APL-2021-00041
Broome County Clerk's Index No. EFCA2017002132
Appellate Division, Third Department Docket No. 530346

Court of Appeals
of the
State of New York

KEVIN GRADY,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

AMICUS CURIAE BRIEF ON BEHALF OF NEW YORK STATE TRIAL LAWYERS ASSOCIATION

NEW YORK STATE TRIAL LAWYERS ASSOCIATION
Amicus Curiae
82 Nassau Street, Suite 301
New York, New York 10038
212-349-5890

On the Brief:

Edward A. Steinberg
Souren A. Israelyan
Annette G. Hasapidis

Date Completed: June 23, 2021

STATEMENT PURSUANT TO RULE 500.1 (f)
OF THE RULES OF PRACTICE OF
THE COURT OF APPEALS

Amicus Curiae – New York State Trial Lawyers Association - is a registered New York not-for-profit corporation with tax exempt status under I. R. C. § 501 (c) (6). It has no parents, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF CASES & AUTHORITIES

QUESTION PRESENTED

What is the appropriate place, if any, in the New York jurisprudence for the doctrine of primary assumption of risk, a remnant of the bygone era of contributory negligence, since the doctrine materially deviates from and cannot comfortably coexist with New York's comparative negligence framework (Article 14-A of CPLR), and its continued existence adversely affects fair administration of civil justice?

PRELIMINARY STATEMENT

The New York State Trial Lawyers Association ("NYSTLA") respectfully submits this amicus brief to address a common law doctrine carrying significant implications in the field of personal injury law, the assumption of risk doctrine. NYSTLA was formed in 1953 to promote a safer and healthier society and to assure access to the civil justice system by wrongfully injured parties. In advancing its core objective to promote a safer and healthier society, NYSTLA is often the voice for the silent majority – the injured worker, pedestrian, automobile operator, and/or athlete.

The issue on this appeal is of statewide importance, affects safety of participants in recreational and athletic activities, and the fair administration of the civil justice system. As a friend of the Court, NYSTLA expects this brief to be a valuable resource to assist the Court in its consideration and deliberation of the issue raised on this appeal.

A version of this brief was submitted by NYSTLA in the case of *Ninivaggi v County of Nassau*, APL-2020-00093 (36 NY3d 1037 [2021]). However, recently we were notified that the parties in the *Ninivaggi* matter have settled and the appeal pending in the Court of Appeals will be withdrawn. Incidentally, this is the second time that an appeal on the assumption of risk doctrine in the Court of Appeals is being withdrawn preventing this Court from deciding the continued viability of the

doctrine (*see Philius v City of New York*, 161 AD3d 787 [2d Dept 2018, Connolly, Austin, J.J., concurring based on the Second Department's precedent], *lv granted* 2018 NY Slip Op 80737[U] [2d Dept 2018], *app withdrawn* 32 NY3d 1108 [2018]).

On January 28, 2021, the Third Department issued the decision in the action of *Grady v Chenango Valley Cent. School Dist.* (190 AD3d 1218 [3d Dept 2021]), with Justices Pritzker and Colangelo writing separate dissenting opinions. The *Grady* case has been accepted by the Court of Appeals for review under section 500.11 of the Court of Appeals Rules of Practice. *Grady*, like *Ninivaggi*, raise the significant issue about the continued viability of the assumption of risk doctrine, or its contours.

BRIEF STATEMENT OF FACTS

During a combined varsity and junior varsity outdoor baseball practice, the plaintiff, a high school student of the school district, was hit in his face with a ball causing loss of vision in his right eye. During the multiple infield drills, called a "Warrior Drill," multiple balls were simultaneously in play. Cognizant of the risk that students at the first base might be hit by a ball, the school district installed an available protective screen, without considering whether a larger screen should have been used. During the drill, Grady was assigned to the first base, where he was struck by an errant ball, and the screen did not provide protection.

The Supreme Court, Broome County (Lebous, J.), granted the school district's motion on the constraint of the case law, but noted parenthetically: "In this court's view, under these circumstances equity should dictate a balancing of the parties' respective degree of fault." The Third Department affirmed the judgment (190 AD3d 1218 [3d Dept 2021]), with Justices Pritzker and Colangelo, dissenting in separately written decisions.

