To be Argued by:
STEVEN A. KIMMEL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

JOANNE SECKY, Individually and as Mother and Natural Guardian of JAXSON KOEBEL-SECKY,

Plaintiffs-Respondents,

– against –

NEW PALTZ CENTRAL SCHOOL DISTRICT and KEITH KENNEY,

Defendants-Appellants.

Case No.: 531549

BRIEF FOR PLAINTIFFS-RESPONDENTS

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Preliminary Statement

This appeal is taken by Defendants-Appellants, New Paltz Central School District and Keith Kenney, from a Decision & Order by the Ulster County Supreme Court (Gilpatric, J.) which denied defendants' motion for summary judgment on all issues of liability. The lower court found that the conflicting expert affidavits submitted by the respective parties created issues of credibility which could not be properly determined by that court, and were properly reserved for determination by a jury at trial.

The infant plaintiff, Jaxson Koebel-Secky, was injured while participating in a junior varsity basketball practice at New Paltz High School on January 2, 2017. Four players were participating in a two-on-two rebounding drill, which involved the elimination of the court boundaries and the safety zone which they created between the court and the surrounding walls and folded bleachers. Jaxson had just chased down a rebound and was about to turn back to the court, when another player collided with him from behind, and Jaxson was propelled into a folded bleacher, suffering an injury to his shoulder.

The main thrust of defendants' argument is that the trial court erred in refusing to grant summary judgment in their favor based upon the affirmative defense of primary assumption of risk. Defendants contend that they met their

burden of proof on the motion by demonstrating that, by voluntarily participating in the drill, Jaxson assumed all of the risks of doing so, including the risk of injury from collision with a wall or folded bleachers located adjacent to the court. Plaintiff contends that the doctrine of primary assumption of the risk is not applicable to this matter because the infant plaintiff, who was only 14 years old at the time, did not fully perceive and appreciate the increased risk of injury posed by the elimination of the court boundaries, as there was no open and obvious physical change to the court itself, so that it did not look any different. While the bleachers appeared to be their normal 23 feet and 17 feet from the court boundaries on the east and west sides of the gymnasium, eliminating the court boundaries was the equivalent of moving the bleachers up until they were directly adjacent to the court boundary. In addition, although he had been playing basketball for a number of years, Jaxson had never before participated in or even observed this type of drill, so that he had no idea that it would permit the players to run headlong into the walls or bleachers at full speed, because the buffer or safety zones which would permit a player to safely decelerate after reaching the court boundary had been eliminated. The infant plaintiff did not perceive that the elimination of the court boundaries and safety zones would increase the velocity and force with which a player might strike one of the walls or bleachers which surrounded the court, thereby increasing the severity of the impact and any injury which might result

therefrom. While a participant in a game of basketball is held to have voluntarily assumed the risks which are inherent in the sport, such as colliding with other players or with fixed objects which may be in close proximity to the court, and which are open and obvious, the infant plaintiff did not perceive or fully appreciate the increased risk of injury which was created by the elimination of the court boundaries and could not, therefore, have knowingly or voluntarily assumed that risk. If the principle of primary assumption of the risk did not apply in this matter, then the evidence presented to the trial court clearly raised one or more triable issues of fact with respect to the issue of the negligence of the defendants in utilizing a drill which eliminated the court boundaries and in their supervision of the players.

Counterstatement of Facts

Plaintiff disagrees with defendants-appellants' statement that the facts in this matter are not in dispute. In actuality, there are several issues of material fact which are disputed in this matter, although none of those issues is directly raised in this appeal. In determining that defendants-appellants were not entitled to summary judgment in this matter because there exist issues of credibility with respect to the opinions offered by the experts for the respective parties, the trial court did not reach those issues of fact with respect to the manner in which the incident occurred.

The infant plaintiff, Jaxson Koebel-Secky, played basketball in organized youth leagues since he was seven or nine years old (R. 55-56). He played CYO basketball in third and fourth grades and then played on competitive AAU teams in Poughkeepsie and Newburgh for 3-4 years (R. 58-59). He played basketball for the New Paltz Middle School in 7th and 8th grades (R. 66).

In 2017, Jaxson joined the junior varsity basketball team at New Paltz High School, and his coach was defendant Keith Kenney. Jaxson first tried out for and was selected for the junior varsity team in October of 2016 (R. 68). Practices for the JV team consisted mostly of shooting, dribbling and defensive drills (R. 70-71).

Jaxson was injured during a team practice on January 2, 2017, which was during the school's Christmas break (R. 528). Coach Kenney had the players participating in a basketball version of the "Olympics" that day, in which he split them into two teams and had them compete in a series of four or five drills (R. 72). Jaxson was injured during the first drill of the day (R. 77). The first drill was a two-on-two rebounding drill, in which one pair of players began at the foul line while the other pair began at the bottom blocks closer to the basketball hoop. The drill was initiated when Coach Kenney took a shot from near the three-point line, intentionally missing the shot in order to create a rebound (R. 76). When the shot went up, the pair of players on the blocks would run towards the foul line and attempt to box out the other pair and secure the rebound. Whichever team secured

the rebound would then try to score a basket, and the first team to score 10 baskets would be declared the winner of that event (R. 75-77). Coach Kenney instructed the players that, for purposes of this drill, there was no "out of bounds" and that only major fouls would be called (R. 77-79). This was the only drill Coach Kenney ran in which the court boundaries were eliminated (R. 78). Jaxson had never seen any other coach run a drill which involved elimination of the court boundaries (R. 79). Coach Kenney offered no further instruction or explanation with respect to the two-on-two rebounding drill (R. 77-78). Jaxson was aware that the bleachers on both sides of the court were fully retracted and pushed up into the walls at the time of his injury (R. 82). He watched as three or four sets of players ran the drill before it was his turn (R. 85). Significantly, there was no aggressive play during the first three or four rounds of the drill, and the ball never went beyond the court boundaries (R. 85-86). While Jaxson had previously participated in two-on-two boxout drills, play was stopped in those drills as soon as the rebound was secured by one of the players (R/ 87-88).

