To be argued by:
NICHOLAS I. TIMKO
(Time Requested: 15 minutes)

Case No. 530346

Supreme Court of the State of New York
Appellate Division –Second Department

KEVIN GRADY,

Plaintiff-Appellant,

-against-

CHENANGO VALLEY CENTRAL SCHOOL DISTRICT, CHENANGO VALLEY BOARD OF EDUCATION, MICHAEL ALLEN and MICHAEL FERRARO,

Defendants-Respondents,

BRIEF FOR PLAINTIFF-APPELLANT

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Plaintiff-Appellant Kevin Grady ("Grady") respectfully submits this brief in support of his appeal of the decision and order of the Supreme Court, Broome County (Hon. Ferris D. Lebous) entered October 31, 2019 (the "Decision"), which granted the motion for summary judgment of Defendants-Respondents Chenango Valley Central School District (the "District"), Chenango Valley Board of Education (the "Board"), Michael Allen ("Allen"), and Matthew Ferraro ("Ferraro") (collectively, "Defendants").

PRELIMINARY STATEMENT

This appeal concerns Defendants' decision to direct varsity and junior varsity baseball players to engage in the so-called "Warrior Drill," a joint infield drill involving multiple balls being thrown towards the same area of the field, from different locations on the field, at the same time. Defendants recognized the inherent danger of this drill as well as the increased risk and foreseeability of errant balls striking players, and chose to address those safety concerns with an inadequate "protective" screen, ostensibly to protect the student players including Grady. Defendants had absolutely no idea whether the "protective screen" was adequate to actually prevent balls from shortstop and/or second base from bypassing the "short first baseman" and striking the first baseman – Grady. As a result, the inadequate protective screen failed to stop a ball thrown from second

base to the "short first baseman." The baseball struck Grady in the head causing a catastrophic injury to his right eye.

In this action, Grady seeks to hold Defendants accountable for failing to provide a safe environment for student athletes; failing to follow proper safety rules and protocols; failing to comply with New York State regulations; failing to provide adequate and proper safety equipment; and directing the players to participate in a drill that placed them at an unreasonably increased risk of being struck by an errant ball without proper and adequate protection.

Grady was struck while participating in the Warrior Drill during the first outdoor practice of the season. This multiple-ball activity is not inherent in the game of baseball. To the contrary, the coaches acknowledged the increased risk to players and the need for protective equipment but failed to provide a proper protective screen or to position the screen to provide adequate protection. Instead, the coach testified that he simply used the screen they happened to have on hand without determining if it actually provided adequate protection. Tragically, it did not. As a result, a ball thrown to short first base, not intended for Grady and unrelated to the specific activity Grady was engaged in, flew past the inadequate protective screen and struck Grady in the face resulting in substantial permanent loss of vision in his right eye.

The court below erred when it granted Defendants' motion for summary judgment on the ground that Grady "assumed the risk" of participating in the multi-ball Warrior Drill with multiple balls being thrown towards him simultaneously, with an inadequate protective screen.

First, Defendants failed to meet their initial burden on summary judgment of establishing *prima facie* that they fulfilled their duty under governing caselaw and under applicable regulations of conducting athletic activities under appropriate safety provisions. Indeed, the court below specifically rejected Defendants' expert affidavit as well as the affidavits of Allen and Ferraro asserting that the "protective" screen was adequate, yet nonetheless granted Defendants' motion. Under well-established law, Defendants failure to meet their burden should have resulted in the denial of their motion without even considering Grady's opposition.

Second, even if Defendants had met their initial burden (which they did not), Grady demonstrated the existence of material issues of fact as to whether the "protective" screen was adequate and whether the Warrior Drill as conducted by Defendants on the date of Grady's injury presented an unreasonably increased risk of harm to the student players, including Grady. It is well established by both the Court of Appeals and this Court that a student athlete cannot, as a matter of law, assume the risk of dangers that are not inherent in the sport or which constitute unassumed, concealed or unreasonably increased risks. The Warrior Drill – with

multiple balls being thrown simultaneously to the first base area – is just such an unreasonably increased risk that is not inherent in the game of baseball. Nor can Grady be deemed to have assumed a risk that Defendants claimed to have eliminated through use of a "protective" screen.

Accordingly, Decision should be reversed and Defendants' motion for summary judgment should be denied.

QUESTIONS PRESENTED

QUESTION 1: Did Defendants fail to satisfy their initial burden on summary judgment when, as the court below recognized, they did not establish that the screen they used to protect Grady from what they concede was a foreseeable increased risk was in fact adequate to protect Grady, and therefore did not establish that the Warrior Drill did not present an unreasonably increased risk to Grady?

ANSWER: The court below answered this question in the affirmative, yet erroneously granted their motion.

QUESTION 2: Were Defendants entitled to summary judgment based on assumption of risk when the record demonstrates the existence of genuine issues of fact as to (a) whether the screen used during the Warrior Drill was adequate to protect Grady from what Defendants concede was a foreseeable increased risk; (b) whether the Warrior Drill as conducted on the day Grady was injured presented

unreasonably increased risks to Grady; and (c) whether the Warrior Drill presented risks that are not inherent to the game of baseball?

ANSWER: The court below erroneously answered this question in the affirmative.

QUESTION 3: Does Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392 (2010), in which the Court of Appeals expressly stated that the assumption of risk doctrine "must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation" that the Legislature has applied to personal injury actions, id at 395-96, compel dismissal of this action?

ANSWER: The court below erroneously answered this question in the affirmative.

STATEMENT OF FACTS AND THE CASE

A. Background

In 2017 the Board operated Chenango Valley High School ("CVHS"). R.37, 48. The Board and CVHS employed athletic director Brad Tomm, varsity baseball coach Allen, junior varsity baseball coach Ferraro, R.37, 48-49, and contracted the services of athletic trainer Karen Lipyanek ("Lipyanek"). R.247.

The Defendants acknowledged that "as a coach and teacher, that's certainly a responsibility to maintain a safe environment," R.149, which included setting up

"protective screens" as necessary to protect players on the field during practice. R.236.

> Q. Well, if you were going to have a game or a practice and it rained and the field was slippery or wet, would that be something you would take into consideration so you could keep the environment safe for the players?
>
> Mr. Powers: Object to the form. You can answer.
>
> A. Absolutely. We wouldn't practice on the field. If it were wet or if there was something wrong with field, we would not practice on it.
>
> Q. Why not?
>
> A. Because that's part of keeping the environment safe.
>
> Q. What would you be concerned about with a wet field?
>
> A. Somebody's -- just the conditions not being – someone slipping and falling. You know, there's a various amount of different things.
>
> Q. Did you understand that to be part of your duties and responsibilities as a coach, to keep the playing – to provide a safe environment for the players?
>
> A. Yeah. I mean, usually the decision to not use the field is a decision made by, you know, if it's a game day it's a decision that's made by the athletic director and the coach combined. If it's a practice day generally, as the coach, I would make the decision for my team.

