To be Argued by:
STEVEN A. KIMMEL
(Time Requested: 30 Minutes)

APL-2022-00003
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Appellate Division–Third Department Docket No. 531549

Court of Appeals

of the

State of New York

JOANNE SECKY, Individually and as Mother and Natural Guardian of [redacted]

Petitioner-Appellant,

– against –

NEW PALTZ CENTRAL SCHOOL DISTRICT and KEITH KENNEY,

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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Statement of Jurisdiction

Petitioner-Appellant Joanne Secky moved this Court for leave to appeal from a Decision & Order of the Appellate Division, Third Judicial Department dated June 24, 2021. This Court granted the petition for leave to appeal by Order dated January 11. 2022.[R. 609].[1]

The Court of Appeals has jurisdiction to entertain this appeal pursuant to CPLR 5602 (a)(1)(i). The Third Department's Decision and Order [R. 610] reversed the Decision & Order of the Ulster County Supreme Court (Cahill, J.), entered on May 11, 2020, which denied defendants' motion for summary judgment on all issues of liability. [R. 8] 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 Third Department's Decision & Order constitutes a final determination of the instant proceeding, which was not appealable as of right, inasmuch as it "dispose[d] of all of the causes of action between the parties in the . . . proceeding and le[ft] nothing for further judicial action apart from mere ministerial matters" (*Burke v. Crosson*, 85 NY 2d 10, 15 [1995]).

[1] All references preceded by "R." refer to the consecutively paginated volume entitled "Record on Appeal".

This Court also has jurisdiction to review the questions raised on appeal, namely, whether the Third Department's Decision & Order employed an improper application of the correct legal standard, leading to an erroneous determination that the 14-year old plaintiff had, by participating in the rebounding drill, knowingly and voluntarily assumed the increased risk of injury posed by the elimination of the court boundary lines and the safety zones which they created. In doing so, the Third Department accepted at face value the speculative and conclusory affidavit of respondents' expert, who opined that the rebounding drill complied with all applicable standards and was appropriate for students of this age and experience, despite the lack of any proper scientific and/or evidentiary foundation for such conclusions, which were not rendered with the requisite degree of professional certainty. Throughout the course of this proceeding, the Petitioner-Appellant has raised, and thus preserved, this issue, inasmuch as she extensively argued before the Supreme Court and the Third Department, that the affidavit of the Respondent's expert was not properly admissible, was not entitled to consideration by the Court, and was clearly insufficient to support summary judgment dismissing the Complaint in this matter. Appellant's arguments to this effect appear in multiple locations within the Record on Appeal in this matter. [R. 550, 552, 553, 554-556]

Although the Third Department failed to fully address the infant plaintiff's age, experience and ability to fully understand the potential results of the elimination of the court boundary lines and their corresponding safety zones for purposes of the rebounding drill, it went on to conclude that, by voluntarily participating in the drill, the infant plaintiff assumed the risk of being shoved into the retracted bleachers by another player running at full speed in close proximity to those bleachers. While faulting the plaintiff's expert for failing to set forth the standards which defendants had allegedly violated in running the drill, the Third Department inexplicably accepted the completely unsupported conclusions expressed by defendants' expert without question or comment, and failed to apply the same standard to assessing his affidavit.

Further, in holding, as a matter of law, that the 14-year old plaintiff had voluntarily assumed the increased risk of injury posed by the elimination of the court boundaries and safety zones, the Third Department ignored the line of cases which hold that participants in a sport or activity do not consent to or assume those risks which are concealed or unreasonably increased.

Questions Presented

1) Did the Third Department err in failing to properly evaluate the affidavit of Respondent's expert without properly evaluating it, and then relying upon the conclusions offered in that affidavit to find that Respondents had met their initial burden of proof ?

Answer: Yes. The affidavit of Brian Fruscio was entirely speculative and conclusory, lacked any scientific or evidentiary foundation for the opinions and conclusions offered therein, and none of the opinions or conclusions offered therein were certified to any degree of professional certainty. As such, the Fruscio affidavit was not properly admissible and was clearly insufficient to warrant an award of summary judgment in favor of the Respondents.

2) Did the Third Department err in its application of the doctrine of assumption of the risk in finding that the 14-year old plaintiff had knowingly and voluntarily assumed the enhanced risk of injury posed by the elimination of the court boundary lines in the rebounding drill?

