THE LAW FIRM OF FRANK W. MILLER, PLLC
Attorneys and Counselors at Law
6575 Kirkville Road
East Syracuse, New York 13057
Telephone: (315) 234-9900
Fax: (315) 234-9908
cspagnoli@fwmillerlawfirm.com

Frank W. Miller
Charles C. Spagnoli
Giancarlo Facciponte
Thomas J. Murphy

November 1, 2021

Via overnight mail

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 and Associate Judges of the Court:

Please accept this correspondence as the Respondents' response to the amicus brief filed by the New York State Trial Lawyers Association (NYSTLA). NYSTLA is an organization advertising itself as "fighting initiatives that threaten to limit the rights of injured consumers." *See* www.nystla.org, "About NYSTLA." It is thus a partisan organization, not one providing neutral analysis of the law. We submit the following analysis in response to its contentions.

I. INTRODUCTION

The factual and procedural background of this matter was set forth in Respondents' letter submission of July 1, 2021, to which Respondents respectfully refer the Court.

II. THIS CASE HAS NOT BEEN ACCEPTED FOR REVIEW ON THE MERITS, AND SHOULD NOT BE

NYSTLA (at its Amicus Brief, p. 2) claims this case "has been accepted for review under section 500.11 of the Court of Appeals Rules of Practice," but this is not strictly accurate. This Court directed the parties to address whether the appeal was properly taken as of right under CPLR § 5601(a), by particularly asking the parties to discuss whether there were two dissents in the Appellate Division based on questions of law or not. In fact, the Appellate Division dissents of Justices Pritzker and Colangelo were expressly on questions of fact, not law. Thus, Justice Pritzker found questions of fact as to whether the protective screen was "operably defective," and whether Plaintiff-Appellant had observed errant throws bypass the screen before the ball that struck him (and thus whether he "knowingly assumed the particular risk that caused his injury"). (Decision of Fourth Department pp. 5, 7-8.)

Justice Colangelo contended that there were questions of fact as to whether the practice presented unusual risks and the "jury should be permitted to make the determination as to whether the drill was sufficiently related to the sport of baseball" for it to be an "inherent risk" of the sport such that primary assumption of risk might apply. (Id. pp. 13-14.) An issue to be presented for determination by a jury, of course, is necessarily a question of fact, since questions of law are for the court to decide.

That these factual issues, once resolved, could factor into the determination whether and to what extent the doctrine of primary assumption of risk applies, does not render them any the less pure issues of fact, and the dissents thus do not permit an appeal as of right. *Contrast Owen v. R.J.S. Safety Equip., Inc.*, 79 N.Y.2d 967 (1992) (appeal by certified question, not as of right; issue addressed was whether, as a matter of law, affidavits were sufficient quantum of evidence to raise a question of fact precluding summary judgment; Court of Appeals did not actually take up or resolve the question of fact itself); *Morgan v. State of New York*, 90 N.Y.2d 471 (1997) (addressing the contours of the primary assumption of risk doctrine, rather than resolving specific factual issues).

Therefore, the appeal has not been accepted for review on the merits, and should be dismissed as improperly commenced.[1]

III. THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK IS NOT AT ODDS WITH ARTICLE 14-A OF THE CPLR, AND SERVES AN IMPORTANT PURPOSE IN OUR SYSTEM OF JUSTICE

Apparently recognizing that the Court has not actually accepted this case for review on the merits, NYSTLA urges this Court to take up the appeal, noting the issues relating to the assumption of risk doctrine have failed to be addressed in two prior cases due to settlements. Even if the Court were to take up this case on the merits, NYSTLA's points would not bear consideration. The first of NYSTLA's two main arguments is that the primary assumption of risk doctrine is "an obstacle to the dispensation of social justice" because it makes it "impossible to properly evaluate a reasonable outcome of a case that possibly involves the assumption of risk doctrine," causing a "significant increase in litigation, inconsistent results, and confusion" that "all erode trust in the civil justice system." (Amicus Brief p. 18.) It

[1] Neither NYSTLA nor either of the dissenting justices of the Third Department addressed Plaintiff-Appellant's new argument that application of the primary assumption of risk doctrine somehow violated the New York State Constitution, so that issue will not be addressed here.

continues that "the loss suffered by the victim and [the] burden born [sic] to care and provide for him or her falls on the social fabric for which we all compensate" such that "society as a whole suffers." (Id. p. 22.)

