To be argued by:
NICHOLAS I. TIMKO
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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,

Defendant-Respondents.

REPLY BRIEF FOR PLAINTIFF- APPELLANT

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Plaintiff-Appellant Kevin Grady respectfully submits this reply brief in further support of his appeal of the January 28, 2021 Memorandum and Order of the Appellate Division, Third Department.[1]

PRELIMINARY STATEMENT

Defendants have provided no basis for this Court to affirm the Third Department Order.

In his opening brief, Grady explained that 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. As Grady pointed out, the Legislature specifically intended when it adopted CPLR 1411 to prevent assumption of risk from abrogating a defendant's duty, which is precisely what the primary assumption of risk doctrine does. The doctrine thus sidesteps CPLR 1411 using a rationale that the Legislature specifically intended to foreclose.

In their brief ("Def. Br."), Defendants engage in a lengthy discussion of the concept of assumption of risk, and a lengthy description of the primary assumption of risk doctrine, but do not address the inherent conflict with the express will of the

[1] Capitalized terms used but not defined herein shall have the meanings ascribed in the Brief for Plaintiff-Appellant, dated March 15, 2022 ("Grady Br.").

Legislature. Indeed, Defendants essentially concede that the primary assumption of risk doctrine conflicts with the plain language of the statute when they accuse Grady of "a literalistic reading of CPLR § 1411." Def. Br. at 20.

Defendants also essentially concede that the 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's Regulations that are authorized by the Legislature and have the force of law. In Defendants' view, that duty only applies when it is not otherwise vitiated by the primary assumption of risk doctrine, thus proving Grady's point.

Defendants have also not established as a matter of law that the primary assumption of risk doctrine as it currently exists bars recovery here.

Defendants' position boils down to their repeated assertion that Grady was an experienced high school baseball player who fully understood the dangers of the Warrior Drill. That assertion is based on Defendants' mistaken but oft-repeated contention that Grady testified that he saw other errant balls bypass the "protective" screen. The record is clear, however, that Grady never testified to that, as set forth in detail in Grady's brief, and as Justice Pritzker recognized in his Third Department dissent. In reality, there is no evidence that Grady recognized that the "protective" screen was inadequate.

Indeed, Defendants fail to address Grady's argument that he cannot be deemed to have assumed the risk of the inadequate "protective" screen when Defendants themselves did not recognize that the screen was inadequate, and insisted that the Warrior Drill was safe with the screen in place.

Contrary to Defendants' position, Grady's voluntary participation in the Warrior Drill is insufficient to invoke the primary assumption of risk doctrine when Defendants' conduct unreasonably increased the risk of the activity or presented dangers not inherent in the sport of baseball.

Here, as Grady explained in his opening brief, the contrived multi-ball Warrior Drill, which "appears more reminiscent of Ringling Brothers than Abner Doubleday," R.15, presents risks that are clearly not inherent in baseball. Defendants' position that the risk need only be inherent to baseball practice is illogical. Under Defendants' interpretation, a defendant could escape liability for any dangerous practice drill they might concoct simply by asserting that the risk was inherent in the drill, even if it is not inherent in the sport itself.

Defendants have also not established that they met their initial burden on summary judgment of establishing prima facie that they fulfilled their duty of conducting the Warrior Drill safely. Contrary to Defendants' position, they cannot meet that burden merely by showing that Grady voluntarily participated in the Warrior Drill. As already noted, there is no evidence that Grady understood that

the "protective" screen was inadequate. Moreover, Defendants, having recognized the need for a protective screen and undertaken to use one, have the burden of establishing prima facie that the screen was adequate. They have not done so. Even if they had, as explained below and in Grady's opening brief, issues of fact as to the adequacy of the screen preclude summary judgment.

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

ARGUMENT

I.

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

Defendants do not – and cannot – provide a basis for the Court to disregard the irreconcilable conflict between the primary assumption of risk doctrine enshrined by Turcotte v. Fell, 68 N.Y.2d 432 (1986), and the Legislature's adoption of comparative fault and express abolition of assumption of risk as a bar to recovery in CPLR 1411. This Court has already recognized that "[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." Trupia ex rel. Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392,

395 (2010). As Grady set forth in his opening brief, this Court should act on that recognition and effectuate the express will of the Legislature by abolishing the primary assumption of risk doctrine as a complete defense.

