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

July 1, 2021

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

Re: Grady v. Chenange Valley CSD
APL-2021-00041

Dear Chief Judge and Associate Judges of the Court:

Please accept this correspondence as the Respondents' submission pursuant to Rule 500.11.

I. INTRODUCTION

This case presents the paradigmatic scenario for applying the doctrine of primary assumption of risk. It involves an experienced high school baseball player who witnessed thrown balls pass a protective screen and hit another player during practice. Upon seeing this, he *commented aloud* to his fellow players that the practice was dangerous. Nevertheless, he voluntarily continued participating in the

practice. Eventually another thrown ball passed the protective screen and struck him in the face.

The Complaint of Plaintiff-Appellant Kevin Grady (hereinafter "Grady") was dismissed on summary judgment. His appeal to the Appellate Division, Fourth Department, was unsuccessful.

Grady then improperly took an appeal "as of right" to this Court under CPLR § 5601(a) purportedly based on the fact that two justices of the Appellate Division filed dissenting opinions. The two dissents, however, were explicit that they were based on the existence of fact issues rather than issues of law, and as such no appeal as of right was available.

II. THE APPEAL WAS NOT PROPERLY TAKEN "AS OF RIGHT" UNDER CPLR 5601(A)

The Court has directed the parties to address a preliminary question, to wit, whether there was a dissent by two Justices of the court below on a question of law within the meaning of CPLR § 5601(a). Grady argues the two dissents were on questions of law, not fact. That argument is in direct conflict with the words of the dissenting justices themselves, which are clear beyond cavil that the dissents were premised purely on questions of fact.

The dissent of Justice Pritzker was explicit that his dissent was based on a question of fact. Thus, he began his opinion as follows:

> I respectfully dissent from the majority because I do not believe that primary assumption of the risk was established as a matter of law. I write separately from my dissenting colleague because *my reasoning is based upon a narrow issue, to wit, that there exists a question of fact* as to whether plaintiff could have assumed the risk of participating in the Warrior Drill due to the use of an inadequate safety measure . . . .

(Decision of Fourth Department p. 4 (emphasis added).)

Justice Pritzker went on to say "there is *a question of fact* as to whether [a protective screen] was operably defective because its size and deployment were inadequate." (Id. p. 5 (emphasis added).) After exploring how this purported factual issue would affect the analysis of the case, he opined that "*[f]actually,* the extent and nature of the assumed risk delineates the limit to which a tortfeasor's duty is displaced." (Id. p. 6 (emphasis added).) He further contended that the record was not clear whether the errant throws witnessed by Grady were throws that had bypassed the screen, and stated, "[t]his *fact,* as well as defendants' concession that the purpose of the screen was to make the activity safe, distinguishes this case from Bukowski." (Id. p. 7 (emphasis added).) He claimed that "the conditions were not 'as safe as they appear[ed] to be,'" a factual conclusion. (Ibid.) He reiterated in conclusion that it was his opinion "that there is *a question of fact* as to whether

plaintiff knowingly assumed the particular risk that caused his injury," and "[i]f he did not, the primary assumption of risk doctrine does not apply." (Id. pp. 7-8 (emphasis added).)

The other dissent, by Justice Colangelo, stated at the outset that he dissented "[b]ecause *questions of fact* are present." (Id. p. 8 (emphasis added).) After reviewing the basic facts, he stated "I would find that the evidence adduced, particularly with respect to the nature of the drill and the manner in which it was conducted, raises *an issue of fact* as to whether primary assumption of risk . . . should apply herein." (Id. p. 10 (emphasis added).) He then reviewed various principles of law applying to primary assumption of risk, all of which were recognized by the majority decision and therefore did not introduce any question of law. He stressed in his conclusion that application of the doctrine is "generally a question of fact to be resolved by the jury," asserted that the plaintiff had "adduced facts" purportedly showing the drill presented unusual risks, and stated "a jury should be permitted to make the determination as to whether the drill was sufficiently related to the sport of baseball and whether it posed an unreasonable risk." (Id. pp. 13-14.)

