State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 28, 2021 530346

KEVIN GRADY,
Appellant,
v
MEMORANDUM AND ORDER
CHENANGO VALLEY CENTRAL
SCHOOL DISTRICT et al.,
Respondents.

Calendar Date: January 11, 2021

Before: Lynch, J.P., Clark, Mulvey, Pritzker and Colangelo, JJ.

Kahn, Gordon, Timko & Rodriques, PC, New York City (Robert A. O'Hare Jr. of O'Hare Parnagian LLP, of counsel), for appellant.

Law Firm of Frank W. Miller, Syracuse (Charles C. Spagnoli of counsel), for respondents.

Mulvey, J.

Appeal from an order of the Supreme Court (Lebous, J.), entered October 31, 2019 in Broome County, which granted defendants' motion for summary judgment dismissing the complaint.

Plaintiff, then a high school senior and member of the Chenango Valley High School boys' varsity baseball team, sustained permanent injuries to his right eye after being struck in the head by a baseball during a combined varsity and junior varsity outdoor baseball practice. Plaintiff commenced this

action alleging that his injuries were caused by defendants' negligence in, among other things, conducting multiple infield drills with multiple balls simultaneously in play without proper safety precautions and equipment. Following joinder of issue and discovery, defendants moved for summary judgment dismissing the complaint. Supreme Court granted the motion and dismissed the complaint, finding that plaintiff assumed the risk of injury. Plaintiff appeals.

"The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks. An educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks. If the risks of the activity are fully comprehended or perfectly obvious, [the] plaintiff has consented to them and [the] defendant has performed its duty. Relatedly, risks which are commonly encountered or inherent in a sport, such as being struck by a ball or bat in baseball, are risks for which various participants are legally deemed to have accepted personal responsibility" (Bukowski v Clarkson Univ., 19 NY3d 353, 356 [2012] [internal quotation marks, brackets and citations omitted]; see Morgan v State of New York, 90 NY2d 471, 484-485 [1997]).

"[I]n assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport" (Morgan v State of New York, 90 NY2d at 485 [internal quotation marks and citation omitted]). "The duty owed in these situations is a duty to exercise care to make the conditions as safe as they appear to be" (Custodi v Town of Amherst, 20 NY3d 83, 88 [2012] [internal quotation marks and citation omitted]). Knowledge or "awareness of risk is not to be determined in a vacuum[, but must] be assessed against the background of the skill and experience of

the particular plaintiff" (Morgan v State of New York, 90 NY2d at 486 [internal quotation marks and citation omitted]; see Hope v Holiday Mtn. Corp., 123 AD3d 1274, 1275 [2014]).

In support of their motion, defendants submitted, among other things, transcripts of plaintiff's testimony at a deposition and a General Municipal Law § 50-h hearing. Plaintiff testified that he has played baseball since he was a young child and had played on his school's modified, junior varsity and varsity teams in previous years. At the beginning of the year, he signed a "Duty to Warn" form acknowledging his awareness of the inherent risks and possible injuries that could result from his participation in interscholastic athletics. Plaintiff voluntarily participated in baseball practices, including the multiple ball infield drill referred to as the Warrior Drill, and the testimony makes clear that plaintiff appreciated the risk of getting hit by an errant throw. He was familiar with the Warrior Drill, as he had participated in it in previous years. On the day in question, he observed numerous errant balls being thrown, including one that struck a teammate on the leg, and plaintiff discussed these dangers with other students before his own injury occurred. However, plaintiff did not raise his concerns with a coach and continued to participate in the drill.

Having 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 (compare Braile v Patchogue Medford Sch. Dist. of Town of Brookhaven, Suffolk County, N.Y., 123 AD3d 960, 962 [2014]). Although plaintiff asserts that the presence of a screen between certain players may have provided a false sense of security that they would be protected, thereby creating a dangerous condition beyond the normal dangers inherent in the sport, this argument is belied by his testimony unequivocally establishing that he did not rely upon the screen for safety but, rather, thought that the drill was unsafe even in the presence of the screen. Thus, the conditions were "as safe as they appear[ed] to be" (Custodi v Town of Amherst, 20 NY3d at 88 [internal quotation marks and citation omitted]; see Bukowski v Clarkson Univ., 19

