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Charles C. Spagnoli, Esq.
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New York Supreme Court
Appellate Division – Third Department

KEVIN GRADY,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

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STATEMENT OF QUESTIONS PRESENTED

1. Did Plaintiff-Appellant Kevin Grady assume the risk of being struck by an errant thrown ball during baseball practice on March 8, 2017, barring him from recovering against Defendants-Appellees upon allegations of negligence, when he saw other errant throws bypass a protective screen (with at least one hitting another player) and expressly commented the practice was dangerous, but voluntarily continued to participate anyway?

ANSWER OF THE COURT BELOW: The New York State Supreme Court for the County of Broome correctly held that Grady had assumed the risk of being struck.

2. Was the risk of being struck by the baseball during baseball practice a risk inherent in the sports activity Plaintiff-Appellant engaged in, such that it could be the subject of primary assumption of risk?

ANSWER OF THE COURT BELOW: The New York State Supreme Court for the County of Broome correctly held the risk was inherent in the sport of baseball.

3. Was the risk of being struck by a baseball unreasonably increased during the practice on March 8, 2017?

ANSWER OF THE COURT BELOW: The New York State Supreme Court for the County of Broome correctly held Plaintiff-Appellant did not show the risk was not unreasonably increased by the circumstances he raised.

4. When Plaintiff-Appellant saw errant thrown balls bypass a protective screen, with at least one striking another player in his view, and he commented as a result that the practice was dangerous, but he continued participating in the practice, could he claim to have been "unaware" of the risk of errant balls bypassing the screen and striking him, merely because the coaches had indicated at the beginning of the practice that the screen was provided for the players' protection?

ANSWER OF THE COURT BELOW: The New York State Supreme Court for the County of Broome correctly held that Plaintiff-Appellant was aware of the risk of being struck by an errant thrown ball after he saw multiple balls bypass the screen, and at least one strike another player, regardless of any comments made by the coaches at the outset of the practice.

5. Is Plaintiff-Appellant entitled to be excused from his voluntary assumption of risk based on the doctrine of inherent compulsion?

ANSWER OF THE COURT BELOW: This argument was not raised before the New York State Supreme Court for the County of Broome and has not been preserved for appeal.

6. Was Plaintiff-Appellant's expert's affidavit sufficient to raise a genuine issue of material fact?

ANSWER OF THE COURT BELOW: The New York State Supreme Court for the County of Broome correctly held the affidavit of Plaintiff-Appellant's expert to be insufficient to raise an issue of material fact as to whether the risks in question were inherent to the sport of baseball or were unreasonably increased.

STATEMENT OF CASE AND PERTINENT FACTS

Plaintiff-Appellant Kevin Grady (hereinafter "Grady") commenced litigation against Defendants-Appellants Chenango Valley Central School District, Chenango Valley Board of Education, Michael Allen, and Matthew Ferraro (collectively the "School District") by Complaint filed September 7, 2017 before the New York State Supreme Court for the County of Broome ("Supreme Court"). The claims sounded in negligence. Following completion of discovery, the School District moved for summary judgment. The Supreme Court, in an October 31, 2019 decision, held the undisputed material facts showed Grady assumed the risk that produced his injury and was barred from recovering against the School District in negligence. It thus granted summary judgment dismissing the Complaint.

Grady took this appeal by Notice of Appeal filed November 6, 2019, and has now filed a brief and record on appeal. The School District respectfully submits this brief in opposition.

At the time of his injury on March 8, 2017, Grady was a student at the School District in his senior year. He had played baseball "in every level like up to varsity baseball…starting at T-ball to coach pitch to farm league to Little League to modified baseball to J.V. baseball." (R-101.[1]) Grady played varsity in eleventh grade, and was playing at the varsity level for the second year running during his senior year when the incident occurred. (R-102.) He signed a "Duty to Warn" form that year as in previous years, and the form was also signed by his mother. (R-102-103, 120, 136-137, 279.) It stated, among other things, that "[p]articipation in interscholastic athletics involves certain inherent risks . . . [and] you can be injured while participating in (said sport). It is noted that your injuries could range from being very mild to catastrophic. In unique cases death could be the result." (R-279.) Grady read the form before signing it, and understood he could be hurt while playing, but wished to play despite understanding he could be injured. (R-137.) He also understood that, as part of participating in the baseball program, he had would be participating in practices. *(Ibid.)* He understood he could be hurt in practice as well. (R-139-140.)

[1] References in this form are to pages of the Record on Appeal.

On March 8, 2017, Grady participated in a so-called "Warrior Drill." (R-106, 110-111, 129-131, 309.) It was a drill he had participated in multiple times before, in both junior varsity and varsity practice, and he was familiar with its conduct. (R-162.) The Warrior Drill involved one set of players practicing throws from third base to first base, and another set of players practicing throws from second base to a "short" first base set up not far from the real first base.[2] (R-106-107, 130-131, 166, 212-213, 214.) Grady was in the first group and was stationed at the regular first base. (R-110.) The two sets of players were practicing simultaneously, and the drill involved having two balls in use. (R-162.)

No rule or regulation has been identified to require the use of special protective equipment during such a drill, much less prescribing the necessary size and positioning of protective equipment. Nevertheless, because it was possible for a ball thrown to "short" first base to travel to the real first base, the coaches set up a protective screen between "short" first base and the real first base. (R-159, 161-164, 199.) The screen was approximately seven feet high and seven feet wide. (R-161.) It was the largest screen the School District had. *(Ibid.)* Absent any

[2] The above description is of the portion of the drill that is pertinent to the issues in this case. The full drill for the first set of players involved a ball being batted from home plate to third base, fielded by the player at third base, and thrown to the player at first base. For the second set of players, it involved the player at the shortstop position beginning a "double play" by throwing to second base, with the player at second base then throwing to "short" first base. (R 106-107, 130-131, 166, 212-213, 214.)

requirements or guidance from any published source, 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. (See R-310, 317-318.) As the coach who set it up determined, the screen was sufficient to protect the students at the real first base, and it was positioned appropriately. (R-148-149; see R-304-305, 310-311, 317-318, 322.) Of course, Grady saw the screen and where it was positioned. (R-106-107.) There is no evidence or suggestion that the screen was defective, broken, or unsteady, or that it failed to stay up or to stop balls that struck it. (See R-109.)

Nevertheless, some errant thrown balls went over or around the screen, and at least one struck a fellow student-athlete at the real first base. (R-107-108.) There is no testimony the coaches observed this. (R-108.) Grady, however, did. (R-107-108.) ***Because he saw thrown balls bypass the screen and at least one other player struck by such an errant ball, Grady commented to his fellow players that the practice was dangerous. (R-109.)*** Nevertheless, he voluntarily continued to participate in the practice. (R-110.) There is no evidence any coach directed Grady to continue practice after he saw the other student struck by an errant throw.

After Grady participated in the practice for ten to fifteen minutes, another errant thrown ball from second base went over or past the screen and struck Grady.

(R-107, 110-111.) The coaches immediately attended him and summoned the athletic trainer, who promptly provided care and a concussion assessment. (R-175-177, 216-217, 256, 262, 277, 325, 385-386.) She determined Grady needed immediate medical attention. (R-326.) She was informed that Grady's mother was already on her way and would drive Grady to the emergency room. *(Ibid.)* Grady's mother in fact arrived within a few minutes and took Grady to the emergency room. *(Ibid.)*

SUMMARY OF ARGUMENT

An errant ball struck Grady while he was participating in the School District's varsity baseball team, after he saw other errant throws striking at least one other player during the same practice and stated the practice was "dangerous." The Court of Appeals has repeatedly indicated that being hit by a ball in baseball is a paradigm example of an inherent risk assumed by a participant in a school sports program. This case presents the strongest possible basis for applying the doctrine of primary assumption of risk to bar recovery in negligence.