Thus, the dissents both expressly and unequivocally turned on purported questions of fact, not law, and CPLR § 5601(a) did not confer upon plaintiff an opportunity to appeal as of right to this Court. (Notably, even if only one of the

dissents had turned on a question of fact, the appeal as of right would have been improper under CPLR § 5601(a)'s clear terms. If the dissents turn on both questions of fact and law, no appeal as of right would lie either. *Cf. Aldrich v. Aldrich,* 130 A.D.2d 917 (3d Dept. 1987), *appeal dismissed,* 71 N.Y.2d 948 (1988).) The dissents' description of the issues they focused upon as "questions of fact" is in keeping with the view expressed by courts that have addressed primary-assumption-of-risk matters. *See Connor v. Tee Bar Corp.,* 302 A.D.2d 729, 730 (3d Dept. 2003) (application of primary assumption of risk doctrine is generally a question of fact); *Radwaner v. USTA National Tennis Center, Inc.,* 189 A.D.2d 605, 605-606 (1st Dept. 1993) (same); *Sopkovich v. Smith,* 164 A.D.3d 1598, 1600 (4th Dept. 2018) (same); *Julyan v. Chenfant,* 233 A.D.2d 902 (4th Dept. 1996) (whether case is one of primary assumption of risk or of comparative fault is generally a question of fact).

Notwithstanding the clear expressions of the dissenting justices, Grady insists their dissents were based on questions of law. He claims Justice Pritzker considered whether a plaintiff could be deemed to assume a risk when the defendants did not perceive the risk. However, this portion of Justice Pritzker's dissent was simply about questions of fact that (in his view) might take the case out of the scope of the controlling rule of *Bukowski,* as opposed to an argument that the law was different than that applied by the majority. Similarly, Grady argues that Justice Colangelo

questioned whether "inherent risks" of a sport included those arising in a practice, but as set forth above, Justice Colangelo was simply arguing that there was a factual issue whether the "risk" from the use of multiple balls in the drill was too far removed from regular play to be an "inherent" risk, and the issue should go to a jury. Finally, Grady argues that Justice Pritzker stated the case was more properly analyzed using the standard for cases involving inadequate safety equipment, but that comment was little more than an aside buried in a discussion that focused at length on purported questions of fact, and did not convert Justice Pritzker's dissent into one founded on a question of law.

Next, Grady contends that the allowance of an appeal as of right in *Bukowski v. Clarkson University,* 19 N.Y.3d 353 (2012), somehow indicates an appeal as of right is available in this case. However, in that case the dismissal of the plaintiff's claim came after the plaintiff presented his case at trial, and it was based on the trial court's determination that there was no rational process by which the jury could find in the plaintiff's favor. *Bukowski v. Clarkson University,* 86 A.D.3d 736, 740 (3d Dept. 2011). Thus, the dissent did not turn on a question of what the facts were in that case, but an assessment whether the sum of the evidence reached the legal threshold of proof necessary to allow the case to go to a jury – that is, a legal determination. Here, by contrast, the decision was made on summary judgment that

the Defendants had demonstrated the absence of a material issue of fact to prevent a ruling in their favor, and the dissents explicitly turned upon particular questions of fact they claimed rendered summary judgment inappropriate.

Finally, Grady argues that the existence and scope of a duty is a question of law, and therefore the dissents must turn upon questions of law. This is in effect an attempt to convert all questions of fact in lawsuits into questions of law. Virtually all cases involve establishing facts necessary to the application of legal rules. While the existence and scope of a duty is a question of law, that question can, of course, be resolved only after the facts of the case are established. Where a dissent is based on the belief that there is a question as to the critical facts, it is not raising a "question of law" simply because those facts must ultimately feed into the determination of the scope of a duty. Otherwise, all dissents in cases involving assumption of risk would automatically be dissents on questions of law – clearly a false proposition.

Because this case did not qualify as appealable as of right, the appeal should be rejected as procedurally improper.

III. STATEMENT OF CASE AND PERTINENT FACTS

At the time of his injury on March 8, 2017, Plaintiff-Appellant Kevin Grady (hereinafter "Grady") was a student at the School District in his senior year. He

had played baseball "in every level like up to varsity baseball…starting at T-ball to coach pitch to farm league to Little League to modified baseball to J.V. baseball." (R-101.[1]) Grady played varsity in eleventh grade, and was playing at the varsity level for the second year running during his senior year when the incident occurred. (R-102.) He signed a "Duty to Warn" form acknowledging he could be injured during participation in athletics. (R-102-103, 120, 136-137, 279.) Grady understood he could be hurt whether he was playing a game or in practice, but wished to join the baseball program again nevertheless. (R-137-140.)

On March 8, 2017, Grady participated in a so-called "Warrior Drill." (R-106, 110-111, 129-131, 309.) It was a drill he had participated in multiple times before, in both junior varsity and varsity practices. (R-162.) The Warrior Drill involved one set of players practicing throws from third base to first base, and another set of players practicing throws from second base to a "short" first base set up not far from the real first base. (R-106-107, 130-131, 166, 212-213, 214.) Grady was in the first group and was stationed at the regular first base. (R-110.) The two sets of players were practicing simultaneously, and the drill involved having two balls in use. (R-162.)