R.187.

On March 8, 2017 Allen and Ferraro chose to take the varsity and junior varsity baseball teams outside to practice together, R.167, in the late afternoon.

R.104. The weather was cool and windy. R.104, 407. This was the first outdoor practice of the baseball season, which had begun two-days earlier with indoor practices on March 6, and March 7, 2017. R.103, 167, 274.

B. Defendants Recognized the Increased Risk to Players Presented by the Warrior Drill but Failed to Take Proper Precautions to Protect the Players During the Drill

During the March 8, 2017 outdoor practice, Allen and Ferraro chose to engage in a multiple-ball drill known as the Warrior Drill. R.166, 372, 374. During this drill, Allen would stand on one side of home plate and hit balls to third base. R.198. The third baseman would field the balls hit by Allen and throw to the player at first base. R.198. Simultaneously, Ferraro would stand on the other side of home plate and hit balls to the shortstop or second baseman. The shortstop or second baseman would then throw to a player known as the "short first baseman" positioned close to first base in the base path between first and second base. R.161, 199, 200, 372, 374.

Allen and Ferraro acknowledged their duty to provide a safe environment for the players, R.149, 187. They also specifically recognized the increased danger to players at actual first base – like Grady – when the Warrior Drill with a "short first baseman" was used and the need to use a screen to protect the actual first baseman from being struck by balls thrown to the "short first baseman.":

Q. And when you reviewed the [Warrior] drill from the prior coach, Mr. Tidick, did you have any safety concerns with regard to any of the players during the course of these drills?

A. Sure. Any time you do a drill -- it doesn't matter what drill you do, there's always a safety. So, you know, having that protection screen was very important. But reminding players when you're not involved in the play to, you know, be aware of your surroundings and be paying attention.

Q. Okay. When you say the protection screen was important, what safety concerns did you have with regard to the drill?

A. Well, I mean, you have a protection because you -- part of that warrior drill is you have a -- you know, middle infielders were turning a double play and throwing to a short-first base, which is where the screen is -- that the player that is not involved in -- with the middle infielders, who's receiving balls from the third base, you know, making sure that the screen is in a position that – to protect, you know, a normal thrown ball.

. . .

Q. Okay. Were you concerned at all to protect the first baseman from an errant ball that was thrown from short or second?

A. The screen was there to protect them. You know, I felt that it -- I felt it was a very good drill. And with the screen there, that they were protected.

R.159-160.

Q. Now, during the course of phase one, two, and three when you have a short-first baseman and you have a regular -- an actual first baseman on the bag, is there a risk that they're involved from the short or second baseman can hit the first baseman on the bag?

. . .

A. Well, we try to prevent that by putting the screen there as protection.

Q. All right. But there is a risk, correct?

A. Well, I mean, yeah. That's why we would put the screen up.

Q. Okay. And so the purpose of the screen is to protect the first baseman on the actual bag from being hit by balls thrown from short or second baseman, correct?

A. Or any ball that is being thrown, not just that one particular ball.

Q. Well, the screen is not going to protect him from a ball being thrown by the third baseman to him, correct?

A. No.

Q. So where else would a ball be coming from?

A. Well, I am just saying --

Q. During the course of that drill, the ball would either be coming from the second baseman or the --

A. Right.

Q. -- shortstop, correct?

A. Right.

R.200.

Allen and Ferraro also acknowledged that during the Warrior Drill, the regular first baseman was required to focus on the balls hit to third base and the incoming throws from the third basemen, not the balls being thrown to the "short first baseman." R.162, R.199-200.

However, neither Allen, Ferraro, nor any other Defendant ever did anything to verify that the seven foot by seven foot "protective" screen was adequate and

would protect the regular first baseman from this foreseeable risk. R.148. To the contrary, they simply used the only screen they had available and did not consider using anything larger:

> Q. Who determined that you should use a seven by seven as opposed to a ten by seven or a twelve by seven or some other size screen?
>
> A. I determined that.
>
> Q. And what criteria did you use to determine that a seven by seven screen was sufficient to provide protection for the first baseman?
>
> A. It was the screens [sic] that we had available to use.
>
> Q. Was that the largest screen you had?
>
> A. Yes.
>
> Q. Did you ever consider getting a larger screen than seven by seven to use?
>
> A. No.

R.161; see also R.203.

In addition, Lipyanek, the athletic trainer retained by the District and the Board, testified that she had the authority to, but did not, inspect safety equipment used by the team during the Warrior Drill:

> Q If the team is going to do certain activities or be on certain facilities or certain equipment, do you have authority to overrule the coach in terms of whether they should be permitted at a given point in time to do those activities or to use that equipment?
>
> . . .

A Can you restate that question? I don't quite understand it.

Q Sure. If the football team is going to use a piece of equipment during the course of training or practice but you make a determination based on your knowledge and training that it's not advisable to do that because it puts the players at risk of injury or increased risk of injury, do you have authority to overrule the coach and say, no, you can't do that now, they're not ready for that?

. . .

A I can make that recommendation, yes.

Q When you say make a recommendation, does the coach have to follow your recommendations?

A It's always best if the coach follows my recommendations, yes.

Q Right. But in your experience, does [sic] the coaches follow your recommendations generally?

A Most of the time, yes.

R.249-250.

Q Before the time of the incident, did you ever review the activity that was being engaged in, from a safety point of view as athletic trainer?

A No.

Q Before the incident occurred, did you ever review the equipment that was being used, including the screen that was placed there and where it was being placed, from a safety point of view?

A No.

Q Were you ever asked to review that equipment on the field and the activity and the screen protection before the time of the incident?

A No.

R.263.

Yet despite not actually knowing whether the screen was adequate, Allen nonetheless advised the players that they would be protected by it:

> Q. And was it your understanding during the warrior drill that the seven by seven screen, when it was put in the proper position, would protect the first baseman from ever being hit by a ball being thrown from short or second?
>
> A. Yes.
>
> Q. And did you convey that information to the people who had to play first base, so that they wouldn't have to worry about it, that screen is there to protect you, just focus on getting your ball from third base?
>
> . . .
>
> A. Yeah. I think the kids understood why -- the kids understood why there was a screen there. They knew the screen was there because there was throws coming from second. . . .

R.162-163.

