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COURT OF APPEALS

STATE OF NEW YORK

ROBIN CUSTODI,

Respondent,

-against-

No. 164

TOWN OF AMHERST,

Appellant.

20 Eagle Street
Albany, New York 12207
September 6, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

JOEL B. SCHECHTER, ESQ.
WATSON BENNETT COLLIGAN & SCHECHTER LLP
Attorneys for Appellant
12 Fountain Plaza
Buffalo, NY 14202

ROBERT J. MARANTO, JR., ESQ.
ATTORNEY AT LAW
Attorneys for Respondent
69 Delaware Avenue
Suite 1200
Buffalo, NY 14202

1 CHIEF JUDGE LIPPMAN: Custodi v. the Town
2 of Amherst.

3 Counsel, you want any rebuttal time?

4 MR. SCHECHTER: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go
7 ahead.

8 MR. SCHECHTER: Good afternoon, Your
9 Honors. My name is Joel Schechter. I represent the
10 appellants in this case.

11 This is a case with respect to the
12 applicability of the assumption of risk rule to a
13 participant in a recreational activity as against a
14 property owner, a private homeowner.

15 CHIEF JUDGE LIPPMAN: Why is this an
16 assumption of risk case, rather than a negligence
17 case?

18 MR. SCHECHTER: This is an assumption of
19 risk case because the activity being engaged in by
20 the plaintiff was an activity that carried heightened
21 risks in an area where there was an open and obvious
22 condition, a condition that was as safe as it
23 appeared to be, and under those circumstances, there
24 is no duty of the property owner.

25 JUDGE READ: And your client owns the

1 apron, the driveway?

2 MR. SCHECHTER: Correct.

3 JUDGE READ: And the driveway meets the
4 roadway, and there's a disparity or differential. I
5 looked at the pictures, but I - - -

6 MR. SCHECHTER: Yeah.

7 JUDGE READ: - - - have a hard time, still,
8 visualizing it.

9 MR. SCHECHTER: Well, the driveway meets a
10 drainage culvert, and the culvert runs the entire
11 block in the Town of Amherst.

12 JUDGE READ: Who owns that?

13 MR. SCHECHTER: Well, that's the town's.

14 JUDGE READ: Okay.

15 MR. SCHECHTER: And what happened was that
16 every single driveway in the Town of Amherst on that
17 street sunk over the years. My clients purchased
18 their home in around 1996; it was in exactly that
19 condition. Ten years later, the plaintiff chose to
20 rollerblade down the - - -

21 CHIEF JUDGE LIPPMAN: Do they have - - -
22 does your client have a duty to maintain it in a - -
23 - is that an issue that that was the proximate cause
24 of the accident and - - -

25 MR. SCHECHTER: Well, it's - - - if the - -

1 -

2 CHIEF JUDGE LIPPMAN: - - - and it wasn't
3 maintained properly? Why - - -

4 MR. SCHECHTER: If the assumption - - -

5 CHIEF JUDGE LIPPMAN: Why isn't that a
6 valid way to look at it?

7 MR. SCHECHTER: Because of the primary
8 assumption of risk of sporting activity cases.

9 CHIEF JUDGE LIPPMAN: How does primary
10 assumption of risk fit in with Trupia and the
11 standard that we laid down there?

12 MR. SCHECHTER: Well, it absolutely fits in
13 because - - -

14 CHIEF JUDGE LIPPMAN: How?

15 MR. SCHECHTER: - - - the principles that
16 were laid out in those cases, Trupia and Morgan and
17 Turcotte, basically is that when a consenting
18 participant in a sporting and amusement activity is
19 aware of the risks and has an appreciation of the
20 nature of risks, they assume the risks, and then it
21 becomes a case of no duty.

22 JUDGE CIPARICK: Assume it'd be a qualified
23 activity; have we qualified rollerblading, yet, as a
24 - - -

25 MR. SCHECHTER: Well, certainly many lower

1 courts have.

2 JUDGE GRAFFEO: It's not the kind of
3 organized sports activity that some of the other
4 cases address.

5 MR. SCHECHTER: Well, except that in the
6 Anand case that this court decided, it involved two
7 friends who were golfing, one of whom struck a ball
8 and it hit the other golfer in the head. That
9 certainly was not an organized activity or a
10 sanctioned activity.

