To be argued by:
NICHOLAS I. TIMKO
(Time Requested: 30 minutes)

APL-2021-00041

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 MICHAEL FERRARO,

Defendants-Respondents,

BRIEF FOR PLAINTIFF-APPELLANT

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Broome County Clerk's Index No. EFCA2017002132

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Plaintiff-Appellant Kevin Grady respectfully submits this brief in support of his appeal of the January 28, 2021 Memorandum and Order of the Appellate Division, Third Department (the "Third Department Order"), which affirmed the decision and order of the Supreme Court, Broome County, entered October 31, 2019, that granted the motion for summary judgment of Defendants-Respondents Chenango Valley Central School District (the "District"), Chenango Valley Board of Education (the "Board"), Michael Allen, and Matthew Ferraro (collectively, "Defendants").

PRELIMINARY STATEMENT

This appeal concerns Defendants' decision to direct varsity and junior varsity baseball players to engage in the so-called "Warrior Drill," a joint infield drill with both a regular first baseman and a "short first baseman" that involves multiple balls thrown towards first base from two different locations by different players on the field, simultaneously. Grady was seriously injured during the drill, which, as Justice Colangelo aptly noted in his dissent in the Third Department, "appears more reminiscent of Ringling Brothers than Abner Doubleday." R.15.

This multiple-ball activity is not inherent in the game of baseball. To the contrary, Defendants recognized the inherent danger of the drill and increased risk and foreseeability of errant balls striking players and the need for protective equipment, and attempted to address those safety concerns with a "protective"

screen. Defendants admitted they had no idea whether the "protective" screen was adequate to prevent balls from shortstop or second base from bypassing the short first baseman and striking the actual first baseman – Grady. Instead, the coach testified that he simply used the screen they happened to have on hand without determining if it actually provided adequate protection.

Despite not knowing whether the screen was adequate, Defendants believed the Warrior Drill was safe (a position they have maintained throughout this litigation) and advised the team that the screen would protect them. The inadequate protective screen failed to stop a ball thrown from second base to the short first baseman, which struck Grady in the head, causing catastrophic injury to his right eye.

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

The Third Department majority erred as a matter of law in applying the "primary assumption of risk" doctrine, which acts to bar recovery by voluntary participants in sporting activities, and affirming summary judgment to Defendants.

As a threshold matter, the judicially-created primary assumption of risk doctrine is fundamentally incompatible with the express intent of the Legislature when it adopted CPLR 1411, which abolished assumption of risk as being a bar to recovery in New York and instituted a system of comparative fault. The "no duty" primary assumption of risk doctrine also improperly abrogates the non-delegable duty to conduct extracurricular athletic activities under adequate safety provisions imposed on Defendants by the Commissioner of Education's regulations (the "Commissioner's Regulations"). Accordingly, for the reasons set forth below and in the *amicus* brief submitted by the New York State Trial Lawyers Association ("NYSTLA"), the primary assumption of risk doctrine should be abolished and cases such as this should be considered on the basis of comparative fault like every other negligence case in New York.

Even under the primary assumption of risk doctrine as it currently exists, summary judgment was inappropriate.

As matter of law, Grady cannot be deemed to have assumed the "risk" of an activity which Defendants themselves believed had been ameliorated by the "protective" screen. Moreover, this Court's decisions establish that a student athlete cannot, as a matter of law, assume the risk of dangers that are not inherent in the sport or which constitute unassumed, concealed or unreasonably increased risks. The Warrior Drill – with multiple balls being thrown simultaneously to the

first base area – presents just such an unreasonably increased risk that is not inherent in the game of baseball. Contrary to Defendants' position, as adopted by the Third Department, the primary assumption of risk doctrine only applies to risks inherent in a sport, not to risks inherent in whatever contrived practice drill a coach may concoct, such as the Warrior Drill. The Third Department also failed to consider the issue of inadequate safety equipment, which should have precluded summary judgment.

Moreover, Defendants failed to meet their initial burden on summary judgment of establishing *prima facie* that they fulfilled their duty of conducting athletic activities under appropriate safety provisions. The Supreme Court specifically rejected Defendants' expert affidavit as well as the affidavits of coaches Allen and Ferraro asserting that the "protective" screen was adequate, yet nonetheless granted Defendants' motion. As a matter of law, Defendants' failure to meet their burden should have resulted in the denial of their motion without even considering Grady's opposition. Even if Defendants had met their initial burden, Grady demonstrated the existence of material issues of fact as to whether the "protective" screen was adequate and whether the Warrior Drill as conducted by Defendants on the date of Grady's injury presented an unreasonably increased risk of harm to the student players, including Grady.

Finally, the Third Department erred when it failed to apply the nondelegable duty to conduct athletic activities safely imposed on Defendants by the Commissioner's Regulations, which independently warrants denial of Defendants' motion.

Accordingly, the Third Department Order should be reversed and Defendants' motion for summary judgment should be denied in its entirety.

QUESTIONS PRESENTED

1. Does the judicially-created primary assumption of risk doctrine improperly abrogate the express intent of the Legislature in CPLR 1411, which adopted comparative fault and abolished a plaintiff's assumption of risk as a bar to recovery?

2. Does the judicially-created primary assumption of risk doctrine improperly abrogate the nondelegable duty of care imposed by the Commissioner of Education in regulations promulgated under the authority granted by the legislature?

3. As a matter of law, can a high school student athlete assume the heightened risk of a practice activity when the defendant coaches themselves admittedly did not recognize or comprehend those increased risks?

4. Does the primary assumption of risk doctrine apply to risks that are not inherent in a sport itself, but rather to risks arising from whatever contrived practice activity a coach may employ, even if the enhanced risks created by such practice activity are not inherent in the sport itself?

5. Did the Appellate Division erroneously apply the doctrine of primary assumption of risk when, as Justice Pritzker opined in his dissent, "this case is more properly analyzed using the standard [of care] employed in cases involving inadequate safety equipment?"

6. Did the courts below erroneously determine that Defendants had met their *prima facie* burden on summary judgment and/or that there were no issues of fact precluding summary judgment?

7. Did the courts below err by failing to consider the nondelegable duty imposed on Defendants by the Commissioner's regulations?

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to CPLR 5601(a) because the Third Department Order affirmed the grant of summary judgment to Defendants dismissing Grady's complaint in its entirety, thereby finally determining the action, and there were dissents by two Third Department justices on questions of law. See Argument Point I, infra.

The issues on appeal have been preserved for review by this Court. See R.3-16; 19-29, 353-441. In addition, it is appropriate for this Court to consider the abolition of the primary assumption of risk doctrine, see Argument Point II, infra, on this appeal. "[A] new argument may be raised for the first time in the Court of Appeals if it could not have been obviated or cured by factual showings or legal countersteps in the court of first instance." Rivera v. Smith, 63 N.Y.2d 501, 516 n.5 (1984); see also Richardson v. Fiedler Roofing, Inc., 67 N.Y.2d 246, 250 (1986) ("The argument raises solely a question of statutory interpretation, however, which we may address even though it was not presented below."). Primary assumption of risk is a judicial doctrine created by this Court, and only this Court, not the lower courts, can abolish it. The argument therefore could not have been obviated or cured in the Supreme Court or in the Third Department. It is also a question of statutory interpretation of CPLR 1411.

STATEMENT OF FACTS

A. Background

In 2017 the Board operated Chenango Valley High School ("CVHS"). R.53, 48. The Board and CVHS employed athletic director Brad Tomm, varsity baseball coach Allen, junior varsity baseball coach Ferraro, R.53, 64-65, and contracted the services of athletic trainer Karen Lipyanek. R.263.