Answer: Yes. In finding that the retracted bleachers were an open and obvious obstacle, and that the elimination of the court boundary lines and the safety zones which they create posed only "less than optimal conditions", which are encompassed by the doctrine, the Third Department failed to fully and properly

consider the age and experience of the 14-year old plaintiff, who had never before seen or participated in a drill which eliminated the court boundary lines. While he understood that the rules for the drill meant that he could dribble or chase the ball beyond the court boundaries, the painted boundary lines remained on the court, so that it appeared to him as it always had, and he cannot reasonably be expected to have fully understood that the elimination of the court boundaries meant that another player might run into him at full speed in very close proximity to the bleachers, and that the increased speed would increase the severity of a potential injury. Since the infant plaintiff cannot reasonably have fully understood the enhanced risk of injury posed by the elimination of the court boundary lines and the safety zones which they create, he could not have knowingly and voluntarily assumed that increased risk.

Statement of Facts and Procedural History

The infant plaintiff, [redacted], 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, [redacted] joined the junior varsity basketball team at New Paltz High School, and his coach was defendant Keith Kenney. [redacted] 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).

[redacted] 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). [redacted] 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). Despite his years of basketball experience, [redacted] 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). [redacted] 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 [redacted] 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).

[redacted] knew only one of the other players in his group, [redacted] (R. 89). He and [redacted] 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 [redacted]'s teammate, who immediately passed the ball to [redacted] at the top of the key (R. 94). [redacted] 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). [redacted] 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 [redacted] hit him from behind and pushed him into the bleachers, causing an injury to his right shoulder. He was still facing the bleachers when [redacted] ran into him from behind (R 100-103). After [redacted] was injured, Coach Kenney restored the sideline boundaries for the remainder of the drill (R. 119-120). [redacted] 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 [redacted]'s injury (R. 355-356). She discussed the incident with Coach Kenney, who told her that [redacted] 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).

None of Keith Kenney's 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). [redacted] 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 [redacted] 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's conduct 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 unreasonably increased beyond the risks normally inherent in the sport of basketball; and (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).

By Notice of Appeal dated June 3, 2020, the defendants appealed to the Appellate Division, Third Department [R. 3]. They contended that the Supreme Court had erred in failing to grant their motion for summary judgment dismissing the action, as they had met their initial burden and the plaintiff had failed to raise a triable issue of fact sufficient to preclude summary judgment. Plaintiff argued that the defendants had failed to meet the initial burden on their motion because the affidavit of their expert, Brian Frusci, was speculative and conclusory, was not supported by any scientific or evidentiary foundation, and was insufficient to warrant summary judgment. In a Memorandum and Order, dated and entered on June 11, 2021, the Third Department found that the 14-year old plaintiff had, by participating in the two-on-two rebounding drill, knowingly and voluntarily assumed the enhanced risk of injury posed by elimination of the court boundary lines. In reaching that finding, the Third Department accepted, without question r comment, the speculative and conclusory statements of defendants' expert, Brian Fuscio, who opined that the rebounding drill was safe and met "all applicable standards", but found that the affidavit of plaintiff's expert, Thomas Fowler, failed to raise a triable issue of fact because it failed to set forth the standards which were allegedly violated by the defendants or to citer to any authority in support of his

opinion that the elimination of the court boundary lines unreasonably enhanced the risk of injury [R. 610].

Petitioner-Appellant thereafter applied for leave to appeal to the Court of Appeals from the Memorandum and Order of the Third Department. By Order dated January 11, 2022, the application was granted [R. 609].

POINT I

The Appellate Division Failed To Properly Evaluate The Basis For The Opinions & Conclusions Offered By Defendants' Expert Before Accepting Them.

In making its determination, as a matter of law, that defendants had met their initial burden on their motion for summary judgment, by demonstrating that the doctrine of primary assumption of the risk applied to this matter and that it barred plaintiff's claims against the defendants, the Third Department failed to properly evaluate the statements of defendants' expert as required by well-established legal precedent. Further, it clearly failed to subject the affidavit of defendants' expert to the same level and type of analysis which it applied to the affidavit of plaintiff's expert.

While noting that plaintiff's expert failed to cite to any industry standard which was violated by the defendants, and that there was no indication in the record that the boundary lines of the basketball court acted as, or were intended to be a safety mechanism to prevent a player's collision with the bleachers, the Third Department blindly accepted the statements of defendants' expert, which were entirely conclusory and speculative, and which were totally and completely devoid of any scientific or evidentiary basis for those opinions and conclusions, and even cited those statements in its Memorandum and Order. For example, while Mr. Fruscio opined that the rebounding drill was age appropriate and that many drills

did not use boundary lines, so that it was reasonable to conduct the drill without the use of typical boundary lines, neither conclusory statement cites or even refers to any industry standard or authoritative text or document which supports those statements or conclusions. Similarly, while concluding that the actions of Coach Kenney in running the rebounding drill and supervising the student athletes met "all applicable standards of care", defendants' expert provided no citation or reference to any such standards of care.