Jaxson knew only one of the other players in his group, Zach Grazioso. He and Zach were part of the same group of friends (R. 89). He and Zach had been basketball teammates for three years at the time of his injury (R.92).

When their drill began and Coach Kenney took and missed a shot, the rebound was secured by Jaxson's teammate, who immediately passed the ball to

Jaxson at the top of the key (R. 94). Jaxson took a shot, which hit the rim and kicked out to the left and was tapped, but not pulled in, by one of the other players who was competing for the rebound (R. 96). Jaxson pursued the loose ball, running from the top of the key toward the bleachers at the left side of the court (R. 96-97). As he chased the ball, he passed over the line which marked the boundary of the main court (R. 98). When he reached the ball, he was between 2 and 4 feet from the bleachers (R. 100). He was easing up, with the ball in his right hand, and was about to turn back toward the court, when Zach hit him from behind and pushed him into the bleachers, causing an injury to his right shoulder. He was still facing the bleachers when Zach ran into him from behind (R 100-103). After Jaxson was injured, Coach Kenney restored the sideline boundaries for the remainder of the drill (R. 119-120). Jaxson confirmed that he was over the side court boundaries when he first reached the loose ball (R. 120-121).

Antonia Woody was the Director of Athletics, as well as Health and Physical Education for the New Paltz Central School District for 18 years, including at the time of Jaxson's injury (R. 355-356). She discussed the incident with Coach Kenney, who told her that Jaxson had been injured during a drill, and that he had impacted the bleachers (R. 360). The incident had occurred during a rebounding drill (R. 631). Coach Kenney advised that they were using the main court and

basket for the drill (R. 367-368). Coach Kenney told her that the drill had been run from wall-to-wall or bleacher-to-bleacher (R. 374-375).

Keith Kenney had been the head men's basketball coach at SUNY New Paltz for 2 years at the time of Jaxson's injury (R. 412). None of his college degrees are in coaching or athletics (R. 416). He was head junior varsity and assistant varsity coach for men's basketball at the New Paltz Central School District for 2 years, 2015-2017 (R. 417-418). Jaxson was injured during a two-on-two rebounding drill which was run on the main court (R. 430). Prior to running the drill, he explained to the players that they were allowed to go outside of the boundaries of the main court and that the ball remained live, and they had to get the ball and try to score. They were allowed to reach in for the ball, but not to flagrantly hit another player (R. 432). This was the first time he had run this particular drill with this group of players (R. 433). He told the boys that they could go past the boundaries for the main court, but the side court boundaries remained in effect (R. 435). His instruction, after Jaxson had been injured, that players not go beyond the red line for the remainder of the drill was not a change in the rules for the drill, but only a reminder to the players of his initial directive (R. 438).

Plaintiff commenced this action against the New Paltz Central School District and Coach Kenney, alleging that they were negligent in their supervision of the infant plaintiff (R. 253-263). Plaintiff's specific allegations included that the

defendants were negligent in: (1) conducting a drill which eliminated the court boundaries and (2) failing to provide padding on the retractable bleachers (R. 275-276).

After discovery had been completed in the matter, defendants moved for summary judgment dismissing the action, contending that (1) the infant plaintiff assumed the risk of injury by voluntarily participating in the sport of basketball; (2) Coach Kenney met or exceeded the applicable standard of care for supervision of student athletes; and (3) the incident occurred suddenly and spontaneously, so that the allegedly negligent supervision was not a proximate cause of the injury (R. 36-45). Plaintiff opposed the motion on the basis that (1) the defendants had failed to meet their initial burden of demonstrating their prima facie entitlement to summary judgment; (2) the doctrine of primary assumption of the risk did not apply to this matter because the risk had been increased beyond the risks normally inherent in the sport of basketball; (3) the use of a drill which involved elimination of the court boundaries and safety zones with a group of student athletes who had never participated in such a drill demonstrated a level of supervision which was inappropriate and failed to meet any applicable standard of care (R. 543-566). Supreme Court denied the motion, without reaching any of the foregoing issues, upon its finding that the conflicting affidavits of the experts for the respective

parties raised an issue of credibility which required determination by the jury at trial (R. 8-13).

POINT I

Jaxson Koebel-Secky Did Not Knowingly Or Voluntarily Assume The Increased Risk Of Injury Created By The Elimination Of The Court Boundaries

Defendants-appellants contend that the principle of primary assumption of the risk applies in this matter, and that it was not necessary, in order for them to prevail upon their summary judgment motion, that the infant plaintiff foresee the exact manner in which his injury would occur in order to have assumed the risk of that injury. In response, we note that it has repeatedly been held that a player cannot be said to have assumed the increased risk of injury arising from unseen conditions which he did not fully perceive or appreciate.

While the principle of primary assumption of the risk provides that a voluntary participant in a sporting or recreational activity consents to inherent risks such as those posed by open and obvious conditions of the venue in which the activity is played, participants do not consent to or assume those risks which are concealed or unreasonably increased. *Hanson v. Sewanhala Central High School District*, 155 A.D. 3d 702, 64 N.Y.S. 3d 303 (2nd Dept., 2017); *Deserto v. Goshen Central School District*, 153 A.D. 3d 595, 57 N.Y.S. 3d 423 (2nd Dept., 2017); *Brown v. Roosevelt Union Free School District*, 130 A.D. 3d 852, 14 N.Y.S. 3d 140 (2nd Dept., 2015); *DiBenedetto v. Town Sports International, LLC*, 118 A.D. 3d 663, 987 N.Y.S. 2d 102 (2nd Dept., 2010).

Defendants argue that, in order to prevail on their motion, they were required to prove only that the conditions on the basketball court and in the gymnasium were "as safe as they appear to be", and that if the risks were perfectly obvious or fully comprehended, the player has consented to them. We contend however, that the basketball court and gymnasium were not "as safe as they appeared to be." While the infant plaintiff was aware, amongst other things, of the location of the walls and bleachers which surrounded the court, and which were both open and obvious and easily perceptible, he did not fully perceive or comprehend the substantially increased risk of injury which had been created by eliminating the court boundaries and the safety zones between those boundaries and the walls and bleachers and could not, therefore, have assumed those increased risks.

