

**Secky v New Paltz Cent. Sch. Dist.**

2020 NY Slip Op 35424(U)

May 11, 2020

Supreme Court, Ulster County

Docket Number: Index No. 17-2440

Judge: Christopher E. Cahill

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK  
SUPREME COURT**

**ULSTER COUNTY**

**JOANNE SECKY, Individually and as Mother  
and Natural Guardian of JKS, an Infant over the Age of 14 years,**

Plaintiff,

-against-

**Decision & Order  
Index No.: 17-2440**

**NEW PALTZ CENTRAL SCHOOL DISTRICT  
and KEITH KENNY,**

Defendant.

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Supreme Court, Ulster County  
Motion Return Date: December 4, 2019  
RJI No. 55-18-00145

**Present: Christopher E. Cahill, JSC**

Appearances: DREYER LAW OFFICES, PLLC  
Attorneys for Plaintiff  
5419 Route 9W  
Newburgh, New York 12550  
By: Darryl J. Dreyer, Esq.

THE MILLS LAW FIRM, LLP  
Attorneys for Defendants  
1520 Crescent Road, Suite 100  
Clifton Park, New York 12065  
By: Christopher K. Mills, Esq.

**Cahill, J.:**

This personal injury action arises from a January 2, 2017 incident in which the infant plaintiff, JKS (Plaintiff), was pushed into retracted bleachers during a junior varsity basketball practice at defendant New Paltz Central School District’s (the District) high

school gymnasium while under the direction of defendant coach Keith Kenny (the coach). Issue was joined, discovery completed, and a trial note of issue filed, after which the defendants moved for summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion.

The facts of the underlying incident are largely undisputed. Plaintiff was 14 years old at the time of the incident. During a practice on January 2, 2017, the coach instructed the team to perform a 2-on-2 rebounding drill which required them to use the entire court without regard for the lines which outlined the perimeter of the court for regulation play. The gymnasium's bleachers were retracted against the wall, and the coach advised that he would call only major fouls. After the rules of the drill were explained, there were no questions and the drill began. The plaintiff observed two or three sets of teams perform the drill before it was his turn. Plaintiff secured a pass from his teammate and when he turned toward the basket, he was struck from behind by another player propelling his right shoulder into the retracted bleachers, causing injuries.

The defendants maintain that they did not breach any duty owed to plaintiff. More specifically, relying on the doctrine of primary assumption of the risk, the defendants argue that they satisfied their duty of care by making the conditions in the gymnasium during the basketball practice as safe as they appeared to be. Defendants further point out

that at the time of the accident, plaintiff was an experienced basketball player.<sup>1</sup>

Plaintiff counters that he did not appreciate the risk posed by the use of the entire court for the drill without regard to the lined boundaries used in regulation play. Based on this contention, plaintiff asserts that the defendants were negligent in directing the players to disregard the lined boundaries on the court, thereby eliminating a buffer between the court and the retracted bleachers, and that the defendants' failure to adequately supervise the plaintiff was negligent.

Through the expert affidavit of Brian Fruscio,<sup>2</sup> defendants contend that the rebounding drill was reasonable and appropriate as conducted by the coach, is routinely conducted throughout the State and complies with accepted New York State safety guidelines (Fruscio Aff ¶¶ 16, 28, 30, 38 and 39). He further states that, although constant supervision of high school players is not necessary, the coach herein provided direct supervision during this drill (*id.* at ¶ 32).

In support of their allegations of negligence, plaintiff submits the affidavit of Thomas W. Bowler, a consultant and a Principal of Total Playground Consulting Services of Merritt Island, Florida. Mr. Bowler taught elementary level physical education for 33

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<sup>1</sup>Plaintiff testified that he began playing organized basketball around the age of seven. He initially played CYO Basketball in 3<sup>rd</sup> and 4<sup>th</sup> grades and advanced to Amateur Athletic Union basketball. He further testified that at the time of the incident he was playing basketball year-round four to five times weekly (Exhibit B 9-11, 13, 18).