11 JUDGE SMITH: Is there - - - isn't there
12 another problem in the case? I mean, would this be a
13 different case if your client had been negligent in
14 filling in a pothole on the sidewalk and there was a
15 big pothole there that was dangerous to everyone - -
16 -

17 MR. SCHECHTER: Absolutely.

18 JUDGE SMITH: - - - and the victim just
19 happened to be a rollerblader.

20 MR. SCHECHTER: Absolutely, in fact, that's
21 - - -

22 JUDGE SMITH: You'd be liable to the
23 rollerblader, wouldn't you?

24 MR. SCHECHTER: Well, I agree. And in the
25 Cotty case - - -

1 JUDGE SMITH: Isn't the problem here that
2 this lip or two-inch elevation, if you're driving or
3 walking down the driveway, it's not a problem.

4 MR. SCHECHTER: Correct.

5 JUDGE SMITH: It's only a problem if you're
6 rollerblading.

7 MR. SCHECHTER: Your Honor, I walked here
8 from the parking lot this afternoon, and I came
9 across a number of lips and elevations in the
10 sidewalk.

11 JUDGE PIGOTT: It's funny how they stand
12 out to you when you're coming to court on an issue,
13 isn't it?

14 CHIEF JUDGE LIPPMAN: Would it be different
15 if it was the exact same situation and he was - - -
16 and the person was jogging, rather than
17 rollerblading, went around whatever was - - - caused
18 them to run around, and then came back onto your
19 driveway and tripped? Would that be different?

20 MR. SCHECHTER: It would absolutely be
21 different because - - -

22 CHIEF JUDGE LIPPMAN: Why?

23 MR. SCHECHTER: - - - because placing four
24 wheels on the bottom of your feet in a line is a
25 dangerous activity. Jogging, moving a foot, one in

1 front of the other, is not a dangerous activity.

2 CHIEF JUDGE LIPPMAN: Where do we draw the
3 line, though? Just if it's inherently dangerous, is
4 that here?

5 MR. SCHECHTER: If it's inherently - - - if
6 it's an inherently dangerous activity and it is not
7 unreasonably enhanced by - - -

8 CHIEF JUDGE LIPPMAN: Would running or
9 jogging, to stay with that analogy, be inherently
10 dangerous in terms of people run on the streets all
11 the time and do, again, exactly in this situation,
12 can't it be inherently dangerous?

13 MR. SCHECHTER: No.

14 CHIEF JUDGE LIPPMAN: Similar to an
15 experienced rollerblading person, you have an
16 experienced runner who's doing this all the time?

17 MR. SCHECHTER: No, it would not be.
18 Jogging and walking is basically moving one's feet
19 with shoes on or sneakers on. It's different when
20 you place - - -

21 JUDGE SMITH: Well, suppose you're running
22 a marathon.

23 MR. SCHECHTER: - - - an inline skate on.

24 JUDGE SMITH: A marathon runner runs over
25 your driveway and he's tired. And because he's

1 tired, he slips - - - because he's tired, that two-
2 inch lip becomes dangerous for where for an ordinary
3 pedestrian it wouldn't be. Are you liable?

4 MR. SCHECHTER: I don't know that - - - if
5 it's - - - a marathon is an organized event run on
6 paved, public roads. It's not run on sidewalks or
7 lips of driveways. I don't know - - -

8 CHIEF JUDGE LIPPMAN: No, no. I think the
9 judge is saying he's running; he's not in a marathon
10 at the time, right?

11 JUDGE SMITH: Well, no, no.

12 CHIEF JUDGE LIPPMAN: I'm sorry.

13 MR. SCHECHTER: That example - - -

14 JUDGE SMITH: I - - - no, I'm imagining - -
15 - maybe my imagination is too vivid, but I'm
16 imagining a marathon in which the - - - for some
17 reasons, the runner's path carries him over the lip
18 of this driveway.

19 MR. SCHECHTER: I really - - - I prefer not
20 to extend this to that length. We have a situation
21 with somebody who places wheels on their feet. It's
22 a dangerous activity. It's an experienced woman - -
23 -

24 CHIEF JUDGE LIPPMAN: What about a
25 marathon, taking one step further, what I was just

1 indicating to Judge Smith's example - - - what if
2 it's just a marathoner who - - - training for a
3 marathon which is very taxing, and just is running
4 and for long periods, as the judge indicated, can get
5 very tired. What happens in that situation?

