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,

REPLY BRIEF FOR PLAINTIFF-APPELLANT

KAHN GORDON TIMKO & RODRIQUES, P.C.
Attorneys for Plaintiff-Appellant
20 Vesey Street, Suite 300
New York, New York 10007
(212) 233-2040
nitimko@kgtrpc.com

Of Counsel:
Nicholas I. Timko
Andrew C. Levitt
Robert A. O'Hare Jr.

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Plaintiff-Appellant Kevin Grady respectfully submits this brief in reply to the Brief of Defendants-Appellees, and in further support of his appeal of the Decision and Order of the Supreme Court, Broome County entered October 31, 2019.[1]

PRELIMINARY STATEMENT

Defendants-Appellees' brief on this appeal relies entirely on Defendants' interpretation of the testimony and demonstrates that there are factual issues which require the denial of the Defendants' motion for summary judgment. Defendants breached their duty to protect Grady from what they admit was an inherently dangerous joint infield drill involving multiple balls being thrown towards the same area of the field by different players and from different locations on the field at the same time. Defendants' mischaracterization of Grady's testimony, complete disregard of the testimony of Defendant's employees, and misapprehension of governing law confirms that the lower court erred in granting Defendants' motion for summary judgment.

Indeed, Defendants' entire argument that they met their prima facie burden on summary judgment rests on their assertion that Grady testified that he saw errant balls bypass the "protective" screen, and thereby assumed the risk that the

[1] Capitalized terms used but not defined herein have the meanings set forth in the Brief for Plaintiff-Appellant ("Grady Br.").

screen would not protect him. But Grady never said that. Defendants did not and cannot point to such testimony, because it does not exist. Instead, they simply repeat their interpretation of the testimony, referencing only general pages of the record, in an effort to convince the Court that their interpretation is an undisputed fact.

As Defendants well know, while Grady testified that there were other errant throws at the practice in question, one of which struck another player, he never testified that they "bypassed" the screen – and Defendants never asked Grady if he saw balls "bypass" the screen. Indeed, Grady provided no detail at all about other errant throws, did not describe exactly how they occurred, did not notice who threw them or from where, and did not describe how the other player came to be struck by the errant ball. In fact, Grady did not mention the "protective" screen at all during his discussion of the errant balls. Defendants did not and cannot meet their prima facie burden on summary judgment based on phantom testimony that Grady never actually gave, and their motion should be denied on that basis alone.

Defendants also cannot meet their burden of showing that the assumption of risk doctrine absolves them of any duty when they expressly acknowledged that they had a duty to protect Grady from what they recognized as the inherent and foreseeable risks of the "Warrior Drill" and specifically undertook to protect Grady from those risks.

Defendants have also failed to demonstrate the absence 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. Defendants' own testimony confirms that good and accepted safety practices require the use of an adequate protective screen, and Defendants concede that they did nothing to confirm that the screen they used to ostensibly protect Grady was adequate. Their expert's one-sentence statement about the screen is insufficient in and of itself to demonstrate that the screen was adequate and is insufficient to counter the detailed affidavit of plaintiff's expert. The uncontroverted facts, and common sense, demonstrate that an adequate and properly placed screen would have prevented Grady from being struck. It did not. Ergo, the screen was not adequate. And, Defendants' attempt in their brief to show that Plaintiff's expert's conclusions are factually wrong merely highlights the existence of issues of fact.

As discussed below and in Grady's opening brief, Defendants have not established as a matter of law that the Warrior Drill they conducted on the day of Grady's injury did not present unreasonably increased risks to Grady. Accordingly, the lower court's Decision and Order should be reversed and Defendants' motion for summary judgment should be denied.

ARGUMENT

DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED

A. DEFENDANTS' SOLE ARGUMENT THAT THEY MET THEIR PRIMA FACIE BURDEN ON SUMMARY JUDGMENT IS BASED ON A MISCHARACTERIZATION OF GRADY'S 50-h TESTIMONY

Defendants do not deny that they bear the burden on summary judgment of making "a prima facie showing of entitlement to judgment as a matter of law," that "the evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference," and that "[f]ailure 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). Nor do Defendants deny that they "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).

