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COURT OF APPEALS  
STATE OF NEW YORK

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SECKY,

Appellant,

-against-

NO. 24

NEW PALTZ CENTRAL SCHOOL DISTRICT,

Respondent.

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20 Eagle Street  
Albany, New York  
March 15, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1           ACTING CHIEF JUDGE CANNATARO: Our next appeal is  
2           number 24, Secky v. New Paltz School District.

3           MR. KIMMEL: Good afternoon. May it please the  
4           court. My name is Steve Kimmel, and I represent the  
5           petitioner appellant in this matter.

6           As outlined in our brief, we have two positions.  
7           The first is that the motion should have been denied  
8           because the defendants failed to make the prima facie case  
9           based on a expert's affidavit, which had - - - was of no  
10          probative value. The second position is that assuming that  
11          the expert's affidavit was acceptable, the plaintiff's  
12          affidavit raised in a triable issue of fact with respect to  
13          the probable - - - primary assumption of the risk.

14          A close look at the affidavit of the defendant's  
15          expert, Mr. Frucio (ph.), reveals that there was not one  
16          citation anywhere in there with any authoritative text,  
17          standards, regulations, or anything else. Although, he  
18          says repeatedly that the conduct of the drill and Mr.  
19          Kenney's coaching complied with all applicable standards.  
20          Additionally, he has absolutely no discussion of the  
21          dimensions of the court or the safety zones, and he did not  
22          visit the gymnasium.

23          JUDGE TROUTMAN: How does the configuration here  
24          with the open and obvious nature of the bleachers being  
25          there impact the - - - the need for those expert



1 affidavits?

2 MR. KIMMEL: Because our explan - - - our  
3 position is that the design of the drill, which eliminated  
4 the boundary lines, unreasonably increased the risk of  
5 injury.

6 JUDGE SINGAS: Yeah. But even if the boundary  
7 lines were there, isn't anyone who plays basketball aware  
8 of the risk of running into the bleachers, or running into  
9 the wall, running into another player?

10 MR. KIMMEL: Yes. But this particular plaintiff  
11 had played in this gym a number of times before when the  
12 boundary lines were in effect, and he had a twenty-two foot  
13 alley on one side and seventeen on the other. He had never  
14 in his entire experience, and he'd been playing basketball  
15 since he was seven, participated in a drill in which the  
16 boundary lines were eliminated. If you looked at the  
17 court, the court looked exactly the same.

18 JUDGE TROUTMAN: But aren't there instances, even  
19 when boundary lines are there during a game, players fall  
20 over into the bleachers when they're extended. Here, they  
21 were retracted.

22 MR. KIMMEL: Right. But in those instances, the  
23 bleachers are always there. In this case, the bleachers  
24 were retracted, and there's normally a boundary line with  
25 this buffer zone, which wasn't there that day. The court



1 looked exactly the same, and our position is that he  
2 couldn't appreciate the difference in the physics involved.  
3 Because there were no boundary lines, and you could chase  
4 the ball at full speed all the way to the wall - - -

5 JUDGE TROUTMAN: So what you're saying, if the  
6 bleachers are open, that's expected. But if they're  
7 retracted, you have to have the buffer even though they're  
8 retraction means they're not as close?

9 MR. KIMMEL: Right. No. The argument is that  
10 he'd been playing with boundary lines his entire career.  
11 Like, I'm sorry, the - - - the other judge said in the last  
12 case, they changed the rules.

13 JUDGE GARCIA: So anytime you change the rules,  
14 that's a different risk, and assumption of risk doesn't  
15 apply?

16 MR. KIMMEL: Not necessarily. It still has to  
17 enhance the - - - the risk of injury, but in this case, it  
18 did.

19 ACTING CHIEF JUDGE CANNATARO: Well, I'm - - -  
20 I'm trying - - - I think you're saying that what happened  
21 here was not a risk that's inherent in the game, but you -  
22 - - we've heard from - - -

23 MR. KIMMEL: Right.

24 ACTING CHIEF JUDGE CANNATARO: We've heard  
25 previously that players go out of bounds all the time in



1 regulation play, and they often run into things, and trip,  
2 and fall, and sometimes they even fall on top of other  
3 people.

4 MR. KIMMEL: Yes.

5 ACTING CHIEF JUDGE CANNATARO: Can you tell me  
6 why, in this case, it wasn't a risk inherent in the game?  
7 Maybe you did, and I just didn't understand.