6 MR. SCHECHTER: I would distinguish that
7 case - - - this case - - -

8 CHIEF JUDGE LIPPMAN: Are the two
9 distinguished when they're running in a marathon or
10 then just training? Are they two different
11 situations or they're both the same?

12 MR. SCHECHTER: I don't know if any of the
13 justices have ever participated in inline skating.
14 It involves placing wheels on the bottom of your feet
15 that create a dangerous condition - - -

16 JUDGE SMITH: Okay.

17 MR. SCHECHTER: - - - that does not exist.

18 JUDGE SMITH: But are you - - - is this
19 just a wheels-on-the-bottom-of-the-feet rule? I mean
20 - - -

21 MR. SCHECHTER: No, it's a sporting
22 activity, a recreational activity which the court, as
23 a policy rule, has determined that these kinds of
24 activities are worthy of promotion - - -

25 JUDGE CIPARICK: What about bicycling?

1 What about bicycling? That's wheels.

2 MR. SCHECHTER: Right. Well - - -

3 JUDGE CIPARICK: Would that be the same
4 category as the skating, as the rollerblading?

5 MR. SCHECHTER: Bicycling, if we take the
6 Cotty case in the Second Department that involved a
7 bicyclist on a paved, public roadway where there was
8 a construction project, and the court held that the
9 assumption of risk did not apply. I mean, in a case
10 where somebody was bicycling as a recreational
11 activity over a driveway - - -

12 JUDGE CIPARICK: Well, what if they were
13 just going to the store and they were using their
14 bike, as opposed to a car, and for some reason or
15 other they had to go on the sidewalk because - - -

16 MR. SCHECHTER: I don't think that holding,
17 in this particular case, the assumption of risk
18 applies, extends this beyond this particular
19 situation, this particular factual situation.

20 JUDGE SMITH: Well, the - - - why - - -
21 you're implying, I guess, that Justice Ciparick's
22 bicyclist might be able to sue. Why should the
23 bicyclist be able to sue and the rollerblader not for
24 the same accident from the same cause?

25 MR. SCHECHTER: Actually, I'm not implying

1 that they would be able to sue. In my opinion, if
2 they're engaged in a recreat - - -

3 JUDGE CIPARICK: Well, if they were using
4 it not - - - if they were using it for
5 transportation, as opposed to recreation?

6 MR. SCHECHTER: The - - - in this
7 particular case, there's no question at all, in fact,
8 that there was no issue of transportation.

9 JUDGE CIPARICK: I'm talking about my
10 hypothetical.

11 JUDGE SMITH: Yeah, but in the
12 hypothetical?

13 MR. SCHECHTER: This is purely a
14 recreational activity involving a dangerous - - -

15 JUDGE SMITH: Well, is the result different
16 for a bicycle messenger on his way to make a delivery
17 and a recreational bicyclist? One can sue, the other
18 can't?

19 MR. SCHECHTER: No, I would say that the
20 result is not different, that if you are engaged in
21 an activity with heightened risks and there's - - -
22 and the property is as safe as it appears to be, then
23 the property owner's protected.

24 CHIEF JUDGE LIPPMAN: Counsel, is there any
25 - - - what importance at all, if any, is whether the

1 event is sponsored, whether it's a recreational
2 activity it could be that's sponsored by somebody, in
3 the case in the golf outing where they're
4 participating in a golf outing. Does that make a
5 difference, or is that totally irrelevant, it's of no
6 moment? Is it important, or is it all activities
7 that are dangerous, you're basically - - - how far
8 does the assumption of risk go, I guess is my
9 question.

10 MR. SCHECHTER: Well, the assumption of
11 risk - - -

12 CHIEF JUDGE LIPPMAN: What's the rule?

13 MR. SCHECHTER: First of all, this court
14 has expressed on a number of occasions that if
15 someone is engaged in a sport or recreational
16 activity which carries heightened risks, and they are
17 injured as a result of an open and obvious condition
18 which is as safe as it appears to be, then the
19 property owner is entitled to the protections of the
20 assumption of risk.

21 CHIEF JUDGE LIPPMAN: But you're not saying
22 that's the rule - - - any sporting activity, that's
23 the rule, that whether it's sponsored, whether it's
24 not, whether it's - - - any sporting activity, you're
25 protected by assumption of risk?