C. Grady Was Grievously Injured Participating in the Unreasonably Dangerous Warrior Drill Dictated by Allen and Ferraro

Grady was an outfielder but was assigned by the coaches to play regular first base for the Warrior Drill during the first outdoor practice of the season on March 8, 2017. R.102.

Grady was struck in the head and face without warning by a ball intended for the "short first basemen." The "protective" screen obviously failed to protect

Grady from the throw. As a result, Grady suffered substantial permanent loss of vision in his right eye.

Grady testified that although he signed a Duty to Warn form noting that "participation in interscholastic athletics involves certain inherent risks," he did not view what happened to him as being an inherent risk of baseball, and perhaps more importantly that he trusted his coaches to provide a safe environment:

> Q Kevin, have you ever played in a baseball game where there was more than one ball in play at a time?
>
> A I have not.
>
> Q And when you signed that paper and you said you understood the inherent risks, was what happened to you something you considered an inherent risk to the game of baseball?
>
> A I don't believe having more than one baseball in play is an inherent risk playing baseball.
>
> Q And when you signed that, did you understand that the coaches and the school and the team would provide you with a safe field and safe equipment to play the game?
>
> . . .
>
> A Yeah, I usually just trust the coaches.

R.138.

Grady also testified that he had no choice but to participate in the drills assigned by the coaches:

> Q Okay. And could you tell me, when you went out for the team, you played varsity baseball for a number of years, right?
>
> A Yeah, I played the year before.

Q And what was the dynamic between the coach and the players, could you just tell the coach you didn't want to do something or make your own rules?

. . .

Q You can answer.

A If you wanted to play, you would just listen to what he said, do the drills that he told you to.

Q So you didn't have a choice to decide I don't want to do this drill, I want to sit out, I want to wait?

A Well, if I wanted to play, I didn't have a choice.

R.138.

D The Lower Court Granted Defendants' Motion for Summary Judgment Despite Specifically Finding that Defendants Presented No Evidence Showing that the Warrior Drill Was Safe

Defendants filed their motion for summary judgment on July 24, 2019.

In support of their motion, Defendants submitted a purported expert affidavit of Scott Cassidy. With respect to the screen used by Defendants during the Warrior Drill on March 8, 2017, Cassidy offered only the conclusory statement that the "screen selected . . . was appropriate for the drill and properly positioned." R.304-05 ¶ 7.

In opposition to the motion, Grady offered the expert affidavit of Raymond Salvestrini ("Salvestrini"), R. 348, the Director of Athletics for the Danbury, Connecticut Public Schools. Salvestrini holds I a B.A. in Physical Education, Health and Recreation from Yanton College, South Dakota; a master's degree in

Curriculum and Teaching in Physical Education from Columbia University; and a 6th Year Diploma in Educational Administration from Southern Connecticut State University. He previously served as Director of Athletics for Lehman College (CUNY) in New York City, the White Plains (New York) City Schools, the Ridgefield Connecticut Public Schools, and New Milford High School.

In his affidavit, Salvestrini stated, *inter alia*, that

- "The safety issue in this case is not [as Defendants suggest] simply the use of a multi-ball drill, but all the circumstances surrounding its use," and that the circumstances include that (a) it "was the first outdoor practice of the season for the team"; (b) "it was a late afternoon practice early in the spring when the weather was cloud covered, cool and windy"; (c) "the combination of varsity and junior varsity players meant that the players did not possess equal levels of skill, training, strength, and conditioning when performing the drill;" and (d) "the drill was done late in practice when the players were not as focused as they should have been" had the Warrior Drill been done earlier in the practice.

- "[T]he size and positioning of the protective screen was inadequate for the drill in question."

- Although Allen "acknowledged that in order to protect the player, you need to place the screen closer to the player that needs protection" and told the players on actual first base, like Grady, that the screen would protect them from errant throws, the screen was in fact placed closer to the short first basemen rather than to the players like Grady at actual first base who needed protection.

- "It is my opinion to a reasonable degree of certainty that the failure of the coaches, athletic director, and athletic trainer to provide proper, adequate and properly positioned safety equipment was a departure from good and accepted physical education standards, practices and procedures."

R.350-351.

- "It is my opinion to a reasonable degree of certainty that the defendants also departed from good and accepted physical education standards and practices in failing to assess the readiness of the players, varsity and junior varsity, to participate in the drill on the day in question. Combining the junior varsity players, who were less developed, less skilled, and less familiar with the practice drills, on a cool spring windy late afternoon, with varsity players in a complicated multi-ball drill during the first outdoor practice of the season was a departure from good and accepted physical education and safety standards and practices."

- "Plaintiff Kevin Grady suffered a needless injury which could have and should have been avoided and prevented if the defendants, including the coaches, athletic director, and athletic trainer had 'done their job.'"

R.353.

In the Decision, the lower court recognized that Defendants had not demonstrated that they used appropriate safety measures when conducting the Warrior Drill on March 8, 2017:

> In the first instance, the court does not find the affidavits from Cassidy, Allen or Ferraro particularly compelling. Each opine that the protective screen was proper in size and/or placed in the proper location to provide adequate safety to players standing at the traditional first base. However, none of the submissions, particularly the expert's opinion, is supported by any scientific or technical data supporting their conclusions.

R.8.

Yet the lower court nonetheless granted Defendants' motion for summary judgment based solely on the doctrine of assumption of risk. In doing so, the lower

court was not without misgivings, noting that it was "mindful of the circumstances surrounding this accident namely a school sanctioned activity, team coaches dictating the method and manner of practice including the selection of equipment such as the size and location of the protective screen, and the involvement of minors who may or may not have the maturity to object to directions from a school authority figure." R.12. The court below further stated that "[i]n this court's view, under these circumstances equity should dictate a balancing of the parties' respective degree of fault." Id. Ultimately, however, the court below felt "constrained by the case law" to dismiss the action on the basis of assumption of risk. Id.[1]

As set forth herein, the lower court misapprehended the relevant precedents from this Court and others regarding assumption of risk and therefore erred when it granted Defendants' motion. This appeal therefore ensued.

[1] The Complaint alleges causes of action for negligence and for negligent hiring, retention, and supervision. Because it dismissed all of Grady's claims based on assumption of risk, the court below did not separately analyze each cause of action.

