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COURT OF APPEALS
STATE OF NEW YORK

MAHARAJ,

Appellant,

-against-

NO. 34

CITY OF NEW YORK,

Respondent.

92 Court Street
Binghamton, New York 13901
March 12, 2025

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: The next case on the
2 calendar is Maharaj v. City of New York.

3 MR. ANNENBERG: Good morning, Your Honors.

4 Chief Judge Wilson, I would like to reserve two
5 minutes for rebuttal, please.

6 CHIEF JUDGE WILSON: Yes.

7 MR. ANNENBERG: Thank you. May it please the
8 court. My name is Joshua Annenberg. I'm appellate counsel
9 for the plaintiff-appellant, Maharaj.

10 The Second Department in this case erred in
11 applying primary assumption of risk to the injurious crack
12 and hole in the tennis court. It did not follow the rule
13 in good public policy set by this court in Siegel v. City
14 of New York within Morgan, which states, a negligent
15 condition occurring in the ordinary course of any
16 property's maintenance is not subject to primary assumption
17 - - -

18 JUDGE SINGAS: Aren't some premise - - -

19 MR. ANNENBERG: I'm sorry.

20 JUDGE SINGAS: Aren't some premise hazards
21 inherent in the sport? And I'm not only talking about
22 something like Turcotte, which the cupping of the
23 racetrack. I'm thinking more along the lines of some of us
24 might remember playing stoop ball or stickball in the
25 street, and you might fall into a pothole. And some of us

1 may have twisted lots of ankles playing those games as a
2 child. Now, that I would think is inherent in the game of
3 stickball or stoop ball, that you take those conditions as
4 they come because that's where you've chosen to play.

5 MR. ANNENBERG: But not in our case, not in
6 Maharaj. Maharaj is really modeled after Siegel. And by
7 the way, to - - - to be a little more specific, Your Honor,
8 with respect to that question, I think this court in the
9 Custodi case exempted liability for private play within - -
10 - within sidewalks or within private driveways. The
11 Custodi case and - - - and the primary assumption of risk
12 cases that this court has decided, and in Siegel, goes to
13 the issue of playing sports in a given designated venue,
14 such as we have here, the tennis court at - - - here - - -

15 CHIEF JUDGE WILSON: Well, it's a little odd
16 here, I guess, isn't it, that cricket is normally played -
17 - - I'm not a cricket player - - - but on a - - - on a
18 grass field, I think.

19 MR. ANNENBERG: I - - - I understand.

20 CHIEF JUDGE WILSON: And this is played on tennis
21 courts where the nets are removed.

22 MR. ANNENBERG: The nets are removed.

23 CHIEF JUDGE WILSON: And cricket is not normally
24 played on a hard surface of any sort.

25 MR. ANNENBERG: That - - - that's correct. But

1 since it - - -

2 CHIEF JUDGE WILSON: And this field - - - the
3 grass field that you would play cricket on would have a lot
4 of irregularities.

5 MR. ANNENBERG: A grass - - - a grass - - - yes,
6 but that's not our case.

7 CHIEF JUDGE WILSON: Right. Because - - -
8 because Mr. Maharaj decided to play cricket on a tennis
9 court.

10 MR. ANNENBERG: I don't think it was that he
11 unilaterally decided. He's - - -

12 CHIEF JUDGE WILSON: Well, no, he needed to have
13 other people to play with.

14 MR. ANNENBERG: It was - - - it was part of the
15 Queen's Cricket League, and that - - - and that - - - while
16 it's not explicit in the record, I think it's reasonable to
17 either assume or reasonable to think that since he was part
18 of a league and since they played at the tennis courts
19 where the tennis courts were adjacent, and both nets of
20 both tennis courts were removed, that the City of New York
21 did so. They know they were coming there. They know they
22 were going to play there. And it's reasonable for the City
23 of New York - - -

24 JUDGE CANNATARO: But - - - but Counsel, to
25 follow up with the Chief's question - - - again, I am also

1 not an aficionado of cricket. Everything I know comes from
2 watching period movies. But from what I've seen, part of
3 the game is you hit the ball with some kind of paddle-like
4 advice - - - device, and then at some point you have to go
5 running off like a shot. And I'm questioning the choice to
6 even play that game on a tennis court, much less one that
7 had big cracks on it. So to the extent that it might have
8 been a bad idea to play cricket on a tennis court - - - or
9 a cracked tennis court, who bears that risk?

10 MR. ANNENBERG: Well, going to one - - - one
11 specific fact on this, Mr. Maharaj was playing outfield
12 just as opposed to batter - - -

13 JUDGE CANNATARO: I don't know what that means.

14 MR. ANNENBERG: It's similar to baseball.

15 JUDGE CANNATARO: Okay.

16 MR. ANNENBERG: Quite frankly, I watched a
17 YouTube so I can get to understand how to play cricket, but
18 it's not that much different than baseball.

19 JUDGE CANNATARO: It looks like baseball.

20 MR. ANNENBERG: So - - - so he's - - - he's out
21 in the outfield, and he's catching the ball. Now, the
22 outfield, I'll give - - - I'll - - - I'll say is part of
23 the tennis courts. But if I - - - if I can move for a
24 second - - - I understand the court's questions, but it's
25 not going to matter whether he's playing cricket on a

1 tennis court or there's a tennis court - - - or people are
2 playing tennis court on the tennis court. Here, what
3 matters - - -

4 JUDGE CANNATARO: No, but the question I'm really
5 asking is, why is he playing cricket on a tennis court and
6 not cricket on a nice, soft field of grass?

7 MR. ANNENBERG: I don't have an answer for that,
8 and it's not on the record. It was never asked, and it was
9 never answered. I think this is within the City of New
10 York. This is what people must be doing - - -

11 JUDGE RIVERA: So are there signs - - - are there
12 signs that prohibit the use of these tennis courts for - -
13 - from non-tennis purposes?