1 MR. SCHECHTER: This court held in Anand
2 that the golfer was protected; that was not a
3 sponsored - - -

4 CHIEF JUDGE LIPPMAN: He was participating
5 in a golf outing; they were participating together in
6 a golf outing.

7 MR. SCHECHTER: I believe that the factual
8 situation there was that there were several friends
9 who were out golfing together. There was no - - -

10 JUDGE GRAFFEO: Well, it is a golf course.
11 I mean, it's occurring - - -

12 MR. SCHECHTER: On a golf - - -

13 JUDGE GRAFFEO: - - - in a place that's
14 dedicated to that sporting activity.

15 MR. SCHECHTER: Right. But the interesting
16 thing about rollerblading is that there are several
17 different venues where you can participate. You can
18 participate in a rink which is - - -

19 CHIEF JUDGE LIPPMAN: But that's - - -

20 MR. SCHECHTER: - - - sponsored and you can
21 pay for it - - -

22 CHIEF JUDGE LIPPMAN: But that's the point.
23 If it was a rollerblading rink or a rollerblading
24 course, is that different than this?

25 MR. SCHECHTER: Well, it's not different

1 because rollerblading is a unique activity which can
2 be performed at several different venues. You can
3 perform it in the street - - -

4 CHIEF JUDGE LIPPMAN: And it doesn't matter
5 where you perform it at least in your way of looking
6 at it?

7 MR. SCHECHTER: Correct.

8 CHIEF JUDGE LIPPMAN: Okay. Let's hear
9 from your adversary, and then you'll have rebuttal.

10 MR. SCHECHTER: Thank you.

11 JUDGE CIPARICK: So it seems that counsel's
12 rule would totally obliterate comparative negligence.

13 MR. MARANTO: It would, Your Honor. The
14 fact of the matter, Your Honors, is that this is a
15 leisure activity; this is not a sport.

16 JUDGE READ: Well, what were they supposed
17 to have done? What was their obligation in terms of
18 maintaining the property?

19 MR. MARANTO: When they bought this
20 premises, they knew that there was a - - - there was
21 a change in elevation - - -

22 JUDGE READ: And how much is it, by the
23 way, the change?

24 MR. MARANTO: About two and a half to three
25 inches, Your Honor.

1 JUDGE READ: Okay.

2 MR. MARANTO: And going back to the wheels,
3 there are skateboarder - - -

4 JUDGE READ: What were they supposed to
5 have done?

6 JUDGE SMITH: Do they have to make it safe
7 for rollerbladers?

8 MR. MARANTO: I'm sorry, Your Honor?

9 JUDGE SMITH: If I buy a house, do I have
10 to make a - - - say, a driveway, do I have to make it
11 safe for rollerbladers?

12 MR. MARANTO: Your Honor, the issue here is
13 whether that's an issue of fact because they've made
14 a - - -

15 JUDGE SMITH: Well, what's the answer to
16 the question?

17 MR. MARANTO: The answer is yes, Your
18 Honor, because it's not just rollerbladers; it's
19 joggers, as Your Honor pointed out. It's walkers,
20 it's kids on skateboards, it's - - -

21 JUDGE READ: So you're saying that because
22 of this differential two and a half to three inches,
23 it's not reasonably safe; the property's not
24 reasonably safe?

25 MR. MARANTO: It is not reasonably safe,

1 Your Honor, particularly for the kids. And in the
2 record Your Honor, you'll see that the individual
3 deposed in this case specifically said: I knew that
4 was there; I'm a rollerblader; I avoid it because it
5 was dangerous.

6 CHIEF JUDGE LIPPMAN: Yeah, but that's the
7 ultimate issue, right.

8 MR. MARANTO: That's the issue.

9 CHIEF JUDGE LIPPMAN: It's going to
10 factually be determined, but the question is, is it
11 bicyclists, rollerbladers, joggers - - - where do you
12 draw the - - - what's the test here? Does it matter
13 where it is, where it takes place?

14 MR. MARANTO: Yes.

15 CHIEF JUDGE LIPPMAN: What's the test,
16 based on our case law and what you want us to say?

17 MR. MARANTO: Your Honor - - -

18 JUDGE READ: I mean, I have a depression at
19 the end of my driveway. Do I have to repair that,
20 now, in case somebody decides to rollerblade across
21 it?

