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COURT OF APPEALS

STATE OF NEW YORK

GRADY,

Appellant,

-against-

NO. 23

CHENANGO VALLEY CENTRAL SCHOOL
DISTRICT,

Respondent.

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:

ROBERT A. O'HARE, JR.
ANDREW C. LEVITT
O'HARE PARNIGIAN
Attorney for Appellant
20 Vesey Street
Suite 300
New York, NY 10007

GIANCARLO FACCIPONTE
THE LAW FIRM OF FRANK W. MILLER
Attorney for Respondent
6575 Kirkville Road
East Syracuse, NY 13057

Melissa Key
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Good afternoon.
2 Our first appeal on today's calendar is number 23, Grady
3 versus Chenango Valley.

4 MR. O'HARE: Good afternoon. May it please the
5 court. My name is Robert O'Hare. I'm here with my
6 colleague Andrew Levitt, and we're here on behalf of the
7 plaintiff appellant, Mr. Kevin Grady. I set forth in our
8 briefs, the judicia - - - the judicially created primary
9 assumption of risk doctrine is fundamentally incompatible
10 with the express intent of the legislature when it adopted
11 CPLR 1411, which abolished assumption of risk in
12 contributory negligence. And - - -

13 JUDGE GARCIA: And we've addressed that, right?
14 I mean, we've said that - - - basically, the same thing,
15 but this is a carve out from that, a judicially-created
16 carve out, but a carve out.

17 MR. O'HARE: That is correct, Your Honor, but I
18 think it's time to revisit the reasoning of this court in
19 that line of cases.

20 ACTING CHIEF JUDGE CANNATARO: What's changed?

21 MR. O'HARE: I think what's changed is, as you
22 can see, in the - - - since the Turcotte opinion, which I
23 think that this court has gone exceptionally far to say it
24 needs to be constrained, the doctrine that is, because
25 there's been a tendency by the lower courts to try to



1 expand the doctrine beyond what it was, at least initially,
2 established to allow - - - to allow the - - - to act as a
3 defense.

4 JUDGE RIVERA: So are you arguing that it's
5 unworkable - - -

6 MR. O'HARE: Well - - -

7 JUDGE RIVERA: - - - because the lower courts
8 can't properly apply it?

9 MR. O'HARE: Well, we think it's unworkable, and
10 that it should just - - - we should just do as the
11 legislature has intended, and that is determine whether the
12 actors have conducted themselves under ordinary negligence
13 standards.

14 JUDGE WILSON: If we were trying to pull it back
15 to where you would say Turcotte had it, what would you do?

16 MR. O'HARE: Well, I think - - - and we think
17 that Turcotte was improperly decided. We think that that
18 was - - - that was judicial rulemaking, essentially,
19 judicial legislating.

20 JUDGE WILSON: And Turcotte is a famous jockey,
21 who was at Belmont Park, who was injured in the course of a
22 professional horse race, and you might see public policy
23 reasons for somebody involved in professional sports and is
24 a typical kind of accident in a horse race. To say we're
25 just not going to allow that to proceed, but then take a

1 part of the argument, at least, is putting aside that you
2 might want to throw the whole thing out, it's gone too far,
3 and now reaches into other sorts of things, and the
4 Appellate Division has gone, you didn't say haywire, but
5 far afield.

6 MR. O'HARE: Well, you are correct, Judge Wilson.
7 I think that - - -

8 JUDGE GARCIA: Where would you draw the line?

9 MR. O'HARE: Well - - -

10 JUDGE GARCIA: So we have a horse jockey in a
11 professional horse racing scenario here where you would
12 assume liability issues and liability insurance is at one
13 level; and then you have a local high school at another.
14 So where would you - - - draw the assumption of risk line?

15 MR. O'HARE: Well, as we said, our primary
16 position here in the case is that it's just - - - it's an
17 overstepping of what the legislature intended when it
18 enacted the statute back in 1975. But to Judge Wilson's
19 point, that Turcotte case was really focused on a
20 professional athlete, in that case a professional jockey.
21 And as you've seen since then, it's now - - -

22 JUDGE GARCIA: But I don't think we would be that
23 worried about allowing professional horse racing to survive
24 in the face of liability, whereas it seems to me in cases
25 like this one involving high school athletics, part of the



1 reason - - - policy reason for our doctrine is we want
2 these programs to continue without the threat of crushing
3 liability that would essentially end them. So why wouldn't
4 it be more applicable to the high school amateur sport
5 arena?