Despite their lengthy discussion of the history of assumption of risk, Defendants conspicuously fail to address the only history that actually matters: (1) in 1975, the Legislature adopted CPLR 1411, which expressly provided that assumption of risk "shall not bar recovery" and (2) in so doing, the express intent of the Legislature was to prevent assumption of risk from negating the defendant's duty. See Sponsor's Mem in Support, Bill Jacket, L 1975, ch 69 at 3 ("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.") (citation omitted); Judicial Conference Mem in Support, Bill Jacket, L 1975, ch 69 (same).

Defendants' dissertation on the history of assumption of risk from Aristotelian times is irrelevant in view of this specific legislative pronouncement abrogating the doctrine. No one disputes that assumption of risk acted as a bar to recovery before the adoption of CPLR 1411 in 1975 – that is why CPLR 1411 was adopted.[2] The issue is that despite: (1) the Legislature's unambiguous

[2] Defendants are thus correct when they note that, prior to the adoption of CPLR 1411, "New York chose to follow the large body of Roman and English case law which preceded it and held *(cont'd)*

pronouncement in CPLR 1411 that assumption of risk "shall not bar recovery"; (2) the fact that the statute does not differentiate between "express" or "primary" assumption of risk; and (3) the absence of any language in the statute or the legislative history that somehow carves out athletic activities from the scope of CPLR 1411, the doctrine of primary assumption of risk nonetheless "has survived as a bar to recovery." Trupia, 14 N.Y.3d at 395 .[3]

In his opening brief, Grady explained that the Turcotte decision thwarted the will of the Legislature and ignored fundamental principles of statutory construction when it evaded CPLR 1411 by holding 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. See Grady Br. at 28-33.

Defendants do not address the legislative history of CPLR 1411, and do not adequately address the irreconcilable conflict between the holding in Turcotte and

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that assumption of risk wrought from common law principles may indeed fully bar recovery in a negligence action." Def. Br. at 14. But that all changed in 1975 when the Legislature adopted CPLR 1411.

[3] Defendants' statements that "[s]imilar appeals have consistently fallen flat," Def. Br. at 11, and that Grady "mak[es] an argument which has been attempted since the Reagan era, expecting a different result," id. at 8, is disingenuous. Grady is not aware of any decision by this Court since Turcotte that ruled on the question of whether the primary assumption of risk doctrine should be abolished, although there have been cases raising the issue that settled before this Court could rule. This Court clearly recognized the conflict between the primary assumption of risk doctrine and CPLR 1411 in Trupia, but was not required to decide the issue based on its determination that the doctrine did not apply in that action.

the express will of the Legislature set forth in CPLR 1411. Instead, Defendants essentially reiterate the Turcotte decision, in which the Court strained to cram the square peg of primary assumption of risk into the round hole of CPLR 1411. Defendants' arguments, however, merely serve to underscore the lack of any basis for retaining the primary assumption of risk doctrine in the wake of CPLR 1411.

Defendants assert that there is a distinction between "primary" and "express" assumption of risk and that "[a]s explained by the Court in Turcotte, the doctrine of implied assumption of risk at common law was abolished by CPLR § 1411, but the 'no duty' defense commonly known as primary 'assumption of risk' remains by the nature of that statue [sic] itself assigning comparative fault." Def. Br. at 15 (citing Turcotte, 68 N.Y.2d at 438).[4]

On its face, of course, Defendants' assertion is illogical: primary assumption of risk cannot remain "by nature of the statue [sic] itself assigning

[4] Defendants' statement that "[t]his must be true regardless of the statute's wording," Def. Br. at 15, makes no sense and goes against the most basic precepts of statutory interpretation, which requires courts to "give effect to the plain meaning of the words and apply the statute according to its express terms," and "not impose limitations on the clear statutory language." Tucker v. Bd. of Educ., Cmty. Sch. Dist. No. 10, 82 N.Y.2d 274, 278 (1993). While Defendants characterize Grady's position as "a literalistic reading of CPLR § 1411, which ignores the natural order of logic," Def. Br. at 20, it merely gives effect to the will of the Legislature expressed in the statute. Indeed, Defendants' appeal to the "natural order of logic" is essentially a concession that the statutory language itself does not support Defendants' position. Defendants' citation to Prosser and Keeton, Torts § 53 and to De Angelis v. Lutheran Med. Ctr., 58 N.Y.2d 1053 (1983), which discuss general principles of when a duty should be imposed, are irrelevant here, where the express intent of the Legislature in adopting CPLR 1411 was to prevent assumption of risk from negating the defendant's duty.

comparative fault" because the application of the primary assumption of risk doctrine prevents courts from determining comparative fault.