These assertions are presented solely through ipse dixit rhetoric. NYSTLA provides no actual evidence to support them. Although NYSTLA cites a law review article by a then-third-year law student, *Assumption of Risk in New York: The Time Has Come to Pull the Plug on This Vexatious Doctrine*, 86 St. John's L. Rev. 1051 (2012), neither NYSTLA's brief nor the law review article provides any factual data to support the claims that the primary assumption of risk doctrine, in its present form, has actually interfered with the dispensation of social justice (assuming "social justice" does not simply mean granting every plaintiff a monetary award), eroded trust in the judicial system, unduly placed burdens on "victims," or caused "society as a whole" to suffer. Instead, what is offered is a series of bare assertions by NYSTLA without even anecdotal evidence offered in support, let alone statistical or other reliable factual data.

NYSTLA does state that a Westlaw search revealed 1,108 decisions discussing assumption of risk in the thirty-seven years since *Turcotte* was decided in 1987, of which 882 were issued in the twenty-four years since *Morgan* was decided in 1997. (Amicus Brief, p. 17.) However, it says that only "scores" of

claims were actually dismissed based on the doctrine of primary assumption of risk in that time. (Id.) This would suggest an average of one to perhaps four or five alleged victims being denied recovery per year based on the doctrine – far from the widespread social catastrophe alluded to by NYSTLA.

Instead, the marriage of CPLR Article 14-A and the primary assumption of risk doctrine, if sometimes tempestuous, has been a visibly successful one. On the one hand, personal injury law is healthy and alive in this state, with NYSTLA itself boasting a 3,500-lawyer membership despite charging in the neighborhood of $200.00 for an annual membership. *See* www.nystla.org/?pg=history. Personal injury claimants have received increasingly impressive awards under even bizarre circumstances. *See, e.g.*, *Makra v. Newmark Realty*, 0039140/1999 (N.Y. Sup. May 1, 2003) ($3.75 million awarded to man who stuck thumb in hole to open door that lacked doorknob and suffered minor disability when someone tried to open door from other side); *Kim v. New York City Transit Authority*, 27 A.D.3d 332 (1st Dept. 2006) (vacating jury award of $5 million for woman who laid down between subway tracks in apparent suicide attempt, but who was not killed when train passed over her, in absence of any proof train actually struck her). Formerly familiar organized school pastimes, such as dodgeball, have been frequently banned on the view that

they are excessively dangerous and/or prone to expose school districts to liability. *See* www.freeadvice.com/legal/dodgeball-nose-injury-and-school-district-liability.

On the other hand, under the present regime of primary assumption of risk, sports and other physical recreative activities have been able to survive and indeed prosper, as Sunday Night Football and channels such as ESPN not-so-mutely attest. They furnish entertainment and beneficial exercise to millions: in the United States alone, an estimated 71 million people participated in baseball, basketball, football, volleyball, and/or soccer during 2017. *See* www.statista.com/statistics/190273/number-of-participants-in-team-sports-in-the-us-in-2009/.

Moreover, the doctrine has not affected those who, going about their business, encounter unexpected situations in daily life, such as those traversing floors in shopping malls with unmarked wet spots, or those following sidewalks who come upon areas of poor maintenance. Primary assumption of risk pertains only to those who have consciously decided to join in organized sports or recreative activity with well-known risks, accepting such risks as part of the activity, but who upon injury abruptly wish to be treated as if they were unwitting victims.

Nor, contrary to NYSTLA's repeated references, is the current doctrine of primary assumption of risk usually permitted to shield landowners from liability where they have allowed their facilities to fall into disrepair. Torn nets, fields with

significant defects such as large holes, and the like are generally viewed as not involving risks "inherent" to the sport or activity at issue, and thus subject to an exception to the doctrine's protection. *See, e.g., Morgan, supra* (torn tennis net was not an inherent risk of sport); *Simmons v. Saugerties Central School District*, 82 A.D.3d 1407 (3d Dept. 2011) (assumption of risk did not apply where there was one-foot hole in area where children played football, as that was not an inherent risk of nature of sport).