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[1] References in this form are to pages of the Record on Appeal.

No rule or regulation has been identified to require the use of special protective equipment during such a drill, much less prescribing the necessary size and positioning of protective equipment. Nevertheless, because it was possible for a ball thrown to “short” first base to travel to the real first base, the coaches set up a protective screen between “short” first base and the real first base. (R-159, 161-164, 199.) The screen was approximately seven feet high and seven feet wide. (R-161.) It was the largest screen the School District had. *(Ibid.)* Absent any requirements or guidance from any published source, the coaches relied on their extensive experience to choose and place the protective screen to provide an appropriate level of protection to the players, including Grady. (See R-310, 317-318.) The coach who set it up determined that the screen was sufficient to protect the students at the real first base, and was positioned appropriately. (R-148-149; see R-304-305, 310-311, 317-318, 322.) Grady saw the screen and where it was positioned. (R-106-107.) There is no evidence that the screen was defective, broken, or unsteady, or that it failed to stay up or to stop balls that actually struck it. (See R-109.)

Nevertheless, some errant thrown balls went over or around the screen, and at least one struck a fellow student-athlete at the real first base with Grady. (R-107-108.) There is no testimony the coaches observed this. (R-108.) Grady,

however, did. (R-107-108.) ***Because he saw thrown balls bypass the screen and at least one other player struck by such an errant ball, Grady commented to his fellow players that the practice was dangerous. (R-109.)*** Nevertheless, he voluntarily continued to participate in the practice. (R-110.) There is no evidence any coach directed Grady to continue practice after he saw the other student struck by an errant throw. After ten to fifteen minutes, another errant thrown ball from second base went over or past the screen and struck Grady, causing his injury. (R-107, 110-111.)

Grady's submission argues he did not specifically testify the other throws he saw were throws that bypassed the screen. That is, however, the only plausible construction of his testimony. After all, he said the "drill" was dangerous in reference to the errant throws he observed strike other players. (R-109.) He can hardly have been referring to ordinary throws from third base to first, which would not be unique to the drill, or to throws that were not part of the practice (such as horseplay from the sidelines). The other throws were plainly from second base to "short" first base and passed the protective screen.

In fact, Grady's submission betrays that this is his real recollection of the incident. He does not state that the errant throw that struck him was the first to bypass the screen. Instead, he states "During the drill, *balls* thrown to short first

base . . . flew past the inadequate 'protective' screen and struck Grady in the face . . . ." (Grady's submission p. 7 (emphasis added).) It is undisputed that he was struck by only one ball and that the practice ended when he was struck, so the reference to multiple balls bypassing the screen must mean he observed throws that passed the screen before his injury.

IV. THE APPEAL FAILS ON THE MERITS

A. Primary Assumption of Risk Negates the Existence of a Duty to Protect Against That Risk While Participating in Athletic Activities of Social Value.

The Court in *Turcotte v. Fell,* 68 N.Y.2d 432 (1986), recognized assumption of risk, not as a defense, but as negating the existence of a duty of care. In other words, to the extent an individual voluntarily participates in an athletic or recreative activity while aware of a certain risk, the organization hosting the activity has no duty of care regarding that risk. As such, there is no liability if the participant is injured as a result of that *known* risk. *Id.* at 437. A board of education and its employees need only "exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks." *Benitez v. New York City Board of Education,* 73 N.Y.2d 650, 658 (1989).

The pertinent passage in *Turcotte* reads:

> With the enactment of the comparative negligence statute . . . 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.*

Id. at 437-438 (emphases added; citations omitted).

The Court made this further explicit in *Trupia v. Lake George Central School District,* 14 N.Y.3d 392 (2010), stating:

> [A]ssumption of risk has survived as a bar to recovery. 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 [citing *Turcotte]*. 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 . . . .

Id. at 395 (citations omitted). The Court went on to note that the doctrine is justified for its "utility in 'facilitat[ing] free and vigorous participation in athletic

activities.'" *Ibid.* The Court further "recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and have employed 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." *Trupia, supra* at 395-396.

The passage of eleven years has not robbed these words of any of their force.

B. Grady Assumed the Risk of Being Struck.

This case presents the clearest possible example of assumption of risk, as Grady not only saw but commented upon the very risk that would later result in his injury, and he continued to participate in the practice anyway.