Moreover, an examination of the cited portion of Turcotte demonstrates that the Court in that case was searching for a way to avoid the clear language of CPLR 1411:

> Traditionally, the participant's conduct was conveniently analyzed in terms of the defensive doctrine of assumption of risk. With the enactment of the comparative negligence statute, however, assumption of risk is no longer an absolute defense. Thus, it has become necessary, and quite proper, when measuring a defendant's duty to a plaintiff to consider the risks assumed by the plaintiff. The shift in analysis is proper because the doctrine of assumption of risk deserves no separate existence (except for express assumption of risk) and is simply a confusing way of stating certain no-duty rules. Accordingly, the analysis of care owed to plaintiff in the professional sporting event by a coparticipant and by the proprietor of the facility in which it takes place must be evaluated by considering the risks plaintiff assumed when he elected to participate in the event and how those assumed risks qualified defendants' duty to him.

Turcotte, 68 N.Y.2d at 437-38 (citations, brackets, and internal quotation marks omitted).

In other words, the Court in Turcotte, while recognizing that CPLR 1411 abolished assumption of risk as a bar to recovery, essentially created a judicial end run around the statute by allowing assumption of risk to remain a bar to recovery in certain circumstances. As set forth at length in Grady's opening brief, this Court recognized in Trupia that such semantic games cannot disguise the fact that under Turcotte and its progeny, the doctrine of primary assumption of risk acts for all

intents and purposes as an absolute defense in contravention of CPLR 1411. See Grady Br. at 29-30 (quoting Trupia, 14 N.Y.3d at 395).

In reality, there is no distinction in CPLR 1411 between "express" and "primary" assumption of risk. There is no basis in CPLR 1411 to allow the retention of the primary assumption of risk doctrine "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 (brackets and internal quotation marks omitted). There is no basis in CPLR 1411 for the adoption of a contrived "duty to exercise care to make the conditions as safe as they appear to be," Turcotte, 68 N.Y.3d at 439, in an attempt to retain primary assumption of risk as a defense. And given the express Legislative intent to prevent assumption of risk from acting as a "no duty" rule, there was no basis for the Turcotte court to try to salvage the primary assumption of risk doctrine by characterizing it as a "no duty" rule, or for Defendants to claim that "a 'no duty' defense [is] not prohibited by CPLR § 1411." Def. Br. at 17.[5]

[5] Defendants cite to Custodi v. Town of Amherst, 20 N.Y.3d 83 (2012), for the proposition that primary assumption of risk only acts as a "no duty" rule supposedly allowed by CPLR 1411 "in circumstances where the material facts must lead to a finding that a duty was not owed." Def. Br. at 17. The Custodi decision does not actually contain the circular "there is only a no duty rule where there is no duty" reasoning set forth by Defendants, but merely describes the parameters of the primary assumption of risk doctrine. See Custodi, 20 N.Y.3d at 87-89. In any event, it is undisputed that Defendants had a duty to Grady here. See Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 658 (1989) ("[A] board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes *(cont'd)*

Primary assumption of risk acts as a complete bar to recovery in direct contravention of the express will of the Legislature, as this Court already recognized in Trupia. The fact that it has done so for decades is not, as Defendants appear to claim, a basis to retain the doctrine. This case, in which the Supreme Court stated that "[i]n this court's view, under these circumstances equity should dictate a balancing of the parties' respective degree of fault," but was "constrained by the case law" to dismiss the action on the basis of primary assumption of risk, R.28, is a prime example of the inappropriateness of clinging to that judicially created doctrine.[6]

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

Defendants do not dispute that the New York State Education Commissioner's regulations providing 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), have the force of law. See Grady Br. at 34-35. To the contrary, Defendants acknowledge that "§ 135.4 requires that

voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks."); 8 NYCRR § 135.4(c)(7)(i)(g) ("It shall be the duty of trustees and boards of education . . . to conduct all [extraclass athletic] activities under adequate safety provisions.").