Grady's arguments that the doctrine does not apply seek to force the facts of the case into exceptions that do not fit at all, such as that the risk was "unreasonably increased" by the School District. His main argument on appeal is that the protective screen used during the practice was not large enough or not

positioned correctly, but he provides no valid basis for this contention. The main question presented in this case is thus whether a plaintiff who expressly recognized and commented upon the precise risk and mechanism by which he was ultimately injured, and who was afforded protective equipment that actually reduced the risk to which he was exposed, can credibly argue that under the law his injury was the result of an "unreasonably increased" risk.

ARGUMENT

POINT I

A STUDENT-ATHLETE WHO EXPRESSLY POINTS OUT A PARTICULAR RISK, BUT CONTINUES PARTICIPATING IN PRACTICE, THEREBY ASSUMES THE RISK AND ELIMINATES THE DUTY TO PROTECT HIM FROM THAT RISK

On the day he was injured, Grady saw other errant throws pass over or alongside the protective screen, including at least one that struck a fellow player, and Grady even said to his fellow student-athletes as a result that the practice was dangerous. He nevertheless continued practice until he was struck by a ball himself. Under current law he thus assumed the exact risk which led to his injury, negating any duty on the part of the School District and eliminating his claims sounding in negligence.

A. Assumption of Risk Negates the Existence of a Duty to Protect Against That Risk in the Context of Athletic and Recreative Activities.

Reports of the death of "assumption of risk" as a complete bar to liability have been greatly exaggerated. Following the adoption of principles of comparative fault in New York State, the New York Court of Appeals preserved the concept of assumption of risk – albeit in a different procedural posture – for application in the context of sports and other recreational activities of social value.

The Court of Appeals in *Turcotte v. Fell*, 68 N.Y.2d 432 (1986), recognized assumption of risk, not as a defense, but as negating the existence of a duty of care. In other words, to the extent an individual voluntarily participates in an athletic or recreative activity while aware of a certain risk, the organization hosting the activity has no duty of care regarding that risk. As such, there is no liability if the participant is injured as a result of that *known* risk. *Id.* at 437. The pertinent passage reads:

> Traditionally, the participant's conduct was conveniently analyzed in terms of the defensive doctrine of assumption of risk. With the enactment of the comparative negligence statute, however, assumption of risk is no longer an absolute defense (see, CPLR 1411, eff Sept. 1, 1975). 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". *Accordingly, the analysis of care owed to plaintiff in the professional sporting*

> *event by a coparticipant and by the proprietor of the facility in which it takes place must be evaluated by considering the risks plaintiff assumed when he elected to participate in the event and how those assumed risks qualified defendants' duty to him.*

Id. at 437-438 (emphases added; citations omitted).

Turcotte thus did not signal the demise of assumption of risk as a complete bar to liability. Instead, it reframed a participant's knowing assumption of a risk as eliminating the "duty" element of a negligence claim. The Court of Appeals made this further explicit in *Trupia v. Lake George Central School District*, 14 N.Y.3d 392 (2010), stating:

> [A]ssumption of risk *has survived as a bar to recovery.* The theory upon which its retention has been explained and upon which it has been harmonized with the now dominant doctrine of comparative causation is that, by freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk [citing *Turcotte]*. The doctrine, then, is thought of as limiting duty through consent--indeed, it has been described a "principle of no duty" rather than an absolute defense based upon a plaintiff's culpable conduct--and, as thus conceptualized can, at least in theory, coexist with the comparative causation regimen. The reality, however, is that the effect of the doctrine's application is often not different from that which would have obtained by resort to the complete defenses purportedly abandoned with the advent of comparative causation--culpable conduct on the part of a defendant causally related to a plaintiff's harm is rendered *nonactionable* by reason of culpable conduct on the plaintiff's part that does not entirely account for the complained-of harm.

Id. at 395 (citations omitted; emphases added). The Court of Appeals went on to note that although "[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation," its persistence is justified for its "utility in 'facilitat[ing] free and vigorous participation in athletic activities.'" *Ibid.* It thus remains true in the context of such athletic activities that "If the risks of the activity are fully comprehended or perfectly obvious, [the participant] has consented to them and defendant has performed its duty." *Turcotte, supra* at 439 (citations omitted).

This passage does not admit of an interpretation that assumption of risk merely reduces the degree of liability of a purported tortfeasor, as Grady implies. (Plaintiff's Brief pp. 24-25.) The Court of Appeals expressly stated that assumption of risk survives as a "bar" to recovery. *Ibid.; see also DeMarco v. DeMarco*, 154 A.D.3d 1226, 1227 (3d Dept. 2017) (distinguishing between "primary" assumption of risk in context of sporting events, which provides complete bar to recovery, and "implied" assumption of risk in other contexts, which only reduces liability proportionately). If assumption of risk resulted in no more than a proportionate and partial reduction of liability, it would cease to exist altogether as a separate doctrine, for proportionate reduction would be the result under comparative fault principles even in the absence of the doctrine of assumption of risk.

Addressing the need to ensure that the survival of "primary" assumption of risk did not unduly weaken comparative fault principles, the Court of Appeals stated:

> We have recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise. We have not applied the doctrine outside of this limited context and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation . . . .

Trupia, *supra* at 395-396. This passage makes clear that, when the Court of Appeals spoke of the need to keep the doctrine "circumscribed" to avoid undermining comparative fault principles, *it meant by allowing assumption of risk as a bar only in athletic and recreative activities.* It was *not* suggesting that within those contexts, the courts should still be suspicious of assumption of risk arguments, or hesitant to apply them to bar liability.

Any argument that this Court should nevertheless refrain from fully applying assumption of risk in the context of sports cannot be squared with *Trupia.* In that case, the Court of Appeals found the doctrine of primary assumption of risk inapplicable because of the activity involved – riding a bannister, also described as "horseplay." The Court noted that it was not an activity that "recommends itself as worthy of protection" and was not one the defendant had "sponsored or otherwise

supported" as a "risk-laden but socially valuable voluntary activity." *Id.* at 396. This analysis immediately followed the Court of Appeals' comments regarding the need to "circumscribe" application of assumption of risk principles, signaling that limiting the contexts in which assumption of risk may be applied to sports and other "socially valuable" activities is what the Court of Appeals had in mind. Its analysis and result did not signal any lingering prejudice against applying primary-assumption-of-risk principles to more appropriate contexts such as sporting events.

Grady quotes the language about keeping assumption of risk principles "carefully circumscribed," conspicuously omitting the introductory phrase "We have not applied the doctrine outside of this limited context [of athletic and recreative activities]." *(See, e.g.,* Plaintiff's Brief p. 24.) Such selective quotation creates the impression that the Court of Appeals wished to discourage courts from applying the doctrine even in proper contexts. However, as the full language shows, the Court of Appeals viewed restricting assumption of risk to "athletic and recreative activities" as fully accomplishing the necessary "circumscribing" of the doctrine.

This Court recognized that to be the case in *DeMarco v. DeMarco,* 154 A.D.3d 1226 (3d Dept. 2017), stating:

> Although the Court of Appeals has continued to express the vitality of the doctrine of primary assumption of risk, it has cautioned that the application of the doctrine "must be closely circumscribed if it is not seriously to

> undermine and displace the principles of comparative causation." *Thus*, as a general rule, the doctrine "should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designed venues."

Id. at 1227 (emphasis added; citations omitted); *see Custodi v. Town of Amherst*, 20 N.Y.3d 83, 89 (2012). This Court, by using "thus" in the passage quoted, expressly drew the connection between the "circumscribing" of the doctrine and its limitation to athletic and recreative activities.

Therefore, in the context of organized athletic and recreative activities, a participant's assumption of a known risk eliminates an organizer's duty to protect against that risk. The organizer or host is then not liable if injury results from that risk.

B. Grady Saw and Commented Upon Thrown Balls Passing the Protective Screen and Striking Players During the Practice, and Assumed the Risk of Being Struck By Continuing to Participate in the Practice.

This case presents the clearest possible example of assumption of risk, as Grady not only saw but commented upon the very risk that would later result in his injury, and he continued to participate in the practice anyway.