The facts before the Court place this case squarely within the ambit of the Court's prior decision in *Bukowski v. Clarkson University,* 19 N.Y.3d 353 (2012). There, a college freshman who had been playing baseball since he was five years old was described by the Court of Appeals as "an experienced and knowledgeable baseball player." *Id.* at 355, 356. He was instructed by coaches to join a "live" pitching practice without a protective screen, although he had never been in a live

pitching practice before. *Id.* at 355.[2] He saw others struck by batted balls and was aware of the obvious risk of being injured while pitching without a protective screen. *Id.* at 356. After throwing several pitches, he was struck by a ball batted back to him, sustaining an injury. *Ibid.* The Court found "the risks of pitching in an indoor facility without a protective screen were inherent to the sport of baseball and readily apparent to plaintiff," such that he had assumed the risk of his injury. *Id.* at 357. These allegations parallel the circumstances in the present case, except, of course, for the fact that here the School District *did* use a protective screen. The Court's decision in *Bukowski* is thus inimical to Grady's claims, because it found the utter lack of a protective screen in that case was insufficient for a jury to find he faced an "unassumed, concealed, or enhanced risk." *Id.* at 358. How, then, could the School District be liable *because* there was a protective screen?

In *Turcotte,* a racetrack operator was excused from liability to a jockey despite the allegation that the track on which he was injured was improperly watered and thus hazardous. The Court found the jockey had participated in three

[2] This fact in *Bukowski* – that the coaches instructed the player to join the practice without any protective screen – eliminates Grady's argument (at page of his letter brief) that the coaches' instruction to run the practice with the protective screen removes this case from the ambit of assumption of risk. The cases cited by Grady are inapposite as they generally involve instructions to players to forgo protective equipment required by an affirmative rule, or are simply inconsistent with this Court's holding in *Bukowski.*

prior races on the track on the day he was injured, and had the opportunity to observe the condition of the track. *Id.* at 442-443. Similarly, here, Grady participated in baseball practice for some time, with full knowledge that multiple balls were in play, and with the location and the size of the screen fully visible to him. He voluntarily continued despite the fact that he actually commented on the danger from errant throws bypassing the screen, after seeing at least one strike a fellow player. *See also Benitez v. New York City Board of Education,* 73 N.Y.2d 650 (1989) (high school football player assumed risks posed by his playing while fatigued, because such risks were obvious and evident); *Legac v. South Glens Falls Central School District,* 150 A.D.3d 1582 (3d Dept. 2017) (fifteen-year-old high school baseball player assumed the risk of being struck in the face by a batted ball where he had previously been hit with a baseball while at bat, witnessed another student struck by a batted ball, and had seen professional players on television get hit by balls); *O'Connor v. Hewlett-Woodmere Union Free School District,* 103 A.D.3d 862 (2d Dept. 2013) (player assumed risk of being struck in face by baseball that took "bad hop" on part of baseball field known to him to have a height differential).

C. The Risk of Being Hit By a Thrown Ball is Inherent to Baseball.

The risk of being struck by a thrown ball is, both under controlling precedent and self-evidently, inherent in participation on a school baseball team, and thus an assumed risk. Grady's arguments to the contrary are without merit.

The doctrine of "primary" assumption of risk embraces the risks "inherent" in a sport or recreational activity. As the Court stated in *Bukowski,* the doctrine reaches "risks which are commonly encountered or 'inherent' in a sport, *such as being struck by a ball or bat in baseball." Bukowski, supra* at 356 (emphasis added). In other words, when the Court wished to provide an illustrative example of a risk "inherent" to a sport or activity, it selected being struck by a ball in baseball. It has even recognized that a *spectator* at a ball game assumes the risk of being struck by a ball. *Benitez, supra* at 657.

More specifically, this Court in *Bukowski* found the risk of being struck by a baseball in the face during a practice – even one conducted in a manner different from regulation game play (e.g., indoors) – to be inherent to the sport of baseball and within the scope of assumption of risk by a high school student-athlete. *Bukowski, supra* at 357. Grady's arguments fail in the face of this holding. Only by rejecting the nine-year-old decision in *Bukowski* could this Court grant Grady's appeal.

Notwithstanding these unequivocal statements of the Court, Grady argues that the use of multiple balls in the drill rendered being struck by a ball a risk not "inherent" to the sport. He reasons that multiple balls are (supposedly) not used simultaneously in baseball games.[3]

This approach presents the wrong question. As *Bukowski* makes clear, the issue is not whether the use of multiple balls is inherent to a *regulation baseball game,* It is whether it was an inherent part of *baseball.* It is beyond dispute that practice drills are an indispensable component of participating on a school baseball team. (See R-304.) Even Grady's own expert does not actually contend that multi-ball practice drills are not routine and ordinary parts of baseball *practices.*

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[3] So Grady contends. He neglects to discuss the situation where a relief pitcher "warms up" on the sidelines with one ball while play continues on the field with another.