14 MR. ANNENBERG: Not that I know of. The record
15 is silent in that regard.

16 JUDGE HALLIGAN: You know, part of what I've been
17 wrestling with is how far your position goes, right? So I
18 think in - - - in a lot of areas you find asphalt gets
19 cracks during the winter because of freezing and cooling.
20 Right? So is - - - is the City or any municipality then
21 liable for any crack that emerges? You could trip on
22 pretty much anything, I think. And what does that mean
23 for, you know, the ability to keep these properties open to
24 the public as opposed to someone, you know, heading out and
25 seeing a crack - - - somebody that works for the City

1 seeing a crack and saying, I'd better shut it down because
2 I don't want to run the risk of liability. I know you're
3 saying here that the crack was significant, and you have
4 photos in the record, but - - - but what kind of lines
5 would you have us draw around that?

6 MR. ANNENBERG: I think the lines are - - - are
7 clearly set by this court previously in the Siegel case
8 within Morgan. The line that - - - in that case, and that
9 I think is quite applicable here, is that, as I started
10 out, the negligent condition occurring in the ordinary
11 course of any property's maintenance - - -

12 JUDGE HALLIGAN: So - - - so a small crack is - -
13 - is okay - - - I'm - - - I'm trying to understand what a
14 rule is that you would have us adopt. A small crack - - -

15 MR. ANNENBERG: Well, the - - -

16 JUDGE HALLIGAN: - - - is okay, but a larger
17 crack - - -

18 MR. ANNENBERG: I - - - I - - - I understand, but
19 then it begs the question, how is - - - how small is small?
20 How big is big?

21 JUDGE HALLIGAN: That's my concern.

22 MR. ANNENBERG: However - - - so to answer that,
23 this court and the Appellate Divisions and the lower courts
24 have already dealt with the issues of trivial defects. So
25 to that extent, the - - - the municipality or any private

1 owner would have a defense and can move for summary
2 judgment on trivial defect - - -

3 JUDGE HALLIGAN: And - - - and you don't think
4 that - - - that this would - - - that - - - that if we were
5 to adopt your position, that that would induce
6 municipalities to err on the side of shutting public
7 facilities down while they - - - they figure out, you know,
8 how to get - - - how to get them spick and span?

9 MR. ANNENBERG: No, I - - - I don't think so. I
10 think that - - - that - - -

11 JUDGE HALLIGAN: Why not?

12 MR. ANNENBERG: Why not?

13 JUDGE HALLIGAN: Uh-huh.

14 MR. ANNENBERG: Because my - - - my answer is
15 that not - - - not every roadway has potholes. Not every
16 sport facility in the City of New York is riddled with
17 cracks and holes.

18 JUDGE HALLIGAN: A lot - - - a lot of them have
19 some cracks at different times of year.

20 MR. ANNENBERG: Then - - - then they need to - -
21 - our position is then you need to maintain the premises
22 and - - - and maybe this is the qualifier - - - in the
23 reasonably safe condition.

24 JUDGE GARCIA: Counsel, can I ask a factual
25 question? And I just don't know this. Was this an

1 organized game that you had a permit for - - - your client
2 had a permit for? Or did they just go on a tennis court,
3 take the nets down, and play?

4 MR. ANNENBERG: It would seem to me that it's an
5 organized game. It was not asked or answered in the record
6 as to the issue of the permit. But as I mentioned before,
7 since they went to the court, and the nets were down, it
8 would seem that - - - it's reasonable that they had a
9 permit, that the City of New York knew that they were going
10 to be there.

11 CHIEF JUDGE WILSON: So if you're - - - if you're
12 playing cricket on a grass field, which has some
13 irregularities and has turf, is there an inherent risk of
14 tripping?

15 MR. ANNENBERG: Your - - - I believe, Your Honor,
16 you're almost asking me like the Ninivaggi case.

17 CHIEF JUDGE WILSON: Well, I'm actually just
18 asking you a fact about cricket.

19 MR. ANNENBERG: Okay. Fair enough. So it - - -

20 CHIEF JUDGE WILSON: I mean, I've seen some
21 cricket highlights on TV, and I see people diving and
22 sometimes tripping and tumbling - - -

23 MR. ANNENBERG: Well, that would be - - -

24 CHIEF JUDGE WILSON: - - - in the - - - in the
25 outfield, on grass.

1 MR. ANNENBERG: On grass.

2 CHIEF JUDGE WILSON: On grass. I haven't seen
3 cricket played on asphalt.

4 MR. ANNENBERG: I understand.

5 CHIEF JUDGE WILSON: So would you agree that
6 there is an inherent risk in tripping and falling when
7 you're playing the outfield in cricket? You don't have to
8 agree.

9 MR. ANNENBERG: It's an interesting question, but
10 if - - - if you're - - -

11 CHIEF JUDGE WILSON: Right.

12 MR. ANNENBERG: - - - if you're playing - - - I -
13 - - I would say that if you're playing on grass and where -
14 - - where it's usually played - - -

15 CHIEF JUDGE WILSON: Uh-huh.

16 MR. ANNENBERG: - - - I - - - I still think that
17 the - - - the manner in which the premises are maintained,
18 whether it's going to be grass or whether it's going to be
19 asphalt, is not a - - - is not a risk inherent in the game.
20 In my - - - in my discussion - - -

21 CHIEF JUDGE WILSON: Wait - - - wait - - - I'm
22 sorry. You have to slow down. The manner in which the
23 field is maintained is not a risk - - -

24 MR. ANNENBERG: In other words, if - - - if there
25 - - - like you said, if there are - - - if there are waves

1 or holes or whatever it is in a grassy - - -

2 CHIEF JUDGE WILSON: Yeah. Uh-huh.

3 MR. ANNENBERG: - - - field, that - - - that
4 grassy field, to me, is comparable to the tennis court in
5 this matter. So it's - - - it's the game surface. If - -
6 - if the game surface - - - if the court - - - if the grass
7 field has holes or has some type of depressions in it
8 because it is not maintained properly, reasonably safe in
9 the ordinary course of its maintenance, then it would fall
10 within the - - - the confines of Siegel - - -

11 CHIEF JUDGE WILSON: I think I'm ask - - - trying
12 to ask something different, I think.

13 MR. ANNENBERG: I'm sorry; I'm not understanding.

14 CHIEF JUDGE WILSON: No? Okay. So I think
15 earlier you said that cricket is played on grass,
16 typically? It - - - right?