SUMMARY OF ARGUMENT

Assumption of risk as a legal doctrine first surfaced in the industrial age and was employed as a means to suppress and foreclose servants' rights to sue their masters for their masters' negligence. In one respect, the doctrine meant that the master owed no duty to his servant because the servant "assumed the risk" of the master's negligence. With human progress, the strict rules such as contributory negligence and assumption of risk became obstacles to dispensing substantial justice.

In 1975, New York passed Article 14-A of CPLR, abolishing the doctrines of contributory negligence and assumption of risk, and in their place and stead adopting the pure comparative negligence framework. The plain meaning of Article 14-A and the legislative history behind it demonstrate that contributory

negligence and assumption of risk were subsumed into plaintiff's comparative negligence, an affirmative defense to be plead and proved by defendant.

Despite the clear and unambiguous statutory framework and the legislative intent, the doctrine was revived in *Turcotte v Fell* (68 NY2d 432 [1986]) and expanded in *Morgan v State* (90 NY2d 471 [1997]). Although the cases could be explained on the "no *breach* of duty" analysis, they appeared to and were interpreted as renaissance of the "no duty" analysis with all its ramifications that the legislature intended to eradicate by the enactment of the pure comparative negligence statutes. The doctrine span in many directions and its applications have become detached from realities and expectations of persons engaged in recreational or athletic activities and those in charge of such activities and recreational/sporting venues. The doctrine in effect became, like in the era it was born, a result-driven legal doctrine to foreclose actions brought by injured parties against negligent parties.

The application of the doctrine caused significant confusion, increased litigation, and produced contradictory and conflicting decisions. Because of its evident unfairness, New York courts have struggled to find an appropriate place for the doctrine. Feeling restrained by precedent, the courts have tried to limit its application and to emphasize its exceptions. The doctrine is in conflict not only with the public policy of this State which allows comparative negligence, but also

with the policies to protect and ensure the safety of participants engaged in recreational and athletic activities, and the need to deter negligent conduct. The doctrine allows, and potentially encourages, negligent conduct by landowners who abdicate their duty of maintaining their premises safe, and may actually encourage risky behavior by participants in athletic and recreational activities, and therefore have a chilling effect by frightening people away from participating in those activities. The doctrine, like in the pre-CPLR 1411 days, serves as a means to transfer burdens from negligent parties to their victims and the social institutions supported by public funds. The same reason the doctrine was abolished in the first place cries for the need to retire it again, and this time hopefully for good.

The doctrine has no place in New York's pure comparative negligence framework, and should be discarded even as a means to describe any action by a plaintiff. Alternatively, it should be removed from the duty analysis and, if facts warrant, be considered as part of a plaintiff's comparative negligence.

ARGUMENT

THE PRIMARY ASSUMPTION OF RISK DOCTRINE, A REMNANT OF THE BYGONE ERA OF CONTRIBUTORY NEGLIGENCE, IS AN OBSTACLE TO THE DISPENSING OF SUBSTANTIAL JUSTICE.

A. Article 14-A of CPLR and legislative intent

Before the enactment of Article 14-A of CPLR in 1975, a plaintiff's

contributory negligence, however slight, barred recovery (*Fitzpatrick v International Ry. Co.*, 252 NY 127, 134 [1929] ["the slightest contributory negligence upon the part of the plaintiff, no matter how or by whom it may be proven, bars recovery, establishes that there is and was no cause of action, no right to damages"]).

In the words of Assemblyman Fink, the sponsor of the Article 14-A legislation, "the traditional contributory negligence rule has, by rigid application, become an obstacle to the dispensing of substantial justice" (Assembly Introducer's Mem in Support, Bill Jacket, L 1975, ch 69 at 1; *see also* 13th Ann Report of N.Y. Jud Conf, 1976 Legis Doc No. 90 at 238).