6 MR. O'HARE: Well, as it relates to scholastic
7 sports, I think there's a problem with having minors assume
8 risks that, in many cases, are not readily apparent. From
9 a public policy standpoint, I don't know if that should be
10 a basis in this case for permitting the doctrine to
11 continue because the legislature did not carve out any
12 exceptions with respect to that, and it had the opportunity
13 to do so.

14 JUDGE TROUTMAN: Could there be a concern by the
15 public that if you got rid of assumption of risks, there
16 would be no more sports for kids to participate in - - -

17 MR. O'HARE: Well - - -

18 JUDGE TROUTMAN: - - - because it would be a
19 crushing financial obligation to insure?

20 MR. O'HARE: Well, I don't - - - Your Honor, I'm
21 not sure that - - - that, really, the sky is falling
22 attitude toward what might happen if we just retreat, if
23 you will, to ordinary negligence standards is realistic. I
24 think that in most cases, when we would look at the
25 activity, and let's look at the activity in this case. It



1 refers to baseball. In traditional baseball game, if you
2 had kids participating, even at the high school level, they
3 took the field. The field is properly groomed. There were
4 no things - - -

5 JUDGE TROUTMAN: So let's look at this case, and
6 the question being asked is there a risk that was greater
7 than the athlete assumed here by participating in the drill
8 in the manner at which it was constructed, such that
9 there's at least a question of fact that should allow the
10 case to go forward.

11 MR. O'HARE: Well, in this case in particular,
12 Your Honor, that's our position. We think that there were
13 many questions of fact as to whether the doctrine should
14 apply in this case because, as you pointed out, one of our
15 arguments is the - - - the risk was unnecessarily
16 increased.

17 JUDGE WILSON: Why - - -

18 JUDGE SINGAS: Why? Isn't there many balls in
19 play in the baseball practice? Isn't that a risk that you
20 assume? Like, isn't that something that's standard? Are
21 you suggesting that the only way that you practice for
22 baseball is with one ball?

23 MR. O'HARE: No. But there - - - there - - -
24 this is actually coupled with more than just a multiple-
25 ball drill, right? In this case, there was also a screen



1 that was purportedly placed out there that was - - - that
2 was, as Judge Pritzker said, it was - - - was placed out
3 there, and it was operationally defective, right? It - - -
4 it was not a device that was - - - that could have
5 protected the - - - the student in this case from the
6 injury that he suffered. Short of - - -

7 JUDGE SINGAS: Yeah. But short of - - - short of
8 the student being in a bubble, I mean, what screen would?
9 There wasn't an opaque screen. There wasn't a hole in the
10 screen.

11 MR. O'HARE: Well, the screen could have been - -
12 - in this case, it could have been larger than it was. It
13 could have been properly selected. It could have been
14 tested beforehand and measured.

15 JUDGE GARCIA: But isn't that an obvious risk,
16 Counsel? I mean, the screen is - - - what - - - they were
17 using seven by seven, I think.

18 MR. O'HARE: Yeah.

19 JUDGE GARCIA: So this player goes out. There's
20 a seven by seven screen between these two players in the -
21 - - in the infield, and they can see that. I mean, it
22 isn't - - - when you sit behind netting at baseball game.
23 There's a hole in the netting, and the ball comes through
24 that you wouldn't be expecting. I mean, this is a limited
25 protective device that's out there.

1 MR. O'HARE: But Your Honor, I don't think - - -
2 if we - - - if we take a step back and we look at whether
3 the risk is inherent in the sport, right? And then the
4 activity that is, in this case, the practice, it has to
5 relate to the risk that is generally inherent for the - - -
6 in the sport for the - - - for the doctrine to - - - to
7 apply.

8 If, in this case, we would have been talking
9 about the first baseman, who received the throw from the
10 third baseman, and he missed the ball, and it hit him in
11 the face during routine ground ball drills, there'd be no
12 question. There'd be no negligence there, going to Your
13 Honor's question before about whether the floodgates would
14 open up with respect to unlimited liability in the game.
15 There would - - - I think that at the trial level, at a
16 minimum, the court would dismiss the case after summary
17 judgment because there would be no indication that the
18 parties acted unreasonably.

19 In this case, as you - - - as you look at the
20 drill that was being conducted, not only were there
21 multiple balls being hit and put in play throughout the
22 infield, there were multiple players at each position. And
23 there were - - - in - - - in this case, there was a screen
24 that, it was imperceptible that this screen was defective
25 in the sense that it could not protect the player at first



1 base and the players behind him that were getting ready to
2 take their position at first base.

3 ACTING CHIEF JUDGE CANNATARO: So going back to a
4 question Judge Wilson asked you, if you take all those
5 factors, and you try to distill it into a rule that pulls
6 back what you say is the creeping expansion of primary
7 assumption of the risk, what would be the articulation of
8 that rule? Because we can't have a rule that says when you
9 have ten baseballs and one screen. We need something a
10 little more applicable to the rest of the world. What
11 would it be?