Grady had participated in the so-called "Warrior" multi-ball drill in prior years. (R-107.) At the time of his injury, he had been participating in the drill for ten to fifteen minutes already. *(Ibid.)* He was aware that there were multiple balls

being actively thrown about, and he saw where a protective screen was placed and its size. (R-130-131, 298-302.) He saw other errant throws pass the screen, including at least one that hit another player. (R-107-108.) When he saw this, he complained to his fellow student athletes that the practice drill was dangerous because of the risk of errant throws. (R-109.) He continued to participate voluntarily nonetheless. (R-107-108, 109-110.)

This case falls, as the School District previously argued, squarely within the ruling of the Court of Appeals in *Bukowski v. Clarkson University,* 19 N.Y.3d 353 (2012). There, a college freshman who had been playing baseball since he was five years old was described by the Court of Appeals as "an experienced and knowledgeable baseball player." *Id.* at 355, 356. He was instructed by coaches to join a "live" pitching practice without a protective screen, although he had never been in a live pitching practice before. *Id.* at 355. He saw others struck by batted balls and was aware of the obvious risk of being injured while pitching without a protective screen. *Id.* at 356. After throwing several pitches, he was struck by a ball batted back to him, sustaining an injury. *Ibid.* The Court of Appeals found "the risks of pitching in an indoor facility without a protective screen were inherent to the sport of baseball and readily apparent to plaintiff," such that he had assumed the risk of his injury. *Id.* at 357. These allegations parallel the circumstances in the present case, except, of course, for the fact that here the School District *did* use

a protective screen. The Court of Appeals' decision in *Bukowski* is thus inimical to Grady's claims, because it found the utter lack of a protective screen in that case was insufficient for a jury to find he faced an "unassumed, concealed, or enhanced risk." *Id.* at 358.[3]

Notably, in *Turcotte*, a racetrack operator was excused from liability to a jockey despite the allegation that the track on which he was injured was improperly watered and thus hazardous. The Court of Appeals found the jockey had participated in three prior races on the track on the day he was injured, and had the opportunity to observe the condition of the track. *Id.* at 442-443. Similarly, here, Grady participated in baseball practice for some time, with full knowledge that multiple balls were in play, and with the location and the size of the screen fully visible to him. He voluntarily continued despite the fact that he actually commented on the danger from errant throws bypassing the screen, after seeing at least one strike a fellow player. *See also Benitez v. New York City Board of Education*, 73 N.Y.2d 650 (1989) (high school football player assumed risks posed by his playing while fatigued, because such risks were obvious and evident).

[3] It is also undisputed that Grady signed a "Duty to Warn" document advising him that "Participation in interscholastic athletics involves certain inherent risks . . . [and] you can be injured," with such injuries ranging from "very mild" to "catastrophic," possibly even including "death." (R-279.)

Similarly, this Court in *Legac v. South Glens Falls Central School District*, 150 A.D.3d 1582 (3d Dept. 2017), found that a fifteen-year-old high school baseball player assumed the risk of being struck in the face by a batted ball where he was an "experienced and knowledgeable baseball player" who had previously been hit with a baseball while at bat, had witnessed another student struck by a batted ball, and had seen professional players on television get hit by balls. *Id.* at 1584. Again, the facts in *Legac* closely parallel the central facts here, suggesting a like result is appropriate. *See also O'Connor v. Hewlett-Woodmere Union Free School District*, 103 A.D.3d 862 (2d Dept. 2013) (player assumed risk of being struck in face by baseball that took "bad hop" on part of baseball field known to him to have a height differential).

The circumstances of this case present a paradigm example of primary assumption of risk. Because Grady saw the risk, expressly stated the risk, and continued to participate despite knowing of the risk, he assumed the risk, and the School District had no further duty to protect him from the risk. His claims, which sound in negligence and therefore require the existence of a duty, fail as barred by the doctrine of primary assumption of risk.

C. The Risk of Being Hit By a Thrown Ball was Inherent in the Activity of Baseball Practice.

The risk of being struck by a thrown ball is, both under controlling precedent and self-evidently, inherent in participation on a school baseball team, and thus an assumed risk. Grady's arguments to the contrary are without merit.

A board of education and its employees need only "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 Board of Education*, 73 N.Y.2d 650, 658 (1989). The doctrine of "primary" assumption of risk embraces the risks "inherent" in a sport or recreational activity. As the Court of Appeals stated in *Bukowski v. Clarkson University*, 19 N.Y.3d 353 (2012), the doctrine reaches "risks which are commonly encountered or 'inherent' in a sport, *such as being struck by a ball or bat in baseball." Id.* at 356 (emphasis added). In other words, when the Court of Appeals wished to provide an illustrative example of a risk "inherent" to a sport or activity, it selected being struck by a ball in baseball. In fact, it has even recognized that a *spectator* at a ball game assumes the risk of being struck by a ball. *Benitez, supra* at 657. More specifically, it has found the risk of being struck by a baseball in the face during a practice to be inherent to the sport of baseball and within the scope of assumption of risk by a high school student-athlete. *Bukowski, supra* at 357.

Notwithstanding these unequivocal statements of the Court of Appeals that being hit by a ball – including during practice – is an inherent risk of participating in baseball, Grady argues that the use of multiple balls rendered being hit by a ball not an "inherent" risk of the sport, because multiple balls are not used simultaneously in baseball games.[4]

This approach presents the wrong question. The issue is not whether the use of multiple balls is inherent to a regulation baseball game, as *Bukowski*, among other decisions cited above, makes clear. It is whether it was an inherent part of the activity in which Grady voluntarily participated – the baseball practice drill. It is beyond dispute that practice drills are an indispensable component of participating on a school baseball team. (See R-304.) Even Grady's own expert does not actually contend that multi-ball practice drills are other than routine and ordinary parts of baseball *practices.*

The doctrine of assumption of risk does not hinge on the "ordinary and necessary dangers" of regulation play of a sport. The question is whether an individual assumed the risk of the "ordinary and necessary" hazards of *the sports activity he voluntarily participated in.* Assumption of risk extends to those risks "inherent to and aris[ing] out of *the nature of the sport generally,"* not just those

[4] So Grady's expert contends. He neglects to discuss the situation where a relief pitcher "warms up" on the sidelines while play continues on the field.

involved in formal games or contests. *Kane v. North Colonie Central School District*, 273 A.D.2d 526, 527 (3d Dept. 2000) (quoting *Morgan v. State of New York*, 90 N.Y.2d 471, 484 (1997); emphasis added). Thus, in *Kane*, for example, this Court found the risk of injury from contact during a noncompetitive track practice was "inherent" to the sport. *Kane*, *supra* at 527. In *Legac*, this Court held a player assumed the risk of being struck in the face with a baseball during an indoor fielding practice on a hard gymnasium floor. *Legac*, *supra* at 1582-1583, 1585 ("the conditions inherent in *the indoor ground ball fielding drill* were readily apparent to Legac and the risk of being struck by a ball was a reasonably foreseeable consequence of engaging in that drill"). In *Rawson v. Massapequa Union Free School District*, 251 A.D.2d 311, 312 (2d Dept. 1998), the injured party was a high school wrestler. He was not injured in a wrestling match, or even while wrestling, but while participating in a jogging exercise during wrestling practice. It can hardly be argued that tripping and falling is an inherent risk of a wrestling match, but the Second Department properly focused on the activity the student was engaged in at the time of his injury – jogging during practice – not what he could expect to face in a wrestling competition; it held assumption of risk applied. In *Falcaro v. American Skating Centers, Inc.*, 167 A.D.3d 721 (2d Dept. 2018), an amateur hockey player was deemed to have assumed the risk of

involving himself in an on-ice fight as an inherent risk of playing hockey! *Id.* at 722.[5]