Defendants have not met their burden here, and the Decision and Order should be reversed on that basis alone.

1. Defendants' Entire Argument That They Met Their *Prima Facie* Burden is Based on a Mischaracterization of Grady's Testimony

In their brief ("Def. Br."), Defendants assert that they met their prima facie burden on summary judgment because Grady "saw other errant throws pass over or alongside the protective screen, including at least one that struck a fellow player," yet continued to participate in the practice. Def. Br. at 8. Indeed, the idea that Grady testified that he saw other balls "bypass" the protective screen is a mantra that Defendants repeat throughout their brief. See id. at 1, 2, 6, 16, 31, 41, 42, 44, 46, 54. It is even a point heading in their brief. See id. at 14.

The problem for Defendants, however, is that Grady never said that. In the testimony from Grady's 50-h hearing that Defendants rely on, Grady did testify that he observed some errant balls thrown during practice, but did not describe exactly how they were thrown, did not notice who threw them or from where, did not describe how a player came to be struck by an errant ball, and did not say that he saw any errant balls bypass the screen. Indeed, he did not mention the screen at all during his discussion of the errant balls:

> Q. Now, as you were progressing in the drill on Wednesday, March 8, 2017, when you're in that drill, was the drill progressing the way that it was supposed to be; in other words, the way the coach had instructed?
>
> A. I would say that there were definitely some irregularities that day.
>
> Q. Explain your answer to me, please.

A. There were many errant balls which was unusual compared to the times we've done it before.

Q. Did you have occasion to observe who was responsible for those errant balls?

A. I couldn't say exact names but there were -- it was a JV tryout and there were some new players and inexperienced players on the field.

Q. How many times did you observe errant balls thrown?

A. From what I remember, there were at least a couple.

Q. When you say you observed that there were at least a couple errant balls that were thrown, describe for me what you observed. Were they wild throws, were they simply thrown to the wrong location, what were they?

A. From what I remember, there was both of those instances. I also remember one of them hit another player lightly but not as severe as mine, but still struck him.

. . .

Q. Describe for me how that came about with Jackson Retzlaff being struck by an errant ball, what happened then?

A. From what I remember, he was hit in the leg from I don't remember the exact situation, but I would say that it was an errant throw from not where he was looking, where he was supposed to be looking.

Q. Did you take note of who threw the ball?

A. No, I did not.

R.107-08.

Notably, Defendants did not even ask Grady if the errant balls "bypassed" or went around or over the screen. See id. And they never asked Grady about it at

his deposition. See R.117-142. Yet, Defendants base their entire argument on testimony that they never elicited, but obviously wish they had.

Grady's testimony about other errant balls is the sole basis for Defendants' assertion that they met their burden on summary judgment. See Def. Br. at 23 ("[B]ased on Grady's admissions at deposition alone, he was experienced and knowledgeable, at the time of his injury he was fully aware of the risk of an errant thrown ball passing the screen and striking him, and he had assumed the inherent risk of being struck by a baseball during practice."); id. at 26-27 ("it is clear that the School District was entitled to rely on Grady's admissions that he was aware of the precise risk that led to his injury to raise a *prima facie* showing of assumption of risk"). Defendants, however, cannot meet their burden through testimony that Grady never gave, no matter how many times Defendants repeat their mischaracterization of the testimony.

Viewing the evidence "in the light most favorable to [Grady]" and affording [Grady] every favorable inference," Framan Mech., Inc., 182 A.D.3d at 948, Defendants simply have not established as a matter of law that Grady recognized that the "protective" screen was inadequate or that he assumed the risk of participating in the Warrior Drill with an inadequate protective screen (assuming *arguendo* that such a risk could even be assumed, which it cannot as set forth below).

2. Because Defendants Admit That They Had A Duty to Provide an Adequate Protective Screen and Undertook to Do So, They Cannot Claim That the Assumption of Risk Doctrine Absolves Them of That Duty

As set forth in Grady's opening brief, Defendants specifically recognized the increased danger to players at actual first base – like Grady – when the Warrior Drill with a "short first baseman" was conducted, acknowledged that they had a duty to protect the participants like Grady by using a protective screen, and undertook to fulfill that duty:

> 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 (emphasis added).

