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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

JOHN WOOLINGTON et al.,

Plaintiffs and Appellants,

v.

CHRISTOPHER HALL,

Defendant and Respondent.

H036257

(Santa Clara County  
Super. Ct. No. CV132487)

**I. INTRODUCTION**

Appellants John Woolington and Pamela Weiss are the parents of the decedent, Amy Woolington.<sup>1</sup> Amy, age 21, tragically died in an accident at a ski resort in Utah that occurred while she was sledding at night with a group of college friends. The group was staying at a nearby house owned by the father of respondent Christopher Hall, age 23, one of the college friends who participated in the nighttime sledding.

Appellants filed a wrongful death and survivor action against Christopher, who subsequently brought a summary judgment motion on the ground that their claims were barred by the affirmative defense of assumption of risk. The trial court granted

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<sup>1</sup> Since John Woolington and Amy Woolington shared the same surname, Amy will be referred to by her first name to avoid confusion and meaning no disrespect. Respondent Christopher Hall will be referred to as defendant or Christopher.

the motion, finding as a matter of law that Christopher had not increased the inherent risks of the sledding activity and therefore the doctrine of assumption of risk was a complete bar.

Appellants contend that the trial court erred in determining that assumption of risk was a complete defense because there is a factual dispute as to whether Christopher increased the inherent risks of sledding by, among other things, representing to Amy that it was safe to sled at night, trespassing on an unlighted ski run, and providing a sled and alcohol to her.

For the reasons stated below, the trial court correctly determined that on the undisputed facts of this case, appellants' claims are barred as a matter of law by the complete defense of assumption of risk. Therefore, the judgment will be affirmed.

## **II. FACTUAL BACKGROUND**

The factual summary is drawn from the parties' separate statements of fact and the evidence submitted by the parties in connection with Christopher's motion for summary judgment, which includes Christopher's deposition testimony.

Christopher and two of his friends from UCLA, Jonathan Munz and Robert Havard III, decided to live in a house owned by Christopher's father in Deer Valley, Utah for part of the 2006-2007 ski season. Christopher was employed as a ski lift operator at the Deer Valley Resort.

In December 2006, three other friends from UCLA, including Amy, Jennifer Cambra, and Danielle Perkel, came to visit Christopher, Jonathan, and Robert in Deer Valley. During their visit, all of the UCLA friends went sledding at a nearby mountain range. Amy took several sled runs on that trip. She also told Christopher, as he recalled in his deposition testimony, that she was an intermediate snowboarder.

The three young women, including Amy, returned to Deer Valley on January 19, 2007, for a visit that was timed to coincide with the Sundance film festival. As they were driven from the airport to Christopher's house in daylight hours, they

crossed the Deer Crest Estates' bridge over a ski run in the Deer Valley Resort. Christopher pointed out the ski run to the young women and told them that he and his friends sometimes went sledding there. The ski run was an intermediate " 'blue diamond' " run called the Mountaineer, which flattens out under the bridge and then splits off with another run called the Crescent. According to Christopher, all of the young women, including Amy, could see "the steepness of the run, the snow conditions, and the fact that it was lined with trees." In his deposition testimony, Christopher stated that he, John, and Robert had sledded down the Mountaineer ski run at night on three or four previous occasions, although the ski run was closed and unlit at night since the Deer Valley Resort does not offer night skiing.

According to the testimony of Charles English, Director of Mountain Operations at Deer Valley Resort, sledding on the ski runs at night is trespassing. Don Taylor, general manager of the Deer Crest Estates' homeowner's association, testified that in his opinion it is not safe to sled down any ski slope because a sled does not have any brakes or steering control.

All of the college friends, except Jonathan, drank alcohol during the evening of January 19, 2007. Christopher provided the alcohol and the group had also purchased beer when they arrived in town. Everyone, including Amy, was of legal drinking age. In his deposition, Christopher testified that Amy had a total of three alcoholic beverages – possibly one beer and two drinks – over the course of several hours. She did not appear to be intoxicated.

The group of friends discussed doing the sled run on the Mountaineer a few times during the day and also during the evening of January 19, 2007. They had originally planned to spend the evening going to some bars and then bowling, but when they called the bowling alley they discovered it was closed. At about 10 p.m., Christopher recalled, the group "kind of decided to go sledding . . . as the fall back." No one remembers who made the "final suggestion" to go sledding, but Christopher

recalled that it was not Amy's idea. However, Danielle, Jennifer, Christopher, Robert, and Jonathan all stated in their declarations that Amy expressed "excitement and enthusiasm" about the sled run and the young men did not have to convince the young women to participate.<sup>2</sup>

Before going to the Mountaineer ski run, all of the friends except Jonathan chose a sled from the sleds in the garage at Christopher's house. Amy chose a flat foam sled, which Christopher recalled in his deposition testimony was a commercially made sled with handles, dimensions of two feet by four feet, and thickness of about one inch. Danielle and Christopher also chose flat foam sleds and Jennifer chose a toboggan-style sled. Christopher could not recall the type of sled chosen by Robert. Jonathan did not choose a sled, since he had not been drinking and was going to drive.

According to Christopher's deposition testimony, at about midnight the group traveled in a truck driven by Jonathan to the end of the road and walked to the top of the Mountaineer ski run. When they got there, Christopher repeated the instructions on doing the sled run that he had given the young women when they stopped at the bridge overlooking the Mountaineer ski run earlier that day. As stated in his deposition testimony, Christopher "told everyone that the car picks us up at the bridge and that we therefore stop at the bridge." He also "explained to everybody that from where we were starting, everything funnels to under the bridge, and under the bridge is where the run goes flat for . . . a while, and . . . that's, you know, essentially where to stop. And that because [the bridge] has lights on it, it's clearly visible and that's why .

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<sup>2</sup> At oral argument, appellants' counsel claimed that the record contained evidence showing that the young men "encouraged and convinced the girls" to sled that night. However, the record cite provided by appellants' counsel, to plaintiffs' response to defendant's request for admissions No. 25, does not support his claim. Defendant's request for admission No. 25 states, "ADMIT that the decedent was not 'extremely reluctant' to go sledding on the run which took her life." Plaintiffs' response to defendant's request for admission No. 25 states, "Deny."

. . . when you see the lights, when you see the bridge, jump off the sled and stop there.” Christopher also told the group that the ski run “got steeper after it flattened out.” He further emphasized, as he stated in his deposition testimony, that they should stop at the bridge, where the truck would be waiting to pick them up, and told them to stop the sled by rolling off rather than by dragging their hands or feet.

Christopher went down the Mountaineer ski run first and stopped at the bridge, intending to make sure that everyone else stopped there. Amy went next. Christopher recalled in his deposition testimony that he yelled at her to stop and to “bail out” of the sled, but Amy kept going. She was sledding much faster than Christopher had gone when he went down the ski run. He also recalled in his deposition testimony that when Amy went by him, she was “yelling, you know, enthusiastically, . . . like a weeee or something like that, you know, you’d say on a roller coaster, that kind of a sound . . . was just going, was just having fun and was just kind of not trying to stop.”

Danielle sledded after Amy. She stated in her declaration that she stopped at the bridge without any difficulty. After she stopped, Christopher told her that Amy “had kept going past the bridge.” Jennifer was next to sled. Her recollection was that she “mistakenly did not stop at the bridge as [she] had been told to do, however, because when the run leveled out [she] thought that [she] was in the process of slowing to a stop.” Jennifer acknowledged that “[t]his was my mistake, as I do recall [Christopher] saying that you had to ‘bail out’ to stop.” She did not “blame [Christopher] for [her] failing to stop at the bridge, even though I went too far and ended up injuring my back at the very bottom of the run.”

Robert was the last to go down. After he stopped at the bridge, he “was told that, contrary to [Christopher’s] instructions, that Amy had kept going past the bridge.” Next, Christopher recalled, “[w]e then called out for Amy who had kept going, and Robert and I went down the run to go find her. I was the first to find her, and it appeared to me that she had run into a small tree just to the skier’s right off the

Mountaineer run, just after it splits with the Crescent run. Amy was unconscious. We then all took various steps to help her—I ran down to the guard gate to have the guard call for immediate help, and Robert remained behind to try to administer some sort of first aid. Help did eventually come, but she was declared dead at the scene.”

The State of Utah Assistant Medical Examiner performed an autopsy on January 20, 2007. The report of examination states that Amy died due to a blunt force neck injury and that she had a blood alcohol level of 0.06.