By enacting Article 14-A of the CPLR, New York abolished the doctrines of contributory negligence and assumption of risk,[1] and in their stead and place substituted the doctrine of pure comparative negligence:

---

[1] "But the greater mischief was that in one of its aspects the phrase 'assumption of risk' gave judicial expression to a social policy that entailed much human misery. The notion of 'assumption of risk' as a defense – that is, where the employer concededly failed in his duty of care and nevertheless escaped liability because the employee had 'agreed' to 'assume the risk' of the employer's fault – rested, in the context of our industrial society, upon a pure fiction. And in all English-speaking countries legislation was necessary to correct this injustice. In enforcing such legislation the courts should not lose sight of the ambiguous nature of the doctrine with which the legislation dealt. In giving effect to the legislative policy, care must be taken lest such ambiguity perpetuate the old mischief against which the new legislation was directed." (*Tiller v Atlantic Coast Line R. Co.*, 318 US 54, 69-70

> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages. (CPLR 1411.)

The language of the statute cannot be any clearer. The assumption of risk does not bar recovery but is relevant to the comparative negligence of a plaintiff or decedent. Plaintiff's assumption of risk no longer stood as a bar to recovery, but merely as a factor to be considered on the issue of plaintiff's comparative negligence. As stated by the drafters: "This article equates the defenses of contributory negligence and assumption of risk by providing that neither shall continue to serve as a complete defense in actions to which this article applies" (13th Ann Report of N.Y. Jud Conf, 1976 Legis Doc No. 90 at 240).

This was and is the legislative framework and one that is clear and workable. Plaintiff has the burden to plead and prove that defendant is negligent, and defendant has the burden to plead and prove that plaintiff was negligent (*see also Rodriguez v City of New York*, 31 NY3d 312, 317-324 [2019]). The assumption of

---

[1943, Frankfurter, J., concurring].) To understand the "social policy that entailed much human misery," referenced by Justice Frankfurter, review of two cases might be helpful: *Priestly v Fowler*, 3 Mees & Welsb 1 (1838); *Tuttle v Detroit G.H. & M. Ry. Co.* 122 US 189 (1887).

risk is a factor to be considered when resolving the issue whether plaintiff was comparatively negligent.

As explained in *Rodriguez*, *supra*, a typical negligence case involves the following questions: (1) whether defendant is negligent; (2) whether defendant's negligence was a substantial factor [of the accident or the injury]; (3) whether plaintiff was negligent; (4) whether plaintiff's negligence was a substantial factor [of the accident or the injury]; and (5) apportionment of percentage of fault of defendant, and the percentage of fault of plaintiff (31 NY3d at 324). Whether a plaintiff assumed a risk of injury doctrinally and logically falls within the third question whether the plaintiff's conduct was negligent. "Once the determination is made that the defendant breached a duty to the plaintiff, then the courts should treat any consensual and voluntary conduct that contributed to plaintiff's injury as 'culpable conduct,' to be considered in the apportionment of damages in accordance with CPLR 1411" (Danielle Clout, *Assumption of Risk in New York: The Time Has Come to Pull the Plug on this Vexatious Doctrine*, 86 St John's L Rev 1051, 1073 [2012]).

Both the drafters and the sponsor noted that assumption of risk is a form of culpable conduct, and does not absolve or relieve defendant's duty:

> "On occasion, a New York court has taken the position that assumption of risk is not a mere defense to any

> action for negligence, but actually negated any duty owed by the defendant to the plaintiff: 'The doctrine of assumption of risk lies in the maxim *volenti non fit injuria.*[2] Based as it is upon plaintiff's assent to endure a situation by the negligence of the defendant, it relieves the defendant from performing a duty which might otherwise be owed to the plaintiff where the plaintiff has assumed the risk of harm . . . no breach of duty by the defendant is shown and consequently no negligence.' *McEvoy v. City of New York*, 266 App. Div. 445, 447 (2nd Dep't 1943), *aff'd*, 292 N.Y. 654 (1944).
>
> "Such an analysis would bar plaintiff's recovery as a matter of law, thereby undermining the purpose of this article – to permit partial recovery in cases in which the conduct of each party is culpable. Just as there has been a 'general softening of the rigidities of the doctrine of contributory negligence' with 'a tendency to treat it almost always a question of fact' (*Rossman v. LaGrega*, 28 N.Y.2d 300, 306 (1971)), as well as a growing recognition that 'the great issue is not liability but the damages recoverable for injuries' (*Andre v. Pomeroy*, 35 N.Y.2d 361, 370 (1974) (Breitel, dissenting)), it is expected that the court will treat assumption of risk as a form of culpable conduct under this article.

(13th Ann Report of N.Y. Jud Conf, 1976 Legis Doc No. 90 at 241.)