[6] Defendants are incorrect when they state that "Appellant cherry picks statements from the Supreme Court's decision to paint it as one that reluctantly granted Appellee' s dispositive motion, but that characterization is untrue." Def. Br. at 9.

appropriate safety standards be enacted and put in place by school districts regarding extracurricular voluntary school sponsored activities, including athletic activities." Def. Br. at 22.

Grady explained in his brief that under the primary assumption of risk doctrine, the "principle of no duty," Trupia, 14 N.Y.3d at 395, operates to vitiate the express duty of care imposed on Defendants by the Commissioner's regulations. Grady Br. at 34-35. In their brief, Defendants do not address the conflict between the "no duty" primary assumption of risk doctrine and the nondelegable duty imposed by the Commissioner's regulations. Instead, Defendants prove Grady's point by arguing that the duty imposed by the regulation is only applicable in circumstances where the primary assumption of risk doctrine does not vitiate the duty. See Def. Br. at 22-24 (citing primary assumption of risk cases and applying primary assumption of risk analysis to interpret the regulation).

In other words, Defendants claim that the duty imposed by the regulation is limited by the primary assumption of risk doctrine. But that is the whole point. As Grady explained in his opening brief, it is inappropriate for the "no duty" doctrine of primary assumption of risk to abrogate an express duty of care imposed on the Defendants by the Commissioner's Regulations that are authorized by the Legislature and therefore have the force of law. Defendants' position essentially acknowledges that application of the primary assumption of risk doctrine abrogates

a duty imposed by law, thereby providing even more reason to abolish the doctrine.[7]

II.

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

A. Defendants Have Not Established That Grady Understood the Risks of the Warrior Drill

Defendants' argument concerning the application of the primary assumption of risk doctrine consists in large measure of repeating over and over again throughout their brief that Grady was an experienced high school baseball player who fully understood the risks of the Warrior Drill and nonetheless voluntarily participated.

Defendants' position that Grady fully understood the risks of the Warrior Drill, however, is based on a persistent misstatement of the record. Specifically, despite claiming that Grady engages in "an attempt to distort the record," Def. Br. at 3, it is Defendants who continue to do so by continuing to assert that Grady "saw errant throws bypass the screen." Id. at 36.

There is simply no evidence that Grady saw any other errant throws bypass the "protective" screen, as Justice Pritzker noted in his Third Department dissent,

[7] Defendants do not address Grady's arguments regarding the Supreme Court's erroneous interpretation of the regulations and the Appellate Division's failure to consider the regulations. See Grady Br. Point IV.

R.9, and as Grady explained in his brief. Grady Br. at 18-20, 35. Defendants do not address this, and instead simply continue to falsely assert that Grady testified that he saw other balls bypass the screen. See Def. Br. at 5 ("He personally saw at least two errant throws, with one striking another player. The other player who Appellant witnesses to have been struck with a ball was hit essentially in the same manner he was . . . ."); id. at 36-37 ("It is not disputed that Appellant saw that the protective screen could not, and did not, eliminate the risk of being hit by an errant throw. He saw errant throws bypass the screen. He saw at least one errant throw bypass the screen and strike a fellow player.").

Defendants are not entitled to falsely assert that Grady testified that he saw other errant balls bypass the screen when he did not testify to that. Giving Defendants continued mischaracterization of Grady's testimony its most charitable interpretation, Defendants ask the Court to impermissibly draw inferences from Grady's testimony in Defendants' favor rather than, as required on summary judgment, in Grady's favor.

Defendants tacitly acknowledge that Grady never testified that he saw errant balls bypass the screen when they state that "Appellant also never alleged that the ball which injured him somehow 'bypassed' the dividing screen." Def. Br. at 6. That is, of course, wrong. More importantly, in the portion of Grady's testimony that Defendants cite, Grady was not discussing the ball that hit him, but rather was

generally describing an errant ball that hit the other player. R.123-24. Defendants thus unintentionally confirm that Grady did not see another errant throw bypass the screen.