The Defendants acknowledged that "as a coach and teacher, that's certainly a responsibility to maintain a safe environment," which included setting up "protective screens" as necessary to protect players on the field during practice.

> Q. As a varsity baseball coach, are you responsible for providing a safe environment for your players?
>
> . . .
>
> A. Yes. As a coach and a teacher, that's certainly a responsibility to maintain a safe environment.
>
> Q. And would maintaining a safe environment include setting up protective screens as necessary to protect players on the field during practice?
>
> A. Yes. Using screens, making sure kids use helmets -- you know, you'll have a kid that forgets and hops in the batting cage and doesn't have a helmet on. And you say, hey, you know, go put your helmet on. Oh, Coach, I forgot. You know, just -- you know, reminding those -- because they are kids that, you know, that you need to be safe.

R.165.

> Q. Well, if you were going to have a game or a practice and it rained and the field was slippery or wet, would that be

something you would take into consideration so you could keep the environment safe for the players?

. . .

A. Absolutely. We wouldn't practice on the field. If it were wet or if there was something wrong with field, we would not practice on it.

Q. Why not?

A. Because that's part of keeping the environment safe.

Q. What would you be concerned about with a wet field?

A. Somebody's -- just the conditions not being – someone slipping and falling. You know, there's a various amount of different things.

Q. Did you understand that to be part of your duties and responsibilities as a coach, to keep the playing – to provide a safe environment for the players?

A. Yeah. I mean, usually the decision to not use the field is a decision made by, you know, if it's a game day it's a decision that's made by the athletic director and the coach combined. If it's a practice day generally, as the coach, I would make the decision for my team.

R.203.

On March 8, 2017 Allen and Ferraro chose to take the varsity and junior varsity baseball teams outside to practice together, R.183, in the late afternoon. R.120. The weather was cool and windy. R.120, 423. This was the first outdoor practice of the baseball season, which had begun two-days earlier with indoor practices on March 6, and March 7, 2017. R.119, 183, 290.

B. Defendants Recognized the Increased Risk Presented by the Warrior Drill, Failed to Take Proper Precautions to Protect the Players During the Drill, but Nonetheless Erroneously Believed the Drill was Safe

During the March 8, 2017, practice, coaches Allen and Ferraro chose to engage in the multiple-ball Warrior Drill. R.182, 388, 390. During the drill, Allen would stand on one side of home plate and hit balls to third base. The third baseman would field the balls hit by Allen and throw to the player at first base. R.214. Ferraro would stand on the other side of home plate and hit balls to the shortstop or second baseman. The shortstop or second baseman would then throw to a player known as the "short first baseman" positioned close to first base in the base path between first and second base. R.177, 215, 216, 388, 390.

Allen and Ferraro recognized the increased danger the Warrior Drill presented to players at actual first base and the need to use a screen to protect the actual first baseman – like Grady – from being struck by balls thrown to the "short first baseman":

> Q. And when you reviewed the [Warrior] drill from the prior coach, Mr. Tidick, did you have any safety concerns with regard to any of the players during the course of these drills?
>
> A. Sure. Any time you do a drill -- it doesn't matter what drill you do, there's always a safety. So, you know, having that protection screen was very important. . . .
>
> Q. Okay. When you say the protection screen was important, what safety concerns did you have with regard to the drill?

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

. . .

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

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

R.175-76.

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

. . .

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

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

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

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

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

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

A. No.

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

A. Well, I am just saying --

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

A. Right.

Q. -- shortstop, correct?

A. Right.

R.216.

Allen and Ferraro also acknowledged that during the Warrior Drill, the regular first baseman was required to focus on the balls hit to third base and the incoming throws from the third basemen, not the balls being thrown to the "short first baseman." R.178, R.215-16.

However, Defendants never verified that the "protective" screen was adequate and would protect the regular first baseman from this foreseeable risk. R.164. They simply used the only available screen and did not consider using anything larger:

Q. Who determined that you should use a seven by seven as opposed to a ten by seven or a twelve by seven or some other size screen?

A. I determined that.

Q. And what criteria did you use to determine that a seven by seven screen was sufficient to provide protection for the first baseman?

A. It was the screens [sic] that we had available to use.

Q. Was that the largest screen you had?

A. Yes.

Q. Did you ever consider getting a larger screen than seven by seven to use?

A. No.

R.177.[1]

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

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

. . .

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

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

. . .

[1] Defendants' contention in their July 1, 2021 letter pursuant to Rule 500.11 ("Def. Ltr.") that "the coaches relied on their extensive experience to choose and place the protective screen to provide an appropriate level of protection to the players, including Grady," Def. Ltr. at 9, is not accurate. "Choosing" the only screen available, as Allen admittedly did, is not the same as selecting a proper screen.

A I can make that recommendation, yes.

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

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

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

A Most of the time, yes.

R.265-66.

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

A No.

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

A No.

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

A No.

R.279.

Despite not knowing whether the screen was adequate, defendants nonetheless wrongly believed that the drill was safe. See R.176 ("I felt it was a

very good drill. And with the screen there, that they were protected."). Allen advised the players that they would be protected by the screen:

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

R.178-79.

C. <u>Grady Is Grievously Injured During the Warrior Drill</u>

Grady, an outfielder, was assigned by the coaches to regular first base for the Warrior Drill. R.118. Grady was struck in the head and face without warning when a ball intended for the "short first basemen," not intended for Grady. and unrelated to the specific activity Grady was engaged in, flew past the inadequate "protective" screen and struck him in the face, resulting in substantial permanent loss of vision in his right eye.

Grady testified that although he signed a Duty to Warn form noting that "participation in interscholastic athletics involves certain inherent risks," he did not

view what happened to him as being an inherent risk of baseball, and perhaps more importantly that he trusted his coaches to provide a safe environment:

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

R.154.

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

> Q Okay. And could you tell me, when you went out for the team, you played varsity baseball for a number of years, right?
>
> A Yeah, I played the year before.
>
> Q And what was the dynamic between the coach and the players, could you just tell the coach you didn't want to do something or make your own rules?
>
> . . .
>
> Q You can answer.
>
> A If you wanted to play, you would just listen to what he said, do the drills that he told you to.

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

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

R.154.

The Third Department majority stated that Grady "observed numerous errant balls being thrown, including one that struck a teammate on the leg," R.5, and Defendants have taken the position throughout this litigation that Grady recognized that the "protective" screen was inadequate because he supposedly saw other errant balls bypass the screen before he was struck. That is incorrect. In the testimony from Grady's 50-h hearing that Defendants rely on, Grady did testify that he observed some errant balls thrown during practice, but did *not* describe exactly how they were thrown, did *not* notice who threw them or from where, did *not* describe how a player came to be struck by an errant ball, and did *not* say that he saw any errant balls bypass the screen. As Justice Pritzker noted in his dissent, "In [A]lthough the record indicates that plaintiff had seen balls go astray and one even striking another player's leg, the record does not indicate that he witnessed balls evading the screen and, in proximity, hurtling towards him. In fact, the record fails to indicate that the errant balls were thrown anywhere near the screen." R.9.

Indeed, Grady did not mention the screen at all during his discussion of the errant balls:

Q. Now, as you were progressing in the drill on Wednesday, March 8, 2017, when you're in that drill, was the drill progressing the way that it was supposed to be; in other words, the way the coach had instructed?

A. I would say that there were definitely some irregularities that day.

Q. Explain your answer to me, please.

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

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

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

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

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

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

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

. . .

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

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

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

A. No, I did not.

R.123-24.

Notably, Defendants failed to ask Grady at his 50-h hearing if the errant balls "bypassed" or went around or over the screen. See id. And they failed to ask him about it at his deposition. See R.133-58. Defendants thus base their entire argument, which the Third Department majority adopted, on testimony that they never elicited, but pretend they had.