ARGUMENT

DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED

A. DEFENDANTS FAILED TO MEET THEIR INITIAL BURDEN ON SUMMARY JUDGMENT BECAUSE, AS THE COURT BELOW EXPRESSLY FOUND, THEY DID NOT DEMONSTRATE THAT THEY CONDUCTED THE WARRIOR DRILL UNDER ADEQUATE SAFETY PROVISIONS AND IN A MANNER THAT WOULD PROTECT PLAYERS FROM THE RECOGNIZED AND FORESEEABLE INCREASED RISKS PRESENTED BY THE DRILL

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and the evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Framan Mech., Inc. v. State Univ. Constr. Fund, 182 A.D.3d 947, 948 (3d Dep't 2020) (citation and internal quotation marks omitted); accord Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985).

Moreover, Defendants "have the burden to establish as a matter of law that plaintiff's action is barred by the doctrine of primary assumption of risk." Weller v. Colleges of the Senecas, 217 A.D.2d 280, 283-84 (4th Dep't 1995).[2]

Here, Defendants failed to meet their initial burden, and their motion should have been denied on that basis alone.

It is well-established that "a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks." Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 658 (1989).

Independently, the New York State Education Commissioner has promulgated regulations providing that "[t]t shall be the duty of trustees and boards of education . . . to conduct all [extraclass athletic] activities under adequate safety provisions. 8 NYCRR § 135.4(7)(i)(g).

Thus, to meet their initial burden on summary judgment, Defendants were required to establish *prima facie* that the Warrior Drill did not present "unassumed, concealed or unreasonably increased risks" and that it was conducted "under adequate safety provisions." Defendants have not done, as the court below recognized despite granting their motion.

[2] The assumption of risk doctrine is discussed in detail in Point B, infra.

As set forth above, Defendants expressly recognized the increased risk to the regular first baseman – Grady, in this case – from the Warrior Drill and the need to protect the regular first basement using appropriate safety equipment. Yet they never established that the "protective" screen they used was adequate. Defendant's expert, Cassidy, offered only the brief and conclusory statement, without explanation, the "screen selected . . . was appropriate for the drill and properly positioned. R.304-05. As the court below recognized, this is insufficient to demonstrate that the screen was, in fact, sufficient:

> In the first instance, the court does not find the affidavits from Cassidy, Allen or Ferraro particularly compelling. Each opine that the protective screen was proper in size and/or placed in the proper location to provide adequate safety to players standing at the traditional first base. However, none of the submissions, particularly the expert's opinion, is supported by any scientific or technical data supporting their conclusions.

R.8.

The court below erred, however, when it failed to recognize that its conclusion doomed Defendants' motion. Because Defendants did not establish that the screen they used was, in fact, the correct size and in the correct position to protect Grady, they have not met their burden of demonstrating that the Warrior Drill as conducted on March 8, 2017 did not present an unreasonably increased risk or that it was conducted under adequate safety provisions. Accordingly, Defendants' motion should have been denied on that basis alone:

> Here, the defendants failed to establish, prima facie, that the injured plaintiff, by participating in the wrestling match, assumed the risk of being injured in the manner in which he allegedly was injured here. The defendants' moving papers failed to demonstrate, prima facie, that the allegedly dangerous condition caused by the improperly taped or secured mats did not unreasonably increase the risk of injury inherent in the sport of wrestling.

Philippou v. Baldwin Union Free Sch. Dist., 105 A.D.3d 928, 929-30 (2d Dep't 2013) (affirming denial of defendants' summary judgment motion); see also Framan Mech., Inc., 182 A.D.3d at 950 (denying summary judgment because "conclusory blanket assertion" in affidavit "was insufficient in and of itself to establish defendant's prima facie entitlement to summary judgment"); Connor v. Tee Bar Corp., 302 A.D.2d 729, 730-31 (3d Dep't 2003) (affirming denial of summary judgment when defendant failed to meet initial burden of establishing that plaintiff assumed the risk of activity); Brown v. Roosevelt Union Free Sch. Dist., 130 A.D.3d 852, 854 (2d Dep't 2015) ("Here, the defendants failed to establish, prima facie, that the infant's coach, by having her perform an infield sliding drill on the subject grass field, did not unreasonably increase the inherent risks of the activity. Since the defendants failed to establish, prima facie, their entitlement to judgment as a matter of law, the motion and cross motion were properly denied, and the Court need not determine the sufficiency of the plaintiff's opposition papers.") (citations omitted); Stillman v. Mobile Mountain, Inc., 162 A.D.3d 1510, 1511 (4th Dep't 2018) ("the court properly denied that part of

defendant's motion based on assumption of the risk inasmuch as it failed to meet its initial burden of establishing that the risk of falling from the climbing wall is a risk inherent in the use and enjoyment thereof"); Charles v. Uniondale Sch. Dist. Bd. of Educ., 91 A.D.3d 805, 806 (2d Dep't 2012) (because "the defendant failed to eliminate all triable issues of fact as to whether it unreasonably increased the risk of harm to the plaintiff by failing to provide him with head and face protection during preseason high school lacrosse practice," and therefore "did not establish its prima facie entitlement to judgment as a matter of law," it was "unnecessary to consider the sufficiency of the plaintiff's opposing papers.").

B. AT THE VERY LEAST, ISSUES OF FACT CONCERNING WHETHER DEFENDANTS BREACHED THEIR DUTY TO CONDUCT ATHLETIC ACTIVITIES UNDER ADEQUATE SAFETY PROVISIONS AND WHETHER GRADY ASSUMED THE RISK OF DEFENDANTS' NEGLIGENT CONDUCT PRECLUDE GRANTING SUMMARY JUDGMENT TO DEFENDANTS

As set forth below, even assuming *arguendo* that Defendants met their initial burden on summary judgment – which they did not – the record establishes the existence of genuine issues of fact as to whether Defendants fulfilled their duty under governing Court of Appeals precedent "to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks, " Benitez, 73 N.Y.2d at 658, and their independent

duty under governing regulations "to conduct all [extraclass athletic] activities under adequate safety provisions. 8 NYCRR § 135.4(7)(i)(g)."

As a result, there are necessarily also genuine issues of fact as to whether Grady "assumed the risk" of Defendants' acts and omissions.

1. The Limits of the Assumption of Risk Doctrine

As this Court has noted, [a]pplication of the doctrine [of primary assumption of risk] is generally considered a question of fact for the jury." Pantalone v. Talcott, 52 A.D.3d 1148, 1149 (3d Dep't 2008); see also Dann v. Family Sports Complex, Inc., 123 A.D.3d 1177, 1179 (3d Dep't 2014) (same); Weller, 217 A.D.2d at 284 (same).

As the Court of Appeals has made clear, an "important counterweight to an undue interposition of the assumption of risk doctrine is that participants will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks. Morgan v. State, 90 N.Y.2d 471, 485 (1997) (citations and internal quotation marks omitted). As the Court of Appeals further explained, "in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual

dangers that are inherent in the sport." Id. (internal quotation mark omitted); see also Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 395-96, (2010) (application of assumption of risk doctrine "must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation that the Legislature has deemed applicable to '*any* action to recover damages for personal injury, injury to property, or wrongful death'") (quoting CPLR 1411)(emphasis added by court).