It has repeatedly been held that, in determining whether or not a participant has voluntarily assumed the risks inherent in engaging in a particular sport or activity, the determination is not to be made in a vacuum but, instead, is to be assessed against the background of the skill and experience of the particular plaintiff. *Brown v. Roosevelt Union Free School District*, 130 A.D. 3d 852, 14 N.Y.S. 3d 140 (2nd Dept., 2015); *Braile v. Patchogue Medford School District of Brookhaven*, 123 A.D. 3d 960, 999 N.Y.S. 2d 873 (2nd Dept., 2014).

The case law demonstrates that there have been numerous instances in which it was held that the plaintiff had not assumed the risk of injury because the facility in which the sport or activity was engaged in was not "as safe as it appeared to be". See, e.g. *Owen v. RJS Safety Equip.*, 79 N.Y. 2d 967, 471 N.Y.S. 2d 998 (1992) (race car driver did not accept risk of defective guard rail and barrier or placement of barrels along side of track, which were not risks inherent in the sport of racing); *Morgan v. State*, 90 N.Y. 2d 471, 662 N.Y.S. 2d 421(1997) (torn net curtain which separated adjacent tennis courts was not a risk inherent in the sport of tennis); *Zhou v. Tuxedo Ridge LLC*, 180 A.D.3d 960, 119 N.Y.S. 3d 251 (2nd Dept., 2020) (9-year old novice skier could not fully appreciate the risk posed by layout and terrain of bunny slope); *Lee v. Brooklyn Boulders LLC*, 156 A.D. 3d 689, 67 N.Y.S. 3d 67 (2nd Dept., 2017) (question of fact whether gap in mat at bottom of rock climbing wall which was covered by Velcro strip posed a risk beyond those inherent in the sport); *Mussara v. Mega Funworks, Inc.*. 100 A.D. 3d 185, 952 N.Y.S. 2d 568 (2nd Dept., 2012) (adult male riding tube in water slide did not assume the risk that the splash pool would be inadequate to bring his tube to a stop prior to striking stairs at far end and ejecting him onto concrete surrounding pool).

Another line of cases has held that changes in the rules or manner in which the sport or activity is played which vary from the normal can increase the risk of

injury beyond that which is inherent in the sport or activity. See, e.g., *Weinberger v. Solomon Schechter School of Westchester*, 102 A,D. 3d 675, 961 N.Y.S. 2d 178 (2nd Dept., 2013) (high school softball pitcher did not assume the risk of being hit by line drive while pitching closer than normal to batter and without protective screen); *Jamjyan v. W. Mountain Ski Club, Inc*, 169 A.D.3d 772, 93 N.Y.S. 3d 442 (2nd Dept., 2019) (question of fact with respect to whether risk to snow tube rider was increased beyond those inherent to the activity when attendant prematurely disconnected tow rope from plaintiff's tube); *Finn v. Barone*, 83 A.D. 3d 1365, 921 N.Y.S. 2d 704 (3rd Dept., 2011) (experienced skier did not assume risk of falling when exiting chairlift where snow guns were pointed at chairlift causing accumulation of snow and ice on bottom of her skis).

The *Weinberger* case is factually quite close to the case at bar. In that case, the infant plaintiff was participating in a junior varsity softball team practice on the school grounds. While this was her first season with the team, she had previously played in the New City Softball League for two years. On the day of her accident, the coach had the team try a new type of drill during batting practice. The drill was called a "rapid fire drill", and required that the pitcher be located closer than normal to the batter and that she throw a rapid succession of pitches. Plaintiff was the pitcher and the coach elected to have her use an "L-screen" for protection against balls batted back at her. While the national Softball Association

regulations required that such a screen be freestanding, the one in use that day was wedged between two benches and kept falling over. Toward the end of batting practice, the screen fell over again. The coach did not direct anyone to fix the L-screen, but instead asked the plaintiff if she was okay to pitch. When plaintiff did not reply, the coach told her to take one step over before pitching to the last batter because she was left-handed. Two other players testified that the coach advised the plaintiff to leave the screen on the ground. Plaintiff threw a pitch to the batter, which was hit back at her and struck her in the face. Plaintiff appealed from a verdict in favor of the school based on assumption of the risk. The Second Department found, as a matter of law, that the doctrine of assumption of the risk was not applicable to the case. It found that the plaintiff could not be said to have assumed the risk of being hit in the face by a line drive while pitching from behind an L-screen which was defective and fell down prior to the pitch which was hit back at her. Additionally, it cannot be said that the plaintiff assumed the risk when her coach specifically directed her to pitch without a protective screen from a distance closer than normal to the batter.

The facts of the present case are strikingly similar to those in *Weinberger* because, in each case, the plaintiff was a high school junior varsity athlete participating in a team practice, and in each case the coach had the team try a new drill which involved changing the usual rules and measurements of the playing

field. Although each of the infant plaintiffs was a student athlete with experience in the sport in which they were engaged, neither had ever observed or participated in that particular drill before, and each was simply following the direction of his or her coach. Just as the plaintiff in *Weinberger* cannot be said to have assumed the increased risk of pitching from a distance which was closer than normal to the batter and with a defective L-screen, the infant plaintiff in this case was directed to play on a court from which the boundaries and safety zones had been removed, and to engage in a drill in which a greater degree of personal fouling was permitted. In each case, it was the deviation from the usual rules and a change in the dimensions of the playing field by the coach which significantly increased the risk of injury to the infant plaintiff beyond those risks which were inherent in engaging in the sport under the normal rules and on a playing field of standard dimensions. If the infant plaintiff in *Weinberger* cannot be said to have assumed the increased risk of injury by participating in the "rapid fire" drill, then the infant plaintiff in the present case cannot be said to have assumed the increased risk of participating in the "two-on-two rebounding drill" which involved the elimination of the court boundaries and safety zones.