In holding that the defendants met their initial burden on the motion by submitting the expert affidavit in which Brian Fruscio concluded that the rebounding drill was age appropriate and that it was reasonable to run it without any court boundary lines, the Third Department ignored a long line of legal precedent which provides that an expert affidavit which consists entirely of conclusory and speculative statements, without any scientific or evidentiary basis therefor, is of no probative value on a motion for summary judgment. While the Third Department applied such an analysis to the affidavit of plaintiff's expert, it did not subject the affidavit of defendants' expert to the same or similar analysis, and accepted it without question or comment. Further, the Third Department failed to note or comment upon the fact that none of Mr. Fruscio's opinions or conclusions are rendered with any degree of professional certainty.

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.*, 262 A.D. 2d 514, 675 N.Y.S. 2d 374 (2nd Dept., 1998). It is equally well settled that an expert opinion must be limited to facts in the record or personally known or observed, and cannot be reached by assuming material facts not supported by evidence. *Casano v. Hagstrom*, 5 N.Y. 2d 643, 187 N.Y.S. 2d 1(1969); *Hambsch v. New York City Transit Authority*, 63 N.Y. 2d 723, 480 N.Y.S. 2d 195 (1994); *Tirado v. Koritz*, 156 A.D. 3d 1342, 68 N.Y.S. 3d 295 (4th Dept., 2017); *Freitag v. The New York Times*, 260 A.D. 2d 748, 687 N.Y.S. 2d 809, 260 A.D. 2d 748, 687 N.Y.S. 2d 809th Dept., 1999).

In the present case, plaintiff's expert, Thomas Bowler, conducted a site inspection of the gymnasium in which the infant plaintiff was injured, taking photographs and extensive measurements of the basketball court and the entire building. In particular, Mr. Bowler measured the distance from the court boundary lines to the surrounding fixed objects, such as the retracted bleachers, as

well as the size of the safety zones which existed when the boundary lines were observed as well as when they were eliminated, as they were at the time of plaintiff's injury. Defendant's expert, Mr. Fruscio, did not conduct a personal site inspection of the gymnasium, and does not even discuss the physical layout of the gymnasium before concluding that the elimination of the court boundaries for the drill was proper. While Mr. Bowler cites to available reference texts and other sources to support his opinions and conclusions, Mr. Fruscio's affidavit is completely devoid of any references or citations to any authoritative texts, statutes, or industry standards, despite the fact that he concludes that both the rebounding drill and Coach Kenney's supervision of the drill complied with "all applicable standards of care". Finally, while Mr. Bowler certified that his opinions and conclusions were rendered within a reasonable degree of professional certainty, Mr. Fruscio gave no such certification for his opinions and conclusions, which were entirely conclusory and speculative and were unsupported by any scientific or evidentiary foundation, rendering his affidavit of no probative value on the motion. *Accardo v. Metro-North Railroad*, 103 A.D. 3d 589, 959 N.Y.S. 2d 696 (1st Dept., 2013); *LeMarque v. North Shore University Hospital*, 227 A.D. 2d 594, 643 NYS 2d 221 (2nd Dept., 1996).

Based upon the foregoing legal precedent, the Third Department was required to evaluate the opinions and conclusions of defendants' expert in the same

manner in which it evaluated the opinions and conclusions of plaintiff's expert. There is no indication, from the language of its Memorandum and Order, that the Third Department conducted the required analysis of the affidavit of defendants' expert. Instead, it, appears that it simply accepted the affidavit in its entirety, without question or comment, while performing the required analysis on the affidavit of plaintiff's expert and finding that it was insufficient to defeat summary judgment in favor of the defendants. Justice Reynolds Fitzgerald identified this failure in her dissenting opinion, in which she expressed her belief that the affidavit of defendants' expert was insufficient, as a matter of law, to support an award of summary judgment in favor of the defendants. Justice Reynolds Fitzgerald also correctly noted that, the majority's statement to the contrary notwithstanding, plaintiff's expert did cite to several authoritative texts in his affidavit and, with specific reference to the issue of safety zones around the court, he cited to the National Federation of State High School Association's Court & Field Diagram Guide, which mandates a minimum of 3 feet (preferably 10) of unobstructed space outside of the court boundaries. This supports the expert's conclusion that such safety zones are necessary in order to provide some space in which a player can safely decelerate after crossing the court boundary line and before striking the bleacher, wall or whatever else might be located along the edge of the court. In contrast, Mr. Friuscio offered no citation or references to any

standards, publications or other authority which supported his conclusions that the rebounding drill was age appropriate and that both the rebounding drill and Coach Kenney's conduct in assigning and supervising the drill met "all applicable standards".