8 MR. KIMMEL: No, I - - - I - - - maybe I haven't  
9 said it clearly yet. If the two players had collided  
10 within the boundary lines, that's an inherent risk in the  
11 sport.

12 ACTING CHIEF JUDGE CANNATARO: Yes.

13 MR. KIMMEL: And that - - -

14 ACTING CHIEF JUDGE CANNATARO: But don't players  
15 often - - - in regulation play, don't they often go past  
16 the boundary lines?

17 MR. KIMMEL: Yes.

18 ACTING CHIEF JUDGE CANNATARO: They're running  
19 after each other or something like that?

20 MR. KIMMEL: Yes.

21 ACTING CHIEF JUDGE CANNATARO: Okay. So what  
22 differentiates that from the scenario at issue here?

23 MR. KIMMEL: Because in a normal game, once you  
24 pass the boundary line, the ball's dead, and when they fall  
25 into a - - - a courtside seat or the scores table, they are

1           trying to decelerate. They're trying to slow down. In  
2           this case, they were still running head on, full speed, all  
3           the way to the wall.

4                    JUDGE WILSON: Well, the ball - - - the ball is  
5           not - - - the ball is not always dead after you pass the  
6           boundary line, right?

7                    MR. KIMMEL: I'm sorry?

8                    JUDGE WILSON: The ball could be out of the  
9           boundary line in basketball, but have not - - -

10                   MR. KIMMEL: Yes.

11                   JUDGE WILSON: - - - touched the ground. You  
12           could jump from in - - - within the boundary line to  
13           outside the boundary line, so you and the ball are both  
14           still in play. You see that all the time on TV, right?

15                   MR. KIMMEL: Yes. And that's one reason why.  
16           The momentum carries them into the - - -

17                   JUDGE WILSON: Well, does the - - - does the  
18           record show how far, when the bleachers are open, how far  
19           there is between the outline and the edge of the bleachers  
20           or no?

21                   MR. KIMMEL: I believe it's in the report in the  
22           measurements, although, I don't recall what that was off  
23           the top of my head.

24                   JUDGE WILSON: That's fine.

25                   MR. KIMMEL: He does - - - he does give the



1 measurement for the bleachers opened.

2 JUDGE WILSON: But it wouldn't be - - - it  
3 wouldn't be the seventeen or twenty-three feet as when  
4 they're - - -

5 MR. KIMMEL: No.

6 JUDGE WILSON: - - - retracted.

7 MR. KIMMEL: No.

8 JUDGE WILSON: It'd be much less than that.

9 MR. KIMMEL: No. And in fact, as we pointed out,  
10 the nationally promulgated court specifications, which our  
11 - - - which our expert relied on, requires a buffer of at  
12 least three feet, preferably ten.

13 JUDGE GARCIA: So would - - - would your rule be  
14 that any practice drill that increases the risks over the  
15 risk inherent in the game situation that you're not  
16 entitled to an assumption of risk? That's - - -

17 MR. KIMMEL: Basically, yes. I mean, he's - - -  
18 he's - - - he's accepting the risks in - - - inherent in  
19 playing the game of basketball, and he's used to playing  
20 the basketball by the rules.

21 JUDGE GARCIA: So at any practice - - -

22 MR. KIMMEL: Because the rules are suspended - -  
23 -

24 JUDGE GARCIA: - - - that varies those rules and  
25 increases risks. So if they were shooting multiple balls



1 to the hoop, one of those bounces off the rim, hits  
2 somebody in the head, that's no assumption of risk?

3 MR. KIMMEL: No, because I believe that occurs  
4 very often during practice where you see multiple people  
5 shooting balls at the same time.

6 JUDGE GARCIA: But that increases the risk under  
7 your rule, multiple balls being shot from different  
8 locations on the court.

9 MR. KIMMEL: But it's something that's done  
10 routinely in a practice, and it's not necessarily changing  
11 the rules of the game.

12 JUDGE GARCIA: So it's something not done  
13 routinely in a practice that increases the risk. That's  
14 the rule?

15 MR. KIMMEL: Our - - - our claim is that the - -  
16 - changing the - - - eliminating the boundaries here  
17 changed the rules of the game and increased the risk.

18 JUDGE RIVERA: And including rules of practice  
19 because I - - - otherwise, I don't see how you're really  
20 responding to Judge Garcia's question. I mean, this is  
21 just so far outside what is even acceptable in a practice.  
22 Is that your point?