NY3d at 356-357; compare Dann v Family Sports Complex, Inc., 123 AD3d 1177, 1179 [2014]; McGrath v Shenendehowa Cent. School Dist., 76 AD3d 755, 757-758 [2010]).[1] As the evidence showed that plaintiff was an experienced baseball player who "knew of the risks, appreciated their nature and voluntarily assumed them," defendants demonstrated their prima facie entitlement to summary judgment under the primary assumption of risk doctrine (Layden v Plante, 101 AD3d 1540, 1541 [2012]; see Legac v South Glens Falls Cent. Sch. Dist., 150 AD3d 1582, 1584-1585 [2017], lv denied 30 NY3d 905 [2017]; see also Bukowski v Clarkson Univ., 19 NY3d at 356-357). In response, plaintiff failed to raise a triable question of fact. Accordingly, we affirm Supreme Court's order granting summary judgment to defendants.

Lynch, J.P., and Clark, J., concur.

Pritzker, J. (dissenting).

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, specifically,

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[1] One of the dissents concludes that a question of fact exists because the baseball coaches thought that the screen would stop the balls, thereby rendering the drill safe. But the question regarding primary assumption of risk is whether the participant was aware of, appreciated and voluntarily assumed the risks of the sporting activity (see Bukowski v Clarkson Univ., 19 NY3d at 356); plaintiff here was and did so, regardless of what his coaches may have thought.

the deflecting screen.[1]

"The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks'" (Bukowski v Clarkson Univ., 19 NY3d 353, 356 [2012], quoting Morgan v State of New York, 90 NY2d 471, 484 [1997]). "However, participants will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks" (Fithian v Sag Harbor Union Free School Dist., 54 AD3d 719, 720 [2008], citing Morgan v State of New York, 90 NY2d at 484).

Here, although the precise mechanics of the injury remain unknown at this juncture, there is no dispute that plaintiff was injured when an errant ball thrown from second base to the short first baseman evaded the deflecting screen. Although the screen was not defective per se,[2] there is a question of fact as to whether it was operably defective because its size and deployment were inadequate, thus increasing the risk by obscuring it. As defendants concede, the purpose of the screen was to make the drill reasonably safe. However, instead of choosing a screen because it was a particular size or shape, the screen they utilized was chosen out of convenience, as it was what was the largest one available. Notably, plaintiff's expert opined that the screen was too small and was not positioned in a manner so as to protect plaintiff at first base. Accordingly, it is my opinion that this case is more properly analyzed using the standard employed in cases involving inadequate safety equipment (see e.g. Fithian v Sag Harbor Union Free School Dist., 54 AD3d at 720).

It is the inadequacy of the deflecting screen that distinguishes this case both factually and conceptually from

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[1] This is if it is assumed, without deciding, that defendants established a prima facie case.

[2] For example, there is nothing in the record to suggest that the screen had holes in it that would allow a ball to pass through it.

Bukowski v Clarkson Univ. (19 NY3d 353 [2012], supra) and Legac v South Glens Falls Cent. Sch. Dist. (150 AD3d 1582 [2017], lv denied 30 NY3d 905 [2017]). From a conceptual point of view, the primary assumption of risk doctrine is designed to promote "free and vigorous participation in athletic activities and shields [scholastic] athletics from potentially crushing liability" (Bukowski v Clarkson Univ., 19 NY3d at 358). "If the risks of the activity are fully comprehended or perfectly obvious, [the] plaintiff has consented to them and [the] defendant has performed its duty" (id. at 356 [emphasis added]). It is my opinion that this very important social goal would not be promoted, and the assumption of risk doctrine would be improperly expanded, if we immunize those who negligently design an activity and ostensibly conceal, or at least falsely minimize the risk, by putting in place ineffective safeguards. 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?[3] 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?