17 MR. ANNENBERG: Yes.

18 CHIEF JUDGE WILSON: And that grass fields have
19 irregularities in them?

20 MR. ANNENBERG: Yes.

21 CHIEF JUDGE WILSON: They're not perfectly smooth
22 like the putting surface of a golf course.

23 MR. ANNENBERG: Fair enough.

24 CHIEF JUDGE WILSON: There - - - you know,
25 there's some bumps. And the same with soccer fields and so

1 on. People play on grass, right?

2 MR. ANNENBERG: Fair enough.

3 CHIEF JUDGE WILSON: And that those
4 irregularities, an inherent risk is that you're going to
5 trip on something like that. I mean, people, you know, get
6 their cleats stuck in turf or their shoe slips out from
7 under them if it's a little bit wet or there's a
8 depression, you know, or a little bump that they don't
9 anticipate, and they trip.

10 MR. ANNENBERG: I think here - - -

11 CHIEF JUDGE WILSON: On - - - on what - - - so is
12 there an inherent risk in tripping on a grass field in
13 cricket? You could say no.

14 MR. ANNENBERG: I - - - I think no. I think no,
15 because, if I may, I think the - - - the whole issue goes
16 to what - - - what - - - it was discussed in Morgan and
17 Siegel as to the sine qua non, the necessary condition of
18 the risk. And - - -

19 JUDGE CANNATARO: What about - - - what about
20 sliding, Counsel? I - - - I - - - I feel like in cricket,
21 sometimes - - - I think those things are called wickets.

22 MR. ANNENBERG: Yes. The wickets - - -

23 JUDGE CANNATARO: I feel like sometimes I see
24 people sliding to - - - to get to a wicket before a ball
25 gets there. Is - - - is that - - - am I right?

1 MR. ANNENBERG: Well, that would - - - that would
2 be what I call the method and manner of play.

3 JUDGE CANNATARO: Okay.

4 MR. ANNENBERG: That - - - that's how you play
5 the game. But you don't - - -

6 JUDGE CANNATARO: But does the method and manner
7 of play also - - - also include a risk that's inherent in
8 the game?

9 MR. ANNENBERG: You - - - you - - -

10 JUDGE CANNATARO: In other words, if you slide
11 into the wicket, is that a risk inherent - - - and you
12 injure yourself doing so, would that have been a risk
13 inherent in the game?

14 MR. ANNENBERG: Yes, absolutely.

15 JUDGE SINGAS: All right. So did - - -

16 MR. ANNENBERG: The - - - the method and manner -
17 - - if you get hit in the head by the ball, if you slide
18 into the wicket, if you - - - you know, if there's some - -
19 -

20 JUDGE CANNATARO: Okay.

21 MR. ANNENBERG: - - - other game of body
22 checking, that - - -

23 JUDGE CANNATARO: So let me ask you this. If you
24 slide to the wicket in a game of cricket being played on a
25 tennis court and you're injured worse, than you might be

1 sliding into the wicket on grass, is - - - is that a risk
2 that's been assumed of the game as well?

3 MR. ANNENBERG: Well, that - - - if - - - if the
4 player so chooses, and that's how the game - - - and if
5 that is an option on how to play the game - - -

6 JUDGE CANNATARO: Uh-huh.

7 MR. ANNENBERG: - - - then I'll answer yes.
8 Because - - -

9 JUDGE CANNATARO: So the last question in my
10 syllogism is this, if - - - if you accept the - - - the
11 assertion that tripping is a risk inherent in the game.
12 And I know you kind of said no to that, right?

13 MR. ANNENBERG: I - - - I - - - I don't. Okay.

14 JUDGE CANNATARO: But if you accept that
15 assertion, then the risk of tripping on an asphalt surface
16 and being injured worse than you might be injured on grass
17 would also be a risk inherent in the game.

18 MR. ANNENBERG: Not if - - - not if the premises
19 here was maintained in a reasonably safe condition. They
20 could have played cricket - - - see, with - - - with
21 respect to the issue of the risk being the sine qua non,
22 being the necessary condition, and then what I call the
23 manner and method of how - - - how the game is played, they
24 could have played just fine without the crack and hole.

25 JUDGE HALLIGAN: But they could have played on -

1 - - on - - -

2 JUDGE SINGAS: So is it your position that - - -
3 that no matter what sport was being played here, that crack
4 being so obvious and so obviously increased the risk of any
5 sport being played, whether you were playing tennis or
6 cricket, over and above the normal defects of a surface.
7 Is that your position? And if that is your position, did
8 you preserve that argument? Like, where below did you
9 raise this argument that that crack so increased the risk
10 of injury above and beyond regular maintenance?

11 MR. ANNENBERG: That is not our position on - - -
12 on this appeal that the - - - when we talk about the issue
13 of preservation, the - - - what we're - - - what we're
14 arguing here on appeal is that the crack and hole is not
15 subject to primary assumption of risk whatsoever, because
16 it's not a risk inherent in the game, and it - - - it is
17 not - - - it was a negligent condition occurring in the
18 ordinary course - - -

19 CHIEF JUDGE WILSON: Well, but - - - to - - - to
20 what - - - to what game - - - to just follow up on Judge
21 Singas' question, to what game is a crack in a pavement
22 inherent?