D. Supreme Court Grants Defendants' Motion for Summary Judgment

In the Supreme Court, Defendants' expert and Defendants themselves asserted that the Warrior Drill was safe. See R.320 (Warrior Drill is "not, as plaintiff contends, inherently dangerous"); R.320-21 (the "screen selected . . . was appropriate for the drill and properly positioned"); R.338 ("There was nothing inherently hazardous about the practice drill as far as I could determine."); R.346 ("There is nothing inherently dangerous about the 'Warrior' drill.").

In opposition, Grady submitted an expert affidavit opining, inter alia, that the "protective" screen was inadequate, and explaining why. R.363-77.

In its decision, the Supreme Court recognized that Defendants had not demonstrated that they used appropriate safety measures when conducting the Warrior Drill on March 8, 2017:

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

R.24.

The Supreme Court nonetheless reluctantly granted Defendants' motion for summary judgment based solely on the doctrine of primary assumption of risk. In doing so, the Supreme Court noted that it was "mindful of the circumstances surrounding this accident namely a school sanctioned activity, team coaches dictating the method and manner of practice including the selection of equipment such as the size and location of the protective screen, and the involvement of minors who may or may not have the maturity to object to directions from a school authority figure." R.28. The court further stated that "[i]n this court's view, under these circumstances equity should dictate a balancing of the parties' respective degree of fault," i.e., comparative fault. Id. Ultimately, however, the Supreme Court felt "constrained by the case law" to dismiss the action on the basis of primary assumption of risk. Id.[2]

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

E. The Third Department Affirms

Three justices of the Third Department voted to affirm, relying on Grady's voluntary participation in the Warrior Drill, i.e., primary assumption of risk, and on what they perceived as his knowledge of the risks. See R.5-6.

Two Justices dissented, concluding that the legal doctrine of primary assumption of risk is not applicable as a bar to recovery.

Justice Pritzker opined that the issue of the defective screen "distinguishes this case both factually and conceptually" from the primary assumption of risk cases relied on by the majority, and believed that "this case is more properly analyzed using the standard employed in cases involving inadequate safety equipment." R.5. He also believed that Grady had a right to trust his coaches' (erroneous) judgment that the screen rendered the drill safe, and would have held that Grady could not assume the risk of an activity that the coaches themselves did not view as risky. R.8-9.

Justice Colangelo, after discussing the parameters of the primary assumption of risk doctrine, explained that "the reason behind preserving this vestigial doctrine is to promote participation in a sport and not, as the majority appears to suggest, participation in some concocted practice or drill. In other words, the risks assumed must be risks inherent to the sport itself, not risks inherent to the drill." R.14. He then noted that "the spectacle of the Warrior Drill, as described by defendants and

diagrammed in the record, appears more reminiscent of Ringling Brothers than Abner Doubleday – multiple balls in play with a host of players, some far less experienced than others, milling around awaiting their turn, two first base positions where one should be and balls flying toward them at different angles, topped off by a randomly chosen screen that provided what turned out to be a false promise of protection." R.15.

ARGUMENT

I.

THIS APPEAL IS PROPER UNDER CPLR 5601(a) BECAUSE THERE WERE DISSENTS BY TWO APPELLATE DIVISION JUSTICES ON QUESTIONS OF LAW

In its April 30, 2021, letter, the Court directed that Grady's letter pursuant to Court of Appeals Rule 500.11 "shall also address whether 'there is a dissent by at least two Justices on a question of law' (CPLR 5601[a])." Because the Court's December 14, 2021 letter directing full briefing did not withdraw its April 30, 2021 directive, Grady addresses the question in this brief as well.

"[T]he doctrine [of primary assumption of risk] in the post-CPLR 1411 era has been described in terms of the scope of duty owed to a participant." Custodi v. Town of Amherst, 20 N.Y.3d 83, 87 (2012). And "the existence and scope of a duty is a question of law." Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 138 (2002); see also Anand v. Kapoor, 61 A.D.3d 787, 792 (2d Dep't 2009)

("the existence and scope of duty in tort cases is a question of law . . . the doctrine of primary assumption of the risk operates to relieve a participant in a sporting or recreational activity from a duty of care toward another participant"), aff'd, 15 N.Y.3d 946 (2010).

Thus, defining the parameters of the primary assumption of risk doctrine, i.e., defining situations to which it applies and when a duty is abrogated, are questions of law. Those are precisely the types of legal questions presented by the Third Department dissents here.

As set forth above, Justice Pritzker's view is that " this case is more properly analyzed using the standard employed in cases involving inadequate safety equipment," R.5, and that a student athlete cannot, as a matter of law, assume the risk of an activity that the coaches themselves do not recognize as presenting an increased risk. R.7; R.8-9. Justice Colangelo believed that, as a matter of law, for the "vestigial" primary assumption of risk doctrine to apply "the risks assumed must be risks inherent to the sport itself, not risks inherent to the drill." R.14.

This Court regularly considers such legal issues. For example, in Owen v. R.J.S. Safety Equip., Inc., 79 N.Y.2d 967 (1992), the Court considered the issue of whether certain risks were inherent in the sport of auto racing:

> Plaintiff's submissions included expert affidavits indicating that the contour of the track's retaining wall, as well as the design of its guardrail and the placement of barrels near the guardrail, was unique and created a dangerous condition over and above the usual dangers

> that are inherent in the sport of auto racing. Although plaintiff's decedent may have been an experienced race car driver who assumed the risks of injury that ordinarily attend auto races, these affidavits were sufficient to create a triable question of fact as to whether defendants' alleged negligence, if any, engendered additional risks that "do not inhere in the sport" and, if so, whether the decedent should be deemed to have assumed those risks by voluntarily participating in the race.

Id. at 970. Notably, in Owen, this Court, which only considers questions of law pursuant to CPLR 5501(b), held that questions of fact precluded summary judgment because a review of the questions of law led to the conclusion that there were triable issues of fact. Id.[3] Here, similarly, the Third Department dissents noted that there were issues of fact, and those determinations were based on questions of law appropriate for this Court's review.

Similarly, in Bukowski v. Clarkson Univ., 19 N.Y.3d 353 (2012), this Court considered the whether the primary assumption of risk doctrine barred recovery for injuries a pitcher suffered when hit by a line drive, absent a protective "L-screen." See id. at 355. The Court examined the same types of issues present in this case, such as whether the risks faced by the plaintiff were inherent in the sport and the plaintiff's own knowledge and experience. See id. at 356-57. The Appellate

[3] See also, e.g., Hewitt v. Palmer Veterinary Clinic, PC, 35 N.Y.3d 541, 549 (2020) (summary judgment inappropriate when "questions of fact exist as to whether the alleged injury to plaintiff was foreseeable, and whether Palmer took reasonable steps to discharge its duty of care"); Xiang Fu He v. Troon Mgmt., Inc., 34 N.Y.3d 167, 175 (2019) (summary judgment inappropriate when "triable issues of fact exist regarding the manner in which the accident occurred and the presence of snow and ice").

Division dissents in Bukowski, which were the basis for an appeal as of right under CPLR 5601(a), discussed similar issues:

> With regard to the conditions present, plaintiff submitted evidence, including expert testimony, that the lighting, along with the coloring of the backdrop, flooring and netting, made it difficult for a pitcher to see balls coming off the hitter's bat, which the expert described as "pretty dangerous." Similarly, plaintiff's expert testified that the practice of not placing an L-screen in front of the pitcher in such conditions is unsafe.
>
> In sum, affording plaintiff every favorable inference, we believe that plaintiff offered ample evidence from which a jury could conclude that the risk of injury incident to his participation in the indoor practice was unreasonably increased over the inherent risks of the sport . . . .