What NYSTLA wishes is to move the bar, such that in virtually every instance of injury during a sports or organized recreative event, the organizer will be exposed to some amount of liability. It is difficult to imagine a case involving, for example, injury during a baseball game in which the proof will be so one-sided that a jury would predictably assign one hundred percent of the responsibility to the injured party and zero percent to the team or league overseeing playing conditions. The inevitable consequence of abandoning primary assumption of risk would be to expand the category of abandoned sports beyond the likes of dodgeball to the more

mainstream and popular games. It is respectfully submitted that such an outcome is not justified by NYSTLA's thin arguments.[2]

NYSTLA's second argument is that CPLR Article 14-A was intended to, and did, dispense with all forms of the assumption of risk doctrine. However, notwithstanding the nomenclature "primary assumption of risk," the current doctrine is not within the scope of the types of assumption-of-risk-style rules that are actually barred by Article 14-A. CPLR § 1411 states that the *"culpable"* conduct attributable to the claimant shall not bar recovery in (e.g.) personal injury actions, including culpable conduct that may constitute assumption of risk or contributory negligence. The doctrine of primary assumption of risk, however, does not pertain to "culpable" conduct at all. To the contrary, as the Court observed in *Trupia v. Lake George Central School District*, 14 N.Y.3d 392 (2010), "athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks." *Id.* at 395-396. As such, a participant's voluntary consent to those risks is not "culpable" conduct, but a salutary decision furthering activities of social value,

---

[2] These potential consequences should not be dismissed as mere alarmism on the part of Respondents. The concern originated with this Court. As it stated in *Trupia*, the Court subscribes to "the notion that these risks may be voluntarily assumed *to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise."* *Supra* at 395 (emphasis added). The Court's view on this point should not be dismissed as groundless.

and it works in tandem with the organizer's coordination of those activities to amend the scope of duty that otherwise would be owed. Primary assumption of risk, then, is not culpable conduct, and is not affected by CPLR § 1411's rule that culpable conduct of the claimant is not an absolute bar to recovery.[3]

NYSTLA itself argues that if primary assumption of risk is eliminated, it would leave defendants with the "burden to plead and prove that plaintiff was *negligent"* to reduce its liability in the comparative negligence framework. (Amicus Brief, p. 7 (emphasis added).) How is a defendant to prove that a participant's decision to join a sport or recreative activity – something recognized as having affirmative social value – was negligent? What jury would agree that a baseball player was negligent in agreeing to join a baseball team? The comparative negligence framework would set a defendant up for full liability every time a player was injured by the ordinary and necessary hazards of the game.

To the extent NYSTLA suggests *Turcotte* improperly relied on preceding cases to support its "no duty" reasoning, NYSTLA is incorrect. In both *Akins v. Glens Falls City School District,* 53 N.Y.2d 325 (1981), and *Davidoff v. Metropolitan Baseball Club,* 61 N.Y.2d 996 (1984), the Court discussed assumption

[3] It is difficult to imagine how a sports player's assumption of risk could be incorporated into the comparative fault regime. How can a sports organizer argue that a player was negligent by agreeing to participate in a sport?

of risk at length, and it defined the scope of a sporting facility owner's obligation to provide safety netting around a ballfield as properly limited by the desires and expectation of spectators, some of whom preferred an unobstructed view of the field to the additional safety of an intervening net. The reasoning in these cases was properly cited by the Court in *Turcotte* as supporting the idea that the extent of a sports organizer or facility owner should be shaped in part by the risks accepted and even preferred by the participant or spectator.

The New York State Legislature has been well aware that the primary assumption of risk doctrine survives in the courts despite the enactment of Article 14-A. Indeed, in 2009, a bill (A3776A) was introduced to legislatively overrule primary assumption of risk, but was never enacted. Thirty-five years have passed since *Turcotte v. Fell,* 68 N.Y.2d 432 (1986), recognized primary assumption of risk operated despite the 1975 passage of Article 14-A, and eleven years have passed since *Trupia* reaffirmed that the doctrine may prevent recovery. If the Legislature viewed primary assumption of risk as wholly untenable – or as preventing what it sought to achieve through Article 14-A – it surely would have addressed the matter explicitly, rather than assume the courts would abruptly snap back to a wholesale preclusion of anything labeled assumption of risk.