23 MR. ANNENBERG: Well, I would say there's no such
24 game. I - - - I don't - - - I - - -

25 CHIEF JUDGE WILSON: So - - - so the answer to

1 her question is - - -

2 MR. ANNENBERG: - - - so then - - - but in answer
3 to the question, with respect to the issue of the open and
4 obvious doctrine, outside of primary assumption of risk,
5 the open and obvious doctrine does not gain a dismissal.
6 It only goes to the plaintiff's culpable conduct, to the
7 plaintiff's culpable negligence.

8 Here, as we are - - - as I'm arguing that this
9 crack and hole is not subject to primary assumption of
10 risk, even though, I'll grant you, it is open and obvious,
11 but with my position that the crack and hole are not
12 subject to primary assumption of risk. All that open and
13 obvious condition does is put into play CPLR 1411 of
14 comparative negligence against Mr. Maharaj, which I've said
15 quite openly in my brief. He is subject to comparative
16 negligence.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. ANNENBERG: Thank you, Your Honor.

19 MS. GUSTAFSON: Good morning, Your Honors.

20 Excuse me. May it please the court. Ingrid Gustafson,
21 appearing on behalf of the City.

22 I'd like to focus mostly on the merits, but I do
23 just want to touch very briefly on preservation and point
24 out to the - - - to the extent that plaintiff is still
25 pressing the sort of sweeping distinction that - - - that

1 he pushed in his brief between the method and manner of
2 play and the conditions of play, that contention, which is
3 contrary to forty years of this court's precedent, is
4 entirely unreserved, it's undeveloped in the courts below,
5 and should not be reached by this court. I think the
6 plaintiff, to the extent he is arguing that the assumption
7 of the risk doctrine does not apply to negligent
8 maintenance claims ever, I think that is also unreserved.

9 But I would like to go ahead and turn to the
10 merits, and I will - - - I will - - -

11 JUDGE HALLIGAN: All right. Can I just ask you -
12 - -

13 JUDGE CANNATARO: Could you do - - - yeah, go
14 ahead.

15 JUDGE HALLIGAN: Sorry. Is there - - - is there
16 anything in the record about whether or not the players had
17 a permit to play cricket on this court?

18 MS. GUSTAFSON: No, there's nothing in the record
19 about that. And - - - and to the extent - - -

20 JUDGE HALLIGAN: So there's no indication that
21 the - - - that the City signed off on removing the net and
22 having a game which would otherwise be designed to be
23 played on grass and where injuries might be less severe.
24 No indication that the City approved that in the record.

25 MS. GUSTAFSON: That's - - - that is correct.

1 And it's the City's position that to the extent that the
2 plaintiff here knowingly - - - and I think there can be no
3 dispute that he knowingly chose to play cricket on a tennis
4 court - - -

5 JUDGE RIVERA: Where - - - where are the cricket
6 courts in New York City?

7 MS. GUSTAFSON: I - - - I do not have that
8 information. I do believe - - -

9 JUDGE RIVERA: Are there any? Are there any?

10 MS. GUSTAFSON: I -- - I believe that there
11 might - - - that there are. I mean, this is outside of the
12 record, Your Honor.

13 JUDGE RIVERA: No, I understand.

14 MS. GUSTAFSON: I think when the - - - when the
15 City redid - - -

16 JUDGE RIVERA: Publicly available information.

17 MS. GUSTAFSON: Well, based on, I mean, just this
18 park, when the court redid this park in 2016, I believe it
19 actually did put in cricket - - -

20 JUDGE HALLIGAN: Do you think that you could play
21 cricket, for example, on the public courts on Randall's
22 Island? There are large grassy fields there that are used
23 for sporting activities.

24 MS. GUSTAFSON: I mean, I think - - - there are -
25 - - there are lots of grassy fields, certainly. So I mean,

1 those would be alternative options for playing cricket - -
2 -

3 JUDGE CANNATARO: Can we - - - can we talk about
4 that big, gigantic crack running through the middle of this
5 tennis court?

6 MS. GUSTAFSON: Uh-huh.

7 JUDGE CANNATARO: You know, I - - - I think
8 counsel has a good - - - your adversary has a good point
9 that the - - - the first thing people who work in this area
10 think when they see that is that's a big, open, and obvious
11 crack. But I also think he's correct that that goes to
12 comparative. And - - - and I think I understand where he's
13 coming from when he says that's really separate and
14 distinct from assumption of the risk. So can you somehow
15 connect this crack to assumption of risk, or do we have to
16 let it survive summary judgment?

17 MS. GUSTAFSON: Absolutely, Your Honor, and in
18 two different ways, both because the risk presented by - -
19 - by cracks and imperfections are inherent in the game of
20 cricket, and also because of how this court has applied the
21 assumption of the risk doctrine to conditions. It has
22 explicitly incorporated open and obvious into the doctrine.
23 There is a special rule - - -

24 JUDGE CANNATARO: Where did - - - where did we
25 did - - - where did we do that?

1 MS. GUSTAFSON: Starting in Turcotte, and the
2 court has recited the principle repeatedly, including in
3 Morgan. That - - - where assumption of the risk applies,
4 it - - - the duty for - - - of premises liability is to
5 make the conditions as safe as they appear to be. Where a
6 condition is - - - of play is open and obvious, it is among
7 the reasonably foreseeable and assumed risks of playing in
8 that location - - -

9 JUDGE RIVERA: So - - - so that means you
10 incentivize the - - - the premises owner never to make a
11 repair.

12 MS. GUSTAFSON: I disagree, Your Honor. And
13 that's - - -

14 JUDGE RIVERA: Okay. Tell me how - - - tell me
15 how New York City is incentivized to make these repairs if
16 - - - if we say summary judgment was properly granted here
17 in your favor.

