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June 8, 2021

New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Grady v Chenango Valley CSD*
APL-2021-00041

Dear Chief Judge DiFiore and Associate Judges of the Court of Appeals:

Pursuant to Rule 500.11 of the Court's Rules of Practice, plaintiff-appellant Kevin Grady respectfully submits this letter in support of his appeal of the January 28, 2021 Memorandum and Order of the Appellate Division, Third Department, ("Third Department Order"), which affirmed the decision and order of the Supreme Court, Broome County, that granted the motion for summary judgment of defendants-respondents Chenango Valley Central School District, Chenango Valley Board of Education, Michael Allen, and Matthew Ferraro (collectively, "Defendants").

In its April 30, 2021, letter, the Court directed that this letter "shall also address whether 'there is a dissent by at least two Justices on a question of law' (CPLR 5601[a])."

Introduction

Justice Colangelo noted in his Third Department dissent that the so-called "Warrior Drill" which caused Grady's serious injury during baseball practice, "appears more reminiscent of Ringling Brothers than Abner Doubleday." Third Department Order at 13. The Warrior Drill, an infield drill with both a regular first baseman and a "short first baseman," involves multiple balls thrown towards first base from two different locations by different players on the field, simultaneously.

Defendants recognized the inherent danger of the drill and increased risk of errant balls striking players, and attempted to address those safety concerns with a "protective" screen. Defendants admitted they had no idea whether the screen was adequate to prevent balls from shortstop and/or second base from bypassing the short first baseman and striking the actual first baseman – Grady. 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.

The Third Department majority erred as a matter of law in applying the "primary assumption of risk" doctrine and affirming summary judgment to Defendants. As a 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, the 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, and failed to apply the "equipment doctrine" in determining the application of assumption of risk.

More fundamentally, the legal doctrine of primary assumption of risk, which vitiates a legal duty of care ("no duty rule"), should be discarded entirely because it contravenes the will of the Legislature, which enacted CPLR 1411, a law that abolished assumption of risk as a bar to recovery. Furthermore, the principle issue on appeal is the legal doctrine and exceptions applicable thereto.

Summary of Facts

The facts of this case are set forth in Grady's Third Department brief. Certain pertinent facts are summarized here for the Court's convenience.

A. Defendants Recognized the Increased Risk Presented by the Warrior Drill, Failed to Take Proper Precautions to Protect the Players During the Drill, but Nonetheless 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.166, 372, 374. 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.198. 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.161, 199, 200, 372, 374.

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 first baseman 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.159-160.

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

. . .

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

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

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

R.200.

However, Defendants never verified that the "protective" screen was adequate and would protect the regular first baseman from this foreseeable risk. R.148. 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.161.

Despite not knowing whether the screen was adequate, defendants nonetheless wrongly believed that the drill was safe. See R.160 ("I felt it was a very good drill. And with the screen there, that they were protected."). Allen also 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.162-163.

Grady testified that he trusted his coaches to provide a safe environment.

R.138.

B. Grady Is Grievously Injured During the Warrior Drill

Grady, an outfielder, was assigned by the coaches to regular first base for the Warrior Drill. R.102. During the drill, balls thrown to short first base, not intended for Grady and unrelated to the specific activity Grady was engaged in, flew past the inadequate "protective" screen and struck Grady in the face, resulting in substantial permanent loss of vision in his right eye.

C. Supreme Court Grants Defendants' Motion for Summary Judgment

In the Supreme Court, Defendants asserted that the Warrior Drill was safe. See R.304 (Warrior Drill is "not, as plaintiff contends, inherently dangerous"); R.304-05 (the "screen selected . . . was appropriate for the drill and properly positioned"); R.322 ("There was nothing inherently hazardous about the practice drill as far as I could determine."); R.330 ("There is nothing inherently dangerous about the 'Warrior' drill.").[1]

The Supreme Court recognized that Defendants failed to demonstrate appropriate safety measures for the Warrior Drill. R.8. Yet it reluctantly granted Defendants' summary judgment because, while it believed that "equity should dictate a balancing of the parties' respective degree of fault," it was "constrained

[1] In opposition, Grady submitted an expert affidavit opining, inter alia, that the "protective" screen was inadequate. R.347-61.

by the case law" to dismiss the action pursuant to the doctrine of primary assumption of risk, defining a central "question of law" herein. R.12.

D. The Third Department Affirms

Three justices of the Third Department voted to affirm, relying on Grady's voluntary participation in the Warrior Drill and on what they perceived as his knowledge of the risks. Two Justices dissented, concluding that the legal doctrine of primary assumption of risk is not applicable as a bar to recovery.