Bukowski v. Clarkson Univ., 86 A.D.3d 736, 740-41(3d Dep't 2011) (Peters, J. dissenting) (citations omitted).

In another case similar to this one, Morgan v. State, 90 N.Y.2d 471 (1997), the Court considered whether primary assumption of risk applies to cases involving defective safety equipment:

> [T]he plaintiffs assert that the torn net separating the tennis courts was not "inherent" in the sport and therefore a player should not be deemed to have assumed the risk of such a tripping accident during a tennis match. The line to be drawn and applied in this case is close, but plaintiffs have the better of it. It cannot reasonably be disputed that nets separating indoor tennis courts, such as the one at issue here, are inherently part of the playing and participation of the sport at such facilities. . . . But 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; see also Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 658 (1989) (considering whether plaintiff football player assumed the risk of playing in a mismatched game in a fatigued condition); Turcotte v. Fell, 68 N.Y.2d 432, 440 (1986) (considering whether an athletes "consent was an informed one" so as to fall under the primary assumption of risk doctrine).

Accordingly, Grady is entitled to appeal the Third Department Order as of right pursuant to CPLR 5601(a).[4]

[4] This case also meets this Court's criteria for permissive review because it presents an issue of public importance, as conformed by Defendants' own pronouncements about the primary assumption of risk doctrine. See Court of Appeals Rule 500.22(b)(4). Indeed, this Court recently granted the plaintiff's motion for leave to appeal in Secky v. New Paltz Cent. Sch. Dist., APL-2022-00003, 37 N.Y.3d 917 (2022), which also concerns the application of the primary assumption of risk doctrine to an athletic practice drill. See 195 A.D.3d 1347 (3d Dep't 2021). The Court previously granted the plaintiff's motion for leave to appeal in Ninivaggi v. County of Nassau, APL-2020-00093, 35 N.Y.3d 909 (2020), in which the Appellate Division held that primary assumption of risk barred recovery to a plaintiff injured playing catch on an elementary school athletic field. See 177 A.D.3d 981 (2d Dep't 2019). The Ninivaggi appeal was subsequently withdrawn. 37 N.Y.3d 962 (2021).

II.

THE JUDICIAL DOCTRINE OF PRIMARY ASSUMPTION OF RISK SHOULD BE ABOLISHED AS FUNDAMENTALLY INCOMPATIBLE WITH THE WILL OF THE LEGISLATURE

A. The Primary Assumption of Risk Doctrine is an Improper Abrogation of CPLR 1411, Which Abolished Assumption of Risk as a Bar to Recovery

In 1975, the Legislature enacted CPLR 1411, which established comparative negligence in New York and abolished assumption of risk as a bar to recovery:

> 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

(Emphasis added).[5]

[5] In their November 1, 2021 letter in response to NYSTLA's *amicus* brief, Defendants argue that CPLR 1411 does not abolish the primary assumption of risk doctrine because voluntarily participating in athletic activities is not "culpable" conduct, but rather a "salutary decision furthering activities of social value." 11/1/21 Ltr. At 9. This argument, for which Defendants cite no authority, makes no sense. By Defendants' logic, a plaintiff who engages in what Defendants would consider "culpable" conduct cannot have his or her claim barred by assumption of risk, while a plaintiff like Grady who makes what Defendants call a "salutary decision" is punished by having his claims barred.

Defendants also muse that if primary assumption of risk is abolished, no defendant will be able to prove that "a participant's decision to join a sport or recreative activity . . . was negligent. What jury would agree that a baseball player was negligent in agreeing to join a baseball team?" Id. at 10. That would not be the inquiry, however. As in any other comparative negligence situation, the issue will be whether the plaintiff's acts or omissions during the course of the sporting activity warrant assigning a percentage of the fault to the plaintiff. If the plaintiff is not at fault, there is no reason to artificially shield a negligent defendant from liability through the primary assumption of risk doctrine.

Despite the Legislature's unambiguous pronouncement that assumption of risk "shall not bar recovery," this Court has noted that "[n]onetheless, assumption of risk has survived as a bar to recovery." Trupia ex rel. Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 395 (2010); see also Custodi, 20 N.Y.3d at 87 ("Despite the text of this provision, we have held that a limited vestige of the assumption of the risk doctrine—referred to as 'primary' assumption of the risk—survived the enactment of CPLR 1411").

This seemingly irreconcilable conflict derives from this Court's decision in Turcotte, in which the Court held that that primary 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." Turcotte 68 N.Y.2d at 439.

In the years since Turcotte, this Court has recognized that such semantic contortions cannot disguise the fact that under Turcotte an its progeny, the doctrine of primary assumption of risk acts for all intents and purposes as an absolute defense:

> 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. 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. 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.

Trupia, 14 N.Y.3d at 395 (citations omitted).

This Court correctly recognized in Trupia that "[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." Id. Despite that recognition, the doctrine nonetheless persists. It has been justified "not on the ground of doctrinal or practical compatibility, but simply for its utility in facilitating free and vigorous participation in athletic activities" which "possess enormous social value, even while they involve significantly heightened risks." Trupia, 14 N.Y.3d at 395 (2010).[6]

The promulgation of the primary assumption of risk doctrine contravenes basic principles of statutory interpretation:

> When statutory language is unambiguous, a court will ordinarily give effect to the plain meaning of the words and apply the statute

[6] Although this Court in Trupia recognized the conflict between the primary assumption of risk doctrine and CPLR 1411, it was not necessary for the Court to rule on the issue because of its determination that the doctrine did not apply in that action, which dealt with a student sliding down a stairway banister, not a student participating in athletics. Trupia, 14 N.Y.3d at 396.

> according to its express terms. Thus, where, as in this case, the statute unequivocally describes in general terms the particular situation in which it is to apply and nothing indicates a contrary legislative intent, the courts should not impose limitations on the clear statutory language. Education Law § 2573(1)(a) does not provide for any exception to its 60–day tenure denial notice requirement; hence, we conclude that the Legislature did not intend to provide any exception.

Tucker v. Bd. of Educ., Cmty. Sch. Dist. No. 10, 82 N.Y.2d 274, 278, (1993) (citations omitted). Here, the Legislature unequivocally stated that assumption of risk is no longer a bar to recovery, and there is no basis for courts to impose limitations to or create exceptions (including policy-based exceptions designed to foster athletic participation) to the Legislature's unequivocal pronouncement. See People v. Iverson, 37 N.Y.3d 98, 103 (2021) ("[A] court, in interpreting a statute, should attempt to effectuate the intent of the Legislature.") Yet that is precisely what the Turcotte court did when it established primary assumption of risk as an exception to CPLR 1411.

The legislative history of CPLR 1411 further confirms that the primary assumption of risk "no duty" doctrine is contrary to the Legislature's intent in adopting CPLR 1411:

> [T]he 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. Unless assumption of risk is so treated, it would negate any duty owed by defendant to plaintiff, 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."

Sponsor's Mem in Support, Bill Jacket, L 1975, ch 69 at 3 (citations omitted; emphasis added); Judicial Conference Mem in Support, Bill Jacket, L 1975, ch 69 (citations omitted; emphasis added).

The express intent of the Legislature was thus to prevent assumption of risk from negating the defendant's duty. And yet the primary assumption of risk doctrine is expressly based on negating the defendant's duty: "Under this theory, a plaintiff who freely accepts a known risk 'commensurately negates any duty on the part of the defendant to safeguard him or her from the risk.'" Custodi, 20 N.Y.3d at 87 (quoting Trupia, 14 N.Y.3d at 395). This discrepancy cannot be resolved.