The fact that the age and experience of the plaintiff is a critical factor to be considered in determining whether he could or should have perceived and fully comprehended the increased risk of injury as a result of the elimination of the court

boundaries and safety zones is clearly illustrated by cases such as *Trupia v. Lake George Central School District*, 14 N.Y. 3d 392, 901 N.Y.S. 2d 127 (2010), in which it was alleged that the 12-year old infant plaintiff was injured by falling from a banister at summer camp while completely unsupervised. The camp sought leave to amend its answer to assert, as an affirmative defense that, by sliding down a bannister, the infant had assumed the risk of falling from the bannister, which he had done on a prior occasion. The Court of Appeals affirmed the Appellate Division's denial of the motion for leave to amend the answer, finding that the doctrine of assumption of the risk was not applicable to the matter. In a concurring opinion, Justice Smith opined that

> Assumption of the risk cannot possibly be a defense here because it is absurd to say that a 12-year old boy "assumed the risk" that his teachers would fail to supervise him. That is a risk a great many children would happily assume, but they are not allowed to assume it for the same reason that the duty to supervise exists in the first place; children are not mature, and it is for adults, not children, to decide how much supervision they need. 14 N.Y. 3d, at 397

Despite his experience in playing basketball for most of his life, Jaxson had never before observed or participated in a drill which involved elimination of the court boundaries.[1] He was only 14 years old at the time, and was clearly incapable

[1] Although he had observed two groups of his teammates run the same drill before he did, Jaxson testified that those players did not have the occasion to chase a ball out of bounds or to run past the court boundaries (R. 86-86).

of fully comprehending the potential consequences of removing the court boundaries. Asked for his understanding of what the rules for the drill were, Jaxson had testified that "there was no out of bounds" and "You could go a hundred feet up the court and dribble or ten feet out of bounds and dribble". Asked how Coach Kenney had described the drill, Jaxson replied "He said this is kind of like a boxing out drill, like free for all with no boundaries; whoever gets ten points, wins." (R. 77). Asked if there had been any further discussion about the drill, Jaxson replied "No". (R. 78) While it was clear that it meant that one could pass the red stripe on the floor which indicated the court boundary without play stopping because you had run "out of bounds", he did not perceive or appreciate that elimination of the court boundaries would also eliminate the 17 and 23 foot safety zones on both sides of the court which permitted players to safely decelerate after running at full speed toward the court boundaries to retrieve a ball, or that the removal of the safety zones was the equivalent of moving the bleachers and walls right up to the court boundaries, thereby increasing the force of the impact and the severity of any injury which might result therefrom. Clearly, a 14-year-old cannot reasonably be expected to perceive or fully comprehend this invisible increased risk of injury and could not, therefore, have knowingly and voluntarily assumed that increased risk.

Defendants cite several cases, at the top of page 11 of their brief, for the proposition that the doctrine of assumption of the risk requires dismissal of cases which involve "risks engendered by less than optimal conditions, providing those conditions are open and obvious and that the consequently arising risks are readily appreciable." While it is true, in the present case, that the retracted bleachers were open and obvious and that he was aware of their location, the 14-year-old plaintiff, who had never observed or participated in a drill which involved elimination of the court boundaries, did not perceive or fully appreciate the substantial increase in the risk of injury which was created by the elimination of those court boundaries and the safety zones which they created. The increased risk of injury was neither open nor obvious, and was clearly not readily appreciable by a 14-year-old who had never observed or participated in that type of drill. Once again, if he did not perceive or fully appreciate the invisible increase in the risk of injury, he could not have knowingly or voluntarily assumed that increased risk.

Defendants' reliance upon the ***Ribaudo*** case is misplaced. We do not dispute that the retracted bleachers were open and obvious. Our argument, however, is that the elimination of the court boundaries, and the safety zones which they create between the court boundary and the retracted bleachers, as well as the increased risk of injury posed by those eliminations, was neither open and obvious nor readily perceptible to a 14-year-old. As we explained above, while Jaxson

could see where the boundary lines were located on the court floor, and understood that the rules of the drill meant that the ball remained in play after it crossed those lines, the court did not look any different, and there was no way that he could have fully comprehended that the elimination of the safety zones meant that players might still be running at full speed when they reached the wall or bleachers, substantially increasing the force of any impact as well as the severity of any injury which resulted from that impact. As opposed to the addition of a physical obstacle, which would be open and obvious, and which would impose an increased risk which was readily apparent, the elimination of the court boundaries did not result in any visible or apparent obstacle which was added to the court. Instead, while there was no apparent physical change to the court, the elimination of the court boundaries and safety zones was the equivalent of moving the bleachers to within 3 feet of the court boundaries. Put another way, with court boundaries and safety zones eliminated, the court was no longer "as safe as it appeared to be". As a matter of law, the infant plaintiff cannot have assumed an increased risk which he could nether perceive nor fully comprehend.

The fact that our expert agreed that the risk of running into a wall or bleachers is an inherent risk of engaging in the sport of basketball does not, as defendants contend, require that their motion be granted. Once again, defendants continuously misapprehend or misstate the factual issue which is before this Court

with respect to the doctrine of primary assumption of the risk. The issue is not whether the bleachers were open and obvious – we concede that they were and that the infant plaintiff was aware of their presence. The issue is whether a 14-year-old player could have knowingly and voluntarily assumed the increased risk of injury posed by a drill which changed the normal rules of the game by eliminating the court boundaries and safety zones, which change was neither open and obvious nor easily perceptible to him. While he understood that the elimination of the court boundaries meant that the ball remained in play if it went beyond the boundary lines, he had no knowledge or experience which would have led him to perceive that the elimination of the safety zones around the court meant that any impact with the walls or bleachers would carry much greater force than it would have had the court boundaries been enforced and the safety zones maintained, which would have allowed players to safely decelerate once they reached the boundary lines.