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.

R.200 (emphasis added).

Having undertaken the duty to use an adequate protective screen during the Warrior Drill, Defendants were obligated to do so properly. See Glanzer v. Shepard, 233 N.Y. 236, 239 (1922) (Cardozo, J.) ("It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."); Hilts v. Bd. of Educ. of Gloversville Enlarged Sch. Dist., 50 A.D.3d 1419, 1420 (3d Dep't 2008) ("[I]t is well settled that once a person voluntarily undertakes acts for which he or she has no legal obligation, that person must act with reasonable care or be subject to liability for negligent performance of the assumed acts."); Raney v. Seldon Stokoe & Sons,

Inc., 42 A.D.3d 617, 619 (3d Dep't 2007) ("one who assumes to act, even though not obligated to do so, may thereby become subject to the duty to act carefully.").

Defendants' contention that "[t]o make a prima facie showing of assumption of risk, a school district need not present evidence ruling out every possible argument that there was an 'unreasonably increased' risk due to the size, placement, color, fabric, tensile strength, weight, history of use, or brand labeling of every piece of protective equipment used or not used at the time of an injury," Def. Br. at 22, is a red herring. "Every possible argument" and "every piece of protective equipment" are not at issue here. Rather, Defendants expressly recognized the specific danger at issues in this case requiring the use of a proper protective screen, undertook to protect Grady from that recognized danger, and failed to provide that protection.

Defendants cannot affirmatively acknowledge and assume a duty of care and then claim that Grady assumed the risk of them not fulfilling that duty.

Accordingly, Defendants have not met their prima facie burden of demonstrating as a matter of law that the doctrine of primary assumption of risk bars Grady's claims.

B. DEFENDANTS' BRIEF ONLY SERVES TO HIGHLIGHT THE ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT

1. Grady's Participation in Practice Does Not Mean That He Assumed the Risk of the Dangerous Conditions Created by Defendants

It is well established that, as a matter of law "participants [in sports] 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 omitted). It is equally well-established that "a participant does not assume risks resulting from a dangerous condition over and above the usual dangers inherent in the activity." Layden v. Plante, 101 A.D.3d 1540, 1541 (3d Dep't 2012); see also Myers v. Friends of Shenendehowa Crew, Inc., 31 A.D.3d 853, 854 (3d Dep't 2006) (same).

Defendants do not contest these fundamental principles. In their brief, however, they fail to address this Court's holding that 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)).

Defendants do not address Simmons in their brief. Nor do they address the other cases cited by Grady recognizing that voluntary participation in an activity, in and of itself, does not end the inquiry. See Baker v. Briarcliff Sch. Dist., 205 A.D.2d 652, 653, 655 (2d Dep't 1994) (affirming the denial of summary judgment even though the plaintiff field hockey player testified that she failed to wear a mouthpiece despite having it with her and knowing of the requirement to wear it, because there were "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"); 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.").

Thus, Defendants' focus on Grady's voluntary participation despite what they claim (erroneously) was his recognition of the risks of the inadequate "protective" screen is irrelevant. Indeed, in all of the cases in which courts find that assumption of risk does not apply, the plaintiff has been a voluntary participant in the activity, and the issue is whether the Defendants' conduct unreasonably increased the risk of the activity or presented dangers not inherent in the sport. On this motion, Defendants simply have not established as a matter of law that the Warrior Drill as conducted on March 8, 2017 did not pose an unreasonably increased risk to Grady, did not present dangers not inherent in the sport, and was conducted "under adequate safety provisions. 8 NYCRR § 135.4(7)(i)(g)."

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

As set forth above, Defendants recognized the increased risk that the Warrior Drill posed to players like Grady and admitted that they had a duty to protect them. However, neither Allen, Ferraro, nor any other employee of the 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, Allen admits that the sole criteria he

used in selecting the screen was its availability, not whether it would actually provide the degree of protection he admits was necessary to protect players like Grady:

> 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.

R.161; see also R.203. Thus, Defendants' contention that "the coaches relied on their extensive experience to choose and place the protective screen to provide an appropriate level of protection to the players, including Grady," Def. Br. at 6, is not accurate – "choosing" the only screen available is not the same as actually selecting a proper screen.[2] Further, the Defendants did not take any action to test the placement of the screen to confirm that it would, in fact, protect the first baseman.