Moreover, Defendants miss the point entirely when they argue that "the screens were so obvious to anyone engaged in the sporting event would have been aware of their presence, and such open and obvious risks do not present an increased danger of the type necessary to obviate a primary assumption of risk defense." Def. Br. at 19. This is not a case like Palladino v. Lindenhurst Union Free Sch. Dist., 84 A.D.3d 1194 (2d Dep't 2011), on which Defendants rely, in which the presence of an obstacle that caused an injury was open and obvious. Grady does not claim that the presence of the screen is what caused his injury, but rather that the screen was insufficient to protect him from the increased risk that Defendants recognized and against which the screen was intended to protect. It was, of course, obvious that the screen was there, but there was no basis for Grady to understand that it was inadequate to protect him.

Defendants also fail to address Grady's argument that 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. See Grady Br. at 36-37 (citing 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)).

B. Grady Cannot Be Deemed to Have Assumed the Risk of the Warrior Drill When the Defendants Themselves Did Not Recognize Those Risks and Instead Asserted That the Drill Was Safe

Defendants fail to address Grady's argument that it cannot be determined as a matter of law that Grady was aware of and appreciated the enhanced risk presented by the Warrior Drill when (1) Defendants themselves did not appreciate the risk, (2) Defendants testified that they believed that they had taken adequate precautions to render the Warrior Drill safe, and (3) Defendants have maintained in this litigation that the drill was safe with the screen in place. See Grady Br. at 37-38. 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).

Defendants do not address the critical point that Defendants not only deemed the Warrior Drill to be safe, but also told the team that the screen would protect them and that Grady cannot be deemed to have assumed the risk of an inadequate "protective" screen that his coaches told him was adequate. Grady Br. at 38.[8] While Defendants assert that "[s]tanding in a field while you know hard objects

[8] Defendants' assertion that Grady "testified that he personally did not believe the screen was set up to provide safety, Def. Br. at 10, is incorrect.

will be thrown at you directly, and at those around you, all at high speeds, is an instance where the risk of bodily peril is *res ipsa loquitur*" that "alone bars Appellant's recovery," Def. Br. at 20, they ignore the fact that in this case, Grady was standing behind a screen that was placed there specifically to protect him from that risk and which his coaches told him would protect him.

Defendants also fail to adequately address cases cited by Grady holding 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 Grady Br. at 38-39 (citing Brown v. Roosevelt Union Free Sch. Dist., 130 A.D.3d 852, 854 (2d Dep't 2015); Weinberger v. Solomon Schechter Sch. of Westchester, 102 A.D.3d 675, 679 (2d Dep't 2013); Gilbert v. Lyndonville Cent. Sch. Dist., 286 A.D.2d 896, 896 (4th Dep't 2001); DeGala v. Xavier High Sch., 203 A.D.2d 187 (1st Dep't 1994); Parisi v. Harpursville Cent. Sch. Dist., 160 A.D.2d 1079, 1080 (3d Dep't 1990); Kane v. N. Colonie Cent. Sch. Dist., 273 A.D.2d 526, 527 (3d Dep't 2000)).

Defendants do not address the principle espoused by the cases cited by Grady, but do attempt to distinguish some of the cases factually in a *seriatim* discussion untethered to any specific argument in Grady's brief. Defendants' contention that Brown "provides no useful guidance" because it does not "describe

the circumstances that raised a question of 'unreasonably increased risk,'" Def. Br. at 34-35, is not correct, as the Brown decision was clear that the coach instructed the plaintiff to "perform an infield sliding drill on the subject grass field," i.e., not on the dirt infield. Brown, 130 A.D.3d at 854. Thus, in Brown, as here, the coaches instructed the players to engage in a practice activity that unreasonably increased the risk to the plaintiff.

Defendants' attempt to distinguish Parisi and Weinberger on the basis that those cases involved violations of specific regulations or safety handbooks is unavailing. Defendants do not and cannot contend that their duty to protect players is limited to situations covered by specific safety regulations because it is well-established that Defendants owe general duties (i) "to protect student athletes . . . from unassumed, concealed or unreasonably increased risks," Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 658 (1989), and from "dangerous condition[s] over and above the usual dangers that are inherent in the sport," Morgan v. State, 90 N.Y.2d 471, 485 (1997), and (ii) "to conduct all [extraclass athletic] activities under adequate safety provisions." 8 NYCRR § 135.4(c)(7)(i)(g).