Again, even Grady's expert does not actually deny that multiple-ball practices are a customary part of an interscholastic baseball program. He makes the non sequitur statement that there would not be more than one ball in play during a regulation baseball *game.* (R-354-355.) This parallels the argument of the expert in *Legac,* who insisted that because the shortest distance from batter to fielder on a regulation ball field would be sixty feet, six inches, the conduct of an indoor practice with the batter only forty-eight feet from the fielder was unsafe. *Legac, supra* at 1585. Grady's expert's argument has no more validity than the argument this Court rejected in *Legac.*

The cases are clear that the "inherent" risks of a sport extend far beyond those faced in formal, regulation play. Therefore, the relevant inquiry here is not whether the risk was part of the regulation game of baseball. The inquiry is whether the risk was an ordinary and necessary part of the baseball practice Grady

[5] In *Stillman v. Mobile Mountain, Inc.,* 162 A.D.3d 1510 (4th Dept. 2018), the Fourth Department held that the risk of falling was not inherent in the use of a "climbing wall." It is respectfully submitted that the finding, thus phrased, is irreconcilable with prior caselaw or common sense. If there is a risk inherent in using a climbing wall, it is the risk of falling. At best, *Stillman* should either be ignored or regarded as an infelicitously phrased application of the concept that "concealed" risks are not assumed (given that the injury in that case resulted from a carabiner separating from the plaintiff's safety harness, precipitating the fall).

participated in. The Supreme Court properly followed the Court of Appeals and this Court in finding that it was.

POINT II

THE EVIDENCE PRESENTED TO THE SUPREME COURT WAS SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF ASSUMPTION OF RISK

In his brief, Grady attacks the sufficiency of the School District's affidavits to show, e.g., the protective screen was an appropriate size and placed properly. However, the School District was entitled to summary judgment regardless of the affidavits' adequacy on these points.

To 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. The treatment by the Court of Appeals of the claim in *Bukowski* bears this out. There, as previously discussed, a college freshman baseball player, described as "experienced and knowledgeable," was found to have assumed the inherent risk of being struck by a baseball during a practice. *Bukowski, supra* at 356. He was specifically found to have been "aware of the obvious risk of pitching without the protection of an L-screen, and he had

the opportunity to observe the lighting in the facility as well as the color of the pitching backdrop prior to his accident." *Id.* at 356-357. On these grounds, the Court of Appeals found the defendant college had established assumption of risk, *without requiring the defendant to provide expert, scientific, or technical evidence that the non-use of an L-screen, the lighting in the facility, or the pitching backdrop did not materially increase the risk to the players.*

This precisely parallels the situation in this case before the School District's affidavits are even considered: based 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. There was no need for the School District to go farther and submit expert, scientific, or technical evidence that the size and positioning of the screen were proper. Instead, if Grady wished to argue that the size or positioning of the protective screen unreasonably increased the risk to him, carrying this case out of the scope of his patently clear assumption of the risk, it was incumbent upon him to present appropriately supported expert testimony – which, as explained in Point III.A, *infra,* he did not do.

That this is the proper order of proof is borne out by this Court's own decision in *Bukowski* which the Court of Appeals affirmed on appeal. *See*

Bukowski v. Clarkson University, 86 A.D.3d 736 (3d Dept. 2011). The Court reviewed the plaintiff's trial testimony as to his level of experience, his familiarity with the facility (presumably including its lighting and backdrop conditions), and his knowledge that no L-screen was to be used, and found that primary assumption of risk had been established. *Id.* at 738. It did *not* require, before reaching this conclusion, that the defendant have introduced expert, scientific, or technical evidence that the non-use of the L-screen, the lighting conditions, or the multicolored backdrop did not materially increase the risk to the plaintiff. To the contrary, this Court focused on the plaintiff's failure to provide such evidence to overcome the bar of assumption of risk:

> Plaintiff's expert evidence . . . is that an L-screen or darker backdrop could have lessened the risk, making the indoor conditions safer. *Such evidence is, however, irrelevant* given the fully comprehended and perfectly obvious nature of the inherent risk.
>
> Although plaintiff has cited cases in which a breach of binding rules or governing standards requiring certain safety measures was held to have raised the issue of whether the risk of injury normally associated with the sport was unduly enhanced, *he presented no evidence that any such rule or standard required the use of a protective screen or a different backdrop here.*

Id. at 738 (emphases added). In other words, the defendant's prima facie case was established without affirmative scientific or technical evidence ruling out an "unreasonable increase" in the risk, and the burden was placed on the plaintiff to

overcome that prima facie case with appropriately supported evidence. When he failed to do so, the case was dismissed.

This Court's order of analysis in *Legac, supra*, is to the same effect. There, again, the Court considered the evidence that the plaintiff – a high school junior – was an "experienced and knowledgeable baseball player," that he was aware of the possibility of being struck by a baseball "during tryouts, practices or games," that he knew it was common for baseballs to take unexpected bounces, that he had seen professional players on television hit by baseballs, and that he had "adequate opportunity to observe the less than optimal conditions of the gymnasium" where tryouts were being held. *Legac, supra* at 1584-1585. In light of this evidence, and without indicating the defendant school district had offered any expert, scientific, or technical evidence that the tryout conditions did not create an "unreasonably increased" risk, the Court held that "defendants established their prima facie entitlement to summary judgment dismissing the complaint" based on assumption of risk. *Id.* at 1585. Again, it then focused on the failure of the *plaintiff* to proffer, with his expert's affidavit, any "objective support" for his claims that the tryouts had been conducted at an unsafe distance, using improper equipment, and in an unsafe manner. *Ibid.* Again, the defendant's prima facie case was established without affirmative scientific or technical evidence ruling out an "unreasonable increase" in the risk, and the burden was placed on the plaintiff to overcome that

prima facie case with appropriately supported evidence. *See also O'Connor, supra* at 863 (defendant's proof regarding awareness of risk demonstrated prima facie entitlement to judgment as a matter of law, and plaintiff had to, but did not, raise triable issue of fact through proof that the defendant unreasonably increased the risk of injury).

To the extent the Second Department (in *Phillippou v. Baldwin Union Free School District*, 105 A.D.3d 928 (2d Dept. 2013), *Brown v. Roosevelt Union Free School District*, 130 A.D.3d 852 (2d Dept. 2015), and *Charles v. Uniondale School District Board of Education*, 91 A.D.3d 805 (2d Dept. 2012)) implies that a defendant must provide proof of no "unreasonably increased" risks in order to raise a prima facie case of assumption of risk, its approach is irreconcilable with the rulings of the Court of Appeals and this Court in *Bukowski* and *Legac* (as well as its own decision in *O'Connor).*[6] The rulings of the Court of Appeals and this Court, of course, take precedence in this judicial department.

In light of this Court's analysis in *Bukowski*, as upheld and echoed on appeal by the Court of Appeals, and in light of this Court's identical approach in *Legac*, it is clear that the School District was entitled to rely on Grady's admissions that he

[6] It appears the Second Department may have more recently adjusted its approach to recognize that a prima facie case of assumption of risk is established without showing there was no unreasonable increase in risk, and that the burden is then on the plaintiff to advance evidence of an unreasonable increase in risk. *See MacIsaac v. Nassau County*, 152 A.D.3d 758, 758-759 (2d Dept. 2017).

was aware of the precise risk that led to his injury to raise a prima facie showing of assumption of risk. It was then Grady's burden to advance sufficient evidence of an unreasonable increase in the risk he otherwise assumed. There is nothing in the record before this Court to suggest that there are published and accepted standards governing the proper size and placement of a protective screen during a multi-ball drill. Nor is there any suggestion that there have been scientific or technical studies performed to determine the efficacy of such screens based on their size and placement during such drills. Having failed to satisfy his burden, Grady was and is not entitled to denial of summary judgment.[7]

POINT III

NEITHER THE PROTECTIVE SCREEN NOR THE CLOUDY, COOL, AND WINDY CONDITIONS "UNREASONABLY INCREASED" THE RISK

Faced with the strong headwinds against his claims from the decisions of the Court of Appeals and this Court in similar cases, Grady argues one or more exceptions apply to rescue his claims from being barred by his assumption of risk.