12 MR. O'HARE: Well, I think - - - well, as I said,
13 our position, is we think that the doctrine itself should
14 not stand - - -

15 ACTING CHIEF JUDGE CANNATARO: Granted. Let's -
16 - - let's - - - let's assume for one second that it's not
17 going to be a wholesale overruling primary assumption of
18 the risk. What's the correct limitation on that doctrine?

19 MR. O'HARE: Well - - - well, Judge Wilson's
20 point, I think, was that when Turcotte was first decided,
21 that really applied to professional athletes. I mean, I
22 think that's probably - - -

23 JUDGE WILSON: Let's take the example you just
24 gave, though, where it's a high school baseball player and
25 it's - - - there's no multiple balls or anything like that.



1 It's a routine play, and the first baseman simply misses a
2 ball. It hits him in the face. It seems to me the
3 consequence of eliminating primary assumption of risk
4 doctrine in that circumstance is just what you said. This
5 goes all the way through summary judgment. Whereas, if we
6 have it in place, the case would probably either not be
7 filed, or it would end in a motion to dismiss. And so that
8 - - - that is sort of the question, I guess, right, is if
9 it is, do we want to protect even that or not?

10 MR. O'HARE: Well, I think, Your Honor, I mean,
11 not to state the obvious. I mean, that's what the courts
12 are for, right? And I think that if - - - if litigants
13 think that they have a case, and they have a right to bring
14 it, they should. What the court - - - the courts will be
15 the gatekeeper eventually or ultimately as to whether or
16 not those cases should go forward in - - - or be dismissed
17 summarily at some earlier stage before it goes to trial.

18 JUDGE RIVERA: Let me ask a different question,
19 which perhaps is somewhat of a bridge between these two
20 inquiries that my colleagues to my left or right are
21 making. So let's just be clear on what this pulled back,
22 closer to Turcotte rule would be. Is it that you focus on
23 the inherent risk of the sport as it is played? This is a
24 little bit about what, I think, Judge Singas was getting
25 to, or the inherent risk of the drills that are associated

1 with that sport?

2 MR. O'HARE: Well, I think - - - I think the
3 drill that is conducted in order to make a determination
4 whether that is - - - it is not inherent in the sport or -
5 - - or it - - - it - - -

6 JUDGE RIVERA: Uh-huh.

7 MR. O'HARE: - - - poses risks that are not
8 inherent in the sport.

9 JUDGE RIVERA: Okay.

10 MR. O'HARE: The drill itself should relate very
11 closely to the actual game, right? And so in my example
12 where we talked about ground balls being hit to the third
13 baseman - - -

14 JUDGE RIVERA: Uh-huh.

15 MR. O'HARE: - - - and the third baseman fielding
16 the balls, and throw them over to first, that's very
17 similar to game-time activity. Once you start increasing
18 the risk, increasing the number of players on the field,
19 injecting supposed security devices, multiple coaches on
20 the field hitting balls or throwing balls where balls are
21 being thrown in the same direction, now you're starting to
22 move away what is traditional in the sport- - -

23 JUDGE RIVERA: But that - - - that sounds almost
24 unworkable, right? You're sort of saying well, there are
25 some drills that are okay, and some drills that are not.



1 And it sounds a little bit unclear where one would draw the
2 line - - -

3 MR. O'HARE: Well - - - well, the - - -

4 JUDGE RIVERA: - - - between the drills that are
5 acceptable and the drills that are not, or at least the
6 drills that'll open you - - - open up the defendants to a
7 liability. Let me put it that way.

8 MR. O'HARE: Well, Your Honor, you're correct,
9 and that is one of the issues that we're faced here in this
10 case - - -

11 JUDGE RIVERA: Uh-huh.

12 MR. O'HARE: - - - and - - - and the cases - - -

13 JUDGE RIVERA: Uh-huh.

14 MR. O'HARE: - - - that are - - - that have to
15 examine where the primary assumption of risk applies. We
16 think in many cases, it's outcome determinative. It's
17 really - - - sometimes - - - I - - - I don't want to say
18 it's a crap shoot, but sometimes you really - - -

19 JUDGE RIVERA: But - - - but - - -

20 MR. O'HARE: - - - there's - - - there's not a -
21 - - a good body.

22 JUDGE RIVERA: But to be clear, you're not taking
23 the position that one only looks at the way the sport
24 itself is played?