Grady's own expert expressly disclaimed that argument that the mere use of multiple balls, by itself, rendered the drill unsafe:

> The safety issue in this case is not simply the use of a multi-ball drill, but *all the circumstances surrounding its use.*

(R-350-351 (emphasis added).) Nowhere did Grady's expert actually say the use of multiple balls in the practice, in and of itself, created a safety issue. Nor did Grady cite any authority for such a proposition.

The doctrine of assumption of risk does not hinge on the "ordinary and necessary dangers" of regulation play of a sport. The question is whether an individual assumed the risk of the "ordinary and necessary" hazards of *the sports activity he voluntarily participated in.* Assumption of risk extends to those risks "inherent to and aris[ing] out of *the nature of the sport generally,"* not just those involved in formal games or contests. *Morgan v. State of New York,* 90 N.Y.2d 471, 484 (1997) (emphasis added); *see also Braile v. Patchogue Medford School District,* 123 A.D.3d 960, 962 (2d Dept. 2014) (assumption of risk inapplicable, not because running in a hallway was not part of a regulation soccer game, but because it was not a risk "inherent in and aris[ing] out of the nature of soccer *generally").* Multiple decisions of the Appellate Division have found assumption of risk to apply even when the basic mechanism of injury (unlike a thrown ball in baseball) was unique to a practice. *See Kane v. North Colonie Central School District,* 273 A.D.2d 526, 527 (3d Dept. 2000) (injury from contact during a noncompetitive track practice was "inherent" to the sport); *Legac, supra* at 1582-1583, 1585 (player assumed the risk of being struck in the face with a baseball during an indoor fielding practice on a hard gymnasium floor); *Rawson v. Massapequa Union Free School District,* 251 A.D.2d 311, 312 (2d Dept. 1998) (high school wrestler assumed risk of injury from jogging exercise during

wrestling practice); *cf. also Falcaro v. American Skating Centers, Inc.,* 167 A.D.3d 721, 722 (2d Dept. 2018) (amateur hockey player assumed the risk of involving himself in an on-ice fight as an inherent risk of playing hockey).

The cases are clear that the "inherent" risks of a sport extend beyond those faced in formal, regulation play. 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 baseball practice Grady participated in. The Supreme Court and the Appellate Division properly followed the Court in finding that it was.

D. The Protective Screen Did Not "Unreasonably Increase" the Risk.

Faced with the strong headwinds against his claims from the decisions of the Appellate Division and this Court in similar cases, Grady argues that the risk was "unreasonably increased" and not subject to assumption of risk. The evidence does not support this argument.

First, Grady dwells on the fact that the coaches monitoring the practice recognized that the use of multiple balls increased the risk to players, but believed that the protective screen rendered the drill safe. (Grady's submission pp. 3-6.) It is not clear what argument Grady is advancing. Is he saying that if the coaches believe the practice involves increased risk as compared to a regulation baseball

game, then assumption of risk automatically does not apply? Or that if the coaches believe the practice has been rendered safe by the use of protective equipment, assumption of risk does not apply? It cannot be the former, since only *unreasonably* increased risks are outside the scope of assumption of risk. As to the latter, it would be a peculiar result indeed if assumption of risk protected coaches who knew protective equipment was not sufficient to render an activity reasonably safe, but left unprotected coaches who proceeded on the good-faith belief that the use of protective equipment rendered an activity reasonably safe. In any event, neither contention can be squared with the Court's decision in *Bukowski.*

In making this argument, Grady may have been prompted by Justice Pritzker's comment that the instant case is distinguished from *Bukowski* by the purported fact that the risk was "camouflaged" such that "it was not even perceived by the defendants themselves." (Fourth Department decision p. 7.) True or not, this point is moot for purposes of assumption of risk. It is incontestable that *Grady* perceived the risk, regardless of whether it was "camouflaged" from the coaches. Again, it would be a peculiar outcome if a coach would be shielded from liability if he knew of an unmitigated risk, but liable if he was unaware of the risk.[4]

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[4] Grady argues that the assumption of risk doctrine does not apply because the Defendants "conceded that a screen was necessary." There is no exception to the assumption of risk doctrine based on such concessions. Assumption of risk

Grady also relies on his expert's ipse dixit assertion that the protective screen was not large enough to meet the standard of care. (Grady's submission pp. 7 n.1, 19-21.) However, his expert cited no scientific or technical basis for this assertion, nor any published standard or rule specifying the appropriate size for a protective screen. Where an expert's affidavit is devoid of a foundational scientific basis for its conclusions, it is insufficient to establish the standard of care and should be regarded as having "no probative force." *Cf. Burton v. Sciano,* 110 A.D.3d 1435, 1436-1437 (4th Dept. 2013). This is true where an industry standard is alleged without citation to any published industry standard or treatise. *Ibid.*

