No. 47149-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Pamela O'Neill, Appellant

v.

The City of Port Orchard, Respondent

BRIEF OF APPELLANT

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INTRODUCTION

This is an action relating to a serious injury to plaintiff/appellant Pamela O'Neill on July 17, 2008 from a fall on a city street from her bicycle which she was using to commute to and from work. She alleges road defects and poor maintenance caused her fall. The concrete slabs at the scene have shifted and have gaps and ledges. There is evidence at the scene of prior City attempts to repair the roadway, but they are worn and ineffective.

Defendant/Respondent City of Port Orchard nominated City Engineer Mark Dorsey to serve as their CR 30(b)(6) deponent/spokesman. His deposition was taken on September 13, 2013.

Defendant moved for summary judgment under CR 56. Plaintiff submitted materials in response, including but not limited to, a declaration from proposed expert James Couch, who had visited the scene and taken photos and measurements.

The court struck the plaintiff's expert and granted the motion to dismiss. This appeal follows.

ASSIGNMENTS OF ERROR

1. The court erred by finding no duty of the City to maintain roadways safe for bicycle use.
2. The court erred by finding the plaintiff's bicycle expert was not qualified and disregarding his facts and opinions.
3. The court erred by finding that plaintiff was engaged in the sport of bicycling, invoking assumption of risk principles, and negating the

City's duty to provide safe roads, as evidence shows she was commuting to and from work by bicycle.

4. The court erred in granting summary judgment by finding as a matter of law that plaintiff has failed to make a prima facie case of negligence by the City of Port Orchard when there are facts on which reasonable minds could differ.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. What is the City's duty to provide a safe roadway for bicyclists using the roadway for transportation purposes?
2. Did the City breach its duty to provide a safe roadway to plaintiff?
3. Did the trial court abuse its discretion in disregarding the plaintiff's expert's opinions?
4. Does using a bicycle on a public road for transportation purposes invoke assumption of risk principles absolving the City of a duty to provide safe roads?
5. Are there sufficient facts to cause reasonable minds to differ on defendant's negligence?

STATEMENT OF THE CASE

A. Statement of Facts.

The street in question is Sidney Avenue, a major road into the City of Port Orchard. Dorsey Deposition, p. 68, lines 12-17, CP 111. As it approaches downtown, it has a significant downhill grade. Where Sidney has cross streets, such as the one at Kitsap Street, the grade levels out, then the

descent starts again on the far side of the cross street. Otto declaration, Exhibit 4, CP 122, 123, 124. The City of Port Orchard has the responsibility to maintain the roadway at Sidney Avenue and Kitsap Street. Dorsey deposition, p. 35, line 24, CP 106. Sidney Avenue was apparently paved in 1946 or before. Dorsey deposition, p. 56, line 20 to p. 57, line 21, CP 109. There have been no major repairs since that time. Sidney is constructed of concrete slabs. The slabs have moved and heaved over time, with one panel rising while the other one does not. Dorsey deposition, p. 58, line 20 to p. 59, line 7. CP 110. This leaves gaps and ledges in the roadway. The gaps and ledges are significant. Some of the shifting has raised the concrete slabs from neighboring slabs in excess of an inch, with the ledge running parallel to vehicular traffic. Otto Declaration, Exhibit 4, CP 121-124. Defects that run parallel to the direction of bicycle travel are particularly hazardous, are difficult to see, and need not be very large to cause a bicycle accident. Declaration of James Couch, CP 124A-E[1]. Even City Engineer Dorsey acknowledged that diagonal hazards can catch a bicycle tire and kick it to the side. Dorsey deposition, p. 49, line 20 to p. 50, line 2, CP 108.

Plaintiff's expert, James Couch, has examined the site and states: "I have seen only a few hazards as pernicious as the pavement defect located

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[1] Although Couch's Declaration was listed in plaintiff's Designation of Clerk's Papers, the County Clerk erroneously omitted it initially from the Index of Documents transmitted to the Court of Appeals. The odd CP pagination of this document, which Appellant has been told by the County Clerk will be used, permits it to stay in chronological order with the other documents.

near the intersection of Sidney Avenue and Kitsap Boulevard in Port Orchard." Declaration of James Couch, ¶ 30, CP 124D .

There are no records that maintenance has ever been done at the intersection of Sidney Avenue and Kitsap Street. Dorsey deposition, p. 54, line 17, CP 109. Even without records, there is evidence of prior attempts at repair by City road crews, as shown by asphalt patches on the road. Dorsey Deposition, p. 55, line 6-21, CP 109. No one currently working in the City road department can remember when those patches were made. Dorsey Deposition, p. 65, line 1-11, CP 111. Dorsey estimated that the patches could have been ten to thirty years old, and were placed to reduce the differential so that the edges would not be so abrupt. Dorsey deposition, p. 67 line 20 to p. 68 line 2. CP 111. He agreed that the patches were very worn, and that "Yes, I would say that the City does need to address this section of road...." Dorsey deposition, p. 68, lines 3-5, CP 111.

As to the question of whether there are regular inspections of roadways for safety issues, Mr. Dorsey stated the City of Port Orchard operates solely on a "complaint-based system." (Dorsey deposition, page 78, lines 11-17), implying it does no regular inspections of its streets. Apparently it takes an injury or accident before a defect will be examined. Whether there are actual repairs is based on financial constraints. (Dorsey deposition, page 79, lines 1-24).

The City has no training for road staff as to the needs of bicycles. Dorsey deposition, p. 52, line 11 -25, CP 108. The roads are maintained for

vehicles. As to the specific intersection in question, Dorsey stated in his deposition at page 59, starting at line 19, CP 110:

> A: ... I think that even though that roadway, from what I've been told, lifts and falls seasonally, we've not done anything to that since I've been here. Again, it's primarily maintained for vehicles.
> Q: Vehicles other than bicycles?
> A: Yes.

The grade from South to North on Sidney is a significant descent, in the neighborhood of 25 percent both above and below the landing at Kitsap Street. Dorsey deposition, p. 69, line 16 to p. 70, line 4, CP 112. This exceeds current standards, but which the City Engineer contends is permitted because it was constructed before the standards. The road was sloped, "[I]n the order of 25 percent, definitely in excess of 12 percent," the maximum grade currently allowed by law. (Dorsey deposition, p. 70, lines 5-18, CP 112).

Plaintiff/Appellant Pamela O'Neill regularly rode her bicycle to and from work. O'Neill deposition, p. 13, lines 3-11, CP 92. O'Neill had no driver's license, and so used her bicycle to get to work, and to go to the store, and to visit friends. O'Neill deposition, p. 13, lines 6-18, CP 92. On the day of the incident, she was bicycle commuting on her way home from work. O'Neill deposition, p. 16, lines 22-25, CP 92. Ms. O'Neill worked at that time as a patient personal care provider at Sidney House. Plaintiff's deposition at p. 41, lines 22 - 25, CP 98. Her bicycle was a Cannondale, which she obtained the year before. O'Neill deposition, pp. 11-12. CP 91. She first learned to ride a bicycle at age six. O'Neill deposition p. 12, line 16,

CP 91. She was born in 1960. CP 29. At the time this incident arose, she was 48 years of age. CP 29.

In the year preceding the bike accident, Plaintiff rode her bike daily. O'Neill deposition, p. 13, line 5, CP 92. She never had a bicycle accident, and rode her bike frequently without incident. Moreover, Plaintiff never had any near misses with cars or other bicyclists prior to the bike accident underlying this litigation. O'Neill deposition, p. 15, lines 12-20, CP 92. Ms. O'Neill is a skilled bike rider, but does not ride trails and stays on the concrete. Plaintiff's deposition, p. 14, line 22 to p. 15, line 8, CP 92. While she frequently rode elsewhere in the City of Port Orchard, Ms. O'Neill never rode her bicycle anywhere other than the City of Port Orchard itself. O'Neill deposition, p. 14, line 25 to p. 15, line 2, CP 92. Although she had been bicycle commuting for a year, this was the first time she used this particular roadway with her bicycle. O'Neill deposition, p. 29, lines 10-25, CP 37.

As to traffic control devices pertinent to travel on Sidney Avenue, there was no stop sign for a vehicle or bicycle traveling northbound on Sydney as she was. There were stop signs for cross traffic, eastbound and westbound on Kitsap Street. O'Neill deposition, p. 60, lines 9-13, CP 100, Otto Declaration, Exhibit 4, CP 124. There was a yellow incline sign warning travelers of a hill that Plaintiff saw further up the hill as she approached the descent. O'Neill deposition, p. 60, line 24, CP 100, which Ms. O'Neill understood to mean the incline would be steeper, and to use caution. O'Neill deposition, p. 61, lines 1-3, CP . At the time Plaintiff saw

the incline sign, her speed was already slow, but she brought her bicycle to an even slower speed by evenly applying the brakes in the handlebars and pedals of her bicycle. O'Neill deposition, p. 62, lines 2-11, CP 101. There was no signage prohibiting the use of bicycles on Sidney. Deposition of Dorsey, p. 52, line 6, CP 108. The City Engineer never recommended a sign prohibiting bicycle travel on this road, but would consider one if they lost this case. Dorsey deposition p. 70, line 19 to p. 71, line 12. CP 112.

On July 17, 2009, plaintiff Pamela O'Neill was riding home after work by bicycle. O'Neill deposition, p.16, line 25, CP 92. She was proceeding Northbound on Sidney Avenue in Port Orchard, downhill. As she approached the intersection with Kitsap Street, described above, a truck was traveling her same direction, requiring her to pull to the right to allow the truck to pass on the left, though there were cars parked on the right side of the road. O'Neill deposition, p. 20, lines 8-19, CP 93 . This is the area where bicycles in the flow of traffic are expected to travel, and where experienced and skilled bicyclists are most likely to ride. Declaration of James Couch, ¶ 21, CP 124D. When there is other traffic on the roadway, bicycles are to move to the right, so that traffic can pass, but they cannot go so far right as to be endangered by the parked cars.

Suddenly, her front tire changed directions, and she was thrown over the handlebars. O'Neill deposition, p. 20, line 3, CP 93, p 21, line 24, CP 94. It turned her handlebars. She testified that the condition of the road caused her to fall, Plaintiff declaration, p. 23, line 24. In particular the uneven, rough

road surface of the road which had been repaired caused the fall. Plaintiff declaration, p. 24, lines 9-16, CP 94.

In further describing why she fell, Ms. O'Neill stated, "All of a sudden the bike changed directions with the front tire. That's all I know." O'Neill deposition, p. 21, lines 24-25 CP 94. Plaintiff explained that she felt a vibration and a quick jerk when her tire changed direction, and her handlebars moved to her right. O'Neill deposition, p. 22, lines 1-7, CP 94.

Plaintiff landed on her head and right shoulder, and injuring her elbow, back, hands and knees. O'Neill deposition, p. 33, lines 10-24, CP 96. Fortunately she was wearing a bicycle helmet, and suffered no head injury or loss of consciousness. Plaintiff declaration, p. 33, lines 13-20, CP 96. She knew right away that her bones broke, as she could hear them cracking and had immediate pain. Plaintiff declaration, p. 34, lines 3-9, CP 96, CP 30. The assessment of paramedics was possible right shoulder dislocation, elbow, rib and clavicle fracture. CP 30. She was in the hospital for seven days with a fractured clavicle and punctured lung. Deposition of Plaintiff, p. 39 l lines 17-24, CP 97, p. 40, line 1, CP 97.

Weather was not a contributing factor to this crash and injury. The weather conditions that day were dry and warm. O'Neill deposition, p. 43, line 1. CP 98. She was sober. O'Neill deposition, p. 42, lines 23, 24, CP 98. Plaintiff was riding a Cannondale brand bicycle, an excellent bike, which the City, through counsel, admits. O'Neill deposition, p. 12, line 13, CP 91.

James Couch was retained to look at the circumstances and supply an expert opinion as to the cause of this crash. But for a short hiatus in 1979, Couch has spent his career the bicycle industry since 1975. He was trained in manufacturing and fitting bicycles by the top companies, and is employed by REI as a Technical Specialist II, the highest level cycle and ski shop technician certification. He has been trained and certified as a United States Cycling Federation Category 3 cycling coach. He has owned his own bicycle shop, Spoke & Sprocket, for 17 years in Tacoma, Washington. His shop provided mechanical support to the areas top organized rides, including the Seattle to Portland Classic (STP), Peninsula Metric, Daffodil Metric, and Rhapsody events. His shop sponsored recreational and racing bicycle clubs. He has organized and run bicycle races, and has provided assistance in both racing and recreational route and course development. Declaration of James Couch, CP 124A-C.

While a member of the University Place Economic Development Committee, he was often asked to give advice about cycling facilities. He is currently on the Multnomah County Bicycle and Pedestrian Citizen Advisory Committee which advises Multnomah County regarding bicycle and pedestrian facilities. CP 124B.

Mr. Couch has served as a bicycle accident expert for 17 years, identifying eight specific court cases in which he was retained, and referencing being a consultant in a number of other cases which did not make

it to formal litigation. He has never been found unqualified to serve as an expert witness. CP 124B-C

Mr. Couch met with Pamela O'Neill at the scene of the crash, discussed the accident with her, read her deposition, and personally inspected the site. Couch declaration, ¶¶ 6-8, CP 124C. He has reviewed all of the photographs, the deposition of the City Engineer, Mr. Dorsey, and the accident report. Couch declaration, ¶¶ 9-11, CP 124C. He saw that the there are pavement defects of concrete slabs that have separated in the area that her front tire of her bicycle hit. Couch declaration, ¶ 12, CP 124C. He saw that the height difference between the slabs exceed one inch, which alone is enough to cause the most experienced bike rider to lose control of their bicycle. Couch declaration, ¶ 13, CP 124C. Otto Declaration, Exhibit 4, CP 124. He saw that the slabs in question are separated from each other by a distance that varies, from two to six inches, with one as wide as eleven inches. Couch declaration, ¶ 14, CP 124C. Otto Declaration, Exhibit 4, CP 122-124. He saw that the surface area within (between) the slabs is very rough and formed by a variety of substances, including dirt, gravel, and road patch material. Couch declaration, ¶ 15, CP 124C. He saw that the primary defect runs nearly parallel to the direction of travel, and is long, running the length of the slab. Couch declaration, ¶ 16, CP 124C. He saw that the roadway defects at Sidney Avenue and Kitsap Street are in the area where skilled and experienced bicyclists are most likely to ride, far enough from parked cars to be safe for travel. Couch declaration, ¶¶ 21, 22, CP 124D. He

knows that the defects which run parallel to the direction of travel are difficult for a cyclist to see while cycling. Couch declaration, ¶ 17, CP 124C-D. He knows that roadway defects which run the direction of bicycle travel need not be very large to cause a bicycle accident. Couch declaration, ¶ 18, CP 124D.

Mr. Couch expressed an opinion that, this particular defect creates a significant hazard to cyclists, given its size and length. Couch declaration, ¶ 19, CP 124D, as, once a bicyclist's wheel engaged the defect, even the most experienced cyclist would have trouble maintaining control of the bicycle. Couch declaration, ¶ 20, CP 124D. Mr. Couch found Ms. O'Neill to be a cautious, skilled, safe cyclist. Couch declaration, ¶ 29, CP 124D. He expressed the opinion that Ms. O'Neill's tire engaged the road defect, which steered her bike, caused a loss of control, turned her bike, and caused her body to fly over the handlebars. Couch declaration, ¶ 19, CP 124D. Mr. Couch expressed the opinion that, in his entire career, he has seen only a few hazards as pernicious as the pavement defect here at issue. Couch declaration, ¶ 30, CP 124D.

B. Statement of Procedure

A Summons and Complaint for damages was filed on July 16, 2012. CP 1-7.

An Answer was filed July 27, 2012. CP 8-12.

Defendants filed a Motion for Summary Judgment on August 28, 2014, CP 13-14, along with a Memorandum of Authorities, CP 15-26, and a Declaration of Patrick McMahan, with exhibits, CP 27-48.

Plaintiff's Response was filed September 22, 2014, along with a Declaration of Anthony C. Otto, with exhibits, CP 87-124, and a Declaration of James Couch, CP 124A-E.

Defendant filed a reply on September 29, 2014, CP 125-137, including a motion to strike plaintiff's expert, CP 127-131.

Argument was held on October 24, 2014. The court asked for supplemental authorities, which plaintiff supplied on October 24, 2014. CP 138-140.

The court entered findings of fact, Conclusions of law and an Order Granting Summary Judgment on December 1, 2014. CP 141-147.

Plaintiff filed a timely motion to reconsider on December 11, 2014. CP 148-150, and Supplemental authority on December 19, 2014. CP 151-158.

An Order on Reconsideration denying reconsideration was filed on December 19, 2014. CP 159-161.

A Notice of Appeal was timely filed. CP 162.

ARGUMENT & AUTHORITIES

A. Summary Judgment Presumptions

i. At the Trial Court

There is a strong presumption that juries, not judges, will decide issues of fact, as the right to jury trial, even in civil cases, is established in the Washington State Constitution, Article 1 § 21:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The Washington State Supreme Court reaffirmed that principle on May 28, 2015 in Davis, et al. V. Cox, et al, Supreme Court Docket number 90233-0, when they declared unconstitutional RCW 4.24.525, which required trial courts to weigh evidence in deciding an anti-SLAPP motion to dismiss, similar to a summary judgment motion, yet requiring more intensive proof to withstand dismissal.

Still, summary judgment is constitutionally permissible "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *LaMon v. Butler*, 112 Wn.2d 193, n. 5, 770 P.2d 1027 (1989); *Sanders v. City of Seattle*, 160 Wn.2d 198, 207, 156 P.3d 874 (2007).

While, generally, issues of fact are for trial, *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230 (1983), a court may determine an issue of fact if reasonable minds could not differ on the outcome, and could reach but one conclusion. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007); *Dutton v. Washington Physicians*, 87 Wn. App. 614, 943 P.2d 298

(1997); *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). If, however, reasonable minds could differ, then summary judgment is not appropriate. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003).

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. CR 56(c); *Public Employees Mutual Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 828 P.2d 63 (1992). In determining if summary judgment is appropriate, the court must consider all evidence and inferences in a light most favorable to the non-moving party. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), *Davis v. Niagara Mach. Co.*, 90 Wn.2d 342, 581 P.2d 1344 (1978).

When it comes particularly to negligence decisions, the supreme court has noted that:

> "issues of negligence and proximate cause are generally not susceptible to summary judgment." *Ruff [v. King County]*, 125 Wash.2d at 703, 887 P.2d 886 (citing *LaPlante v. State*, 85 Wash.2d 154, 159, 531 P.2d 299 (1975)); *accord Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wash.2d 745, 759, 912 P.2d 472 (1996) (noting negligence is ordinarily a question of fact).
>
> Similarly, whether a condition is inherently dangerous or misleading is generally a question of fact. *See Leber v. King County*, 69 Wash. 134, 124 P. 397 (1912); *Provins v. Bevis*, 70 Wash.2d 131, 422 P.2d 505 (1967); *Tanguma v. Yakima County*, 18 Wash.App. 555, 563, 569 P.2d 1225 (1977); *cf.* **1224 *Hewitt v. Spokane, Portland & Seattle Ry. Co.*, 66 Wash.2d 285, 291–92, 402 P.2d 334 (1965) (noting unusual circumstances at railroad crossing may allow trier of fact to find crossing "exceptionally dangerous" and "extrahazardous"). Likewise, the adequacy of the

> government's attempt to take corrective action is generally a question of fact. *E.g., Livingston v. City of Everett,* 50 Wash.App. 655, 658, 751 P.2d 1199 (1988).

