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

APL-2022-00003
Ulster County Clerk's Index No. 2440/17
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.

REPLY BRIEF FOR PETITIONER-APPELLANT

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POINT I

The Infant Plaintiff Did Not Fully Appreciate Or Comprehend The Enhanced Risk, Therefore He Could Not Have Assumed That Risk

Respondents continue to misunderstand or misrepresent the Appellant's argument in this matter. While all of the cases which are cited by Respondents in the opening paragraphs of Point I of their brief hold that a person is deemed to have assumed the risks inherent in a sport or amusement activity by voluntarily participating in that sport or activity while aware of the risks; and with an appreciation of the nature of the risks, or if the risks are fully comprehended or perfectly obvious, they fail to fully discuss that final element of the doctrine in their argument. While there is no question that the infant plaintiff voluntarily participated in the 2-on-2 drill in which he was engaged when he was injured, or that he was an experienced basketball player, he had never before participated in any drill in which the court boundaries were ignored, and did not, therefore, fully appreciate or comprehend the enhanced risk posed by the elimination of those boundaries. He testified that Coach Kenney had told the players only that there were "no boundaries" and that he understood that to mean that you could chase the ball beyond the painted sidelines, and that reach-in fouls were permitted. Our argument is that, under all of the specific circumstances of this case, the 14-year

old infant plaintiff could not have fully comprehended or appreciated that the elimination of the court boundaries meant that players would be chasing a loose ball, at full speed, all the way to the walls or bleachers, and that any collision with such fixed objects would occur at higher speed and involve significantly more force than would occur if the court boundaries were observed and players had the prescribed buffer zones in which to decelerate before reaching the walls or bleachers. Put another way, while the bleachers were open and obvious, and the risk of running intro them was "perfectly obvious" under normal game or practice conditions, the significantly increased risk of injury when the court boundaries were ignored was neither fully comprehended nor perfectly obvious to a 14-year old who had never played under those conditions. The fact that a plaintiff's age must be considered in determining assumption of the risk is illustrated by the case of *Zhou v. Tuxedo Ridge LLC*, 180 A.D.3d 960, 119 N.Y.S. 3d 251 (2nd Dept., 2020), in which the Second Department held that a 9-year old novice skier could not fully appreciate the risk posed by the layout and terrain of the bunny slope, which layout and terrain were clearly open and obvious.

Respondents fail to acknowledge that the field or facility upon which a sport or amusement activity takes place can appear to be safe and yet contain an unreasonably enhanced risk of injury which is not easily appreciated or comprehended, and which rises above the normal risks which are inherent in the

sport or activity. This Court recognized that possibility in the case of *Owen v. RJS Safety Equip.*, 79 N.Y. 2d 967, 471 N.Y.S. 2d 998 (1992), un which the race track did not appear to be unusual in any significant observable way, yet this Court found that the plaintiff, an experienced race car driver, had raised a triable issue of fact with respect to whether he had voluntarily assumed the risk when the contour of the track's retaining wall, the defective design of the guardrail and the placement of barrels along the side of the track were unique, and that they raised the risk of injury beyond that which was normally inherent in the sport of auto racing. There was no question that each of these features was open and obvious. The Second and Third Departments have also recognized this possibility. In the case of *Mussara v. Mega Funworks, Inc.*. 100 A.D. 3d 185, 952 N.Y.S. 2d 568 (2nd Dept., 2012), the Second Department held that an adult male who was riding an inflatable tube on a water slide did not assume the risk that the splash pool would be inadequate to bring his tube to a stop prior to striking the exit stairs at far end of the 50-foot pool, and that he would be ejected onto the concrete deck which surrounded the pool. The court found that the conditions were unique and were over and above the usual dangers inherent in riding a water slide. The conditions were not as safe as they appeared to be, and the Court was unable to conclude that the plaintiff fully appreciated and understood the risk before entering the ride. In *Finn v. Barone*, 83 A.D. 3d 1365, 921 N.Y.S. 2d 704 (3rd Dept., 2011), the Third

Department held that an experienced skier did not assume the risk of falling when exiting a chairlift where the snow guns were pointed at the chairlift, causing an accumulation of snow and ice on the bottom of her skis. The Third Department found that the plaintiff had raised a triable issue of fact with respect to whether the aiming of the snow guns at the chairlift created a risk which was over and above the risks normally inherent in skiing.