To the extent Grady attempts to shoehorn his assertion that the protective screen was "inadequate" into the caselaw applying where safety equipment is *damaged or defective,* it is respectfully submitted that he is trying to expand the meaning of "defective" far beyond its rational limits. No case has been found in which safety equipment was deemed to be "defective" simply because, without any damage or weakening of its materials or improper design, it was not as protective as the plaintiff asserted it should be. This is borne out by the cases Grady cites as involving damaged or defective equipment, which featured improperly taped or

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depends on whether the risk exists, is inherent to the sport, is observed by the injured party, and causes injury thereafter when the participant voluntarily continues in the sport. It does not hinge on the subjective beliefs of the defendant.

secured mats; an L-screen that was not freestanding and had fallen down allowing a pitch to injure the plaintiff; a cracked batting helmet; an unpadded wall behind a basketball hoop; and protective mats that separated at a seam. (See Grady's submission pp. 20-21.)

Grady cannot prevail on the contention that the provision of the screen "unreasonably increased" the risk of being hit by a thrown ball. The argument defies logic. The risk was of being hit by a thrown ball. Grady did not testify that every thrown ball bypassed the protective screen. That means the screen stopped some, and probably most, of the thrown balls. *The screen thus **REDUCED** the risk of being hit by a thrown ball.* What Grady is really arguing is that the screen did not completely *eliminate* the possibility of being hit by a thrown ball. His contortion of that fact into an assertion that the screen actually increased, instead of reduced, the risk from thrown balls, is no more than an attempt to squeeze this case into an exception to assumption of risk that does not fit. Therefore, Grady's contentions that the protective screen unreasonably increased the risk he faced, excusing his assumption of the risk that led to his injury, are without basis.

E. Grady Cannot Claim He was Unaware of the Risk.

It is well-established that a voluntary participant assumes the risks of which he is aware, such that other parties have no duty to protect him from those risks.

Grady, however, attempts to turn this rule on its head and argue that the provision of safety measures somehow eliminates his awareness even of risks he actually identifies aloud.

Grady saw that the protective screen could not and did not entirely eliminate the risk of being hit by an errant throw. He saw errant throws bypass the screen. He saw at least one errant throw get past the screen and strike a fellow player. He even commented on the risk prior to his injury. Contrary to Grady's submission (at page 15), the screen was precisely as safe as it appeared to Grady to be.

He nevertheless argues that the School District's provision of the protective screen rendered him unaware of the risk of an errant throw, *when he had just seen errant throws bypass the screen and strike at least one other student*. His argument is meritless for two reasons.

First, it is entirely contrary to reality. Grady was still aware a thrown ball could go above or around the screen. He witnessed it. He *commented* on it. He himself considered it to make the practice dangerous.[5] When Grady's submission (at page 13) says "[t]here is no evidence in the record that Grady understood the protective screen to be inadequate," it ignores Grady's statement that the drill was

[5] Even if he had not, any logical person would recognize that an errant throw could go above or around any screen, no matter how tall or wide.

"dangerous" after he saw other throws pass the screen. (R-109.) *Contrast Owen v. R.J.S. Safety Equipment,* 169 A.D.2d 150 (3d Dept. 1991) (no evidence decedent was aware of risk from design and construction of retaining wall where decedent made no remark about the danger).

Second, if adopted, the argument would discourage the use of safety measures. It would place school districts in a better position if they refrain from utilizing safety measures whenever a risk is obvious or known. Thus, as Grady's argument runs, the use of a safety measure renders a student-athlete who actually recognizes and acknowledges a risk nevertheless "ignorant" of its existence through a legal fiction, thereby depriving the school district of the protection of the assumption of risk doctrine. However, if the school district refrained from using safety measures to mitigate an obvious risk, the student-athlete would have no response to the assumption of risk argument, and the school district would escape liability. The argument would create an incentive to refrain from taking safety measures. No such argument should be adopted by the Court, as a matter of public policy.

Nor, contrary to Grady's submission (at pages 14-15), did Defendant-Appellee Michael Allen testify he instructed Grady that the screen would absolutely protect Grady from harm or be one hundred percent effective against

any ball no matter how thrown, thereby “misleading” Grady to believe there was no residual danger and somehow “concealing” the risk. Instead, in response to a question whether he had “convey[ed] that information to the people who had to play first base . . . , that screen is there to protect you,” he testified only that he believed the players understood the screen was there to offer them protection: “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-200-201.) Mr. Allen’s response cannot reasonably be interpreted as testimony that he made the extraordinary and unlikely statement to Grady and the other players that the screen would completely and absolutely protect them from any wild or errant throws. Grady’s own testimony establishes no such statement was made. (R-109.)