Owen v. Burlington N. and Santa Fe R.R. Co., 153 Wash.2d 780, 788; 108 P.3d 1220, 1223 (2005). Further, negligence is generally a question of fact for the jury, and should be decided as a matter of law only "in the clearest of cases and when reasonable minds could not have differed in their interpretation" of the facts. *Bodin v. City of Stanwood*, 130 Wash. 2d 726, 741, 927 P.2d 240, 248 (1996); *Young v. Caravan Corp.,* 99 Wash.2d 655, 661, 663 P.2d 834, 672 P.2d 1267 (1983); *accord Thomas v. Wilfac, Inc.*, 65 Wn.App. 255, 261, 828 P.2d 597, *review denied,* 119 Wn.2d 1020, 838 P.2d 692 (1992).

ii. Summary Judgment On Appellate Review

Review of a grant of summary judgment is de novo. *Bank of Am. v. David W. Hubert, P.C.*, 153 Wn.2d 102, 111, 101 P.3d 409 (2004). The reviewing court is to engage in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Kaiser*, 161 Wash. App. 705, 718, 254 P.3d 850, 857 (2011), *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 501, 115 P.3d 262 (2005). No deference is to be given to the trial court's findings and determinations. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). Trial court findings are superfluous and need not to be considered on appeal. *Hubbard v. Spokane County*, 146 Wash.

2d 699, n 14, 50 P.3d 602 (2002). Accordingly, there are no verities on appeal.

B. Negligence Generally

This is a negligence claim. To prove negligence, a plaintiff must prove 1) a duty to conform to a standard of conduct for the protection of others against certain risks, 2) a breach of that duty, 3) that the breach was a proximate cause of plaintiff's injury, and 4) damages. DeWolf and Allen on Tort Law and Practice, Washington Practice 16 § 2:1, *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985).

Since the Washington State Legislature waived sovereign immunity for municipalities in 1967, now codified at RCW 4.96.010, municipalities are generally held to the same negligence standards as private parties. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 731, 927 P.2d 240 (1996); *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

C. Duty of City to maintain roads

i. Municipal duty generally

A municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845, (2002). Washington law has held governmental entities responsible for unsafe roads since at least 1940. *See, e.g. Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940). The City owed Ms. O'Neill a duty to provide reasonably safe roads. This duty includes a duty to safeguard against

a dangerous or misleading condition, including the overarching duty to provide reasonably safe roads for the people of Washington to drive on. *Owen v. Burlington Northern and Santa Fe Railroad Company,* 153 Wn. 2d 780, 787-788, 103 P.3d 1220 (2005).

Under our comparative fault system under RCW 4.22.070, even if a traveler on the roads is negligent or reckless, the City's duty to provide safe roads is established. Casey Keller, the plaintiff in *Keller v. Spokane*, a motorcyclist, was alleged to be traveling as much as 80 miles per hour in a 30 mile per hour zone, yet the City's duty to provide safe roadways for ordinary travel remained. The phrase "ordinary travel" does not mean just automobile travel, as Keller was on a motorcycle. The fact that motorcycles are less common than four wheel vehicles did not matter. Stated another way, *Keller's* principle is that if the City breaches its duty to provide roadways safe for ordinary travel, the negligence of a traveler does not absolve the City of its breach. RCW 4.22.005 changed to the prior law so that contributory negligence is no longer a bar to recovery on a negligence theory. *Smith v. Fourre*, 71 Wn.App. 304; 858 P.2d 276 (1993).

ii. Duty as to Bicycle traffic

A bicycle is "ordinary travel" for a roadway. Bicycles are authorized to use public roadways. There is no ambiguity on this point. RCW 46.61.755 indicates in pertinent part:

> (1) Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this chapter....

A bicycle must follow the rules of the road, with some modifications. One such modification is contained in RCW 46.61.770, which states in part:

> (1) Every person operating a bicycle upon a roadway at a rate of speed less than the normal flow of traffic at the particular time and place shall ride as near to the right side of the right through lane as is safe except as may be appropriate while preparing to make or while making turning movements, or while overtaking and passing another bicycle or vehicle proceeding in the same direction. [additional rules for one way roads and limited access highways omitted.]

As bicycles are given rights to use the roadways and duties to follow traffic rules, bicycle traffic is a regular part of ordinary travel for considerations of negligence and municipal liability.

The City alleged below that, as a bicyclist, plaintiff must show that the City owes her a special duty, CP 19, or an additional duty to protect bicyclists, CP 20, line 8. That argument is erroneous, as bicycles are part of ordinary travel, just as was the motorcycle in Keller. The City's obligation is a general duty to provide safe roadways for all expected traffic, including bicyclists. The *Keller* duty and obligation of the City to maintain safe roadways for ordinary travel extends to bicycles.

In *Camicia v. Howard S. Wright Construction Co.*, 179 Wash.2d 684, 317 P.3d 987 (2014), a bicyclist was using a bicycle trail along the I-90 corridor, owned by the City of Mercer Island, when she crashed into a wooden post, suffering injury. The recreational immunity claim[2] turned on

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[2] The Recreational Immunity Statute does not apply here. Plaintiff/Appellant Pamela O'Neill was using her bicycle to get to and from work at the time of the injury. Recreational immunity under RCW 4.24.210 was not part of the summary judgment motion by the City of Port Orchard. It was neither raised

whether there were facts supporting a theory that the trail was used for transportation rather than recreation. As the title history of the land made clear, the trail was a part of a transportation corridor, and the bicycle was therefore being used for transportation, not recreation. The court overturned the summary judgment dismissal which was based on recreational immunity. At page 699, the *Camicia* court affirmed that bicycles are part of "ordinary travel" for Keller analysis:

> Extending the reach of RCW 4.24.210 to land that is open to the public for purposes other than recreation simply because some recreational use occurs not only undermines the statute's plain language and the legislature's intent but would also unjustly relieve the government of its common-law duty to maintain roadways in a condition reasonably safe for ordinary travel. *See Keller v. City of Spokane*, 146 Wash.2d 237, 249, 44 P.3d 845 (2002).

Please note and distinguish *Jewels v. City of Bellingham*, 180 Wn. App. 605; 324 P.3d 700 (2014), review accepted at 181 Wash.2d 1001 (September 2014) , a case involving a bicycle accident on a paved road in a city park. As the injury happened in a park, the analysis in that case was under the recreational immunity statute, RCW 4.24.210. Except for a brief mention in the dissent, the obligation to provide safe roadways under a *Keller* analysis was not discussed.

iii. Assumption of Risk Principles do not apply to Negate the City's Duty

a) Assumption of Risk generally

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nor briefed below.

Assumption of Risk is a legal principle which negates the duty of the defendant for negligence considerations. Assumption of risk means that the plaintiff, prior to the incident complained of, gave his consent to relieve the defendant of an obligation of conduct toward him, and agreed to assume a chance of injury from a known risk arising from the obligation for which the defendant has been relieved. DeWolf and Allen, Tort Law and Practice, Washington Practice Vol 16 §9:11.

Assumption of risk is recognized to have four separate classes: 1) Express, 2) Implied Primary, 3) Implied Reasonable, and 4) Implied Unreasonable. DeWolf and Allen, Tort Law and Practice, Washington Practice Vol 16 §9:11; *Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 496, 834 P.2d 6 (1992).

Express assumption of risk involved a contracted, bargained for, formalized assumption of risk, with a full subjective understanding of the specific risks undertaken, such as an express written waiver. *Leyendecker v. Cousins*, 53 Wn.2d 675, 770 P.2d 675 (1989). There is no express waiver here.

Implied primary assumption of risk is the same as express assumption of risk, but without the formality of a written agreement. *Taylor v. Baseball Club of Seattle*, 132 Wn.App. 32, 130 P.3d 835 (Div. I, 2006)(spectator in stands at a professional baseball game impliedly assumed risk of errant baseball). It still requires a subjective understanding of the risks inherent in the activity, and acceptance of those risks. It often is asserted as a defense

when a the plaintiff was participating in a sporting activity. DeWolf and Allen, Tort Law and Practice, Washington Practice Vol 16 §9:13, *Lascheid v. City of Kennewick*, 137 Wn.App 633, 641; 154 P.3d 307 (2007). If there is implied primary assumption of risk, it is a complete bar to recovery when the risk which was knowingly encountered causes harm, but it is only a factor to consider in comparative liability analysis when what causes harm is an unanticipated risk, outside that knowingly undertaken by participation. *Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 496, 834 P.2d 6 (1992) (inherent risk of skiing combined with negligent creation of ski race conditions by the ski area to permit a comparative fault analysis).

Inherent in the cases and analysis is some agreement between the defendant and the claimant before the injury. The plaintiff in *Taylor, supra*, was permitted into the ball park to enjoy the game. The plaintiff in *Scott, supra*, was permitted to ski. The plaintiff in *Kirk v. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987) was permitted to participate as a cheerleader for the school. Of note, in the case at bar, the City did not even have knowledge of plaintiff using the roads for her commute until after the crash. Except for a very limited discretion to close roads because of hazards to certain types of traffic, under RCW 47.48.010, which it chose not to exercise, the City must permit bicycle traffic under RCW 46.61.755, which grants right to bicyclists to use the roadways.

The other two types of assumption of risk, Implied reasonable assumption of risk and implied unreasonable assumption of risk are said to

now be considered for contributory or comparative liability purposes only, and do not negate the duty of the defendant to use reasonable care, DeWolf and Allen, Tort Law and Practice, Washington Practice Vol 16 §9:16. For this reason, they will not be further detailed here, in a duty analysis.

b) The trial court had no basis in fact or law to apply assumption of risk

The court below erroneously found and ruled as a matter of law that plaintiff was involved in the sport of bicycling, and assumed the primary risk of poor surface conditions and injury, absolving the City of its duty to provide safe roads. CP 144, 145.

At best, whether she was engaging in a sport would be a contested issue of fact, which under summary judgment principles would be a question for jury decision, making summary judgment inappropriate. However, there is no basis at all to conclude that she was engaged in any sport, or assumed any risk of negligence of others. The evidence shows that she was commuting by bicycle from work to home, O'Neill deposition, p. 16, lines 22-25, CP 92, as she had been doing for a year before injury. O'Neill deposition, p. 29, lines 10-25, CP 37. The evidence is that she was maintaining her speed and using caution. O'Neill deposition, p. 62, lines 2-11, CP 101. There is no basis to conclude that Ms. O'Neill was engaging in any sport. She had no driver's license, and needed and used a bicycle and the roads for transportation, as she has the statutory right to do. RCW 46.61.755.

Ms. O'Neill voluntarily encountered no more risk than any other traveler on the highway. There is always a risk that others will be negligent,

but that does not relieve the others from their duty of care. She was always cognizant of risks from other vehicles. She found other vehicles scary because she could not control what they do. O'Neill deposition, p. 14, line 10-15, CP 92. For the City to claim assumption of risk here, and for the court to adopt that theory, is as absurd as a negligent driver who collides with a bicycle claiming that the rider assumed the risk that she would be hit by a car.

Just because some bicycles are used for sport, such as BMX competitions, and for recreation, does not mean that every use of a bicycle is for sport, such that a bicyclist assumes the risk of negligence of others. Even recreational use does not negate the transportation purpose of roadways and city streets and transportation corridors. *Camicia v. Howard S. Wright Construction Co.*, 179 Wash.2d 684, 317 P.3d 987 (2014). Likewise, cars can be used for racing, but that does not mean that every automobile on the roadway is engaged in the sport of auto racing. Automobile drivers cannot be said to assume the risk that the City will be negligent in maintaining the roads. *See, e.g. Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

Spence v. U.S., 374 Fed.Appx. 717 (9th Cir., 2010), the case relied on by the court in finding assumption of risk, involved injury on a military training base during an organized long distance bicycling event in which Spence was one of many participants. Those facts are entirely distinguishable, as Ms. O'Neill was not engaged in any organized event, and was using her bicycle for transportation. *Spence* relied on other authorities

which were also entirely distinguishable, including *Knight v. Jewett*, 3 Cal.4th 296, 315-16, 834 P.2d 696, 708, 11 Cal.Rptr.2d 2, 14 (1992) (injury while playing touch football), *Moser v. Ratinoff*, 105 Cal.App.4th 1211, 1219-21, 130 Cal.Rptr.2d 198, 203-05 (2003) (a large organized 200 mile bike ride in Death Valley, in which the crowded conditions of the pack of riders led to a fall)[3], *Buchan v. U.S. Cycling Federation, Inc.*, 227 Cal.App.3d 134, 148, 277 Cal.Rptr. 887, 895 (1991)(injury during an organized bike race in which there was a collision with other riders), and *Connelly v. Mammoth Mountain Ski Area*, 39 Cal.App.4th 8, 11-12, 45 Cal.Rptr.2d 855, 857-58 (1995) (downhill skiing). As none of those activities are the equivalent of using a bicycle to get home from work, any assumption of risk analysis is inappropriate. The City had a duty to provide a roadway safe for ordinary travel, and the fact of commuting by bicycle on the roadway does not negate that duty, as a matter of law.

Other States have reached this same conclusion. In *Cotty v. Town of Southampton*, 64 A.D.3d 251, 257, 880 N.Y.S.2d 656, 661 (2009), the court held:

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[3] Even *Moser* distinguished bicycle riding for transportation from riding in an organized sporting event in its assumption of risk analysis. As stated at page 1221:

> It is true that bicycle riding is a means of transportation—as is automobile driving. Normal automobile driving, which obviously is not an activity covered by the assumption of risk doctrine, requires skill, can be done for enjoyment, and entails risks of injury. But organized, long-distance bicycle rides on public highways with large numbers of riders involve physical exertion and athletic risks not generally associated with automobile driving or individual bicycle riding on public streets or on bicycle lanes or paths.

> In sum, it cannot be said, as a matter of law, that merely by choosing to operate a bicycle on a paved public roadway, or by engaging in some other form of leisure activity or exercise such as walking, jogging, or roller skating on a paved public roadway, a plaintiff consents to the negligent maintenance of such roadways by a municipality or a contractor. Adopting such a rule could have the arbitrary effect of eliminating all duties owed to participants in such leisure or exercise activities, not only by defendants responsible for road maintenance, but by operators of motor vehicles and other potential tortfeasors, as long as the danger created by the defendant can be deemed inherent in such activities. We decline to construe the doctrine of primary assumption of risk so expansively.

Cotty v. Southampton, supra, involved a bicyclist having to swerve into traffic to avoid another cyclist who fell on a hazard very similar to that presented to Ms. O'Neill: an un-barricaded one inch drop off, "lip," running parallel to the direction of travel. Note that Cotty was injured during an organized event, with many other riders, yet the court did not find this risk a hazard which Cotty assumed.

See also *Childs v. County of Santa Barbara*, 115 Cal.App.4th 64, 8 Cal.Rptr.3d 823 (2004), in which a child was injured while riding a razor scooter (like a skateboard with a handle) over an uplifted section of sidewalk on a residential street. That court held that there was a triable issue whether the facts supported assumption of risk, precluding summary judgment.

As Ms. O'Neill did not assume any risk of defendant's negligence, we ask for reversal of the dismissal below.

E. BREACH OF THE CITY'S DUTY

The City of Port Orchard has the acknowledged responsibility to maintain the roadway at Sidney Avenue and Kitsap Street. Dorsey

deposition, p. 35, line 24, CP 106. Sidney Avenue was apparently paved in 1946 or before. Dorsey deposition, p. 56, line 20 to p. 57, line 21, CP 109. There have been no major repairs since that time. Sidney is constructed of concrete slabs. The slabs have moved and heaved over time, with some panels rising while the others do not. Dorsey deposition, p. 58, line 20 to p. 59, line 7. CP 110. The height difference between the slabs exceed one inch. Couch declaration, ¶ 13, CP 124C. Otto Declaration, Exhibit 4, CP 124. The slabs in question are separated from each other by a distance that varies, from two to six inches, with one as wide as eleven inches. Couch declaration, ¶ 14, CP 124C; Otto Declaration, Exhibit 4, CP 122-124. The surface area between the slabs is very rough and formed by a variety of substances, including dirt, gravel, and road patch material. Couch declaration, ¶ 15, CP 124C. The primary defect runs nearly parallel to the direction of travel, and is long, running the length of the slab. Couch declaration, ¶ 16, CP 124C. The roadway defects at Sidney Avenue and Kitsap Street are in the area where skilled and experienced bicyclists are most likely to ride, far enough from parked cars to be safe for travel. Couch declaration, ¶¶ 21, 22, CP 124D. This is the area in which the law requires the bicycle rider must ride when traffic approaches from the rear, as Ms. O'Neill did. RCW 46.61.770. Defects which run parallel to the direction of travel are difficult for a cyclist to see while cycling. Couch declaration, ¶ 17, CP 124C-D. Roadway defects which run the direction of bicycle travel need not be very large to cause a bicycle accident. Couch declaration, ¶ 18, CP 124D.

The City Engineer, defendant's 30(b)(6) deponent, authorized to speak for the City, agreed that the patches were very worn, and that "Yes, I would say that the City does need to address this section of road...." Dorsey deposition, p. 68, lines 3-5, CP 111.

Even the authorities cited by the City in its motion support denial of summary judgment. The City cited *Owens v. City of Seattle*, 49 Wn.2d 187, 191; 299 P.2d 560, 562 (1989) for the proposition that the City's duty does not extend to normal hazards such as small depressions in the roadway, or ordinary puddles of water. The case, however, goes on to say at page 191:

> But where the depression is so large and extensive, or the accumulated water so wide and deep, as to constitute a real danger not reasonably to be anticipated by users of the street, the municipality has a duty to eliminate the hazard or to warn the public of its presence.
>
> The jury, on the evidence presented in this case, could have found that the depression and accumulated water on Airport Way was of a kind which gave rise to such a duty.

The City is on notice of this condition as there have been prior, ineffective, attempts to patch and repair the height differential and gaps, as shown by the photographs of the scene, Otto declaration, Exhibit 4, CP 122-124, and as was acknowledged by Mr. Dorsey. There are no records that maintenance has ever been done at the intersection of Sidney Avenue and Kitsap Street. Dorsey deposition, p. 54, line 17, CP 109. Even without records, there is evidence of prior attempts at repair by City road crews, as shown by asphalt patches on the road. Dorsey Deposition, p. 55, line 6-21, CP 109. No one currently working in the City road department can

remember when those patches were made. Dorsey Deposition, p. 65, line 1-11, CP 111. Dorsey estimated that the patches could have been 10 to 30 years old, and were placed to reduce the differential so that the edges would not be so abrupt. Dorsey deposition, p. 67 line 20 to p. 68 line 2. CP 111. He agreed that the patches were very worn, and that "the City does need to address this section of road...." Dorsey deposition, p. 68, lines 3-5, CP 111. He stated that the City was waiting for outcome of this litigation before posting any sign prohibiting bicycles. Dorsey Deposition, p.70, line 19-23, CP 112.

WPI 140.02 states:

> SIDEWALKS, STREETS AND ROADS -- NOTICE OF UNSAFE CONDITION
>
> In order to find a city liable for an unsafe condition of a street which was not created by its employees, and which was not caused by negligence on its part, and which was not a condition which its employees or agents should have reasonably anticipated would develop, you must find that the city had notice of the condition and that it had a reasonable opportunity to correct the condition or give proper warning of the condition's existence.
>
> A city is deemed to have notice of an unsafe condition if the condition has been brought to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

Here, the city had notice, actual notice, of the separated and heaved roadway slabs, as the City had repaired them in the past. Further, after the repairs became worn, they had ten to thirty years to discover and repair this condition on one of its major roads. Although bicycles are part of ordinary

travel expected on City streets, there is no training of the road maintenance staff as to the needs of bicycles, and the special challenges bicyclists face. Dorsey deposition, p. 52, line 11 -25, CP 108. Still, just with life experience, Dorsey himself knew that diagonal hazards can catch a bicycle tire and kick it to the side. Dorsey deposition, p. 49, line 20 to p. 50, line 2, CP 108.