[7] In the absence of any published standard or requirement, and absent any indication that a scientific or technical study has ever been performed regarding the efficacy of protective screens in multi-ball drills based on size and positioning, the School District's affidavits relied on the extensive experience of the coaches and the School District's expert witness.

His primary argument is that the risk was "unreasonably increased" and not subject to assumption of risk. The evidence does not support this argument.

A. The Protective Screen Did Not Unreasonably Increase Any Risk.

Grady first relies for this argument on his expert's ipse dixit assertion that the protective screen was not large enough to meet the standard of care. However, his expert cited no scientific or technical basis for this assertion, nor any published standard or rule specifying the appropriate size for a protective screen. Where an expert's affidavit is devoid of a foundational scientific basis for its conclusions, it is insufficient to establish the standard of care and should be regarded as having "no probative force." *Burton v. Sciano,* 110 A.D.3d 1435, 1436-1437 (4th Dept. 2013). This is true where an industry standard is alleged without citation to any published industry standard or treatise. *Ibid.*

Referring again to this Court's recent decision in *Legac*, the affidavit of the expert in that case asserted the placement of the pitcher in a drill much closer than the minimum distance in regulation play was unsafe, but because the affidavit did not provide any technical or scientific basis for the position, it did not raise an issue of fact as to whether the risk was "unreasonably increased." *Legac, supra* at 1585. In *Jones v. City of New York,* 32 A.D.3d 706 (1st Dept. 2006), for a further example, an expert's affidavit claimed the failure to "anchor" a garbage can placed on the sidewalk did not conform to "good and accepted engineering safety

practice," but failed to offer any supporting data or identify "any particular professional or industry standard" in support of his contention. As such, the affidavit did not raise a triable issue as to whether the placement of the garbage can without an anchor created an unreasonably dangerous condition. *Id.* at 706-707.

The only rule, regulation, or standard Grady cites is 8 NYCRR 135.4(c)(7)(i)(d)(2), which defines an athletic trainer's duties in general terms, such as "prevention of athletic injuries, including assessment of an athlete's physical readiness to participate," "education and counseling of coaches, parents, student athletic trainers and athletes," "risk management and injury prevention, including . . . assisting in the proper selection and fitting of protective equipment [and] assisting in the inspection of the fields and playing surfaces for safety."

That is it. That broad statement of general duties is the sole authority relied upon by Grady's expert. There are no specific rules, standards, or published requirements that he supplies to establish that what the School District did here failed to meet the standard of care. That regulation is insufficient to establish that the size of the screen was inadequate, which leaves only Grady's expert's personal preference as the basis for his opinion that the screen size was inadequate. An expert cannot provide admissible evidence of the standard of care simply by citing his individual preference or belief, as opposed to actual evidence establishing an industry-wide standard. *See Jones*, *supra* at 706-707.

Similarly, Grady's expert's insistence that the screen needed to be positioned closer to Grady is unsupported. He essentially relies on a misreading of Defendant-Appellee Michael Allen's testimony for this proposition. Mr. Allen testified that a protective screen needed to be placed closer to a hypothetical group of players it was intended to protect, rather than a second hypothetical group of players a significant distance away, but never testified that in the practice in question the screen needed to be closer to Grady and the other regular first basemen than to the "short" first basemen. (R-149, 441-442.) He further testified he set up the screen and examined it to assure himself it would provide appropriate protection to the regular first baseman. (R-163-164.) Contrary to Grady's expert (R-352), Mr. Allen did look at the size of the screen and determine it to be adequate for protection. (R-163-164.) Grady's expert's assertion that the screen needed to be positioned closer to Grady is unsupported by any specific rule, regulation, or standard, or any scientific or technical analysis, and amounts only to his conclusory statement, insufficient to defeat summary judgment.[8]

[8] Grady's expert also asserted that the School District "acknowledged that the protection they provided was inadequate." (R-352.) No such admission was ever made. While the School District admitted that despite the protective screen, an errant thrown ball struck Grady, this does not mean it admitted the protection was *inadequate.* No protective equipment can ever completely prevent injury while participating in a sport. That does not mean it is legally, or otherwise, "inadequate."

Grady's expert's affidavit, moreover, purports to show only that the protective screen did not protect Grady as much as his expert contends it should have. It must be remembered that, once the School District made out its prima facie showing of assumption of risk, Grady could not assume there was a duty of care and argue the School District failed to meet it and thereby "unreasonably increased" the risk. Upon the School District's prima facie showing, there was a presumption that there *was* no duty with respect to that risk, and Grady had the burden of reestablishing a duty by showing the circumstances did not fall under the sweep of primary assumption of risk. He could not prove a duty existed by arguing the School District failed to meet its (nonexistent) duty, and thus did not reduce the risk as much as it should have, thereby reinstituting the duty through circular logic. Notwithstanding his expert's twisting language attempting to express his opinions in terms of "increased" risk, the affidavit sets forth nothing to suggest the protective screen actually increased Grady's risk of being hit.

Grady simply cannot prevail on the contention that the provision of the screen "unreasonably increased" the risk of being hit by a thrown ball. The argument defies logic. The risk was of being hit by a thrown ball. Grady testified that only some of the balls thrown bypassed the protective screen. That means the screen stopped some, and probably most, of the thrown balls. *By definition, the screen* ***REDUCED*** *the risk of being hit by a thrown ball.* What Grady is really

arguing is that the screen did not completely *eliminate* the possibility of being hit by a thrown ball. His contortion of that fact into the assertion that the screen actually increased, instead of reduced, the risk from thrown balls, is no more than an attempt to shoehorn this case into an exception to the assumption of risk rule when the exception simply does not fit – semantically trying to drive a square peg into a round hole.

This argument is in contrast to the arguments sustained in cases like *Kane, supra*. In *Kane,* the "bunching up" of runners in a hallway actually increased the risks the runners otherwise would have faced. *Kane, supra* at 528. Here, the protective screen used by the School District did not *increase* the risk Grady faced – at most, Grady's argument is that although it actually *substantially reduced* the risk he faced, it did not reduce that risk to absolute zero. Similarly, in *Laboy v. Walkill Central School District*, 201 A.D.2d 780 (3d Dept. 1994), a high school pole vaulter chose to "defensively" land on a mat that separated at a seam below him, causing his knee to slam into the hard floor below. *Id.* at 780. The seam in the mat thus arguably increased the risk he faced over landing on a mat without an improperly-placed seam (on which his knee would have struck only the softer surface of the mat). In other words, had he known of the seam, he might have chosen a different spot to "defensively" land – or might have abandoned "defensively" landing at all in favor of another route to protect himself. In

Stackwick v. Young Men's Christian Association of Greater Rochester, 242 A.D.2d 878 (4th Dept. 1997), the defendant failed to place any padding on the wall behind a basketball hoop, creating a risk of serious injury not inherent in the sport of basketball; there is no comparable utter failure to provide protective equipment here.

In *Parisi v. Harpursville Central School District,* 160 A.D.2d 1079 (3d Dept. 1990), a baseball player was struck in the face by a baseball when she was permitted to coach during practice without a catcher's mask on, despite an applicable safety handbook's requirement that a player in the catcher's position wear a mask at all times during practices and games. *Id.* at 1080. By contrast, there is no published requirement that a particular size screen be used in a multi-ball drill like that which Grady participated in at the time of his injury.

Huneau v. Maple Ski Ridge, Inc., 17 A.D.3d 848 (3d Dept. 2005), involved an attendant at the top of a tube-sledding slope who allegedly engaged in affirmative negligence by "spinning" the defendant's inflatable tube (causing the defendant to be dizzy at the bottom of the ride) and sending subsequent riders down too quickly such that they struck the defendant. No comparable affirmative negligence of the School District is present here. In the same vein, *Cruz v. City of New York*, 288 A.D.2d 20 (2d Dept. 2001), centered on a push sled that was ordinarily placed well away from a football field's active areas in order to avoid

the risk of collision, but which on a particular day was negligently left near the field and caused an injury to a running player. Again, no comparable conduct of the School District is at issue here.

