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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHURCH MUTUAL INSURANCE
COMPANY,

Plaintiff and Appellant,

v.

NEWPORT DUNES RESORT and
MARINA et al.,

Defendants and Respondents.

G046346

(Super. Ct. No. 30-2009-00123461)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
John C. Gastelum, Judge. Affirmed.

Law Office of Howard L. Hibbard and Howard L. Hibbard for Plaintiff and
Appellant.

Harrington, Foxx, Dubrow & Canter, Dale B. Goldfarb, Edward R.
Leonard, Derek A. Earley and John D. Tullis for Defendants and Respondents.

* * *

INTRODUCTION

James Gillentine was injured when he dove into shallow water at a lagoon and struck his head on the lagoon's floor. Church Mutual Insurance Company (Church Mutual), the workers' compensation insurance carrier for Gillentine's employer, sued Newport Dunes Resort and Marina, a California general partnership doing business as Newport Dunes Waterfront Resort, Newport Dunes Marina, LLC, and Dunes Resort, LLC (collectively, Newport Dunes). Newport Dunes manages the beach area where Gillentine's accident occurred. Church Mutual sought to recover the benefits paid on Gillentine's behalf. Newport Dunes filed a motion for summary judgment, arguing it owed Gillentine no duty under the primary assumption of risk doctrine. The trial court granted Newport Dunes's motion, and Church Mutual appeals.

We affirm. The primary assumption of risk doctrine applies because the risk of hitting one's head on a lagoon floor is a risk inherent in the sport of diving into the water at a lagoon's beach. Newport Dunes did not owe Gillentine a duty to protect him from the harm resulting from his voluntary undertaking of that risk.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On August 23, 2007, Vineyard Christian Fellowship of Anaheim (Vineyard) sponsored a "fun day" for its church staff at the Newport Dunes lagoon. Vineyard's pastor, James Gillentine, attended. About 6:00 p.m., Gillentine dove headfirst into the shallow water at the shore, struck his head on the floor of the lagoon, and suffered a serious injury resulting in paralysis.

Church Mutual, as the workers' compensation insurance carrier for Vineyard, paid benefits to Gillentine. Church Mutual then filed a complaint against Newport Dunes, alleging premises liability, negligence, and failure to warn. Newport Dunes filed a motion for summary judgment, arguing the doctrine of primary assumption of risk barred all of Church Mutual's claims. The trial court found the doctrine of

primary assumption of risk provided a complete defense to Church Mutual’s claims, and granted the motion for summary judgment. Judgment was entered in favor of Newport Dunes, and Church Mutual timely appealed.

DISCUSSION

I.

STANDARD OF REVIEW

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.

[Citation.] We review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.

[Citation.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) A defendant has the initial burden to show that undisputed facts support summary judgment based on the application of an affirmative defense. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484-1485.) ““When a defendant moves for summary judgment on the basis of implied assumption of risk, he or she has the burden of establishing the plaintiff’s primary assumption of risk by demonstrating that the defendant owed no legal duty to the plaintiff to prevent the harm of which the plaintiff complains.”” (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 656.)

II.

PRIMARY ASSUMPTION OF RISK

“Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk does bar recovery because no duty of care is owed as to such risks.” (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11.) “[A] property owner ordinarily is

required to use due care to eliminate dangerous conditions on his or her property.

[Citation.] In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.” (*Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, 1087-1088.)

In *Capri v. L.A. Fitness International, LLC, supra*, 136 Cal.App.4th at page 1088, the appellate court held that risks such as “hitting the wall or pool floor” are “risks inherent in the sport of swimming.” (See also *Connelly v. Mammoth Mountain Ski Area, supra*, 39 Cal.App.4th at p. 12 [subsurface snow and ice conditions are inherent risks of snow skiing].) The risk of hitting the ocean floor or the floor of a lagoon connected to the ocean is similarly a risk inherent in the sport of diving into the ocean or a lagoon. Therefore, Gillentine’s voluntary participation in the act of diving into the lagoon causes the doctrine of primary assumption of risk to apply, meaning Newport Dunes owed no duty to Gillentine and barring Church Mutual’s claims against Newport Dunes.