The City's maintenance program is response-based, waiting for a complaint or injury before addressing a need which is readily apparent by seeing and patrolling its own streets. Such a program creates a one free injury rule, which the law should not and does not condone. Notice may be actual or constructive. *Iwai v. State of Washington*, 129 Wn.2d at 96, 915 P.2d 1089 (1995); *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991). Constructive notice may be inferred from the lapse of time a dangerous condition is permitted to continue. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994); *Nibarger v. City of Seattle*, 53 Wn.2d 228, 230, 332 P.2d 463 (1958). Determining whether an unsafe condition has existed long enough for a property owner exercising reasonable care to discover it is ordinarily a question of fact for the jury. *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn.App. 213, 220, 853 P.2d 473 (1993). This would make such a determination inappropriate for summary judgment.

For summary judgment purposes, at a minimum, the evidence creates an issue on which reasonable minds could differ, so that summary judgment was inappropriate, especially construing the facts in the light most favorably to plaintiff, as the court must. For the trial judge to weigh and resolve issues

of fact against plaintiff here, there was error. Even without the opinions of Mr. Couch, there are facts which present a jury question.

F. PROXIMATE CAUSE, INJURY, AND DAMAGES

The remaining elements of a negligence cause of action are not seriously contested, and were not the basis fo the summary judgment granted below, and will not be dealt with extensively here. The record contains evidence that the plaintiff encountered the raised and heaved concrete slabs, the ledges, lips and drop off, and the gaps and rough surfaces and the debris between the slabs, and all of a sudden, her bicycle handlebars turned and she was pitched over onto the road surface, O'Neill deposition, p. 20, line 3, CP 93, p 21, line 24, CP 94. When she got to the defect with the rough surface, she felt a vibration and a quick jerk when her tire changed direction, and her handlebars moved to her right. O'Neill deposition, p. 22, lines 1-7, CP 94. Landing on her head and shoulder, she instantaneously suffered a fractured clavicle, a punctured lung, and was required to endure an extended hospital stay. Deposition of Plaintiff, p. 39 lines 17-24, CP 97, p. 40, line 1, CP 97.

G. DISQUALIFICATION OF PLAINTIFF'S EXPERT

Plaintiff retained James Couch to consider the case, to look over the depositions, and look over the documents supplied by the City, and to visit and examine the scene of the crash. He did all these things, and took measurements and photographs before formulating his opinions.

Mr. Couch has a very long career in the bicycle industry, and in addressing the needs of bicyclists. CP 124A-124E. Plaintiff's brief, *supra*,

page 9-11. He has significant training and experience in selling and fitting bicycles, and in outfitting, training, and coaching bicyclists at all levels, and in skills development. He has supplied mechanical support to the region's premier organized bike events, such as the Seattle to Portland ride and many others. He has given advice as to pedestrian and bicycle facilities while serving on the University Place Economic Development Committee. He serves currently as a member of the Multnomah County Bicycle and Pedestrian Citizen Advisory Committee, advising Multnomah County as to pedestrian and bicycle facilities.

Mr. Couch has served as an expert for seventeen years, since 1997. CP 124A. He listed seven cases in which he has previously been qualified to give expert testimony. In addition, he has consulted in a number of cases which have not made it into formal litigation. He has never before been found not qualified to give expert testimony. CP 124B. It is true that the cases he lists are rather cryptic, and he does not explain the nature of the testimony given in each case, nor the nature of the controversy or claim. Likewise he does not list the nature of the controversies for which he has consulted. However, two of the listed cases are against cities, as here, one is regarding Pierce County, and one against a local improvement association. An inference is warranted that such cases were about bicycle injuries and roadways, and not about bicycle sales. However, even without supplementation, James Couch is qualified by "specialized knowledge" to express opinions about causation of bicycle crashes and the suitability of road

surfaces for the needs of bicyclists. This is the first inquiry posed by ER 702, and must be answered in the affirmative.

As stated in *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash. 2d 593, 600, 260 P.3d 857, 860, 61 (2011), trial judges perform an important gate keeping function when determining the admissibility of evidence under ER 104. Further, courts must interpret evidence rules mindful of their purpose: "that the truth may be ascertained and proceedings justly determined" under ER 102.

ER 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

As stated in *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000):

> The admissibility of expert testimony is governed by Evidence Rules (ER) 702 and 703. The determination of the admissibility of expert testimony is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. See, e.g., *State v. Stenson*, 132 Wn.2d 668, 715, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. Testimony that will assist the trier of fact to understand the evidence or to determine a fact is to be admitted. ER 702. However, it is an abuse of discretion for a court to admit expert testimony that lacks an adequate foundation. *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993).

While the abuse of discretion standard is said to apply, it has also been noted that De Novo review is used in the present context. In *Kill v. City*

of Seattle, 183 Wn. App. 1008 (2014), while addressing disqualification of an expert witness in conjunction with a summary judgment appeal:

> We generally review evidentiary rulings for abuse of discretion. *Hensrude v. Sloss,* 150 Wn.App. 853, 860, 209 P.3d 543 (2009). However, the "de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King,* 135 Wn .2d 658, 663, 958 P.2d 301 (1998). Therefore, we conduct the same inquiry as the trial court in considering [the excluded expert] Gill's testimony.

For these reasons, the exclusion of the opinions of James Couch should be reviewed de novo.

Helpfulness to the trial of fact is to be construed broadly, *Philippides v. Bernard,* 151 Wash.2d 376, 88 P.3d 939 (2004), and will favor admissibility in doubtful cases. *Miller v. Likins*, 109 Wash. App. 140, 148, 34 P.3d 835, 839 (2001), citing *Linkstrom v. Golden T. Farms*, 883 F.2d 269 (3rd Cir., 1989, reversing exclusion of a farm safety expert in a wrongful death case).

Mr. Couch has both expert opinions and non-expert evidence to offer to the jury, as he observed, measured, and photographed the accident site. He can testify as a fact that he personally inspected the site. He can testify to the fact that the height difference of the slabs exceeds one inch. He can testify to the fact that the slabs in question are separated from each other by distances that vary from two to six inches, with one as wide as eleven inches. He can testify to the fact that the surface area is extremely rough and formed by a variety of substances including dirt, gravel, and road patch material. He

can testify to the fact that the primary defect runs nearly parallel to the direction of travel, and is long, running the length of the entire concrete slab. He can testify to the fact that there is physical evidence of repairs at the site. He can testify to the fact that there are no signs warning cyclists that there are significant risks along this route.

This case presents issues which are likely beyond the experience of the average juror: How bad does an uneven road surface need to be before it becomes a hazard to bicyclists? How can a road surface with a lip or ledge just an inch in height cause a bicyclist to lose control? Why is a drop in surface running parallel to the direction of travel hard to see? How can a gap in a concrete surface be hazardous to bicyclists? What kind of gaps in road surfaces are a hazard to bicyclists? In the terms of ER 702, will the expert's opinion evidence help the jury understand the evidence and to determine a fact at issue? We submit that a jury will be denied relevant opinion evidence which would assist them in understanding the facts and determining a fact at issue if Mr. Couch, or one with his experience, is denied expert status. Construing the helpfulness of such testimony broadly, it should be admitted.

The opinions of Mr. Couch do not involve unique scientific theories. There are many cases detailing injuries caused by similar hazards. See, e.g *Cotty v. Town of Southampton*, 64 A.D.3d 251, 257, 880 N.Y.S.2d 656, 661 (2009), also cited above, with a road repair in progress leaving an un-barricaded lip or ledge one inch high running parallel to traffic. See also the hazard which injured the plaintiff in *Jewels v. City of Bellingham*, 180 Wn.

App. 605; 324 P.3d 700 (2014), review accepted at 181 Wash.2d 1001 (September 2014), a one to two inch asphalt berm causing the rider to lose control of his front wheel, throwing him from the bike. A very common hazard involved road drainage grates which run parallel to travel. *See, e.g., Cole v. City of East Peoria*, 201 Ill.App.756, 559 N.E.2d 769, 147 Ill.Dec. 429 (1990), in which grate openings ran parallel to the direction of travel, trapping a bicycle tire, reversing summary judgment for the defense. See also *Koffler v. City of Huntington*, 196 W.Va. 202, 469 S.E.2d 645 (1996), in which a road drainage grate running parallel to the direction of travel trapped a bicycle tire, reversing summary judgment for the defense. See also *Moffat v. U.S. Foundry and Manufacturing*, 551 So.2d 592 (1989) a suit against a grate manufacturer for injury to a bicyclist injured by veering into traffic to avoid a dangerous grate with openings parallel to travel, reversing summary judgment for the manufacturer.

Mr. Couch need not know the tensile strength of steel and concrete, nor how to pour concrete or construct roads to be able to formulate opinions on what constitutes a safe bicycling surface, or to formulate opinions on the needs of bicyclists for safe surfaces, or to consider what causes bicyclists to fall, or on the difficulties of perceiving parallel defects in the road, and the effect on a bicycle of a one inch ledge running parallel to traffic. He was not called upon to express opinions about engineering road design issues, or projecting costs of future or past improvements. He was not needed for such opinions.

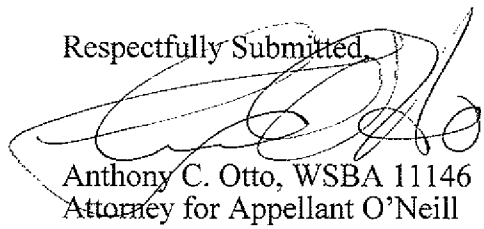
We submit that Mr. Couch's qualifications are such that the trial court committed error in excluding his opinions, and ask that the court reverse the trial court's decision, and remand for trial.

Even without the opinions of the expert, however, the facts were sufficient to present a jury issue, especially the photographs on CP 122 - 124. It was error for the court to weigh the evidence and find it insufficient here.

CONCLUSION

The court should find that the City has a duty to maintain roadways reasonably safe for ordinary travel, and rule that ordinary travel includes bicycles. The court should rule plaintiff assumed no risk which relieves the City of such duty. The court should find that, in a light most favorable to Ms. O'Neill, there is evidence that the City was on notice of the defect which caused her injury, and that reasonable persons could at least differ as to whether the City of Port Orchard was negligent, and overturn the trial court decision dismissing the case. The court also should overturn the trial court in its disqualification of the injured party's expert witness. As reasonable minds might differ on the City's negligence, summary judgment should not have been granted, and the decision should be reversed, and the matter remanded for trial. This is our request.

Respectfully Submitted,



Anthony C. Otto, WSBA 11146
Attorney for Appellant O'Neill

APPENDIX

1. *Buchan v. U.S. Cycling Federation, Inc.*, 227 Cal.App.3d 134, 148, 277 Cal.Rptr. 887, 895 (1991)

2. *Childs v. County of Santa Barbara*, 115 Cal.App.4th 64, 8 Cal.Rptr.3d 823 (2004)

3. *Cole v. City of East Peoria*, 201 Ill.App.756, 559 N.E.2d 769, 147 Ill.Dec. 429 (1990)

4. *Connelly v. Mammoth Mountain Ski Area*, 39 Cal.App.4th 8, 11-12, 45 Cal.Rptr.2d 855, 857-58 (1995)

5. *Cotty v. Town of Southampton*, 64 A.D.3d 251, 257, 880 N.Y.S.2d 656, 661 (2009)

6. *Koffler v. City of Huntington*, 196 W.Va. 202, 469 S.E.2d 645 (1996).

7. *Knight v. Jewett*, 3 Cal.4th 296, 315-16, 834 P.2d 696, 708, 11 Cal.Rptr.2d 2, 14 (1992)

8. *Linkstrom v. Golden T. Farms*, 883 F.2d 269 (3rd Cir., 1989)

9. *Moffat v. U.S. Foundry and Manufacturing*, 551 So.2d 592 (1989)

10. *Moser v. Ratinoff*, 105 Cal.App.4th 1211, 1219-21, 130 Cal.Rptr.2d 198, 203-05 (2003)

11. *Spence v. U.S.*, 374 Fed.Appx. 717 (9th Cir., 2010)

1.

227 Cal.App.3d 134, 277 Cal.Rptr. 887

BARBARA BUCHAN, Plaintiff and Respondent,
v.
UNITED STATES CYCLING FEDERATION, INC.,
Defendant and Appellant.
No. B037872.

Court of Appeal, Second District, California.
Jan. 30, 1991.

SUMMARY

An injured bicyclist brought an action against the federation that organized the race in which she suffered serious injuries. Prior to the race, the cyclist, who was aspiring to represent the United States in the Olympics, signed a release relieving the federation of liability for its negligence. The trial court denied the federation's motion for summary judgment made on the basis of the signed release. At trial, the trial court denied the federation's motion for directed verdict also made on the basis of the release, and the jury returned a verdict in favor of plaintiff. (Superior Court of Los Angeles County, NWC94943, Irwin J. Nebron and Marvin D. Rowen, Judges.)

The Court of Appeal reversed with directions for the trial court to enter a new and different judgment in favor of the federation. It held that the release constituted an express assumption of the risks inherent in bicycle racing, and that international bicycle racing did not affect the public interest such that public policy would make illegal waivers of liability. (Opinion by Woods (Fred), J., with Lillie, P. J., concurring. Separate dissenting opinion by Johnson, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c)
Negligence § 37--Express Assumption of Risk--Bicycle Race:Contracts § 8--Legality--Contracts Contravening Public Policy--Cyclist's Express Assumption of Risk in Bicycle Race.
In an action for personal injuries brought by a participant in a bicycle race against the federation that organized the race, the trial court erred in denying defendant's motion for summary judgment, and at trial, erred in denying defendant's motion for directed verdict. Prior to entering the race plaintiff had signed a release which relieved defendant of liability for its negligence. The release constituted an express assumption of the risks inherent in bicycle racing. The cyclist, who was aspiring to represent the United States in the Olympics, was an expert cyclist who was well aware that collisions and injuries often occur in bicycle races. Also, international bicycling does not affect the public interest such that public policy would make illegal a waiver of liability for negligence, notwithstanding the level of competition or the cyclist's subjective intention of competing in international bicycle races.

[See **Cal.Jur.3d,** Contracts, § 125; 1 **Witkin,** Summary of Cal. Law (9th ed. 1987) Contracts, § 634; 6 **Witkin,** Summary of Cal. Law (9th ed. 1988) Torts, §§ 1107, 1109.]

(2)
Contracts § 24--Construction and Interpretation--Appellate Court.
In interpreting a written instrument, it is the duty of an appellate court to conduct a de novo review and make a determination in accordance with the applicable principles of law.

(3)
Contracts § 8--Legality--Contracts Contravening Public Policy-- Exculpatory Provisions.
Attempted but invalid exculpatory provisions in a contract involve a transaction that exhibit some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public. The party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation has a decided advantage of bargaining strength as against a member of the public seeking its services. The party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser of the service may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under control of the seller, subject to the risks of carelessness by the seller or its agents.
COUNSEL
Thomas & Price, Allan I. Shatkin and Everett S. Hinchcliffe for Defendant and Appellant.

James P. Carr, Kelly, Herlihy & Bane and Andrew N. Chang for Plaintiff and Respondent.

WOODS (Fred), J.

This is an appeal by appellant/defendant United States Cycling Federation, Inc. (USCF) from the judgment of the Los Angeles County Superior Court, the Honorable Irwin J. Nebron, Judge presiding, in favor of respondent/plaintiff, Barbara Buchan (Buchan). Reversed.

I. Facts and Proceedings Below

On July 7, 1983, Buchan filed a form complaint for personal injury against defendants, USCF, Self Magazine, and 50 fictitious defendants alleging, inter alia, that "[d]efendants and each of them sponsored a bicycling race at which the plaintiff was a participant. The defendants, and each of them, negligently failed to supervise and monitor the bicycle race with the result that the plaintiff was involved in a collision with other cyclists suffering the injuries and damages complained of."

On October 1, 1986, USCF filed its "First Amended Answer to Unverified Complaint." Included in the affirmative defenses was an allegation that Buchan assumed all the risks, hazards and dangers, and that Buchan expressly waived and relinquished all legal rights to seek damages from USCF for her injuries.

Buchan's complaint arises out of an accident that occurred on July 9, 1982, during a bicycle race from Malibu to Westlake Village. The race was part of a four-race competition to select the United States Women's World Road Race Team. The four-race series was sponsored by Conde Nast ***137** Publications, Inc.[1] (Nast), publishers of Self Magazine, and was named the Self Magazine Cycling Circuit. Defendant, USCF, was the sanctioning body for the races. Buchan was involved in a fall during the race and received head injuries.

Buchan's superior court form complaint includes three causes of action. The first and second causes of action are couched in terms of general negligence against USCF, Magazine, and Does 1 to 25. The first cause of action for general negligence alleges that defendants negligently supervised and monitored the bicycle race with the result that plaintiff was involved in a collision with other cyclists. The second cause of action for general negligence alleges that defendants negligently failed to require, recommend or warn that participants in the bicycle race should wear hard-shell protective helmets. This second cause of action further alleges that defendants negligently sanctioned the use of an unsafe leather helmet. The third cause of action is couched in terms of product liability against Does 26 through 50. It describes the defective product as a leather bicycle helmet.

On October 9, 1986, Magazine filed a motion for summary judgment. The basis for the summary judgment motion was the agreement and release of liability signed by Buchan at the time she applied to USCF for the 1982 renewal of her racing license and the release that she signed as part of her application for entry in this Self Magazine Cycling Circuit series of races. On January 8, 1987, the court, the Honorable Martha Goldin, Judge presiding, granted Magazine's motion for summary judgment, based upon the releases signed by plaintiff.

On December 10, 1986, USCF filed a motion for summary judgment, based upon the same releases as in Magazine's motion for summary judgment. On April 2, 1987, the court, the Honorable Marvin D. Rowen, Judge presiding, granted USCF's motion for summary judgment. The court granted the motion for summary judgment based upon *Okura v. United States Cycling Federation*,[2] ruling that "the summary judgment motion must be ***138** granted." On April 8, 1987, Judge Rowen vacated his April 2, 1987, order granting the motion for summary judgment following further oral argument, and then denied the motion for summary judgment. Defendant's counsel argued that the same issues were raised as in Magazine's motion before Judge Goldin. This court infers from the colloquy revealed in the transcript of proceedings that Judge Rowen felt that international cycling affects the public interest and distinguished *Okura* on that basis.[3] Judge Rowen then ruled as follows: "The Court is going to change its position and enter as its final ruling in this matter the denial of the motion for summary judgment."

Jury trial commenced on July 7, 1988. Although no substantial evidence issue has been raised on appeal, we deem it advantageous to present not only a summary of the procedural history of the case but also a synopsis of the pertinent evidence herein for background purposes to enchance an understanding of our reasons for reversing the judgment.

Testimony at time of trial established that Buchan got involved in bicycle racing for the first time in 1975, and first raced in competitive events as a cyclist in 1975. She received her first USCF license in 1975. By 1981, Buchan was a category II (highest classification) rider. Buchan had participated in 100 races and considered herself to be an experienced road racer. Buchan testified that she knew there were risks involved in cycling.

Witness Jolanta Goral testified that Buchan was an "elite rider," that falls and crashes in bicycle races are common, that she agreed with Buchan's testimony that in 75 percent of bicycle races there are crashes involving the fall down of multiple riders, and that good bicycle riders are involved in crashes, which is part of the sport.