Finally, Defendants misstate the holding in Kane. While Defendants correctly note that the Court in Kane held that the risk of colliding with another runner is inherent in the sport of running, they neglect to mention that the Court nonetheless reversed the grant of summary judgment to the defendant because

there were issues of fact as to whether the coach conducted the practice in a manner that unreasonably increased the risk, i.e., running in a school hallway. Kane, 273 A.D.2d at 527-28.

C. Grady's Voluntary Participation Is Insufficient to Establish Primary Assumption of Risk

While Defendants repeat many times in their brief that Grady voluntarily participated in the Warrior Drill, they fail to address Grady's argument that a plaintiff's voluntary participation will not absolve a defendant of liability when the defendants' conduct unreasonably increased the risk of the activity or presented dangers not inherent in the sport. See Grady Br. at 39-41 (citing Simmons v. Saugerties Cent. Sch. Dist., 82 A.D.3d 1407, 1409 (3d Dep't 2011); Weller v. Colleges of the Senecas, 217 A.D.2d 280, 284 (4th Dep't 1995); Baker v. Briarcliff Sch. Dist., 205 A.D.2d 652, 655 (2d Dep't 1994)). Defendants do not address any of these cases.

D. The Primary Assumption of Risk Doctrine Does Not Apply to the Contrived Warrior Drill, Which Presented Risks that Are Not Inherent to the Game of Baseball

Grady explained in his brief that 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. See Grady Br. at 41-43 (citing Braile v. Patchogue Medford Sch. Dist., 123 A.D.3d 960, 962 (2d Dep't

2014); Layden v. Plante, 101 A.D.3d 1540, 1541 (3d Dep't 2012); Zmitrowitz v. Roman Catholic Diocese of Syracuse, 274 A.D.2d 613, 615 (3d Dep't 2000)).

Defendants do not address the cases cited by Grady, and do not really address the substance of Grady's argument. Defendants assert as follows:

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

Def. Br. at 31.

They miss the point. Regardless of whether a player is engaging in a game or a practice, the player can only assume risks that are inherent in the sport of baseball. Practices and games cannot be looked at as separate activities with different inherent risks; rather, the inquiry for both practices and games is whether the activity in question presents risks that are not inherent to baseball. If "practice" is treated as something different from "baseball," then, as Grady noted in his opening brief, Defendants could have created a drill using six balls at a time and claim that they were protected by the primary assumption of risk doctrine because the risk of getting hit by one of the six balls is inherent in the drill, even though using six balls is not inherent in baseball. Justice Colangelo was thus correct when he noted in his dissent that "the risks assumed must be risks inherent in the sport itself, not risks inherent to the drill." R.14.

Defendants' reliance on Bukowski v. Clarkson Univ., 19 N.Y.3d 353 (2012), and Legac v. S. Glens Falls Cent. Sch. Dist., 150 A.D.3d 1582 (3d Dep't 2017), is unavailing. In both of those cases, unlike here, the plaintiff was engaged in an ordinary baseball activity with a single ball that was unquestionably inherent in baseball – fielding a ground ball hit to him that "took an odd hop" in Legac, 150 A.D.2d at 1584, and a pitcher being hit by a line drive back to the mound in Bukowski, 19 N.Y.3d at 355; see also Grady Br. at 43 n.12 (discussing Bukowski and Legac). Similarly, in O'Connor v. Hewlett-Woodmere Union Free Sch. Dist., 103 A.D.3d 862 (2d Dep't 2013), on which Defendants also rely, a player was hit by a batted ball hit to him that "took an 'unpredictable' hop." Id. at 862.[9]

This case, unlike the cases cited by Defendants, did not involve risks inherent in the game of baseball but rather the contrived Warrior Drill that "appears more reminiscent of Ringling Brothers than Abner Doubleday." R.15.

[9] This case is also fundamentally different from Rawson v. Massapequa Union Free Sch. Dist., 251 A.D.2d 311 (2d Dep't 1998), on which Defendants rely, because in Rawson the plaintiff was engaged in traditional practice activity of jogging, without the additional circumstances present in a case like Kane (discussed above). And this case is totally unlike Falcaro v. Am. Skating Centers, LLC, 167 A.D.3d 721, 722 (2d Dep't 2018), in which the court unsurprisingly found that the plaintiff was at fault for affirmatively "involving [him]self in an ongoing fight" during a hockey game.