25 MR. O'HARE: We're - - -



1 JUDGE RIVERA: That a drill might still fall
2 within the existing framework?

3 MR. O'HARE: That - - - that is correct.

4 JUDGE RIVERA: Okay.

5 MR. O'HARE: That is correct.

6 JUDGE RIVERA: Okay.

7 MR. O'HARE: In this case, as - - - as we've
8 pointed out, and as the two dissents have pointed out in
9 the Third Department, this was very different than the
10 ordinary sport in that once you couple the activity of the
11 number of players, the number of balls being hit, the
12 activity that they were conducting, and a screen, that the
13 risk associated with it was imperceptible. Even to the
14 coaches.

15 JUDGE GARCIA: Wait. Let's say they have no
16 screen.

17 MR. O'HARE: Well, that - - - that, I think,
18 makes it much easier, Your Honor. I think if there was no
19 screen, and the - - - and the player was - - - was struck,
20 the argument would be that the - - - the primary assumption
21 of risk could not apply because the activity was so
22 inherently risky.

23 JUDGE GARCIA: So the screen here doesn't make a
24 difference, really, then. I mean, whatever screen they
25 had. I mean, no screen, any screen, because there's no



1 screen that's going to protect a player completely. So if
2 the player's hit, in your reasoning, I mean, that's a
3 defective screen, so the screen to me seems unimportant in
4 this case.

5 MR. O'HARE: Well, the - - - the only reason why
6 we focus on the screen and the activity combined, and I
7 think that the - - - Judge Pritzker did as well, is because
8 one of the - - - one of the things that you look at in
9 analyzing whether they - - - whether there is no duty on
10 the part of the defendant is whether there's an assumed
11 risk, whether there's a concealed risk, or whether the risk
12 has been increased beyond reasonableness.

13 And so in your example, we would make an argument
14 that because the risk was increased unreasonably, the - - -
15 the - - - the - - - the defendant would not get the benefit
16 of the no-duty rule. And therefore, the primary assumption
17 of risk doctrine would not - - -

18 JUDGE GARCIA: But if there was a big enough
19 screen, the risk would not be increased to the level you
20 say?

21 MR. O'HARE: Well, I think that, one - - - it
22 would be a couple of things. First, big enough screen, and
23 then also that the drill would have to be conducted safely.

24 JUDGE GARCIA: But let's say this drill.

25 MR. O'HARE: Uh-huh.



1 JUDGE GARCIA: Big enough - - -

2 MR. O'HARE: This - - -

3 JUDGE GARCIA: - - - screen would do it or not?

4 MR. O'HARE: Well, if - - - if there was a
5 determination made that the screen was adequate to protect
6 the player, and there are screens that would have been
7 adequate to protect the player. The screen could have been
8 larger, one. The screen also could have been situated at a
9 position where - - -

10 JUDGE GARCIA: The player gets hit. Then it
11 obviously wasn't large enough to protect the player, right?

12 MR. O'HARE: Well, that's our - - - that's one of
13 the - - - the points that we make in the case. There's - -
14 - the - - - the - - - the safety equipment chosen in this
15 case, which then falls into a very different line of cases,
16 which says or which say, you can't have a primary
17 assumption of risk doctrine and a no-duty rule applied if
18 the equipment is defective. And as Judge Pritzker pointed
19 out, it was operationally defective in this case because
20 the screen was not positioned or of a size that it was
21 adequate to protect the player. Now, there could have been
22 screens that would - - - would have been adequate.

23 JUDGE GARCIA: But the other way to look at that,
24 I think, though, is it provided a certain level of
25 protection, seven by seven foot protection, which is



1 obvious when you step on the field, just as no screen would
2 provide no protection, obviously, for that in that way.
3 And that's what you assumed. I mean, you walk down the
4 field. There's the screen. You see what it provides, or
5 there's no screen. And you see there's no screen. You
6 play. You assume.

7 MR. O'HARE: Well, I would say to that, Your
8 Honor, here you have a high school student that's looking
9 at a screen that's seven-foot tall. It's obviously taller
10 than he is, and he's assuming just like the coaches were
11 that it was safe, and it was adequate. But in this case,
12 we know it wasn't. It didn't work. It's - - -

13 JUDGE SINGAS: And he knew that, too, because
14 there was testimony that he knew that somebody was hit, so
15 right?

16 MR. O'HARE: Well - - - Your Honor, that - - -
17 that - - - I - - - I need to try to put that to rest. That
18 whole argument that's in the defendant's briefing and was
19 also argued below is just incorrect. As - - - as the
20 dissents have pointed out, there was no testimony that - -
21 - that prior balls had bypassed the screen.