Assumption of risk "is not an absolute defense but a measure of defendant's duty of care." Kane v. N. Colonie Cent. Sch. Dist., 273 A.D.2d 526, 527 (3d Dep't 2000) (citing Benitez, 73 N.Y.2d at 657); see also Turcotte v. Fell, 68 N.Y.2d 432, 438 (1986) ("With the enactment of the comparative negligence statute, however, assumption of risk is no longer an absolute defense. Thus, it has become necessary, and quite proper, when measuring a defendant's duty to a plaintiff to consider the risks assumed by the plaintiff. The shift in analysis is proper because the doctrine of assumption of risk deserves no separate existence (except for *express* assumption of risk) and is simply a confusing way of stating certain no-duty rules.") (citations, brackets, and internal quotation marks omitted).

Here, Defendants have not claimed, nor is there any evidence to establish, "express" assumption of risk, "which was held to preclude any recovery, resulted from agreement in advance that defendant need not use reasonable care for the

benefit of plaintiff and would not be liable for the consequence of conduct that would otherwise be negligent." Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch., 65 N.Y.2d 161, 169 (1985). In determining whether there is an "implied" assumption of risk, "[t]here is no question that the doctrine requires not only knowledge of the injury-causing defect but also appreciation of the resultant risk, but awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff, and in that assessment a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport." Maddox v. City of New York, 66 N.Y.2d 270, 278 (1985) (citations and internal quotation marks omitted).

"We do not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out of school-only that the inference of such an assumption as a ground for exculpation may not be made in their case, or for that matter where adults are concerned, except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled." Trupia, 14 N.Y.3d at 396. Thus, the issue of culpable conduct by the defendants is a significant factor in determining assumption of risk. Here, the actions of the Defendants in choosing the practice activities, directing the student players regarding the practice activities, selecting

and setting up the "protective screen," determining the location of the "protective screen," selecting the practice drill, and advising the student athletes that the "protective screen" would in fact protect them, raise issues of fact regarding the culpable conduct of Defendants such that assumption of risk would not apply.

Application of these principles to the facts of this case should have led the court below to deny Defendants' motion.

2. There Are Genuine Issues of Fact Concerning Whether the Warrior Drill Conducted by Defendants on March 8, 2017 Presented an Unreasonably Increased Risk to Grady

The record clearly demonstrates issues of fact concerning whether the Warrior Drill was conducted under adequate safety provisions and whether it involved concealed or unreasonably increased risks and whether it presented a dangerous condition not inherent in the sport of baseball.

Plaintiff's expert, Salvestrini, stated in his affidavit that the screen was too small and was positioned too close to the "short first baseman" rather than, as it should have been, closer to the regular first baseman. R.351. He also detailed multiple other factors that caused the Warrior Drill as conducted by Defendants on March 8, 2017 to pose an unreasonably increased risk to Grady, including that (1) it was the first outdoor practice of the season; (2) the weather; (3) the combination of varsity and junior varsity players in the same practice; and (4) the fact that the

drill was conducted late in the practice when the players were less focused. R.350-351. When compared to the conclusory statement by Defendants' expert Cassidy that the "screen selected . . . was appropriate for the drill and properly positioned." R.304-05 ¶ 7, Salvestrini's affidavit is more than sufficient to demonstrate the existence of issues of fact.[3]

Court of Appeals precedent, this Court's own precedent, and precedent from other Departments dictates the denial of summary judgment when, as here, the record shows that issues of fact exist concerning whether safety equipment and/or safety precautions were adequate:

> Nor is the affirmative defense of assumption of risk which defendants asserted a viable ground for dismissing the complaint as a matter of law. Plaintiff's submissions included expert affidavits indicating that the contour of the track's retaining wall, as well as the design of its guardrail and the placement of barrels near the guardrail, was unique and created a dangerous condition over and above the usual dangers that are inherent in the sport of auto racing. Although plaintiff's decedent may have been an experienced race car driver who assumed the risks of injury that ordinarily attend auto races, these affidavits were sufficient to create a triable question of fact as to whether defendants' alleged negligence, if any, engendered additional risks that "do not inhere in the sport" and, if so, whether the decedent

[3] The court below' discounted Salvestrini's affidavit because it felt that "Salvestrini – like defendants' expert – does not provide any scientific and/or technical data supporting his opinion." R.10. In reality, as set forth above, Salvestrini provided far more detail then Cassidy and discussed factors other than the size and positioning of the screen that made the Warrior Drill unsafe on March 8, 2020. In any event, if the court below was correct that Cassidy's affidavit was insufficient, then Defendants failed to meet their burden as set forth in Point A., supra, and there was no need for the court below to even examine Salvestrini's affidavit. Conversely, if Cassidy's affidavit were to be deemed sufficient, then Salvestrini's affidavit would likewise be sufficient and therefore would present issues of fact for the jury as to whether the Warrior Drill presented an unreasonably increased risk to Grady.

> should be deemed to have assumed those risks by voluntarily participating in the race.

Owen v. R.J.S. Safety Equip., Inc., 79 N.Y.2d 967, 970 (1992); see also Kane v. N. Colonie Cent. Sch. Dist., 273 A.D.2d 526, 527 (3d Dep't 2000) (reversing grant of summary judgment based on assumption of risk when track coach was aware of increased risk to runners who got too close to each other during indoor practice and there were issues of fact whether coach took adequate precautions to ameliorate that risk); Stackwick v. Young Men's Christian Ass'n of Greater Rochester, 242 A.D.2d 878, 879 (4th Dep't 1997) (reversing summary judgment due to "issue of fact whether defendant's failure to pad the wall behind the basket created a risk beyond those inherent in the sport of basketball"); Laboy v. Wallkill Cent. Sch. Dist., 201 A.D.2d 780, 781 (3d Dep't 1994) (issues of fact precluded summary judgment on issue of whether pole vaulter assumed risk of landing on protective mats that separated at the seam); Parisi v. Harpursville Cent. Sch. Dist., 160 A.D.2d 1079, 1080 (3d Dep't 1990) (in case involving player hit in the face by a softball, summary judgment was inappropriate when there were issues of fact whether coaches violated sound coaching practice by failing to instruct players to wear face masks that were available for their use); Weinberger v. Solomon Schechter School of Westchester, 102 A.D.3d 675, 679 (2d Dep't 2013) (where "faulty equipment provided by the School and the decreased distance between [plaintiff] and the batter, from which she was pitching at the direction of [the

coach] without the benefit of the L-screen, did not represent risks that were inherent in the sport of softball and instead, enhanced the risk of being struck by a line drive," issue of assumption of risk was for the jury); Huneau v. Maple Ski Ridge, Inc., 17 A.D.3d 848, 849 (3d Dep't 2005) (affirming denial of defendant's summary judgment motion where defendant's manager acknowledged at her deposition that the duties of the attendant stationed at the top of the run included maintaining a sufficient distance between tubers to afford adequate time to clear the bottom of the run before the next tuber); Cruz v. City of New York, 288 A.D.2d 250 (2d Dep't 2001) (affirming grant of summary judgment against board of education in favor of plaintiff high school football player who had been practicing under the supervision of the coaches and ran into a push sled placed near the sidelines).