Tessier v. City of Newport Beach (1990) 219 Cal.App.3d 310 and *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184 are instructive. In both cases, the plaintiff dove into the water at a public beach and was injured when he hit his head on the ocean floor. (*Tessier v. City of Newport Beach, supra*, at p. 312; *Morin v. County of Los Angeles, supra*, at p. 186.) In both cases, the appellate court held the public entity was immune, in part, under Government Code section 831.7,¹ because diving into the ocean is

¹ In relevant part, Government Code section 831.7 provides: “(a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity . . . for any damage or injury to property or persons arising out of that hazardous recreational activity. [¶] (b) As used in this section, ‘hazardous recreational activity’ means a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator. [¶] ‘Hazardous recreational activity’ also means: [¶] . . . [¶] (2) Any form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given.”

a hazardous recreational activity. (*Tessier v. City of Newport Beach, supra*, at p. 316; *Morin v. County of Los Angeles, supra*, at pp. 194-195.) Although these cases address governmental immunity, their conclusion that the same activity in which Gillentine participated in this case is a hazardous recreational activity strengthens our conclusion that the inherent risk of striking one's head on the floor of the ocean or a lagoon when diving into shallow water causes the doctrine of primary assumption of risk to apply here.

Church Mutual relies on *Hawk v. City of Newport Beach* (1956) 46 Cal.2d 213. In that case, a minor had been injured at the beach after diving into the water from a rock about eight feet above the water line, and striking the bottom. (*Id.* at pp. 215-216.) The California Supreme Court concluded the defense of assumption of risk did not bar the claims of the minor or his father: "The defense of assumption of risk as a matter of law is likewise unavailing. The elements of this defense are a person's voluntary acceptance of a risk and *an appreciation of the magnitude of that risk*. [Citations.] Even if David can be said to have realized that his dive was attended with some degree of danger, *it cannot be said as a matter of law that he appreciated the magnitude of that danger*. [Citation.]" (*Id.* at p. 218, italics added.)

Hawk v. City of Newport Beach no longer represents the law of this state. In *Knight v. Jewett* (1992) 3 Cal.4th 296, 316, the California Supreme Court approved of the duty approach to the doctrine of assumption of risk, "which does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk." (See *Cohen v. McIntyre* (1993) 16 Cal.App.4th 650, 655 ["*Knight* makes it clear, however, that a plaintiff's subjective knowledge or appreciation of the nature or magnitude of the potential risk is no longer a relevant inquiry. Rather the focus is whether, in light of the nature of the sport or activity involved, it can be said that defendant breached a legal duty of care to plaintiff"].)

Church Mutual also relies on *Gates v. Gautier* (1938) 29 Cal.App.2d 524, in which the plaintiff was injured when he dove into a privately owned lake. That case

did not address the defense of assumption of risk, however; the court's holding is that the plaintiff's case was not barred as a matter of law by the doctrine of contributory negligence: "It was the duty of defendant to use reasonable care for the safety of his patrons in view of the use of the premises that might reasonably be anticipated. Plaintiff as a patron of the bathing resort had the right to assume that defendant had discharged his duty and had provided a place which was reasonably safe. He was not required to make a critical inspection. [Citation.] It was the duty of the trial court to determine whether plaintiff exercised ordinary care for his own safety when he dived from the point in question. The finding of the trial court on this issue is adverse to defendant and is binding upon the reviewing court." (*Id.* at p. 525.)

In *Anderson v. Anderson* (1967) 251 Cal.App.2d 409, 410-411, on which Church Mutual also relies, the plaintiff was injured when he dove into the defendant's swimming pool; the defendant had invited the plaintiff to swim, but had not warned him of a hazardous condition in the pool, of which the defendant had knowledge—the submerged ledge into which the plaintiff dove. The trial court granted a nonsuit in favor of the defendant after the plaintiff's opening statement. (*Id.* at p. 410.) The appellate court reversed the judgment in favor of the defendant because, as a matter of law, it could not be said that the defendant had not breached a duty to warn the plaintiff of the hazardous condition: "A decision in this case depends upon the answer to the following question: Does the lawful occupier of land owe a duty to warn a social guest (a licensee) of the presence of a potentially hazardous condition when the following circumstances are found: the hazardous condition exists in a part of the land intended for a specific use; the occupier knows of the hazard and has created or maintained it, and has no reason to believe that the licensee is aware of the existence of the hazardous condition and he is in fact unaware of it; the guest is invited by the occupier to use that part of the land for the specific use intended; the presence of the dangerous condition is then not apparent because of conditions brought about by the occupier of the land; it is reasonably

foreseeable that the licensee will encounter the hazard in making reasonable use of that part of the property for the specific purpose intended? [¶] We believe the question must be answered in the affirmative. The breach of such a duty is actionable negligence.” (*Id.* at p. 413.) *Anderson v. Anderson* is not governed by the doctrine of assumption of risk, and therefore is not dispositive of the present case.