Nor can the doctrine be saved by referring to a contrived "duty to exercise care to make the conditions as safe as they appear to be." See Turcotte, 68 N.Y.3d at 439. Once again, semantic games cannot disguise the fact that doctrine of primary assumption of risk is a "principle of no duty" and that "[t]he reality . . . 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." Trupia, 14 N.Y.3d at 395.

Primary assumption of risk is thus an example of "a judicially created doctrine that is not tethered to the CPLR's text." Motorola Credit Corp. v. Standard Chartered Bank, 24 N.Y.3d 149, 165 (2014) (Abdus–Salaam, J., dissenting) (internal quotation marks omitted). The judicially-created doctrine has

acted as a complete bar to recovery in direct contravention of the express will of the Legislature. Grady respectfully submits that the doctrine should be abolished and that, as the Legislature intended, assumption of risk should be treated merely as a component of the plaintiff's comparative fault to be evaluated by the jury.[7]

B. The Primary Assumption of Risk Doctrine Improperly Abolishes the Duty of Care Imposed by the Commissioner of Education's Regulations Promulgated Under Authority Granted by the Legislature

The Commissioner's Regulations provide that "[i]t shall be the duty of trustees and boards of education . . . to conduct all [extraclass athletic] activities under adequate safety provisions. 8 NYCRR § 135.4(c)(7)(i)(g). The regulations also impose the following duties with regard to athletic trainers:

> 7) Basic code for extra class athletic activities. Athletic participation in all schools shall be planned so as to conform to the following:
> (i) General provisions. It shall be the duty of trustees and boards of education:

[7] In their Rule 500.11 letter, Defendants argued that the will of the Legislature should continue to be ignored because the Legislature has "not legislatively annul[led]" the primary assumption of risk doctrine. Def Ltr. at 27. The Legislature, however, has *already* declared that assumption of risk is not a bar to recovery. There are myriad reasons why the Legislature may not have statutorily overturned the judicially-created doctrine, but those reasons are speculative and not before this Court. What is not speculative, and what is before this Court, is what the Legislature *did* do when it enacted CPLR 1411, and the legislative history demonstrating that the Legislature's express intent was to prevent assumption of risk from negating the defendant's duty, which is precisely what the primary assumption of risk doctrine does. By abolishing the primary assumption of risk doctrine, this Court would simply bring its jurisprudence back in line with the intent of the legislature, as the Court seems to have recognized in Trupia, 14 N.Y.3d at 395. Defendants' worry about the threat of liability, as expressed in their Rule 500.11 Letter and in their letter responding to NYSTLA's amicus brief, is not a basis to thwart the will of the Legislature. If an athlete is injured because a school district or coach is negligent, then holding the school district or coach negligent is consistent with the will of the Legislature. There is no basis for Defendants' assertion that eliminating the primary assumption of risk doctrine will always expose similar defendants to 100% liability when that does not happen in any other category of negligence cases not covered by the primary assumption of risk doctrine.

> . . .
> (d) to determine the need for an athletic trainer and to permit individuals to serve as athletic trainers for interschool athletic teams, intramural teams or physical education classes only in accordance with the following:
> . . .
> (2) Scope of duties and responsibilities. The practice of the profession of athletic training shall be as defined in Education Law, section 8352. Consistent with Education Law, section 8352, the services provided by an athletic trainer shall include, but not be limited to, the following:
> (i) prevention of athletic injuries, including assessment of an athlete's physical readiness to participate;
> . . .
> (v) education and counseling of coaches, parents, student athletic trainers and athletes;
> (vi) risk management and injury prevention, including:
> . . .
> (B) assisting in the proper selection and fitting of protective equipment, including the application of wraps, braces, tape and pads;
> (C) assisting in the inspection of fields and playing surfaces for safety;
> . . .

8 NYCRR § 135.4(c)(7)(i)(d)(2).

"It is well settled that the Legislature may authorize an administrative agency to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" and that "[a] duly promulgated regulation . . . has the force of law." Raffellini v. State Farm Mut. Auto. Ins. Co., 9 N.Y.3d 196, 201 (2007) (citations and internal quotation marks omitted). Here, regulation 135.4 "was promulgated under the authority granted the Board of

Regents under Section 207 of the Education Law." Murtaugh v. Nyquist, 78 Misc. 2d 876, 877 (Sup. Ct., Sullivan Cnty. 1974).

Accordingly, the Commissioner's Regulations, including the duty of care they impose, have the force of law. Yet, under the primary assumption of risk doctrine, the "principle of no duty," Trupia, 14 N.Y.3d at 395, operates to vitiate that duty. The "no duty" doctrine of primary assumption of risk thus impermissibly abrogates an express duty of care imposed on Defendants by the Commissioner's Regulations, in violation of the New York State Constitution and the doctrine of separation of powers.

III.

EVEN UNDER THE PRIMARY ASSUMPTION OF RISK DOCTRINE AS IT CURRENTLY EXISTS, SUMMARY JUDGMENT WAS INAPPROPRIATE

A. A High School Student Athlete Cannot Be Deemed to Have Assumed the Risk of an Activity When the Defendants Themselves Did Not Recognize Those Risks and Instead Asserted That the Activity Was Safe

The Third Department majority affirmed based on its determination that the legal doctrine of primary assumption of risk applied as a matter of law under the facts as stated. R.5-6. This holding fundamentally misapprehended the primary assumption of risk doctrine.

"[P]rimary assumption of the risk applies when a consenting participant in a qualified activity is aware of the risks; has an appreciation of the nature of the

risks; and voluntarily assumes the risks." Custodi, 20 N.Y.3d at 88 (internal quotation mars omitted). "On the other hand, participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced." Id.

The Third Department majority erred by focusing on Grady's misgivings about the Warrior Drill. See R.5. There is no evidence in the record that Grady understood the protective screen to be inadequate. While the Third Department majority stated that Grady "observed numerous errant balls being thrown, including one that struck a teammate on the leg," there is no evidence that any of these errant balls bypassed the screen in a way that would have demonstrated to Grady that the screen was inadequate. As Justice Pritzker noted, while Grady did testify to observing some errant balls during practice, he did not describe how they were thrown, did not notice who threw them or from where, did not describe how a player came to be struck by an errant ball, and did not testify that he saw any errant balls bypass the screen. R.9. Indeed, Grady he did not mention the screen at all during the discussion of the errant balls. See R.123-24.

Moreover, the mere fact that Grady was familiar with the Warrior Drill is not sufficient to demonstrate that he was aware of the risks of an inadequate "protective" screen:

> [P]laintiff alleges that the design and construction of the retaining wall failed to direct decedent's car back onto the track and caused the car

> to become airborne, thereby increasing the risk of serious injury or death. Although decedent's experience at the race track may have provided him with knowledge of the placement and condition of the retaining wall, the evidence presented by the parties is insufficient to determine whether, as a matter of law, decedent was aware of and appreciated the enhanced risk.

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

Here, likewise, it cannot be determined as a matter of law that Grady was aware of and appreciated the enhanced risk presented by the Warrior Drill, because Defendants themselves did not appreciate the risk. To the contrary, Defendants testified that they believed they had taken adequate precautions that rendered the Warrior Drill safe and have maintained in this litigation that the drill was safe. R.175-76; R.320-21; R.338; R.346.

The Third Department nonetheless believed that Grady should somehow be deemed to have assumed the risk of an activity that the Defendants believed they had made safe. As Justice Pritzker noted in his dissent:

> Here, defendants testified in earnest that the drill was rendered safe by the protective screen. Thus, even defendants, with all of their athletic education and training, failed to recognize the risk. As such, how can plaintiff be clothed with knowledge of the same imperceptible risk? In other words, how could it be an assumable risk if it was not perceived as such by defendants themselves, who now seek shelter under the doctrine?