Argument

I. There Are Dissents by Two Appellate Division Justices on a Question of Law

In Bukowski v. Clarkson Univ., 19 N.Y.3d 353 (2012), this Court considered the applicability of the primary assumption of risk doctrine on an appeal based on a two-justice Appellate Division dissent pursuant to CPLR 5601(a). See id. at 356. This Court considered 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. 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 Division dissent in Bukowski, which satisfied 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).

Because the appeal in Bukowski was proper under CPLR 5601(a), this appeal is also proper under CPLR 5601(a).

Even without the Bukowski precedent, the Third Department dissents present questions of law appropriate for this Court's review. "[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.[2] Those are precisely the types of legal questions presented by the Third Department dissents here, including:

- Whether, as Justice Pritzker considered, a plaintiff can be deemed to have assumed the risk of an activity when the defendants did not recognize the risk and deemed the activity to be safe. Third Department Order at 6-7.

- Whether, as Justice Colangelo discussed, the primary assumption of risk doctrine applies to risks not inherent in a sport itself, but rather arise only from a contrived practice activity. Id. at 12-13.

- Whether, as Justice Pritzker stated, "this case is more properly analyzed using the standard employed in cases involving inadequate safety equipment." Id. a 5.

This Court regularly considers such legal issues. In 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

[2] The application of the doctrine, as so defined, then becomes a question of fact. See, e.g., Pantalone v. Talcott, 52 A.D.3d 1148, 1149 (3d Dep't 2008) (noting that, as a matter of law, the primary assumption of risk doctrine does not apply to "conduct that is reckless, intentional or so negligent as to create an unreasonably increased risk" and finding issue of fact as to whether defendant recklessly operated snowmobile); Dann v. Fam. Sports Complex, Inc., 123 A.D.3d 1177, 1179 (3d Dep't 2014) (issue of fact as to whether soccer player was aware of presence of concrete footer into which he collided since it was obscured by a vinyl liner).

> 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.

The Court considered similar issues in Owen v. R.J.S. Safety Equip., Inc., 79 N.Y.2d 967 (1992):

> 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; 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, 502 N.E.2d 964, 969 (1986) (considering whether an athletes "consent was an informed one" so as to fall under the primary assumption of risk doctrine).

Notably, this Court's review of the questions of law presented in Owen led it to conclude that there was a triable issue of fact precluding summary judgment Owen, 79 N.Y.2d at 970. Here, similarly, while the Third Department dissents determined that there were issues of fact, that determination was based on questions of law appropriate for this Court's review.

This case also involves issues similar to those presented in Ninivaggi v. County of Nassau, APL-2020-00093, 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). This Court granted the plaintiff's motion for leave to appeal in Ninivaggi, 35 N.Y.3d 909 (2020), indicating that the applicability of the primary assumption of risk doctrine presents a question of law appropriate for this Court's review.

II. The Third Department Incorrectly Interpreted the Primary Assumption of Risk Doctrine

A. A High School Student Athlete Cannot Assume the Risk of an Activity When the Defendants 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. Third Department Order at 3-4. 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 v. Town of Amherst, 20 N.Y.3d 83, 88 (2012) (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 Third Department Order at 3. There is no evidence in the record that Grady understood the protective screen to be inadequate. 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 see any errant balls bypass the screen. Indeed, he did not mention the screen at all during his discussion of the errant balls. R.107-08.

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.

The Third Department 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?

Third Department Order at 8 (footnote omitted).

Not only did Defendants deem the Warrior Drill to be safe, but they also told the team that the screen would protect them. Grady testified that he trusted is coaches to provide a safe environment, and there is no evidence in the record that

Grady had any reason to disbelieve his coaches.[3] It is illogical to claim that Grady assumed the risk of an inadequate "protective" screen that his coaches told him was adequate. Under these circumstances, it is impossible to determine that Defendants fulfilled their duty "to make the conditions as safe as they appear to be." Turcotte, 68 N.Y.2d at 439.

Moreover, 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. 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

[3] The Third Department was thus incorrect when it stated that Grady "did not rely on the screen for safety." Third Department Order at 3.

"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. 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."); cf. Baker v. Briarcliff Sch. Dist., 205 A.D.2d 652 (2d Dep't 1994) (because "the defendants were required to exercise reasonable care to protect Ms. Baker from any unreasonably increased risks during the practice session," the 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." Third Department Order at 3. Indeed, the case on which the majority relied demonstrates that primary assumption of risk only applies to risks in the sport itself, not in whatever practice drill the coach comes up with:

> [T]he defendant failed to establish, prima facie, that by voluntarily participating as a member of her school soccer team, the infant consented to the risks of racing in the school hallway [during practice]. In other words, the defendant did not establish that the commonly appreciated risks which are inherent in and arise out of the nature of soccer generally and flow from such participation on the soccer team included the risks of running into a wall while racing in the school hallway."

Braile v. Patchogue Medford Sch. Dist., 123 A.D.3d 960, 962 (2d Dep't 2014).