3. The Factors Relied on by the Lower Court Are Insufficient to Warrant Granting Defendants' Motion

The court below determined that Defendants were entitled to summary judgment despite not establishing that the screen was properly sized or positioned because Grady signed a "Duty to Warn" form and because he stated that he thought that the Warrior Drill was potentially dangerous. The court below was in error on both counts.

Contrary to the lower court's holding, the "Duty to Warn" form that Grady signed does not demonstrate as a matter of law that he assumed the risk of participating in the Warrior Drill without adequate safety measures. To the contrary, the form, which notes that "participation in interscholastic athletics involves certain inherent risks," simply begs the question of whether the risks Grady faced during the Warrior Drill were inherent in baseball or whether they unreasonably increased the danger. Grady specifically testified that he did not believe that having multiple balls in play was an inherent risk of baseball. And even known dangers cannot support an assumption of risk defense if they are exacerbated by inadequate safety equipment. See Fithian v. Sag Harbor Union Free Sch. Dist., 54 A.D.3d 719, 720 (2d Dep't 2008) (although getting hit in the head by a ball during a baseball game was a risk inherent in the sport, issues of fact precluded summary judgment on issue of whether player assumed the risk of playing with a cracked batting helmet provided by defendants).[4]

More fundamentally, as a matter of law Grady cannot be deemed to have assumed the risk of a drill that involves unreasonably increased risks or risks not

[4] In the court below, Defendants' asserted that Grady's position "would place school districts in a better position by refraining from utilizing safety measures whenever a risk was obvious or known." R.430. This of course makes no sense – Defendants had a duty to protect Grady from unreasonably increased risks and to conduct the Warrior Drill under adequate safety provisions. They breached their duty by having an inadequate "protective" screen and would also have breached it had they had no screen at all.

inherent in the sport, Morgan, 90 N.Y.2d at 485, which is the key factual issue that should have led the court below to deny defendants' motion.

The well-established principle that, as a matter of law, a student athlete cannot assume unreasonably increased risks also demonstrates that the court below wrongly relied upon Grady having misgivings about the safety of the drill but not declining to participate. As this Court has recognized, voluntarily participating in an activity is not the equivalent of assuming the risk of any condition, no matter how unreasonably dangerous, even if the plaintiff is aware of it. See Simmons v. Saugerties Cent. Sch. Dist., 82 A.D.3d 1407, 1409 (3d Dep't 2011) ("Defendant misapprehends the scope of the primary assumption of risk doctrine in arguing that a voluntary participant in a sport or recreational activity consents to *all* defects in a playing field so long as the defects are either known to the plaintiff or open and obvious. The doctrine, as defined by the Court of Appeals, does not extend so far. Rather, while 'knowledge plays a role' in 'determining the extent of the threshold duty of care,' it is 'inherency [that] is the sine qua non.'") (quoting Morgan, 90 N.Y.2d at 484)).

Thus, in Baker v. Briarcliff Sch. Dist., 205 A.D.2d 652 (2d Dep't 1994), the court affirmed the denial of summary judgment even though the plaintiff field hockey player testified that she failed to wear mouthpiece despite having it with her and knowing of the requirement to wear it. Id. at 653. The court held that "the

defendants were required to exercise reasonable care to protect Ms. Baker from any unreasonably increased risks during the practice session" and that it could not "conclude, as a matter of law, that her failure to wear a mouthpiece constituted an absolute bar to any recovery, rather than a factor to be considered in diminution of damages":

> There exists, on this record, questions of fact regarding whether the coach adequately warned the players about the risks involved in not wearing a mouthpiece, and whether reasonable care was exercised in the supervision of the practice, and whether the coach's conduct constituted a breach of sound coaching practices, thereby exposing Ms. Baker to unreasonably increased risks of injury.

Id. at 655; see also see Weller, 217 A.D.2d at 284 ("Although plaintiff's conduct of riding between the trees after dark may have been ill-advised, based on his prior experience with the alleged desired pathway, we conclude that plaintiff did not assume the risk of hitting a tree root. Rather than constituting primary assumption of risk, plaintiff's voluntary decision to ride between the trees is simply a factor relevant in the assessment of culpable conduct.").

Here, Grady testified that he trusted his coaches to provide adequate safety protections for him. And the coaches, who recognized the increased risk to the first baseman in the Warrior Drill, told the team that the screen used during the drill would protect them. There is no evidence in the record that Grady had any reason to disbelieve his coaches or to understand that the screen was inadequate. Rather, the screen in use on March 8, 2017 was "not as safe as it appeared to be."

McGrath v. Shenendehowa Cent. Sch. Dist., 76 A.D.3d 755, 758 (3d Dep't 2010) (reversing grant of summary judgment based on assumption of risk).[5]

Moreover, even if an athlete has assumed the inherent risks of a sport, assumption of risk does not warrant dismissal on summary judgment when, as here, there is evidence that the coaches instructed or permitted the players to take additional risks. See Gilbert v. Lyndonville Cent. Sch. Dist., 286 A.D.2d 896, 896 (4th Dep't 2001) ("Although Lyndonville established as a matter of law that plaintiff assumed the risks inherent in the game of volleyball by participating on Lyndonville's varsity volleyball team, we conclude that plaintiff raised an issue of fact whether Lyndonville exposed her to "unassumed, concealed or unreasonably increased risks" by directing or allowing her to warm up in a hazardous location."); Royal v. City of Syracuse, 309 A.D.2d 1284, 1285 (2d Dep't 2003) ("According to the affidavit of plaintiffs' expert, performance of the stunt without a spotter was improper and should not have been permitted by the coach. Thus, although the