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

[2] Defendants apparent position that they cannot be liable for Grady's injuries because "the screen stopped some, and probably most, of the thrown balls," Def. Br. at 31, is ludicrous. First, contrary to Defendants' misrepresentation, Grady never testified that "only some of the balls thrown bypassed the protective screen." See id. As set forth above, his testimony about errant throws did not refer to the screen at all. And, of course, most of the throws at practice were presumably not errant and did not trigger the need for the screens. The screen was not intended to stop all throws; rather, it was intended to prevent injuries due to errant throws when the first baseman was necessarily focused on another ball, and failed horribly in Grady's case. More fundamentally, it is not necessary for Grady to establish that the screen utterly failed to protect every single player who participated in the Warrior Drill. The fact that other first basemen got lucky is not a basis to absolve Defendants of liability for their own negligence.

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.

Defendant's expert, Cassidy, by contrast offered only a 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 statement is insufficient to demonstrate that the screen was, in fact, sufficient. See R.8. The opinion is also belied by the uncontroverted fact that the screen failed to prevent the ball in question from striking Grady. Since an expert's opinion must be based on facts in the record, and since the facts in the record directly contradict the defense expert's opinion, that opinion is conclusory and should be disregarded.

"Where opinion testimony is contradicted by the facts, the facts must prevail." Matter of Will of Slade, 106 A.D.2d 914, 915 (4th Dep't 1984) (citing Matter of Horton, 272 A.D. 646, 651 (3d Dep't. 1947), aff'd, 297 N.Y. 891 (1948)); see also Grant-White v. Hornbarger, 12 A.D.3d 1066 (4th Dep't 2004). Here, Defendants' expert failed to offer any explanation about how an "allegedly

adequate and properly placed safety screen" failed to prevent Grady from being struck in the face with the ball, the very purpose of the safety screen. Because Defendants' expert's opinion is contradicted by the undisputed facts, it should be disregarded.

The differing expert opinions alone are sufficient to create issues of fact. Moreover, Defendants' extensive attempts to show that Salvestrini's conclusions are factually incorrect, see Def. Br. at 30, 38-40, only serve to demonstrate the existence of issues of fact precluding summary judgment.

Furthermore, Defendants are simply wrong in claiming that Salvestrini did not demonstrate that Defendants' conduct violated the applicable standard of care.

Salvestrini is the Director of Athletics for the Danbury, Connecticut Public Schools. He holds 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. R.348.

Salvestrini specifically stated that "[b]ased on my education and work experience, I am familiar with the good and accepted physical education and safety

standards and practices regarding high school sports, including baseball," id., and provided a detailed explanation of how Defendants' conduct violated those good and accepted standards and practices. See R.350-51. This is far more than the "conclusory statement" that Defendants attempt to portray it as.

To the extent Defendants claim that Salvestrini was required to cite to a specific rule or regulation, they are incorrect. They cite no case law in support of this assertion, nor can they, because the very nature of common law negligence is that it is not statutory. For example, in Royal v. City of Syracuse, 309 A.D.2d 1284, 1285 (4th Dep't 2003), the court credited the plaintiff's expert's affidavit stating that "performance of the stunt without a spotter was improper and should not have been permitted by the coach," but the court did not refer to any specific rule or guideline that the defendant had violated.

Indeed, Defendants themselves admit that they "relied on the extensive experience" of their expert witness. Def. Mem. at 27 n.7. What's good for the goose is good for the gander.

In any event, here, unlike in the cases on which Defendants rely, there is no dispute about the applicable standard, because Defendants have admitted that good and established safety practices require the need for an appropriate protective screen. They simply have not established as a matter of law that they provided one.

Moreover, as set forth in Grady's opening brief, 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 Grady Br. at 33-34.[3] Here, despite not actually knowing whether the screen was adequate, Allen nonetheless advised the players that they would be protected by it:

> 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.