Preserving the doctrine of primary assumption of risk properly segregates a class of choices that are salutary because they are associated with, and essential to, sports and recreative activities of social value. In other words, such choices should not be lumped in with the decisions of individuals who are simply reckless, heedless, or inappropriately thrill-seeking. They merit special treatment and respect, even when the individuals making them later repent because their choices have led them to unfortunate injury.

Thus, NYSTLA is incorrect when it argues that analyzing the scope of a duty based on the conduct of a plaintiff "is the equivalent of placing the cart before the horse."[4] (Amicus Brief, p. 15.) It is perfectly appropriate to look to the actions and conduct of both parties to an arrangement to determine what duties are owed between them.

[4] NYSTLA urges the Court to reimagine *Turcotte* as finding no breach by the defendant in that case, rather than as holding the defendant's duty limited to not include risks assumed by the plaintiff. (Amicus Brief, p. 16.) NYSTLA's reading cannot be squared with *Turcotte's* plain language: "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 . . . . [T]he 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." *Supra* at 438; *see also Morgan*, *supra* at 485 (same).

NYSTLA further complains that primary assumption of risk is a "result-oriented highly artificial construct." (Amicus Brief, p. 17.) The foregoing analysis shows that the doctrine actually is well-grounded in the relationship between a sports organizer and a participant. Even if NYSTLA were correct that the doctrine is "results-oriented," however, this is no argument against the doctrine. Results-oriented ("teleological") doctrines may have just as much value to a system of justice as principle-driven ("deontological") doctrines. Which approach to the law is "better" is a question best left to the philosophers who have argued the point for millennia.

To the extent NYSTLA contends the doctrine of primary assumption of risk undermines deterrence of negligent activity, the concern is misplaced. Even if the doctrine occasionally avoids liability on the part of an actor guilty of some negligence, the actor does not, prior to that point, *know* he or she will avoid liability. Among other things, there is the uncertainty that the participant will specifically envision the risk causing injury at the time he or she decides to participate, or that he or she will take actual note of a newly-developing risk while engaging in an athletic contest. This uncertainty ensures that organizers and presenters of sports and recreative contests will continue to strive to provide safe playing circumstances. The commentator NYSTLA cites, Benjamin Pomerance, speculates that the primary

assumption of risk doctrine "may actually encourage risky behavior" in that "it could open the door to participants in a given activity taking more risks – knowing that they will not be held liable for another participant's injury as long as they can show that the injury arose from a risk inherent to the activity." (Amicus Brief, p. 22 (quoting Benjamin P. Pomerance, *Forewarned: Sports, Torts, and New York's Dangerous Assumption,* 76 Alb. L. Rev. 1275, 1305 (2012/2013).) However, nothing is offered to show that this hypothetical has ever translated into a real situation in the thirty-five years since *Turcotte*. NYSTLA's concern over reduced deterrence is out of place.

IV. ANY CONFUSION REGARDING THE DOCTRINE MAY BE RESOLVED WITHOUT ABOLISHING IT

Even if there has been some confusion among the lower courts' decisions interpreting – or in some cases inventing – exceptions allowing liability where primary assumption of risk would otherwise eliminate a duty, the answer is not, as NYSTLA insists (at Amicus Brief, p. 4), to eliminate the doctrine. Much of the purported "confusion" is easily seen as judges contorting the applicable principles out of an evident desire to avoid applying the doctrine at all. The solution is to

reaffirm and clarify the doctrine and its exceptions as previously announced in this Court's decisions.