Buchan testified that her goal was to make the Olympic team in bicycling and that most of the female riders in 1982 had the same goal. Buchan admitted that it was her signature on the 1982 renewal application. ***139**

There are falls in at least 75 percent of the races. Seventy-five percent of the riders that Buchan is aware of have broken a collarbone by falling. Buchan had two prior racing falls. Ninety percent of the riders get broken collarbones. Buchan further testified as follows:

"Q. You did realize that falls are a common occurrence?

"A. Falls, yes.

"Q. And I think you said they occur maybe 75 percent of the time?

"A. Yes."

Witness Ronald Smith, Ph.D., a sports psychologist, stated that there is a high degree of risk in bicycle racing. From a reading of Buchan's deposition transcript, he determined that she was aware of the risk of personal injury that existed in bicycle racing, and was aware of the risk of serious head injury.

Witness Deborah Winsor, a participant in Buchan's race, acknowledged the risks of bicycle racing, and indicated that bicycling can get pretty rough.

Witness Lester D. Earnest, a USCF member since 1973, testified that there were certain inherent dangers in participating in cycling races, including the risk of significant personal injuries, head injuries, and even death.

Witness Paul Pearson testified that injuries are common in bicycle racing, and all riders realize the risk of injury. Witness Edward Borysewicz, a cycling coach, testified that crashes and falls are common; riders shouldn't race unless they are willing to accept the risks.

Otto Wenz, another witness, testified that head injuries are a known hazard of cycling.

On July 20, 1988, USCF, made a motion for a directed verdict, pointing out that the subject activity does not affect the public interest; nobody has to go out there and undertake this risk. The court, the Honorable Irwin J. Nebron, Judge presiding, denied the motion, without prejudice. The court distinguished *Okura,* since the race was the only way to get to the Olympics. Defense counsel argued that it was decided as a matter of law that bicycle racing is not a matter affecting the public interest. The court concluded: ***140** "I think that this court has to give weight to the *Ordway*[4] case here."

Witness Mary Pieper testified that injuries are common, it is common that a number of riders go down, and she accepts the proposition that accidents and injuries are one of the inherent risks of the sport. Pieper decided to get out of bicycle racing because of the risks of injury. Counsel stipulated that if Mary Pieper were called to testify pertaining to the releases, she would have testified that she had read the subject releases, knew what was in them, expected to be bound by them, and expected them to prohibit her from bringing a lawsuit.

Witness Robert Ross, a mechanical engineer and USCF official, testified that crashes of the instant variety are common and a part of the sport. Ross told Buchan on several occasions that she should wear a better helmet, and she acknowledged that, but said she didn't like to since it was too heavy and too hot.

The trial judge, Irwin J. Nebron, reviewed the transcript of

proceedings on USCF's motion for summary judgment before Judge Rowen, stating that this obviously was "a very, very close issue in his mind." Judge Nebron ruled, as a matter of law, that all six *Tunkl*[5] factors had been satisfied. The court ruled that under *Ordway* a question of fact was presented, and the jury would have to determine if Buchan had acted reasonably or unreasonably. The court was of the opinion that *Okura* was distinguishable. The court refused defendant's special instructions 1, 1A, 1B, 3, and defendant's 4.30 (express assumption of risk).[6] In regard to the jury instruction on implied assumption of risk, Buchan's counsel agreed that falling off a bicycle and hitting your head is within the inherent risks of bicycling. Buchan's counsel argued that Buchan's conduct was not "entirely reasonable."

In closing argument, Buchan's counsel conceded that Buchan assumed the risks of bicycle racing, but argued that she only chose selective risks: "He says Barbara chose to accept the risks of the sport. Sure she did. Up to a point. She did not sign on for accepting the risk of someone who didn't belong out there and someone who the cycling federation knew didn't belong out there." ***141**

In addressing the applicability of the doctrine of reasonable implied assumption of risk, counsel for Buchan argued that it applied to Buchan's choosing to wear a hairnet helmet, rather than Buchan's choosing to participate in the sport of bicycle racing, with all the risks included therein. Buchan's counsel stated: "One of the defenses you heard about is this thing in the law called reasonable implied assumption of risk. [¶] Now, the way it works is that the plaintiff is only barred, which means she is only out of court, if her actions were 100 percent reasonable and that is in this case if she was 100 percent reasonable in choosing to wear a hairnet helmet knowing as she did of the risks. [¶] Now, she doesn't claim that's 100 percent reasonable. Throughout the trial, evidence has been presented by the defense to suggest that this is not reasonable."

The following jury instructions were given by the court: "The court has ruled as a matter of law that the release and assumption of risk agreements executed by plaintiff Buchan are not enforceable." "If plaintiff acted reasonably in participating in this bicycle race, her implied assumption of the risk of injury prevents her from recovering damages from defendant for that injury."

On July 29, 1988, the special verdict was returned and filed in favor of Buchan and the poll of the jury revealed that the verdict was nine to three. The jury responded in the negative to the interrogatory: "Did plaintiff act reasonably with respect to her participating in this bicycle race?" The jury further found Buchan to be 12 percent negligent. Juror Daisietta Kim made a personal statement in the record, stating that she was profoundly disappointed with the process through which this decision was reached. Ms. Kim criticized the jury in the following manner: "In Barbara Buchan versus the USCF, one should be compelled to come to grips in sufficient depths with such notions as assumption of risk, acting with reasonable prudence, and the boundaries of personal choice and freedom. This jury in my view did not make a careful enough attempt to understand in general the issues fundamental to the case."

Following a discussion about the jury having to decide on the implied assumption of risk, the following colloquy took place:

"The Court: Was this a unanimous verdict?

"Mr. Hinchcliffe: No, it's 9/3.

"The Court: Then you convinced three people. ***142**

"Mr. Hinchcliffe: I convinced them on all the issues including Ms. Kim, as you recall, that couldn't believe what was going on in front of her."

The judgment on special verdict provides that "plaintiff, Barbara Buchan, have and recover from said defendant, United States Cycling Federation, judgment in the sum of $1,151,176.00."

Notice of entry of judgment was served on August 2, 1988. USCF filed a motion for judgment notwithstanding the verdict and notice of intention to move for a new trial on August 17, 1988. The motion for judgment notwithstanding the verdict and motion for new trial were denied on September 22, 1988.

On October 5, 1988, USCF filed a timely notice of appeal from the judgment.

The motions for judgment notwithstanding the verdict and new trial were heard on September 20, 1988, and September 22, 1988. The motions commenced with the recognition by

defense counsel that "the issue in this case is the same issue that's always been there, the question of validity and legal effect of these releases." Defense counsel stated that in this particular case the evidence is overwhelming that this accident is the kind of accident that one has to anticipate in a bicycle race and that plaintiff had said people go down 75 percent of the time.

On the issue of collateral estoppel vis-à-vis Judge Martha Goldin's ruling on Magazine's motion for summary judgment, the judgment states there is no triable issue of fact as to the validity and legal effect of the releases signed by plaintiff. USCF contended that this issue was resolved and established as a matter of law, since the summary judgment entered by Judge Goldin was not appealed. Buchan conceded that the party against whom USCF is trying to assert the claim of waiver is the same and that there is a final judgment. Buchan argued that collateral estoppel is inapposite since the issues are not the same. USCF contends that the issue regarding enforceability of the same release, as a matter of law, was clearly the same issue. The court denied the motion for judgment notwithstanding the verdict on USCF's collateral estoppel theory, stating: "I think the issues are different."

In regard to the *Tunkl* factors, USCF argued: "There is not one reported case in this state or, in fact, that I could find in the entire country where any court has ever held that a sport or recreational activity affects the public policy and therefore allows a release to be voided on that ground." ***143**

In the posttrial motions, USCF emphasized that in *Okura* the appellate court upheld the release as to an inexperienced rider, and that to void the release as to an experienced rider would make no sense: "And I'm asking the court when you look at what the ruling was, when the court voids this release as to experienced, elite riders, who know what she is doing, knows the risks she is assuming and as the court says as a matter of law, I rule you cannot assume those risks and the court acknowledges that Okura, Mr. Okura, as an inexperienced rider, because that's how you distinguish the case, is it not? He's inexperienced. Probably doesn't know as much about bicycle racing the risks that plaintiff does. [¶] When the court distinguishes that case and says that he can assume the risks because he's inexperienced, doesn't know what he's taking on. When you look at that, I think this whole thing has to make sense to people and I can't make any sense out of that. If the court can, I guess this is the time to do it so we can understand how it makes sense."

Buchan's counsel argued that there was evidence that Buchan was unreasonable in wearing the particular helmet. Counsel for USCF contends such an argument was a "red herring" and that the true issue is whether Buchan reasonably assumed the risks inherent in a dangerous sport.

USCF further contends that the court, in effect, took the issue of the defense of implied assumption of risk away from the jury, by the manner in which the court ruled that Buchan could not expressly assume the risk by stating:

"There was evidence presented by the defense throughout the trial that the plaintiff was unreasonable in wearing the helmet that she wore and which directly related to her head injury and despite that evidence, Mr. Hinchcliffe wanted-argued for a different result.

"So he wants his cake and he wants to eat it, too.

"Mr. Hinchcliffe: All I want is the court to exercise its obligation under the law to sit as a 13th juror and make a ruling on whether or not this plaintiff made a free and voluntary and knowing choice to enter a dangerous sport and to tell us why that's different than the plaintiff in the Ordway case.

"Now, the jury-I have real problems with the jury making any decision on implied assumption of risk for the simple reason that how can I in good conscience stand before this jury and say, 'Ladies and gentlemen, we started this morning off in closing argument with the judge telling you that this ***144** plaintiff as a matter of law can not expressly assume the risks. [¶] But let me tell you something. I'm going to explain to you folks how she can impliedly do what the court told you she can't expressly do.'

"As far as I'm concerned, the jury's determination, they made no determination on that because your ruling on the expressed assumption of risk took it out of their hands.

"... [¶]

. . . . . .

"But the point being this: How do you convince them that you can do by implication what you can't expressly do? I think

that issue, by the court's ruling, was in a sense taken out of my hand."

II. Contentions

The contentions formulated and stated by USCF on appeal are as follows:

(a) Whether the doctrine of collateral estoppel barred Buchan's action against USCF where the summary judgment for Magazine granted by Superior Court Judge Martha Goldin established the validity and legal effect of express releases and established that the releases which barred Buchan's action also barred Buchan's action against USCF, based upon the same releases, as a matter of law;

(b) Whether *McClain v. Rush,*[7] wherein a defendant successfully asserted the doctrine of collateral estoppel against a plaintiff pertaining to an issue established as to another defendant in a motion for summary judgment, acts to bar Buchan's action against USCF;

(c) Whether the trial court erred in denying USCF's motion for summary judgment and motion for a directed verdict based upon releases signed by Buchan under which she expressly assumed all risks inherent in bicycle racing;

(d) Whether the trial court erred in impliedly holding that an express assumption of risk is void if it relates to a "career" activity;

(e) Whether the trial court erred in impliedly holding that an individual's aspirations to be in the Olympics is a matter of "public interest" as defined in *Tunkl*; and ***145**

(f) Whether Buchan's claim was barred by the reasonable implied assumption of risk (RIAR) doctrine, where Buchan, an experienced cyclist, testified that falls and crashes occur in about 75 percent of all bicycle races.

III. Discussion

We find it unnecessary to address all six ((a) through (f)) of the contentions raised by appellant on this appeal since a reversal based upon issues presented in appellant's contention (c) that the trial court erred in denying USCF's motion for summary judgment and USCF's motion for directed verdict in that the releases signed by Buchan, under which she expressly assumed all risks inherent in bicycle racing, effectively barred her action, is dispositive of all remaining contentions.

([1a]) The agreement and release of liability signed by Buchan at the time she applied for the 1982 renewal of her United States Cycling Federation racing license and the release that Buchan signed as part of her application for entry in the Self Magazine Cycling Circuit series of races constitute an express assumption of risk.

The release and assumption of risk provision in the 1982 renewal application reads as follows:

"Agreement and Release of Liability

"I am an amateur in good standing and wish to be a licensed athlete under the Constitution, Bylaws and General Rules of the United States Cycling Federation, Inc. I certify that the information on this application, as corrected by me, is truthful.

"*I acknowledge that cycling is an inherently dangerous sport in which I participate at my own risk* and that the United States Cycling Federation, Inc. ('USCF') corporation formed to advance the sport of cycling, the efforts of which directly benefit me. In consideration of this agreement of the United States Cycling Federation, Inc. to issue an amateur license to me, hereby on behalf of myself, my heirs, assigns and personal representatives, *I waive, release and forever discharge the United States Cycling Federation, Inc.,* its employees, agents, members, sponsors, promoters and affiliates whosoever *from any and all liability,* claim, loss cost or expense arising from or attributable in any legal way to any action or omission to act of any such person or organization in connection with sponsorship, organization ***146** or execution of any bicycle racing or sporting event, including travel to and from such event, in which I may participate as a rider, team member of spectator.

"To the best of my knowledge I have no physical condition which would interfere with my ability to participate in or attend any such event or would endanger my health hereby.

"Dated: Jan 6-82 */S/ Barbara Jean Buchan*

Signature of Applicant"

(Italics added.)

The release and assumption of risk provision contained in the application for entry to the Self Magazine Cycling Circuit reads as follows:

"*I hereby waive, release and discharge any and all claims of damages for death, personal injury* or property damage which I may have, or which may hereafter accrue to me, as a result of my participation in the Event. The *release* is intended to discharge in advance Self Magazine, the Conde Nast Publications, Inc., and other sponsors, *USCF,* the promoting clubs, the officials and any other individuals, their respective agents, their directors, and employees, and any involved municipalities or other public entities, *from and against any and all liability arising out of or connected in any way with my participation in the Event,* even though that liability may arise out of negligence or carelessness on the part of the persons or entities mentioned above. I further understand that serious accidents occasionally occur during bicycle racing, and that participants in bicycle racing occasionally sustain mortal or serious personal injuries as a consequence thereof.

"*Knowing the risks of bicycle racing, I nevertheless hereby agree to assume those risks and to release and hold harmless all of the persons or entities mentioned above* who (through negligence, carelessness or otherwise) might be liable to me, or my heirs or assigns, for damages. It is further understood and agreed this waiver, release and assumption of risks is to be binding on my heirs and assigns."[8] (Italics added.)

The foregoing release and assumption of risk document was signed by Buchan on July 2, 1982. ([2]) It is well established that in interpreting a written instrument it is the duty of an appellate court to conduct a de novo ***147** review and make a determination in accordance with the applicable principles of law. (*Southern Cal. First Nat. Bank v. Olsen* (1974) 41 Cal.App.3d 234, 241 [116 Cal.Rptr. 4].)

Division Two of the Court of Appeal for the Second Appellate District was recently confronted with the effect of an express written release signed by a race car driver. In *National & Internat. Brotherhood of Street Racers, Inc. v. Superior Court* (1989) 215 Cal.App.3d 934 [264 Cal.Rptr. 44],[9] an action by a race car driver against a race organizer and the county landowner, for injuries sustained in a crash, defendants moved for summary judgment on the basis of a release signed by plaintiff, and petitioned for a writ of mandate when the trial court denied their motions.

The Court of Appeal issued the writ directing the trial court to grant the motion. Although plaintiff alleged in *National* that defendants were liable for failure to assure the presence of appropriate extrication equipment and properly trained rescue personnel, the court held the release was unlimited in scope and, in unqualified terms, released all claims arising from plaintiff's participation in the race. (215 Cal.App.3d at p. 937.) It held that to be effective a release need not achieve perfection, but it suffices if it is clear, unambiguous, and explicit, and that it express an agreement not to hold the released party liable for negligence. (215 Cal.App.3d at p. 938.)

The court pointed out that plaintiff is a professional automobile and race car mechanic and "an experienced race car driver." (215 Cal.App.3d at p. 936.) In connection with competing in the race, all participants, including plaintiff, signed the printed release. As in the present case, the tenor of the release was an agreement that any injury the signatories might suffer would not be the legal responsibility of the race organizer. Division Two of the Second Appellate District had no difficulty in concluding that plaintiff's blanket release of responsibility on the part of the race organizer was all-encompassing. The court stated:

"In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.

"... It suffices that a release be clear, unambiguous, and explicit, and that it express an agreement not to hold the released party liable for negligence. ***148** (See *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 596-600 [250 Cal.Rptr. 299].) This was accomplished here." (215 Cal.App.3d at p. 938.)

In *Bennett v. United States Cycling Federation* (1987) 193 Cal.App.3d 1485 [239 Cal.Rptr. 55], the trial court granted summary judgment for the sponsors of a bicycle race on the

ground that the bicyclist had signed a hold-harmless and release agreement before participating in the race. The Second Appellate District, Division Five, held that the release agreement was valid and enforceable.

"There is little doubt that *a subscriber of the bicycle release at issue here must be held to have waived any hazards relating to bicycle racing that are obvious or that might reasonably have been foreseen.* As plaintiff points out, *these hazards include 'collisions with other riders, negligently maintained equipment, bicycles which were unfit for racing but nevertheless passed by organizers,* [and] bad road surfaces ....' " (*Bennett v. United States Cycling Federation, supra,* 193 Cal.App.3d 1485, 1490.) (Italics added.)

([1b]) In the present case, Buchan acknowledges that falls and crashes are common occurrences in bicycle races and occur in about 75 percent of all races. Falls and crashes are acknowledged as risks of injury inherent in the sport of bicycle racing.

In the Second Appellate District case of *Madison v. Superior Court, supra,* 203 Cal.App.3d 589, decided by Division Three, defendants petitioned the Court of Appeal in a wrongful death action for a writ of mandate to direct the trial court to vacate its order denying their motion for summary judgment and to enter a new and different order granting that motion, based upon a waiver and release signed by plaintiffs' decedent pursuant to his enrollment in defendants' scuba diving training course. The decedent had drowned while participating in defendants' training course, after a diving instructor had left him alone on the surface. The release expressly stated that it was the decedent's intent to exempt and relieve defendants from any liability for their negligence, but the trial court found that triable issues of fact existed as to whether the release agreement constituted an express assumption of all risks so as to bar the wrongful death claim by plaintiffs, the decedent's family.

The Court of Appeal granted the writ. It held that the release could not operate to limit plaintiffs' right to prosecute a wrongful death claim, since the decedent had no power or right to waive that cause of action on behalf of his heirs. (203 Cal.App.3d at p. 596.) However, it also held that a plaintiff in a wrongful death action is subject to any defenses which could have been ***149** asserted against the decedent, including an express agreement by the decedent to waive the defendants' negligence and assume all risks. (*Id.,* at p.600.) By the language of the release, the decedent expressly manifested his intent to relieve defendants of any duty to him and to assume the entire risk of any injury, and no public policy reason existed to preclude him from validly executing the agreement. (*Id.,* at pp. 600-601.) Thus, the court held that the agreement was enforceable and was sufficient to cover the particular risk of injury which occurred. (*Id.,* at p. 602.)

This court has not been apprised of any case in which the California Supreme Court or the Courts of Appeal have voided a release on the ground of "public interest" as defined by *Tunkl v. Regents of University of California, supra,* 60 Cal.2d 92, in the sports and recreation field. The *Madison* court was specific in stating that the concept of "public interest" has no applicability to sports activities. The *Madison* court opined:

"Moreover, we perceive of no reason why Ken could not validly execute such a broad agreement. '[*N*]*o public policy* opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party ....' [Citation.]

([3]) "In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. [Citation.]" (*Madison v. Superior Court, supra,* 203 Cal.App.3d 589, 598-599.) ***150**

The court in *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606 [246 Cal.Rptr. 310] concluded that a release signed by motorcycle dirt bike riders did not involve a public interest. The court, in language equally applicable here, stated that the release "agreement used here was printed legibly, contained adequate, clear and explicit exculpatory language and indicated defendants were to be absolved from the consequences of their own negligence. [Citation] Furthermore, *it did not involve the public interest*: defendants' business was not generally thought to be suitable for public regulation; defendants did not perform a service of great importance to the public, and the business was not a matter of practical necessity for members of the public; and defendants' customers did not place their persons under defendants' control. [Citation.]" (Italics added.) (*Id.*, at p. 612.)