23 MR. KIMMEL: Yes.

24 JUDGE RIVERA: Or that there's a fact question  
25 around that? I don't know. Maybe that's what you're - - -





1 MR. KIMMEL: In a practice or during the game  
2 with the regulations, the boundary lines remain in effect.  
3 As I said, my client had been playing basketball since he  
4 was seven. He had never participated in or even observed a  
5 drill in which the boundary lines were eliminated.

6 JUDGE RIVERA: So there would be other changes,  
7 is what you mean. That there - - - there might be other  
8 rules that are not - - - not adhered to - - - let me put it  
9 that way - - - in a drill, but not the one regarding this -  
10 - - the boundaries. Is that what you mean?

11 MR. KIMMEL: Yes.

12 JUDGE RIVERA: Could have a drill with multiple  
13 balls like has been already mentioned.

14 MR. KIMMEL: Yes.

15 JUDGE GARCIA: And that you would get an  
16 assumption of risk defense.

17 MR. KIMMEL: Yes.

18 JUDGE GARCIA: If it's multiple balls being shot  
19 at the hoop from different areas of the court, somebody  
20 gets injured by one of those balls being thrown. They're  
21 not looking at that one, that you get assumption of risk  
22 for.

23 MR. KIMMEL: Well, my understanding is, and I'm  
24 not a basketball expert, is that's a routine practice  
25 that's done by every team almost every day.



1 JUDGE RIVERA: So regardless of how risky it may  
2 be, because the - - - the people in the sport, at least at  
3 the school level, have accepted that this is an appropriate  
4 type of drill, the practice - - -

5 MR. KIMMEL: And this - - - and the players  
6 appreciate it. In this case, our argument is that our - -  
7 - that our plaintiff did not appreciate the risk because he  
8 was only fourteen years old, and he couldn't understand the  
9 physics.

10 JUDGE RIVERA: So - - - so if you - - - if you  
11 had a player who had done this same practice on, let's make  
12 it easy, four prior occasions, not hurt in the prior four,  
13 but hurt this time, what - - - does the assumption of risk  
14 apply to that one?

15 MR. KIMMEL: I would argue that it still doesn't.  
16 They might argue that it shows he's had more experience,  
17 and that he was aware of, and could appreciate the risk.

18 JUDGE RIVERA: Okay. So how doesn't he  
19 appreciate the risk if he's done it four - - - or the  
20 player has done it four times in the past?

21 MR. KIMMEL: Our player didn't.

22 JUDGE RIVERA: No. No. I understand.

23 MR. KIMMEL: Right.

24 JUDGE RIVERA: That was the hypothetical.

25 MR. KIMMEL: I'm sorry.



1 JUDGE RIVERA: That's the point of a  
2 hypothetical.

3 MR. KIMMEL: No. I'm saying is they would argue  
4 that, yes, that means that he appreciates it because he's -  
5 - - he experienced it. If our - - - if our player had  
6 observed somebody else doing the same thing, and a ball  
7 going loose, and somebody chasing it, and running into - -  
8 - next to the wall at top speed, he could then appreciate  
9 that you're allowed to run all the way to the wall at top  
10 speed.

11 JUDGE RIVERA: Yeah. But isn't that common  
12 sense? I mean, isn't that obvious? If people are running  
13 - - -

14 MR. KIMMEL: To a fourteen year old, I'm not so  
15 sure.

16 JUDGE RIVERA: - - - and someone's going to run  
17 into me, I might hit my shoulder against those bleachers.  
18 Isn't that obvious?

19 MR. KIMMEL: Yes. But if not for - - - for  
20 eliminating the rules, they wouldn't have been by the  
21 bleachers.

22 JUDGE SINGAS: So according to you, the - - - the  
23 player who bumped into him, let's say he was 18. Let's say  
24 it's a varsity sport.

25 MR. KIMMEL: Okay. They were 14 at the time,



1 actually.

2 JUDGE SINGAS: Okay. But let's - - - in my - - -  
3 in my hypothetical - - -

4 MR. KIMMEL: I'm sorry. Go ahead.

5 JUDGE SINGAS: - - - the person's 18, so we can  
6 sue that person now? That's - - - that - - - don't you  
7 think there's some consideration for us to give to what  
8 we're doing. Like, co-participants now would be subject to  
9 liability based on the elimination of the assumption of  
10 risk. So the person who threw the ball at the kid that got  
11 hit in the eye, the person who - - - who ran into your  
12 client, then knocked him out of the boundaries and into the  
13 bleachers, they'd be liable, right?