Absent such an improbable and unbelievable statement, it is plain that Grady knew there was some remaining risk notwithstanding the use of the screen, and chose to continue participating in the baseball practice anyway. Grady subsequently observed errant throws bypassing the screen and strike at least one other student, and commented on it. Regardless of Mr. Allen’s alleged statements before that, Grady certainly knew after observing the errant throws (and prior to his injury) that it could happen.

Again, contrary to Grady's submission (at page 15), it is not "illogical to claim that Grady assumed the risk of an inadequate 'protective' screen that his coaches told him was adequate." It is entirely logical to consider that Grady assumed a risk after his coaches told him the screen was adequate (if in fact they did), when he subsequently obtained information about the continuing risk that his coaches did not have – Grady's own observation of errant throws bypassing the screen

Thus, Grady's arguments suggesting he was unaware of the risk that led to his injury are meritless.

V. THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK SHOULD NOT BE ABOLISHED

Grady contends the primary assumption of risk doctrine should be abolished.[6] The circumstances of this case and policy considerations generally necessitate preservation of the doctrine.

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[6] On this topic, he purports to incorporate by reference the arguments submitted in a brief in another case, *Ninivaggi v. County of Nassau.* This should not be permitted as it would allow Grady to circumvent the length restrictions on his submission, and place Respondents in a position of having to respond to the combined arguments in their single submission subject to the 7000 word limit.

As Grady concedes, the assumption of risk doctrine has survived the passage of CPLR 1411 for decades – in fact, nearly fifty years. The Legislature is aware of the persistence of the doctrine and has chosen not to legislatively annul it, despite its purported inconsistency with the comparative fault regime under CPLR 1411. Even in 1975 when CPLR 1411 was adopted, the Thirteenth Annual Report of the Judicial Conference to the Legislature on the Civil Practice Law and Rules asserted the "no duty" approach to assumption of risk undermined the purpose of CPLR 1411. There have been efforts since to amend CPLR 1411 to expressly reject the doctrine of primary assumption of risk, including in 2009, when a bill (A3776A) was introduced to add a subsection (b) for that very purpose. Apparently the effort failed, as no such subsection (b) appears in CPLR 1411 today, twelve years later. The Legislature's failure to take up the banner of extinguishing the doctrine of primary assumption of risk is an indication that it recognizes the value of the doctrine and is loath to abolish it.

Conceptually, the doctrine of primary assumption of risk has been framed as one of "no duty" in the context of certain pastimes of high value to society. A clearer description might be that it is a doctrine reflecting that free citizens in this country frequently organize, without overt or economic compulsion, to conduct popular and physically beneficial contests, not in *spite* of their potential to produce

injury, but *because* they involve exertion and feats of athleticism that carry an enhanced risk of injury. It is that very potential for great achievements, made meaningful by the potential for failure or injury, that motivates the participants and generates the excitement that attracts spectators.

As that view pertains to this case, what the School District offered, and what Grady sought, was baseball. Baseball: with its swinging bats, thrown and batted balls, runners careening at top speed around third and heading for home, outfielders plunging back heedless of ground or fellow and with eyes only for a dot plummeting from the sun. Baseball: home runs, sprained ankles, dazzling catches, scraped knees. Players step onto the field not in fear that they will be physically tested, but yearning to be. The chance of injury is no tradeoff in baseball, but part and parcel of its whole, and elsewise the great stadiums would sit forlorn and silent.

In light of this truth, the Legislature – and this Court – should be reluctant to annul the doctrine. Nothing less than the survival of academic and professional sports is at stake. This Court in *Trupia* directly justified the doctrine as shielding professional and amateur sports, with all their benefits to public health and society, from the "prohibitive liability" that would otherwise crush them. *Trupia, supra* at 395.

Without the doctrine, *in theory* an institution (whether school or professional sports organization) would face no threat of liability or increased costs if it did not contribute, by way of negligence, to the occurrence of an injury. *In practice* the outcome would be far different. In literally every case of injury, some imaginative story of malfeasance on the part of the institution would be advanced, and even the most far-fetched would likely result in a plaintiff's case reaching a jury.

This case affords a perfect example: Grady argued before the courts below not only that the size of the protective screen was inadequate, but that Respondents were negligent because they held practice early in the season, with a mixture of players of varying experience on the field, *late in the afternoon, when it was cloudy, cool and windy.* (R-351.) These arguments were even presented to the Appellate Division.