Defendants deny that Allen advised the players that the screen would protect them and offer their own interpretation of his testimony, Def. Br. at 43, but that is an issue of fact that cannot be resolved on summary judgment, where "the evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference." Framan Mech., Inc., 182 A.D.3d at 948 (3d Dep't 2020). Allen was asked if he told the players

[3] Citing Gilbert v. Lyndonville Cent. Sch. Dist., 286 A.D.2d 896 (4th Dep't 2001); Royal v. City of Syracuse, 309 A.D.2d 1284 (2d Dep't 2003); DeGala v. Xavier High Sch., 203 A.D.2d 187 (1st Dep't 1994); Weinberger v. Solomon Schechter Sch. of Westchester, 102 A.D.3d 675 (2d Dep't 2013); Zmitrowitz v. Roman Catholic Diocese of Syracuse, 274 A.D.2d 613 (3d Dep't 2000).

that "they wouldn't have to worry about it, that screen is there to protect you" and he responded with "yeah." That is more than sufficient to create an issue of fact.

Grady testified that he trusted his coaches to provide adequate safety protections for him. R.138. There is no evidence in the record that Grady had any reason to disbelieve his coaches or to understand that the screen was inadequate (as demonstrated by Defendants' need to mischaracterize Grady's testimony to "prove" their point, as discussed above). And, contrary to Defendants' contention, the mere fact that Grady was familiar with the Warrior Drill is not sufficient to demonstrate that he was aware of the risks of an inadequate "protective" screen:

> [P]laintiff alleges that the design and construction of the retaining wall failed to direct decedent's car back onto the track and caused the car to become airborne, thereby increasing the risk of serious injury or death. Although decedent's experience at the race track may have provided him with knowledge of the placement and condition of the retaining wall, the evidence presented by the parties is insufficient to determine whether, as a matter of law, decedent was aware of and appreciated the enhanced risk.

Owen v. R.J.S. Safety Equip., Inc., 169 A.D.2d 150, 156 (3d Dep't 1991), aff'd, 79 N.Y.2d 967 (1992).[4]

[4] Defendants' continued reliance on the "Duty to Warn" form that Grady signed is unavailing. As noted in Grady's opening brief, 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. As the Court of Appeals and this Court have repeatedly made clear, a participant in interscholastic sports does not, as a matter of law, assume the risk of unreasonably increased risks and risks not inherent in the sport.

Defendants' statement that "being hit by a baseball is a paradigm example of an inherent risk assumed by a participant," Def. Br. at 7, merely begs the ultimate question at issue in this case: whether Defendants unreasonably increased the risk of Grady being hit by a baseball in a manner that was not inherent in the sport. Defendants' assertion that the issue is not whether the use of multiple balls is inherent in a baseball game, but whether "it is an inherent part of the activity in which Grady voluntarily participated – the baseball practice drill," Def. Br. at 19, is circular and unavailing. By that logic, Defendants could have created a drill using 17-balls at a time and claim that the risk of getting hit by one of the 17 balls is inherent in the drill. It also ignores the fact that Defendants expressly recognized the increased risk posed by the Warrior Drill but failed to take adequate measures to protect Grady and the other participants.

Defendants also ignore the authority cited by Grady holding that 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).

3. The Cases on Which Defendants Primarily Rely Do Not Warrant Granting Summary Judgment Under the Facts and Circumstances of This Case

As the cases cited in Grady's opening brief indicate, this Court and courts throughout the state routinely deny summary judgment over questions of whether the activity at issue presented an unreasonably increased risk not inherent in the sport.[5] Defendants' attempts to distinguish the facts of these cases merely serves to highlight the fact-intensive, case-by-case nature of the inquiry.

Moreover, the cases on which Defendants primarily rely, Legac v. S. Glens Falls Cent. Sch. Dist., 150 A.D.3d 1582 (3d Dep't 2017); O'Connor v. Hewlett-Woodmere Union Free Sch. Dist., 103 A.D.3d 862 (2d Dep't 2013); Bukowski v. Clarkson Univ., 19 N.Y.3d 353 (2012), do not support granting summary judgment to Defendants here.