Factually, the extent and nature of the assumed risk delineates the limit to which a tortfeasor's duty is displaced (see generally Morgan v State of New York, 90 NY2d at 485; Owen v R.J.S. Safety Equip., 79 NY2d 967, 970 [1992]). In this regard, although the record indicates that plaintiff had seen balls go astray and one even striking another player's leg, the record does not indicate that he witnessed balls evading the

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[3] As one coach candidly testified, "Yeah, I mean, the screen is – your thought is that the screen is there . . . the screen being seven-feet high, you thought the kid made a bad throw, that being seven-feet high was going to stop a bad throw" (emphasis added). Here, plaintiff is also a "you" who may have reasonably "thought" that the drill was rendered safe, at least for those behind the screen. Moreover, given the size and placement of the screen, the varsity coach opined that it was difficult to imagine a throw from second base being "air mail[ed]" and striking the first baseman.

screen and, in proximity, hurtling towards him. In fact, the record fails to indicate that the errant balls were thrown anywhere near the screen. Furthermore, although there is evidence that plaintiff knew that the drill was dangerous in some ways, there is no evidence that he perceived or had any foreknowledge that the screen was neither located nor sized appropriately to repel errant baseballs – which is of course the principal risk in the drill. Further, we do not know from the record that these concerns involved errant throws reaching the players that were waiting to take their turn behind the first basemen. This fact, as well as defendants' concession that the purpose of the screen was to make the activity safe, distinguishes this case from Bukowski, which involved the plaintiff's assertion that an L-Screen was needed – a fact which was not conceded by the defendants – and the plaintiff "was also aware of the obvious risk of pitching without the protection of an L-screen" (Bukowski v Clarkson Univ., 19 NY3d at 356).[4] In Legac v South Glens Falls Cent. Sch. Dist. (150 AD3d at 1584-1585), the majority held that the enhanced risk of hitting a baseball indoors on a hardwood gym floor was obvious, and hence assumed by the plaintiff.[5] Finally, in neither Bukowski nor Legac was the risk camouflaged to the extent that it was not even perceived by the defendants themselves.

Additionally, it is my opinion that plaintiff had a right to trust his coaches' judgment that the drill was safe because of the screen. Based on their deposition testimony, it appears that, had either considered the drill unsafe, it would have been aborted. Clearly, however, the conditions were not "as safe as they appear[ed] to be" (Turcotte v Fell, 68 NY2d 432, 439 [1986]). In conclusion, under the circumstances presented here,

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[4] A direct line drive hit to the mound is an obvious risk to the pitcher in baseball.

[5] Indeed, Legac would have greater precedential value if, for example, a mat had been placed on the gym floor in front of the batter for the purpose of blunting the velocity of the ball, but the mat was either too small or improperly angled to protect the plaintiff, who was injured by a ball careening off of the gym floor.

it is my opinion that there is a question of fact as to whether plaintiff knowingly assumed the particular risk that caused his injury. If he did not, the primary assumption of risk doctrine does not apply to displace defendants' duty.

Colangelo, J. (dissenting).

Because issues of fact are present, I respectfully dissent and would reverse the grant of summary judgment to defendants. Plaintiff was seriously injured during a baseball practice session that took place in March 2017 when he was struck in the eye by an errant throw. However, this was no ordinary practice session. Conducted late in the day and early in the season, this session was also a tryout that included experienced and inexperienced players, some on the junior varsity baseball team and some on the varsity level team. Plaintiff had played on the varsity level the prior season and, at the beginning of the school year, had signed a "Duty to Warn" form acknowledging, in general terms, the inherent risks and possible injuries that could result from his participation in athletic activities.

Toward the end of the practice session, the coaches conducted a drill during which plaintiff was injured. Called the Warrior Drill after the team's nickname, it involved bats and balls, but otherwise bore only a resemblance to the game of baseball itself. The drill involved not one but two first basemen, one standing at the regular first base position and the other standing a few feet to the side of him, in the basepath between first and second base (called for purposes of the drill the short first base position), each of whom received baseballs thrown by different players at different positions. Two of the coaches stood at either side of home plate; one hit ground balls to the player at the third base position, who then threw to the first baseman. At the same time, the second coach hit ground balls to, initially, the shortstop, who would in turn practice a double play maneuver by flipping the ball to the baseman covering second base who would then throw that ball to the short first baseman. As the drill progressed, ground balls would be hit to the second baseman, who then flipped the ball to the

shortstop and then on to the short first baseman, while the third baseman threw a different ground ball to the real first base position. Then, a ground ball hit to the third baseman would be thrown to the second baseman covering second base, and on to the short first baseman in order to practice a different version of the double play, while another ground ball went to the shortstop, who then threw directly to the real first base position. Thus, throughout the drill, multiple balls were flying in the direction of the first base position from different angles, thrown by experienced and inexperienced players alike. All the while, several players were lined up at each infield position, including first base and short first base, awaiting their respective turns.