### **III. PROCEDURAL BACKGROUND**

#### ***A. The Pleadings***

The operative pleading is the first amended complaint. Appellants allege that defendant Christopher “encouraged and convinced” Amy to “sled on the ski runs,” although he knew that sledding was against the rules of the Deer Valley ski resort, and also knew that everyone staying at his house was under the influence of alcohol, sledding down ski runs was very dangerous, and Amy had never been on the ski run before.<sup>3</sup> Appellants also allege that Christopher represented to Amy that sledding down ski runs was safe and she relied on those representations. Christopher also, according to the allegations, provided Amy with a sled and alcohol and subsequently interfered with the law enforcement investigation after she died during the sledding accident on January 20, 2007.

The first amended complaint includes a cause of action for wrongful death and a survivor action, in which they allege that Christopher acted negligently, recklessly, and carelessly, and his negligence was the cause of Amy’s death.

Christopher filed an answer to the first amended complaint in which he asserted the affirmative defense of assumption of risk.

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<sup>3</sup> Christopher’s father, Kevin G. Hall, was also named as a defendant, but the record reflects that he was never served and was dismissed.

### ***B. The Motion for Summary Judgment***

Christopher brought a motion for summary judgment on the ground that appellants' claims were barred by the affirmative defense of assumption of risk, which he argued precludes liability under California law where a participant is injured while encountering an inherent risk in a sport and coparticipant's negligence caused or contributed to the accident.

Assuming for purposes of the motion that California law applied, Christopher argued that sledding is an activity subject to the assumption of risk defense; losing control while sledding is an inherent risk of the activity; colliding with a tree is also an inherent risk; he did not owe a duty to Amy to protect her from the inherent risks of sledding; he did not owe a duty to Amy to decrease the inherent risks of sledding; and his conduct was not reckless because he did not act in deliberate disregard of the high probability of an accident.

Christopher further argued that none of the exceptions to the doctrine of assumption of risk applied, since there was no evidence to show that (1) his actions were so reckless as to be totally outside the range of ordinary activity involved in the sport; (2) his actions constituted willful misconduct; or (3) alcohol was a contributing factor in the accident.

### ***C. Opposition to Motion for Summary Judgment***

In opposition, appellants argued that Christopher was liable under either California law regarding the assumption of risk defense or Utah's statutory provisions regarding the inherent risks of skiing.

Relying on *Knight v. Jewett* (1992) 3 Cal.4th 296 (*Knight*), appellants argued that Christopher was liable because his conduct was totally outside the range of ordinary activity involved in the sport of sledding. This conduct included, according to appellants, taking Amy sledding on a designated ski slope, trespassing on the unlighted Mountaineer ski run, and providing alcohol to Amy.

Appellants also argued that Christopher's conduct constituted gross negligence, in light of his former employment at the Deer Valley ski resort and his knowledge of its rules and regulations, which made him liable under Utah law. Further, appellants argued that Christopher was not protected under the Utah Inherent Risks of Skiing Act (Utah Code Ann. § 78-27-51) because that act applies only to ski area operators.

***D. The Trial Court's Order***

In its order filed on September 1, 2010, the trial court granted Christopher's motion for summary judgment. First, the trial court ruled that Christopher had shown that he owed no duty to Amy, because the evidence showed that "[Amy] was of legal drinking age; [she] voluntarily consumed alcohol; [she] saw the sled run in question during the daylight hours, the steepness of the run and the fact that it was lined with trees, and what the run was like after it passed under the bridge; and, [she] was enthusiastic about going sledding on the unfortunate night of the accident."

Second, the trial court ruled that Christopher had shown that "he did not increase the risk in the subject activity in which [Amy] voluntarily participated, there was no special relationship between [Christopher] and [Amy], and [he] did not otherwise owe a duty to [Amy]." The court therefore determined that Christopher had met his initial burden to show that the doctrine of assumption of risk was a complete bar to appellants' claims.

Having also determined that appellants had failed to present a triable question of material fact in their opposition, the trial court granted the motion for summary judgment. Judgment in Christopher's favor was entered on September 16, 2010. A timely notice of appeal was subsequently filed on November 12, 2010.

**IV. DISCUSSION**

Appellants contend that the trial court erred in granting Christopher's motion for summary judgment under the doctrine of assumption of risk because triable issues of material fact exist. Before addressing appellants' contentions, the threshold

question of choice of law will be considered since the fatal accident that is the subject of this action occurred in Utah.

**A. Choice of Law**

In the proceedings below, appellants argued both California and Utah law in opposing Christopher's motion for summary judgment, but did not seek a ruling that Utah law applied to the determination of Christopher's liability. The trial court granted the summary judgment motion under California law governing the assumption of risk defense and did not make an express choice of law ruling.

To the extent appellants raise the choice of law issue on appeal by arguing Utah law in the alternative, they have forfeited any claim that Utah law applies in this case. The general rule is that "the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event he [or she] must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it. [Citations.]" (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 919.)

Here, appellants did not demonstrate in their opposition to the summary judgment motion that Utah law, rather than California law, appropriately applies in this case. They also failed to request a ruling from the trial court on the choice of law issue. Appellants have therefore forfeited the choice of law issue on appeal. (See, e.g., *Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 1139.) For that reason, this analysis will consider only California law in determining the applicable standard of review and the merits of the order granting the motion for summary judgment motion.

**B. The Standard of Review**

The standard of review for an order granting a motion for summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*.)

The trial court's stated reasons for granting summary judgment are not binding on the reviewing court, "which reviews the trial court's ruling, not its rationale. [Citation.]" (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 498.)

In performing its independent review, the reviewing court applies the same three-step process as the trial court. "Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 (*Baptist*).

"We then examine the moving party's motion, including the evidence offered in support of the motion." (*Baptist, supra*, 143 Cal.App.4th at p. 159.) A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.)

If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence and the motion must be denied. However, if the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 (*Kahn*).

In determining whether the parties have met their respective burdens, the court must " 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar, supra*, 25 Cal.4th at p. 843.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of

the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850, fn. omitted.) Thus, a party “cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]” (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981.)

In the present case, defendant Christopher moved for summary judgment on the ground that he has a complete defense – assumption of risk – to appellants’ cause of action for wrongful death and survivor action. Independent review of the merits of the summary judgment motion therefore begins with an overview of the doctrine of assumption of risk.

### **C. Assumption of Risk**

#### **1. California Supreme Court Authority**

The California Supreme Court has clarified the doctrine of assumption of risk in a series of decisions. (*Shin v. Ahn* (2007) 42 Cal.4th 482 (*Shin*); *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148 (*Avila*); *Kahn, supra*, 31 Cal.4th 990; *Cheong v. Antablin* (1997) 16 Cal.4th 1063 (*Cheong*); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456 (*Parsons*); *Knight, supra*, 3 Cal.4th 296; and *Ford v. Gouin* (1992) 3 Cal.4th 339 (*Ford*).)

Discussing its 1992 landmark decision in *Knight*, our Supreme Court more recently stated, “In *Knight, supra*, 3 Cal.4th 296, we examined the doctrine of assumption of risk in light of the principle of comparative fault. We observed that the term ‘assumption of risk’ had been used in connection with two classes of cases: those in which the issue to be resolved was whether the defendant actually owed the plaintiff a duty of care (primary assumption of risk), and those in which the defendant had breached a duty of care but where the issue was whether the plaintiff had chosen to face the risk of harm presented by the defendant’s breach of duty (secondary assumption of risk). [Citation.] In the latter class of cases, we concluded, the issue

could be resolved by applying the doctrine of comparative fault, and the plaintiff's decision to face the risk would not operate as a complete bar to recovery. In such a case, the plaintiff's knowing and voluntary acceptance of the risk functions as a form of contributory negligence. [Citation.]" (*Kahn, supra*, 31 Cal.4th at p. 1003.)

The *Kahn* court further stated, "As for the first class of cases, however, we held [in *Knight*] that the plaintiff's claim should be barred entirely because of a *legal* determination that the defendant did not owe a duty to protect the plaintiff from the particular risk of harm involved in the claim. [Citation.] We observed that such cases frequently arise in the context of active sports, and warned that 'the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.' [Citations.] We emphasized that the question of 'the existence and scope' of the defendant's duty is one of law to be decided by the court, not by a jury, and therefore it generally is 'amenable to resolution by summary judgment.' [Citation.]" (*Kahn, supra*, 31 Cal.4th at pp. 1003-1004.)

"Looking first at the nature of the sport, we observed [in *Knight*] that '[i]n the sports setting . . . conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.' [Citation.] We explained that, as a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events. *Accordingly, defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty not to increase the risk of harm beyond what is inherent in the sport.* [Citation.]" (*Kahn, supra*, 31 Cal.4th at p. 1004, italics added.)