Church Mutual argues that this case is governed by the doctrine of secondary assumption of risk. Because we conclude no duty on the part of Newport Dunes arose under the primary assumption of risk doctrine, we do not reach the issue of the secondary assumption of risk doctrine. “In *Knight [v. Jewett]*, *supra*, 3 Cal.4th [at page] 320, we made clear that in primary assumption of risk cases the defendant owes no duty to protect a plaintiff from a particular risk that the plaintiff is construed to have assumed. In the sports context, the plaintiff is deemed to have assumed those risks inherent in the sport in which plaintiff chooses to participate. . . . [¶] As indicated in *Li [v. Yellow Cab Co. (1975)]* 13 Cal.3d 804, and clarified in *Knight, supra*, 3 Cal.4th [at page] 320, the secondary assumption of risk doctrine relates to the allocation of damages, not to the question of duty. . . . [¶] . . . [¶] *Knight, supra*, 3 Cal.4th 296, clarified the manner and degree to which assumption of risk merged into the comparative negligence scheme. The *Knight* . . . plurality explained that the *primary* assumption of risk doctrine ‘embodies a legal conclusion that there is “no duty” on the part of the defendant to protect the plaintiff from a particular risk.’ [Citation.] It is the *secondary* assumption of risk principle that was merged into *Li*’s new comparative negligence approach. Under this merged approach the analysis proceeds as follows. The first question is whether the defendant has breached a duty to the plaintiff. The duty analysis depends on the nature of the activity or sport and the parties’ relationship to it. [Citation.] Once it has been established that a duty has been breached, however that duty is appropriately defined under the circumstances of the case, the general principles of comparative fault are applied to assign *liability* in proportion to the parties’ respective fault. Thus, *primary*

assumption of risk applies to the question of duty and *secondary* assumption of risk applies to the calculation of damages.” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 498-499.)

Church Mutual appears to argue, in its reply brief on appeal, that the primary assumption of risk doctrine applies only to cases where the accident occurs on public property or where a public entity is the defendant. Nothing in case law, however, limits the application of the doctrine in this manner. (See, e.g., *Shin v. Ahn, supra*, 42 Cal.4th 482 [golfer injured by errant ball hit by another golfer]; *Cheong v. Antablin* (1997) 16 Cal.4th 1063 [skier collided with another skier at privately owned ski resort]; *Knight v. Jewett, supra*, 3 Cal.4th 296 [injury occurred during touch football game on private property].)

Church Mutual also argues the application of the assumption of risk doctrine is a factual issue properly determined by the jury, and is not amenable to summary disposition. As explained *ante*, whether primary assumption of risk is a full defense to a complaint requires a determination whether the defendant owed a duty to the plaintiff. Questions of the existence and scope of a defendant’s duty are questions of law decided by the courts, not juries, and therefore are amenable to resolution by summary judgment. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004 (*Kahn*); see Code of Civ. Proc., § 437c, subd. (f)(1) [“A party may move for summary adjudication as to . . . one or more issues of duty”].)

At oral argument, Church Mutual argued for the first time that *Kahn, supra*, 31 Cal.4th 990, is controlling on the issue of secondary assumption of risk. To the contrary, the doctrine of secondary assumption of risk is not addressed in *Kahn, supra*, 31 Cal.4th 990. In that case, a student who was a novice member of her school’s swim team was seriously injured while diving into a practice pool. (*Id.* at p. 998.) The student sued the school district, alleging her coach failed to provide her with sufficient instruction on how to safely dive into the pool, failed to provide adequate supervision, and breached a duty of care by insisting she dive at the swim meet despite her objections, her fear of

diving, her lack of expertise, and the coach's earlier promise that she would not have to dive. (*Id.* at p. 995.) The Supreme Court concluded that the rule of *Knight v. Jewett*, *supra*, 3 Cal.4th 296, applies "in cases in which an instructor's alleged liability rests primarily on a claim that he or she challenged the player to perform beyond his or her capacity or failed to provide adequate instruction or supervision before directing or permitting a student to perform a particular maneuver that has resulted in injury to the student. A sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is 'totally outside the range of the ordinary activity' [citation] involved in teaching or coaching the sport." (*Kahn, supra*, at p. 996.) The court then concluded there were triable issues of fact that prevented the trial court from summarily adjudicating the case based on the primary assumption of risk doctrine. (*Id.* at pp. 996-997.) Nothing in this opinion is inconsistent with *Kahn*.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.