In each of those cases, unlike in this case, the plaintiff was engaged in an ordinary baseball activity with a single ball – fielding a ground ball hit to him that "took an odd hop" in Legac, 150 A.D.2d at 1584; being hit by a batted ball hit to

[5] See Philippou v. Baldwin Union Free Sch. Dist., 105 A.D.3d 928 (2d Dep't 2013); Connor v. Tee Bar Corp., 302 A.D.2d 729 (3d Dep't 2003); Brown v. Roosevelt Union Free Sch. Dist., 130 A.D.3d 852 (2d Dep't 2015); Stillman v. Mobile Mountain, Inc., 162 A.D.3d 1510 (4th Dep't 2018); Charles v. Uniondale Sch. Dist. Bd. of Educ., 91 A.D.3d 805 (2d Dep't 2012); Kane v. N. Colonie Cent. Sch. Dist., 273 A.D.2d 526, (3d Dep't 2000); Stackwick v. Young Men's Christian Ass'n of Greater Rochester, 242 A.D.2d 878 (4th Dep't 1997); Laboy v. Wallkill Cent. Sch. Dist., 201 A.D.2d 780 (3d Dep't 1994); Parisi v. Harpursville Cent. Sch. Dist., 160 A.D.2d 1079 (3d Dep't 1990); Weinberger v. Solomon Schechter School of Westchester, 102 A.D.3d 675 (2d Dep't 2013); Huneau v. Maple Ski Ridge, Inc., 17 A.D.3d 848 (3d Dep't 2005); Cruz v. City of New York, 288 A.D.2d 250 (2d Dep't 2001).

him that "took an 'unpredictable' hop" in O'Connor, 103 A.D.3d at 862; and a pitcher being hit by a line drive back to the mound in Bukowski, 19 N.Y.3d at 356.

Furthermore, the defendants in Legac, O'Connor, and Bukowski – unlike Defendants here – did not expressly acknowledge that the activities there were conducting involved an increased risk and did not affirmatively undertake to protect the participants from any recognized increased risk.

In Legac, this Court held that a baseball player assumed the risk of being hit by a ground ball, hit to him and which he was expected to field, during an indoor ground ball fielding drill. There, 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, as set forth above, 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 a ground ball," id. at 1586, and was fielding a ball hit specifically to him. Id. at 1583. Here, by contrast, Grady was hit by a ball intended for another player while he was focused on a different ball that was being thrown to him by yet another player. Grady was therefore defenseless, but for the inadequate protective screen. Indeed, Allen and Ferraro specifically acknowledged that during the Warrior Drill

– unlike in Legac –the regular first baseman (Grady) 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.

Importantly, in Legac, this Court and the plaintiff himself recognized that being hit by a ground ball hit to him was a common occurrence that might happen in an ordinary baseball game:

> Legac stated that he had previously been hit with a baseball while at bat, that he had witnessed a line drive hit a third baseman and that he had observed, on televised games, instances in which professional baseball players were hit by baseballs. He testified that it was common for infielders to field ground balls, that he had played an infield position in the past and that he had been taught in prior years how to properly field ground balls. Legac further acknowledged that it was common for baseballs to take unexpected bounces

Legac, 150 A.D.3d at 1584. Here, by contrast, it is undisputed that there are never two baseballs in play during a baseball game.

Similarly, in Bukowski, the plaintiff "testified at trial that he was aware of the risk of getting hurt in baseball, had seen other pitchers get hit by batted balls, had experienced balls being batted back at him, and had hit batters with his own pitches." Bukowski, 19 N.Y.3d at 356. He could testify to that because a pitcher getting hit by the batted ball he had just thrown to the batter is an inherent risk of baseball. By contrast, Grady being hit by a ball that had been hit to one player and was being thrown to another while Grady focused on a second ball being thrown

by yet another player is not an inherent risk of baseball. Rather, it is an unreasonably increased risk that Defendants admit they had to protect Grady from.

Moreover, Bukowski was an appeal after trial, and the lower court had previously denied the defendants' motion for summary judgment. See Burkowski v. Clarkson Univ., No. 1148-08, 2009 WL 3827735 (N.Y. Sup. Ct. Albany Cnty. Oct. 10, 2009).[6]

C. DEFENDANTS CANNOT IGNORE REGULATIONS IMPOSING A NON-DELEGABLE DUTY ON THEM TO CONDUCT ATHLETIC ACTIVITIES SAFELY

Defendants misapprehend the importance of the regulations governing school athletic activities.