The *Kahn* court further explained, “But the question of duty depends not only on the nature of the sport, but also on the ‘role of the defendant whose conduct is at issue in a given case.’ [Citation.] Duties with respect to the same risk may vary according to the *role* played by particular defendants involved in the sport. . . . [¶] When in *Knight, supra*, 3 Cal.4th 296, we examined whether particular defendants, namely *coparticipants* in an active sport such as touch football, may be held liable to each other, we stressed the role of the participant in the sport *and* the likely effect on the sport of imposing liability on such persons. To impose liability on a coparticipant for ‘normal energetic conduct’ [citation] while playing—even careless conduct—could chill vigorous participation in the sport. . . . Accordingly, *we concluded that coparticipants breach a duty of care to each other only if they ‘intentionally injure[ ] another player or engage[ ] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.’* [Citation.]” (*Kahn, supra*, 31 Cal.4th at pp. 1004-1005, fourth italics added.)

Applying this rule, the *Knight* court ruled that assumption of the risk was a complete bar to a plaintiff’s claim that the defendant, a coparticipant, was liable for injuring her during an informal game of touch football. (*Knight, supra*, 3 Cal.4th at pp. 320-321.) The court determined that the “defendant was, at most, careless or negligent in knocking over plaintiff, stepping on her hand, and injuring her finger. . . . [T]he conduct alleged . . . is not even closely comparable to the kind of conduct—conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport—that is a prerequisite to the imposition of legal liability upon a participant in such a sport.” (*Ibid.*) Thus, “[a] defendant participating in the same sporting activity owes no duty to a coparticipating plaintiff to avoid ordinary negligence as to those risks.” (*Shin, supra*, 42 Cal.4th at p. 498.)

In *Kahn*, our Supreme Court also discussed the application of the doctrine of assumption of risk to defendants other than coparticipants. (*Kahn, supra*, 31 Cal.4th at

p. 1005.) “ ‘[T]here are circumstances in which the relationship between defendant and plaintiff gives rise to a duty on the part of the defendant to use due care not to increase the risks inherent in the plaintiff’s activity. For example, a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage. [Citations.] Likewise, a coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student. [Citations.]” (*Id.* at pp. 1005-1006, italics omitted.)

Finally, the doctrine of assumption of risk is not limited to cases arising from competitive sports. The California Supreme Court has established that the doctrine “applies to participants engaged in noncompetitive but active sports activity. . . .” (*Ford, supra*, 3 Cal.4th at p. 345.)

## **2. Application to Wrongful Death and Survivor Actions**

Since the California Supreme Court’s decisions regarding assumption of the risk have addressed personal injury actions brought by injured plaintiffs, the next consideration is whether the doctrine of assumption of risk may be asserted as a defense to appellants’ cause of action for wrongful death and their survivor action.

“A cause of action for wrongful death is . . . a statutory claim. (Code Civ. Proc., §§ 377.60–377.62.) Its purpose is to compensate specified persons—heirs—for the loss of companionship and for other losses suffered as a result of a decedent’s death. [Citation.]” (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263 (*Quiroz*)). “ ‘The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*. [Citations.]’ [Citation.]” (*Ibid.*)

In general, “ ‘ ‘a plaintiff in a wrongful death action is subject to defenses which could have been asserted against the decedent. [Citations.]’ ” [Citation.]” (*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 755; see also *Ruiz v.*

*Podolsky* (2010) 50 Cal.4th 838, 852 (*Ruiz*) [wrongful death plaintiffs may be bound by defenses applicable to the decedent if the statute giving rise to the defense is construed to intend such application]; *Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040, 1042-1043 [assumption of risk barred wrongful death action arising from rock climbing class].)

“Unlike a cause of action for wrongful death, a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives the event. [Citation.]” (*Quiroz, supra*, 140 Cal.App.4th at p. 1264.) Thus, “[a] decedent’s personal injury action does indeed survive the decedent’s death and may be brought by his or her estate. ([Code Civ. Proc.], §§ 377.20, 377.30.)” (*Ruiz, supra*, 50 Cal.4th at p. 850, fn. 3.) Assumption of risk may be asserted as a defense to a survivor cause of action where it could have been raised as a defense to the decedent’s personal injury action. (See, e.g., *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 891.)

Since the doctrine of assumption of risk may be asserted as a defense to appellants’ cause of action for wrongful death and survivor action, the merits of Christopher’s motion for summary judgment will be analyzed next.

#### **D. Analysis**

##### **1. Nature of the Activity and the Inherent Risks**

Following the California Supreme Court’s instruction, the nature of the activity in which Amy suffered her fatal accident will be addressed first. (*Kahn, supra*, 31 Cal.4th at p. 1004.)

It is undisputed that Amy, Christopher, and their group of college friends engaged in the following activity: a midnight recreational trespass onto an unlighted, intermediate ski run for the purpose of sledding down the ski run after it was closed to the public. Like off-road motorcycling, this was “ ‘an activity which for all intents and

purposes has no rules.’ ” (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1262.) It was also a similar thrill-seeking activity that “may be readily characterized by the phrase ‘[t]hrills, chills, and spills.’ ” (*Ibid.*)

As such, Amy’s activity was distinct from the less thrilling activity of sledding down a neighborhood hill or an authorized sled run. A similar distinction between a more thrilling activity and its tamer version has been noted with respect to white-water rafting. “It is the thrill of challenging nature and running the rapids without mishap which gives the sport its distinct allure and sets it apart from, for example, a trip down the giant slide at Waterworld.” (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 256.) Thus, it was integral to the thrill-seeking nature of Amy’s sledding activity that it involved a midnight recreational trespass to sled down a ski run. (See *Cheong, supra*, 16 Cal.4th at p. 1068 [conditions that otherwise might be viewed as dangerous often are an integral part of the sport].)

Moreover, there is no dispute that Amy’s activity of sledding down an unlighted ski run at midnight was inherently risky. Although the parties have not cited a case addressing the inherent risks of snow sledding, the inherent risks of a similar snow sport—skiing—are well established. “ ‘ ‘ ‘Each person who participates in the sport of [snow] skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment. [Citations.]’ ” ’ ” (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12, italics omitted (*Connelly*); see also *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1202 (*Lackner*); *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 467.)

It is obvious that the inherent risks of skiing, including a collision with a tree or other obstacle, are equally inherent in the activity of sledding down a ski slope. Appellants have not argued otherwise.

Having determined the nature of the activity in which Amy suffered her fatal accident and its inherent risks, the next consideration is Christopher's role. (*Kahn, supra*, 31 Cal.4th at p. 1004.)

## **2. Defendant's Role in the Activity**

The *Kahn* court emphasized that “defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty not to increase the risk of harm beyond what is inherent in the sport. [Citation.] [¶] But the question of duty depends not only on the nature of the sport, but also on the ‘role of the defendant whose conduct is at issue in a given case.’ [Citation.] Duties with respect to the same risk may vary according to the *role* played by particular defendants involved in the sport. In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit—vigorous deployment of a bat in the course of a game being an integral part of the sport—a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats.” (*Kahn, supra*, 31 Cal.4th at p. 1004.)

Here, it is implicit in appellants' arguments that they believe that Christopher is liable in multiple roles, including social host, provider of a recreational opportunity, and coparticipant. In *Kahn* the court reiterated the ruling in *Knight* that “coparticipants breach a duty of care to each other only if they ‘intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.’ [Citation.]” (*Kahn, supra*, 31 Cal.4th at p. 1005.)

The *Kahn* court then addressed the application of the assumption of risk doctrine to a defendant swim coach, and determined that “a sports instructor or coach

owes a duty of due care not to increase the risk of harm inherent in learning an active sport.” (*Kahn, supra*, 31 Cal.4th at p. 1006.) The court also stated that “a purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage.” (*Id.* at p. 1005.)

The appellate courts have addressed application of the assumption of risk doctrine to defendants in other roles, including the role of social host. Where the defendant social host organized a game of front yard volleyball and set up the equipment that the 13-year-old plaintiff tripped over, the appellate court ruled that the defendant had a duty not to increase the inherent risk of “tripping over a tie line used to secure the net poles while retrieving a ball hit out of bounds.” (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 110.)

Other social hosts granted the request of a barbecue guest to ride one of the hosts’ horses, who then fell off the horse and was injured. (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1550-1553.) The appellate court ruled that the guest’s negligence action was barred by assumption of risk, since “[d]efendants were merely the hosts of a social gathering at their cattle ranch, where [the plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibility of an instructor.” (*Id.* at pp. 1550-1551.)

Thus, whether appellants claim that Christopher is liable in his role of social host, recreational opportunity provider, or coparticipant, the general assumption of risk rule applies: “[D]efendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty not to increase the risk of harm beyond what is inherent in the sport. [Citation.]” (*Kahn, supra*, 31 Cal.4th at p. 1004.)

