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Fair or Foul? NYS Court of Appeals Says Case of Injured High School Baseball Player Must Go to Trial

Earlier this year, the New York Court of Appeals provided new guidance on the often-litigated assumption of the risk doctrine. That doctrine provides that a plaintiff cannot recover under tort for the actions of a negligent defendant where the plaintiff voluntarily accepted the risk of injury resulting from the actions.

On April 27, 2023, the Court issued decisions in *Grady v. Chenango Valley Central School District* and its companion case, *Secky v. New Paltz Central School District*. *See* 40 N.Y.3d 89 (2023). In *Grady*, a four-judge majority of the Court denied summary judgment to the Defendant School District because genuine issues of material fact remained as to whether an injured student-athlete assumed the risk of being struck by an errant ball while participating in a drill during varsity baseball practice.

The plaintiff in *Grady* was a varsity baseball player who was participating in an elaborate fielding drill during practice. The practice drill consisted of one coach hitting a ground ball to a player at third base, who would throw the ball to a player at first base. Simultaneously, a different coach would hit a ground ball to a player at shortstop, who would throw the ball to a player on second base, who would then in turn throw the ball to a player at "short" first base. The "short" first base player stood in an area a few feet in front of traditional first base. A seven-by-seven foot protective net was placed in-between the player at first base and the player at "short" first base. During the drill, an errant throw from the player at second base to the player at "short" first base bypassed the protective net striking Grady, who was standing near first base. Grady subsequently sued the School District for injuries he sustained.

The lower courts held that Grady was barred from recovery because being hit with an errant baseball during a practice drill was a foreseeable and inherent risk of playing baseball. The Court of Appeals disagreed.

The Court held that the School District had not shown, as a matter of law, that Grady's injury was sustained "as a result of the inherent risk of baseball." Generally, participants in high school athletics assume the risk of injury when they are "aware of the risks; ha[ve] an appreciation for the nature of the risks; and [have] voluntarily assume[d] the risks." However, a participant will not be "deemed to have assumed risks that are concealed or unreasonably enhanced." Grady, the Court reasoned, had raised triable issues of fact as to "whether the drill, as conducted here and with the use of the seven-by-seven-foot screen, was unique and created a dangerous condition over and above the usual dangers that are inherent in baseball." In other words, the Court said that a jury should determine whether the risk of being hit with an errant ball was "concealed or unreasonably enhanced" as a result of the complexity of this particular practice drill.

Grady's companion case, *Secky*, provides insight into the limit of the Court's holding. *Secky* similarly involved an injury to a high school varsity athlete. However, unlike in *Grady*, the Court held that the case should be dismissed without going to a jury. Secky was injured during basketball practice while participating in a rebounding drill where two players competed for a rebound, but where the traditional out-of-bounds

lines of the basketball court were not in effect. During the drill, Secky collided with another player outside of the traditional confines of the basketball court, causing him to hit his shoulder into the retracted gym bleachers. The Court concluded that colliding with open and obvious objects near a basketball court was an inherent risk in playing basketball on that court and that the practice drill was not so complex or unique as to unreasonably enhance the risk inherent in the sport of basketball.

Few courts have addressed assumption of the risk questions in the wake of the Court of Appeals' April 2023 decision. However, there are two cases worth discussing. First, in *J.M. v. Town of Huntington*, 80 Misc.3d 1202(A), *2-3 (Sup. Ct., Suffolk County Aug. 24, 2023), the court denied the Defendant-Town's summary judgment motion, citing *Grady* and *Secky*. There, a 12-year-old skateboarder was injured during a skateboarding drill. The court found that questions of fact existed as to whether the obstacle course relay drill created by the skateboarding instructor presented risks that were not inherent in the sport of skateboarding. Likewise, in *Guerra v. Swanstrom*, Dkt. No. 21-CV-00459 (LEK/ML), 2023 WL 5528721, *6 (N.D.N.Y. Aug. 28, 2023), the court denied the defendant's summary judgment motion, finding triable issues of fact as to whether a college football coach increased the inherent risks of football practice by not following certain NCAA bylaws governing practices in college athletics.

Grady and *Secky* are important lessons for entities or individuals who facilitate athletic or other recreational activities. The Court's decision opens the door to liability for individuals or entities that sometimes lack adequate insurance coverage for personal injuries, but that may now be facing more complex and lengthy litigation if an injury occurs during a sporting or recreational activity.

Bond's attorneys can assist in reviewing your insurance policies and any waivers that you may offer if you are an individual or entity affected by these new decisions to ensure that you are not caught off guard by an unanticipated lawsuit.

If you have any questions, please contact Karl Deuble, any attorney in Bond's litigation practice or the attorney at the firm with whom you are regularly in contact.

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