

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PAGMAN KHODABANDEH et al.,

Plaintiffs and Appellants,

v.

ICE CENTER ENTERPRISES, LLC,

Defendant and Respondent.

A144908

(San Mateo County
Super. Ct. No. CIV525562)

Pagman Khodabandeh and Zubi Khodabandeh appeal from a summary judgment entered against them on their complaint for injuries arising when a hockey puck struck Pagman¹ while he watched a live hockey game. Appellants contend the court erred by ruling that respondent had no relevant duty of care. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Pagman and Zubi filed a complaint in December 2013 against respondent Ice Center Enterprises, LLC (Ice Center) and two other entities that were subsequently dismissed. The complaint alleged that Pagman was struck by a hockey puck as he watched an ice hockey game at Ice Center of San Mateo. Pagman brought a cause of action for premises liability and Zubi, his mother, brought a cause of action for negligent infliction of emotional distress.

Ice Center filed a motion for summary judgment. In its separate statement of material facts, supported by evidence submitted with the motion, Ice Center set forth the

¹ Because appellants have the same last name, we refer to them by their first names for clarity and brevity, without disrespect.

following. The ice surface at Ice Center of San Mateo is surrounded by a barrier that includes a short opaque wall with Plexiglas on top. Above the Plexiglas is a conduit, attached to netting that extends from the conduit up to the ceiling. Pagman contends he was watching a hockey game from the back row of the bleachers, which were located adjacent to a set of doors that led onto the ice. At that location, there was an open space “between the conduit and the top of the doors”—in other words, a gap between the netting and the doors—and Pagman was struck by a hockey puck that traveled from the ice surface through this gap.

Ice Center argued that, under the primary assumption of risk doctrine, it owed no duty to Pagman with respect to flying hockey pucks because they are an inherent risk that ice hockey spectators assume as a matter of law, and Ice Center did not increase the risks of injury beyond those inherent in the activity.

Appellants did not dispute Ice Center’s material facts. Instead, they argued that Ice Center had a duty to protect spectators because it had installed protection from flying pucks and placed the bleachers where there was a gap in that protection.

After a hearing, the court granted Ice Center’s summary judgment motion. The court ruled that Ice Center had no legal duty to eliminate the inherent risk of injury from flying pucks, and that Ice Center did not assume a duty to protect appellants from flying pucks by providing the protective netting. In the absence of any duty to Pagman for his injuries, Ice Center had no liability to Zubi for negligent infliction of emotional distress. Judgment was entered accordingly.

This appeal followed.

II. DISCUSSION

In reviewing the grant of summary judgment, we conduct an independent review to determine whether there is a triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We construe the moving party’s evidence strictly, and the nonmoving party’s evidence liberally, in determining whether there is a triable issue. (See *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1,

20; *Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (*Thomas*).

“A defendant seeking summary judgment must show that at least one element of the plaintiff’s cause of action cannot be established, or that there is a complete defense to the cause of action. ([Code Civ. Proc.], § 437c, subd. [(p)](2).) The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue. (See [*ibid.*])” (*Thomas, supra*, 98 Cal.App.4th at p. 72.)

A. Pagman’s Premises Liability Claim

Liability for recreational services posing an inherent risk of injury is limited by the primary assumption of risk doctrine. Essentially, there is “no duty to eliminate those risks,” but only a duty “not to unreasonably increase the risks of injury beyond those inherent in the activity.” (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 (*Nalwa*); see *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 166.)

1. Ice Center Met Its Burden on Summary Judgment

A flying puck is an inherent risk that ice hockey spectators assume. (*Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 638 (*Nemarnik*)). Accordingly, under the primary assumption of risk doctrine, “defendants owe no duty to eliminate the inherent risk of injury from flying pucks.” (*Id.* at p. 643.) Because it is undisputed that Pagman was injured by a flying puck while watching live ice hockey, and because Ice Center did not increase the inherent risk, Ice Center met its burden of demonstrating it had no liability as a matter of law.

2. Appellants Failed To Establish A Triable Issue of Material Fact

Notwithstanding the primary assumption of risk doctrine, appellants argue that Ice Center voluntarily assumed a duty to Pagman by installing a safety net. In their opening brief, they state: “By providing a protective netting around the entire ice surface to prevent flying pucks from striking spectators, the defendants assumed a duty to provide a netting free from gaps and one that would prevent injury to spectators from flying pucks. The defendants provided a protective netting which extended to the ceiling. The defendants also placed bleachers outside the ice surface to encourage spectators to watch

the ice hockey games. By placing a protective netting the defendants assumed a duty to safeguard spectators from injury by providing a netting free from gaps or open spaces.” The argument is meritless: the law and the cases on which appellants rely are inapposite, and in any event there is no evidence that Ice Center increased the risk of watching ice hockey.

a. Appellants’ Arguments and Cases Are Inapposite

Appellants’ argument is based on the negligent undertaking doctrine: a defendant, who otherwise has no duty of care to protect the plaintiff, assumes a duty by voluntarily undertaking to provide protective services, such that the defendant must exercise reasonable care in providing them. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249 & fn. 28 (*Delgado*); see Rest.3d Torts, § 42, pp. 91–97.) In that instance, liability may arise if “(a) the volunteer’s failure to exercise such care increases the risk of harm to the other person, or (b) the other person reasonably relies upon the volunteer’s undertaking and suffers injury as a result.” (*Delgado*, at p. 249, fn. omitted.)