"It thus seems clear, absent a public interest involvement, that Civil Code section 1668 will not invalidate contracts which seek to exempt one from liability for simple negligence or strict liability. This is such a case. Here, Ken certainly had the option of not taking the class. There was no practical necessity that he do so. *In view of the dangerous nature of this particular activity defendants could reasonably require the execution of the release* as a condition of enrollment. Ken entered into a private and voluntary transaction in which, in exchange for an enrollment in a class which he desired to take, he freely agreed to waive any claim against the defendants for a negligent act by them. This case *involves no* more a *question of public interest* than does motorcross racing (*McAtee v. Newhall Land & Farming Co.*) (1985) 169 Cal.App.3d 1031 [216 Cal.Rptr. 465]), sky diving (*Hulsey v. Elsinore Parachute Center, supra,* [1985] 168 Cal.App.3d 333 [214 Cal.Rptr. 194]), or motorcycle dirtbike riding. (*Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606 [246 Cal.Rptr. 310].)" (Italics added.) (*Madison v. Superior Court, supra,* 203 Cal.App.3d 589, 598-599.)

In *Okura v. United States Cycling Federation, supra,* 186 Cal.App.3d 1462, the Second Appellate District, Division Five, upheld the granting of a summary judgment on behalf of South Bay Wheelman and United States Cycling Federation based on the Southern California Cycling Federation's standard athletes entry blank and release form. Except for a few minor discrepancies, the wording on that entry blank and release form is identical to the language in the Magazine's entry blank and release form.

The plaintiff in *Okura* claimed that the release that he executed to enter the bicycle race in which he was injured was void as against public policy as a transaction affecting the public interest as defined in *Tunkl v. Regents of the University of Southern California, supra,* 60 Cal.2d 92. The court analyzed ***151** each of the six *Tunkl* factors and found that appellant's situation did not fall within the guidelines set out in *Tunkl.* The *Okura* court held:

"Measured against the public interest in hospitals and hospitalization, escrow transactions, banking transactions and common carriers, this transaction is not one of great public importance. There is no compelling public interest in facilitating sponsorship and organization of the leisure activity of bicycle racing for public participation. The number of participants is relatively minute compared to the public use of hospitals, banks, escrow companies and common carriers. Also, the risks involving in running such an event certainly do not have the potential substantial impact on the public as the risks involving in banking, hospitals, escrow companies and common carriers. The service certainly cannot be termed one that 'is often a matter of practical necessity for some members of the public.' " (*Okura v. United States Cycling Federation, supra,* 186 Cal.App.3d at p. 1467.)

([1c]) Buchan seeks to distinguish the reasoning of the *Okura* court by pointing out that at least as to her this race was a practical necessity and was part of her overall goal to eventually participate in the 1984 Olympics. She uses this subjective importance to classify the *Hulsey*[10] and *McAtee*[11] cases cited by the *Madison* court as "hobby cases" and to distinguish herself from what she describes as the "Sunday cyclist" in *Okura.* However, this court knows of no case that has ever intimated, much less held, that public importance and necessity is to be measured by a subjective as opposed to an objective test.

Simply because Okura was riding in an open class does not mean that he too could not have had further goals which possibly included even some day competing at the Olympic level. Such a goal is commendable but that does not make bicycle racing a matter of great public importance or turn participation in such a race into a practical necessity for anyone. No matter how important it is to any individual, bicycle racing does not rise to the level of public importance as that of hospitals and hospitalization, escrow transactions, banking transactions, and common carriers.

Buchan complains that an unqualified cyclist was allowed to compete and that the United States Cycling Federation rules

only established minimum standards for helmets and did not force her to wear a sturdier helmet. However, collisions and falls are an inherent risk of the sport according to testimony adduced at trial and Buchan had complete control of the helmet ***152** that she chose to wear, as long as that helmet met the minimum standards set by USCF. It was solely her decision not to wear a sturdier helmet.

The *Okura* case establishes that bicycle racing, no matter how important it is claimed to be by any particular participant, is not a matter sufficiently affected with the public interest so as to void clear and unambiguous exculpatory clauses.

The trial court denied the motion for summary judgment on April 8, 1987, apparently and by inference from the transcript of proceedings, under a misconception of the legal latitude to be given to the term "public interest." The court erroneously equated "public interest" with publicity and notoriety, although the court did not state the reasons for denying the motion for summary judgment.

"The Court: Doesn't international cycling affect the public interest?

"Mr. Hinchcliffe: I don't believe-

"The Court: Do you recall a year ago the papers were full of the fact that-and I think the President of the United States invited the first American who won an international cycling race in France, if I recall correctly, to the White House. [¶] And the American Public was fixed to their television screens during the course of the Olympics when cycling was being shown on television because this was a matter of great public interest."

"The Court: Isn't the national interest of our country concerned with its amateur athletics and how well its cycling team does in national, international competition?

"Mr. Hinchcliffe: I am sure there are many members of the public that are bicycle hobbyists and care about bicycle racing activities, but does that mean it is a transaction affecting the public interest? [¶] I don't believe it does under Tunkl. It is not of significant importance to the population in general and to society in general to bring it up to that level.

"The Court: Would the fact that the President of the United States brings a winner of an international cycling event to the White House bring it up to that level?

"Mr. Hinchcliffe: No."

"The Court would like to hear you address a public policy issue. Let's assume that this Court accepts that this is a matter of sufficient public ***153** interest to qualify under Tunkl and that the only way that one can achieve status to become an international racer with all of the rewards resulting therefrom and recognizing the realities of our own contemporary society wherein we, as a society, elevate people involved in the entertainment field or in the athletic field to great heights of notoriety and potential financial reward to them so that there is tremendous motivation for young people, or people of all ages to give up everything else that they do and to train to work for, participate in the kind of events that are going to lead them to the rewards that they hope will be found."

The court's remarks, in reversing its prior grant of summary judgment herein, that the cycling event of the Olympics "was a matter of great public interest" misconceived that concept as it relates to the instant setting. A matter of great interest to the public is not a matter of "public interest" within the *Tunkl* and *Okura* context, requiring "essential services" which must be involuntarily utilized by the general public. It is readily apparent that the court's original grant of summary judgment was correct. The court's remarks that our society elevates athletes to great heights of notoriety, a winner of an international cycling event is brought to the White House, and the American public was fixed to their televisions during the cycling event of the Olympics "because this was a matter of great public interest" clearly reveal that the court reversed itself upon an incorrect view of "public interest."

Buchan's claim that she was a serious cyclist with dreams of going to the Olympics seems to be the key piece of evidence relied on by the trial court in analyzing each of the six *Tunkl* factors, and in failing to grant the motion for a directed verdict and motion for summary judgment. Buchan testified that all of the riders in this race dreamed of going to the Olympics and that that was a common dream of competitive cyclists. If that is one of the keys used by the court for voiding these releases, then it raises an interesting question as to whether or not the court would enforce these releases against some of the riders in this race, yet void them as to others. Obviously, the top riders under the court's analysis would all be entitled to void the releases. However, other riders in the

race that are competing for the same spot on the world's team but do not have the same dream of going to the Olympics would find that the court would uphold the releases as to them.

The plaintiff chooses to characterize herself, based upon her subjective intentions, as being somehow different and apart from Mr. Okura. But there is nothing in the Court of Appeal decision in *Okura* to suggest that the court would have felt compelled to void this release as to Mr. Okura if he ***154** would have just told the Court of Appeal that he "was a serious cyclist that someday hoped to make the Olympic team."

The case of *Bennett v. United States Cycling Federation, supra,* 193 Cal.App.3d 1485, cites *Okura* for the proposition that the release is binding and enforceable in light of *Tunkl.* (*Id.* at p. 1491.) Again, the Court of Appeal makes no mention in its decision as to whether the state of mind of the racer or the racer's skill level have anything to do with the enforceability of the release. The court does not state that the release is enforceable against Mr. Bennett only because he is not a serious cyclist who does not have Olympic dreams. Instead, the only statement made about the plaintiff is as follows: "On June 10, 1984, plaintiff entered an amateur bicycle race sanctioned and conducted by defendants." (*Id.,* at p. 1487.) Again, the validity and enforceability of the release is in no way dependent upon Mr. Bennett's cycling experience or dreams. It is dependent only on the fact that he signed an assumption of risk agreement and release and that under *Okura,* bicycle racing is not an activity affecting the public interest.

Apparently, the trial court felt that Buchan as an elite rider that had been involved in about 100 road races and was well aware of the risks of bicycle racing cannot as a matter of public policy expressly assume those risks. On the other hand, a leisure cyclist who is less experienced and probably has less of an understanding of the sport of bicycle racing and the risk involved in it can assume those risks. In other words, the trial court seems to be saying that it would void a knowing and intelligent decision by an experienced rider to expressly assume the risks inherent in participating in the sport of bicycle racing, while it would enforce an express assumption of risk by an inexperienced rider who may not realize how inherently dangerous this sport is. Logic, common sense, and decisions of the Courts of Appeal show the fallacy of such a proposed rule.

Logic and common sense dictate that if releases are to be voided as a matter of public policy based on the skill level and dreams of participants, then the law should protect inexperienced participants as opposed to elite, experienced riders who are fully aware of and knowingly and voluntarily accept the risks inherent in participating in the sport.[12] ***155**

IV. Disposition

The judgment is reversed. The matter is remanded to the trial court with directions to enter a new and different judgment in favor of defendant/appellant, USCF, commensurate with the views expressed herein. Appellant to recover costs of appeal.

Lillie, P. J., concurred.

JOHNSON, J.

I respectfully dissent.

If the facts in this case were as stated by the majority I would join in voting to reverse the judgment. The majority opinion leads one to believe this is a case about a bicycle racer, with "dreams" of going to the Olympics, who fell off her bicycle and was injured in the course of a race. The majority opinion misstates the facts in this case by omitting any mention of the cause of plaintiff's accident and the federation's responsibility for it; by glossing over plaintiff's standing in the world of amateur bicycle racing; and by ignoring the domination over amateur bicycle racing exercised by the United States Cycling Federation (Federation). These facts, set forth more fully below, distinguish this case from the *Okura* line of cases relied on by the majority[1] and support the trial court's ruling that the releases signed by plaintiff are unenforceable by the Federation.

Facts and Proceedings Below

Ms. Buchan suffered severe head injuries as the result of a crash during a bicycle race in Malibu conducted by the Federation. The evidence relevant to the issues on appeal is as follows:

A. *Ms. Buchan's Athletic Career*

Ms. Buchan had been a top-level athlete all her life. In high school she was one of the state's premier track and cross-country runners and she received a full athletic scholarship to attend Boise State. In college, she competed against the best long-distance runners in the country and ***156** qualified for the national championships in both the 3,000- and 5,000-meter races.

She started competitive cycling and obtained her first Federation racing license in 1975, at the age of 18. Toward the latter part of 1979 she decided to devote full time to amateur cycling.

Ms. Buchan testified she was an assistant coach at University of California San Diego for a short time after graduating from college. But, as she progressed in the sport of cycling, the travel and training requirements required her to give up this job and become a full-time athlete. In her view, bicycle racing was her career. Her typical day began at 7 a.m. with stretching exercises, then breakfast, then a minimum two-hour bicycle ride. Three nights a week she attended weight training classes and three nights a week she attended gymnastics classes.

Ms. Buchan's goals, at the time of her injury, were to represent the United States in the Cycling World Championship in 1982 and in the Summer Olympics in 1984. The evidence shows these goals were objectively realistic, not simply "dreams" as the majority characterizes them. In 1981, the Federation placed Ms. Buchan in the highest category in women's racing. In races that year she consistently placed high among the country's best cyclists and was invited to join the top 30 women cyclists in training at the United States Olympic Training Center in Boulder Springs, Colorado. The purpose of the training center was to develop top amateur athletes for Olympic competition. It clearly took more than "dreams" to be invited to train at the Olympic Training Center.

B. *The Federation's Control Over National and World-level Cycling*

The Federation is the governing body in the United States for the Olympic sport of cycling. The Federation is a member of the United States Olympic Committee. The Amateur Sports Act of 1978 (36 U.S.C. § 371 et seq.) regulates amateur competitive cycling. The act imposes duties upon the Federation as the sole national governing body of Olympic amateur cycling including the duty of ensuring safety precautions are taken to protect the athletes. (36 U.S.C. § 392(b)(1)(B)(vi).)

The Federation has total control over the conduct of national-level events such as the 1982 world trials in which plaintiff was injured. Other groups are allowed to conduct local or regional races, but all national, international and Olympic-level races are conducted solely by the Federation. A United ***157** States cyclist wishing to compete in world-class cycling events must have a Federation license.

The Federation divided women cyclists into three categories: A-2 was limited to the best, most experienced world-class racers, followed by A-3 and A-4 riders. Ms. Buchan was classified as an A-2 rider. These categories were created because putting world-class A-2 cyclists and beginning A-4 cyclists together in the same race greatly enhanced the risk of injury due to the great variance in the skill levels between the two categories. Accordingly, in national-level events, A-4 riders who were first-year riders were not allowed to compete. In the unusual case where, because of a small entering field, A-4 riders were mixed in with A-2 racers, the field was staggered so that A-2 racers started a few minutes before the A-4 cyclists to avoid racing alongside each other.

The Federation required every applicant for a license to sign an application form containing an "Agreement and Release of Liability" which provided, in relevant part: "I acknowledge that cycling is an inherently dangerous sport in which I participate at my own risk .... In consideration of the agreement of the United States Cycling Federation, Inc. to issue an amateur license to me hereby on behalf of myself, my heirs, assigns and personal representatives, I waive, release and forever discharge the United States Cycling Federation, Inc., its employees, agents, members, sponsors, promoters and affiliates whosoever from any and all liability, claim, loss cost or expense arising from or attributable in any legal way to any action or omission to act of any such person or organization in connection with sponsorship, organization or execution of any bicycle racing or sporting event, including travel to and from such event, in which I may participate as a rider, team member or spectator."

Ms. Buchan signed this agreement when she applied for her 1982 license. She testified she was given no opportunity to negotiate the terms of the release. The evidence at trial showed the Federation had no procedure whereby a racer could, for an additional fee, purchase insurance against the

Federation's negligence.

C. *The Federation's Conduct of the 1982 World Trials*

In the summer of 1982, the Federation conducted a series of four races referred to by the competitors as the "World Trials." The World Trials were the top competitive events of 1982 in the United States. The top finishers in the World Trials would be automatically selected to represent the United States in 1982 at the world championships in England. In turn, ***158** the members of the world team would be favored to make the United States team in the 1984 Summer Olympics. In sum, the 1982 World Trials were a major stepping stone to the 1984 Olympics.

Racers entering each World Trials event were required to sign a release of liability which provided, in relevant part:

"I hereby waive, release and discharge any and all claims of damages for death, personal injury or property damage which I have, or which may hereafter accrue to me, as a result of my participation in the Event. This release is intended to discharge in advance Self Magazine, the Conde Nast Publications Inc., and other sponsors, [the Federation], the promoting clubs, the officials and any other individuals, their respective agents, their directors, and employees, and any involved municipalities or other public entities, from and against any and all liability arising out of or connected in any way with my participation in the Event, even though that liability may arise out of negligence or carelessness on the part of the persons or entities mentioned above. I further understand that serious accidents occasionally occur during bicycle racing, and that participants in bicycle racing occasionally sustain mortal or serious personal injuries as a consequence thereof."

Prior to the World Trials, the Federation's policy was to segregate the racers according to their classification; novices raced against novices; elite riders, such as Ms. Buchan, raced against other elite racers. The purpose of this segregation was safety. Although the risk of a crash in a cycling event is ever present, allowing a novice rider to race in a pack of elite world-class racers substantially increases the risk. In an Olympic- level race, the elite racers know each other, rely upon each other's experience and know what to do and what not to do in tight, pressure situations.

In the 1982 World Trials, the Federation decided to admit novice racers into the event on a case-by-case basis. Thus, unknown to the elite racers before the World Trials began, the Federation determined a novice rider, Mary Pieper, possessed sufficient skills to be admitted into the field of elite racers. Ms. Pieper had received her first Federation license in 1982 and was a category A-4 rider, i.e., a novice. At the time Ms. Buchan signed the application for entry into the 1982 World Trials, no national-level event had ever been conducted in which novice riders were allowed to race alongside the national-level racers.

D. *The Plaintiff's Injury*

The World Trials commenced with a 40.5-mile race in Laguna Beach. As the tight pack of racers sped downhill reaching a speed of 30 miles per hour, ***159** Mary Pieper weaved in and out of the pack, trying to get past the group. Pieper was not accustomed to and was scared of large packs of riders. Pieper's front wheel hit the rider in front of her, and she went down, causing a chain reaction of fallen riders.

Although that day there were no serious injuries, a number of the cyclists, Ms. Buchan among them, approached the president and other officials of the Federation present at the race site and complained vigorously that Pieper did not belong in the World Trials and was a danger to the competitors. The Federation's chief referee had the authority to reverse the prior decision allowing a first-year rider to race if it was demonstrated that the rider was so inexperienced as to be unsafe and a danger to the world-class cyclists. Despite the complaints and the Federation's knowledge that Pieper presented a danger to the world-class cyclists, the Federation allowed Pieper to continue racing.

Six days after the Laguna Beach race, the World Trials resumed in Malibu. On the morning of the Malibu race, the complaints about Mary Pieper's presence in the race were renewed and again ignored. After five miles of the race, the pack of riders descended downhill, reaching a speed of fifty miles per hour. Once again, Mary Pieper began weaving in and out of the pack and lost control of her bicycle. Her front wheel struck a racer's back wheel and Pieper fell, causing an immediate chain reaction of numerous riders to spill, this time with tragic consequences. Ms. Buchan landed squarely on her head and sustained a catastrophic injury to her brain.

Ms. Buchan was tended to on the scene by Paul Pearson, an emergency medical technician, who had been covering cycling races since 1972. He testified hers was the most severe head injury he had ever seen in a bicycle race. There was evidence a helmet meeting the standards in existence in

1982 would have prevented any brain injury whatsoever. Ms. Buchan was not wearing such a helmet.

At the hospital, Ms. Buchan was admitted in an extreme comatose state and immediately underwent emergency brain surgery to save her life. She remained in a coma for four weeks and when she left the hospital she could not walk or talk.

At the scene of the accident, the cyclists blamed Mary Pieper for the crash. Federation officials immediately disqualified Pieper from competing in further World Trials races. ***160**

E. *Trial Court Proceedings*

Ms. Buchan filed a complaint for personal injuries against the Federation and Conde Nast Publications which sponsored the Malibu race in which she was injured. The gravamen of her complaint was that defendants negligently failed to supervise and monitor the race. Defendants denied they acted negligently and alleged Ms. Buchan expressly and impliedly assumed all risks related to the race.

The trial court granted a motion for summary judgment by defendant Conde Nast Publications based on the releases Ms. Buchan signed upon applying for her racing license and upon entering the Malibu race. Ms. Buchan did not appeal this judgment. The trial court denied a motion for summary judgment by the Federation based on these same releases.