Weinberger v. Solomon Schechter School of Westchester, 102 A.D.3d 675 (2d Dept. 2013), also does not aid Grady. In *Weinberger*, there was a specific regulation promulgated by a national softball association requiring that protective screens be "freestanding" (i.e., able to stand up on their own, not propped up). *Id.* at 676. That regulation was disregarded and a protective screen was used that was simply propped up between two benches. *Ibid.* There is no comparable specific regulation to support Grady's claims that the protective screen in this case should have been larger and/or positioned closer to Grady. However, that is not even the most glaring distinction between this case and *Weinberger.* After the school in that case improperly propped up the protective screen in violation of the specific regulation, the screen *fell down* – and the school's employee directed the student to leave the screen on the ground and continue pitching (upon which, of course, the ball was immediately hit back at her, striking her in the face). *Id.* at 676. These facts were the focus of the Second Department's decision against applying assumption of risk. *Id.* at 679-680. Here, by contrast, there was no disregard of a specific regulation, collapse of safety equipment, or express direction of a coach to

continue practice following the known failure of safety equipment in the present case.

The remaining cases cited by Plaintiff at pages 20 to 21 of his brief on appeal do not supply him with a valid argument that the circumstances here involved any "unreasonably increased" risk. *Philippou v. Baldwin Union Free School District*, 105 A.D.3d 928 (2d Dept. 2013), involved improperly taped or secured mats, which led to the plaintiff (a wrestler) being injured when his elbow struck a hard gymnasium floor where the mats had separated. *See id.* at 929-930. No comparable improper erection or defect in the protective screen was involved in this case, Grady's expert's unsupported contentions to the contrary notwithstanding. It is not clear why Grady cites *Framan Mechanical, Inc. v. State University Construction Fund*, 182 A.D.3d 947 (3d Dept. 2020), since that case has nothing to do with assumption of risk and it is cited for the proposition that a blanket assertion in an affidavit is insufficient to establish entitlement to summary judgment; here the School District founded its arguments for assumption of risk primarily on Grady's own admissions in deposition. *Connor v. Tee Bar Corp.*, 302 A.D.2d 729 (3d Dept. 2003), is unilluminating, since the defendant in that case failed to supply an affidavit or testimony upon personal knowledge on the key issue in that case – whether a motorboat was operated too fast – and it thus involves a straightforward application of summary judgment principles; the

affidavits in this case, by contrast, were all made upon personal knowledge, and, of course, Grady's own deposition testimony was admissible where introduced by the School District.

Brown v. Roosevelt Union Free School District, 130 A.D.3d 852 (2d Dept. 2015), found the defendants in that case failed to show they had not "unreasonably increased" the risk to the plaintiff by having her perform a sliding drill on a grass field, but did not otherwise describe the circumstances that raised a question of "unreasonably increased risk," and did not indicate what the defendants had submitted or how it was deficient; the case thus provides no useful guidance here. *Stillman v. Mobile Mountain, Inc.*, 162 A.D.3d 1510 (4th Dept. 2018), has already been addressed (see p. 21 n.5, *supra).* Finally, *Charles v. Uniondale School District Board of Education*, 91 A.D.3d 805 (2d Dept. 2012), involved failure to provide head and face protection to a lacrosse player, a circumstance that finds no

parallel in this case.[9]

It should be noted that none of these cases suggest a defendant must rule out every possible argument that an "unreasonably increased" risk existed in order to establish a prima facie defense of assumption of risk. Instead, as discussed in Point II, *supra*, the task of the defendant at the prima facie stage is simply to show the risk was inherent to an activity and known to the plaintiff. It is then up to the *plaintiff* to submit admissible evidence creating a genuine issue of fact as to the existence of an unreasonably increased risk. Only then is the defendant called upon to submit evidence showing there is, in fact, no genuine issue as to whether the risk was "unreasonably increased." The cases cited by Grady apparently involve defendants who reached the latter step and failed to meet their burden.

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[9] *Zmitrowitz v. Roman Catholic Diocese of Syracuse*, 274 A.D.2d 613 (3d Dept. 2000), cited by Grady in another part of his brief, is a further case of coaches failing to direct a catcher to wear a catcher's mask, in violation of the customary practice as established by the plaintiff's evidence. There is no testimony or evidence in this case that that it was a customary practice across the state to use larger protective screens positioned closer to the players in multi-ball drills. *Zmitrowitz* thus does not support Grady's arguments for "unreasonably increased" risk.

Gilbert v. Lyndonville Central School District, 286 A.D.2d 896 (4th Dept. 2001), and *Royal v. City of Syracuse*, 309 A.D.2d 1284 (4th Dept. 2003), in addition to being from another judicial department, held the plaintiffs in those cases had raised issues of fact as to unreasonable increase in risk, without describing the proof the plaintiffs submitted or explaining whether it involved appropriate scientific and technical evidence. The decisions in a vacuum are not instructive as to the issues in this case.

They are not cases where the defendant established its initial prima facie burden, and the plaintiff utterly failed to provide anything beyond self-serving statements of a purported expert, without scientific or technical support, to create a genuine issue as to the presence of an unreasonably increased risk. That is the case here, and the School District was never in a position where it was obligated to provide admissible evidence negating the existence of an unreasonably increased risk.

Therefore, Grady's contentions that the protective screen unreasonably increased the risk he faced, excusing his assumption of the risk that led to his injury, are without basis.

B. The Cloudy, Cool, Windy Conditions and Other Conditions Cited by Grady Did Not Unreasonably Increase the Risk.

Next, Grady argues the environmental and circumstantial conditions somehow unreasonably increased the risk of his being struck by a ball. Not much explanation is provided and the contention does not merit extensive attention.

It must first be clarified that Grady never argues the use of multiple balls during the practice drill created an "unreasonably increased" risk.[10] His own expert, in fact, expressly disclaimed that argument:

> The safety issue in this case is not simply the use of a multi-ball drill, but *all the circumstances surrounding its use.*

[10] Grady only quoted his testimony as to his own personal opinion that the use of multiple balls was not an inherent risk of "playing baseball." (See Plaintiff's Brief p. 13.)

(R-350-351 (emphasis added.) Nowhere did Grady's expert actually say the use of multiple balls in the practice, in and of itself, created a safety issue. Nor did Grady cite any authority for such a proposition. He has, in short, not raised the argument – let alone sufficiently supported the argument – that the use of multiple balls "unreasonably increased" the risk that led to his injury.

Instead, his expert relies on various circumstances (the cloudy, cool, and windy weather, the presence of players of varying degrees of experience, etc.) as establishing an increase in the risks of participation in a multi-ball baseball practice. Neither Grady nor his expert may, with a straight face, argue that baseball is not played when it is cloudy, cool, windy, late in the day, or early in the season; that it is not played with a mix of players of varying experience on the field; or that it is not played outside. Such "less than optimal" conditions, as the Court of Appeals has stated, do not take an activity out of the scope of primary assumption of risk.

The plaintiff in *Bukowski, supra,* claimed the lack of a protective screen, a "multicolored pitching backdrop," and "low lighting" enhanced the risk of being hit such that his claims escaped the assumption of risk doctrine. *Id.* at 355-356. The Court of Appeals clarified "there is a distinction between accidents resulting from defective sporting equipment and those resulting from suboptimal playing conditions." *Id.* at 357. It essentially limited "non-assumed risks" to such matters

as defective sporting equipment. *Ibid.* (citing *Siegel v. State,* 90 N.Y.2d 471, 488-489 (1997) (torn tennis net) and *Owen v. R.J.S. Safety Equipment,* 72 N.Y.2d 967 (1992) (defective guard rail and faulty track design)).

This Court in *Legac* also rejected very similar arguments, including that the hard floor of a gymnasium where baseball tryouts were conducted created an "unreasonably increased" risk due to the "odd hops" baseballs took on the floor. This Court stated that assumption of risk may encompass risks created by such "less than optimal" conditions. *Id.* at 1584.