22 JUDGE SINGAS: Uh-huh.

23 MR. O'HARE: There was no testimony as to where
24 the prior baseballs had come from that were errantly
25 thrown. There was no testimony as to the one player that

1 it had been indicated was struck in the leg where that ball
2 come from. And so on all of those issues, while there were
3 - - - there were balls being thrown around, and no one
4 doubts that that doesn't happen in a - - - in a traditional
5 practice, there's no testimony that any of those balls
6 bypassed the screen so as to put our client on notice that
7 that screen wouldn't have protected him.

8 And - - - and with respect to Judge Garcia's
9 question as to the size of the screen, and wouldn't the
10 player have been able to determine, stepping on to the
11 field, that that could have - - - would or could have
12 protected him. I would say as to that, once you put your -
13 - - you get onto the field, and you start taking these
14 throws and ground balls, because of the way that the balls
15 are going to be, you're going to have to react to them.
16 They're going to put you in a position where the screen
17 might not be in a position to safely protect you.

18 And so if it's too small in this case, or it's
19 positioned in a manner that it shouldn't be in terms of the
20 distance from the fielder, then the coaches should have
21 made adjustments to that - - -

22 JUDGE TROUTMAN: So is it the screen or the
23 manner in which the drill was conducted - - -

24 MR. O'HARE: It's actually - - -

25 JUDGE TROUTMAN: - - - by the coaches.



1 MR. O'HARE: It's both. It's both.

2 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
3 O'Hare.

4 MR. O'HARE: Thank you.

5 MR. FACCIPONTE: Good afternoon, Your Honors. If
6 it pleases the court, my name is Giancarlo Facciponte on
7 behalf of respondent, Chenango Valley Central School
8 District.

9 Initially, I must put something to rest of my
10 own. In the transcript of plaintiff's testimony during the
11 50-h examination, the record at page, I believe, 123 to
12 125, plaintiff discusses his feelings on the protective
13 screen and the level of protection it provided. I - - - I
14 think calling it a protective screen is a misnomer because
15 plaintiff himself says that he doesn't believe it provided
16 him any protection. He believes the drill was dangerous.
17 He believed that the screen was not something that was
18 there to protect him from balls.

19 If you look, then, at the testimony of the
20 coaches as well as the plaintiff, I think it's clear that
21 the screen, at most, provided protection to guide the drill
22 and the catch between the players. Now, as I noted in my
23 brief, I am not a baseball man.

24 JUDGE TROUTMAN: What about the argument that it
25 is, likewise, the manner in which the drill was conducted



1 by the coaches?

2 MR. FACCIPONTE: Yes. To that argument, I think
3 it's very important to realize now that we take the screen
4 out of relevancy of the situation, I mean, there isn't
5 anything to indicate that it is relevant to the situation,
6 what we are left with are students playing catch and
7 hitting balls in baseball practice in the middle of a
8 field. I - - - I do not see how they - - -

9 JUDGE TROUTMAN: But does it matter that - - -

10 MR. FACCIPONTE: - - - are different from the - - -
11 - the long line of cases that we're - - -

12 JUDGE TROUTMAN: Does it matter that they're
13 coming at a player from different directions?

14 MR. FACCIPONTE: No, Judge. It does not. As I
15 noted, I am - - - I'm not a baseball man. I played
16 lacrosse, but I did have occasion to see a lot of baseball
17 practices, and in those baseball practices, I think that we
18 all know driving by fields, you can see kids running all
19 over the field, playing catch, multiple balls, multiple
20 people running back and forth doing multiple things at
21 multiple times. There is no one set environment in which
22 these practices occur throughout the field.

23 JUDGE RIVERA: So is it, in your view, there is
24 no version of a drill that would render your clients
25 liable?



1 MR. FACCIPONTE: Of course there is. I - - -
2 Judge - - -

3 JUDGE RIVERA: Okay. Give me an example.

4 MR. FACCIPONTE: An example would be any drill -
5 - -

6 JUDGE RIVERA: Since you see a lot of baseball,
7 give me an example.

8 MR. FACCIPONTE: Any drill that unreasonably
9 increases the risk of safety. I will point to a case,
10 Murphy, I believe - - -

11 ACTING CHIEF JUDGE CANNATARO: What - - - what's
12 unreasonable, because I assume you think that the - - -
13 there - - - this was a reasonable drill?

14 MR. FACCIPONTE: Judge, it would be, for example,
15 unreasonable if you ask a experienced baseball player to
16 stand too close to the plate intentionally and get hit with
17 a ball. That would be unreasonable.

18 ACTING CHIEF JUDGE CANNATARO: But wasn't the
19 purpose of this drill to have players from different areas
20 of the field throw balls at the first base player?