R.8. (footnote omitted).[8]

Not only did Defendants deem the Warrior Drill to be safe, but they also told the team that the screen would protect them. R.178-79. Grady testified that he trusted his coaches to provide a safe environment, R.154, and there is no evidence in the record that Grady had any reason to disbelieve his coaches.[9] It is illogical to claim that Grady assumed the risk of an inadequate "protective" screen that his coaches told him was adequate. Indeed, it is it is well established that even if an athlete has assumed the inherent risks of a sport, assumption of risk does not warrant dismissal on summary judgment when, as here, there is evidence that the coaches instructed or permitted the players to take additional risks. See Brown v. Roosevelt Union Free Sch. Dist., 130 A.D.3d 852, 854 (2d Dep't 2015) ("defendants failed to establish, prima facie, that the infant's coach, by having her perform an infield sliding drill on the subject grass field, did not unreasonably increase the inherent risks of the activity"); Weinberger v. Solomon Schechter Sch.

[8] Defendants argued in their Rule 500.11 letter that Grady's position means that primary assumption of risk somehow "protect[s] coaches who knew protective equipment was not sufficient to render an activity reasonably safe but [leaves] unprotected coaches who proceed on the good-faith belief that the use of protective equipment rendered an activity reasonably safe." Def. Ltr. at 20. This is incorrect. The idea that Grady cannot assume the risk of an inadequate protective screen when Defendants themselves did not recognize that risk does not mean that a defendant who does recognize a risk and does nothing is somehow better off. Surely Defendants – who are entrusted with the safety of student athletes – would never maintain that they could not be liable because a player assumed the risk of a coach intentionally conducting practice with what the coach knows to be inadequate safety equipment.

[9] The Third Department was thus incorrect when it stated that Grady "did not rely on the screen for safety." R.5.

of Westchester, 102 A.D.3d 675, 679 (2d Dep't 2013) (as a matter of law, "it cannot be said that S. assumed that risk, when she was specifically instructed by her coach to pitch, without the benefit of the L-screen, closer to home plate than is the standard distance for pitching in the sport of softball"); Gilbert v. Lyndonville Cent. Sch. Dist., 286 A.D.2d 896, 896 (4th Dep't 2001) (summary judgment inappropriate on issue of "whether Lyndonville exposed player to 'unassumed, concealed or unreasonably increased risks' by directing or allowing her to warm up in a hazardous location"); DeGala v. Xavier High Sch., 203 A.D.2d 187 (1st Dep't 1994) (summary judgment inappropriate on issue of whether "the team coach's failure to inform plaintiff of the rule [against weight class mismatches] or to prohibit such mismatched drilling" exposed plaintiff to unreasonably exposed risks); Parisi v. Harpursville Cent. Sch. Dist., 160 A.D.2d 1079, 1080 (3d Dep't 1990) (summary judgment properly denied when player hit in the face by a softball after coaches failed to instruct players to wear face masks that were available for their use); Kane v. N. Colonie Cent. Sch. Dist., 273 A.D.2d 526, 527 (3d Dep't 2000) (reversing grant of summary judgment based on assumption of risk when track coach directed team to engage in risky indoor practice activity).

More generally, the Third Department's focus on Grady's voluntary participation misses the point. Even in cases where courts find that assumption of risk does *not* apply, the plaintiff has been a voluntary participant in the activity.

The issue is whether the defendants' conduct unreasonably increased the risk of the activity or presented dangers not inherent in the sport. If it did, then a plaintiff's voluntary participation will not absolve the defendants of liability. See Simmons v. Saugerties Cent. Sch. Dist., 82 A.D.3d 1407, 1409 (3d Dep't 2011) ("Defendant misapprehends the scope of the primary assumption of risk doctrine in arguing that a voluntary participant in a sport or recreational activity consents to *all* defects in a playing field so long as the defects are either known to the plaintiff or open and obvious. The doctrine, as defined by the Court of Appeals, does not extend so far. Rather, while 'knowledge plays a role' in 'determining the extent of the threshold duty of care,' it is 'inherency [that] is the sine qua non.'") (quoting Morgan, 90 N.Y.2d at 484)); Weller v. Colleges of the Senecas, 217 A.D.2d 280, 284 (4th Dep't 1995) ("Although plaintiff's conduct of riding between the trees after dark may have been ill-advised, based on his prior experience with the alleged desired pathway, we conclude that plaintiff did not assume the risk of hitting a tree root. Rather than constituting primary assumption of risk, plaintiff's voluntary decision to ride between the trees is simply a factor relevant in the assessment of culpable conduct.") (internal quotation marks omitted); cf. Baker v. Briarcliff Sch. Dist., 205 A.D.2d 652, 655 (2d Dep't 1994) (even though plaintiff failed to wear mouthpiece despite knowing of the requirement to do so, court could not "conclude, as a matter of law, that her failure to wear a mouthpiece constituted an

absolute bar to any recovery rather than a factor to be considered in diminution of damages").

B. Primary Assumption of Risk Does Not Apply to Risks Arising Solely from a Contrived Practice Activity That Are Not Inherent in the Sport Itself

The Third Department majority erred when it justified its decision on the grounds that "[h]aving more than one ball in play may not be an inherent risk in a traditional baseball game, but the record indicates that it is a risk inherent in baseball team practices." R.5. The majority's reasoning is circular and unavailing. Of course practicing baseball is inherent in baseball. The issue here is that the multiple-ball Warrior Drill, specifically (not baseball practice in general), presented risks not inherent in baseball. By the Third Department majority's logic, Defendants could have created a drill using six balls at a time and claim that the risk of getting hit by one of the six balls is inherent in the drill, an absurd result.[10]

Thus, as Justice Colangelo stated in his dissent, "the risks assumed must be risks inherent in the sport itself, not risks inherent in the drill." R.14.[11] It is

[10] Defendants invite similar absurd results when they argue in their letter opposing NYSTLA's *amicus* brief that "the 'inherent risk' inquiry should be satisfied by a showing at a general level. That is, if one is struck by a thrown or batted ball during baseball practice, the 'inherent risk' inquiry is satisfied, without reference to the specifics of the incident." 11/1/21 Letter at 16. By that logic, a practice involving six batters hitting balls to one fielder simultaneously would constitute an "inherent risk" of baseball.

[11] The "Duty to Warn" form that Grady signed does not demonstrate as a matter of law that he assumed the risk of participating in the Warrior Drill without adequate safety measures. To the contrary, the form, which notes that "participation in interscholastic athletics involves certain *(cont'd)*

undisputed that there is never more than one ball in play during a baseball game, as there was during the Warrior Drill. Summary judgment was thus inappropriate because the Warrior Drill exposed Grady to risks not inherent in the game of baseball. See Braile v. Patchogue Medford Sch. Dist., 123 A.D.3d 960, 962 (2d Dep't 2014) (relied on by Third Department majority) (reversing grant of summary judgment to defendant and holding that student's voluntary participation in high school soccer did not constitute assumption of risk of dangerous practice activity); Layden v. Plante, 101 A.D.3d 1540, 1541 (3d Dep't 2012) (even though plaintiff knew back injuries were a possible result of weight lifting, summary judgment inappropriate due to question of whether trainer's instructions to plaintiff "unreasonably heightened the risks to which [plaintiff] was exposed beyond those usually inherent in weight-lifting") (internal quotation marks omitted); Zmitrowitz v. Roman Catholic Diocese of Syracuse, 274 A.D.2d 613, 615 (3d Dep't 2000) (defendants' motion for directed verdict based on assumption of risk properly denied when "plaintiffs offered evidence that defendants' failure to provide and require a ninth grader to wear a catcher's mask during a tryout session, which was inconsistent with standard athletic custom in schools throughout the State,

inherent risks," simply begs the question of whether the risks Grady faced during the Warrior Drill were inherent in baseball or whether they unreasonably increased the danger.