The conditions listed by Grady's expert – cloudy, cool, windy weather, late in the afternoon, with a mix of experienced and less-experienced players present – fall squarely within the category of "less than optimal" conditions and thus within the scope of Grady's assumption of risk. Grady therefore cannot cite them to evade the bar of his primary assumption of risk.[11]

[11] The accident involving Grady happened so quickly that additional supervision on the field could not have prevented it, dooming his negligent supervision claim to the extent it exists separate from the alleged issues involving the protective screen and its positioning or the other conditions of the practice. Once again, Grady (at Plaintiff's Brief p. 35 n.6) responds with a large number of words that only regurgitate his arguments about the adequacy of the safety *precautions,* which have been dealt with above, and have nothing to do with the adequacy of the number of supervisors or the quality of supervision at the time of the incident.

POINT IV

GRADY CANNOT CLAIM HE WAS UNAWARE OF THE RISK

It is well-established that a voluntary participant assumes the risks of which he is aware, such that other parties have no duty to protect him from those risks. Grady, however, attempts to turn this rule on its head and argue that the provision of safety measures somehow eliminates his awareness of risks he actually identifies aloud.

This Court in *Legac* noted that in the context of sports or other valuable recreational activities, the duty of care is only to make the conditions "as safe as they *appear* to be." *Legac, supra* at 1583 (quoting *Turcotte, supra* at 439; emphasis added). Grady argues the protective screen was not as safe as it appeared to be, citing *McGrath v. Shenendehowa Central School District,* 76 A.D.3d 755 (3d Dept. 2010),[12] but as should now be clear, the facts of this case do not support the argument.

Grady saw that the protective screen could not and did not entirely eliminate the risk of being hit by an errant throw. He saw errant throws bypass the screen. He saw at least one errant throw get past the screen and strike a fellow player. He

[12] In *McGrath,* the portion of a field surface that occasioned the plaintiff's injury appeared level, but in fact ruts and holes were concealed by loose fill, creating a non-visible hazard. *Id.* at 757-758.

even commented on the risk prior to his injury. The screen was precisely as safe as it appeared to Grady to be.

He nevertheless argues that the School District's provision of the protective screen rendered him unaware of the risk of an errant throw, *when he had just seen errant throws bypass the screen and strike at least one other student*. His argument is meritless for two reasons.

First, it is entirely contrary to reality. Grady was still aware a thrown ball could go above or around the screen. He witnessed it. He *commented* on it. He recognized it made the practice dangerous. Even if he had not, any logical person would recognize that an errant throw could go above or around any screen, no matter how tall or wide.

Second, if adopted, the argument would discourage the use of safety measures. It would place school districts in a better position by refraining from utilizing safety measures whenever a risk was obvious or known. Thus, as Grady's argument runs, the use of a safety measure renders a student-athlete who actually recognizes and acknowledges a risk nevertheless "ignorant" of its existence through a legal fiction, thereby depriving the school district of the protection of the assumption of risk doctrine. However, if the school district refrained from using safety measures to mitigate an obvious risk, the student-athlete would have no response to the assumption of risk argument, and the school district would escape

liability. The argument would create an incentive to refrain from taking safety measures. No such argument should be adopted by the Court, as a matter of public policy.[13]

Nor, contrary to Grady (Plaintiff's Brief p. 32), did Defendant-Appellee Michael Allen testify he instructed Grady that the screen would absolutely protect Grady from harm or be one hundred percent effective against any ball no matter how thrown, thereby "misleading" Grady to believe there was no residual danger and somehow "concealing" the risk. Instead, in response to a question whether he had "convey[ed] that information to the people who had to play first base . . . , that screen is there to protect you," he testified only that he believed the players understood the screen was there to offer them protection: "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-200-201.) Mr. Allen's response cannot reasonably be interpreted as testimony that he made the extraordinary and unlikely statement to Grady and the other players that the screen would completely and absolutely protect them from any wild or errant throws. Grady's own testimony establishes no such statement was made. (R-109.)

[13] Grady dismisses this argument, insisting that the school district has a duty to protect from unreasonably increased risks. As with many of Grady's arguments, this depends on ignoring the rules of assumption of risk. If the risk is known to and assumed by the player, there is no duty to protect against it, and the failure to execute that nonexistent duty cannot be cited as "increasing" the risk.

Absent such an improbable and unbelievable statement, it is plain that Grady knew there was some remaining risk notwithstanding the use of the screen – particularly when he then commented on it – and chose to continue participating in the baseball practice anyway. Grady subsequently observed errant throws bypassing the screen and strike at least one other student. Regardless of Mr. Allen's alleged statements before that, Grady certainly knew after that (and prior to his injury) that it could happen.

Thus, Grady's arguments suggesting he was unaware of the risk that led to his injury are meritless.

POINT V

GRADY HAS NOT PRESERVED AN ARGUMENT BASED ON INHERENT COMPULSION AND NO SUCH COMPULSION OCCURRED

Next, Grady attempts to avail himself of an exception to primary assumption of risk that applies when a student has been "compelled" to engage in an activity. However, that argument was not raised before the Supreme Court and is not preserved for review. Further, the exception does not apply merely because a coach organized the practice in which a player was injured, and there are no other facts upon which the "inherent compulsion" theory may be hung in this case.

Although Grady referred a couple of times in his papers before the Supreme Court to the coaches as having implicitly directed players to participate in the practice on March 8, 2017, he never argued that the doctrine of "inherent compulsion" applied to vitiate his assumption of risk during the practice. (See generally R-337-346, 408-425.) Nevertheless, he purports to raise it for the first time in a footnote to his brief. (See Plaintiff's Brief p. 33 n.5.) The argument has not been preserved for appeal and it is respectfully submitted that it should not be entertained. *See, e.g., New York Higher Education Services Corp. v. Ortiz*, 104 A.D.2d 684, 685 (3d Dept. 1984) (argument not presented to Supreme Court in opposition to summary judgment was not preserved for appeal and could not be raised for the first time on appeal); *Kellman v. State of New York*, 36 A.D.3d 668, 669 (2d Dept. 2007) (same).

Even if this argument had been raised below and preserved for appeal, it would have no merit. It is well-established that participation in an organized game or practice does not, in and of itself, involve "compulsion" so as to exclude assumption-of-risk principles. In *Benitez*, a high school football player was found to have assumed the risk of his injury (a broken neck) although he was participating in a formal game at the time of the injury. *Benitez, supra* at 654. The Court of Appeals explained that in order for so-called "inherent compulsion" to overcome application of assumption-of-risk principles, two factors must be

present: direction by a supervisor, and economic or other circumstances impelling compliance. *Id.* at 658. Although the plaintiff "may have feared that if he did not play or if he asked to be rested his athletic standing or scholarship opportunities might be jeopardized," there was no evidence that in the presence of his concern over some "unreasonably heightened risk" his coach had "directed him to disregard a risk he would not otherwise have assumed." *Id.* at 659. Here, Grady voluntarily participated in practice, did not articulate to the coaches that he was concerned about balls bypassing the protective screen, and continued participating without any specific direction by the coaches to continue practice despite the risk of being hit by a ball that bypassed the screen. Under *Benitez,* no "inherent compulsion" argument can be sustained merely because the practice was originally organized by the coaches. *See also O'Connor, supra* at 864 (plaintiff's "voluntary participation in baseball practice on the date of the accident did not implicate the doctrine of inherent compulsion").

The same conclusion is dictated by *Bukowski,* for the player there – who was aware of the obvious risks of pitching without a protective screen – also "decided 'to go along with how the coach set up practice.'" *Bukowski, supra* at 357. Assumption of risk was found to bar recovery in that case, as previously noted, and thus the circumstances cannot have been viewed by the Court of Appeals as involving inherent compulsion.