Having determined Christopher’s possible roles with respect to Amy’s sledding activity, the next consideration is whether he met his initial burden in moving for summary judgment by making a prima facie showing that assumption of risk is a

complete defense to appellants' claims. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.)

### **3. Christopher's Prima Facie Showing of a Complete Defense**

Christopher moved for summary judgment on the ground that appellants' wrongful death cause of action and survivor action were barred by the defense of assumption of risk, since the undisputed facts show that he did nothing to increase the risks inherent in the sledding activity that led to Amy's fatal accident. The trial court correctly determined that assumption of the risk was a complete defense as a matter of law.

Although no one observed Amy's accident, the parties have inferred that she collided with a tree after sledding past the bridge on the Mountaineer ski slope. Under California law, Amy assumed the inherent risk of colliding with a tree when she chose to sled down a ski run. (See, e.g., *Connelly, supra*, 39 Cal.App.4th at pp. 12-13.) In his capacity as either social host, recreational opportunity provider, or coparticipant, Christopher did not have a duty to either protect Amy from the inherent risk of colliding with a tree, eliminate that risk, or avoid ordinary negligence with respect to the sledding activity. (*Kahn, supra*, 31 Cal.4th at p. 1004; *Shin, supra*, 42 Cal.4th at p. 498.)

Christopher did have a duty not to increase the risk of colliding with a tree that was inherent in the activity of midnight sledding on an unlighted ski slope that was closed to the public. (*Kahn, supra*, 31 Cal.4th at p. 1004.) The undisputed material facts are that Christopher and his college friends, including Amy, decided as a group to go sledding at night on an unlighted ski slope. Christopher provided the sleds that each participant selected, transportation to the Mountaineer ski slope, and instruction to stop at the bridge where the group would be picked up after their sled runs. It is undisputed that Amy voluntarily chose to participate in the sledding activity, that she selected her own sled, and that she made her sled run unaccompanied by Christopher

or anyone else. During her solo sled run, Amy apparently collided with a tree after she sledded below the bridge on the Mountaineer ski run. The evidence does not show that any of Christopher's actions increased the inherent risk of colliding with a tree while sledding on an unlighted ski slope at night. Christopher therefore met his initial burden in moving for summary judgment to show that appellants' claims were barred by the complete defense of assumption of risk. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.)

#### **4. Existence of a Triable Question of Material Fact**

Since Christopher met his initial burden on summary judgment, the burden then shifted to appellants to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849; *Kahn, supra*, 31 Cal.4th at pp. 1002-1003.) Appellants argue that triable questions of fact exists as to whether Christopher increased the inherent risks by (1) taking Amy sledding at a ski-only resort; (2) failing to follow the safety rule and regulations of the Deer Valley ski area, where he was an employee; (3) representing to Amy that the illegal nighttime sledding activity was safe and failing to disclose its dangers; and (4) providing the sleds and alcohol. Appellants also argue that all reasonable inferences should be drawn against Christopher because he "tampered with the evidence" by telling witnesses not to fill out statements to the sheriff's department. Each contention will be addressed in turn.

#### ***Taking Amy Sledding at a Ski-Only Resort***

Even assuming that the evidence shows that Christopher "took" Amy sledding at a ski-only resort, that fact does not show that Christopher increased the inherent risks of their sledding activity. As Christopher points out, he had no duty to protect Amy, age 21, from the inherent risks of the illegal and highly dangerous activity of sledding at a ski-only resort, nor did he have a duty to eliminate those risks. (*Kahn, supra*, 31 Cal.4th at p. 1004.) And, contrary to appellants' contention, there is no

evidence to support their claim that Christopher “encouraged and convinced” Amy to “sled on the ski runs.” The two other young women who participating in the sledding activity, Danielle and Jennifer, both stated in their uncontradicted declarations that they did “not recall any of the participants as expressing any resistance” and denied “that the young men had to ‘convince’ us to do it.” They also recalled that Amy “expressed excitement and enthusiasm for the trip.”

### ***Failing to Follow Safety Rules and Regulations***

Relying on the decision in *Campbell v. Derylo* (1999) 75 Cal.App.4th 823 (*Campbell*), appellants contend that Christopher “knowingly failed to follow the safety rules and regulations of Deer Valley ski area (as he was an employee of the ski resort and a long time seasonal-resident),” which creates a triable question of fact as to whether he increased the inherent risks of the sledding activity.

There is no merit in this contention. First, appellants’ reliance on the decision in *Campbell* is misplaced, since that decision is factually distinguishable. The plaintiff in *Campbell*, an 11-year-old skier, had stopped at the bottom of a ski slope when she was struck by defendant’s runaway snowboard. (*Campbell, supra*, 75 Cal.App.4th at p. 825.) The appellate court determined that a runaway snowboard due to ordinary skier carelessness is an inherent risk of skiing. However, the defendant’s snowboard did not have the retention strap required by a county ordinance. The court accordingly determined that a triable question of fact existed as to whether the defendant had thereby increased the inherent risk that “his snowboard might escape” and injure other participants. (*Id.* at pp. 829-830, 827.) In contrast, in the present case there is no evidence that Christopher’s conduct increased the inherent risk of colliding with a tree while solo sledding on a ski slope at night.

Second, as discussed above, the thrilling and illegal nature of Amy’s sledding on the ski run at night was integral to the activity. Christopher did not owe Amy a

duty to protect her from the inherent risk of colliding with a tree while sledding under those conditions. (*Kahn, supra*, 31 Cal.4th at p. 1004.)

***Failure to Disclose the Dangers of the Illegal Nighttime Sledding Activity***

Appellants further contend that Christopher increased the inherent risks of Amy’s sledding activity by “representing the area was safe and, although [he] knew sledding on the ski run was illegal and unsafe and . . . failed to disclose those dangers to [Amy].” This contention also lacks merit.

Appellants’ counsel conceded at oral argument that there was no evidence to support their claim that Christopher expressly told Amy that sledding down the Mountaineer ski run was safe. Appellants’ counsel explained that appellants’ position is that it is “implicit” that Christopher told Amy that the sled run was safe. Since there is no evidence that Christopher said the activity was safe, appellants have failed to show there is a triable issue of fact as to whether Christopher represented to Amy that the sledding activity was safe.

Appellants additionally contend that Christopher breached his duty to warn Amy of the dangers of the sledding activity. At oral argument, appellants’ counsel stated that it was their position that Christopher increased the risk of the sledding activity by failing to warn Amy of all the dangers of nighttime sledding and trespassing on a ski run. Appellants’ counsel also argued that there was a special relationship between Christopher and Amy because Christopher had failed to warn Amy of the dangers.

These arguments are not convincing. First, an obvious risk is its own warning, as discussed in *Connelly, supra*, 39 Cal.App.4th at page 12. In *Connelly*, the plaintiff skier was injured in a collision with a ski lift tower. The appellate court determined that the risk of colliding with a ski lift tower was inherent in skiing, and “[b]ecause of the obvious danger, the very existence of a ski lift tower serves as its own warning. [Citation.]” (*Ibid.*; see also *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th

262, 271 [large metal snowmaking hydrant served as its own warning to skier].) The existence of trees on a ski slope similarly serves as its own warning due to the obvious danger of colliding with a tree while skiing or sledding. (*Connelly, supra*, 39 Cal.App.4th at p. 12.)

Second, appellants have not alleged a special relationship between Christopher and Amy or provided any evidence of a special relationship that would impose a duty on him to warn her or to otherwise protect her from danger. This court has stated that “[a]lthough the general rule of nonliability is that ‘no one is required to save another from a danger which is not of his making’ [citations], courts have recognized exceptions to this rule where there is some ‘special relationship’ between the parties, giving rise to a duty to act. [Citation.] Typically, in special relationships, ‘the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff’s welfare. [Citation.]’ [Citation.] A defendant who is found to have a ‘special relationship’ with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another . . . .” (*Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 Cal.App.4th 307, 325 (*Rotolo*)).

Here, there is no evidence to support the existence of a special relationship between Christopher and Amy. Nothing in the record indicates that Amy was “particularly vulnerable and dependent” upon Christopher. (*Rotolo, supra*, 151 Cal.App.4th at p. 325.) To the contrary, it is undisputed that they were college friends and that Amy was a 21-year-old adult capable of snowboarding and sledding. Christopher therefore had no duty to protect Amy from the inherent risk of colliding with a tree while sledding or to warn her of that obvious danger.

### *Providing the Sled and Alcohol*

Appellants also contend that a factual dispute exists as to whether Christopher increased the inherent risks of the sledding activity by providing a sled and alcohol to Amy.