The bill sponsor's memorandum in support also made the same point:

> "First, the bill would equate the defenses of contributory negligence and assumption of risk under the rubric of 'culpable conduct.' This is consistent with the position taken by the New York courts (McFarlane v. City of Niagara Falls, 247 N.Y. 340, 347 (1928). Unless assumption of risk is so treated, it would negate any duty owed by defendant to plaintiff (see McEvoy v. City of New York, 266 App. Div. 445, 447 (Second Dept. 1943),

[2] *Volenti non fit injuria* means "to a willing no injury is done."

> affd. 292 N.Y. 654 (1944)), thus, undermining the purpose of the proposed bill, which is to permit partial recovery in cases in which the conduct of each party is culpable." (Assembly Introducer's Mem in Support, Bill Jacket, L 1975, ch 69 at 3; *see also* OCA Mem in Support, Bill Jacket, L 1975, ch 69 at 3.)

To understand the change brought by Article 14-A of CPLR, it is helpful to review the case, *McEvoy v City of New York* (266 App Div 445 [2d Dept 1943], *affd* 292 NY 654 [1944]), which the bill drafters and the sponsor referenced.

> "The doctrine of assumption of risk lies in the maxim, volenti non fit injuria. Based as it is upon the plaintiff's assent to endure a situation created by the negligence of the defendant, it relieves the defendant from performing a duty which might otherwise be owed to the plaintiff. Where the plaintiff has assumed the risk of harm through the acts or omissions of the defendant, it matters not that the plaintiff was free from contributory negligence. In such case no breach of duty by the defendant is shown and consequently no negligence." (*McEvoy*, at 447.)

While "[a] court should construe unambiguous language to give effect to its plain meaning" (*Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 522 [2019]), the legislative history dispels any doubt that the enactment of Article 14-A of CPLR overruled the line of cases that plaintiff's assumption of risk relieves or negates a defendant's duty. Since the enactment of Article 14-A, such reasoning would "undermine the purpose of this article" (13th Ann Report of N.Y. Jud Conf, at 241; Assembly Introducer's Mem in Support, Bill Jacket, L 1975, ch 69 at 3; OCA Mem in Support, Bill Jacket, L 1975, ch 69 at 3).

B. Revival of assumption of risk doctrine – *Turcotte*

Contrary to the unambiguous legislative history, intent, and the clear language of CPLR 1411, the Court in *Turcotte v Fell* (68 NY2d 432 [1986]) held that "assumption of risk is not an absolute defense but a measure of the defendant's duty of care and thus survives the enactment of the comparative fault statute" (*id.* at 439). The Court characterized the case as one of "primary" assumption of risk: "Risks in this category are incidental to a relationship of free association between the defendant and the plaintiff in the sense that either party is perfectly free to engage in the activity or not as he wishes" (*id.* at 438-439). "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (*id.*). *Turcotte*'s holding undermined the purpose of the comparative negligence framework, at least to the extent it revived the assumption of risk doctrine.

In support of the duty analysis, the *Turcotte* Court cited three cases, *Akins v Glens Falls City School Dist.* (53 NY2d 325 [1981]), *Davidoff v Metropolitan Baseball Club* (61 NY2d 996 [1984]), and *Clapman v City of New York* (63 NY2d 669 [1984]). The *Akins* Court specifically stated: "This case does not involve the 'culpable conduct' (CPLR 1411) – be it assumption of risk or contributory negligence – of a spectator in the court of a baseball game" (*Akins*, at 327). The

Court acknowledged the pre-CPLR 1411 cases, but set them aside "because these cases arose prior to the adoption of the comparative negligence rules in this State (CPLR 1411), [when] application of the assumption of risk doctrine served as a complete bar to a plaintiff's causes of action without regard to the degree of care exercised by the owner of the ball park" (*id.* at 329). The Court went on to define the duty of an owner of the baseball field to its spectators (*id*. at 329-331). Similarly, the memorandum decisions in *Davidoff* and *Clapman* were decided not on the issue of assumption of risk, but on the issue whether the proprietor of a sporting venue *breached* its duty to spectators (*Davidoff*, 61 NY2d at 997; *Clapman*, 63 NY2d 697-697).