Ms. Buchan's personal injury action was tried before a jury. After hearing the evidence, the trial court ruled, as a matter of law, the two written releases Ms. Buchan signed were unenforceable under Civil Code section 1668 and *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 [32 Cal.Rptr. 33, 383 P.2d 441, 6 A.L.R.3d 693]. The case was submitted to the jury on the issues of negligence, contributory negligence and reasonable implied assumption of the risk. The jury returned special verdicts in favor of plaintiff. The jury found the Federation was negligent, Ms. Buchan was contributorily negligent, but Ms. Buchan did not reasonably assume the risk of the Federation's negligence. In conformity with the jury's special verdict, the court entered judgment for Ms. Buchan in the sum of $1,151,176.

Discussion

Civil Code section 1668 provides "[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for ... violation of law, whether willful or negligent, are against the policy of the law." In *Tunkl v. Regents of University of California, supra,* 60 Cal.2d at page 96, the court, without resolving conflicting interpretations of Civil Code section 1668, noted, "[t]he cases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.' " Accepting the premise "the exculpatory clause which affects the public interest cannot stand" the court proceeded to ascertain "those factors or characteristics which constitute the public interest." (*Id.* at p. 98.) The court concluded, after a review of previous decisions, an "invalid exemption involves a transaction which exhibits some or all of the following characteristics[:] [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing ***161** a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed unde r the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Id.* at pp. 98-101, citations omitted.) The court characterized this list of factors as a "rough outline of that type of transaction in which exculpatory provisions will be held invalid." (*Id.* at p. 98.)

Although subsequent cases have invalidated exculpatory clauses upon finding all six *Tunkl* factors were present,[2] a score of 100 percent on the Tunkl test is not required to invalidate an exculpatory clause on public policy grounds. "To meet that test, the agreement need only fulfill some of the characteristics above outlined; ..." (*Tunkl, supra,* 60 Cal.2d at p. 101.) As we have previously observed, the Supreme Court has not told us how many characteristics have to be satisfied-or which ones-before exculpatory clauses become unenforceable. (*Gardner v. Downtown Porsche Audi, supra,* 180 Cal.App.3d at p. 717.) Nor did the court indicate whether certain factors should be given greater weight than others. Nevertheless, we do not believe the court intended a mechanical application of the factors mentioned in *Tunkl.* Instead, the focus should be on the two principal concerns

reflected in the court's opinion: (1) Is the party seeking exculpation engaged in a service of great importance to the public? (2) Does providing this service give the provider a decisive advantage in bargaining strength over a person using this service? (*Tunkl, supra,* 60 Cal.2d at pp. 101-102.)

The present case represents a situation in which public interest and publicly conferred power provide the Federation an insurmountable advantage in bargaining strength against any athlete seeking to participate in amateur bicycle racing at the world-class level. ***162**

1. ***The Public Interest in World-class Amateur Sports.*** Few would argue with the proposition amateur athletics are important to the health, well-being and enjoyment of most Americans. But that is not a basis for denying enforcement of the exculpatory clauses in this case. As the court correctly pointed out in *Okura v. United States Cycling Federation, supra,* 186 Cal.App.3d at page 1467, "There is no compelling public interest in facilitating sponsorship and organization *of the leisure activity of bicycle racing for public participation.*" (Italics added.) Thus, in *Okura,* the court upheld the enforcement of an exculpatory clause, similar to the one signed by plaintiff Buchan, in a negligence action brought by a cycling hobbyist injured in a race conducted by the Federation. The plaintiff in *Okura* was riding in an " 'open' public event" in which "anyone with a bicycle and the entrance fee who desires to enter the event can do so under standards established by the organizers." (*Ibid.*)

The race in which Ms. Buchan was injured was not a "leisure activity" open to anyone "with a bicycle and the entrance fee." Hers was a race between the top cyclists in the country competing for a place on the team which would represent the United States in the world championships later that year which in turn was a step toward a place on the United States Olympic team.

Although at one time amateur sports at the international level was of significance only to individuals with a particular interest in a certain sport, that era has passed. Today, international amateur athletics involve the power and prestige of the United States. Indeed, it was the shortcomings in the nation's performance in such events that led to the Amateur Sports Act of 1978 (36 U.S.C. § 373 et seq.) (See discussion below.) In its final report, the President's Commission on Olympic Sports concluded, "[t]he fact is that *we* are competing less well and *other nations* competing more successfully because other nations have established excellence in international athletics as a national priority." (1 Final Rep. of the President's Comm. on Olympic Sports 1975-1977 (1977), p. ix, italics added.) In support of the act's overhaul of the administration of amateur athletics, Representative Robert Michel observed, "it would be good *for our nation* and for the *athletes who represent us* if the cooperation, spirit of individuality, and personal freedom that are the great virtues of *our system* are allowed to exert their full influence in the [Olympic] games." (124 Cong. Record 31662 (1978), italics added.) The nationalistic aspect of amateur athletics was recognized in *San Fran. Arts & Athletics v. U.S.O.C.* (1987) 483 U.S. 522, 537 [97 L.Ed.2d 427, 449, 107 S.Ct. 2971], which concluded "Congress has ***163** a [broad] public interest in promoting ... the participation of amateur athletes from the United States in [the Olympic Games]."

The public interest in international competition by United States amateur athletes is reflected in the Amateur Sports Act of 1978, *supra.* Among other things, the act created the United States Olympic Committee (U.S.O.C.) (36 U.S.C. § 371) whose "objects and purposes [should] be to [¶] (1) establish national goals for amateur athletic activities and encourage the attainment of those goals; [¶] (2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations; [¶] (3) exercise exclusive jurisdiction, either directly or through its constituent members or committees, over all matters pertaining to the participation of the United States in the Olympic Games and in the Pan-American Games, including the representation of the United States in such games, and over the organization of the Olympic Games and the Pan-American Games when held in the United States; [¶] (4) obtain for the United States, either directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan-American Games; [¶] (5) promote and support amateur athletics activities involving the United States and foreign nations; ..." (36 U.S.C. § 374.)

The U.S.O.C. is authorized to recognize a national governing body for any Olympic sport. "The [U.S.O.C.] shall recognize *only one national governing body* for each sport ...." (36 U.S.C. § 391(a).) (Italics added.) A national governing body recognized by the U.S.O.C. "is under a duty to (1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents; ... [¶] (4) promptly review every request submitted by an amateur sports organization or person for a

sanction (A) to hold an international amateur athletic competition in the United States; or (B) to sponsor United States amateur athletes to compete in international amateur athletic competition held outside the United States, and determine whether to grant such sanction, in accordance with the provisions of subsection (b) of this section; ..." (36 U.S.C. § 392(a).)

The Amateur Sports Act amply demonstrates amateur sports at the international level-the level at which Ms. Buchan was competing-are a matter of great importance to the public.

Furthermore, as evidenced by the Amateur Sports Act, the Federation, as the governing body for amateur cycling in the United States, is engaged in a service Congress thought suitable for public regulation. *164

The evidence in this case shows the Federation's races are open to racers "coming within certain established standards." (*Tunkl, supra,* 60 Cal.2d at p. 99.) Also, the Federation is prohibited from discriminating on the basis of race, religion, color, age, sex or national origin, (36 U.S.C. § 391(b)(6)), and is under a duty to "provide equitable support and encouragement for participation by women ...." (36 U.S.C. § 392(a)(6).)

Therefore, the first, second and third *Tunkl* factors are met.

2. As a Result of Its Monopoly Over World-class Amateur Cycling, the Federation Possesses a Decisive Advantage in Bargaining Strength Over World- class Cyclists.

The Federation is *the* national governing body for amateur cycling recognized by the U.S.O.C. under the Amateur Sports Act. (36 U.S.C. § 391(a).) As a result, the Federation enjoys a total monopoly over world- class amateur cycling in the United States. A cyclist who wants to participate in Olympic or other international competition can only do so through the Federation.

The Federation has total control over the races it conducts, including the qualifications of the racers. Once a racer like Ms. Buchan entered the World Trials she came under the control of the Federation, subject to the risk of its carelessness. She had no choice over whom she would race against. The decision on who would be allowed to race was in the complete discretion of the Federation.

Ms. Buchan had less bargaining power than the plaintiff in *Gardner* who took his automobile to defendant for repairs. (*Gardner v. Downtown Porsche Audi, supra,* 180 Cal.App.3d at p. 719.) There was more than one garage that could have repaired Gardner's Porsche, but there is only one governing body for amateur bicycle racing. If Ms. Buchan was going to compete at the world-class level, the only way to do it was through the Federation.

Therefore, the fourth and sixth *Tunkl* factors are met.

3. The Federation Used Standardized Adhesion Contracts of Exculpation.

The remaining factor under *Tunkl* is whether, in exercising its superior bargaining power, the party confronts the user of its service with "a standardized adhesion contract of exculpation, and makes no provision whereby ***165** a purchaser may pay additional reasonable fees and obtain protections against negligence." (60 Cal.2d at pp. 100-101, fns. omitted.)

Both of the exculpatory clauses in this case were printed on standardized forms and presented on a take-it-or-leave-it basis. Ms. Buchan was given no opportunity to negotiate or even discuss the terms of the agreements. Furthermore, the Federation has no procedure whereby a racer can pay an extra fee and be protected against the Federation's negligence.

Therefore, the fifth and final *Tunkl* factor is met, and the exculpatory clauses are unenforceable.

By ignoring the unique facts in this case, the majority lumps this case in the same class as cases involving white water rafting (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758 [276 Cal.Rptr. 672]); dirt bike riding (*Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606 [246 Cal.Rptr. 310]); and sky diving (*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333 [214 Cal.Rptr. 194]). Thus, the majority dismisses this case as one involving mere "sport and recreation" and holds as a matter of law the concept of " 'public interest' has no applicability to sports activities." (Maj. op., *ante,* at p. 149.) The majority opinion is contradicted by the factual record in this case developed after a lengthy trial. This factual record was before the trial court when it ruled the exculpatory clauses were unenforceable. The trial court's ruling is fully supported by the record and should be affirmed on this appeal.

Respondent's petition for review by the Supreme Court was denied May 2, 1991.

Footnotes

1 The complaint of Buchan states causes of action against "Self Magazine." However, Self Magazine appeared in the action as defendant Conde Nast Publications, Inc. We find no amendment to the complaint of Buchan which would either substitute Conde Nast Publications, Inc., for defendant, Self Magazine, or make an appropriate amendment substituting the correct defendant for one of the fictitiously named defendants. However, the case was apparently litigated by all parties on the theory that Conde Nast Publications, Inc., was the true defendant vice "Self Magazine." Hereafter we refer to "Magazine" for convenience and when we do so it includes the named defendant, Self Magazine, and defendant, Conde Nast Publications, Inc., unless otherwise indicated.

2 *Okura v. United States Cycling Federation* (1986) 186 Cal.App.3d 1462 [231 Cal.Rptr. 429].

3 Code of Civil Procedure section 437c, subdivision (g) provided as follows at the time of USCF's motion for summary judgment: "(g) Upon the denial of a motion for summary judgment on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order."
We find nothing in the record to indicate that the court complied with section 437c, subdivision (g); therefore we resort to reasonable inferences to be drawn from the record. Appellant has waived any error in the trial court's failure to comply with section 437c, subdivision (g) by having neglected to raise the issue in the trial court or on this appeal.

4 *Ordway v. Superior Court* (1988) 198 Cal.App.3d 98 [243 Cal.Rptr. 536].

5 *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 [32 Cal.Rptr. 33, 383 P.2d 441, 6 A.L.R.3d 693].

6 Defendant's special jury instructions 1, 1A, 1B and 3 are not included in the record on appeal, but we infer that they pertain to assumption of risk defenses.

7 *McClain v. Rush* (1989) 216 Cal.App.3d 18 [264 Cal.Rptr. 563].

8 The record is far from clear pertaining to the Self Magazine release and whether the motion before Judge Rowen and the trial before Judge Nebron considered this release. Inasmuch as the USCF release, which was clearly in issue in the litigation, is extremely similar to the Self Magazine release, we infer that the ruling of Judge Rowen and the judgment of Judge Nebron encompasses the Self Magazine release.

9 Hearing denied by the California Supreme Court on February 1, 1990.

10 *Hulsey v. Elsinore Parachute Center, supra,* 168 Cal.App.3d 333.

11 *McAtee v. Newhall Land & Farming Co., supra,* 169 Cal.App.3d 1031.

12 We are appreciative of the "additional" facts proffered by the dissent but following review of the facts set forth in the majority opinion and the reasonable inferences to be drawn therefrom we see no necessity to revise that portion of the opinion dealing with the pertinent facts and proceedings in the trial court. Nor do we find that the dissent has moved the majority to reconsider the results in the lead opinion. The distilled result of this appeal is that there is no pervading public interest in amateur bicycle racing. This is so regardless of the level of competition, the motive of the participants, or of the fact that the course is provided and maintained for all who wish to use it. The *Tunkl, supra,* analysis in this case does not dictate the invalidation of the written release signed by Buchan.

1 *Okura v. United States Cycling Federation* (1986) 186 Cal.App.3d 1462 [231 Cal.Rptr. 429].

2 See, e.g., *Vilner v. Crocker National Bank* (1979) 89 Cal.App.3d 732, 735-736 [152 Cal.Rptr. 850]; *Gardner v. Downtown Porsche Audi, supra,* 180 Cal.App.3d 713, 717; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551, 1556 [230 Cal.Rptr. 253].

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115 Cal.App.4th 64
Court of Appeal, Second District, Division 6, California.

Tatiana CHILDS, a Minor, Plaintiff and Appellant,
v.
COUNTY OF SANTA BARBARA, Defendant and Respondent.

No. B162350. | Jan. 22, 2004. | Review Denied April 28, 2004.*

Synopsis

Background: Child brought personal injury action against county after she suffered serious injury when she rode scooter over uplifted section of sidewalk. The Superior Court, Santa Barbara County, No. 1046165, James W. Brown, J., granted summary judgment for county, finding that doctrine of primary assumption of risk barred liability. Child appealed.

Holdings: The Court of Appeal, Perren, J., held that:

[1] triable issue of material fact existed as to whether child was riding scooter in such a manner that she was engaged in a sport or recreational activity covered by doctrine of primary assumption of risk, and

[2] even if doctrine of primary assumption of risk applied, triable issue of material fact existed as to whether county's alleged negligence increased risks to child over and above those inherent in riding her scooter.

Reversed.

West Headnotes (13)

[1] **Appeal and Error**
⇦Cases Triable in Appellate Court

The appellate court reviews an order granting summary judgment de novo, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.

2 Cases that cite this headnote

[2] **Automobiles**
⇦Knowledge Of, and Duty to Observe, Defect or Danger
Judgment
⇦Tort Cases in General

Triable issue of material fact existed in child's personal injury action against county as to whether child, who fell and was injured when she rode scooter over uplifted section of sidewalk, was riding her scooter in such a manner that she was engaged in a sport or sports-related recreational activity covered by the doctrine of primary assumption of risk, thus precluding summary judgment; riding a scooter was not a recreational activity subject to the doctrine under all circumstances, and applying the doctrine to simply riding a scooter on a residential sidewalk would not have furthered purpose of the doctrine to protect sports and sports-related activities from chilling effect of liability for injuries caused by inherent risks in the activity.

See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1088 et seq.; Cal. Jur. 3d, Negligence, § 136 et seq.

9 Cases that cite this headnote

[3] **Negligence**
⇦Effect of Comparative Negligence
Negligence
⇦Primary and Secondary Distinguished

Primary assumption of risk is a complete bar to recovery, while secondary assumption of risk 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.

1 Cases that cite this headnote

[4] **Negligence**
Assumption of Risk

When the facts are not disputed, application of the doctrine of primary assumption of risk is a legal question to be decided by the court.

3 Cases that cite this headnote

[5] **Negligence**
Sports, Games and Recreation

The "primary assumption of risk doctrine," which is applied to certain sports or sports-related recreational activities where conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself, is based on the commonsense conclusion that where a person is playing an active sport, others involved in the activity should not be liable for injuries caused by risks that are an inherent part of the sport unless the defendant's conduct has increased the risk of harm.

5 Cases that cite this headnote

[6] **Negligence**
Effect of Comparative Negligence
Negligence
Primary Assumption of Risk

To make the determination that primary assumption of risk rather than comparative negligence principles applies, a court must examine the nature of the particular activity and the relationship of plaintiff and defendant to the activity and each other.

1 Cases that cite this headnote

[7] **Negligence**
Primary **Assumption** of **Risk**
Negligence
Sports, Games and Recreation

As a general rule, an activity falls within the doctrine of primary **assumption** of **risk** if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential **risk** of injury.

2 Cases that cite this headnote

[8] **Negligence**
Sports, Games and Recreation

An activity subject to the doctrine of primary **assumption** of **risk** necessarily matches a participant's physical skill, strength, or agility against another competitor, or against some other standard of performance such as a high score or a low time, and necessarily includes some element of danger.

Cases that cite this headnote

[9] **Negligence**
Primary **Assumption** of **Risk**

The overriding consideration in the application of primary **assumption** of **risk** is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature.

1 Cases that cite this headnote

[10] **Negligence**
Sports, Games and Recreation

Application of the doctrine of **assumption** of **risk** is determined by the manner in which equipment is used, not the manner in which it can be used, and merely using recreational equipment for pleasure does not trigger the doctrine.

Cases that cite this headnote

[11] **Judgment**
Particular Defenses
Judgment
Torts

Triable issue of material fact existed as to whether doctrine of **assumption** of **risk**, or the statutory scheme for government tort liability, including principles of comparative fault, was applicable in child's personal injury action against county after child fell and was injured when she rode scooter over uplifted section of sidewalk, thereby precluding summary judgment; facts alleged by child supported conclusion that county breached its statutory duty to use due care and that, even if doctrine of **assumption** of **risk** applied, county's negligence increased **risks** to child over and above those inherent in riding her scooter. West's Ann.Cal.Gov.Code § 835.

7 Cases that cite this headnote

[12] **Negligence**
Sports, Games and Recreation
Negligence
Sports, Games and Recreation

Although defendants generally have no legal duty under the primary **assumption** of **risk** doctrine to eliminate or protect a plaintiff against **risks** inherent in the sport itself, defendants generally do have a duty to use due care not to increase the **risks** to a participant over and above those inherent in the sport.

2 Cases that cite this headnote

[13] **Counties**
Condition and Use of Public Buildings, Places, and Property

A county's statutory duty to maintain sidewalks in a condition that does not create a hazard to foreseeable users extends not just to pedestrians, but also to other uses of sidewalks that are neither extraordinary nor unusual. West's Ann.Cal.Gov.Code § 835.

2 Cases that cite this headnote

Attorneys and Law Firms

**824 *67 Law Offices of Jeffrey S. Young and Jeffrey S. Young for Plaintiff and Appellant.

**825 Stephen Shane Stark, County Counsel, Michael M. Youngdahl, Lisa Rothstein, Deputy County Counsel, for Defendant and Respondent.

*68 PERREN, J.

Tatiana Childs fell and suffered serious injury when she rode a small "razor" scooter over an uplifted section of sidewalk on a residential street in the County of Santa Barbara. She sued

the County contending that the sidewalk constituted a dangerous condition of public property. The trial court ruled that the doctrine of primary **assumption** of **risk** barred liability because, as a matter of law, riding a scooter is a recreational activity, and falling is an inherent **risk** of the activity. She appeals a summary judgment granted in favor of the County. (Code Civ. Proc., § 437c, subd. (c).)

We conclude that riding a scooter is covered by the doctrine of primary **assumption** of **risk** only when the activity involves an element of danger, requires physical exertion and skill, and includes a competitive challenge. A triable issue exists in this case regarding whether Tatiana was riding her scooter in such a manner. Accordingly, we reverse.

FACTS AND PROCEDURAL HISTORY

While riding a scooter on a sidewalk in a residential neighborhood in the County of Santa Barbara, 11–year–old Tatiana Childs fell and suffered injuries. Acting through her guardian ad litem, Alexander Childs, Tatiana sued the County for personal injury, alleging that the County negligently maintained the subject sidewalk in a dangerous condition. (Gov.Code, § 835.)