As the record reflects, the head coach, recognizing that having multiple balls in play with each being thrown in the direction of first base from different angles might pose a danger to the first baseman who stood but a few feet from the short first baseman, set up a screen behind the short first base "position"; the screen, which measured seven feet by seven feet, was not designed for that purpose, but was the only screen that happened to be available. Needless to say, it proved inadequate to the task. Prior to the throw that injured plaintiff, both plaintiff and other players waiting in line at the real first base position noticed that a few errant throws had eluded both the short first baseman and the screen, at least one ball striking at the feet of one of the players, and they commiserated that the drill was dangerous. They did not mention their concerns to either coach, but, being teenage boys intent on making the team, they – including plaintiff – continued to participate in the drill. Then, for plaintiff, disaster struck. While fielding the first base position and anticipating a throw to him, he was struck by an errant throw intended for the short first baseman. Plaintiff has suffered permanent damage to his eyesight, for which he brought the instant suit seeking compensation.

Following extensive discovery, including depositions of the coaches and plaintiff as well as plaintiff's General Municipal Law § 50-h testimony, defendants moved for summary

judgment dismissing the complaint. In essence, defendants contended in Supreme Court and contend here that since plaintiff was aware of the risks involved in the drill and knowingly proceeded to participate in it, his claims are barred by the doctrine of primary assumption of risk. Supreme Court, albeit reluctantly, agreed and granted summary judgment to defendants. The majority would affirm that decision. I would not. Instead, 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, as a bar to plaintiff's recovery, should apply herein.

The enactment of CPLR 1411 abolished the absolute defenses of contributory negligence and assumption of risk in favor of a regime of comparative fault (see Trupia v Lake George Cent. School Dist., 14 NY3d 392, 396 [2010]). However, the doctrine of primary assumption of risk survived as a complete bar to recovery, limited to sporting activities. "Under the primary assumption of risk doctrine, a participant . . . in a sport . . . consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (Morrisey v Haskell, 133 AD3d 949, 949 [2015] [internal quotation marks and citation omitted], lv denied 26 NY3d 919 [2016]). The purpose underlying the rule is the promotion of athletic activities and organized sporting events which, as the Court of Appeals recognized, "possess enormous social value, even while they involve significantly higher 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 v Lake George Cent. School Dist., 14 NY3d at 395). At the same time, courts have recognized that since the absolute defense of primary assumption of risk is in derogation of the predominant comparative fault system, "its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation that the Legislature has deemed applicable to any action to recover damages for personal injury, injury to property or wrongful death" (id. at 395 [internal quotation marks, emphasis

and citations omitted]). Accordingly, this Court has stated that "as a general rule, the doctrine should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreational activities, or athletic or recreational pursuits that take place at designated venues" (DeMarco v DeMarco, 154 AD3d 1226, 1227 [2017] [internal quotation marks and citation omitted]). Thus, a playful slide down a bannister (see Trupia v Lake George Cent. School Dist., 14 NY3d at 396) or bouncing on a backyard trampoline (see DeMarco v DeMarco, 154 AD3d at 1227) have been held to lie outside the protective ambit of primary assumption of risk; some sport or organized recreational activity, and the recognition by the injured party of the risks inherent in participating in that sport, are required before the bar of liability will apply.

Moreover, and for similar reasons, not every organized athletic activity, even if loosely connected to a sport, is shielded from liability. Courts have long held that even activities that are derived from a particular sport are not within the zone of liability protection if they involve risks not inherent to the sport from which they are derived – such as "unassumed, concealed or unreasonably increased risks" (Benitez v New York City Bd. of Educ., 73 NY2d 650, 658 [1989]), and for good reason – the risk undertaken by the participant is not a risk inherent to the sport in which he or she participates when the sporting activity has been altered to include concealed or unreasonable risks beyond those that are part and parcel of the sport itself. As the Court of Appeals has stated, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. . . . [F]or purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine qua non. . . . Therefore, in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in

the sport" (Morgan v State of New York, 90 NY2d 471, 484-485 [1997] [internal quotation marks and citations omitted]).