Turcotte might be explained on its specific facts. "Hard cases make bad law" pointedly applies to *Turcotte*. Before his unfortunate accident, Ronald J. Turcotte had a 17-year career as a professional jockey who had ridden over 22,000 races. Seconds after the subject race began, Turcotte's horse clipped the heels of the horse next to it and then tripped and fell, propelling Turcotte to the ground rendering him a paraplegic (*id.* at 435-436). Turcotte sued the jockey of the horse next to him, the owner of that horse, and the owner and operator of the racetrack, New York Racing Association ("NYRA").

Turcotte claimed that NYRA failed to water the "chute" leading to the main track, but overwatered the main track, causing "cuppy" surface (*id.* at 442-443).

Turcotte testified that "cupping" conditions are common on racetracks, that he had experienced them before at the same racetrack and on many other tracks, and that he had three prior races on the same track on the date of injury (*id.* at 443). Under these set of facts, *Turcotte*'s holding could certainly be explained that NYRA did not breach its duty of care. In other words, as to the first question whether defendant was negligent, the Court found that it did not breach its duty of care under the circumstances. A determination that a defendant did not *breach* its duty is distinctly different from a determination that the defendant had *no* duty. To the extent *Turcotte* is interpreted to conflate plaintiff's conduct with defendant's duty of care, such analysis is inconsistent with New York's pure comparative negligence framework (*compare Tiller v Atlantic Coast Line R. Co.*, 318 US 54, 67 [1943, Black, J.] ["assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon"]).

C. Renaissance of assumption of risk doctrine – *Morgan*

In *Morgan v State* (90 NY2d 471 [1997]) the Court granted leave to appeal four cases wherein defendants invoked the assumption of risk doctrine. The Court held that the assumption of risk "serves to define the standard of care under which a defendant's duty is defined and circumscribed because assumption of risk in this form is really a *principle of no duty,* or no negligence and so *denies the existence of any underlying cause of action.*" (*id.* at 485 [emphasis in original and internal

quotation marks omitted]). The Court made a plaintiff's conduct absolve the defendant of its duty, even when the defendant was negligent.

The Court affirmed the dismissal of claims in *Morgan v State*, *Beck v Scimeca*, and *Chimerine v World Champion John Chung Tae Kwon Do Inst.*, but reversed the judgment in *Siegel v City of New York*. Similar to *Turcotte*, in the *Morgan*, *Beck* and *Chimerine* cases, where the Court affirmed dismissal of plaintiffs' complaints, these decisions could be explained as no breach of duty holdings (*Morgan*, at 486-487; *see also Chimerine*, 225 AD2d 323, 323 [1st Dept 1996] ["there was no evidence that the defendants breached a duty of care owed to plaintiff"]).

In *Siegel*, the plaintiff had been a member of the Racquet Club for 10 years and played doubles once a week on the tennis court, and for over two years he *knew* that the side divider net was ripped, but his foot got caught in that torn net causing him to be injured (*id.* at 482). The Court held that "a torn or allegedly damaged or dangerous net – or other safety feature – is by its nature not automatically an inherent risk of a sport as a matter of law for summary judgment purposes. Rather, it may qualify as and constitute an allegedly negligent condition occurring in the ordinary course of any property's maintenance and may implicate typical comparative negligence principles." (*Id.* at 488.)

"Thus, the issue boils down to whether defendants here

> had a continuing duty to players to keep the net in good repair. We hold that they may in these circumstances and as to plaintiff Siegel, because a torn net is not sufficiently interwoven into the assumed inherent risk category.
>
> "We agree with Siegel's argument that because a torn net is not an 'inherent' part of the game of tennis in and of itself, he should not be deemed legally to have assumed the risk of injuries caused by his tripping over it. Our precedents do not go so far as to exculpate sporting facility owners of this ordinary type of alleged negligence." (*Id.* at 488-489.)

While in *Akins*, the Court was cognizant of the parameters of the inquiry and made a determination on the scope of the duty, specifically isolating and not considering plaintiff's culpable conduct (*see Akins*, 53 NY2d at 329), in *Turcotte* and *Morgan*, while unnecessary and possibly dicta, the decisions conflated plaintiffs' conduct with defendants' duty analysis (*Turcotte*, at 438-439; *Morgan*, at 485), starting renaissance of the assumption of risk doctrine in New York.