constituted a breach of sound coaching practice which enhanced the risk of injury normally associated with the activity").[12]

C. The Third Department Failed to Consider the Issue of the Inadequate "Protective" Screen

In focusing on Grady's voluntary participation in the Warrior Drill, the Third Department majority failed to consider whether the "protective" screen was adequate and provided the protection that Defendants believed it did and advised the team that it did. Failure to consider the inadequacy of the screen was an error because even known dangers cannot support an assumption of risk defense if they are exacerbated by inadequate safety equipment. See Bukowski, 19 N.Y.3d at 357 ("There is a distinction between accidents resulting from defective sporting

[12] The Third Department majority's reliance on Bukowski and Legac v. S. Glens Falls Cent. Sch. Dist., 150 A.D.3d 1582 (3d Dep't 2017) is misplaced. In Bukowski, the defendants did not concede that a protective screen was necessary. Here, Defendants conceded that a screen was necessary and undertook to provide one, thereby lulling everyone including themselves into a false sense of security. And in Bukowski, the plaintiff "testified at trial that he was aware of the risk of getting hurt in baseball, had seen other pitchers get hit by batted balls, had experienced balls being batted back at him, and had hit batters with his own pitches." Bukowski, 19 N.Y.3d at 356. He could testify to that because a pitcher getting hit by the batted ball he had just thrown to the batter is an inherent risk of baseball. By contrast, Grady being hit by a ball that had been hit to one player and was being thrown to another while Grady focused on a second ball being thrown by yet another player, all as part of a contrived drill, is not an inherent risk of baseball. Rather, it is an unreasonably increased risk that Defendants admit they had to protect Grady from. In Legac, similarly, the plaintiff was specifically aware of the potential dangers of the allegedly defective condition, *i.e.*, the dangers of fielding balls off of a hardwood gymnasium floor rather than a baseball field and the absence of protective equipment. Legac, 150 A.D.3d at 1584-85. Here, there is no evidence that Grady knowingly assumed the risk of an inadequate protective screen. Moreover, in Legac, the plaintiff was injured when fielding a ball hit specifically to him. Id. at 1583. Here, Grady was hit by a ball intended for another player while he was focused on a different ball that was being thrown to him by yet another player, and was, therefore, defenseless.

equipment and those resulting from suboptimal playing conditions."); Philippou v. Baldwin Union Free Sch. Dist., 105 A.D.3d 928, 930 (2d Dep't 2013) ("defendants' moving papers failed to demonstrate, prima facie, that the allegedly dangerous condition caused by the improperly taped or secured mats did not unreasonably increase the risk of injury inherent in the sport of wrestling"); Weinberger, 102 A.D.3d at 678-79 ("[softball pitcher] cannot be said to have assumed the risk of being hit in the face by a line drive while pitching behind an L-screen, which, due to a defect, was not freestanding and had fallen down prior to the pitch that led to her injuries. . . . The faulty equipment provided by the School and the decreased distance between S. and the batter, from which she was pitching at the direction of Pisano without the benefit of the L-screen, did not represent risks that were inherent in the sport of softball and, instead, enhanced the risk of being struck by a line drive."); Fithian v. Sag Harbor Union Free Sch. Dist., 54 A.D.3d 719, 720 (2d Dep't 2008) (although getting hit in the head by a ball during a baseball game was a risk inherent in the sport, summary judgment inappropriate on issue of whether player assumed the risk of playing with a cracked batting helmet provided by defendants); Stackwick v. Young Men's Christian Ass'n of Greater Rochester, 242 A.D.2d 878, 879 (4th Dep't 1997) (reversing summary judgment due to question of "whether defendant's failure to pad the wall behind the basket created a risk beyond those inherent in the sport of basketball"); Laboy

v. Wallkill Cent. Sch. Dist., 201 A.D.2d 780, 781 (3d Dep't 1994) (summary judgment properly denied when pole vaulter injured after protective landing mats separated at the seam).[13]

Thus, when this case is "analyzed using the standard employed in cases involving inadequate safety equipment" as Justice Pritzker stated in his dissent, R.7, summary judgment is inappropriate.

D. Defendants Failed to Meet Their Initial Burden on Summary Judgment Because They Did Not Demonstrate that they Conducted the Warrior Drill Under Adequate Safety Provisions and in a Manner That Protected Players from the Recognized and Foreseeable Increased Risks of the Drill

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853, (1985) (citations omitted). Moreover, Defendants "have the burden to establish as

[13] In the Supreme Court, Defendants asserted that Grady's position "would discourage the use of safety measures" and "would place school districts in a better position by refraining from utilizing safety measures whenever a risk was obvious or known." R.446. This, of course, makes no sense. Defendants had a duty to protect Grady from unreasonably increased risks and to conduct the Warrior Drill under adequate safety provisions. They breached their duty by having an inadequate "protective" screen and would also have breached it had they had no screen at all.

a matter of law that plaintiff's action is barred by the doctrine of primary assumption of risk." Weller, 217 A.D.2d at 283-84.

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

It is well-established that "a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks." Benitez, 73 N.Y.2d at 658. Independently, the New York State Education Commissioner has promulgated regulations providing that "[t]t shall be the duty of trustees and boards of education . . . to conduct all [extraclass athletic] activities under adequate safety provisions. 8 NYCRR § 135.4(c)(7)(i)(g).[14]

Thus, to meet their initial burden on summary judgment, Defendants were required to establish *prima facie* that the Warrior Drill did not present "unassumed, concealed or unreasonably increased risks" and that it was conducted "under adequate safety provisions." Yet, although Defendants expressly recognized the

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

increased risk to the regular first baseman – Grady, in this case – from the Warrior Drill and the need to protect the regular first basement using appropriate safety equipment, they never established that the "protective" screen they used was adequate, as Supreme Court recognized when it discounted the affidavits of Defendants' expert Cassidy and of Allen and Ferraro:

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

R.24.

Because Defendants did not establish that the screen they used was, in fact, the correct size and in the correct position to protect Grady, they have not met their burden of demonstrating that the Warrior Drill as conducted on March 8, 2017 did not present an unreasonably increased risk or that it was conducted under adequate safety provisions, and their motion should have been denied on that basis alone. See Stillman v. Mobile Mountain, Inc., 162 A.D.3d 1510, 1511 (4th Dep't 2018) ("the court properly denied that part of defendant's motion based on assumption of the risk inasmuch as it failed to meet its initial burden of establishing that the risk of falling from the climbing wall is a risk inherent in the use and enjoyment thereof"); Philippou, 105 A.D.3d at 930 ("defendants' moving papers failed to

demonstrate, prima facie, that the allegedly dangerous condition caused by the improperly taped or secured mats did not unreasonably increase the risk of injury inherent in the sport of wrestling"); Brown, 130 A.D.3d at 854 ("Here, the defendants failed to establish, prima facie, that the infant's coach, by having her perform an infield sliding drill on the subject grass field, did not unreasonably increase the inherent risks of the activity. Since the defendants failed to establish, prima facie, their entitlement to judgment as a matter of law, the motion and cross motion were properly denied, and the Court need not determine the sufficiency of the plaintiff's opposition papers.") (citations omitted).