The *Trevett* and *Altagracia* cases both involve a collision with the pole which supports the basketball backboard and hoop. Defendants' reliance on those cases demonstrates again that they misapprehend our argument in this matter. Once again, it is undeniable that a pole at the base of the key on a basketball court, located directly beneath the backboard and hoop, is both open and obvious, and that it is easily perceptible. Those cases would clearly be applicable if our argument was, as defendants contend, that the bleachers were not open and

obvious, and that the infant plaintiff did not perceive or assume the risk of running into them. Our argument is, however, that the elimination of the court boundaries and the safety zones which they create around the court, as well as the allowance of reach-in fouls, were invisible conditions which substantially increased the risk of injury from running into those bleachers or walls in a manner and to a degree which was neither open or obvious and was not easily perceptible to a 14-year-old who had never observed or participated in that type of drill. If he could not perceive or fully comprehend the increased risk of injury as a consequence of the elimination of the court boundaries, then he clearly could not have knowingly or voluntarily assumed that increased risk.

The *Perez* case is easily distinguished from the present case for the same reasons. The exit door into which the plaintiff crashed in *Perez* was clearly open and obvious and the risk of injury from running into it was easily perceptible, while the elimination of the court boundaries and safety zones in this matter did not result in any visible or easily perceptible change to the court or the gymnasium. The increased risk of injury was not posed by any physical obstacle, but by the laws of physics which dictate that the force of an impact with a wall or bleacher will be significantly higher if a player is permitted to run at full speed right into the wall, than it would be if the ball was out of play when it crossed the court

boundary, so that the players had the safety zone in which to decelerate or stop before striking the walls or bleachers.

Defendants' argument that the failure to dismiss the present case would prevent the "free and vigorous participation in athletic activities" that the doctrine of primary assumption of the risk is intended to foster, is without merit. Both Coach Kenney and defendants' expert, Mr. Fruscio, have listed the skills which the two-on-two rebounding drill was designed to teach or improve. Plaintiff's expert suggested that it was possible to teach or improve the same skills without the necessity for eliminating the court boundaries and, by doing so, significantly increasing the risk of injury to the players (R. 475). If the same skills could be taught or reinforced in a safer manner, and the primary responsibility of the defendants is to protect the health and safety of their student athletes, then the use of a drill which needlessly and significantly increased the risk of injury to the players was negligent.

Defendants' argument that Jaxson was an experienced player who was, or should have been, aware of the inherent risks of being inadvertently pushed into a wall, bleacher, scorer's table, or other physical object located in proximity to the court, again ignores the difference between such physical objects and the elimination of the court boundaries, which resulted in no physical alteration to the court. While a wall, bleacher or scorer's table are physical objects which are open

and obvious and create an increased risk of injury which is readily apparent to even an inexperienced player, the elimination of the court boundaries and the safety zones which they create results in no physical alteration of the court. While the 14-year-old plaintiff understood that the elimination of the court boundaries meant that the ball would remain in play when it crossed the painted boundary line on the floor, he had never previously observed or participated in a similar drill, so he could not fully perceive or comprehend the increased risk posed by the elimination of the court boundaries and the allowance of reach-in fouls. The increased risk was neither visible nor apparent, and Jaxson could not fully comprehend that the risk of injury was increased by the elimination of the safety zones around the court, so that the players would now be running at full speed all the way up to the walls or bleachers, as opposed to decelerating once the ball passed the boundary line under normal rules of play. While Jaxson was aware that participating in the sport of basketball indoors carried an inherent risk of colliding with a wall or bleacher, he did not fully comprehend the potential differentials in both the speed and force of such an impact if the court boundaries were eliminated. Consequently, he could not have knowingly or voluntarily assumed that increased risk. There is no evidence that Coach Kenney explained to the players, prior to commencing the drill, the nature and extent of the increased risk created by eliminating the court

boundaries, or that he offered them the option to skip the drill if they felt that risk was too high.

In summary, plaintiff does not contend, as defendants suggest, that the doctrine of primary assumption of the risk is not applicable to this case because the bleachers which the plaintiff was pushed into were not open and obvious and the risk of running into them was not easily perceptible. Instead, our argument is that the doctrine does not apply to this case because the significantly increased risk of injury was neither open nor obvious and was not fully comprehended by the 14-year-old plaintiff. Jaxson did not comprehend that the elimination of the court boundaries would also eliminate the safety zones, of 17 feet on one side of the court and 23 feet on the other, which were designed to provide space for players to decelerate from full speed after chasing the ball to the boundary line in an effort to keep it in play. Having never observed or participated in a similar drill, he would not have fully comprehended the increased speed and force with which a player might strike the wall or bleacher when permitted to continue at full speed beyond the court boundary. Clearly, if he could not fully comprehend an increased risk which was neither open and obvious nor easily perceptible, then he could not have knowingly or voluntarily assumed that increased risk.

Point II

The Trial Court Correctly Accepted The Opinions Of Plaintiff's Expert, Who Was Qualified To Render Such Opinions In This Matter

Defendants-appellants object to the consideration by the trial court of the reports and affidavit of plaintiff's expert, Thomas Bowler, on the basis that he has failed to demonstrate that he has the requisite skill, training, education, knowledge or experience to qualify him as an expert with respect to the standards applicable to a high school basketball practice drill. Defendants apparently contend that only an expert in the sport of basketball and the coaching thereof can possibly be qualified to render an opinion in this matter. That is clearly not the case.

It is well settled that the purpose of expert testimony is to assist the finder of fact in understanding matters which are outside of their ordinary experience. *People v. Alpern*, 217 A.D. 2d 853, 630 N.Y.S. 2d 166 (3rd Dept., 1995); *Selkowitz v. County of Nassau*, 45 N.Y. 2d 97, 408 N.Y.S. 2d 10)1978).

It is also well settled that it is for the Court to determine if a witness is qualified as an expert in a particular matter, and it is then up to the trier of fact to assess the testimony of that expert witness and determine the amount of weight, if any, to be accorded to that testimony. *Felt v. Olson*, 74 A.D. 2d 722 (4th Dept., 1980); *Quigg v. Murphy*, 37 A.D. 3d 1191, 829 N.Y.S. 2d 800 (4th Dept., 2007); *Salisbury v. Christian*, 68 A.D. 3d 1664, 891 N.Y.S. 2d 830 (4th Dept, 2009).