22 MR. MARANTO: I think it's an issue of
23 fact, Your Honor, depending on how that depression
24 is, and whether you have - - -

25 JUDGE SMITH: That's a yes, isn't it?

1 MR. MARANTO: Absolutely, Your Honor.

2 Absolutely. If you have children - - -

3 CHIEF JUDGE LIPPMAN: But if she invited -
4 - - if the judge invited someone into her driveway,
5 that would be a different case?

6 MR. MARANTO: Well, I don't know if it - -
7 -

8 CHIEF JUDGE LIPPMAN: And is she entitled
9 to protection of assumption of risk?

10 MR. MARANTO: She's not entitled to
11 protection of primary assumption of the risk.
12 Assumption of the risk, as in the - - - in the reply
13 brief where someone is standing on a bleacher,
14 shaking it, and falls, that's assumption of the risk.
15 We're talking - - -

16 CHIEF JUDGE LIPPMAN: But if the judge
17 invites someone onto her driveway to rollerblade, or
18 whatever they're doing, she's protected?

19 MR. MARANTO: Maybe, Your Honor. That's
20 the - - - and that's the Trupia decision. We not
21 only look at what the activity is of the plaintiff in
22 this case; we look at what the defendant is. And in
23 your case - - - and it was decided here - - - we need
24 to know, does the defendant sponsor socially valuable
25 activity. And in that case - - -

1 CHIEF JUDGE LIPPMAN: What about the golf
2 outing situation?

3 MR. MARANTO: Your Honor, we treat a sport
4 - - -

5 CHIEF JUDGE LIPPMAN: Is that because it's
6 on a golf course, or they're on a golf outing; why
7 does that qualify as assumption of risk?

8 MR. MARANTO: Because it's a sport, number
9 one.

10 CHIEF JUDGE LIPPMAN: Right.

11 MR. MARANTO: And sports are distinguished
12 from someone just skating - - -

13 JUDGE SMITH: So the - - -

14 MR. MARANTO: - - - or walking or jogging.

15 JUDGE SMITH: So the Anand case would have
16 come out the same way if they were playing sports in
17 the backyard, playing golf in the backyard?

18 MR. MARANTO: I think it would have, Your
19 Honor.

20 JUDGE SMITH: So it isn't - - - so if it's
21 sports, it's not limited to the sports venue. But if
22 it's rollerblading which is sort of a quasi sport, it
23 is limited to the venue?

24 MR. MARANTO: Yes, Your Honor. If you and
25 I are - - -

1 JUDGE SMITH: Why?

2 MR. MARANTO: Because if - - - Your Honor,
3 if you and I are playing catch and I throw the ball
4 too fast at you and it hits you in the head, it's
5 part of that. And it's part of a sport. Coming into
6 contact with an area of somebody's property, on his
7 premise as a premise liability case is not something
8 that you're expecting at the end of a driveway that -
9 - -

10 JUDGE SMITH: If you're going to
11 rollerblade on a private street, why should you not
12 expect that there might be a lip at the end of the
13 driveway once in a while?

14 MR. MARANTO: Your Honor, you can expect
15 that there might be some changes in elevation.

16 JUDGE CIPARICK: Didn't she testify that
17 she preferred rollerblading on the street because she
18 knew that the sidewalks were uneven? She knew that;
19 she testified to that. She's aware of that.

20 MR. MARANTO: Yes, Your Honor, and this is
21 all issue of fact that goes towards negligence.

22 CHIEF JUDGE LIPPMAN: What if she was
23 training for a rollerblading championship, the sport
24 of rollerblading; would that make a difference?

25 MR. MARANTO: If she was on a rink, Your

1 Honor?

2 CHIEF JUDGE LIPPMAN: No, if she was
3 training. She was going to be in the nationals of
4 the rollerblading competition.

5 MR. MARANTO: It would make - - -

6 CHIEF JUDGE LIPPMAN: Would that make a
7 difference?

8 MR. MARANTO: It would make no difference
9 whatsoever because we're looking at two things.
10 Well, we're looking at whether the property owner in
11 this case is a sponsor of socially valuable activity.