Thus, under well-established law, Grady cannot be deemed to have assumed the risk of the Warrior Drill.[10]

E. The Inadequacy of the "Protective" Screen Precludes Summary Judgment for Defendants Based on Primary Assumption of Risk

As Grady explained in his opening brief, the Third Department majority's failure to consider the inadequacy of the "protective" screen was an error because even known dangers cannot support an assumption of risk defense if they are exacerbated by inadequate safety equipment. See Grady Br at 43-45 (citing Bukowski, 19 N.Y.3d at 357; Philippou v. Baldwin Union Free Sch. Dist., 105 A.D.3d 928, 930 (2d Dep't 2013); Weinberger, 102 A.D.3d at 678-79); Fithian v. Sag Harbor Union Free Sch. Dist., 54 A.D.3d 719, 720 (2d Dep't 2008); Stackwick v. Young Men's Christian Ass'n of Greater Rochester, 242 A.D.2d 878, 879 (4th Dep't 1997); Laboy v. Wallkill Cent. Sch. Dist., 201 A.D.2d 780, 781 (3d Dep't 1994)). Defendants do not contest this general principal. Indeed, they concede in

[10] Defendants continue to rely on the "Duty to Warn" form that Grady signed, and claim that by signing it, Grady "was notified in advance that there is an inherent danger when one voluntarily allows other people to throw hard objects, traveling very fast, at their face." Def. Br. at 6-7. As Grady explained in his brief, the form merely begs the question of whether the risks Grady faced during the Warrior Drill were inherent in baseball or whether they unreasonably increased the danger.

their brief that "non-assumed risks" include "such matters as defective sporting equipment." Def. Br. at 35.[11]

Thus, as set forth in Grady's opening brief and discussed below, 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.

1. Defendants Failed to Meet Their Initial Burden on Summary Judgment of Demonstrating that the "Protective" Screen Was Adequate

Defendants do not deny that they "have the burden to establish as a matter of law that plaintiff's action is barred by the doctrine of primary assumption of risk." Weller, 217 A.D.2d at 283-84. 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," Benitez, 73 N.Y.2d at 658, and that it was conducted "under adequate safety provisions." 8 NYCRR § 135.4(c)(7)(i)(g).

Here, as Grady explained in his opening brief, Defendants failed to meet that burden because they never established that the "protective" screen was the correct

[11] Defendants do not address Fithian, and their attempts to distinguish Laboy, Stackwick, and Philippou only highlight the fact that in those cases the courts recognized that the use of inadequate safety equipment was sufficient to defeat the primary assumption of risk doctrine. See Def. Br. at 32. It is irrelevant that those cases involved mats instead of screens, because the principle applies to all inadequate safety equipment.

size or the correct position. See Grady Br. at 46-48 (citing Stillman v. Mobile Mountain, Inc., 162 A.D.3d 1510, 1511 (4th Dep't 2018); Philippou, 105 A.D.3d at 930; Brown, 130 A.D.3d at 854)). Defendants do not address Stillman, and do not distinguish Philippou or Brown in any meaningful way, as set forth above.

Indeed, Defendants themselves admit that "Appellee did not present any evidence that the Screens were intended or fit to protect against errant balls." Def. Br. at 19.

Perhaps recognizing that they failed to meet their prima facie burden of establishing that the screen was adequate, Defendants contend that, by virtue of Bukowski and Legac, they have met their burden because they are "entitled to rely on the undisputed material facts which show that Appellant was aware of the precise risk that led to his injury." Def. Br. at 43.[12]

As set forth above, the evidence does not establish that Grady "was aware of the precise risk[s]" of the Warrior Drill. If it is Defendants' position that they need to establish such awareness to meet their burden, they failed.

In any event, neither Bukowski nor Legac have any bearing on Defendants' burden here.

[12] Defendants cite this Court's decision in Bukowski, but certain of their citations appear to actually be to the Third Department's decision in that case.

As an initial matter, Bukowski involved a motion for a directed verdict after both sides had put on their evidence at trial and does not discuss a movant's prima facie burden on summary judgment. Bukowski, 19 N.Y.3d at 356.