In the present case, while the infant plaintiff may have been quite experienced and was certainly aware of the risk of running into a wall or bleacher while playing basketball, he had never before done so on a court on which the court boundaries were ignored. At the time that he agreed to voluntarily participate in the 2-on-2 drill, the basketball court appeared exactly the same as it always had, and he had no way to fully comprehend and appreciate the significantly enhanced risk of injury posed by the elimination of the court boundaries. This enhanced risk of injury was clearly above and beyond the risk normally inherent in the sport of basketball, in which the court boundaries serve to provide players with a safety or buffer zone in which to safely decelerate before reaching the walls or bleachers which are adjacent to the court. As a result of the failure to observe the court boundaries, the basketball court was not as safe as it appeared to be to the 14-year old plaintiff, and he could not have fully appreciated

or comprehended the nature or extent of that increased risk and could not, therefore, have voluntarily assumed the enhanced risk.

The distinguishing factor between the present case and those cited by Respondents for the contention that running into a fixed object adjacent to the court is a risk inherent to the sport of basketball is that, in this case, the risk was unreasonably enhanced beyond that which is inherent to the sport by altering the rules and layout of the court to remove safety zones which are incorporated into the required dimensions of the court in order to provide an area in which players may decelerate before reaching those fixed objects. While it may be true that players will run into each other when the court boundaries are observed, they will do so at a greater distance from the fixed object, and be moving at a slower speed and with much less force if, and when, they subsequently strike the fixed object. Respondent's contention that the distance from the court boundary to the fixed object is irrelevant to an assumption of risk analysis is without merit. The regulations and specifications for the dimensions of a high school basketball court exist for several reasons, one of which is to allow for the enjoyment of the game while protecting participants from an unreasonable risk of bodily injury. Altering the rules and/or the dimensions of the court defeats the intended design specifications and unreasonably enhances the risk of injury to the participants.

Respondents' contention that, if the elimination of the court boundaries posed a risk beyond that which is inherent in the sport of basketball, the 14-year old plaintiff may be deemed to have constructive notice of that enhanced risk by virtue of the fact that he was an experienced basketball player, is also without merit. Despite having extensive experience playing basketball in a variety of venues, it is undisputed that he had never before participated in a drill in which the court boundaries were ignored. Nor had he observed such a drill prior to the date of his injury. While he had watched several of his teammates run the drill prior to his turn to do so, there had been no loose balls or rough play during those prior runs. Under those circumstances, the 14-year old plaintiff cannot properly be charged with constructive notice that the elimination of the court boundaries significantly enhanced the risk of injury beyond that which is normally inherent to the sport. Once again, while he may have appreciated the normally inherent risk of colliding with a fixed object adjacent to the court, the 14-year old infant plaintiff clearly did not fully comprehend or appreciate the significantly enhanced risk of injury posed by the elimination of the court boundaries. This case is distinguished from the case of *Legac v. South Glens Falls Central School District,* 150 A.D. 3d 1582 (2017), which h is relied upon by Respondents, by the fact that the plaintiff in *Legac* had been observing the baseball interact with the hardwood floor for three days prior to the date of his injury, and had observed infielders being struck in the face by a

ground ball which suddenly hopped into the air, while the infant plaintiff in this case had never participated in or observed a drill in which the court boundaries were ignored at anytime prior to his injury.

Based upon the foregoing, it is respectfully submitted that, despite being an experienced basketball player, the 14-year old infant plaintiff could not have fully comprehended or appreciated the significantly enhanced risk of injury which was created by the elimination of the court boundaries. While he was certainly aware that the risk of colliding with a fixed object was inherent in the sport, he had never before participated in any drill or game in which the court boundaries were ignored. As a result, while the basketball court may have appeared to be exactly the same as the previous times that he had played on it, it was clearly not as safe as it appeared to be on the date of his injury, because the elimination of the court boundaries significantly enhanced the risk of injury beyond that which is normally inherent in the sport. The infant plaintiff could not have fully comprehended or appreciated the enhanced risk, so he could not have voluntarily assumed it.

POINT II

The Third Department Abused Its Discretion In Accepting And Considering The Affidavit Of Respondents' Expert

Respondents' contention that their summary judgment motion could have properly been determined without considering the affidavits of the respective expert witnesses for the parties is an entirely new arguments, which was not raised in either the trial court or the Appellate Division, and should not, therefore, be considered by this Court.