Thus, for example, in *Morgan* this Court stated the doctrine applies to those risks which "arise out of the *nature of the sport generally,*" not only the risks that exist during regulation play only. *Supra* at 484 (emphasis added). It could and should thus be clarified that the "inherent risks" of a sport, for primary assumption of risk purposes, includes those risks associated with practices, not merely those found in regulation play. Indeed, in *Morgan*, the Court addressed several consolidated cases, including *Beck v. Scimeca,* which involved a student in a martial arts class who was injured, not while sparring, but in a practice in which he performed a "jump roll" over an obstacle. *Id.* at 486-487. The Court held primary assumption of risk applied. It specifically observed that "The primary means of improving one's sporting prowess and the inherent motivation behind participation in sports is to improve one's skills by undertaking and overcoming new challenges and obstacles." *Id.* at 488. It is respectfully submitted this shows unequivocally the Court intended "inherent risks" to encompass more than the same regulation play experienced in every game, and to reach the risks encountered in practices in which the participants seek to develop their skills further by facing new challenges.

It is further offered 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. This would avoid endless litigation over whether, for example, it was an "inherent risk" of participation on a baseball team to be hit by a ball when the day was windy or the sky was cloudy or Mercury was in retrograde. Such issues should instead be relegated to the analysis whether the particular circumstances rendered the situation so "unreasonably dangerous" as to justify an exception to the doctrine – and that should be a significant threshold indeed.

The exceptions recognized by the Court to assumption of risk were phrased in *Benitez v. New York City Board of Education,* 73 N.Y.2d 650 (1989) as "unassumed, concealed or unreasonably increased risks." *Id.* at 658.

With regard to the exception applying when a risk is unreasonably increased through the use of "defective" equipment, it is respectfully submitted that the Court should clarify the exception applies only where the equipment is actually *physically damaged,* "defective" in the sense that it was manufactured using unintended (weaker or inappropriate) materials and/or produced in a form other than the intended form (as with broken or separated parts due to error in the manufacturing process), or moved or fallen such that it offers no protection at all. The argument

that a piece of protective equipment did not offer the level of protection a plaintiff insists it should have (which, coincidentally enough, usually means the greater level of protection that would have prevented the plaintiff's injury) should be precluded as a basis to argue the equipment was within the "dangerous or defective" exception.

Similarly, the argument that the protective equipment was not sufficiently protective (or "inadequate") should not be allowed to invoke the exception that a risk was "concealed." The instant case illustrates the point: Plaintiff-Appellant indisputably saw the protective screen and understood it could not prevent all accidents from errant throws, and he observed exactly how much protection it afforded – and what protection it did not. The risk was not "concealed" in any logical sense of the term, and plaintiffs should not be permitted to play a semantic game of insisting equipment was not sufficiently protective and then rebranding this as "concealment" of a risk.

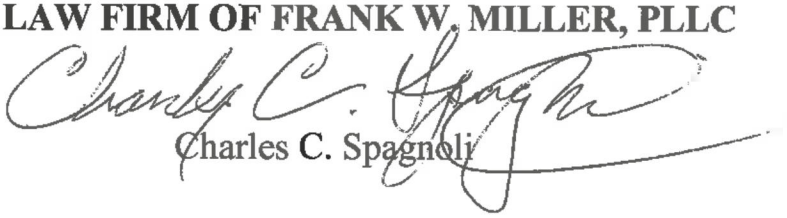
V. CONCLUSION

The doctrine of primary assumption of risk serves a valuable purpose in our society and system of government. NYSTLA's arguments for its abolishment – and/or that it has been abolished by the enactment of CPLR Article 14-A – are without merit. Respondents respectfully submit that this case was not properly

appealed and should be dismissed. Even if the Court takes up the case on its merits, far from abandoning the doctrine, this Court should reaffirm its existence and issue such orders as will inhibit lower courts from devising "end-runs" around the doctrine's application in the guise of overly-broad application of its exceptions. The decision of the lower courts, if reviewed, should therefore be affirmed.

Respectfully submitted,

THE LAW FIRM OF FRANK W. MILLER, PLLC



Charles C. Spagnoli

Cc: David Gill, Superintendent of Schools
Nicholas Timko, Esq.

CERTIFICATION PURSUANT TO RULE 500.11(m)

I certify and affirm that this submission consists of 3,516 words, exclusive of this certification and the accompanying proof of service, as calculated by Microsoft Word.

Dated: November 1, 2021

s/Charles C. Spagnoli

Charles C. Spagnoli
The Law Firm of Frank W. Miller, PLLC
6575 Kirkville Road
East Syracuse, New York 13104
(315) 234-9900
cspagnoli@fwmillerlawfirm.com