This contention also lacks merit. The fact that Christopher provided the sled that Amy chose to use is immaterial, because appellants have not alleged that defective equipment was a factor in Amy's accident or that the sled itself increased the inherent risk of colliding with a tree while sledding. In summary judgment procedure, the pleadings establish the issues to be considered in ruling on the motion for summary judgment. (*Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 122.) A triable question of material fact therefore cannot be based upon Christopher's role in making a sled available to Amy.

Christopher argues that the fact that he provided alcohol is also immaterial, since he did not have a duty with respect to Amy's legal drinking and there is no evidence that his own alcohol consumption was a contributing factor in the accident. Alternatively, Christopher argues that liability on the basis of providing alcohol to Amy is barred under Civil Code section 1714, subdivision (c),<sup>4</sup> which protects social hosts who furnish alcoholic beverages to a person from liability to third persons injured by the consumption of those beverages.

However, it is recognized that for purposes of assumption of the risk under *Knight*, consuming alcohol should not be considered to be within the range of ordinary activity involved in snow sledding. It has been held that "participants in many sports,

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<sup>4</sup> The version of Civil Code section 1714, subdivision (c) in effect in 2007 provided, "No social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages."

including skiing, may foolishly combine the participation in their given sport with the consumption of alcoholic beverages. However, the unfortunate fact that some skiers simultaneously engage in both drinking and skiing does not mean that drinking is an activity ordinarily ‘involved’ in skiing, as that term is used in *Knight*. . . . [C]onduct is within the range of ordinary activity involved in a sport if that conduct cannot be prohibited without deterring vigorous participation in the sport or otherwise fundamentally altering the nature of the sport. [¶] . . . [D]rinking alcoholic beverages is not an activity within the range of activities ‘involved’ in the sport of skiing, and that the increased risks presented by the consumption of alcohol are not inherent in the sport of skiing.” (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1396 (*Freeman*).)

The decisions in *Freeman, supra*, 30 Cal.App.4th 1388 and *Lackner, supra*, 135 Cal.App.4th 1188, on which appellants rely, are nevertheless inapposite. In *Freeman*, the defendant drank alcohol while skiing, then collided with another skier and seriously injured her. (*Freeman, supra*, 30 Cal.App.4th at p. 1391.) The appellate court ruled that the defendant’s summary judgment motion on the ground of assumption of risk was erroneously granted, since the defendant had failed to establish that he did not increase the risk of an inadvertent collision by drinking while skiing. (*Id.* at pp. 1396-1397.) In *Lackner, supra*, 135 Cal.App.4th 1188, the defendant was taking a practice run before a snowboarding competition when he failed to look where he was going and crashed into the plaintiff at a high rate of speed. (*Id.* at p. 1195.) The appellate court determined that triable issues of fact existed as to whether the defendant’s conduct was reckless and that precluded summary judgment on the ground of assumption of risk. (*Id.* at p. 1193.)

In the present case, unlike *Freeman, supra*, 30 Cal.App.4th at page 1391, there is no evidence to show that alcohol was a contributing factor in the accident. It is also undisputed that Christopher did not collide with Amy while sledding, unlike the

defendant in *Lackner, supra*, 135 Cal.App.4th at page 1195, and that she collided with a tree during her solo sled run.

Moreover, although Christopher provided some or all of the alcoholic beverages that Amy, age 21, drank before sledding, Amy chose to drink and it is undisputed that she did not appear to be intoxicated prior to her sled run. Christopher did not do anything to increase the inherent risks of a collision by, for example, encouraging Amy to become intoxicated or providing her with alcohol after it was apparent that she was impaired. And, to the extent that it was arguably negligent for Christopher, Amy, and their friends to consume alcohol before sledding, Christopher had no duty to avoid ordinary negligence with respect to the inherent risks of sledding. (*Shin, supra*, 42 Cal.4th at p. 498.)

Therefore, although Christopher provided alcohol to Amy, as a matter of law he did not increase the inherent risk of colliding with a tree that Amy had assumed by participating in the sledding activity. (*Connelly, supra*, 39 Cal.App.4th at pp. 12-13.)

### ***Tampering with the Evidence***

Finally, appellants contend that all reasonable inferences should be drawn against Christopher because he “tampered with the evidence” by telling witnesses not to fill out statements to the sheriff’s department, and for that reason summary judgment should be denied.

Christopher correctly responds that the trial court sustained his evidentiary objections to the sheriff’s report, and appellants have provided no authority for the proposition that inferences may be drawn from the excluded evidence that preclude summary judgment. Moreover, Christopher’s alleged post-accident conduct of “evidence tampering” is not relevant to a determination of whether appellants’ claims are barred by the defense of assumption of risk.

### **E. Conclusion**

It is undisputed that Amy was fatally injured when she collided with a tree during an inherently dangerous activity: a midnight recreational trespass onto an unlighted, intermediate ski run for the purpose of sledding down the ski run after it was closed to the public. In his capacity as either social host, recreational opportunity provider, or coparticipant, as a matter of law Christopher did not have a duty to either protect Amy from the inherent risk of colliding with a tree, eliminate that risk, or avoid ordinary negligence with respect to the activity. (*Kahn, supra*, 31 Cal.4th at p. 1004; *Shin, supra*, 42 Cal.4th at p. 498; *Connelly, supra*, 39 Cal.App.4th at p. 12.)

In his motion for summary judgment, Christopher made a prima facie showing, based on the undisputed facts, that he did not increase the inherent risk of colliding with a tree that Amy had assumed when she participated in the sledding activity.

(*Kahn, supra*, 31 Cal.4th at p. 1004; *Connelly, supra*, 39 Cal.App.4th at p. 12.)

Christopher therefore met his initial burden in moving for summary judgment to show that appellants' cause of action for wrongful death and survivor action are barred by the complete defense of assumption of risk. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.) Appellants' opposition to the motion for summary judgment failed to meet their burden to show the existence of a triable question of material fact as to whether Christopher increased the inherent risks of the sledding activity. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849; *Kahn, supra*, 31 Cal.4th at pp. 1002-1003.)

There is no evidence to support appellants' claim that Christopher and Amy had a special relationship that would impose a duty on him to warn her or to otherwise protect her from danger. (*Rotolo, supra*, 151 Cal.App.4th at p. 325.) Therefore, as a matter of law Christopher had no duty to warn Amy of the dangers of a midnight recreational trespass onto an unlighted, intermediate ski run for the purpose of

sledding down the ski run after it was closed to the public, or to protect her from those dangers.

Accordingly, following the California Supreme Court's rulings regarding the affirmative defense of assumption of risk (*Shin, supra*, 42 Cal.4th 482; *Avila, supra*, 38 Cal.4th 148; *Kahn, supra*, 31 Cal.4th 990; *Cheong, supra*, 16 Cal.4th 1063; *Parsons, supra*, 15 Cal.4th 456; *Knight, supra*, 3 Cal.4th 296; and *Ford, supra*, 3 Cal.4th 339) the trial court did not err in granting Christopher's motion for summary judgment. In so ruling, there is no intention to in any way diminish appellants' tragic loss of their 21-year-old daughter.

## **V. DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to respondent Christopher Hall.

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BAMATTRE-MANOUKIAN, ACTING P. J.

**Mihara, J., Concurring in the Judgment.**

Amy Woolington died tragically after she collided with a tree while sledding at night on a ski slope in Utah. Her parents filed a wrongful death and survivorship action against Christopher Hall. The trial court granted Hall's summary judgment motion, and Amy's parents appeal. The lead opinion concludes that the trial court did not err in granting Hall's motion, and I agree with this conclusion. The dissent contends that there were triable issues of fact that precluded summary judgment. There were not.

Hall's summary judgment motion was based primarily on his own declaration. Amy and several other friends of Hall were visiting Hall at his father's house in Utah at the time of her death. The group of friends, all of whom were over the age of 21, consumed alcohol, some of which was provided by Hall, before deciding to go sledding at night down a steep ski slope near where they were staying. Hall had previously pointed out this sledding route during daylight hours and mentioned that he had gone sledding on it. He provided sleds for the four of his five friends who chose to sled that night. Amy selected a sled that was identical to the one Hall elected to use that night. Hall described the sledding route to the group, and he told them all to stop at the bridge where the slope flattened out after the initial steep portion. He explained that the best way to stop was to deliberately roll off the sled. Hall sledded down the slope first. He stopped at the bridge. Amy was the next person to come down the slope. Although Hall called out to her to stop, she did not. Instead, she proceeded past the bridge at a high rate of speed and collided with a tree below the bridge resulting in her death.

Amy's parents' opposition to Hall's summary judgment motion was based in part on Hall's deposition, which was not inconsistent with his declaration. Although Amy's parents did not and do not dispute that colliding with a tree is an inherent risk

of sledding, they contend on appeal that the trial court erred in finding that their claims were barred by the doctrine of primary assumption of the risk. They maintain that they raised triable issues of fact as to whether Hall's acts or omissions increased the inherent risks of sledding.