18 MS. GUSTAFSON: Absolutely. Absolutely. And I
19 think this is a critical point because it goes to the
20 interaction of the premises liability background principle
21 that the City does not dispute applies to everyone and the
22 assumption of the risk doctrine.

23 The assumption of the risk doctrine is very
24 narrowly cabined by this court. It only applies to certain
25 people engaged in certain activities, often in certain

1 locations and with respect to certain risks. So in a
2 narrow piece of the back - - - of the background premises
3 liability principle, the duty is modified to make
4 conditions as safe as they appear to be. But anybody else
5 who doesn't fall in the scope of the doctrine, as - - - as
6 plaintiff himself points out, pedestrians, bystanders,
7 children of a young age with no experience - - -

8 JUDGE RIVERA: So if Mr. Maharaj was just walking
9 through the field, they could sue you?

10 MS. GUSTAFSON: I mean, the assumption - - - I
11 mean, they could. I mean, the assumption - - - I mean, any
12 - - - anybody can sue, but the assumption of the risk
13 doctrine - - -

14 JUDGE RIVERA: Well, you wouldn't have this
15 defense is my point.

16 MS. GUSTAFSON: Absolutely. Also the assumption
17 of - - -

18 JUDGE RIVERA: Well, what's the logic in that?

19 MS. GUSTAFSON: The - - - I think it's a - - -

20 JUDGE RIVERA: What's the logic in that?

21 MS. GUSTAFSON: It's a - - - it's a design of the
22 doctrine because the doctrine is meant to - - - to protect
23 against the - - - the crushing liability from the
24 heightened risks of sports participation. If you are
25 participating in a sport - - -

1 JUDGE RIVERA: Well, it's - - - it's in - - -
2 yes. Yes. Okay. But that's tied to the fact that there's
3 some social benefit from having venues where people can
4 indeed recreate. And what - - - what's the social benefit
5 to a venue which is so dangerous?

6 MS. GUSTAFSON: Well, I - - - I - - - I - - -

7 JUDGE RIVERA: Where - - - where if I just walked
8 by - - - or Mr. Maharaj walked by, then he could sue you.

9 MS. GUSTAFSON: I mean, I think as - - - as was
10 pointed out earlier, someone can trip on anything. The
11 doctrine - - - the heightened risks - - -

12 JUDGE RIVERA: Well, what - - - what is the size
13 of size of this thing?

14 MS. GUSTAFSON: If I - - - if I - - - if I may -
15 - -

16 JUDGE RIVERA: No. No. No. What's the size of
17 what he tripped over?

18 MS. GUSTAFSON: He gave very different
19 measurements over the - - -

20 JUDGE RIVERA: Okay.

21 MS. GUSTAFSON: - - - anywhere from two to eight
22 inches wide, two to four inches deep. This particular
23 portion of the crack was seven feet long. I mean, I think
24 there's no dispute that - - -

25 JUDGE RIVERA: Doesn't sound like just a thing

1 that's on the ground, right?

2 MS. GUSTAFSON: It's - - - it's a significant - -
3 -

4 JUDGE RIVERA: It took a long time to get this to
5 - - - to be of that decayed condition, no?

6 MS. GUSTAFSON: I think that there's no dispute
7 in the record that it is a naturally occurring condition
8 from repetitive cycles of freezing - - -

9 JUDGE RIVERA: Would you agree that this would
10 discourage people to use this property?

11 MS. GUSTAFSON: I think, you know, some people
12 might make a decision - - -

13 JUDGE RIVERA: Doesn't that work against the
14 purpose?

15 MS. GUSTAFSON: I - - - I don't think it does,
16 Your Honor, because the - - - the - - - the - - -

17 JUDGE RIVERA: Well, if the social benefit is to
18 have venues where people can recreate and people will be
19 discouraged for fear of injury, I mean, I think most people
20 might not take their child to this particular area to learn
21 tennis.

22 MS. GUSTAFSON: If I may - - - if I may frame it
23 a different way. I mean, the City has 4,500 courts and
24 fields - - -

25 JUDGE RIVERA: Right.



1 MS. GUSTAFSON: - - - and it is inevitable that
2 they are going to - - -

3 JUDGE RIVERA: Of course.

4 MS. GUSTAFSON: - - - to develop cracks and holes
5 and surface imperfections - - -

6 JUDGE RIVERA: Absolutely. Absolutely.

7 MS. GUSTAFSON: - - - and it's going to be
8 impossible to keep them in perfect condition. Additionally
9 - - -

10 JUDGE RIVERA: Absolutely. That's what happens
11 when you have millions of people in a city, but there are
12 things called budgets.

13 MS. GUSTAFSON: If I could - - - if I could refer
14 - - - I - - - I want to fin - - - sort of refer back and
15 finish my prior point, though, about the heightened risk of
16 sporting activities. Just as you're more likely to crash
17 into someone and get injured - - -

18 JUDGE RIVERA: Uh-huh.

19 MS. GUSTAFSON: - - - when you're playing a
20 sport, you're also more likely to trip and fall when you
21 are running, jumping - - -

22 JUDGE HALLIGAN: Would he have a better - - -
23 would he have a stronger case if he was playing tennis?
24 Does it matter that he was playing a sport not intended for
25 - - - for playing on that particular field?