The discussion which appears at pages 17-18 of their brief in this matter demonstrates that defendants contend that, unless Mr. Bowler shows some indicia of experience in coaching high school or college basketball, he cannot possibly be qualified as an expert witness in this matter. In response we would point out that Mr. Bowler's resume reflects that he holds both Bachelor's and Master's degrees in sports education, that he has trained physical education teachers, that he has been the Director of Intramural Sports at the university level, that he has written articles on the subject of safety and buffer zones and basketball court design, and that he has published papers and given lectures on topics such as "Ball Skills" and "A Creative Approach to Teaching Ball Skills" (R. 476-516). A perusal of Mr. Bowler's resume makes it clear that, despite the fact that he may never have been employed as the coach of a varsity basketball team, he is, nevertheless, eminently qualified to render an expert opinion in this matter. While it may be true that Mr. Bowler's expertise and experience have leaned more toward safety aspects of athletics than to coaching of sports teams, there can be no question that he can assist the jury in understanding both the risks which are inherent in the sport of basketball as well as the significantly increased risks posed by elimination of the court boundaries and the likelihood that a 14-year-old who has never observed or participated in similar drills could fully comprehend the full nature and extent of those increased risks. Based upon Mr. Bowler's resume and affidavit, the trial

court correctly determined that he was qualified as an expert, at least for the purposes of opposing a summary judgment motion, and that defendants could challenge his qualifications, if they so desired, through cross-examination at trial.

Defendants' argument that Mr. Bowler's reliance upon hearsay publications in rendering his opinions renders them inadmissible because defendants have not had an opportunity to cross-examine the authors of those publications, is simply incorrect. It is well settled that hearsay evidence may be properly admissible in support of or opposition to a summary judgment motion, as long as it is not the only evidence submitted. *Mallon v. Farmingdale Lanes, LLC*, 89 A.D. 3d 996, 933 N.Y.S. 2d 338 (2nd Dept., 2011); *Feinburg v. Sanz*, 115 A.D. 3d 705, 982 N.Y.S. 2d 133 (2nd Dept., 2014); *Candela v. City of New York*, 8 A.D. 3d 45, 758 N.Y.S. 2d 31 (1st Dept., 2004). It is also incorrect that Mr. Bowler relied exclusively and entirely upon such hearsay publications for his opinion in this matter. A complete reading of his reports and affidavit makes it clear that he relied upon his own measurements and observations, as well as the pleadings, 50-h and deposition transcripts, and incident report in formulating his opinions in this matter, and simply used the references to industry publications to reinforce his own personal opinions. This is certainly preferable, and in stark contrast to, the practice employed by defendants' expert, who simply offers self-serving and conclusory statements which, although they state that defendants' actions "fully complied with

all applicable standards", fail to offer even a single citation to any of such standards.

Defendants' reliance upon the *Hinlicky* and *Borden* cases, in support of their contention that the report and affidavit of plaintiff's expert were not entitled to consideration on their motion for summary judgment, is clearly misplaced. First, each of those cases dealt with issues raised by the expert's testimony at trial, while the present appeal arises out of the denial of defendants' motion for summary judgment, which is subject to different evidentiary standards. Second, the facts of the present case are substantially different from those of the cited cases. *Hinlicky* was a medical malpractice case in which defendant anesthesiologist testified that he had used an algorithm from a clinical practice guideline in making his determination with respect to whether to send the plaintiff to the operating room or for a cardiac assessment prior to surgery. The trial court allowed the entry of the algorithm and guideline into evidence as demonstrative evidence for the jury, as they assisted the jury in understanding the process by which the defendant arrived at his decision. *Borden* involved a 1977 motor vehicle accident in which the plaintiff was a passenger in a parked bus which was struck by an automobile driven by the defendant. Plaintiff's treating physician referred him to a neurologist for consultation, and then used the neurologist's report in making his determination that plaintiff's condition was permanent. The trial court allowed him to testify to

his opinion and how he had reached it, and also admitted the neurologist's report and allowed it to be read to the jury. While recognizing that the rules of evidence had evolved so that expert testimony is no longer rendered inadmissible because it is based, in part, upon the hearsay reports of others, provided that the data are of the type which is reasonably relied upon by experts in the field in forming opinions and inferences upon the subject. This Court found, in that case, that the trial court has exceeded the scope of the evolved rule because the neurologist's report formed the principal basis for the expert's opinion on a crucial issue of the case, and was not merely a link in the chain of data on which the witness relied. The present case may be easily distinguished from both of those cases because plaintiff's witness, Mr. Bowler, did not rely upon any of the cited references as the principal basis for his opinion with respect to the crucial issue in the case. To the contrary, those references reinforce his opinions and are clearly the types of references used by experts in the field in formulating their opinions. For example, Mr. Bowler refers to the National Federation of High School Associations guide to confirm that the basketball court on which the subject incident occurred was basically in compliance with the standards for High Scholl basketball courts, although it was some five inches longer than the standard. He similarly cites to other publications to demonstrate that the factors which he evaluated in formulating his opinions are those which are generally considered by other experts in the field. It is quite clear,

from a thorough reading of his reports, that he has based his opinions, not solely upon the referenced publications, but upon his own personal measurements and observations, as well as the testimony of the parties and non-party witnesses in this matter.

It is difficult to see how defendants can fault plaintiff's expert for including references to accepted standards or generally followed procedures and guidelines for making the required evaluation, which demonstrate that his statements are not speculative, conclusory or unsupported by any evidence in the case. In stark contrast, defendants' expert, Mr. Fruscio, relies exclusively and entirely upon his own speculative, conclusory and self-serving statements, while offering no personal observations or other evidence to support those statements and failing to offer any citation to the "generally accepted standards" to which he repeatedly refers.

Defendants'-appellants' claims to the contrary notwithstanding, we contend that they failed to make the required prima facie showing of entitlement to judgment as a matter of law.[2] As we have demonstrated in Point I herein, the defendants clearly failed to establish that the doctrine of primary assumption of the

[2] The trial court did not make a finding with respect to whether or not defendants met their initial burden on the motion, but based its decision upon the existence of credibility issues raised by the conflicting expert affidavits, which issues were properly reserved for determination by the jury at trial. (R. 8-14)

risk is applicable to this case or that they had eliminated any triable issue with respect to its applicability to this case.