Defendants do not deny that the regulations provide that "[i]t shall be the duty of trustees and boards of education . . . to conduct all [extra class athletic] activities under adequate safety provisions." 8 NYCRR § 135.4(7)(i)(g). Yet they claim that the "duty" specifically imposed by the regulation is somehow not

[6] Defendants' reliance on Turcotte v. Fell, 68 N.Y.2d 432 (1986), is unavailing because Turcotte dealt with "the scope of the duty of care owed to a professional athlete injured during a sporting event." Id. at 435 (emphasis added). The Court of Appeals in Turcotte specifically recognized that "[m]anifestly 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. The decision in Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392 (2010), which is discussed more fully in Grady's opening brief, is inapposite because the Court of Appeals held in that case 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. Id. at 394-96.

actually a duty because it is not, in Defendants' view, specific enough. Def. Br. at 50-51. Such an interpretation would render the entire regulation meaningless.

Defendants cite no authority for their position, because there is none. Their citation to Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343 (1998) is unavailing, because Rizzuto construes Labor Law § 241(6), which specifically provides for the creation of implementing regulations expressly setting forth what specifically constitutes a violation. Here, by contrast, the regulations expressly provide that they create a duty independent of any other regulations. See 8 NYCRR § 135.4(7)(i)(a) ("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).

Defendants misunderstand the importance of the conjunctive "and." Grady is not arguing that the regulation "mandated" the creation of additional rules by the District or anyone else. See Def. Br. at 53. Rather, the fact that the regulation states that athletics must be conducted in accordance with the regulation *and* in accordance with any additional rules indicates that the duty imposed by the regulation continues to govern whether or not additional rules are adopted, and is not dependent on any additional rules. This is in direct contrast to Labor Law §

241(6), which is expressly dependent on the implementing regulations. See Grady Br. at 40-41.

Defendants also misconstrue the applicable regulations governing athletic trainers. See 8 NYCRR § 135.4(7)(i)(a) and (d)(2). Defendants' view is that these regulations are merely hypothetical because they only "permit" school districts to hire athletic trainers. Def. Br. at 52. But here, the Defendants *did* hire an athletic trainer who was then subject to the requirements of the regulation, which include 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. Athletic trainer Lipyanek testified that she did none of these things with regard to the Warrior Drill, and was not asked to:

> 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.

R.263.

Defendants also question what evidence Grady has provided that the drill was "unsafe.". The ball hit Grady in the eye and caused a permanent loss of vision. If allowing our children to be needlessly injured is how the Defendants define safe, then we should stop pretending to care about our children's safety and just tell all parents that we are willing to sacrifice the health and safety of their children, because winning school sports and protecting schools from accountability is more socially valuable than a child's eyesight, health, or life for that matter.

On the other hand, if the New York State Rules and Regulations governing the safety of our children during athletic activities mean anything, Defendants' complete exoneration by summary judgment must be denied. Defendants should be required to explain to the people of Broome County during trial why they have

no duty for the safety of their children and let the people decide whether Defendants fulfilled their duty to the students they were charged to protect.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Grady's opening brief, the Decision and Order of the Supreme Court, Broome County entered October 31, 2019 should be reversed and Defendants' motion for summary judgment should be denied in its entirety.

Dated: New York, New York
September 14, 2020

Respectfully submitted,

Kahn, Gordon, Timko & Rodriques, P.C.

Nicholas I. Timko
20 Vesey Street
New York, NY 10007
(212) 227-6260
nitimko@kgtrpc.com

Robert A. O'Hare Jr.
Andrew Levitt
O'HARE PARNAGIAN LLP
20 Vesey Street, Suite 300
New York, NY 10007
(212) 425-1401
rohare@ohareparnagian.com
alevitt@ohareparnagian.com

Attorneys for Plaintiff-Appellant

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Nicholas I. Timko
Kahn Gordon Timko & Rodriques P.C.
Attorneys for Plaintiff-Respondent
20 Vesey Street, Suite 300
New York, NY 10007
(212) 233-2040