The County moved for summary judgment contending that riding a scooter constitutes a sport or recreational activity and that, pursuant to the doctrine of primary **assumption** of **risk**, the County had no duty to protect Tatiana against a **risk** inherent in such an activity. In support of the motion, the County relied exclusively on the allegation in Tatiana's complaint that she was riding her scooter on a residential sidewalk and fell "as she rode over a break in the sidewalk that was raised more than three inches above the adjoining sidewalk section." The County offered no other evidence regarding the circumstances of her activity.

The trial court granted the motion concluding that "scootering is a recreational activity for purposes of the doctrine of **assumption** of the **risk**," and the "**risk** of coming upon uneven surfaces and falling from a scooter is inherent in the activity of riding a scooter. Any failure to maintain the sidewalk on the part of the County did not increase this inherent **risk**." Tatiana appeals the judgment.

DISCUSSION

[1] To obtain summary judgment, a defendant must negate a necessary element of the plaintiff's case or establish a complete defense to the claim *69 which eliminates the existence of all material issues of fact that require a trial. (Code Civ. Proc., § 437c, subd. (p)(2); *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107, 252 Cal.Rptr. 122, 762 P.2d 46.) We review an order granting summary judgment de novo, "applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222, 38 Cal.Rptr.2d 35.)

[2] Tatiana contends that the County is liable because her injuries were a reasonably foreseeable **risk** of a dangerous condition of public property (**826 Gov.Code, § 835), and that the doctrine of primary **assumption** of **risk** does not bar recovery as a matter of law. A dangerous condition of public property is "a condition ... that creates a substantial (as distinguished from a minor, trivial or insignificant) **risk** of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov.Code, § 830, subd. (a).)

In its motion for summary judgment, the County does not challenge the existence of a dangerous condition as defined in Government Code section 830. Instead, the County argues that its liability "is subject to any defenses that would be available to the public entity if it were a private person" (Gov.Code, § 815, subd. (b)), and that the defense of **assumption** of **risk** constitutes a complete bar to liability in this case. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308, 11 Cal.Rptr.2d 2, 834 P.2d 696 (*Knight*).)

[3] [4] The doctrine of "primary" **assumption** of **risk** developed as an exception to the general rule that all persons have a duty to use due care to avoid injury to others. (*Knight*, at p. 315, 11 Cal.Rptr.2d 2, 834 P.2d 696; see also *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068, 68 Cal.Rptr.2d 859, 946 P.2d 817.) *Knight* distinguishes between primary **assumption** of **risk** where a person has no duty of care, and "secondary" **assumption** of **risk** where the defendant owes a duty to a plaintiff who is careless in encountering a known **risk** created by the defendant's breach of its duty. (*Knight*, at pp. 308, 314–315, 11 Cal.Rptr.2d 2, 834 P.2d 696.) Primary **assumption** of **risk** is a complete bar to recovery. Secondary **assumption** of **risk** "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." (*Id.*, at p. 315, 11 Cal.Rptr.2d 2, 834 P.2d 696.) When the facts are not disputed, application of the doctrine of primary **assumption** of **risk** is a legal question to be decided by the court. (*Id.*, at p. 313, 11 Cal.Rptr.2d 2, 834 P.2d 696; *Record v. Reason* (1999) 73 Cal.App.4th 472, 479, 86 Cal.Rptr.2d 547.)

[5] The doctrine of primary **assumption** of **risk** is applied to certain sports or sports-related recreational activities where "conditions or conduct that *70 otherwise might be viewed as dangerous often are an integral part of the sport itself" and their removal would alter the nature of the sport. (*Knight*, at p. 315, 11 Cal.Rptr.2d 2, 834 P.2d 696.) The doctrine is based on the commonsense conclusion that where a person is playing an active sport, others involved in the activity should not be liable for injuries caused by **risks** that are an inherent part of the sport unless the defendant's conduct has increased the **risk** of harm. (*Id.*, at pp. 315–318, 11 Cal.Rptr.2d 2, 834 P.2d 696; *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 796, 112 Cal.Rptr.2d 217.)

[6] To make the determination that primary **assumption** of **risk** rather than comparative negligence principles applies, a court must examine the nature of the particular activity and the relationship of plaintiff and defendant to the activity and each other. (*Knight*, at pp. 315–317, 11 Cal.Rptr.2d 2, 834 P.2d 696; *Cheong v. Antablin, supra*, 16 Cal.4th at p. 1068, 68 Cal.Rptr.2d 859, 946 P.2d 817.) In *Knight*, the court held that a defendant owes no duty of care to protect a plaintiff against the **risks** inherent in the competitive team sport of football, and in a companion case, the court reached the same conclusion regarding the noncompetitive, nonteam sporting activity of waterskiing. (*Ford v. Gouin* (1992) 3 Cal.4th 339, 345, 11 Cal.Rptr.2d 30, 834 P.2d 724.) Later cases **827 have applied the primary **assumption** of **risk** doctrine to a wide range of sports and recreational activities. (See cases cited in *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1220–1221, 130 Cal.Rptr.2d 198.)

[7] [8] As a general rule, an activity falls within the doctrine if "the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential **risk** of injury." (*Record v. Reason, supra*, 73 Cal.App.4th at p. 482, 86 Cal.Rptr.2d 547.) In addition, an activity subject to the doctrine necessarily matches a participant's physical skill, strength or agility against another competitor or against some other standard of performance such as a high score or a low time, and necessarily includes some element of danger. (See *Shannon v. Rhodes, supra*, 92 Cal.App.4th at p. 797, 112 Cal.Rptr.2d 217.)

[9] "The overriding consideration in the application of primary **assumption** of **risk** is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 253, 38 Cal.Rptr.2d 65.) Many sports and sports-related activities necessarily involve dangers and have rules established expressly to enhance the challenge, thrill or **risk**, and could not exist if vigorous participation were discouraged by the specter of legal liability. (*Knight*, at p. 318, 11 Cal.Rptr.2d 2, 834 P.2d 696.)

Applying these criteria to the instant case, we conclude that the record does not establish as a matter of law that Tatiana was engaged in a *71 sport or sports-related recreational activity covered by the **assumption** of **risk** doctrine. Riding a scooter may be subject to the doctrine under some circumstance, but we cannot conclude, as the trial court did, that riding a scooter is a recreational activity subject to the doctrine under all circumstances. Based on the undisputed facts, applying the **assumption** of **risk** doctrine to simply riding a scooter on a residential sidewalk would not further the purpose of the doctrine to protect sports and sports-related activities from the chilling effect of liability for injuries caused by inherent **risks** in the activity. To the contrary, it might chill the riding of scooters and other wheeled toys, a result which would not be consistent with the purpose of the doctrine. (See *Knight*, at pp. 318–320, 11 Cal.Rptr.2d 2, 834 P.2d 696.)

We analyze the evidence of the nature of Tatiana's activity, the manner in which it was performed, and its inherent **risks**. (*Knight*, at p. 315, 11 Cal.Rptr.2d 2, 834 P.2d 696; *Shannon v. Rhodes, supra*, 92 Cal.App.4th at p. 797, 112 Cal.Rptr.2d 217.) In support of its motion for summary judgment, the County relied on allegations in the complaint to establish that Tatiana was riding a scooter on a residential sidewalk and fell "as she rode over a break in the sidewalk that was raised more than three inches above the adjoining sidewalk section." The County offered no evidence that she was riding at any particular speed, or with other children in a structured or unstructured contest such as a race, or was testing the limits of her ability or the scooter, or that she was attempting any trick or maneuver requiring skill. Based on the evidence, Tatiana may have been engaged in no more than the diversion of getting from one place to another through the use of a child's toy with wheels. Further, the characteristics of the scooter show that it was not a formidable means of transportation. It

was lightweight and could be folded up into something not much larger than a breadbox. **828 And, Tatiana testified that it "looks like a normal scooter, except it's a lot smaller."

We do not discount the opportunity for mischief that any wheeled vehicle presents for children of all ages, and the evidence at trial may show that Tatiana was riding her scooter in an adventuresome and thrill-seeking manner. But we must review the order granting summary judgment as if Tatiana's activity involved no more than riding her scooter on the sidewalk.

[10] Application of the doctrine of **assumption** of **risk** is determined by the manner in which equipment is used, not the manner in which it can be used, and merely using recreational equipment for pleasure does not trigger the doctrine. (See *Shannon v. Rhodes, supra,* 92 Cal.App.4th at p. 801, 112 Cal.Rptr.2d 217.) To conclude otherwise would mean that because a car can be used in a race, riding in a car is participation in a sport. Similarly, it would mean that *72 because a **bicycle** can be used in a race, riding a **bicycle** as a means of transportation is participation in a sport. There are no cases holding that the use of an automobile or **bicycle** or other equipment is automatically subject to the **assumption** of **risk** doctrine solely because the equipment can be used in a sport or sports-related activity. (*Id.*, at pp. 799–801, 112 Cal.Rptr.2d 217.) In all situations, the conduct of the driver or rider may be considered in apportioning fault. (See *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 816, 829, 119 Cal.Rptr. 858, 532 P.2d 1226.) But attributing fault to a plaintiff in determining recovery is very different from entirely barring recovery.

In a recent case, the court discussed the application of **assumption** of **risk** to different types of **bicycling** activities. (*Moser v. Ratinoff, supra,* 105 Cal.App.4th at pp. 1220–1221, 130 Cal.Rptr.2d 198.) The court analogized **bicycle** riding to automobile driving as a "means of transportation," and suggested that **bicycle** riding, like automobile driving, is not automatically covered by the **assumption** of **risk** doctrine. (*Id.*, at p. 1221, 130 Cal.Rptr.2d 198.) The court concluded that the particular type of **bicycling** at issue in the case was subject to the doctrine because "organized, long-distance **bicycle** rides on public highways with large numbers of riders involve physical exertion and athletic **risks** not generally associated with automobile driving or individual **bicycle** riding on public streets or on **bicycle** lanes or paths." (*Id.*, at p. 1221, 130 Cal.Rptr.2d 198, fn. omitted.) The distinction drawn in *Moser* applies to the instant case. Riding a scooter as a means of transportation on a public sidewalk is not the same activity as "scootering" by a number of riders in an organized event.

Further, the County's heavy reliance on the skateboarding case, *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 96 Cal.Rptr.2d 394, is misplaced. *Calhoon* does not support the conclusion that Tatiana's activity in riding her scooter is comparable to the *Calhoon* plaintiff's skateboarding activity. In *Calhoon,* the plaintiff was injured in an accident in the driveway of a residence owned by the parents of a friend. As he attempted to perform a skateboarding trick known as an "ollie," he lost control of his skateboard, fell backwards, and was injured by a metal pipe located in a planter. The court granted summary judgment in favor of the property owners principally on the ground that immunity for recreational use of private property set forth in Civil Code section 846 barred recovery. (*Calhoun,* at p. 113, 96 Cal.Rptr.2d 394.)

829 The court also concluded that the **assumption of **risk** doctrine applied to plaintiff's skateboarding activity because the accident was caused by the plaintiff's failure to successfully complete a dangerous skateboarding stunt and not by the condition of the driveway. (*Calhoon v. Lewis, supra,* 81 Cal.App.4th at pp. 115–117, 96 Cal.Rptr.2d 394.) Here, Tatiana may have contributed to her fall by carelessly riding over a dangerous section of the sidewalk, but there is nothing in the record showing that Tatiana fell while attempting to perform a stunt or while riding her scooter for thrills and excitement.

*73 Moreover, riding a scooter on the sidewalk is not inherently dangerous merely because a scooter rider might fall and suffer injury. Falling or a comparable mishap is possible in any physical activity but is not necessarily an *inherent danger* of the activity. The possibility that any person who rides a scooter, **bicycle** or other wheeled vehicle might be injured by the negligence of another is insufficient to impliedly excuse others from acting with due care to avoid accidents. (*Knight,* at pp. 311–312, 11 Cal.Rptr.2d 2, 834 P.2d 696; *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 330, 21 Cal.Rptr.2d 178.)

[11] In addition to the nature of the activity, application of the doctrine of **assumption** of **risk** depends upon the relationship of the parties to the activity and to each other. (*Knight,* at pp. 315–317, 11 Cal.Rptr.2d 2, 834 P.2d 696; *Cheong v. Antablin, supra,* 16 Cal.4th at p. 1068, 68 Cal.Rptr.2d 859, 946 P.2d 817.) Here, evidence concerning the relationship of the County to Tatiana and her activity reveals a triable issue as to whether

the doctrine of **assumption** of **risk** or the statutory scheme for government tort liability, including principles of comparative fault, should be applied to Tatiana's accident. Clearly, a trier of fact should be entitled to consider Tatiana's conduct in causing the accident, but the evidence offered in support of the County's summary judgment motion is insufficient to establish that her conduct should bar recovery.

[12] Primary **assumption** of **risk** is a policy-driven doctrine that reduces a defendant's duty of care regarding injuries in sporting activities that maximize challenges, excitement and **risks**. But although "defendants generally have no legal duty to eliminate (or protect a plaintiff against) **risks** inherent in the sport itself, ... defendants generally do have a duty to use due care not to increase the **risks** to a participant over and above those inherent in the sport." (*Knight, supra*, 3 Cal.4th at pp. 315--316, 11 Cal.Rptr.2d 2, 834 P.2d 696.) To use an example from *Knight*, a ski resort has no duty to remove moguls from a ski run but clearly has a "duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased **risk** of harm. The cases establish that the latter type of **risk**, posed by a ski resort's negligence, clearly is not a **risk** (inherent in the sport) that is assumed by a participant." (*Id.*, at p. 316, 11 Cal.Rptr.2d 2, 834 P.2d 696.)

Here, we are asked to extend the doctrine of **assumption** of **risk** to a public entity that owns the sidewalk that was the site of Tatiana's accident and that is maintained by the public entity for public use in general. Tatiana alleges that the County negligently maintained its public property by failing to correct a dangerous condition in its sidewalk caused by height differentials between slabs of sidewalk concrete. These facts support the conclusion that the County breached its statutory duty to use due care and, even if the doctrine of **assumption** of **risk** applies, that the County's negligence increased the **risks** to Tatiana ****830** over and above those inherent in riding her scooter.

[13] ***74** The County has statutory liability for injuries caused by dangerous conditions of its public property and must maintain sidewalks in a condition that does not create a hazard to foreseeable users. (Gov.Code, § 835.) That duty extends not just to pedestrians but also to other uses of sidewalks that are "neither extraordinary nor unusual." (*Acosta v. County of Los Angeles* (1961) 56 Cal.2d 208, 214, 14 Cal.Rptr. 433, 363 P.2d 473 [duty extends to use by bicyclist in violation of local ordinance].) For purposes of its summary judgment motion, the County does not dispute this statutory duty, or that Tatiana was both a permissive and foreseeable user of the public sidewalks or, unless the doctrine of **assumption** of **risk** applies, that a breach of the County's duty is a triable issue.

The trial court concluded that the **risk** of "coming upon uneven surfaces and falling from a scooter" is inherent in riding a scooter and was not increased by "[a]ny failure to maintain the sidewalk" by the County. But the evidence equally supports the contrary conclusion that the existence of uneven surfaces resulted from the County's failure to maintain the sidewalk in a safe condition for all reasonable and foreseeable usage and, therefore, that the **risk** of injury was created, not merely increased, by the County's negligence.

Uplifted portions of the sidewalk create a danger to all users of the sidewalk. It is not a danger unique to riding a scooter. Sidewalk height differentials create a **risk** for walkers, running children, parents running after their children, parents pushing children in carriages, persons carrying packages that impede the view of the sidewalk, as well as persons riding scooters, **bicycles**, tricycles, and other toys with wheels and pedals that may be purchased in any large toy store. The doctrine of **assumption** of **risk** is intended to reduce a person's legal duty to avoid **risks** created by a particular type of sport or recreational activity, but is not intended to eliminate a duty to avoid **risks** not only to the participants in the activity but also to other members of the public who properly and foreseeably utilize the same facilities.

At trial, it may be shown that riding a scooter increased the danger created by the sidewalk hazard, but based on the evidence before the trial court it is also possible that the sidewalk hazard rendered any use of the sidewalk dangerous. The evidence permits the reasonable inference that Tatiana's fall was not caused by riding a scooter as a sport whose inherent characteristics caused her to challenge the hazard head-on or prevented her from reacting quickly enough to avoid the hazard. Rather, the evidence supports a conclusion that Tatiana was riding her scooter at a safe speed and in a safe manner, and that the accident may have been caused by her inattention to the sidewalk hazard resulting from distractions that are not inherent in riding a scooter. It ***75** is also possible, if not likely, that the hazard was not readily visible to an attentive rider. The critical conclusion, however, is that the evidence before the trial court did not establish any of the possibilities.

In support of its motion, the County offered a declaration stating that sidewalks are constructed and maintained "to accommodate people who are walking" not to "accommodate scootering." Surely, the declaration was offered to suggest a

relevant difference in the use of sidewalks by walkers and riders of scooters. But the declaration fails to establish that use of the sidewalks for any number of purposes other than walking, including riding scooters, was not foreseeable and permissible. The declaration also fails to support an inference **831 that the County could have fulfilled its duty to keep its public sidewalks safe for pedestrians without also keeping the sidewalks in a safe condition for the scootering activity performed by Tatiana. The evidence does not establish that the method and cost of maintaining sidewalks against the danger of height differentials to riders of scooters would be materially different than that required to maintain sidewalks against the danger of height differentials to pedestrians.

CONCLUSION

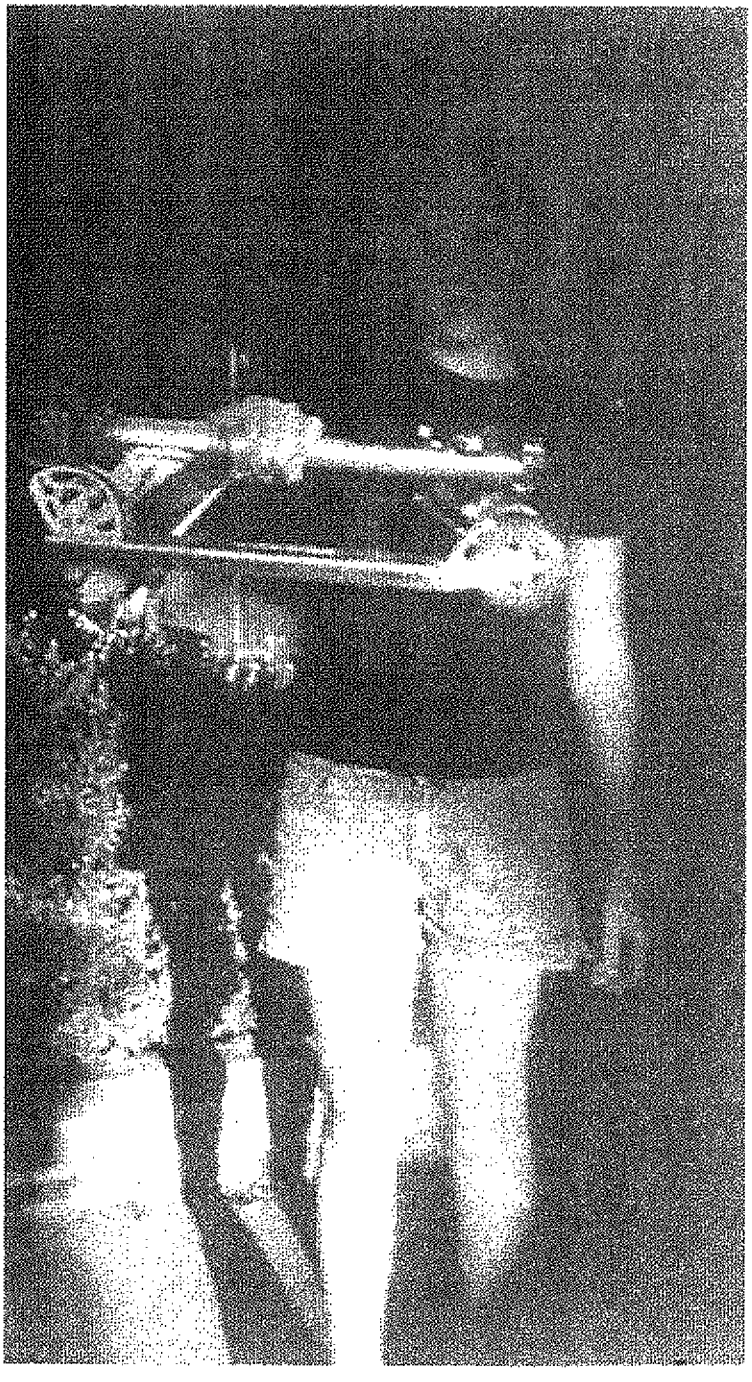
A fundamental rule of tort law is that all persons are legally liable for the harm they cause based on their fault reduced by any contributing fault by the injured party. (Civ.Code, § 1714; *Li v. Yellow Cab Co., supra,* 13 Cal.3d at pp. 816, 829, 119 Cal.Rptr. 858, 532 P.2d 1226.) The doctrine of primary **assumption** of **risk** is an exception to the rule and completely bars recovery by an injured party irrespective of the negligence of another. If we were to apply the doctrine to injuries involving toys and vehicles regardless of the manner of their use, the exception would become the rule. This we decline to do.