Removing the assumption of risk doctrine and allowing cases to go to juries based on such factors essentially means *every* sports injury case would require a trial – meaning (1) there would always be a threat of liability and (2) every case would impose at least the burden of trial preparation fees. Given that sports are, by their nature, endeavors in which injuries are expected and even common, it can readily be seen that elimination of the assumption of risk doctrine would leave it prohibitively costly for sports programs to continue. The first to fall would be

those in school districts serving economically disadvantaged communities, but eventually even professional sports franchises would collapse under the weight of this litigation juggernaut. Notably, Grady, who advocates for the abolishment of the doctrine, offers not even a word of analysis or a shred of evidence to suggest the reasoning of the *Trupia* court was wrong, and that abolishment of the doctrine would not be a death knell for the activities it protects.

Further, abolishing the doctrine would impose added costs on the public at large, and not just municipalities, school districts, and sports organizations. The public will face increased premiums for personal insurance coverage and increased taxes from the municipalities and other institutions facing higher premiums themselves. This has been the result of uncontrolled personal injury liability in the past, which led to tort reform in this state; it can happen again.

That result would not favor the masses of adults and schoolchildren desiring to participate in and benefit from sports activities and physical fitness, or the public that enjoys and supports such programs. Nor, at the end of the day, would it do much to defray the costs of medical care for injured parties. It would mostly favor plaintiffs' attorneys, particularly those specializing in personal injury litigation.

Contrary to Grady, furthermore, the doctrine need not necessarily produce confusion among the lower courts. Instead, a review of the decisions shows that

many courts go to inordinate lengths seeking arguments to take the injury-producing risk outside the category of a sport's "inherent" risks, allowing them to deny assumption of risk protection. The simple answer is: being hit by a ball is an inherent risk of baseball; tripping and falling is an inherent risk of track; getting a jammed finger is an inherent risk of basketball. To the extent the courts wish to scrutinize the particular circumstances of such an injury with finer precision, they should do so under the rubric of whether the defendants did something *so unreasonable* to increase the risk of injury as to place the matter within the recognized exception to the assumption of risk doctrine.

Finally, Grady makes a throwaway argument that the assumption of risk doctrine abolishes a duty of care imposed by regulation of the Commissioner of Education. However, the regulation, 8 NYCRR § 135.4(7), merely provides general statements of duties to supply adequate provision for safety, to determine the need for athletic trainers, and to have athletic trainers assist with safety equipment. These general provisions do not guarantee any injured party a right of recovery, and they are thus not "abolished" simply because the assumption of risk doctrine results in some injured parties not securing recoveries in litigation. If injured parties believe the regulations have been violated, their remedy before the Commissioner of Education, if any, presumably survives.

For the foregoing reasons, Respondents respectfully request that the appeal be denied.

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 6,960 words, exclusive of this certification and the accompanying proof of service, as calculated by Microsoft Word.

Dated: June 30, 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

COURT OF APPEALS
THE STATE OF NEW YORK

KEVIN GRADY,

Plaintiff-Appellant,

- against –

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

Defendants-Respondents.

AFFIDAVIT OF SERVICE

APL-2021-00041

I, **Kathleen A. O'Neill** being duly sworn depose and say that I am not a party to this action, am over 18 years of age and reside in Parish, New York. That on the 1st day of July 2021, I served the within **Letter Submission Pursuant to Rule 500.11** by mailing a true copy to the following person at the last known address for such person set forth below:

NICHOLAS I. TIMKO, ESQ
KAHN GORDON TIMKO & RODRIGUES, P.C.
20 VESEY STREET – 3RD FLOOR
NEW YORK, NY 10007

Attorneys for Plaintiff-Appellant

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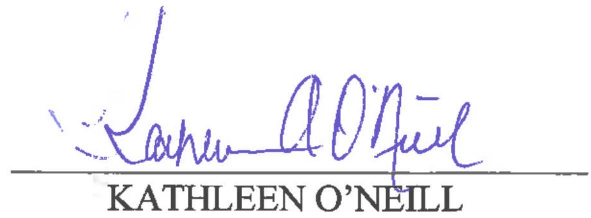
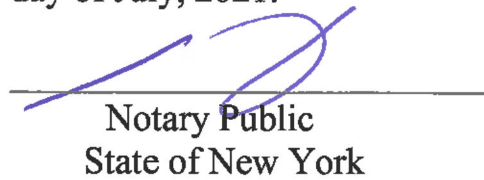


KATHLEEN O'NEILL

Sworn to before me this 1st
day of July, 2021.



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