<sup>2</sup>Mr. Fruscio has coached professionally from 1992 to the present, was inducted into the Upstate New York Basketball Hall of Fame as a player and a coach and has numerous other achievements in the sport of basketball (Fruscio Aff, Exhibit A).

years, coached high school cross-country and track, played junior varsity basketball while in high school, and taught a college course dealing with risk management and safety (Bowler Aff, Exhibit A). Mr. Bowler reviewed all of the pleadings and deposition testimony relevant to this action. In addition, Mr. Bowler conducted a physical examination of the gymnasium by taking measurements and photographs. Finally, among other publications which address safety issues relative to school sports, he reviewed the New Paltz Coaching Handbook (Bower Aff, Supp. Rept., p. 3). After consideration of the above, Mr. Bowler opined, within a reasonable degree of professional certainty, that the plaintiff did not voluntarily accept the risk of injury which was increased by defendants' negligence in the removal of the boundaries of the basketball court and by permitting reach-in fouls (id. at 7-9)

In further opposition to the motion, plaintiff argues that he did not assume the primary assumption of the risk because, although he is a skilled and experienced basketball player who had played the sport for a number of years, he had never participated in or observed the 2-on-2 rebounding drill required by the coach until that day (Exhibit B, pp. 23 and 25). Plaintiff further argues that the doctrine of the primary assumption of the risk is inapplicable in this case because the defendants increased the risk to the plaintiff by removing the boundaries on the basketball court which made it impossible for the plaintiff to make a fully informed assessment of the increased risk of injury (Hanson v Sewanhala Central High School District, 155 AD3d 702 [2<sup>nd</sup> Dept

2017]; Deserto v Goshen Central School District, 153 AD3d 595 [2<sup>nd</sup> Dept 2017]; Brown v Roosevelt Union Free School District, 130 AD3d 852 [2<sup>nd</sup> Dept 2015]; DiBenedetto v Town Sports International, LLC, 118 AD3d 663 987 [2<sup>nd</sup> Dept 2010]).

In further support of their motion, defendants cite the doctrine of primary assumption of the risk stating, “a voluntary participant in a sporting or recreational activity ‘consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation’” (Brown v Roosevelt Union Free Sch. Dist., 130 AD3d 852, 853 [2015], quoting Morgan v State of New York, 90 NY2d 471, 484 [1997]). Defendants further assert that included in inherent risks of a sport are any open and obvious conditions where the sport is played (see Bryant v Town of Brookhaven, 135 AD3d 801, 802 [2016]; Ziegelmeier v United States Olympic Comm., 7 NY3d 893, 894 [2006]; Sykes v County of Erie, 94 NY2d 912, 913 [2000]; Maddox v City of New York, 66 NY2d 270, 277 [1985]; Galski v State of New York, 289 AD2d 195, 196 [2001]; Welch v Board of Educ. of City of N.Y., 272 AD2d 469 [2000]; Trevett v City of Little Falls, 6 NY3d 884, 885 [2006]).

Based on the conflicting expert testimony of Brian Fruscio and Thomas Bowler which directly raises the issue of credibility, this action is properly left to the jury’s determination (MJM Advertising, Inc. v Panasonic Industrial Co., Inc., 2 AD3d 252 [1<sup>st</sup> Dept]; Vassilatos v Chatterton, 135 AD2d 1083 [3<sup>rd</sup> Dept 1987]). In reaching this conclusion, the court finds that plaintiff’s assertions regarding Mr. Bowler’s lack of

qualifications as an expert are best reserved for cross-examination at trial.

Therefore, it is

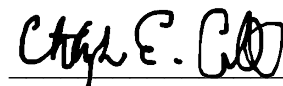
ORDERED that defendants' motion for summary judgment is denied in its entirety.

This shall constitute the decision and order of the Court. The original decision and order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York  
May 11, 2020

ENTER,



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CHRISTOPHER E. CAHILL, JSC

Papers Considered: Defendants' Notice of Motion dated September 9, 2019; Affirmation of Christopher K. Mills, Esq., dated September 9, 2019 with annexed exhibits A-L; Defendants' Affidavit of Brian Fruscio with exhibit A, dated September 6, 2019; Defendants' Memorandum of Law dated September 9, 2019; Plaintiffs Affirmation in Opposition of Darryl J. Dreyer, Esq., with exhibits A-B dated November 22, 2019; Plaintiff's Affidavit of Thomas W. Bowler, dated November 20, 2019; and Defendants' Reply Affirmation of Christopher K. Mills, Esq., dated December 4, 2019.