1 MS. GUSTAFSON: I - - - I don't think it changes
2 the result, because I think the assumption of the risk
3 doctrine would apply in - - - in either case. But the - -
4 - I think the fact that as an adult, plaintiff knowingly
5 chose to play cricket on a surface that was not designed
6 for it - - -

7 JUDGE RIVERA: Does the City prohibit - - -

8 MS. GUSTAFSON: - - - to the extent that was
9 heightened risks - - -

10 JUDGE RIVERA: Does the City in any way indicate
11 that it prohibits certain uses of the court?

12 MS. GUSTAFSON: No, I - - - I - - - it hadn't.
13 And usually there isn't a duty to warn of open and obvious
14 conditions in any event. But I also think what we are
15 trying - - - this - - - there's limited space in the City -
16 - -

17 JUDGE RIVERA: Uh-huh.

18 MS. GUSTAFSON: - - - and its facilities are to
19 put - - - put to multiple use. I don't think we
20 necessarily want to restrict that. But to the extent there
21 were heightened risks, as a - - - as a - - - an adult,
22 plaintiff could freely assume those. But fundamentally,
23 the risk here of tripping while playing on an outdoor
24 surface - - -

25 JUDGE RIVERA: Well, it's a great - - - it's a

1 great argument for comparative negligence, for sure. But
2 the question is whether or not you can even proceed with
3 this defense.

4 MS. GUSTAFSON: I - - - absolutely, Your Honor.
5 This court, again, has applied the assumption of the risk
6 doctrine to claims of negligent maintenance, and the way
7 that it defines inherency - - -

8 JUDGE RIVERA: So - - - so is there any room - -
9 - is there any room in our jurisprudence for a duty on, in
10 this case, the City, to maintain the tennis courts or other
11 recreational venues?

12 MS. GUSTAFSON: Well, I think that's the - - -
13 the background duty, and it's only going to be displaced in
14 narrow circumstances for people - - - you know, it won't
15 apply to concealed conditions. It's not going to apply to
16 conditions that are unique and unreasonably enhance the
17 risks over and above those inherent in the court. So there
18 is all of this background liability that incentivizes - - -

19 JUDGE RIVERA: Why doesn't this crack fit that
20 second category?

21 JUDGE CANNATARO: Yeah. Why doesn't - - - why
22 doesn't this unreasonably increase the risk inherent in the
23 game?

24 MS. GUSTAFSON: Yes, Your Honor. And I would
25 note that - - - note that plaintiff has sort of



1 affirmatively abandoned that argument now. It was
2 abandoned in the briefing in any event, but as a
3 affirmatively abandoned it at argument. That's because
4 that - - - the exception goes to conditions that are unique
5 and that increase the risk over and above that inherent in
6 the sport.

7 This is not unique. Cracks and holes in outdoor
8 surfaces are common and inevitable and natural - - -

9 JUDGE RIVERA: But the measure of it - - - is it
10 not - - - I mean, that - - - that doesn't - - - that
11 doesn't even sound like a crack or hole. That sounds like
12 a fissure. I mean, it's - - - it's not - - -

13 MS. GUSTAFSON: I mean, it's a significant crack,
14 but I think looking at the - - -

15 JUDGE RIVERA: I mean, if this was on a road,
16 you'd have to close the road.

17 MS. GUSTAFSON: I'm not - - - I'm not sure there
18 - - - there would be any restriction - - -

19 JUDGE RIVERA: Unless you're going to pop tires -
20 - -

21 MS. GUSTAFSON: I would note that there are other
22 limitations in light of the City's liability on the road,
23 in recognition of - - -

24 JUDGE SINGAS: But what's the difference - - -
25 what's the difference between this crack and the torn net

1 in Siegel?

2 MS. GUSTAFSON: Absolutely, Your Honor. I - - -
3 I do want to make a sort of framing observation about
4 Siegel, which is that this court said it was a close and
5 difficult case. The - - - the difference is what - - -
6 what - - - what the court in Siegel focused on was that it
7 was a defective safety feature that was not inherent, it
8 said, in the court of tennis.

9 And in Bukowski, this court picked up on that
10 distinction, and it actually put together - - - this case
11 together with Owens, which is - - - that case together with
12 Owens, which is an unreasonably enhanced the risk case.
13 And it said that defective equipment is different than
14 suboptimal conditions. I would submit that - - - that we
15 are in the suboptimal conditions world, and I - - - but I
16 do want to address this idea of the rule of Siegel that
17 plaintiff keeps pointing to.

18 There is this - - - Siegel never once articulates
19 the rule that plaintiff would have this court adopt. What
20 - - - what the court said was this condition is not
21 inherent; therefore, ordinary negligence principles may
22 apply. It - - - it did not - - - plaintiff sort of flips
23 it around and says, well, ordinary - - - this is a - - -
24 this is a claim of ordinary negligence; therefore, the
25 doctrine doesn't apply. But that's not how this court has

1 ever articulated the rule.

2 And if that had been the rule announced by
3 Siegel, Custodi would have come out, which was about, you
4 know, a - - - a - - - a height differential in the roadway
5 would have been very easy. You would have just said, well,
6 the assumption - - - the risk doctrine doesn't apply, which
7 is not the - - - the line that this court drew.

8 JUDGE HALLIGAN: Can we go back, if we can, to
9 one of Judge Rivera's questions. So what incentives does
10 the City have to maintain sporting facilities,
11 specifically? And let's set to the side the question of
12 whether a pedestrian is going to randomly wander through
13 them.

14 MS. GUSTAFSON: I mean, I think, in liability - -
15 - but - - - but - - - but beyond the - - -

16 JUDGE HALLIGAN: Yeah, but - - - but - - - but
17 under - - - under the rule that you are asking us to adopt,
18 seems to me that liability would not readily lie for
19 something like significant cracks in - - - in a surface.
20 Agreed?

21 MS. GUSTAFSON: If - - - depending on whether
22 they're open and obvious, and - - - but I think, yes - - -

23 JUDGE HALLIGAN: But if they're - - - if - - - if
24 there's not liability that would lie there - - - and again,
25 set to the side, if you would, a pedestrian, and let's

1 focus on just the - - - the athletes that are using the
2 facility. What's the incentive to keep the facilities in -
3 - - in some sort of proper maintenance? I don't mean the
4 next day after a crack arises, but on some regular
5 schedule.