Analyzing the scope of defendant's duty based on plaintiff's conduct is the equivalent of placing the cart before the horse. In a premises liability case, "[t]he owner or possessor of the land has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable" (1A NY PJI3d 2:90). Negligence "is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances" (1A NY PJI3d 2:10). These standards provide the

necessary balance, and under appropriate circumstances a defendant may claim that it used reasonable care towards the premises and did not breach its duty.

Turcotte and the cases in *Morgan* could be explained as cases wherein defendants did not breach their duties, and, moreover, the Court's precedents do not "exculpate sporting facility owners of this ordinary type of alleged negligence" (*Morgan [Siegel]*, at 488-489; *see also Sykes v County of Erie*, 94 NY2d 912, 913 [2000] ["Although the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises, there is no evidence that the drain was defective or improperly maintained"]).

D. Assessment of doctrine's effect on the justice system

This Court provided an intellectually honest exposé of the doctrine in *Trupia v Lake George Cent. School Dist.* (14 NY3d 392 [2010]). After discussing the purported basis for preserving the doctrine, the Court noted:

> "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. While it may be theoretically satisfying to view such conduct by a plaintiff as signifying consent, in most contexts this is a highly artificial construct and all that is actually involved is a result-oriented application of a complete bar to recovery.

> Such a renaissance of contributory negligence replete with all its common-law potency is precisely what the comparative negligence statute was enacted to avoid. The doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." (*Id.* at 395.)

This result-oriented highly artificial construct significantly increased litigation, and arbitrariness in dispensing justice. A Westlaw search from 1987 (after *Turcotte*) to present reveals 1,108 reported cases on the subject, 882 of which were issued after *Morgan* (1997). Many of these cases are conflicting (*see Philius v City of New York*, 161 AD3d 787, 797-799 [2d Dept 2018, Connolly and Austin, J.J., concurring] [discussing "a multitude of conflicting cases from the four Appellate Division Departments"]; Robert S. Kelner & Gail S. Kelner, *Play Ball, But Beware the Cracks*, NYLJ, Sept. 25, 2018, at 3, col 1 ["The case law which has evolved with respect to the condition of the playing field has spawned sharply divergent and highly inconsistent opinions"]).

While this Court in *Siegel* permitted plaintiff's claims to proceed against the defendant, even though plaintiff knew about the precise condition for two years prior and which eventually caused his injury, the lower courts have dismissed scores of cases on the ground of a plaintiff's knowledge (*see e.g. Conrad v Holiday Valley, Inc.*, 187 AD3d 1520 [4th Dept 2020]; *Schorpp v Oak Mountain, LLC*, 143 AD3d 1136 [3d Dept 2016]; *Williams v New York City Hous. Auth.*, 107 AD3d 530 [1st Dept 2013]; *Palladino v Lindenhurst Union Free School Dist.*, 84 AD3d 1194

[2d Dept 2011]). It is not surprising that the vast majority of dismissed cases are substantially detached from the realities of expectations in engaging recreational or athletic activities, either by participants or by property owners/managers; the underpinning of the doctrine, however phrased, is deeply rooted in exculpating negligent parties from their wrongdoing.

Whether a plaintiff or a defendant, it is impossible to properly evaluate a reasonable outcome of a case that possibly involves the assumption of risk doctrine. The significant increase in litigation, inconsistent results, and confusion all erode trust in the civil justice system. "Because of the difficulties in applying the doctrine, the inconsistencies that result from it, and the legislative intent in passing CPLR 1411, the doctrine should be abolished in its entirety" (Danielle Clout, *Assumption of Risk in New York: The Time Has Come to Pull the Plug on this Vexatious Doctrine*, 86 St John's L Rev 1051, 1071 (2012).

Our courts have struggled with the doctrine's unfairness. For example, in *Palladino v Lindenhurst Union Free School Dist.* (84 AD3d 1194 [2d Dept 2011]), a case involving a plaintiff who while playing handball stepped on an improperly placed grate and sustained injuries, Justice Peter B. Skelos concurred in the result dismissing the case under the constraint of the Second Department's precedent (*id* at 1201). Justice Skelos noted that the Second Department's jurisprudence that voluntary participation in athletic or recreational activity implies consent to all

defects in the playing field so long as the defects are either known or open and obvious does not comport with this Court's holding in *Siegel* (*id.* at 1999). "The automatic negation of a landowner's duty in such circumstances would give landowners license to allow property, upon which sporting and recreational activities are held, to fall into despair" (*id.*), and "the plaintiff might reasonably expect that certain ordinary defects in the features of the playing surface will be repaired" (*id.* at 1200).