12 JUDGE PIGOTT: Is what? Is what?

13 MR. MARANTO: A sponsor of socially
14 valuable activity. Is it a rink? Is it a state
15 park?

16 JUDGE PIGOTT: Is - - - is the defendant -
17 - -

18 MR. MARANTO: Yes.

19 JUDGE PIGOTT: A what?

20 MR. MARANTO: Sponsor of - - - this is the
21 words used by this court: a sponsor of socially
22 valuable activity.

23 JUDGE PIGOTT: That's why - - - I'm having
24 trouble with - - - I'm sorry about this, but the
25 whole primary assumption of risk stuff, it seems to

1 me, as I thought Judge Read was implying, this is a
2 premises case. And when you've got a premises case,
3 it's an issue of duty. And when you've got a
4 driveway, you owe a duty, I suppose, to people coming
5 in and out with their cars. Do you have to
6 anticipate each and every possible - - - I guess
7 there's a number of questions this way - - - ways
8 that someone is going to go in and out of your
9 driveway, and even if you see - - - and I think in
10 the record it says two inches, and you say the town
11 better fix that one of these days because it's the
12 whole street, that somehow a property owner is
13 responsible. Where's the foreseeability? Where's
14 the - - -

15 MR. MARANTO: Well, Your Honor, and that
16 issue was not raised in - - - foreseeability is not -
17 - - that's not part of his appeal.

18 JUDGE PIGOTT: Where's the duty?

19 MR. MARANTO: Well, the duty, Your Honor,
20 goes to whether this is primary assumption of the
21 risk. And the issues - - - and it's articulated by
22 the Court - - -

23 JUDGE READ: Let's assume it's not. Let's
24 assume it's not; where's the duty. Let's assume
25 assumption of risk is out of the case entirely.

1 MR. MARANTO: The duty, Your Honor, in this
2 case is to those people could be reasonably foreseen
3 in that area. This woman had children biking down
4 that area - - -

5 JUDGE PIGOTT: Well, there's children on
6 every street; there's buses, there's - - -

7 MR. MARANTO: She rollerbladed down - - -

8 JUDGE PIGOTT: Wait a minute; let me
9 finish. There's ice cream trucks. You're right,
10 there's rollerbladers, there's bicyclists, there's
11 skip-ropers, there's all of this stuff. And I don't
12 think you have to put rubber bumpers on the sides of
13 your driveway because somebody may rollerblade into
14 the grass.

15 MR. MARANTO: Your Honor, and I don't know
16 that I disagree with that.

17 JUDGE PIGOTT: You wouldn't.

18 MR. MARANTO: Right? No, Your Honor, I'm
19 serious. I don't disagree with that contention.

20 CHIEF JUDGE LIPPMAN: What's the duty?

21 MR. MARANTO: The issue here is - - -

22 CHIEF JUDGE LIPPMAN: To keep it in safe
23 condition? Is that the duty? To keep the drive - -
24 -

25 MR. MARANTO: That's the duty, Your Honor,

1 and if you look at the Ashbourne case, that the First
2 Department decided in 2011, it is this exact case:
3 identify and looking at the language of your decision
4 in Trupia. Ashbourne is a woman rollerblading, and
5 she's rollerblading on a sidewalk, and she hits a
6 depression, and she sues the adjoining landowner.
7 And the depression was small.

8 JUDGE GRAFFEO: But the landowner can't put
9 up a sign that says no bicycling or rollerblading
10 across my driveway.

11 MR. MARANTO: Sure, but if you - - - Your
12 Honor, of course not. But if you know that you have
13 a discrepancy in, or - - - a particularly dangerous -
14 - -

15 JUDGE GRAFFEO: If it's the whole street
16 has sunk - - -

17 MR. MARANTO: Your Honor, when we say it's
18 the whole street, first of all, there are other
19 driveways like this, and those people should have - -
20 - and it's just one corner of the driveway. And she
21 bought this place ten years ago and recognized and
22 stated that this was a problem: I knew it was
23 dangerous; I was told - - - I was told by the
24 inspector that came into the house to make this right
25 because it created a dangerous condition - - -

1 JUDGE PIGOTT: Yeah, it's a dangerous
2 condition because you - - - every time you go into
3 your driveway, you bump.

4 MR. MARANTO: No, Your Honor, it's a
5 dangerous condition because there are people
6 rollerblading, skating, and using - - -

7 JUDGE PIGOTT: Well, the only reason I say
8 that - - -

9 JUDGE SMITH: That's not what the inspector
10 told her, is it?

11 MR. MARANTO: The inspector told her to
12 remedy the situation. Not because of a car, Your
13 Honor; a two and a half inch depression does not
14 affect a vehicle. It affects people walking,
15 jogging, using scooters and bikes. It doesn't affect
16 a vehicle - - -

17 JUDGE SMITH: It's fairly safe if you're
18 walking, too, isn't it? I can usually manage - - -

19 MR. MARANTO: Yes.

20 JUDGE SMITH: - - - to get over a - - -

21 MR. MARANTO: Yeah.

22 JUDGE SMITH: - - - two-inch lip on a
23 driveway.

24 MR. MARANTO: Absolutely, Your Honor.

25 JUDGE SMITH: You're really saying that she

1 had to put a - - - do something, put a ramp at the
2 end of her driveway because people might want to
3 bicycle or rollerblading.