“When a sports participant is injured, the considerations of policy and duty necessarily become intertwined with the question of whether the injured person can be said to have assumed the risk.” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 489 (*Shin*).)

“Under the primary assumption of risk doctrine, the defendant owes *no duty* to protect a plaintiff from particular harms arising from ordinary, or simple negligence.

[Citation.] In a sports context, the doctrine bars liability because the plaintiff is said to have assumed the particular risks inherent in a sport by choosing to participate.

[Citation.] Thus, ‘a court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm. [Citation.]’” (*Ibid.*) Where the doctrine applies, the defendant has “‘a duty not to increase the risks inherent in the sport, not a duty to decrease the risks.’” (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 166 (*Avila*).) “[T]he question of ‘the existence and scope’ of the defendant’s duty is one of law to be decided by the court, not by a jury, and therefore it generally is ‘amenable to resolution by summary judgment.’” (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004 (*Kahn*).)

The evidence Hall presented in support of his summary judgment motion supported his claim that he did nothing to increase the inherent risks of sledding. The evidence Amy’s parents presented in opposition to his motion raised no material disputed factual issues regarding Hall’s conduct in connection with the sledding activity. Nevertheless, the dissent contends that Hall’s conduct must be evaluated by a

jury because (1) his role does not “fit neatly” into that of “‘social host, recreational opportunity provider, or coparticipant,’” and (2) there are triable issues of fact as to whether Hall engaged in “reckless” conduct. (Dis. opn., *post*, p. 5.)

While Hall’s role in relationship to the sledding activity is an important element in evaluating whether the doctrine of primary assumption of the risk applies here, the mere fact that he acted in a *hybrid* role does not mean that there is a factual dispute about whether his role increased the risks of the activity. Amy’s parents’ evidence identified no factual issues regarding Hall’s role. He was Amy’s friend, not her coach. While Hall provided the sleds for the activity and accurately described the terrain that they would encounter, he did not cajole any of his friends into participating or mislead them about the nature of the activity. He told them where, how, and why to stop at the bridge, which tended to reduce, rather than increase the risks associated with the activity. Since the nature of Hall’s role was not in dispute, this issue was not required to be submitted to a jury.

Amy’s parents’ evidence also raised no triable issues of disputed fact as to whether Hall engaged in reckless conduct. The dissent makes no mention of the case bearing the closest resemblance to the fact pattern before us. In *Levinson v. Owens* (2009) 176 Cal.App.4th 1534 (*Levinson*), a social host permitted a guest to ride one of the host’s horses. The guest was thrown from the horse and injured. The Third District Court of Appeal upheld summary judgment for the host based on primary assumption of the risk. “Horseback riding is a dangerous sporting activity; ‘being thrown off a horse [i]s an inherent risk of horseback riding, [indeed] . . . it is one of the most obvious risks of that activity, and readily apparent to anyone about to climb on a horse.’ [Citation.] [¶] Applying the aforesaid principles of primary assumption of the risk to horseback riding leads to the following general conclusions: The rider generally assumes the risk of injury inherent in the sport. Another person does not owe a duty to protect the rider from injury by discouraging the rider’s vigorous

participation in the sport or by requiring that an integral part of horseback riding be abandoned. And the person has no duty to protect the rider from the careless conduct of others participating in the sport. The person owes the horseback rider only two duties: (1) to not ‘intentionally’ injure the rider; and (2) to not ‘increase the risk of harm beyond what is inherent in [horseback riding]’ [citation] by ‘engag[ing] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport’ [citation]. With respect to increasing the risk of harm, the duty ‘may vary according to the *role* played by particular [persons] involved in the sport’ [citation] and the nature of the particular riding activity at issue [citations].” (*Levinson* at pp. 1545-1546.)

Sledding, like horseback riding, is a dangerous sporting activity. The risk of hitting a fixed object, such as a tree, is an inherent and obvious risk of sledding that is readily apparent to any person who sleds. A host/sled-provider/co-sledder owes no duty to another sledder to protect that sledder from injury by discouraging active participation in the sport. The host/sled-provider/co-sledder’s duty to the sledder clearly does not exceed the scope of the duty owed by a *coach* to a person engaging in any other sporting activity. He or she “breaches a duty of care to [the sledder] only if he or she ‘intentionally injures [the sledder] or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.’” (*Kahn, supra*, 31 Cal.4th at p. 996 [coach].)

Amy’s parents did not produce any evidence that Hall intentionally injured Amy, so his duty of care extended only to refraining from engaging in reckless conduct that was “totally outside the range of the ordinary activity involved in the sport.” The dissent itemizes various facts that it seems to believe establish that Hall’s conduct was reckless. I cannot see how any of those facts are even relevant, let alone how they could provide a basis for a jury to find by a preponderance that Hall’s

conduct was reckless.<sup>1</sup> Hall's education and his former employment by a ski resort as a lift operator have nothing to do with his conduct in connection with the sledding activity. No evidence was presented that Hall studied or was employed in any capacity related to sledding, nor was there any evidence that he told Amy that he had some special knowledge about sledding. Certainly, there was evidence that he had been sledding on this slope previously and that he told this to Amy, but there is no evidence that he made any representations about the safety of this activity or that he even recommended this activity to Amy. Hall knew that Amy had been sledding before. It was undisputed that Hall provided the sleds, but it was also undisputed that each of the sledders picked out a sled. Hall did not select Amy's sled for her; he selected the same type of sled that she selected. His instruction to Amy to stop at the bridge, where the steep slope leveled out, by deliberately rolling off the sled, did not increase the risks of sledding. Instead, it was intended to reduce the risks that attended proceeding down the steep slope on the other side of the bridge.

The dissent relies on a snippet from Justice Kennard's concurring and dissenting opinion in *Avila* to support the proposition that the inherent risks of an activity are "impossible" for a trial court to determine at the summary judgment stage. (Dis. opn., *post*, at p. 8.) Justice Kennard's reference in *Avila* to the difficulties she believed a trial court might encounter in determining the inherent risks of an activity was made in support of her disagreement with "the legal rule [adopted in *Kahn*] that there is no duty to avoid risks 'inherent' in a recreational sport." (*Avila*, *supra*, 38 Cal.4th at p. 168 (conc. & dis. opn. of Kennard, J.)) Because Justice Kennard's observation was based on her disagreement with *Kahn*, it cannot form the

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<sup>1</sup> The dissent notes that Hall flew his friends to Utah on his father's private jet. It is not clear to what issue the dissent finds this fact relevant. Hall's employment as a mechanical engineer, which occurred *after* Amy's death, is similarly irrelevant.

basis for our analysis under *Kahn*, by which we are bound. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Nor is there any validity to the dissent's reliance on the facts of *Kahn* to support its analysis. The defendant in *Kahn* was a coach who pressured a reluctant novice to make a dangerous dive that she feared and had little experience doing. The California Supreme Court concluded that there were factual issues about whether the coach's conduct was reckless. *Kahn's* facts are not analogous to those before us. Hall was not Amy's coach. He did not pressure or even encourage her to participate in the sledding activity. She was not reluctant to participate. Indeed, she enthusiastically joined her friends in this activity without any pressure of any kind. *Kahn* is therefore readily distinguishable on this point. The facts of *Shin*, upon which the dissent also relies, are equally distinguishable. There, a golfer hit a ball without first ascertaining that his fellow golfers were not in the potential path of his ball even though he had seen one of them in that area shortly before he struck the ball, which hit his fellow golfer. Hall did nothing of the sort. His participation in the sledding activity did not pose any danger to Amy, and nothing he did at the site of the sledding activity contributed to Amy's collision. Nor is *Garcia v. Superior Court* (1990) 50 Cal.3d. 728 (*Garcia*) (another case relied on by the dissent, which was not an assumption of the risk case) relevant to the issues before us. There was no evidence that Amy relied on Hall's "'special knowledge'" to her detriment. (*Garcia*, at p. 736.) Hall's only special knowledge was his knowledge of the terrain, which he imparted to his friends prior to the sledding activity in an effort to decrease the inherent risks of the activity.

Hall's evidence established that the doctrine of primary assumption of the risk applied and therefore he lacked a duty to Amy. Amy's parents failed to produce evidence raising a triable issue of disputed fact regarding the application of this doctrine. Hence, Hall was entitled to summary judgment, and the trial court did not err in granting his motion. I therefore concur in the judgment of affirmance.

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Mihara, J.

WALSH, J., Dissenting.

I respectfully dissent.