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." Third Department Order at 12. It is *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, 123 A.D.3d at 962; 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"); 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, constituted a breach of sound coaching practice which enhanced the risk of injury normally associated with the activity").[4]

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

[4] 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 that he that was specifically aware that a pitcher getting hit by the batted ball is an inherent risk of baseball. Bukowski, 19 N.Y.3d at 356. 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.

("There is a distinction between accidents resulting from defective sporting 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).

III. The Judicial Doctrine of Primary Assumption of Risk Should Be Abolished

In the Ninivaggi appeal, the New York State Trial Lawyers Association submitted an amicus brief advocating for the abolition of the primary assumption of risk doctrine. Grady adopts and incorporates the arguments in that amicus brief and offers the following additional arguments.[5]

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

[5] It is appropriate for this Court to consider the abolition of the primary assumption of risk doctrine 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. It is also a question of statutory interpretation of CPLR 1411.

> 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).

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." 68 N.Y.2d at 439.

In the years since Turcotte, this Court has recognized that such semantic games 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).

The promulgation of the judicial doctrine of primary assumption of risk 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

> 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, 2021 WL 2144103, at *2 (N.Y. May 27, 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 doctrine has acted as a complete bar to recovery for decades 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.

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

The New York State Education 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(7)(i)(g). The regulations further state, "It shall be the duty of trustees and boards of education to determine the need for athletic trainers," and upon engaging an athletic trainer, "(B) assisting in the proper selection and fitting of protective equipment." 8 NYCRR § 135.4(7)(i)(a) and (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

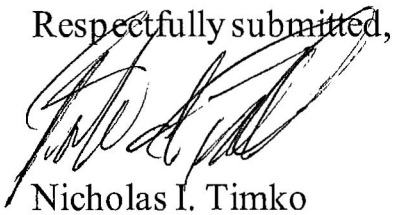
Regents under Section 207 of the Education Law." Murtaugh v. Nyquist, 78 Misc. 2d 876, 877 (Sup. Ct., Sullivan Cty. 1974).

Accordingly, the Commissioner's regulation, including the duty of care it imposes, has the force of law. Thus, for the reason set forth above with regard to CPLR 1411, the "no duty" doctrine of primary assumption of risk impermissibly abrogates a duty of care imposed on Defendants by the Commissioner's regulation, in violation of the New York State Constitution and the doctrine of separation of powers.

Conclusion

For the foregoing reasons and the reasons set forth in Grady's Appellate Division briefs, the Third Department Order should be reversed and Defendants' motion for summary judgment should be denied.[6]

Respectfully submitted,



Nicholas I. Timko

[6] Grady reserves all arguments made in his Third Department briefs not specifically addressed herein, including that Defendants failed to meet their initial burden on summary judgment because they did not demonstrate that the Warrior Drill was conducted under adequate safety provisions; other ways in which the Supreme Court misapplied the primary assumption of risk doctrine; and the Supreme Court's failure to consider the regulations imposing a nondelegable duty on Defendants.

WORD COUNT CERTIFICATION
PURSUANT TO COURT OF APPEALS RULE OF PRACTICE 500.11

I certify that the foregoing letter complies with the word count limit set forth in New York Court of Appeals Rule of Practice 500.11(m). As calculated by Microsoft Word, the letter, exclusive of the caption, salutation, and signature block, contains 6,962 words.

Dated: New York, New York
June 8, 2021

/s/ Nicholas I. Timko

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STATE OF NEW YORK) ss.:
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I, Isabelle Schmidt, being sworn, depose and say:

I am not a party to the action, am over 18 years of age and reside at Brooklyn, New York. On June 8, 2021, I served the within **LETTER BRIEF FOR PLAINTIFF-APPELLANT** by delivering a true copy thereof enclosed in a post-paid wrapper by depositing it in an official depository under exclusive care and custody of the United States Postal Service **[USPS]** within the State of New York and by electronic filing upon the following persons or entities at the last known address set forth after each name:

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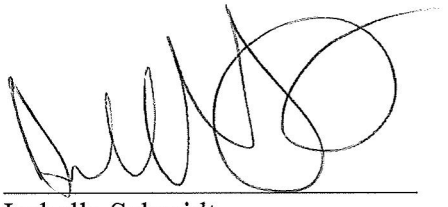
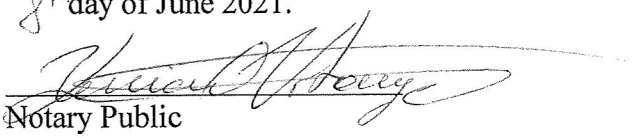


Isabelle Schmidt

Sworn to before me this
8th day of June 2021.



Notary Public

XENIA O. VITOVYCH
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No. 01VI6401034
Qualified in Queens County
Commission Expires December 02, 2023