E. At the Very Least, Issues of Fact Concerning Whether Defendants Breached Their Duty to Conduct Athletic Activities Under Adequate Safety Provisions Preclude Summary Judgment

"Application of the doctrine [of primary assumption of risk] is generally considered a question of fact for the jury." Pantalone v. Talcott, 52 A.D.3d 1148, 1149 (3d Dep't 2008). Here, even assuming *arguendo* that Defendants met their initial burden on summary judgment – which they did not – the record establishes the existence of genuine issues of fact as to whether they fulfilled (i) their duty "to protect student athletes from "unassumed, concealed or unreasonably increased risks, " Benitez, 73 N.Y.2d at 658 and from "dangerous condition[s] over and above the usual dangers that are inherent in the sport," Morgan, 90 N.Y.2d at 485 (1997), and (ii) their independent duty under governing regulations "to conduct all

[extraclass athletic] activities under adequate safety provisions. 8 NYCRR § 135.4(c)(7)(i)(g)."[15]

Grady's expert, Raymond Salvestrini, explained in detail in his affidavit that the screen was too small and was positioned too close to the "short first baseman" rather than, as it should have been, closer to the regular first baseman. R.351. Salvestrini also detailed multiple other factors that caused the Warrior Drill as conducted by Defendants on March 8, 2017 to pose an unreasonably increased risk to Grady, including that (1) it was the first outdoor practice of the season; (2) the weather; (3) the combination of varsity and junior varsity players in the same practice; and (4) the fact that the drill was conducted late in the practice when the players were less focused and more fatigued. R.366-67. When compared to the conclusory statement by Defendants' expert that the "screen selected . . . was appropriate for the drill and properly positioned." R.320-21 ¶ 7, Salvestrini's affidavit is more than sufficient to demonstrate the existence of issues of fact.[16]

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

[16] Supreme Court discounted Salvestrini's affidavit because it felt that "Salvestrini – like defendants' expert – does not provide any scientific and/or technical data supporting his *(cont'd)*

See Owen, 79 N.Y.2d at 970 ("expert affidavits indicating that the contour of the track's retaining wall, as well as the design of its guardrail and the placement of barrels near the guardrail, was unique and created a dangerous condition over and above the usual dangers that are inherent in the sport of auto racing . . . were sufficient to create a triable question of fact as to whether defendants' alleged negligence, if any, engendered additional risks that 'do not inhere in the sport'"); Stackwick, 242 A.D.2d at 879 (reversing summary judgment due to "issue of fact whether defendant's failure to pad the wall behind the basket created a risk beyond those inherent in the sport of basketball").[17]

opinion." R.26. In reality, Salvestrini's detailed explanation, describing the inadequate size and improper positioning of the screen and other factors that made the Warrior Drill unsafe on March 8, 2020, provided far more detail then Cassidy's conclusory statements. In any event, if the Supreme Court was correct that Cassidy's affidavit was insufficient, then Defendants failed to meet their burden as set forth in Point III.D, supra, and there was no need for the Supreme Court to even examine Salvestrini's affidavit. Conversely, if Cassidy's affidavit were to be deemed sufficient, then Salvestrini's affidavit would likewise be sufficient and therefore would present issues of fact for the jury as to whether the Warrior Drill presented an unreasonably increased risk to Grady.

[17] Defendants apparent position in their Rule 500.11 letter that they cannot be liable for Grady's injuries because "the screen stopped some, and probably most, of the thrown balls," Def. Ltr. at 22, is meritless. It is not necessary for Grady to establish that the screen utterly failed to protect every single player who participated in the Warrior Drill. The screen was not intended to stop all throws; rather, it was intended to prevent injuries due to errant throws when the first baseman was necessarily focused on another ball, and failed horribly in Grady's case.

IV.

BOTH THE APPELLATE DIVISION AND THE SUPREME COURT ERRONEOUSLY FAILED TO RECOGNIZE THE INDEPENDENT, NON-DELEGABLE DUTY TO CONDUCT ATHLETIC ACTIVITIES SAFELY IMPOSED ON DEFENDANTS BY THE COMMISSIONER OF EDUCATION'S REGULATIONS

As set forth in Point II.B., supra, the Commissioner's Regulations provide that "[i]t shall be the duty of trustees and boards of education . . . to conduct all [extraclass athletic] activities under adequate safety provisions. 8 NYCRR § 135.4(c)(7)(i)(g), and also impose duties regarding athletic trainers' responsibilities for injury prevention and risk management. 8 NYCRR § 135.4(c)(7)(i)(d)(2).

The Appellate Division did not consider the Commissioner's Regulations. See R.3-6, and Supreme Court improperly brushed them aside. Supreme Court's statement that "this provision is applicable to athletic trainers and does not pertain to the coaches herein," R.27, misinterprets the regulation. First, of course, the regulation imposes an independent and non-delegable duty on the Board to conduct athletic activities "under adequate safety provisions". 8 NYCRR § 135.4(c)(7)(i)(g). Second, with regard to athletic trainers, the regulation imposes a duty on the Board to hire athletic trainers "only in accordance with the following," which includes the trainer's duty to engage in risk management, injury prevention, assisting with the selection and fitting of protective equipment, and inspection of fields and playing surfaces for safety. Here, Lipyanek testified that she did none of

these things with regard to the Warrior Drill. Nor was she asked to. There is thus an issue of fact as to whether the Board fulfilled its duty with regard to the hiring and supervision of athletic trainers.

Supreme Court also erred in rejecting the application of this regulation because, in Supreme Court's view, it "is general in nature and does not set forth any specific requirement or standard of conduct sufficient to create a duty." R.27. To the contrary, the regulation specifically and expressly creates a duty, using the word "duty." See 8 NYCRR § 135.4(c)(7)(i). The regulation also specifically requires athletic trainers to assist "in the proper selection and fitting of protective equipment," such as the protective screen in question, and to inspect fields for safety.

Moreover, there is no basis for the Supreme Court's statement that this regulation is "analogous to the Labor Law § 241(6) cases in which liability is contingent upon proof of a violation of a specific requirement or standard of conduct compared to a broad, general standard that a work area provide reasonable and adequate protection and safety." R.27. Labor Law § 241(6) – unlike the regulation at issue here mandating adequate safety protection – provides for the creation of implementing regulations expressly setting forth what, specifically, constitutes a violation. See id. ("The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their

agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith." Here, by contrast, the language of the regulation tells us that the regulation is applicable whether or not additional regulations are adopted. See 8 NYCRR § 135.4(c)(7)(i)(a) ("It shall be the duty of trustees and boards of education: (a) to conduct school extra class athletic activities in accordance with this Part and such additional rules consistent with this basic code as may be adopted by such boards relating to items not specifically covered in this code.") (emphasis added). The fact that the regulation uses the conjunctive to state that athletics must be conducted in accordance with the regulation *and* in accordance with any additional rules indicates that "may" be adopted that the duty imposed by the regulation continues to govern whether or not additional rules are adopted, and is not dependent on any additional rules, unlike Labor Law § 241(6). See D'Angelo v. Cole, 67 N.Y.2d 65, 69 (1986) ("Village Law § 4–414, authorizes villages to recover such costs in a manner 'assessed, levied and collected as may be provided by local law.' There is no indication that the Legislature intended the terms to be utilized in the alternative rather than the conjunctive.").

The decisions of the Supreme Court and the Appellate Division, finding assumption of risk based on the "no duty" rule, effectively vitiates the express duty imposed on the defendants by the Regulations of the Commissioner. The practical

effect of such a ruling is to immunize school boards, coaches, athletic directors, and athletic trainers from any responsibility for the safety of student athletes in this state, even while they publicly proclaim and testify under oath that they have a duty to protect these student athletes. R.165; R.203.

CONCLUSION

For the foregoing reasons, the January 28, 2021 Memorandum and Order of the Appellate Division, Third Department should be reversed and Defendants' motion for summary judgment should be denied in its entirety.

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Respectfully submitted,

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