While defendants object to the fact that Mr. Bowler relied upon the Borkowski book, the trial court noted that he also made reference to the New Paltz Coaching Handbook. We had objected to the admissibility of the affidavit and report of defendants' expert because, amongst other factors: (1) he never visited the gymnasium where the accident occurred (2) he never discusses or even makes reference to the measurements of the court or the distance between the court boundaries and the bleachers into which the infant plaintiff crashed; (3) while opining that Coach Kenney acted "within all applicable standards", he never identified or cited to those standards; and (4) his opinions are not rendered with the requisite degree of professional certainty (R. 554-556).

While defendants fault Mr. Bowler's opinions because they are based upon principles of risk management and making the activity safer, and contend that these are not the standards by which the defendants' duty of care must be assessed under the doctrine of assumption of the risk, the defendants do not get to dictate our theory of liability in this matter or which standard of care applies. First, primary assumption of the risk is an affirmative defense which was raised by defendants in response to plaintiff's allegations of negligence. Consequently, defendants have the burden of proving that the doctrine applies to this matter, and we are not

required to prove that it does not. Second, whether he reached it from a standard of risk management, psychology or human anatomy and physiology, Mr. Bowler has more than adequately raised a triable issue of fact with respect to whether the 14-year-old plaintiff, despite his years of experience playing basketball, fully appreciated the increased risk of injury due to the elimination of the court boundaries and the safety or buffer zones which they create. If he could not fully comprehend that increased risk, which was not open and obvious or readily perceptible, then he could not have assumed that risk as a matter of law.

Defendants argue that Mr. Bowler does not deny that the risks of the two-on-two rebounding drill were fully comprehended and perfectly obvious, or claim that the rules and conditions were concealed or obscured, or that the infant plaintiff was unable to comprehend them. They contend that Mr. Bowler opined only that the drill could have been made "safer". We disagree totally and completely with that argument. As we have discussed at length earlier in this point, Mr. Bowler opined that the increased risk of injury due to the elimination of the court boundaries and buffer zones was not readily apparent or perceived by the 14-year-old plaintiff who, despite his years of experience playing basketball, had never before observed or participated in that type of drill. Our argument, which is supported by Mr. Bowler's observations and opinion, is that while the 14-year-old plaintiff fully appreciated the risk of running into a wall or retracted bleacher and

comprehended that the elimination of the court boundaries meant that the ball remained in play after it crossed the court boundary lines, there was no physical change to the court, so that he did not perceive the increased speed and force with which a player might collide with a wall or bleacher as a result of eliminating the safety zones, or the potential increase in the severity of the injuries which might result from such an impact. If he did not fully perceive or comprehend the nature and extent of the substantially increased risk of injury as a result of eliminating the court boundaries and the safety zones, then he could not, as a matter of law, have knowingly and voluntarily assumed that increased risk. Once it has been determined that the doctrine of primary assumption of the risk is not applicable to this matter, then Mr. Bowler's opinion that there were a number of other drills which would teach or reinforce the desired skills without requiring elimination of the court boundaries and were, therefore, safer, goes to the issue of negligence. If the defendants had a duty to protect the health and safety of their student athletes, and they chose to utilize a drill which significantly increased the risk of injury when there were other drills available which taught or reinforced the same skills without increasing that risk, then a jury could potentially determine that the defendants were negligent for doing so in this matter. Once again, the defendants cannot dictate our theory of liability or require us to negate their affirmative defense before they have proven that it applies in this matter.

For all of the foregoing reasons, we vehemently disagree with defendants' conclusion that "Mr. Bowler's opinions fail to raise a question of fact as to the doctrine of primary assumption of the risk". Further, we contend that the defendants-appellants failed to meet their burden of proof, on their motion for summary judgment, by demonstrating that the doctrine of primary assumption of the risk applied to this matter and that there were no triable issues of fact with respect to the application of that doctrine in this matter.

Point III

Defendants Failed To Demonstrate That Coach Kenney's Supervision Met Or Exceeded The Standard Of Care And Was Not A Proximate Cause Of Plaintiff's Injuries

Defendants-appellants argue that they have made a prima facie showing that the supervision provided by Coach Kenney was reasonable and appropriate and that it met or exceeded the standard of care for coaching junior varsity basketball. The sole and entire basis for this argument is the opinion of their expert, Brian Fruscio, who rendered an opinion to that effect. Ironically, after faulting plaintiff's expert for using references to or citations from industry publications to support and reinforce his opinions, defendants completely ignore the fact that their expert relies exclusively and entirely upon his own conclusory and unsupported statements in formulating his opinions. Instead, they completely and exclusively rely upon Mr. Fruscio's repeated conclusory and self-serving statements, which are not supported by any reference to the "known or accepted standards" to which he refers. While opining that the two-on-two rebounding drill which the plaintiff was engaged in at the time of his injury "complies with all safety guidelines accepted by New York State high school coaches", Mr. Fruscio again fails to offer a citation to any such guidelines, nor does he demonstrate the manner in which the drill complied with those guidelines. Additionally, as we had mentioned previously, Mr. Fruscio did not visit the gymnasium in which the plaintiff was injured, and makes no mention

in his affidavit of the measurements or physical layout of the basketball court on which the plaintiff was injured. In contrast, the plaintiff's expert, Mr. Bowler, discusses his own personal observations and measurements made at the gymnasium in which the infant plaintiff was injured demonstrates the fact that the court complied with the standard dimensions for a high school basketball court, explains the reason that the safety zones are designed into those dimensions, and details the manner in which eliminating the court boundaries also eliminated those buffer zones, thereby significantly increasing the risk of injury to the players.