[5] The record also shows, as the court below recognized, that Grady had no choice but to participate in the Warrior Drill if he wanted to remain on the team, which raises yet another issue of fact precluding summary judgment. See Smith v. J.H. W. Elementary Sch., 52 A.D.3d 684, 685 (2d Dep't 2008) "[T]he plaintiff raised a triable issue of fact as to the application of the "inherent compulsion" doctrine, which provides that the defense of assumption of the risk is not a shield from liability, even where the injured party acted despite obvious and evident risks, when the element of voluntariness is overcome by the compulsion of a superior.") (internal quotation marks omitted); DeGala v. Xavier High Sch., 203 A.D.2d 187, 187 (1st Dep't 1994) ("[A] question of "inherent compulsion" is raised in that plaintiff conceded that at times he felt that he had no choice but to wrestle with the heavier teammate since he was the co-captain of the team, even though plaintiff was afraid of sustaining at least minor injuries.").

infant plaintiff voluntarily assumed the risks inherent in cheerleading, plaintiffs raised a triable issue of fact whether the coach "failed to provide proper supervision of the cheerleading activities, thereby exposing [the infant] plaintiff to unreasonably increased risks of injury."); DeGala v. Xavier High Sch., 203 A.D.2d 187 (1st Dep't 1994) (affirming denial of summary judgment based on assumption of risk due to issues of fact over whether "the team coach's failure to inform plaintiff of the rule [against weight class mismatches] or to prohibit such mismatched drilling" negligently exposed plaintiff to unreasonably exposed risks); cf. Weinberger v. Solomon Schechter Sch. of Westchester, 102 A.D.3d 675, 678-79 (2d Dep't 2013) (trial court properly submitted assumption of risk issue to jury when there was evidence that coach instructed plaintiff to pitch even though required L-screen was defective and had fallen down); Zmitrowitz v. Roman Catholic Diocese of Syracuse, 274 A.D.2d 613, 615 (3d Dep't 2000) (defendants' motion for directed verdict based on assumption of risk properly denied when "plaintiffs offered evidence that defendants' failure to provide and require a ninth grader to wear a catcher's mask during a tryout session, which was inconsistent with standard athletic custom in schools throughout the State, constituted a breach

of sound coaching practice which enhanced the risk of injury normally associated with the activity").[6]

This case is unlike Legac v. S. Glens Falls Cent. Sch. Dist., 150 A.D.3d 1582 (3d Dep't 2017), relied on by the court below, in which this Court held that a baseball player assumed the risk of being hit by a ground ball during an indoor ground ball fielding drill. In Legac, the evidence showed that the plaintiff was specifically aware of the potential dangers of the allegedly defective condition, i.e., the dangers of fielding balls off of a hardwood gymnasium floor rather than a baseball field and absence of protective equipment. Id. at 1584-85. Here, there is no evidence that Grady knowingly assumed the risk of an inadequate protective screen. Moreover, in Legac, the plaintiff "acknowledged that he knew how to field

[6] With regard to Grady's negligent supervision claim, Defendants' contention in the lower court that "no amount of supervision" would have prevented the incident, since the throw occurred so suddenly that there was no time to warn plaintiff, R.334, misses the point. Defendants' failure did not consist of not alerting Grady to an oncoming ball at the instant it was thrown. Rather, Defendants were required to supervise students so as to ensure that baseball practice was not unreasonably unsafe. Defendants had complete control of (a) whether or not the students would practice inside or outside; (b) whether or not junior varsity players would be practicing with varsity players; (c) assessing whether the players were physically prepared to engage in the drill in question; (d) determining where the screen was positioned; and (e) assessing whether the screen provided adequate and proper protection to the players at regular first base. They failed to do so, thereby failing to supervise Grady. See Royal, 309 A.D.2d at 1285 (issues of fact precluded summary judgment as to whether coach failed to properly supervise cheerleaders by allowing them to perform a stunt without proper safety procedures); Muller v. Spencerport Cent. Sch. Dist., 55 A.D.3d 1388, 1388-89 (4th Dep't 2008) (although "being struck by a discus is a perfectly obvious inherent risk in the sport, plaintiffs raised a triable issue of fact whether defendant's coaching staff failed to provide proper supervision of the discus throwing activities, thereby exposing plaintiffs' daughter to unreasonably increased risks of injury") (citations, brackets, and internal quotation marks omitted).

a ground ball." Id. at 1586, was fielding the ball hit specifically to him, id. at 1583, while Grady was hit by a ball that was intended for someone else while Grady was focused on a different ball being thrown to him, and was essentially defenseless but for the inadequate protective screen.

The court below also wrongly relied on Trupia. See R.12. In Trupia, the Court of Appeals held that the doctrine of assumption of risk did not apply to claims asserted by a plaintiff injured while sliding down a bannister in a school building. Trupia, 14 N.Y.3d at 394-96. Importantly, as set forth above, the Court of Appeals stated in Trupia that the doctrine of assumption of risk "must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation that the Legislature has deemed applicable to '*any* action to recover damages for personal injury, injury to property, or wrongful death'"). Id. at 395-96, (quoting CPLR 1411) (emphasis added by court).

The lower court appeared to recognize this principle when it stated in the Decision that "[i]n this court's view, under these circumstances equity should dictate a balancing of the parties' respective degree of fault." R.12. The court below erred, however, when it held that governing caselaw constrained it to grant Defendants' motion. Id. Rather, as set forth herein, Trupia as well as other

decisions from the Court of Appeals and this Court mandate denial of Defendants' motion and allowing the jury to determine the parties' degrees of fault. [7]

4. The Lower Court Erroneously Declined to Consider the Regulations Imposing a Non-Delegable Duty on Defendants to Conduct Athletic Activities Safely

The court below also wrongly rejected the duty imposed on the Board by the Commissioner of Education's regulations.