4 MR. MARANTO: That people might be using -
5 - - jogging, might be using a scooter, might be using
6 a bike.

7 JUDGE READ: And it's her property.

8 MR. MARANTO: It's true.

9 JUDGE READ: These are people that come on
10 uninvited.

11 MR. MARANTO: It is her property, Your
12 Honor. Just like the sidewalk in front of her
13 property, if I was walking along her sidewalk and
14 there was a hole there, and I tripped in it, it's her
15 responsibility.

16 JUDGE SMITH: Isn't there a difference,
17 though. I mean, most of us recognize if we've got a
18 hole in the sidewalk in front of our property, we've
19 got to fix it but - - - because people - - - you do
20 expect people to walk on sidewalks. Is it the same
21 expectation that people are going to rollerblade down
22 your driveway?

23 MR. MARANTO: Yes, Your Honor, because she
24 said in her deposition, I've seen people rollerblade
25 down it, I've seen people use scooters down it, I've

1 seen people bike down it, and I've actually seen - -
2 -

3 JUDGE READ: So she's supposed to put up a
4 sign that says "keep off" or "mind the gap"?

5 MR. MARANTO: No, Your Honor. What she's
6 supposed to do is, just like a hole, is to fill it
7 in.

8 JUDGE SMITH: Is this a - - - this is a
9 different case if this was the first rollerblader who
10 ever came down there?

11 MR. MARANTO: No.

12 JUDGE SMITH: Well, then what's - - - then
13 all that deposition testimony's irrelevant.

14 MR. MARANTO: Well, it goes - - - well, it
15 goes to her knowledge of the situation. Your Honors,
16 with all due respect, this motion brought before the
17 lower court in this case was whether primary
18 assumption of the risk precluded - - - precluded my
19 client's ability to make a claim, here. Now, if I
20 can just go back to Ashbourne - - -

21 CHIEF JUDGE LIPPMAN: Last point,
22 counselor; your light's on. Go ahead.

23 MR. MARANTO: The Ashbourne case, First
24 Department, 2011, where they hit a small depression,
25 and the First Department analyzed that very same

1 situation, this case, what's in front of us, and
 2 analyzed Trupia and said this is not a sport. This
 3 is a person just exercising. Primary assumption of
 4 the risk is not applicable. It's 2011.

5 Thank you very much.

6 CHIEF JUDGE LIPPMAN: Okay, thanks,
 7 counsel.

8 Counsel, what about the First Department
 9 case?

10 MR. SCHECHTER: Well, I have it right here.
 11 The case - - - first of all, the court got it wrong.
 12 They interpreted your decision in Anand as requiring
 13 a sponsored activity in order to apply the assumption
 14 of risk, and Anand did not require a sponsored
 15 activity, and it was not a sponsored activity.

16 CHIEF JUDGE LIPPMAN: Well, we talked about
 17 it being on a golf course, so that they agreed,
 18 participated in a - - -

19 MR. SCHECHTER: That's a - - -

20 CHIEF JUDGE LIPPMAN: - - - golf outing - -
 21 - -

22 MR. SCHECHTER: Yeah, that's a different
 23 issue - - -

24 CHIEF JUDGE LIPPMAN: - - - with - - -

25 MR. SCHECHTER: - - - as to whether venue

1 of the event - - - and there have been many lower
2 court cases that - - -

3 CHIEF JUDGE LIPPMAN: So it's not just the
4 venue; it's that it has to be sponsored?

5 MR. SCHECHTER: No, well, that's what the
6 Ashbourne court decided, and that was wrong.

7 CHIEF JUDGE LIPPMAN: So what are you - - -
8 what are you saying?

9 MR. SCHECHTER: I'm say - - -

10 CHIEF JUDGE LIPPMAN: What's the test?

11 MR. SCHECHTER: Well, I'm saying that what
12 we're left with is a situation where homeowners in
13 Amherst and other places are going to have to put up
14 signs saying no rollerblading across my driveway;
15 they're going to have to put up police tape and
16 barriers.