As Justice Reynolds Fitzgerald correctly points out in her dissent to the Memorandum and Order of the Third Department, that court incorrectly applied applicable precedent in reaching its determination that defendants had met their initial burden on their motion for summary judgment.

It is respectfully submitted that, upon the proper application of well-established legal precedent to defendants' submissions in support of their motion for summary judgment in this matter, the Appellate Division should have determined, as a matter of law, that defendants failed to meet their initial burden of proof on the motion, and the motion should have been denied in all respects.

POINT II

The Third Department Failed To Properly Consider the Infant Plaintiff's Age And Experience In Finding That He Had Knowingly And Voluntarily Assumed The Increased Risk Of Injury Created By The Elimination Of The Court Boundaries

In determining that the elimination of the court boundary lines did not unreasonably increase the inherent risks in participating in the rebounding drill, and that Mr. Bowler's opinion that the use of the boundary lines and the safety zones which they create would have prevented or reduced the severity of plaintiff's injury did not raise a triable issue of fact, the Third Department relied upon cases which are easily distinguished from the present case upon their facts.

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).

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 the side of the 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). While the 14-year old plaintiff in the case at bar testified that he understood Coach Kenney's instructions to mean that he could chase or dribble the ball beyond the painted boundary lines on the court, he could not have fully understood the full impact of eliminating those boundaries. The court looked exactly the same as it always had, with the painted lines in place, and the plaintiff could not have realized that the elimination of the court boundaries was the equivalent of moving the retracted barriers to within 3 feet of the boundary line, or that it meant that another athlete racing him for the loose ball would not abandon the chase after crossing the boundary line, but would continue running at full speed all the way up the bleachers, thereby increasing the force of any impact between the players.

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 substantially 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, the deviation from the usual rules and a change in the dimensions of the playing field by the coach was a significant factor which 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. While the defendants contend that *Weinberger* turned upon the fact that the plaintiff was furnished with a defective L-screen, the Second Department clearly noted that the facts that the plaintiff had never participated in this new drill previously, and that the distance from the pitcher to the batter was shorter than normal, also played a factor in the incident.

In its Memorandum and Order in this matter, the Third Department concludes that the removal of the court boundary lines, which plaintiff claimed enhanced the risks inherent to the sport of basketball, was actually nothing more than "less than optimal conditions", which are encompassed within the primary

assumption of the risk doctrine. The Third Department went on to find that the opinion of plaintiff's expert that the drill would have been safer with the court boundary lines in effect, thereby providing more space in which to safely decelerate before colliding with whatever stationary object was located adjacent to the court, failed to raise an issue of fact because the failure to do so did not increase the inherent risks of the drill or of playing basketball.

All of the cases which are cited by the Third Department in support of its conclusions that plaintiff failed to raise a triable issue of fact sufficient to preclude summary judgment in favor of the defendants are distinguishable from the case at bar upon their facts. In *Krzenski v. Southampton Union Free School District*, 173 A.D. 3d 725, 102 N.Y.S. 3d 693 (2nd Dept., 2019), the plaintiff was an 11th grader who volunteered to play floor hockey in a school gymnasium during a "class night" event. She was struck by another player and hit a railing attached to the open bleachers. She had previously played floor hockey in that same gymnasium during physical education classes, as well as at previous class night events. A physical education teacher testified that the closed bleachers were used as boundaries when floor hockey was played in physical education classes. The court concluded that the proximity of the bleachers to the playing area was open and obvious and the risk of colliding with the bleachers was an inherent risk of playing floor hockey in that gymnasium. In contrast, the 14-year old plaintiff in the

present case had never before engaged in a rebounding drill in which the court boundary lines were eliminated, and the few rounds of the drill which were run before it was his turn did not feature a loose ball which required the players to chase it down. Further, the retracted bleachers were never used as court boundaries. Clearly, there are significant differences between the age and experience of the plaintiff in each of these cases. While the Second Department found, in *Krzenski,* that the plaintiff's expert had failed to cite to any industry standards which had been violated by the defendants, plaintiff's expert in the case at bar did cite to the court and field guide published by a national federation of high school associations, which required at least 3 feet of space (preferably 10) around all sides of a basketball court.