While we did concede that defendants' expert, Mr. Fruscio, has some impressive credentials and experience in coaching basketball at multiple levels of student experience, his conclusions and opinions are based entirely upon speculation, conjecture and surmise, without any proper scientific basis or evidentiary foundation for them. First, while the location of the boundary lines for the court and the location of the bleachers with respect to those boundary lines are a crucial issue in this matter, Mr. Fruscio does not appear to have ever personally visited and inspected the facility or taken any measurements prior to rendering his opinion that the elimination of the boundary lines for purposes of the drill was totally appropriate and did not unreasonably increase the risk of injury to the student athletes engaged in the drill. Without once providing a single measurement of the distances involved, Mr. Fruscio nevertheless concludes that the elimination of the boundaries and safety zones did not unreasonably increase the risk of injury to the students engaged in the drill. It has repeatedly

been held that any discussion of the physical conditions at the scene of a personal injury which is not based upon a personal site inspection and/or a proper demonstration that the conditions considered in forming the opinion were identical to those which existed at the time of the occurrence is, by necessity, based upon nothing more than speculation and surmise and is, therefore, of no probative value. *Maldonado v. Lee*, 278 A.D. 2d 206, 717 N.Y.S. 2d 258 (2nd Dept., 2001); *Avella v. Jack La Lanne Fitness Centers, Inc.*, 272 A.D. 2d 423, 707 N.Y.S. 2d 628 (2nd Dept., 2000); *Guarino v. La Shekkda Maintenance Corp.*, 252 A.D. 2d 514, 675 N.Y.S. 2d 374 (2nd Dept., 1998).

Defendants' argument that the incident occurred so suddenly and spontaneously that Coach Kenney could not have had enough time to prevent it does not determine the issue of whether it was negligent to run the drill in the manner which he chose when there were alternative drills available which would teach or reinforce the desired skills without eliminating the court boundaries and buffer zones. A jury which is considering plaintiff's theory of negligence in this matter is clearly entitled to consider the fact that there were alternative drills available which would have accomplished the desired results without removing the safety zones and increasing the risk of injury to the players, and which would have afforded Coach Kenney more time in which to intervene if necessary. Additionally, as Mr. Bowler stressed in his analysis of the matter, one critical difference between an official league game and a team practice is that the coach

has complete control over the practice, and can stop play or change the conditions or rules of play at any time.

Defendants' argument that Coach Kenney could not have stopped play while the players were still within the boundary lines mischaracterizes our argument. Our contention is that, if the court boundaries and safety zones had been maintained, any impact with the walls or bleachers would have occurred at a lower speed and been significantly softer, thereby reducing the force of impact and the severity of any resultant injury. The elimination of the court boundaries and safety zones was, therefore, a proximate cause of plaintiff's injuries. Defendants also continue to ignore the fact that there is a triable issue of fact with respect to exactly where plaintiff was located at the time that he was pushed into the folded bleachers. While plaintiff testified that he was well beyond the court boundary lines, and almost at the bleachers when he was pushed by another player and collided with the bleachers, Coach Kenney's testimony was inconsistent, as he agreed with the plaintiff at one point, yet had the boys within the side court boundaries at another. That issue of fact alone would have been sufficient to preclude summary judgment had the trial court reached that issue.

CONCLUSION

The trial court correctly determined that the submissions before it on defendant-appellant's motion for summary judgment raised issues of credibility with respect to the conflicting opinions of the respective expert witnesses, and that such issues could not properly be determined by the court on a motion for summary judgment and should be reserved for determination by the jury at trial. While defendants-appellants contend that plaintiff's expert witness, Thomas Bowler, was not properly qualified to offer expert opinion in this matter because he does not claim to have had any notable experience coaching junior varsity basketball, that is not the proper criteria for assessing his qualification in this matter. A close look at Mr. Bowler's resume demonstrates that he is clearly qualified as an expert in athletic and sports education, including sports safety and mitigating liability for athletic sports and education. If anything, it is the opinions of defendants' expert, Bruce Fruscio, which was not entitled to consideration by the trial court. While Mr. Fruscio clearly has extensive credentials in coaching basketball at the high school and college levels, his submissions in this matter were clearly deficient in several major effects which rendered them of no probative value on defendants' motion for summary judgment. A reading of the Decision and Order of the trial court which is appealed from reflects that the trial court accepted the qualifications of both experts in this matter, determined that there

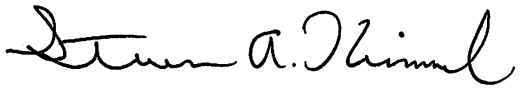
were issues of credibility posed by their submissions, and denied the motion on that basis.

Defendants-appellants' other contention is that their motion for summary judgment should have been granted for the reason that they met their burden on the motion by demonstrating that the doctrine of primary assumption of the risk applies in this matter, and that it operates to preclude any finding of liability against the defendants in this matter as a matter of law. Plaintiff-respondent contends that the defendants-appellants clearly failed to meet their initial burden on their motion, as there remains an issue of fact with respect to whether the 14-year-old plaintiff perceived and fully comprehended the significantly increased risk of injury created by the rules of the two-on-two rebounding drill, which eliminated the court boundaries and the safety zones which they created around the court. Since there was no physical or obvious change in the layout or physical makeup of the court, the plaintiff could not have fully understood that the elimination of the court boundaries and safety zones was the equivalent of moving the folded bleachers, so they were directly adjacent to the court boundaries, thereby leaving very little room for safe deceleration before reaching the bleachers. The infant plaintiff did not understand that the rules of the drill meant that, rather than the ball going out of bounds when it crossed the court boundary, so that the players would abort their chase and have room in which to safely decelerate, the ball would now

remain in play when it crossed the court boundary, so that the players would chase it at full speed right up to the walls or bleachers. He did not understand that allowing the players to run at full speed right up to the walls and bleachers significantly increased the force of any impact with those fixed objects, thereby increasing the severity of any resulting injuries. The law is absolutely clear that the infant plaintiff could not possibly have knowingly and voluntarily assumed an increased risk of injury which he could neither perceive nor fully comprehend.

The trial court correctly denied summary judgment to the defendants for the reason that there exist issues of credibility with respect to the conflicting opinions of the respective experts in this matter, which issues must be reserved for determination by the trier of fact at the trial of this matter. Consequently, the Decision & Order which is appealed from should not be disturbed on appeal.

Respectfully submitted,

By: 

Steven A. Kimmel

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: December 19, 2020