21 MR. FACCIPONTE: I gathered that to be the case.
22 Yes, Judge.

23 ACTING CHIEF JUDGE CANNATARO: Then that would
24 mean the - - - the - - - the balls are coming in from
25 different directions. So when I'm looking over here at the



1 ball that's coming from that direction, there could very
2 well be another coming from the - - - the place that I'm
3 not looking.

4 MR. FACCIPONTE: That I would not agree with,
5 Judge. I believe that there was testimony that the timing
6 was supposed to be such that there would not be, obviously,
7 two balls thrown at the same person at the same time.

8 ACTING CHIEF JUDGE CANNATARO: Can you depend on
9 a bunch of kids? And I think there was some testimony that
10 some of the players in this particular practice on this day
11 were - - - were not varsity-level players. They were
12 junior players. Can you really depend on kids to make sure
13 that the balls are only coming one at a time, from
14 different directions?

15 MR. FACCIPONTE: I believe you can depend on them
16 exactly to the same extent as you can depend on them to not
17 get hit in the face with a ball as they run across the
18 field while multiple people are playing catch.

19 JUDGE WILSON: Isn't there testimony from Coach
20 Allen (ph.) that he told the players the screen would
21 protect them?

22 MR. FACCIPONTE: I - - - I believe there is some
23 testimony. I'm not sure if the word protect was used
24 verbatim, but once again, I believe if you look at that
25 testimony in combination with plaintiff's testimony and the



1 structure of the drill itself, the screen provided a focus
2 guide, much like pylons in football or lacrosse. Those
3 pylons aren't going to stop you from running into someone
4 should you error, but they provide you a guide, so you
5 don't error in your task if you maintain your balls.

6 JUDGE WILSON: Was there - - - was there expert
7 testimony as to whether the screens were an adequate
8 protective device?

9 MR. FACCIPONTE: There was expert testimony
10 submitted from both sides, but if - - -

11 JUDGE WILSON: With that - - - on that question,
12 on whether the screens were a protective device, no?

13 MR. FACCIPONTE: Not based on scientific data.

14 JUDGE WILSON: Oh, I didn't mean that. I mean,
15 that - - - that's just the value of the testimony. I'm
16 asking about what they said.

17 MR. FACCIPONTE: I believe plaintiff did submit a
18 baseball expert of some sort, and he was paid to proffer an
19 affidavit based on the record. And he - - -

20 JUDGE WILSON: And the defendants, same experts?

21 MR. FACCIPONTE: - - - found it was unsafe. And
22 I believe we proffered an affidavit as well, and equally
23 they were both not considered by the court because they
24 were not based on scientific data, which - - -

25 JUDGE RIVERA: But the question is, despite your



1 - - - the argument now, did not your clients argue, at some
2 point below, that, indeed, it was an adequate protective
3 device?

4 MR. FACCIPONTE: I believe that the coaches used
5 the word protective or described a set of circumstances.

6 JUDGE RIVERA: They're the ones choosing the
7 screens. It must be what they think they're doing with the
8 screens.

9 MR. FACCIPONTE: Right. And I don't think that's
10 inconsistent with the facts, Judge, because, as I
11 described, they provided a focus aid to the student so they
12 wouldn't error in their drill. With this case - - -

13 JUDGE RIVERA: Let's go back to your example. In
14 baseball, humbly, I'm not an expert on baseball. But as I
15 understand, there are many times when a player gets very
16 close to the plate.

17 MR. FACCIPONTE: So - - -

18 JUDGE RIVERA: I'm not really sure - - - if I
19 understood your example, your example was that would be
20 unreasonable.

21 MR. FACCIPONTE: In Murphy v. Polytechnic it was,
22 Judge.

23 JUDGE RIVERA: But I'm - - - I'm asking you how
24 is that not like the sport itself?

25 MR. FACCIPONTE: Because - - -



1 JUDGE RIVERA: Not - - - not inherent risk in the
2 sport itself.

3 MR. FACCIPONTE: - - - your coach does not ask
4 you to violate rules normally in the sport itself.

5 JUDGE RIVERA: No. I was talking about your
6 example. What - - - I'm sorry. Maybe I misunderstood your
7 example.

8 MR. FACCIPONTE: Yeah. That's - - -

9 JUDGE RIVERA: But with your example.

10 MR. FACCIPONTE: That is the example, Judge, in
11 Murphy v. Polytechnic Institute, a student was asked to
12 stand too close to a base. I believe she was hit with a
13 bat at that time that was swung by the coach. She was an
14 experienced player just like the plaintiff was experienced
15 here. However, there it did not turn in her favor, or
16 there it did turn in her favor. Here it does not. That
17 experience let her understand that she should not have been
18 doing this, and therefore, she would not think her coach
19 would ask her to stand somewhere that he was going to
20 physically hit her with a baseball bat because he's an
21 adult and a coach. He did, so obviously, that is not a
22 foreseeable risk.