14 MR. KIMMEL: No, because we're - - - we're  
15 arguing that it was negligent coaching and design of the  
16 drill.

17 ACTING CHIEF JUDGE CANNATARO: Well, let me ask a  
18 variation on that question. You - - - you didn't sue the -  
19 - - the - - - your client didn't sue the person who slammed  
20 him into - - -

21 MR. KIMMEL: No.

22 ACTING CHIEF JUDGE CANNATARO: - - - the  
23 bleachers? Could you have?

24 MR. KIMMEL: If it was intentional, perhaps, but  
25 we're not claiming it was. We're claiming it was



1 accidental.

2 ACTING CHIEF JUDGE CANNATARO: Well, what if it  
3 was negligent?

4 MR. KIMMEL: He was playing the game. He was  
5 doing the drill as he was told to do it. I don't see the  
6 negligence there.

7 ACTING CHIEF JUDGE CANNATARO: Okay.

8 MR. KIMMEL: If you're told you can run to chase  
9 the ball all the way to the wall, and that's what you're  
10 doing, and the other guy turns, and you hit him, you're  
11 doing what you were told to do. Our position is that he -  
12 - - they shouldn't have been in that position that close to  
13 the wall running at full speed. And if the boundary lines  
14 were in effect, they wouldn't have been.

15 One of the other statements that Mr. Frucio makes  
16 at page - - -

17 JUDGE RIVERA: What if - - - what if they had put  
18 padding on the bleacher? What if they had attempted - - -

19 MR. KIMMEL: That would certainly - - -

20 JUDGE RIVERA: - - - to ameliorate any possible -  
21 - -

22 MR. KIMMEL: That would certainly help, but there  
23 have been - - -

24 JUDGE RIVERA: - - - excessive risk.

25 MR. KIMMEL: That would certainly help, but I



1 believe there are number of cases that have - - - that said  
2 there's no duty to put padding on walls.

3 JUDGE RIVERA: No. No. I understand that, but  
4 let's say they did.

5 MR. KIMMEL: Okay?

6 JUDGE RIVERA: What - - - what would that do to  
7 your case?

8 MR. KIMMEL: It might mean the injury was less  
9 severe, but it wouldn't change the - - - the basic  
10 argument.

11 JUDGE RIVERA: Okay. Okay.

12 ACTING CHIEF JUDGE CANNATARO: Thank you,  
13 Counsel.

14 MR. MILLS: Good afternoon. May it please the  
15 court. My name is Chris Mills on behalf of the defendants,  
16 New Paltz Central School District and Coach Keith Kenney.

17 The question I think the court has to answer to -  
18 - - here is did the school make this drill as safe as it  
19 appeared to be? That's it. The assumption of the risk  
20 doctrine is a measure of duty. A lot of the questions and  
21 certainly a lot of the responses talk about causation. And  
22 really, what we're talking about with assumption of risk is  
23 duty. It's a different duty.

24 JUDGE RIVERA: So I guess I'm having a - - - and  
25 it may be that I'm just not fully appreciating the



1 argument. I don't understand what you mean by make it as  
2 safe as it appears to be.

3 MR. MILLS: So all of the - - -

4 JUDGE RIVERA: Strikes me telling kids to run  
5 around where there's a bleacher, and they might run into it  
6 doesn't sound very safe.

7 MR. MILLS: The question since this - - -

8 JUDGE RIVERA: Uh-huh.

9 MR. MILLS: - - - doctrine was initially  
10 implemented, and by the way that goes long before the  
11 comparative fault statute - - -

12 JUDGE RIVERA: Uh-huh.

13 MR. MILLS: - - - and - - - and I - - -

14 JUDGE RIVERA: Uh-huh.

15 MR. MILLS: - - - think those cases are still  
16 relevant today.

17 JUDGE RIVERA: Uh-huh. Uh-huh.

18 MR. MILLS: But what is says is that if a  
19 participant in an athletic activity, and that certainly  
20 should include practices because it includes athletic  
21 activities, not just formal sports.

22 JUDGE RIVERA: Uh-huh.

23 MR. MILLS: But if they are aware of the risk, or  
24 more importantly, that those risks are inherent in the  
25 sport. And you know, I think that's, you know, Morgan v.