Appellants’ cases are not primary assumption of risk cases, and are therefore inapposite to the matter at hand. (*Delgado, supra*, 36 Cal.4th at pp. 244–245, 250 [owner of bar, with actual notice of impending assault, had an obligation to take reasonable steps to avert the assault under its special relationship duty]; *Minoletti v. Sabini* (1972) 27 Cal.App.3d 321, 324–325 [by statute, if a landlord undertakes to repair a tenant’s broken window, the landlord must use reasonable care in doing so]; *McDaniel v. Sunset Manor Company* (1990) 220 Cal.App.3d 1, 6–10 [by erecting a fence, the landlord assumed a duty to maintain that fence, and could be liable for injuries to a child who wandered through a hole in the fence and fell into a creek]; see *Williams v. State of California* (1983) 34 Cal.3d 18, 21–22, 27 [highway patrol officers who came to plaintiff’s aid and assumed responsibility for investigating an accident had no liability to plaintiff for failing to investigate adequately or failing to preserve evidence for plaintiff’s civil action].)

Nonetheless, the core question underlying appellants’ misplaced legal theory is similar to the salient question underlying the primary assumption of risk theory: did Ice

Center do something that increased the risk of injury beyond the preexisting (inherent) risk? (Compare *Delgado, supra*, 36 Cal.4th at p. 249, with *Nalwa, supra*, 55 Cal.4th at p. 1162.) As discussed next, there is no evidence it did.

b. No Increase In Risk

Appellants argue that Ice Center “increased the risk of harm to the Appellants by intentionally leaving a gap in the protective netting and by placing the only spectator bleachers directly in front of the gap in the netting.” However, there is no evidence that leaving a gap between the top of the doors and the netting resulted in a risk that was greater than the risk existing *if there was no netting at all* (in other words, the inherent risk). Even partial netting *reduces* the risk of a spectator being hit by a hockey puck. Indeed, anyone struck by a puck traveling the course of the puck that hit Pagman would have been struck whether there was no netting (the inherent risk) or a gap between the netting and the doors. Furthermore, the location of the bleachers did not create a triable issue of *material* fact, since the risks of flying hockey pucks are assumed by spectators as a matter of law, regardless of where they are sitting. Placing the bleachers behind the gap beneath the netting did not increase the risk of harm beyond what it would have been without the netting.

Appellants also argue in their opening brief that by “providing the protective netting, the defendants were giving spectators (not the hockey players) a sense of security from flying pucks.” In their reply brief, they add: “Respondent created an environment which in essence said to spectators ‘I am going to protect you with this floor to ceiling netting’ and proceeded to create an avenue for injury through the netting directly adjacent to the spectator bleachers.” But appellants do not cite to any *evidence* that the netting gave anyone a false sense of security. Nor would ice hockey spectators reasonably believe that Ice Center was protecting them with “ ‘floor to ceiling netting’ ”—since there was no floor to ceiling netting—or that they were secure from flying pucks while sitting on a bleacher adjacent to a gap in the protection between the doors and the netting. Appellants do not argue—and there is no evidence—that the gap was undetectable or concealed by Ice Center.

Appellants rely on *Thurman v. Ice Palace* (1939) 36 Cal.App.2d 364, in which a court held—nearly 80 years ago—that it was for the jury to decide whether defendants were negligent in not providing notices warning of the danger from flying pucks or screens to protect the spectators. But as the court in *Nemarnik* concluded over a decade ago, risks associated with ice hockey have become common knowledge to spectators of the sport since the time *Thurman* was decided, and watching ice hockey is now properly classified as an activity to which the primary assumption of risk doctrine applies. (*Nemarnik, supra*, 103 Cal.App.4th at p. 638.)

In the primary assumption of risk context, voluntary safety measures do not create liability unless they increase the inherent risk of the activity. (See, e.g., *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11–13 [defendant did not increase the inherent risks of skiing by padding the lift towers that plaintiff ran into, even though the padding was not at snow level and allegedly inadequate, because (among other things) it would be “anomalous to hold an operator who padded its towers . . . more liable than an operator who failed to do so”]; *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 267 [defendant did not increase the inherent risks of skiing “by locating the snowmaking hydrant in the middle of a heavily congested, narrow ski run rather than on the side, by inadequately padding the hydrant and nozzle, and by concealing the nozzle and having it pointed uphill in the direction of oncoming skiers”].)

Appellants fail to establish error with respect to the cause of action for premises liability.

B. Zubi’s Emotional Distress Claim

Because Ice Center is not liable for Pagman’s physical injury, Zubi’s action for negligent infliction of emotional distress, which is dependent on Pagman’s claim, must also fail as a matter of law. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 733.) Appellants do not contend otherwise.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A144908)