On January 19, 2007, Amy Woolington spent the last day of her life in the company of defendant Christopher Hall and several of their college friends. Hall flew Amy and others on his father's private airplane from Southern California to Deer Valley Ski Resort in Utah, where Hall lived and worked. Shortly after arriving, Hall pointed out to the group a mountain run at the ski resort where he and his friends sometimes sledged at night when the ski run was closed. That night, after drinking alcohol at Hall's residence, an abode that also was provided to him by his father, Hall furnished the group with sleds and then drove them to participate in an activity the lead opinion describes as "a midnight recreational trespass onto an unlighted, intermediate ski run for the purpose of sledding down the ski run after it was closed to the public." (Lead opn., *ante*, at p. 15.)

The sled provided to Amy was simply "a 2x4 piece of foam that's about an inch thick that has some handles on it." It was faster than the toboggan-type sled used by some of the others but the same type of sled Hall used. Hall was an experienced skier, snowboarder and sledder; there was no evidence that Amy was and Hall never inquired. Once the activity commenced, Hall was able to negotiate the mountain and come to a stop without harm; Amy, it appears, could not. He lived; she died. Amy's parents seek compensation in a jury trial that would assess whether Hall is liable for her death.

I believe that the trial court improperly granted summary judgment. This case should be decided by a jury.

#### **AVAILABLE FACTS**

Though the lead opinion accurately relates many of the factual assertions in defendant's declaration, which we may assume he presented in the best light possible for himself, I believe it is useful to add to defendant's declaration by including his deposition testimony. Because of the trial court's ruling preventing a trial, this was the one time that defendant's version of the events was subjected to meaningful adversarial testing.

1. Defendant flew the victim and seven other people from Van Nuys, California, to Park City, Utah, in his father's private airplane. Defendant knew how to pilot the airplane and his father would let him use it.

2. One of defendant's jobs following college graduation was as a mechanical engineer. He had majored in aerospace engineering at the University of California, Los Angeles.

3. Though he worked as a lift operator for the Deer Valley Ski Resort just before the accident, defendant minimized his state of knowledge about the relevant rules in these terms: "I wouldn't say that I believed or knew of any rules that [nighttime sledding on the ski runs] would be violating. I guess that said—yeah, I guess that's the best I can answer that."

4. Defendant did not ask the victim about her prior experience with winter downhill sports, including sledding.

5. Defendant had bought the sleds the party used on the night of the accident.

6. The victim "was going very fast" just before the accident, "faster than I had been going," defendant explained.

7. The flat foam sled defendant had equipped the victim with was "basically a—maybe a 2x4 piece of foam that's about an inch thick that has some handles on it. I mean, it's a commercially made sled, but that's essentially what it is."

8. Defendant's foam sleds are faster than the toboggan type he also owned.

9. Defendant told the sledding party that run was "steepest before the bridge." "[I]t would be steep and then it would flatten out again" at the bridge, "and then it would roll over again into a section that goes down to the bottom of the chairlift." "We didn't really have a lengthy discussion about what was past [the bridge] where we were supposed to stop . . . ."

10. In his declaration, defendant stated that he drove the others to the venue and "gave the young women," including the victim, "instructions on doing the run." He told

them to stop at a bridge midway down the slope. “I . . . told them to stop by rolling off into the snow,” and defendant said that the run became steeper beyond the bridge.

11. Also in that declaration, defendant professed to be “an experienced skier, snowboarder and sledder.”

## DISCUSSION

The standard of review of a trial court’s ruling on a summary judgment motion is the same for sports-injury cases as for other tort claims. When a reviewing court is called upon to determine “whether [a] defendant’s motion for summary judgment should have been granted[ ] [¶] [t]he rules of review are well established. If no triable issue as to any material fact exists, the defendant is entitled to a judgment as a matter of law. [Citations.] In ruling on the motion, the court must view the evidence in the light most favorable to the opposing party. [Citation.] We review the record and the determination of the trial court de novo.” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499 (*Shin*).

The parties marshal a number of Court of Appeal decisions that could be relied on to arrive at the lead opinion opinion’s conclusion or my own contrary view. Rather than engage in a long discussion of which ones are persuasive and which not, I think it better to focus on the decisions of the California Supreme Court. In my view, Supreme Court precedent militates in favor of reversing the trial court’s ruling.

“Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others. [Citations.] The existence of a duty is not an immutable fact of nature, but rather an expression of policy considerations providing legal protection. [Citation.] Thus, the existence and scope of a defendant’s duty is a question for the court’s resolution. [Citation.] When a sports participant is injured, the considerations of policy and duty necessarily become intertwined with the question of whether the injured person can be said to have assumed the risk.” (*Shin, supra*, 42 Cal.4th at pp. 488-489.)

The “policy” with which the court is concerned is defined in *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003 (*Kahn*): “[S]ome activities—and,

specifically, many sports—are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.”

At issue here is primary assumption of a risk, i.e., a situation in which a defendant may be held liable for reckless conduct (e.g., *Shin, supra*, 42 Cal.4th 482; *Kahn, supra*, 31 Cal.4th at p. 996) but “owes *no duty* to protect a plaintiff from particular harms arising from ordinary, or simple negligence. [Citation.] In a sports context, the doctrine bars liability because the plaintiff is said to have assumed the particular risks inherent in a sport by choosing to participate. [Citation.] Thus, ‘a court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm.’ ” (*Shin, supra*, at p. 489.)<sup>1</sup>

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<sup>1</sup> The assumption of the risk doctrine has two components, primary and secondary, and is summarized in *Cheong v. Antablin* (1997) 16 Cal.4th 1063 as follows: “primary assumption of risk [consists of] ‘those instances in which the 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’ ” (*id.* at pp. 1067-1068), whereas “secondary assumption of risk [consists of] ‘those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty.’ [Citation.] Primary assumption of risk, when applicable, completely bars the plaintiff’s recovery. [Citation.] The doctrine of secondary assumption of risk, by contrast, ‘is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties.’ [Citation.] Whether primary or secondary assumption of risk applies ‘turns on whether, in light of the nature of the sporting activity in which defendant and plaintiff were engaged, defendant’s conduct breached a legal duty of care to plaintiff.’ [Citation.] The test is objective; it ‘depends on the nature of the sport or activity in question and on the parties’ general relationship to the activity’ rather than ‘the particular plaintiff’s subjective knowledge and awareness . . . .’ ” (*Id.* at p. 1068.)

Our Supreme Court has provided considerable guidance in how to assess duty and risk assumption. It has decided cases that bear on the question before us, beginning with and flowing from the landmark plurality opinion in *Knight v. Jewett* (1992) 3 Cal.4th 296.

The lead opinion here concludes that whether defendant was a “social host, provider of a recreational opportunity, and coparticipant” (lead opn., *ante*, at pp. 17, 18, 19, 26), he lacked any duty “to either protect Amy [the victim] from the inherent risk of colliding with a tree, eliminate that risk, or avoid ordinary negligence with respect to the activity.” (*Id.* at p. 26.) However, defendant does not fit neatly in any of the three categories the lead opinion identifies. In addition, there is a triable issue of fact whether defendant’s conduct was reckless; therefore, whether he had a mental state of “ordinary negligence” (*ibid.*) does not bear on the question whether a jury should consider the facts and decide the case.

To be sure, our Supreme Court has imposed heightened scrutiny on lawsuits brought by injured athletes when the alleged tortfeasor was a coach, a fellow participant, or a host (which the lead opinion has aptly named a “recreational opportunity provider”), all roles that defendant played to some extent.

With regard to coaches, “ ‘because a significant part of an instructor’s or coach’s role is to challenge or “push” a student or athlete to advance in his or her skill level and to undertake more difficult tasks, and because the fulfillment of such a role could be improperly chilled by too stringent a standard of potential legal liability, we conclude that . . . 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.’ ” (*Shin, supra*, 42 Cal.4th at pp. 490-491, quoting *Kahn, supra*, 31 Cal.4th at p. 996.)

With regard to fellow participants, “coparticipants’ limited duty of care is to refrain from intentionally injuring one another or engaging in conduct that is ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport.’ ” (*Shin, supra*, 42 Cal.4th at pp. 489-490.)

Finally, with regard to hosts/recreational opportunity providers, a “host school and its agents owe a duty to home and visiting players alike to, at a minimum, not increase the risks inherent in the sport” (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162)—a standard that, in the context of a social host entertaining guests, may fairly be likened to a similar duty to avoid recklessness, i.e., not to “breach[ ] the limited duty of care . . . by engaging in conduct that was ‘so reckless as to be totally outside the range of the ordinary activity involved in [the activity]’ ” (*Shin, supra*, 42 Cal.4th at p. 486), as opposed to the lack of a “duty to eliminate, or protect a plaintiff against, risks inherent in a sport—that is, against ordinary careless conduct considered to be part of the sport” (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 779).