1 State of New York, which is probably the last time this  
2 court addressed a number of these issues altogether,  
3 knowledge of the risk plays a role, but inherency of the  
4 risk is that *sina qua non*. That's the - - - it's - - -  
5 it's the - - - it's the thing that the court ought to focus  
6 on. And if the risk of injury, the mechanism of injury - -  
7 -

8 JUDGE TROUTMAN: So here, the argument is if the  
9 practice had taken place with the boundaries in existence,  
10 then the risk is not increased?

11 MR. MILLS: I would respectfully submit that the  
12 risk wasn't increased at all over the play in any number of  
13 contexts in basketball. One of the things that's sort of  
14 missing here is that this - - - this incident occurs sort  
15 of towards the baseline of the cross courts. I mean, most  
16 practices in - - - in gymnasiums, even in high school, but  
17 certainly if we're talking about CYO gyms, church gyms, AU  
18 gyms. The - - - the boundary lines are in very close  
19 proximity to the bleachers or the wall.

20 And this court has specifically said that  
21 proximity of a fixed object to the playing surface is of no  
22 moment because the - - - the proximity is open and obvious.  
23 So unless that risk is concealed in some way, in other  
24 words, there's a defect in some sort of protective advice -  
25 - - device, then the participant assumes that risk as long



1 as it's a risk inherent in the sport. And - - -

2 JUDGE TROUTMAN: So here, are you saying  
3 understanding they're running at - - - at great speed, and  
4 basketball has, in fact, become quite physical. So they're  
5 running and stopping in the - - - before you crash into it  
6 is a concern, but it's there. It's open. It's obvious.  
7 The - - - it is of no moment that the boundary lines were  
8 loosened or not enforced.

9 MR. MILLS: Correct, because it's a risk inherent  
10 in sport. And there's a great line from a case from 1968.  
11 I just was looking at this this morning as I was preparing.  
12 But it was a Court of Appeals case. 1968, Stevens v.  
13 Central School District, says basketball is a sport, which  
14 requires those who participate in it to race at maximum  
15 speed toward the basket. And it is a rare game indeed when  
16 players so doing are not carried by their momentum beyond  
17 the limits of the court.

18 And that sort of goes back to what Judge Wilson  
19 said. People are diving out of bounds. They are running  
20 at full speed, especially the older they get, and they - -  
21 - they are at risk of crashing into fixed objects. In all  
22 of the fixed object cases, certainly from the Court of  
23 Appeals, but even the cases below in the appellate  
24 divisions, in every single one of those fixed object cases,  
25 as long as the risk was open and obvious, and as long as it

1 was inherent in the sport crashing into something, every  
2 single one of those cases has indicated that the doctrine  
3 applies.

4 ACTING CHIEF JUDGE CANNATARO: And would it be  
5 correct to say that, in this situation, it makes no  
6 appreciable difference to the rule that you just  
7 articulated that this was a practice and not a game?

8 MR. MILLS: No difference. And this court has  
9 already addressed cases involving practices, and - - - and  
10 has found that the doctrine applies in those cases.

11 ACTING CHIEF JUDGE CANNATARO: The thing - - - I  
12 - - - the thing - - - the place where I get stuck, is, you  
13 know, you said that the - - - that the - - - it needs to be  
14 - - - as - - - the risk is - - - it needs to be as safe as  
15 the obvious risk inherent in - - - in the game. And when  
16 you change the rules, I don't see that the risks are as  
17 obvious anymore. I - - - when - - - when - - - when you do  
18 away with the boundaries, or you add dif - - - you know,  
19 multiple balls into the game, I - - - something has changed  
20 in the - - - in the risk calculus. Hasn't it?

21 MR. MILLS: I don't think so. And - - - and - -  
22 - and here's why: because the sport of basketball  
23 necessarily, inherently involves the risk of crashing into  
24 a wall.

25 JUDGE WILSON: So let me then ask you this.



1           Suppose I'm the coach, and I tell the players we've got a  
2           new drill today. I'm going to throw the basketball against  
3           the wall and I want - - - I want you - - - I want two  
4           players to compete for the ball, and in doing that, I want  
5           you to dive and throw your bodies against the wall and try  
6           to bring the ball back into play. That's our drill for  
7           today because in the game of basketball, you're going to  
8           have to do that sometimes if you want to wind up on Sports  
9           Center. That doesn't - - - you know, it fits your test,  
10          but I would have a real concern about a coach telling a  
11          fourteen-year-old kid to throw his body against the wall.