6 MS. GUSTAFSON: Well, as - - - as the government,
7 certainly - - - I mean, the reason why these parks and
8 facilities exist is - - - is to provide a place for - - -
9 for the citizens of the City of New York to carry out
10 sports and recreational activities.

11 JUDGE HALLIGAN: So the check is - - - is you
12 know, sort of the - - - the political pressure of - - - of
13 having the facilities available, but not - - - not a
14 liability check as you would otherwise have in a negligence
15 regime, it sounds to me.

16 MS. GUSTAFSON: I - - - I do think that there is
17 still a liability check, because if you let the facility
18 fall into disrepair - - -

19 JUDGE HALLIGAN: And where - - -

20 MS. GUSTAFSON: - - - I mean, you're still liable
21 for concealed conditions.

22 JUDGE HALLIGAN: Okay. So - - -

23 MS. GUSTAFSON: You're still liable for unique -
24 - -

25 JUDGE HALLIGAN: So what's the line, then,

1 between disrepair and what we have here? Because I think
2 you're telling us that this is not on the disrepair side of
3 - - - of that line, yeah?

4 MS. GUSTAFSON: Well, I think - - - the - - -
5 what I'm saying is it falls - - - the threshold question is
6 always going to be, is it inherent, before you get to the
7 question of has - - - has there been a breach - - -

8 JUDGE HALLIGAN: So could - - - could a surface
9 be so riddled with - - - whatever you want to call them - -
10 - cracks, ruts, chasms, that it would have fallen into
11 disrepair and give rise to liability?

12 MS. GUSTAFSON: I mean, I think - - - again, I
13 just want to say, as a - - - this is - - - I'm sorry - - -
14 I'm sorry for this minor quibble - - -

15 JUDGE HALLIGAN: I might be missing the point.

16 MS. GUSTAFSON: - - - just the - - - the - - -
17 we're not saying that you first determine whether there's
18 disrepair, right. Because that's putting sort of breach
19 before duty. But rather my - - - there is a category shift
20 probably at some point where you go outside of the usual
21 rule for conditions, which is those that are open and
22 obvious - - -

23 JUDGE HALLIGAN: Uh-huh.

24 MS. GUSTAFSON: - - - and that - - - that - - -
25 to those that are unique and unreasonably enhance the risk

1 above those inherent in the sport. A chasm that you would
2 fall into is probably not - - - that's probably not an
3 inherent risk in sports - - -

4 JUDGE HALLIGAN: So you think - - - you there's
5 some line between suboptimal conditions and disrepair, and
6 once you cross it, that there could be recovery?

7 MS. GUSTAFSON: There - - - there are certain
8 conditions, certainly, for which this could - - - could - -
9 - there could be recovery. This - - - but with respect to
10 cracks and holes, I don't see how you draw the line and
11 still maintain this doctrine in this area, which I think
12 still preserves the benefit. It - - - it certainly
13 furthers the policy principles as announced by this court
14 two years ago in Grady - - -

15 JUDGE CANNATARO: So you draw the line at
16 maintenance. You say if it's a maintenance issue, that's
17 not independent of primary assumption of risk, and if it's
18 not a maintenance issue, like maybe a net that the owner
19 installed in their tennis court, that would, at least
20 theoretically, be outside the scope of primary assumptions.

21 MS. GUSTAFSON: We know that from Turcotte and
22 Maddox that the assumption of the risk doctrine applies to
23 claims of negligent maintenance, and this is certainly a
24 claim of negligent maintenance, too. So - - - so I - - - I
25 - - - I don't want to draw that line.

1 JUDGE CANNATARO: So where do you?

2 MS. GUSTAFSON: I draw it where this court has
3 already drawn the lines, which is that when you look at
4 conditions, the question is, you know, are they - - - if
5 they're open and obvious, the risks they present are
6 usually reasonably foreseeable, which is one of the ways
7 you get to inherency. And if - - - but there is an
8 exception to - - - the limitation comes from the exception
9 to the doctrine, which is it - - - is it unique, and does
10 it unreasonably enhance the risk above that inherent in the
11 sport?

12 I think Siegel sits a little uncomfortably with
13 those general rules that the court has - - - has - - - has
14 drawn. I think this court recognized it was a close case
15 and did sort of sort of seek to sort it later in Bukowski.
16 I think I - - - I sort of sort Siegel like along with sort
17 of the - - - the - - - the exception to the doctrine. I
18 don't think there's any evidence in Siegel that the - - -
19 that the - - - the tear in the net was a - - - a - - - was
20 a thing that commonly happened. And I think, you know, the
21 idea of a defective safety condition - - - you know, a
22 safety feature, which is really supposed to protect you,
23 actually doing its exact opposite, I think there's - - -
24 there's something there about unreasonably enhancing the
25 risk - - -



1 JUDGE RIVERA: Did the court actually say
2 anything of what you've just said? Did the court actually
3 put it in those terms?

4 MS. GUSTAFSON: Defective safety condition, yes.
5 That was the basis on which this court sorted - - -

6 JUDGE RIVERA: That is, working contrary to what
7 its purpose is.

8 MS. GUSTAFSON: It didn't - - - it didn't put it
9 that way.

10 JUDGE RIVERA: Okay.

11 MS. GUSTAFSON: I mean, but we're - - - the court
12 explained it in Bukowski, I think, and it sorted it sort of
13 outside of the suboptimal conditional role - - -

14 JUDGE RIVERA: Your red light is on. So just - -
15 - just so I fully appreciate this distinction you're trying
16 to make.