23 Here, we have plenty of testimony from the
24 plaintiff about experience - - -

25 JUDGE RIVERA: So - - - so if the coach just



1 designates a bunch of kids to throw around balls that might
2 hit you, that is the distinction. One is the coach is
3 hitting you with a bat?

4 MR. FACCIPONTE: I believe - - -

5 JUDGE RIVERA: The coach sets up a risky
6 situation where you got hit with the balls?

7 MR. FACCIPONTE: I believe that a coach
8 designating a bunch of kids to throw around baseballs is a
9 baseball practice, Judge. That is what they do there, so -
10 - -

11 ACTING CHIEF JUDGE CANNATARO: Mr. Facciponte,
12 can I ask you a - - - a policy question?

13 MR. FACCIPONTE: Yes, of course.

14 ACTING CHIEF JUDGE CANNATARO: You correct me on
15 any of these premises, but my understanding of the current
16 primary assumption of risk doctrine, the basis that - - -
17 that it relies on is that sports, and I'm going to say even
18 school - - - school sports have an enormous societal value.
19 There's a utility to them. It give kids a chance to play
20 on a team. It teaches them good sportsmanship. It teaches
21 them to follow the rules, and all of that is led to a sort
22 of carve out to 1411 for these kinds of activities.

23 MR. FACCIPONTE: Absolutely, Judge.

24 ACTING CHIEF JUDGE CANNATARO: Great. So now, my
25 question is this. When - - - when you put people in a



1 scenario like the one you have here where you're actually
2 taking it - - - you said - - - you're - - - you're creating
3 a practice, and you're saying the rules that you need to
4 abide by when you play the game, which we find have great
5 social utility, don't apply here. You can have multiple
6 balls flying around, and that's the whole point.
7 Everyone's got to throw balls at the first baseman. What
8 is the social utility in that that - - - that calls for
9 this court's protection?

10 MR. FACCIPONTE: Judge, first and foremost, the
11 social utility has to hone in on what exactly these kids
12 are doing here, okay. To understand social utility, we
13 need to understand what exactly these kids are doing. And
14 these kids are intentionally disregarding the normal due
15 care of their body to perform feats of strength - - -

16 ACTING CHIEF JUDGE CANNATARO: They've been told
17 - - - they've been told to break the rules, break the rules
18 of the game. And I'm saying one of the - - - one of the
19 benefits of organized sports in school is that you learn to
20 play by the rules, and that's why we protect it. That
21 lesson's not being taught in a practice when the rules are
22 - - -

23 MR. FACCIPONTE: Judge, I'm talking more basic
24 than that. At practice, these children want to get better.
25 They want to use their bodies to get better, and they are

1 disregarding the normal due care of their bodies in - - -
2 in order to do it, so at any point in time, they can leave.
3 They can walk off the field, and - - -

4 JUDGE WILSON: So listen, let me - - - suppose -
5 - -

6 MR. FACCIPONTE: - - - the plaintiff here knew
7 that, and he didn't.

8 JUDGE WILSON: Suppose the coaches had moved the
9 pitching mound from sixty feet six inches to thirty - - -
10 at thirty feet, and told them - - - and the kids want to
11 improve their bodies, whatever the coaches said. This - -
12 - this is going to improve your reaction time because now
13 you only have half as long to respond to these pitches. Is
14 that protected?

15 MR. FACCIPONTE: I think that is a much closer
16 question - - -

17 JUDGE WILSON: Still throwing balls around.

18 MR. FACCIPONTE: - - - than the facts involved
19 here.

20 JUDGE WILSON: Well, they fit all of the answers
21 you've given. They're still doing things. They're still
22 throwing the ball around. They still want to improve their
23 bodies. I don't understand how to distinguish that from
24 this.

25 MR. FACCIPONTE: Judge, because you have to look



1 at the totality of the circumstances. Here, we have no - -
2 - I guess - - - well, no. I guess, Your Honor, once again,
3 now, maybe I don't know enough about baseball, but I
4 believe that would still have some utility in value. Yes,
5 much like Bukowski. That is much more like the situation
6 in Bukowski, which the primary section was applied.

7 JUDGE WILSON: We, we already have a - - - we
8 already have a case saying it doesn't apply when you move
9 it to forty-five feet.