12                       MR. MILLS: I understand that, and that's - - -  
13          and that's certainly why hypotheticals are - - - always the  
14          most difficult thing to deal with when you're standing  
15          where I am. That's obviously not a situation I - - - I've  
16          - - -

17                       JUDGE WILSON: It's why we need a limiting - - -  
18          we need a limiting principle so - - -

19                       MR. MILLS: - - - I've thought about because it  
20          is so far outside the bounds of what anybody would do in a  
21          practice. It doesn't serve a purpose towards the - - - the  
22          overall goal. The prac - - - the - - - the drill that's  
23          being done here was being done to teach skills that are  
24          inherent in the sport. I - - - I don't know what diving  
25          intentionally into a wall does, but I can tell you that

1 there's drills where coaches roll the balls out, tells two  
 2 kids from the baseline to run and dive at each other, and  
 3 kids come up bloody and - - - and hurt all the time because  
 4 that's a skill that basketball teaches, that hustle, that -  
 5 - - that drive to dive on the floor to get a basketball.  
 6 So yes, does that - - -

7 ACTING CHIEF JUDGE CANNATARO: So is - - - is - -  
 8 - is increasing the risk for the purpose of increasing  
 9 skill a protected activity in - - - in this - - -

10 MR. MILLS: Yes.

11 ACTING CHIEF JUDGE CANNATARO: - - -  
 12 formulation?

13 MR. MILLS: Yes.

14 ACTING CHIEF JUDGE CANNATARO: And are there any  
 15 limits on that? Can - - - can we go to - - - I - - - I  
 16 know - - - it know it's a hard hypothetical, but - - -

17 MR. MILLS: I - - - I - - - I suppose - - -

18 ACTING CHIEF JUDGE CANNATARO: - - - you have to  
 19 test the boundaries of it.

20 MR. MILLS: - - - and - - - and I think that's  
 21 where that unreasonably increased risk exception, which  
 22 unfortunately, I think has actually started to swallow the  
 23 rule in the courts below, that unreasonably increased risk  
 24 is starting to turn into a judge's decision as to whether  
 25 or not that's a question of fact. I think that starts to



1 subsume the - - - the rule itself. But I think that's - -  
2 - that's a rare situation, and I think it's sort of one of  
3 those ones that we'd all know if we saw it. In other words  
4 - - -

5 ACTING CHIEF JUDGE CANNATARO: Well, we've got  
6 two - - - two right here today, right? We have baseballs  
7 flying around, and we have no boundary lines on the court.  
8 And I - - - I think that the counter argument to your  
9 statement is that, you know, it was enough of a struggle  
10 when we were talking about regular play where all the rules  
11 applied, but now we're talking about scenarios where people  
12 are being told the rules don't apply. But - - - but  
13 participate anyway, and - - - and you assume the risk of  
14 playing in the scenario where the rules don't apply. And -  
15 - - but I guess you're telling me that that's just part and  
16 parcel of what primary assumption of risk is.

17 MR. MILLS: I think that's likely the reason this  
18 took - - - this court took this case, right, is to consider  
19 those issues and to further define, hopefully, for lawyers,  
20 litigants, and participants to decide. Yes, I - - - I - -  
21 - I think that when you're talking about unreasonably  
22 increase the risk, I mean, it has to be something reckless  
23 and so far outside the bounds of what is considered to be  
24 sport. And that's part of the reason we submitted an  
25 expert affidavit.



1           I - - - I don't think experts are really  
2           necessary in this case, but I - - - but I think it's  
3           important for the court to know that this drill is directly  
4           in the middle of what's expected for athletes as young as  
5           fourth grade. This is the type of drill that's run all  
6           over the State of New York, and likely well beyond. This  
7           drill is not some brand new concoction of a - - - a coach  
8           who's trying to find something new and different. This  
9           drill is normal.

10           JUDGE WILSON: What does the drill lose by  
11           enforcing the boundary lines?

12           MR. MILLS: It - - - it - - - it stops the boxing  
13           out. It stops the toughness. It stops the fighting  
14           through adversity.

15           JUDGE WILSON: Well, you - - - you still have the  
16           width - - - you still have the whole width of the court to  
17           do that.