As set forth above, the regulations specifically provide that "[t]t shall be the duty of trustees and boards of education . . . to conduct all [extraclass athletic]

[7] The other cases on which the court below relied also do not support granting Defendants' motion for summary judgment. To the contrary, in Morgan v. State, 90 N.Y.2d 471, 488 (1997), the Court of Appeals held that "a torn or allegedly damaged or dangerous net – or other safety feature – is by its nature not automatically an inherent risk of a sport as a matter of law for summary judgment purposes," and that the plaintiff thus "should not be deemed legally to have assumed the risk of injuries caused by his tripping over it." Id. at 488. The decision in Turcotte, unlike this case, considered "the scope of the duty of care owed to a professional athlete injured during a sporting event." Turcotte, 68 N.Y.2d at 435. In Turcotte, the court explained that "[t]he question of whether the consent was an informed one includes consideration of the participant's knowledge and experience in the activity generally. Manifestly a professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for a salary, than is an amateur." Id. at 440. Moreover, in Turcotte, the plaintiff jockey was injured during a race and, unlike here, the plaintiff "recognized" that the conditions he had faced during the race were "inherent in the sport." Id. at 441. The decision in Barretto v. City of New York, 229 A.D.2d 214 (1st Dep't 1997) is inapposite because in that case the injury did not occur during a normal game or practice; rather, the plaintiff was injured when "during an equipment set-up prior to the start of practice, he attempted a gymnastic dive over a half-raised volleyball net onto a mat, landing, not on his hands, as he intended, but on his head Id. at 215." In Bukowski v. Clarkson Univ., 19 N.Y.3d 353 (2012), the plaintiff was simply hit by a line drive, a well-known and accepted risk of baseball. Id. at 355-56. And while Benitez sets forth the applicable standard of care, its holding on the specific facts of that case is inapplicable here because the Benitez court found that the plaintiff football player assumed the risk of playing in a mismatched game in a fatigued condition – and had not told the coach of his fatigue. See Benitez, 73 N.Y.2d at 657-59.

activities under adequate safety provisions." 8 NYCRR § 135.4(7)(i)(g) (emphasis added). The regulations also provide as follows with regard to athletic trainers:

> 7) Basic code for extra class athletic activities. Athletic participation in all schools shall be planned so as to conform to the following:
>
> (i) General provisions. It shall be the duty of trustees and boards of education:
>
> . . .
>
> (a) to conduct school extra class athletic activities in accordance with this Part and such additional rules consistent with this basic code as may be adopted by such boards relating to items not covered specifically in tis code...
>
> . . .
>
> (d) to determine the need for an athletic trainer and to permit individuals to serve as athletic trainers for interschool athletic teams, intramural teams or physical education classes only in accordance with the following:
>
> . . .
>
> (2) Scope of duties and responsibilities. The practice of the profession of athletic training shall be as defined in Education Law, section 8352. Consistent with Education Law, section 8352, the services provided by an athletic trainer shall include, but not be limited to, the following:
>
> (i) prevention of athletic injuries, including assessment of an athlete's physical readiness to participate;
>
> . . .
>
> (v) education and counseling of coaches, parents, student athletic trainers and athletes;
>
> (vi) risk management and injury prevention, including:
>
> . . .
>
> (B) assisting in the proper selection and fitting of protective equipment, including the application of wraps, braces, tape and pads;
>
> (C) assisting in the inspection of fields and playing surfaces for safety;
>
> . . .

8 NYCRR § 135.4(7)(i)(a) and (d)(2)

The lower court's statement that "this provision is applicable to athletic trainers and does not pertain to the coaches herein," R.11, misses the point. First, of course, the regulation imposes an independent and non-delegable duty on the Board to conduct athletic activities under adequate safety provisions. 8 NYCRR § 135.4(7)(i)(g). Second, with regard to athletic trainers, the regulation imposes a duty on the Board to hire athletic trainers "only in accordance with the following," which includes the trainer's duty to engage in risk management, injury prevention, assisting with the selection and fitting of protective equipment, and inspection of fields and playing surfaces for safety. Here, Lipyanek testified that she did none of these things with regard to the Warrior Drill. Nor was she asked to. There is thus an issue of fact as to whether the Board fulfilled its duty with regard to the hiring and supervision of athletic trainers.

The court below also erred in rejecting the application of this regulation, finding that it "is general in nature and does not set forth any specific requirement or standard of conduct sufficient to create a duty." R.11. To the contrary, the regulation specifically and expressly creates a duty, using the word "duty." See 8 NYCRR § 135.4(7)(i)(g). The regulation also requires athletic trainers to assist "in the proper selection and fitting of protective equipment," such as the protective screen in question, and to inspect fields for safety.

Moreover, there is no basis for the lower court's statement that this regulation is "analogous to the Labor Law § 241(6) cases in which liability is contingent upon proof of a violation of a specific requirement or standard of conduct compared to a broad, general standard that a work area provide reasonable and adequate protection and safety." R.11. Labor Law § 241(6) – unlike the regulation at issue here mandating adequate safety protection – specifically provides for the creation of implementing regulations expressly setting forth what specifically constitutes a violation. See id. ("The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith." The lower court's reliance on Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343 (1998), in which the court noted that "we refined the standard of liability under section 241(6) by requiring that the rule or regulation alleged to have been breached be a specific, positive command rather than a reiteration of common-law standards which would merely incorporate into the State Industrial Code a general duty of care," id. at 349 (citation and internal quotation marks omitted), is therefore unavailing. Here, it is undisputed that the Defendants are under a duty of care pursuant to regulation as well as under the common law.

Finally, 8 NYCRR § 135.4(7)(i)(a), provides that "It shall be the duty of trustees and boards of education: (a) to conduct school extra class athletic activities in accordance with this Part and such additional rules consistent with this basic code as may be adopted by such boards relating to items not specifically covered in this code." (Emphasis added.) The conjunctive "and" is a clear indication of the intent to impose a duty on boards of education to comply with the stated rules set forth in the regulation (i.e., to conduct athletic activities "under adequate safety provisions") and any additional rules that might be enacted. See Campbell v. City of New York, 4 N.Y.3d 200, 207 (2005) ("A reading of General Municipal Law § 50–i, which is written in the conjunctive, that seeks to sever the one-year-and 90–day time period from the other two express statutory requirements, fails to give effect to the entire statute, in direct contravention to one of the most basic rules of statutory construction."); D'Angelo v. Cole, 67 N.Y.2d 65, 69,(1986) ("Village Law § 4–414, authorizes villages to recover such costs in a manner 'assessed, levied and collected as may be provided by local law.' There is no indication that the Legislature intended the terms to be utilized in the alternative rather than the conjunctive."). The use of the conjunctive in this regulation is in direct contrast to Labor Law § 241(6) which states that "[t]he commissioner may make rules to carry into effect the provisions of this subsection. . . ."

The decision of the lower court, finding assumption of risk based on the "no duty" rule, effectively vitiates the express duty imposed on the defendants by the Regulations of the Commissioner. The practical effect of such a ruling is to immunize school boards, coaches, athletic directors, and athletic trainers from any responsibility for the safety of student athletes in this state, even while they publicly proclaim and testify under oath that they have a duty to protect these student athletes. See Huneau, 17 A.D.3d at 849.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Supreme Court, Broome County (Hon. Ferris D. Lebous) entered October 31, 2019 should be reversed and Defendants' motion for summary judgment should be denied in its entirety.

Dated: New York, New York
July 29, 2020

Respectfully submitted,

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