10 MR. FACCIPONTE: You know, once again, we can - -
11 - we can - - - one thing I would actually like to avoid and
12 - - - and - - - and note that this rule as it currently
13 exists, and I think that what plaintiff is essentially
14 arguing at the end of the day, is really just proper
15 application of the primary assumption of risk doctrine.
16 This rule as it currently exists requires no exacerbation
17 of the foreseeable risk known to the students, okay.

18 JUDGE WILSON: Is that a rule you can live with?

19 MR. FACCIPONTE: Absolutely. I think that is - -
20 - that is the rule now, and that's the rule as it should
21 be. And that should be the rule in the future, and that
22 should be the rule here, too. But we can't miss the forest
23 for the trees - - -

24 JUDGE WILSON: Uh-huh.

25 MR. FACCIPONTE: - - - and start, basically,



1 trying to, in an effort to get rid of what plaintiff refers
2 to as a judicially-created doctrine, and I would argue it's
3 a common-sense created doctrine going back thousands of
4 years. We can't create another potential doctrine - - -

5 JUDGE RIVERA: Yeah. But can a doctrine - - -
6 can a doctrine really withstand scrutiny when it's not what
7 the legislature intended. It's fine if the legislature has
8 not itself expressly spoken.

9 MR. FACCIPONTE: I contend that the legislature
10 has spoken, and this is what they intended because when
11 they enacted 1411, they knew of express assumption of risk.
12 It is a comparative fault statute schema.

13 JUDGE RIVERA: Uh-huh.

14 MR. FACCIPONTE: Comparative fault compares
15 blameworthy actions under the law. It is not a passport to
16 - - - to file an action for negligence.

17 ACTING CHIEF JUDGE CANNATARO: Doesn't it - - -
18 I'm sorry. Doesn't 1411 actually mention assumption of the
19 risk and say that it is now going to be subject to
20 comparative fault?

21 MR. FACCIPONTE: By word, and specifically
22 because, at the time to enact implied assumption of risk as
23 a defense, you would have to compare fault. That removes
24 that gambit. As Turcotte, and the line of decisions
25 continuing on discussed, this is a no-duty rule. This is



1 different. We're not talking about a situation where
2 there's an action at fault. We're talking about a
3 situation where kids decided to voluntarily engage in
4 something without - - -

5 ACTING CHIEF JUDGE CANNATARO: Okay. I'm sorry.
6 I'm just trying to understand your statement that this is
7 actually what the legislature intended when they wrote
8 1411. The - - - you're saying they intended for - - - for
9 the courts to maintain a primary assumption of risk
10 doctrine?

11 MR. FACCIPONTE: Yes. If we look back to
12 Abergast, it talks a little bit about this. We could - - -
13 legislative intent cuts both ways. When a legislature does
14 act, you can then assume that they knew of the existing
15 case-line statutes at the time. And then if they do not
16 act further in the face of the evolution of the law, you
17 can assume that they are aware of that as well, and because
18 they took actions in the past, they know of what actions
19 they could take at present.

20 The case law here that is relevantly being
21 applied has existed for almost forty-five years now. The
22 legislature could have done exactly what it did in 1975 if
23 they wanted to get rid of primary assumption of risk. They
24 have not done so, and I believe they have not done so for a
25 reason. And the reason is because should that be



1 extinguished, what is the alternative? As we discussed,
2 are we going to put children in bubbles? Are we going to
3 legislate exactly how big the screen should be from the
4 bench or from anywhere else. I think that's all too far.
5 I don't think anyone wants that for their children in this
6 state or anywhere else. I think we want our children to be
7 able to play sports and be able to walk off the field
8 without it being too dangerous.

9 JUDGE RIVERA: There are other jurisdictions that
10 have - - - don't have this kind of exception, and - - - and
11 their sports do fine.

12 MR. FACCIPONTE: Well, Judge, I don't live in
13 them, and I can't really speak to them. But I'm not sure
14 if anyone, you know, has - - - would curtail the principles
15 behind New York's primary assumption of risk doctrine in
16 the way being requested by the plaintiff in this case. I
17 think that the facts at bar here, at least in the Grady
18 matter, fall squarely within that logical gambit of why we
19 have this doctrine in the first place. I'm voluntarily
20 putting my body out there. I know I can withdraw it at any
21 time. I recognize the risk. I testify to that. I allege
22 it in my complaint, and I decide to do it anyway. I can't
23 claim I'm wronged by an injury that is a natural result of
24 it.

25 ACTING CHIEF JUDGE CANNATARO: Thank you,



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Counsel.

MR. FACCIPONTE: Thank you, Judges.

(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 Grady v. Chenango Valley CSD, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: 

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: March 22, 2023