Moreover, regardless of the procedural posture, the facts of Bukowski do not support Defendants' position that they were not required to establish that the "protective" screen was adequate.

In Bukowski, the plaintiff "threw a fastball which the batter hit directly back at him, striking Bukowski in the jaw and breaking his tooth, id. at 355, and the plaintiff claimed that there should have been a protective screen between him and the batter. In Bukowski, the defendants did not concede that a protective screen was necessary. Here, by contrast, Defendants expressly recognized the increased risk to the regular first baseman – Grady, in this case – from the Warrior Drill, expressly recognized the need to protect the regular first baseman by using a protective screen, and have maintained in this litigation that the Warrior Drill was safe with the "protective" screen in place. Defendants therefore cannot establish their prima face entitlement to summary judgment without establishing that the "protective" screen they used was adequate to protect Grady, which they have not done. See 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").

Moreover, in Bukowski, the defendant could prevail based on the plaintiff's understanding of the risks because the risk of a batter getting hit by a batted ball is an archetypically inherent risk of the sport, as the plaintiff himself admitted when he "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. In addition, the Court found that plaintiff "was also aware of the obvious risk of pitching without the protection of an L-screen." Id.

Here, by contrast, Defendants have not established that Grady was aware of the risk of the inadequate "protective" screen, as set forth above. And here, the risk faced by Grady – being hit by a ball that had been hit to one player and was being thrown to another player, while Grady focused on a second ball being thrown to him by a third player, all as part of a contrived drill – is not an inherent risk of baseball, as set forth above.

The Legac decision is also unavailing. That case did not involve allegedly inadequate protective equipment. An in Legac, like in Bukowski, 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, Legac, 150 A.D.3d at 1584-85, and "acknowledged that it was common for baseballs to take unexpected bounces." Id. at 1584. Thus, the evidence in Legac supported the court's conclusion that the "conditions inherent in the indoor ground ball fielding drill were readily apparent to [the plaintiff]." Id. at 1585. Here, as set forth above, the deficiencies in the "protective" screen were not apparent to Grady, or to Defendants themselves.

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 thrown by one player and intended for another player, while Grady was focused on a second ball being thrown to him by a third player, and was therefore defenseless against the ball that hit him. That is why Defendants understood that a screen was necessary, and why they cannot meet their prima facie burden on summary judgment without establishing that the screen they used was adequate.

2. At the Very Least, Issues of Fact Concerning Whether the Warrior Drill Was Conducted Under Adequate Safety Provisions and Without Unreasonably Increased Risks Preclude Summary Judgment

In his opening brief, Grady explained in detail how, even assuming *arguendo* that Defendants met their initial burden on summary judgment – which they did not – the affidavit of Grady's expert Raymond Salvestrini was sufficient to establish the existence of genuine issues of fact as to whether Defendants fulfilled their duty.

Defendants never really address this argument other than cursorily stating that the Supreme Court was correct in failing to consider it. See Def. Br. at 35 (referring to a "properly disregarded affidavit"). Defendants assert that "neither side presented evidence to show the screen was somehow technically flawed to serve as a conceptual separation device," Def. Br. at 5, and that "Appellant failed to present any evidence that the screens were defective for their intended purpose," id. at 19, but Salvestrini did, in fact, provide such evidence. See Grady Br. at 49; R.364-77 (Salvestrini affidavit).

Defendants never address the substance of Salvestrini's affidavit, which, as Grady explained in his brief, is sufficient to raise an issue of fact precluding summary judgment. See Owen v. R.J.S. Safety Equip., Inc., 79 N.Y.2d 967, 970 (1992) (expert affidavits concerning track's retaining wall and guardrail "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 (affidavit of plaintiff's expert raised "an 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").

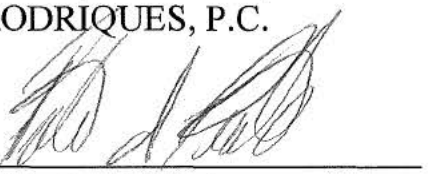
CONCLUSION

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

Dated: New York, New York
November 18, 2022

Respectfully submitted,

KAHN, GORDON, TIMKO & RODRIQUES, P.C.



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