In *Philius v City of New York* (161 AD3d 787 [2d Dept 2018]), a case involving a plaintiff who stepped on a crack in the basketball court, the court dismissed the case on the ground of primary assumption of risk because plaintiff was aware of cracks on the basketball court and the cracks were open and obvious (*id.* at 789). Justices Francesca E. Connolly and Leonard B. Austin concurred based on the court's precedent, noting however that "[t]he doctrine of primary assumption of risk was never intended to allow a landowner to permit a recreational facility to fall into a neglectful state of disrepair, completely relieving it of any duty to sports participants" (*id.* at 790).

In *Grady* (190 AD3d 1218), understanding the elementary unfairness underlying the doctrine, but constrained by the Court of Appeals' precedent, the dissenting justices attempted to distinguish the case so that elementary justice could be administrated. *Grady* is an example why the doctrine is practically

unmanageable, logically unsound, and an obstacle to the dispensing of substantial justice.

Practically speaking, this precedential change will eliminate confusion and will not alter the summary judgment landscape. Landowners can seek dismissal of a complaint by establishing that plaintiff was the sole proximate cause of his or her injuries, instead of engaging in what has now become a tortured and confusing analysis of a plaintiff's actions under the assumption of risk doctrine.

E. Policy considerations

The policy to facilitate free and vigorous participation in athletic activities has been cited as the reason for keeping the doctrine after the adoption of the comparative causation framework in New York (*see Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 657 [1989]; *Trupia*, 14 NY3d at 395; *Bukowski v Clarkson Univ.*, 19 NY3d 353, 357-358 [2012]). As stated by Justice Connolly in *Philius*:

> "While athletics and recreation are socially valuable endeavors, society also has an interest in the safety of participants of those activities. Thus, insofar as one of the principal aims of tort law is to deter conduct that produces harm (*see* Dan B. Dobbs, The Law of Torts § 11 [2000]), it does not comport with public policy to preclude only sporting participants from suing landowners who have negligently allowed their properties to deteriorate – indeed, if the plaintiff had been a pedestrian who tripped while simply passing through the basketball court, he would be allowed to hold the defendant responsible for its negligence." (*Id.* at 797.)

It is difficult to believe that a conscientious proprietor of an athletic playing field would rather endanger the lives, health and safety of those who are reasonably expected to play in the field, than to make some reasonable effort to make the field reasonably safe. If there are people who would choose to endanger others' safety, lives and health in such manner, the laws should assure fair avenues of liability, since deterrence is one of its principal aims. "While '[t]he primary assumption of risk doctrine also encompasses risks involving less than optimal conditions' (*Bukowski v Clarkson Univ.*, 19 NY3d at 356), applying the doctrine of primary assumption of risk where a landowner has unreasonably allowed a sporting venue to fall into a state of disrepair is incompatible with the theoretical and pragmatic rationales behind the doctrine" (*Philius*, at 797).

> "Moreover, insofar as the doctrine of primary assumption of the risk was carried over after the enactment of comparative fault for public policy reasons (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d at 395), it does not make public policy sense to allow landowners who completely abdicate their duty to perform any kind of maintenance or repair on their property to gain the benefit of the defense." (*Philius*, at 797.)

The same question was posited by the dissenting justice in *Ninivaggi*:

> "By obviating the determination of the threshold issue of whether landowners have breached their duty to maintain their premises in a reasonably safe condition, the Second Department has removed landowners' incentive to inspect and repair their premises regardless of whether they were previously put on notice by the regular use of these sports facilities by young people." (*Ninivaggi v*

> *County of Nassau*, 177 AD3d at 988, Maltese, J., dissenting.)