17 CHIEF JUDGE LIPPMAN: Does it matter that
18 he's - - - that in discovery, it said: I know it's
19 dangerous; I was told it's dangerous because there
20 are rollerbladers come up here. Could there be any
21 better warning that, gee, you'd better take some
22 action or someone's going to get hurt?

23 MR. SCHECHTER: I would encourage Your
24 Honors to look at the record because my client did
25 not - - -

1 CHIEF JUDGE LIPPMAN: Assuming it's true.

2 MR. SCHECHTER: Well, she didn't say that.

3 CHIEF JUDGE LIPPMAN: Assuming she said it,
4 would that make it different?

5 MR. SCHECHTER: Assuming that she said she
6 knew there was an issue - - -

7 CHIEF JUDGE LIPPMAN: She said I was told
8 that this is dangerous because this one, that, or the
9 other one, rollerbladers, anyone else come up here
10 and they could get hurt; that would make a
11 difference?

12 MR. SCHECHTER: I assume that if somebody
13 told her that this is dangerous for rollerbladers, it
14 might. She's testified to exactly the opposite. Her
15 children rollerbladed; her children bicycled; she did
16 not believe it was dangerous.

17 JUDGE SMITH: Well, why should it make a
18 difference? Shouldn't she be entitled to say, look,
19 if people want to rollerblade, they're going to have
20 to watch out.

21 MR. SCHECHTER: Absolutely.

22 JUDGE SMITH: I'm not fixing my property
23 for rollerbladers?

24 MR. SCHECHTER: Absolutely, absolutely.
25 And what happened here was over the course of a ten-

1 year period, all of these properties existed exactly
2 the same. If the court allows this appellate
3 division case to stand, the homeowners are going to
4 be faced with only one choice, and that is, when it
5 comes to recreational activities, such as bicycling,
6 such as rollerblading, they're going to have to put
7 up barriers in their property to protect people from
8 - - -

9 CHIEF JUDGE LIPPMAN: For jogging, they're
10 on the hook? You're making a distinction - - -

11 MR. SCHECHTER: I make a distinction
12 between walking and jogging from rollerblading,
13 absolutely.

14 JUDGE PIGOTT: You're - - -

15 MR. SCHECHTER: I don't think that anybody
16 invited people to rollerblade on their property, and
17 they have a - - -

18 CHIEF JUDGE LIPPMAN: But they invited them
19 to jog?

20 MR. SCHECHTER: Well, the difference is
21 that it's - - -

22 CHIEF JUDGE LIPPMAN: That's what I'm
23 getting at. What's the difference?

24 MR. SCHECHTER: The difference is that it's
25 a dangerous - - - it's an activity with enhanced

1 risks.

2 JUDGE PIGOTT: Is Mr. Maranto right? He
3 pointed out that the basis of your motion was not
4 premises liability; it's strictly on primary
5 assumption of risk?

6 MR. SCHECHTER: Well, it was based upon
7 that there was no duty.

8 JUDGE PIGOTT: So if, well, well, I think
9 he said assumption of risk.

10 JUDGE READ: No duty because of assumption
11 of risk?

12 MR. SCHECHTER: No duty because of
13 assumption of risk.

14 JUDGE PIGOTT: SO if you lose on the
15 assumption of risk, you still have premises liability
16 defense, right? I mean, and the issue that you owe
17 no duty to people who are using your driveway for
18 something other than - - - that you didn't have an
19 opportunity to foresee?

20 MR. SCHECHTER: Well, that was the issue
21 before the lower court and that was the issue in the
22 appellate division. Every - - -

23 JUDGE SMITH: Let me ask this question.

24 MR. SCHECHTER: - - - everyone decided
25 based - - -

1 CHIEF JUDGE LIPPMAN: Judge Smith?

2 JUDGE SMITH: In your view, is your motion
3 broad enough to encompass the issue of whether there
4 is a duty to rollerbladers to fix your premises?

5 MR. SCHECHTER: Well, I believe it is
6 because we argued that there was no such duty.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. SCHECHTER: Thank you.

9 CHIEF JUDGE LIPPMAN: Thank you both.

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

I, Dena Page, certify that the foregoing transcript of proceedings in the Court of Appeals of Robin Custodi v. Town of Amherst, No. 164 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 13, 2012