Respondents fail to acknowledge the fact that, simply because their expert witness has an impressive set of credentials which might qualify him as an expert in the subject of basketball coaching does not necessarily require that any opinion which he renders be automatically accepted without any inquiry. Appellant has never argued that Mr. Fruscio is not qualified as an expert in this matter. Our argument is, instead, that his affidavit in this matter is clearly insufficient to support an award of summary judgment in favor of the Respondents, as it consists entirely of speculation and conclusory statements, without the requisite evidentiary basis or scientific foundation therefore. For example, while Mr. Fruscio opines that the use of the 2-on-2 drill and Coach Kenney's supervision met "all applicable standards", he fails to ever cite a single such standard. Similarly, while he states that the same drill is appropriate for use with 4th grade athletes, he fails to cite or refer to any source for that statement. Mr. Fruscio never visited the gymnasium

and never discusses the dimensions of the basketball court in his affidavit, nor does he directly address the removal of the safety zones which are intended to allow players to safely decelerate before reaching fixed objects adjacent to the court. The failure to do so means that his affidavit 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). His statement that the same collision and injury could have occurred during a game, when the court boundaries would have been enforced, is clearly both incorrect and speculative. Finally, none of his opinions or conclusions is certified with the requisite degree of professional certainty, 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).

If the affidavit of Mr. Fruscio is of no probative value in the determination of Respondents' motion for summary judgment, then the Third Department erred in accepting the opinions and conclusions expressed in that affidavit and relying upon them in its determination of the initial appeal in this matter.

Respondent's argument that the affidavit of Appellant's expert, Thomas Bowler, is insufficient to defeat summary judgment in this matter because it relies upon inadmissible hearsay, is devoid of any merit. First, as we have previously demonstrated, Mr. Bowler does not rely solely and entirely upon such hearsay to support his opinions and conclusions. Instead, he bases his opinions and conclusions upon the evidence in the case and his own personal observations and measurements, as well as a promulgated standard for the dimensions of a high school basketball court, and only cites the publication which is alleged to be inadmissible hearsay in further support of his opinions.

Each of the cases which are relied upon by the Respondents in support of their argument that Appellant's expert may not properly rely upon hearsay in support of his opinions in this matter is easily distinguished from the case at bar for the reason that each of the cited cases is the result of a post-trial proceeding to address the admission of hearsay evidence during that trial, while the present case involves a pre-trial motion for summary judgment. The evidentiary standards for admissibility of hearsay on a motion for summary judgment and at trial are quite different. Hearsay which might be inadmissible at trial may be used to oppose a motion for summary judgment, provided that it is not the only evidence submitted for that purpose. *Feinberg v. Sanz*, 115 A.D. 3d 705, 992 N.Y.S.2d 133 (2nd Dept., 2014); *Mallen v. Farmingdale Lanes*, 89 A.D. 3d 996, 933 N.Y.S. 2d 338

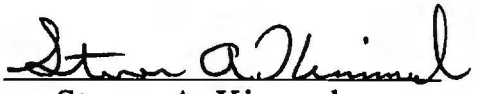
(2nd Dept., 2011); *Candela v. City of New York*, 8 A.D. 3d 45, 778 N.Y.S. 3d 31 (1st Dept., 2004). In the present case, Mr. Bowler relied upon his own measurements and observations, as well as basketball court dimensions promulgated by a national federation of high schools and the deposition testimony of all witnesses in this matter, in addition to the hearsay publication. Such usage was, therefore, totally proper in opposing the Respondents' motion for summary judgment in this matter. In contrast, Respondents' expert, Mr. Fruscio, relies on nothing other than his personal experience and deposition testimony to support his conclusory and speculative statements and opinions, which are not certified with the requisite degree of professional certainty and are, therefore, of no probative value..

Based upon all of the forgoing, it is respectfully submitted that the Third Department erred in accepting and considering Mr. Fruscio's affidavit in this matter, as it consisted entirely of speculation and conclusory statements and was, therefore, of no probative value whatsoever. The appeal should have been denied upon the basis that the Defendants/Respondents had failed to meet their initial burden of proof upon their motion for summary judgment.

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 2,764.

Dated: May 16, 2022
Washingtonville, New York

Steven A. Kimmel

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF MONROE	)		**EXPRESS DELIVERY**

I, **Jeremy Slyck**, of Rochester, New York, 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.

On May 16, 2022

deponent served the within: **REPLY BRIEF FOR PETITIONER-APPELLANT**

Upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copy 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 May 16, 2022

Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024

Jeremy Slyck

Job #511241