17 MS. GUSTAFSON: Yes, Your Honor.

18 JUDGE RIVERA: Given the - - - the - - - the
19 hole, the crack, the fissure, whatever that's in this
20 record. Mr. Maharaj cannot sue, in your view because he's
21 playing, he's assumed the risk. But if he had walked - - -
22 he was just walking by, and he injured himself, he could
23 have sued - - -

24 MS. GUSTAFSON: Yes.

25 JUDGE RIVERA: - - - or not, because it's open

1 and obvious, that's his problem.

2 MS. GUSTAFSON: He - - - he - - - he could have
3 sued, and we would - - - then we would - - -

4 JUDGE RIVERA: Okay.

5 MS. GUSTAFSON: - - - you know, and the usual
6 principles would apply.

7 JUDGE RIVERA: Okay. Yeah.

8 MS. GUSTAFSON: But again, I think that's a
9 feature of the doctrine. It's meant to only prevent - - -
10 prevent - - - prevent heightened risks of sporting
11 activities. It doesn't insulate from premises liability.
12 And the City's position is that it doesn't - - -

13 JUDGE RIVERA: Even though in some sense he would
14 not be using it for the purpose that it exists. Right. If
15 he's just kind of walking by. I don't want to go around
16 the park. I just want to cross through the park, which is
17 not the purpose for that court. The court is for play. He
18 can sue. But when it's being used for play - - - that - -
19 - put aside for the moment the cricket versus actual tennis
20 for one moment.

21 MS. GUSTAFSON: Yes.

22 JUDGE RIVERA: He can't sue.

23 MS. GUSTAFSON: Yes. And I think that that is
24 feature of the doctrine.

25 JUDGE RIVERA: And the incentive for the City is

1 that someone will walk by and injure themselves as opposed
2 to the players.

3 MS. GUSTAFSON: Sure. Or a young child or a
4 novice player, depending on what the risks are - - -

5 JUDGE RIVERA: Even though - - - even though
6 people would likely not be doing that. Right. They would
7 not be walking through these areas because they're
8 recreational areas, or they're in tremendous disrepair, and
9 - - - and they don't want to take the risk.

10 MS. GUSTAFSON: I mean, and if I may - - - if I
11 may answer that, Your Honor - - -

12 JUDGE RIVERA: Yeah. And then I'm done.

13 MS. GUSTAFSON: I think this is why the court
14 drew the line where it did in Custodi, which is that it
15 drew the line around designated sporting facilities and
16 excluded streets and sidewalks. It didn't say all
17 defective conditions on outdoor surfaces, no matter what,
18 are excluded from the doctrine. What it says is, you know,
19 we're worried about sweeping in too much. Let's not - - -
20 we're going to go to where the purposes of the doctrine are
21 served in - - - and where the defendant is actually
22 encouraging sporting activities which are in sporting
23 facilities.

24 It's - - - you know, duty rules aren't going to
25 be perfect. But what this court did in Custodi, is it - -

1 - it - - - it placed the boundary of the rule around a
2 location where its purposes are most likely to be served.
3 That is, the people who are there, are playing the sport
4 and are - - - have assumed heightened risks. And it is
5 true that it is less likely that other people will be
6 there. But the City's position is that it still has an
7 incentive and that it has not, you know, abandoned this
8 park or any of its park, but in fact still regularly
9 maintains and inspects them.

10 CHIEF JUDGE WILSON: Thank you.

11 MS. GUSTAFSON: Thank you very much.

12 MR. ANNENBERG: Thank you, Your Honors. I just
13 wanted to make one point. Opposing counsel started out
14 with respect to the issue of preservation, and I know,
15 Judge Singas, you raised that question. I just want to
16 address it and go back to it. Our position is as laid out
17 in our brief that we have fully preserved our current
18 argument and the opposition to the City's summary judgment
19 motion at record 155, even in the lower courts, the
20 plaintiff's opposition said as follows:

21 "It has long been established that the doctrine
22 of assumption of risk does not exculpate a landowner from
23 ordinary negligence in maintaining its premises."

24 So I brought that forth in my reply brief. I
25 brought the issue of preservation in my reply brief. I

1 brought the issue of preservation in my principal brief as
2 well. I just wanted to clarify and make sure it was
3 clarified to the court that we have certainly preserved it.
4 And I also cited the case of the Telaro against Telaro,
5 which is a preservation case decided by this court. And
6 the - - - the holding in the Telaro case by this court is
7 as follows:

8 "It is well established that questions raised in
9 the trial courts or in the record, even if not argued in
10 the intermediate appellate court, are nonetheless available
11 in the Court of Appeals."

12 So to the - - - to the extent that on appeal
13 before this Court, we have made our arguments, it is - - -
14 it is preserved from the basis of the summary judgment
15 motion and plaintiff's opposition below and the lower
16 court, and pursuant to Telaro.

17 And in addition, I would just say that,
18 interestingly enough, while we - - - while we raised that
19 position in the opposition to summary judgment, the City of
20 New York - - - Defendant, City of New York, did not submit
21 a reply affirmation to our opposition. I know that they
22 don't have to, but if there was an issue of this - - - this
23 matter and the issue of the negligent maintenance and
24 primary assumption of risk not applying, they certainly had
25 the ability to raise that issue in a reply. They did not.

1 They did not submit a reply. And there - - - there is no
2 legal or factual counter steps that they - - - that they
3 could have done. They - - - they waived the issue on
4 reply.

5 And as a - - - as factual, the - - - these cracks
6 are - - - are of course, long standing, as the Second
7 Department noted, and the - - - the City of New York did
8 not even bother to inspect for four months from April to
9 August 2015. They didn't bother to inspect it, but it's -
10 - - if it's open and obvious for the plaintiff, it's open
11 and obvious for the defendant as well.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. ANNENBERG: Thank you.

14 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Maharaj v. City of New York, No. 34 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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