The legal commentators also explained the policy and practical dangers of retaining the assumption of risk doctrine under which a plaintiff is denied recovering one cent even though the injury might be primarily caused by defendant's fault:

> "Such an outcome may actually encourage risky behavior rather than achieving the desired objective of preventing it. Potentially, it could open the door to participants in a given activity taking more risks – knowing that they will not be held liable for another participant's injury as long as they can show that the injury arose from a risk inherent to the activity – and could wind up frightening people away from participation in sports. One party winds up shouldering the entire burden for an injury that really arose from risks taken by two parties, an inequitable and undesirable end to such disputes." (Benjamin P. Pomerance, *Forewarned: Sports, Torts, and New York's Dangerous Assumption*, 76 Alb L Rev 1275, 1305 [2012/2013].)

Further, when a negligent party escapes liability, the loss suffered by the victim and burden born to care and provide for him or her falls on the social fabric for which we all compensate. While some negligent parties escape liability, and pass their burdens onto their victims, the victims' families, and the social institutions supported by public funds – the society as a whole suffers. The harm is multiplied manyfold with the corresponding loss of trust in the justice system.

With the COVID-19 pandemic forcing us to re-examine what works and

what does not, and bringing into the forefront the consideration for safety and security of the people, this is an opportunity to re-evaluate the shortcomings of the past and align the discussion with the plain meaning and intent of CPLR 1411.

> "The threshold issue in any premises liability cause of action is whether the defendants have breached their duty to maintain their premises in a reasonably safe condition and, if not, what was the comparative negligence of the plaintiff and the defendant landowner. By directing dismissal of these actions based upon the doctrine of primary assumption of risk, this Court may have thwarted the determination of this threshold issue where the determination should have been made by a trier of fact." (*Ninivaggi*, 177 AD3d at 986.)

Retaining this outdated legal doctrine causes more harm than benefit. It is a "highly artificial construct and all that is actually involved is a result-oriented application of a complete bar to recovery" (*Trupia*, at 395). Moreover, "the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded." (*Tiller v Atlantic Coast Line R. Co.*, 318 US 54, 72 [1943, Frankfurter, J., concurring].)

Indeed, some lower courts have applied the comparative negligence framework to cases involving recreational or athletic activities (*see e.g. Wyzykowski v State*, 162 AD3d 1705, 1706 [4th Dept 2018] ["claimant's awareness of the poor ice conditions and her decision to continue skating for some period of time, apparently to have a photograph taken, relate only to the issue of her

comparative fault, if any"]; *Simmons v Saugerties Cent. School Dist.*, 82 AD3d 1407, 1409 [3d Dept 2011] ["Contrary to defendant's argument, the open and obvious nature of the large hole in the bus circle and plaintiff's allegedly long-standing knowledge of it does not bar inquiry into whether the allegedly dangerous condition resulted from defendant's negligent maintenance of its property"]).

No valid policy justification exists for keeping this discriminatory doctrine that favors one set of potential defendants at the expense of public safety.

CONCLUSION & RECOMMENDATION

The primary assumption of risk doctrine is a material deviation from New York's legislative framework of comparative negligence. A plaintiff's assumption of risk has been subsumed under Article 14-A of CPLR as a part of plaintiff's culpable conduct. It is therefore recommended that the doctrine be discarded from usage. Alternatively, if assumption of risk has basis in facts, it should be considered as a part of plaintiff's comparative negligence analysis. In its current form, the primary assumption of risk doctrine is a remnant of the bygone era of contributory negligence, and an obstacle to the dispensing of substantial justice.

Dated: New York, New York
June 24, 2021

Respectfully submitted,
NEW YORK STATE
TRIAL LAWYERS ASSOCIATION

By: _____

Edward A. Steinberg
President of NYSTLA
82 Nassau Street, Suite 301
New York, New York 10038
(212) 349-5890

Also on the Brief:

Souren A. Israelyan
Annette G. Hasapidis

CERTIFICATION OF COMPLIANCE
PURSUANT TO 22 NYCRR § 500.14 (c)

The foregoing brief was prepared on computer. A proportionally spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
Point Size:	14
Line Spacing:	Double

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of cases and authorities, question presented, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 6,218.

Dated: New York, New York
June 24, 2021

Respectfully submitted,
NEW YORK STATE
TRIAL LAWYERS ASSOCIATION

By: _____

Edward A. Steinberg
President of NYSTLA
82 Nassau Street, Suite 301
New York, New York 10038
(212) 349-5890