With these principles in mind, the tenor of several cases involving activities related to a sport – for example, as here, contrived practice sessions – is that the further the activity strays from the sport itself, the less reason there is to apply the protection of primary assumption of risk. After all, the reason behind preserving this vestigial doctrine is to promote participation in a sport and not, as the majority appears to suggest, participation in some concocted practice or drill. In other words, the risks assumed must be risks inherent to the sport itself, not risks inherent to the drill. The more attenuated that an activity or a drill is from the essential elements of the sport itself, the less reason there is to enforce an exception to the comparative negligence rule. Accordingly, a practice activity or direction that unreasonably increases the risk of injury beyond that generally inherent in the sport has been held outside the protective ambit of primary assumption of risk. For example, the following circumstances have been held to, at the very least, raise issues of fact as to whether assumption of risk should apply to bar recovery or, instead, permit the comparative fault analysis to hold sway: a direction by a coach or trainer to lift weights in an unusual manner that "unreasonably heightened the risk to which [the plaintiff] was exposed beyond those usually inherent in weight-lifting" (Layden v Plante, 101 AD3d 1540, 1541 [2012] [internal quotation marks and citation omitted]); a direction to handle a horse in a manner that "heightened the risk of [the plaintiff's] fall" (Sara W. v Rocking Horse Ranch Corp., 169 AD3d 1342, 1344 [2019]); directing or permitting a youngster to play the position of catcher without a mask during a baseball practice pitching session (see Zmitrowitz v Roman Catholic Diocese of Syracuse, 274 AD2d 613, 615 [2000]); conducting a baseball practice session with the pitcher's mound closer to home plate than in a game and without a screen to protect the pitcher (see Weinberger v Solomon Schechter Sch. of Westchester, 102 AD3d 675, 678-679 [2013]); and conducting an indoor soccer practice session consisting of having team members run relay races in the school hallways (see Braile v Patchogue Medford Sch. Dist. of

Town of Brookhaven, Suffolk County, N.Y., 123 AD3d 960, 962 [2014] [the defendant failed to "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"]).[1]

A similar situation obtains in the instant case. Indeed, the spectacle of the Warrior Drill, as described by defendants and diagrammed in the record, appears more reminiscent of Ringling Brothers than Abner Doubleday – multiple balls in play with a host of players, some far less experienced than others, milling around awaiting their turn, two first base positions where one should be and balls flying toward them at different angles, topped off by a randomly chosen screen that provided what turned out to be a false promise of protection. On the other hand, plaintiff, by his own testimony, conceded that he was aware of the risks involved in the drill and proceeded to participate nonetheless. As this Court has long held, the "application of the doctrine of assumption of risk is generally a question of fact to be resolved by the jury" (Layden v Plante, 101 AD3d at 1541; see Sara W. v Rocking Horse Ranch Corp., 169 AD3d at 1344). As discussed above, plaintiff has adduced facts reflecting that the drill presented risks over and above those inherent to the game of baseball. As in Layden, Sara W. and

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[1] The majority's reliance on the Court of Appeals' decision in Bukowski v Clarkson Univ. (19 NY3d 353 [2012]) and this Court's decision in Legac v South Glens Falls Cent. Sch. Dist. (150 AD3d 1582 [2017], lv denied 30 NY3d 905 [2017]) is misplaced. Both cases involved straightforward activities inherent to the game of baseball; Bukowski involved pitching practice from a pitcher's mound placed at "regulation distance to the batter and catcher" (Bukowski v Clarkson Univ., 19 NY3d at 355) and Legac involved routine ground ball practice – both a far cry from the multiple ball and multiple base drill, with the false promise of screen protection, that took place in the instant case. The fact that in Butowski and Legac the practice took place indoors is of no moment; many a baseball game, amateur and professional, has taken place indoors and on a surface other than grass.

Braile, 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 of harm "over and above the usual dangers that are inherent in the sport" (Morgan v State of New York, 90 NY2d at 485).

For these reasons, I would reverse and deny defendants' motion for summary judgement.

ORDERED that the order is affirmed, with costs.

ENTER:

Robert D. Mayberger
Clerk of the Court