I am not aware of any Supreme Court decision, however, considering a case like this one, in which defendant: (1) was at least a seasonal resident of the area to which he invited the victim; (2) had worked for the very ski resort on whose facilities she died; (3) had explored the area and knew the nature of the terrain on which his guests would be sledding; (4) had an engineering education and work background, which would have acquainted him with the laws of physics and the mechanical effects of speed followed by sudden deceleration; (5) gave the victim, not an experienced sledder, a primitive, difficult-to-control sled that was among the fastest that he owned; but (6) instructed her to try to stop at the bridge even though the steepest, and thus the fastest, part of the run was immediately before the bridge.

The state of the law, as explicated by our Supreme Court, cannot be stated more plainly than this: “[I]n the context of primary assumption of risk (that is, liability of active sports coparticipants for injuries arising from the normal conduct of the sport), the absence of a duty to protect against ordinary negligence does not absolve a defendant from liability based upon reckless conduct.” (*City of Santa Barbara v. Superior Court*, *supra*, 41 Cal.4th at p. 781.) As I have explained, that rule applies to primary assumption of the risk generally in sports-injury cases. After considering the foregoing factors and observing his demeanor as defendant testified, a trier of fact could conclude that he was reckless if it discounted the self-justifying aspects of his account of the accident and gave more credit to his admissions and the objective circumstances leading up to the accident. Or, I acknowledge, a trier of fact could decide that he was, at worst, merely negligent, considering that he knew that the victim had some experience with sledding and some idea of the nature of the terrain and was familiar with winter downhill sports generally.

The point, however, is to let the case be decided in a courtroom, not on the basis of documents not subjected to the same level of adversarial testing. As Justice Kennard has cogently observed, “because the question of what is ‘inherent’ in a sport is amorphous and fact-intensive, it is impossible for trial courts ‘to discern, at an early stage in the proceedings, which risks are inherent in a given sport.’ ” (*Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 169 (conc. & dis. opn. of Kennard, J.)) That is particularly apt here where the “sport” is an unusual one, defined by the lead opinion as “a midnight recreational trespass onto an unlighted, intermediate ski run for the purpose of sledding down the ski run after it was closed to the public.” (Lead opn., *ante*, at p. 15.)

*Kahn* signals that summary judgment is unwarranted. There are important parallels in that case, although there are important differences too, as must be expected in this “amorphous and fact-intensive” area. (*Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 169 (conc. & dis. opn. of Kennard, J.))

In *Kahn*, a 14-year-old novice on the school's swim team told her coach of her deep-seated fear of doing a racing dive in shallow water. On race day, she begged her coach not to schedule her for that maneuver, but he insisted that if she refused, she would be denied any participation. Allowed no alternative, she prepared by practicing the shallow water dive and broke her neck. The trial court granted summary judgment and the Court of Appeal affirmed. The Supreme Court found that evidence of the following circumstances, as summarized in the introduction to the opinion, required a trial: "the maneuver of diving into a shallow racing pool, if not done correctly, poses a significant risk of extremely serious injury, and . . . there is a well-established mode of instruction for teaching a student to perform this maneuver safely. [There is] . . . a disputed issue of fact as to whether defendant coach provided any instruction at all to plaintiff with regard to the safe performance of such a maneuver, as well as to the existence and nature of the coach's promises and threats. Under these circumstances, the question whether the coach's conduct was reckless in that it fell totally outside the range of ordinary activity involved in teaching or coaching this sport cannot properly be resolved on summary judgment." (*Kahn, supra*, 31 Cal.4th at pp. 996-997.)

Here, of course, there is no evidence of threats or improper promises. But even defendant's evidence raises some of the same material factual questions: did careening down the slope pose a significant risk of serious injury or death; did defendant's superior knowledge and experience and his assumption of the role the lead opinion refers to as "recreational opportunity provider" render him a type of coach before the group began the sled runs and a coparticipant after the runs started; and did defendant provide adequate instruction and warnings to the victim? In addition, did defendant recklessly furnish the victim with a sled that was inadequate, given her level of experience and the steepness of the run, to allow her to safely end the run at the bridge?

*Shin* similarly favors reversing the trial court's ruling here. Arguably, the facts in *Shin* are less compelling for the plaintiff in that case than are the facts here. It would be

easy to characterize them as mere negligence on the defendant's part, accompanied by comparative fault on the plaintiff's:

“Plaintiff and defendant were playing golf with Jeffrey Frost at the Rancho Park Golf Course in Los Angeles. Defendant, the first of the threesome to complete the 12th hole, went to the 13th tee box. Plaintiff and Frost then finished putting and followed him. Frost took the cart path to the 13th tee box, which placed him perpendicular to, or slightly behind, defendant and to his right. Plaintiff took a shortcut, which placed him in front of defendant and to his left. Plaintiff stopped there to get a bottle of water out of his golf bag and to check his cell phone for messages. He did so even though he knew (1) that he was in front of the tee box, (2) that defendant was preparing to tee off, and (3) that he should stand behind a player who was teeing off. Defendant inadvertently ‘pulled’ his tee shot to the left, hitting plaintiff in the temple. . . . [¶] The parties dispute whether defendant knew where plaintiff was standing when he teed off. Plaintiff alleged that he and defendant made eye contact before defendant hit his shot. However, his accounts of just when that eye contact occurred were inconsistent. In his deposition, plaintiff testified that ‘we made eye contact *as I was cutting up the hill*’ toward the 13th tee box. (Italics added.) On the other hand, in his declaration, plaintiff stated that he made eye contact with defendant after he reached the location where he was struck. ‘[P]rior to anyone teeing off on the 13th hole, I made eye contact with [d]efendant [Jack] Ahn as he saw me standing in front of him in close proximity to his left.’ [¶] In his declaration, defendant stated: ‘During the practice swing I looked to see if the area directly ahead of me where I was aiming was clear. I did not see anyone. I then stepped forward and focused on the golf ball for 15 to 20 seconds while settling into my stance and then I hit the ball.’ In his deposition, defendant testified he did not know where plaintiff was, either when he took his practice swing or when he actually teed off.” (*Shin, supra*, 42 Cal.4th at pp. 486-487, fns. omitted.)

Nevertheless, after concluding that the primary assumption of the risk doctrine applied to a noncontact pastime like golf (*Shin, supra*, 42 Cal.4th at p. 497), *Shin* held that the defendant's summary judgment motion was improperly granted. Its consideration of a variety of circumstances is valuable to our consideration here of the multiplicity of evidentiary factors and inferences that a trier of fact could draw from them. *Shin* stated: "Many factors will bear on whether a golfer's conduct was reasonable, negligent, or reckless. Relevant circumstances may include the golfer's skill level; whether topographical undulations, trees, or other impediments obscure his view; what steps he took to determine whether anyone was within range; and the distance and angle between a plaintiff and defendant. [¶] Here plaintiff testified at his deposition that he and defendant made eye contact 'as I was cutting up the hill.' He did not make clear, however, how far he had proceeded up the hill, how far away he was from the defendant, or whether he was stationary when the eye contact occurred. At his deposition, defendant said he looked to see if the area 'directly ahead' of him was clear. It is not apparent just how broad or limited that area was. This record is simply too sparse to support a finding, as a matter of law, that defendant did, or did not, act recklessly. This will be a question the jury will ultimately resolve based on a more complete examination of the facts. We do not suggest that cases like this can never be resolved on summary judgment, only that this record is insufficient to do so." (*Id.* at p. 500, fn. omitted.)

Under *Shin* and *Kahn*, I believe that summary judgment was improper here. In addition to the evidentiary questions that defendant's own evidence raises, which I need not repeat here, a thread that runs through that evidence is defendant's vastly superior knowledge in comparison to the victim's of the inherent risks in the unusual "sport" to which he introduced her. (See *Garcia v. Superior Court* (1990) 50 Cal.3d 728, 736 [under the law of negligence, one whom the injured party reasonably believes to possess superior knowledge has a duty to use reasonable care in providing information to that individual about his or her personal safety].) If a trier of fact found that defendant,

knowing as much about sledding and the terrain as he did, also knew that the victim was inexperienced but gave her a fast foam sled to descend a steep slope at night and told the sledding party that the steepest part came before the bridge that marked the fateful dividing line between a safe stop and injury or death, that trier of fact could, under *Shin* and *Kahn*, find recklessness, i.e., “conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result.” (*City of Santa Barbara v. Superior Court, supra*, 41 Cal.4th at p. 754, fn. 4.)

Therefore, I would reverse the order granting summary judgment.

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Walsh, J.\*

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\* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.