Musante v. Oceanside Union Free School District, 63 A.D. 3d 806, 881 N.Y.S. 2d 446(2nd Dept., 2009) involved an experienced high school wrestler who was injured during practice when he stepped on the edge of a mat while running a "wind sprint" and collided with a nearby wall. In holding that defendant's summary judgment motion should have been granted, the Second Department found that the risk of colliding with a wall was inherent in the activity and was open and obvious, as was any height differential between the floor and the mat. The affidavit of plaintiff's expert, who opined that the drill should have been conducted in a larger and safer venue, was found to be insufficient to raise a triable

issue of fact because such failures did not increase the inherent and obvious risks of the exercise, and also because he failed to identify any specific industry standard which had been violated. In the case at bar, plaintiff's expert cited to authoritative texts as well as the aforementioned official court diagrams published by a national federation of high school associations in support of his conclusion that eliminating the court boundaries also eliminated the safety buffer zones around the court, thereby enhancing the risk of injury by engaging in the rebounding drill. Further, while the retracted bleachers were open and obvious, the court looked exactly as it had on every other occasion on which the plaintiff had used it, so that the enhanced risk of injury posed by the elimination of the court boundary lines was essentially invisible to the 14-year old plaintiff, who could not reasonably be expected to understand how the laws of physics would multiply the forces involved in a collision near the bleachers over the forces which would have been in play had the boundaries been in effect.

Simoneau v. State of New York, 248 A.D. 2d 865, 669 N.Y.S. 2d 972 (3d Dept., 1998) involved a skier with 20 years of experience, who was struck by a chairlift and fell onto a 2 x 4 board which delineated the edge of a ramp which guided skiers toward the boarding area. Plaintiff admitted that she had ridden the same chairlift several times that day, and was aware of the need to pay attention when boarding the lift and of the general risks involved in skiing, including being

struck by a chair. In affirming summary judgment in favor of the defendants, the Third Department found that the fact that a defendant could feasibly have provided safer conditions does not rise to the level of "unreasonably increased risks", where the risk is open and obvious to the participant, taking into consideration his or her level of experience and expertise and is an intrinsic part of the sport. Once again, in the present case, the 14-year old plaintiff had never participated in a rebounding drill in which the court boundaries were eliminated prior to the date of his accident and, although he had observed the drill being run several times prior to his turn to run it, there were no loose balls which required a player to chase them in those earlier drills. In this case, the basketball court would have been safer if the court boundaries remained in place during the rebounding drill. It was the elimination of the boundary lines and the allowance of more aggressive play which unreasonably increased the risk of injury by participating in the rebounding drill, and made the basketball court less safe than it appeared to be.

Appellant submits that Justice Reynolds Fitzgerald correctly stated that the issues of whether the elimination of the court boundaries constituted an unreasonably enhanced risk of injury, and whether the 14-year old, with no prior experience participating in a rebounding drill with the court boundaries eliminated, was capable of fully appreciating and understanding the enhanced risk, are not properly determined by the court as matters of law, but are issues of fact to be

resolved by a jury at trial.

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, [redacted] had never before observed or participated in a drill which involved elimination of the court boundaries.[2] He was only 14 years old at the time, and was clearly incapable of fully comprehending the potential consequences of removing the court boundaries. Asked for his understanding of what the rules for the drill were, [redacted] 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, [redacted] 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, [redacted] 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

[2] Although he had observed two groups of his teammates run the same drill before he did, [redacted] 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).

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.

CONCLUSION

For all of the reasons discussed herein, it is respectfully submitted that the Memorandum and Order of the Third Department must be reversed, and the matter returned to the Ulster County Supreme Court for trial.

Respectfully submitted,

By:_____
Steven A. Kimmel

CERTIFICATION PURSUANT TO 22 NYCRR §500.13(c)

The undersigned hereby certifies that the total number of words herein, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities and the statement of questions presented is 6,991.

Dated: March 11, 2022
Washingtonville, New York

_____
Steven A. Kimmel

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 11, 2022

deponent served the within: **Brief for Petitioner-Appellant**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on March 11, 2022

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

T. Heath

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