18           MR. MILLS: So for example, Judge, oftentimes  
19           when kids dribble out of bounds, they stop playing, but the  
20           referee doesn't always call that. The reason that they're  
21           only hard fouls are being called here because the referees  
22           don't always call fouls, they can't always see them. So  
23           the - - - the purpose of continuing play is to continue to  
24           fight through the adversity and the physicalness of the  
25           activity. And I - - - I think that's universally something

1 that is, you know, revered in sport, and something we ought  
2 to protect.

3 And - - - and - - - I - - - I mean, I think it  
4 really gets back to the public policy here, and that was  
5 mentioned in the prior case, but hasn't men -- mentioned  
6 here. I think a ruling from this court on this Secky case  
7 that overturns the Third Department would be devastating,  
8 and it would mostly be devastating for youth sports. It  
9 would be devastating for those coaches. I mean, the coach  
10 here is individually sued.

11 JUDGE RIVERA: What - - - what - - - what if the  
12 ruling - - - before we get to doing all - - - what - - -  
13 what if the ruling is just you didn't meet the - - - your  
14 burden. You might still succeed, but you didn't meet your  
15 burden. How is that - - -

16 MR. MILLS: The initial - - -

17 JUDGE RIVERA: - - - going to destroy all youth  
18 sports in the State of New York?

19 MR. MILLS: Because I think it's going to act as  
20 a huge disincentive for any coach to get involved at the  
21 youth level where they're not being paid millions of  
22 dollars. They're not college coaches. Why in the world  
23 would you be a coach in a rec basketball league, or a CYO  
24 team, or an AAU team where you're getting paid nothing if  
25 you're going to get sued because one of your players runs



1 into a wall, which is a known - - -

2 JUDGE RIVERA: May - - - maybe - - - maybe you  
3 just won't do the practice without the rules.

4 MR. MILLS: Well, then there's no practice at  
5 all.

6 JUDGE RIVERA: Isn't that the incentive?

7 MR. MILLS: I mean, I - - - I - - - I don't - - -

8 JUDGE RIVERA: So no coaches do the practice  
9 adhering to the lines?

10 MR. MILLS: If you're asking me for my personal  
11 experience - - -

12 JUDGE RIVERA: No. No. I'm asking because you  
13 made an argument to the court, so I'm asking.

14 MR. MILLS: I have coached basketball for a long  
15 time. I have watched countless high school, CYO, AAU youth  
16 games - - -

17 JUDGE RIVERA: Uh-huh.

18 MR. MILLS: - - - and that's, again, part of the  
19 reason we submitted an affidavit from an expert. Those  
20 courts are so much smaller than this. The coaches do  
21 drills that are far more likely to lead to injury than  
22 this. If we - - - if we circumscribe this rule, and it  
23 puts coaches, especially those volunteer coaches at - - -  
24 at the risk of being sued, we have completely changed  
25 sport. And we have - - - we have eliminated - - - and



1 particularly for those in - - - in - - -

2 JUDGE RIVERA: Is that - - - is that because the  
3 cost of insurance would be crushing?

4 MR. MILLS: The cost of insurance - - -

5 JUDGE RIVERA: You can insure, of course.

6 MR. MILLS: It would aff - - - it would  
7 especially affect, Judge, those who can't afford insurance.  
8 I mean, it would - - - it - - - this would - - -

9 JUDGE RIVERA: Isn't that a decision for the  
10 legislature, not this court?

11 MR. MILLS: And I think it would be a decision  
12 for the legislature to change the rule. And - - - and  
13 that's my point on the - - - on the 14-A is - - - and I  
14 think it was mentioned by respondent's counsel before. If  
15 - - - if counsel - - - if the legislature wanted to change  
16 this rule after 14-A was enacted, they've had thirty-  
17 something years to do that, more than that. And they  
18 haven't, and - - - and so for this court to change would  
19 require a massive change in precedent. But the - - - the  
20 rule I was starting to cite says it would be significantly  
21 undermined, I think, here.

22 The last thing I'll say, and I appreciate your  
23 time, if you just apply the rules as they have already - -  
24 - already - - - always been, I think this case falls just  
25 squarely right in the middle of the assumption of risk



1 doctrine.

2 ACTING CHIEF JUDGE CANNATARO: Thank you,  
3 Counsel.

4 MR. MILLS: Thank you.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Melissa Key, certify that the foregoing transcript of proceedings in the Court of Appeals of Secky v. New Paltz CSD, No. 24 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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