Smith v. J.H. W. Elementary School, 52 A.D.3d 684 (2d Dept. 2008), and *DeGala v. Xavier High School*, 203 A.D.2d 187 (1st Dept. 1994), cited by Grady, are not to the contrary. In *Smith*, a ten-year-old plaintiff testified that he agreed to participate in a "forward" relay race – that is, a relay race conducted in the ordinary manner, with children running forward – but (apparently in mid-race) two school employees instructed the children to start running backward instead. *Id.* at 684. The plaintiff had also previously been "told" by a teacher that he would be participating in the race. *Ibid.* The facts here simply are not comparable; Grady was not ten years old, and he had not been specifically directed by the School District to participate in a different practice, under different conditions, than the one he was engaging in when he first became aware of the risk of being struck by an errant throw. *DeGala* is inapplicable inasmuch as it found the possibility of inherent compulsion where the plaintiff felt he had no choice but to wrestle with a heavier teammate because the teammate was the co-captain of the wrestling team. *Id.* at 187. The circumstance has no parallel to the instant case.

The mere fact that the coaches originally set up the practice does not allow Grady to avoid the bar of his assumption of the risk of being struck by a baseball during the practice. Thus, even if he had preserved the argument that the doctrine of "inherent compulsion" should apply – which he did not – the argument would be meritless.

POINT VI

IN LIGHT OF HIS ASSUMPTION OF RISK, GRADY CANNOT ARGUE THE SCHOOL DISTRICT FAILED TO SATISFY A DUTY OF CARE, AND THE ARGUMENT IS MERITLESS ANYWAY

As discussed above, a prima facie showing of primary assumption of risk eliminates a school district's duty of care with respect to the risk that was assumed. Again, many of Grady's arguments seek to avoid the bar of his assumption of risk by assuming a duty existed and arguing the School District failed to meet it. This, however, is not an avenue available to a plaintiff when the defendant has made out a prima facie case of primary assumption of risk. Nevertheless, Grady persists, with one broad variation being that the School District or various of its employees did not satisfy vague and general requirements in certain regulations. No such argument is adequate to oppose summary judgment in the present case.

As noted in Point II, *supra,* this Court's decision in *Bukowski* (which was subsequently affirmed by the Court of Appeals) specifically stated that once a defendant has shown by the plaintiff's own testimony that he was aware of an inherent, obvious risk, evidence that use of protective equipment could have lessened the risk is "irrelevant." *Bukowski,* 86 A.D.3d at 738. In other words, once the defendant has established a prima facie showing of assumption of risk, the plaintiff cannot substitute a purported showing of "failure to satisfy a duty of care"

for actual evidence of an increased risk due to the defendant's actions, or violation of an independent, specific statutory or regulatory requirement. At that point the presumption is that there is no duty of care with respect to the specific risk in question, and plaintiff must present evidence of an unreasonably increased risk to reify the existence of a duty of care.

Grady does neither. His attempt to establish a regulatory violation begins with a collection of statements in 8 NYCRR § 135.4(c):

> (7) Basic code for extra class athletic activities. Athletic participation in all activities 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 this code. A board may authorize appropriate staff members to consult with representatives of other school systems and make recommendations to the board for the enactment of such rules;
>
> * * *
>
> (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;
> > >
> > > * * *
>
> (g) to conduct all activities under adequate safety provisions . . . .

As even a cursory review of these provisions reveals, they are general in nature and do not support Grady's arguments that the specific circumstances in this case violated the regulation or otherwise failed to meet any applicable standard of care.

See, e.g., *Bukowski*, 86 A.D.3d at 738 (rejecting plaintiff's argument based on binding rules and governing standards where plaintiff had failed to show such rules or standards specifically required use of protective screen or a different pitching backdrop); *cf. Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343 (1998) (general requirement to provide reasonable protection and safety not sufficiently specific to base claim of violation of Labor Law § 241).

Grady's response that the regulation employs the term "duty" (Plaintiff's Brief p. 39) in regard to safety practices misses the point. The question is not whether some duty, at some level, is suggested. The question is whether a sufficiently specific duty is imposed to ground a negligence claim, or whether the regulation simply provides a general statement encouraging safe practices. Absent a specific direction in the regulation that was violated by the School District, Grady's argument is an attempt to end-run the need to provide some support beyond his expert's personal opinion for the claim that the practice was culpably unsafe. His expert cannot simply say "I say it was unsafe." Grady attempts to use the regulation to insist the School District had a regulatory duty to provide safety, and it was violated because the practice was unsafe. But what is Grady's evidence that the practice was culpably unsafe? His expert's effective statement, "I say it was unsafe." The requirements of evidence, it is respectfully submitted, cannot so easily be avoided.

In a further effort to establish a violation of the regulation, Grady argues that the School District was obligated to hire athletic trainers "only in accordance" with the provisions regarding the athletic trainer providing assistance in fitting protective equipment and inspecting playing surfaces for safety. Because the athletic trainer in this case did not inspect the Warrior Drill or the protective screen on March 8, 2017, the argument runs, the School District violated a legal duty.

This argument is baseless for several reasons. First, the regulation states only that an athletic trainer should "assist" in these roles, not that the athletic trainer must be involved in fitting every single piece of protective equipment and inspecting the setup of every single practice, every day.[14] Second, the School District's board of education is directed only to "permit" athletic trainers to serve consistent with the succeeding general principles, including those relating to fitting protective equipment and inspecting playing surfaces. It simply strains the language of the regulation too far to say that because an athletic trainer did not, on this particular occasion, involve herself with the protective screen or analyze the Warrior Drill setup, the School District's board of education was affirmatively

[14] Grady contends that the regulation "requires" the athletic trainer to assist with protective equipment. It is respectfully submitted that the regulation, which uses the term "assist" and does not specifically direct that the athletic trainer be involved with every piece of protective equipment without exception, cannot reasonably be read to impose the unvarying requirement Grady urges.

guilty of permitting an athletic trainer to be employed inconsistent with the regulation.[15]

Grady also argues (apparently) that the School District was negligent in not enacting additional unspecified rules. (Plaintiff's Brief p. 41.) No such argument was raised below. In fact, the provision Grady relies upon for this argument – 8 NYCRR § 135.4(c)(7)(i)(a) – was never cited at all in Grady's opposition papers before the Supreme Court. (See R-337-361, 408-425.) The argument thus has not been preserved for review by this Court.

Further, the argument's foundation stands in sand. It is premised upon the language of 8 NYCRR § 135.4(c)(7)(i)(a) requiring boards of education to conduct athletic activities in accordance with the regulation itself "and such additional rules . . . as may be adopted by such boards." Grady insists the word "and" mandated the School District to enact some rule, possibly one related in some way to the issues in this case. The word "and" in the context of the regulation does not bear such a construction. More significantly, the use of *"may"* in direct reference to the adoption of additional rules signifies, in the clearest possible terms, that the

[15] Grady's expert claims the athletic director, Brad Tomm, did not review the practice plan and perform a "risk management analysis" before the practice. He cites no record evidence to this effect. Nor does he cite any standard, rule, or regulation requiring that the athletic director of a school district pre-screen every practice plan or athletic field.

enactment of such additional rules is left to the sound discretion of a board of education.

Therefore, Grady cannot simply presume the existence of a duty, and argue it was breached, to establish the risk he assumed was "unreasonably increased." Nor do the general phrases in the regulation he cites provide any basis for him to argue the School District violated a specific legal or regulatory requirement. His arguments based on such analysis fail as a matter of law.

CONCLUSION

Plaintiff-Appellant Kevin Grady expressly recognized the risk of an errant throw bypassing a protective screen during a baseball practice, saw such a throw strike another player, commented on the risk, and continued to participate, until such an errant throw injured him. The risk was inherent to the practice, it was open and obvious and actually observed by him rather than being concealed, and there is no evidence it was "unreasonably increased." Defendants-Appellees respectfully demand an order affirming the dismissal of the Complaint upon summary judgment, and granting Defendants-Appellees their costs as well as such other relief as may be just.

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Respectfully submitted,

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