The judgment is reversed. Costs on appeal are awarded to appellant.

We concur: GILBERT, P.J., and COFFEE, J.

**832 APPENDIX

APPENDIX



Parallel Citations

115 Cal.App.4th 64, 04 Cal. Daily Op. Serv. 573, 2004 Daily Journal D.A.R. 758

Footnotes

* Baxter, Chin and Brown, JJ., dissented.

1 A photograph of a person, presumably Tatiana, holding the scooter is attached as an appendix to this opinion.

3.

201 Ill.App.3d 756
Appellate Court of Illinois,
Third District.

James D. COLE, II, as natural father, and next friend of Jessica L. Cole, a minor; and James D. Cole, II, individually, Plaintiff-Appellant,
v.
CITY OF EAST PEORIA, Defendant-Appellee.
No. 3-89-0643. | May 21, 1990. | Rehearing Denied June 27, 1990.

Father brought action on behalf of minor daughter for injuries received and for medical expenses paid as result of accident in which **bicycle tire** fell through storm sewer **grate**. The Circuit Court, Tazewell County, Bruce W. Black, J., granted summary judgment for city, finding governmental immunity, and father appealed. The Appellate Court, Green, J., held that: (1) Governmental Immunity Act did not relieve city of liability for injuries to minor caused by unsafe sewer **grate**; (2) city had immunity for plan or design of sewer grating, but did not have immunity if use of design created condition that was unsafe; and (3) genuine issues of material fact existed precluding summary judgment for city on whether city was aware of dangerous condition created by **grate**.

Reversed and remanded.

West Headnotes (3)

[1] **Municipal Corporations**
Care Required as to Condition of Way

Section of Local Governmental and Governmental Employees Tort Immunity Act granting local public entities immunity from liability for injuries caused by failure to upgrade existing street relieved responsibility for upgrading at time of dedication or other acquisition streets and facilities which met then-existing standards, but did not relieve city of immunity from duty to maintain property in reasonably safe condition.

3 Cases that cite this headnote

[2] **Municipal Corporations**
Roadway

Under section of Governmental Immunity Act, city had immunity for plan or design of sewer grating where State Department of Public Works approved design at time of construction project, but, under same section, city did not have immunity if, after sewer grating was put in, it appeared from use that design had created unsafe condition. S.H.A. ch. 85, ¶¶ 3-102(a), 3-103(a), 3-105(b).

7 Cases that cite this headnote

[3] **Judgment**
Tort Cases in General

Genuine issues of material fact existed, precluding summary judgment for city, on question of whether city was aware of danger of sewer **grates** to bicyclists and whether city was aware that area in which accident occurred was frequently used by bicyclists. S.H.A. ch. 85, ¶¶ 3-102(a), 3-103(a), 3-105(b).

3 Cases that cite this headnote

Attorneys and Law Firms

**770 *756 ***430 Christopher P. Ryan, Strodel, Kingery & Durree, Associates, Peoria, for James D. Cole, II.

Nathan R. Miller, Miller, Hall & Triggs, Peoria, for City of East Peoria.

Opinion

*757 Justice GREEN delivered the opinion of the court:

On April 27, 1988, plaintiff James D. Cole II brought suit in the circuit court of Tazewell County against defendant City of East Peoria (City) seeking damages (1) on behalf of his minor daughter Jessica L. Cole for injuries she received; and (2) on his own behalf for medical expenses he paid as a result of those injuries. On October 3, 1989, the circuit court granted the defendant's motion for summary judgment as to plaintiffs' second-amended complaint. Plaintiffs have appealed. Summary judgment may be granted only when the pleadings and other documents before the court show no genuine issue exists as to any material fact which could prevent the movant from being entitled to judgment as a matter of law. (Ill.Rev.Stat.1987, ch. 110, par. 2-1005(c).) Such is not the case here. Accordingly, we reverse and remand for further proceedings.

The second-amended complaint's essential allegations were that (1) the minor was injured on April 13, 1988, when she was riding her **bicycle** on the edge of Springfield Road in the City, and the **tire** of her **bicycle** fell through a storm sewer **grate** with openings parallel to the edge of the road; (2) the City had a duty to maintain the road surfaces and sewer **grates** in a reasonably safe condition for the use of the public; (3) the City was **negligent** in (a) failing to maintain the sewer **grate** in a safe condition for **bicycles** to pass over it, (b) permitting sewer **grates** to be installed with bars that ran parallel to the curb in an area where members of the public rode **bicycles**, and (c) failing to replace the sewer **grates** which ran parallel to the roadway with **grates** which were "**bicycle** safe"; and (4) the minor's injuries resulted from the **negligent** and careless acts or omissions by defendant.

The second-amended complaint also alleged (1) the City had a duty to correct or modify any improvements made by the City which constituted a danger to the public; (2) the City created and renewed striping on the roadway four feet from the edge of the roadway in a highly populated area which did not have sidewalks or other areas designated for pedestrians; (3) the City had actual knowledge through its employees that the four-foot zone at the edge of the roadway was actively used by pedestrians and bicyclists; (4) the City was **negligent** as previously described and for failing **771 ***431 to modify or replace the roadway striping to make the area safe for members of the public while riding **bicycles** in the area.

The question of the propriety of the summary judgment turns upon the operation of three provisions of article III of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (Ill.Rev.Stat.1987, ch. 85, par. 3-101 *et seq.*).

*758 Section 3-102(a) of the Act states:
"Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." Ill.Rev.Stat.1987, ch. 85, par. 3-102(a).

Section 3-103(a) of the Act states that with regard to the adoption of a plan or design of construction of an improvement to public property, a local public entity is generally not liable. That section states, however, that a local public entity is liable "if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe." (Ill.Rev.Stat.1987, ch. 85, par. 3-103(a).) Section 3-105(a) of the Act grants local public entities immunity from liability for "injury caused by the effect of weather conditions as such on the use of street." (Ill.Rev.Stat.1987, ch. 85, par. 3-105(a).) Sections 3-105(b) and (c) of the Act then provide:
"(b) Without implied limitation, neither a local public entity nor a public employee is liable for any injury caused by the failure of a local public entity or a public employee to upgrade any *existing* street, highway, alley, sidewalk or other public way or place, or the ways adjoining any of the foregoing, or the signals, signs, markings, traffic or pedestrian control devices, equipment or structures on or near such street, highway, alley, sidewalk or other public way or place, or the ways adjoining any of the foregoing from the standards, if any, which *existed at the time of the original dedication to, or acquisition of, the right of way of such street, highway, alley, sidewalk or other public way* or place, or the ways adjoining

any of the foregoing, by *the first local public entity to acquire the property* or right of way, to standards which are or may be applicable or are imposed by any government or other person or organization between the time of such dedication and the time of such injury.

(c) Nothing in this Section shall relieve the local public entity ***759** of the duty to exercise ordinary care in the maintenance of its property as set forth in Section 3-102." (Emphasis added.) Ill.Rev.Stat.1987, ch. 85, pars. 3-105(b), (c).

The documents before the court at the time summary judgment was entered undisputedly showed that (1) the minor was injured in the manner alleged in the second-amended complaint; (2) the road and sewer **grate** over which Jessica was riding when she was injured were part of a paving improvement project started in 1964 and completed in 1966; (3) the type of sewer **grate** used at that time was recommended in the plans and specifications for the project by the Illinois Department of Transportation; (4) the improvement project was a joint effort of the City and Tazewell County; (5) by agreement entered into in 1965, the City agreed to maintain the portions of the road involved; (6) on the side of the road where the **bicycle** was being ridden, white stripes had been painted four feet from the curb in 1984; (7) except for the painting of the stripes, the area where the injury occurred was in the same condition as it was at the completion of the improvement; and (8) since sometime in the 1970's, the proper standard for sewer **grates** required they have some sort of cross bars or bars at an angle such that a **bicycle** wheel, when ridden over them, ****772** *****432** would be unlikely to fall through the **grates**.

[1] The circuit court's decision to grant summary judgment to the City was based on a theory that section 3-105(b) of the Act, which concerns immunity granted local public entities in regard to failure to upgrade existing facilities and structures, relieved the City of any liability arising from the injuries to the minor. The City maintains this rule was correct because (1) the grating conformed to standards applicable when installed in the mid-1960's; and (2) under the provisions of section 3-105(b), the City had no duty to upgrade the grating to meet the higher standards existing at the time of the injury to the minor. We conclude the analysis by the circuit court and the City incorrectly interpreted section 3-105(b) of the Act to be concerned with upgrading of facilities from standards existing when construction takes place, when actually section 3-105 is concerned with upgrading facilities on property dedicated to or acquired by a local governmental entity from the standards existing at the time of dedication or acquisition.

Section 3-105(b) of the Act states " * * * neither a local public entity nor public employee is liable for any injury caused by the failure * * * to upgrade any *existing* street * * * from the standards * * * which *existed* at the time of the *original dedication to, or acquisition of, the right of way * * * by the first local public entity to acquire the property **760 or right of way,* to standards * * * applicable or are imposed * * * *between the time of such dedication and the time of such injury.*" (Emphasis added.) (Ill.Rev.Stat.1987, ch. 85, par. 3-105(b).) The language used clearly indicates the immunity granted concerns the upgrading of streets, *et cetera,* existing at the time of dedication of the street, *et cetera,* to public use or acquisition of the street by the first public entity to standards existing at the time of injury. The statutory provision is not keyed, as the City contends, to standards existing when an improvement is made to an existing roadway. Here, there is no evidence as to how or when the roadway was acquired by the first local entity or as to what appropriate standards were at that time.

If, as the City maintains, section 3-105(b) is keyed to the time an improvement is made to an existing street, then it would conflict with and repeal a substantial part of section 3-103(a) of the Act, which relieves a local public entity of liability as to defects of design but does not extend that immunity when "after the execution of such a plan or design it appears from its use that it has created a condition that is not reasonably safe." (Ill.Rev.Stat.1987, ch. 85, par. 3-103(a).) The only legislative history to section 3-105 arises from a question asked on the floor of the House of Representatives concerning the effect of weather conditions in relation to the immunity granted by section 3-105. (84th Ill.Gen.Assem., House Proceedings, June 30, 1986, at 14.) This question obviously involved section 3-105(a), which concerns weather conditions.

In the absence of other explanation and in review of the wording of section 3-105(b) of the Act, we are persuaded the purpose of that subsection is to relieve local public entities from responsibility for upgrading streets and related facilities, particularly those in subdivisions dedicated by the subdivider when, at the time of the dedication or other acquisition, the streets and facilities meet the then existing standards. In areas of rapid growth, local public entities would be taking on a very substantial burden if they were required to upgrade all of the facilities described in section 3-105(b) every time the standard for those facilities rises. The public entity to which property is dedicated or by which property is acquired cannot receive any immunity for design defects as to facilities acquired under

section 3-103(a) of the Act, which only applies to "construction of, or improvement to public property." Ill.Rev.Stat.1987, ch. 85, par. 3-103(a).

[2] As section 3-105(b) is not applicable here, the immunity which the City can claim must arise from sections 3-102(a) or 3-103(a) of the Act. Under section 3-102(a), the City had no immunity from a *761 duty to maintain its property in a reasonably **773 ***433 safe condition and to exercise ordinary care for people using the property in a foreseeable manner as long as it had actual or constructive notice of a dangerous condition for a reasonable length of time to correct the condition. Under section 3-103(a) of the Act, the City has immunity for the plan or design of the sewer grating, because the record shows the then Illinois Department of Public Works approved the design at the time of the construction project. However, under section 3-103(a), the City does not have immunity, if after the sewer grating was put in, "it [appeared] from its use that [the design] has created a condition that it is not reasonably safe." Ill.Rev.Stat.1987, ch. 85, par. 3-103(a).

[3] The documents properly before the court at the time of entry of summary judgment showed evidence existed that (1) since at least 1979, the City knew of the danger of the type of **grates** used and had replaced **grates** which were broken or damaged with those containing safety features; (2) the area of the street where the minor's injuries occurred had an extended white line four feet from the curb on the side of the **grate**; (3) the area between the white line and the nearest curb was being used extensively by bicyclists and pedestrians; and (4) prior to the injury to the minor, the City had notice that another bicyclist had been injured when a wheel of a **bicycle** ridden by that person had fallen through a similar **grate**.

Citing *Swett v. Village of Algonquin* (1988), 169 Ill.App.3d 78, 119 Ill.Dec. 838, 523 N.E.2d 594, the City maintains the Act does not create duties upon a local public entity or its employees but merely provides for immunity under conditions where liability would result at common law. The City concedes that section 3-102(a) recites the common law duty of a local public entity in regard to maintenance, but indicates that duty is the only duty upon a local public entity, and that the provision of section 3-103(a), that a local public entity has liability "if after the execution of such plan or design it appears from its use that it has created a condition that is not reasonably safe" (Ill.Rev.Stat.1987, ch. 85, par. 3-103(a)), neither creates a duty nor recites one which is not covered by section 3-102(a). (See *Swett*, 169 Ill.App.3d at 95, 119 Ill.Dec. at 850, 523 N.E.2d at 606.) We need not decide whether that is correct because we conclude that even if plaintiff must prove a cause of action under section 3-102(a) of the Act, a sufficient showing was made that a factual question exists in that regard.

The necessary factual question of liability is raised here by evidence that (1) the City ordered a white line painted a distance from the curb (four feet), indicating an intention the area be used by others than those driving automobiles; (2) the City became aware the area *762 was being used by many bicyclists; (3) the City became aware that at least one person had been injured locally when a **bicycle tire** was caught between similar **grates**; and (4) the City had become aware that the type of **grates** used did not meet then existing standards and replaced parallel **grates** when they were damaged. Thus, evidence was produced that the City both intended and permitted cyclists to use the four-foot strip; it was foreseeable that the use would continue; the condition was unsafe; and the City had a reasonable time to remedy the condition of the **grate**, all as required by section 3-102(a) in order to negate immunity. In addition, the evidence could be taken to indicate the execution of the plan for the construction in the 1960's and the use of the street had created an unsafe condition as described by section 3-103(a) as creating liability.

Accordingly, summary judgment in favor of the City should not have been entered. We reverse and remand to the circuit court of Tazewell County for further proceedings.

Reversed and remanded.

KNECHT, P.J., and STEIGMANN, J., concur.

Parallel Citations

201 Ill.App.3d 756, 559 N.E.2d 769

559 N.E.2d 769, 147 Ill.Dec. 429

End of Document

4.

39 Cal.App.4th 8, 45 Cal.Rptr.2d 855, 95 Cal. Daily Op. Serv. 8155, 95 Daily Journal D.A.R. 13,977

PATRICK J. CONNELLY, Plaintiff and Appellant,
v.
MAMMOTH MOUNTAIN SKI AREA, Defendant and Respondent.
No. C018483.

Court of Appeal, Third District, California.
Sep 29, 1995.

SUMMARY

An individual, who sustained serious injuries when he lost control while snow skiing and collided with a ski lift tower, brought an action for premises liability and general negligence against the ski resort operator, alleging that defendant failed to properly pad the tower. The trial court granted defendant's motion for summary judgment, finding the collision with the tower to be an obvious, avoidable, and inherent risk, for which defendant owed no duty under the primary assumption of the risk doctrine. (Superior Court of Mono County, No. 9708, N. Edward Denton, Judge.)

The Court of Appeal affirmed. The court held that defendant owed no duty of care to plaintiff under the primary assumption of the risk doctrine. Snow skiing is a sport that involves certain inherent risks, including the risk of collisions with ski lift towers and their components. Because of the obvious danger, the very existence of a ski lift tower serves as its own warning. Moreover, defendant's failure to place more padding on the tower did not support the conclusion that defendant breached its duty not to increase the inherent risks of skiing. A ski area operator has no duty to pad its ski lift towers, and plaintiff did not allege that defendant did or failed to do anything that caused him to collide with the tower. (Opinion by Davis, Acting P. J., with Raye and Morrison, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)

Negligence § 9--Elements of Actionable Negligence--Duty of Care.
A duty to use due care is one of the elements of a negligence cause of action. If there is no such duty, there is no negligence action.

(2)

Negligence § 37--Exercise of Care by Plaintiff--Assumption of Risk-- Primary Versus Secondary.
Secondary assumption of the risk arises where a defendant breaches a duty of care owed to the plaintiff but the plaintiff nevertheless knowingly encounters the risk created by the breach. Secondary assumption of the risk is not a bar to recovery, but requires the application of comparative fault principles. Primary assumption of the risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks. Primary assumption of the risk does bar recovery because no duty of care is owed as to such risks. The existence and scope of a defendant's duty of care in the primary assumption of the risk context is a legal question that depends on the nature of the sport or activity and is an issue to be decided by the court rather than the jury.

[Effect of adoption of comparative negligence rules on assumption of risk, note, 16 **A.L.R.4th** 700.]

(3)

Negligence § 37--Exercise of Care by Plaintiff--Assumption of Risk-- Primary--Snow Skier's Collision With Ski Lift Tower.
In an action for premises liability and general negligence against a ski resort operator, for injuries plaintiff sustained when he lost control while snow skiing and collided with a ski lift tower that he alleged was not properly padded, the trial court correctly granted defendant's motion for summary judgment on the ground that defendant owed no duty of care to plaintiff under the primary assumption of the risk doctrine. Snow skiing is a sport that involves certain inherent risks, including the risk of collisions with ski lift towers and their components. Because of the obvious danger, the very existence of a ski lift tower serves as its own warning. Moreover, defendant's failure to place more padding on the tower did not support the conclusion that defendant breached its duty not to increase the inherent risks of skiing. A ski area operator has no duty to pad its ski lift towers, and plaintiff did not allege that defendant did or failed to do anything that caused him to collide with the tower.

[See 6 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 1104 et seq.]

COUNSEL

J. Kenneth Jensen for Plaintiff and Appellant.
Hancock, Rothert & Bunshoft, Paul S. Rosenlund and Peter J. Koenig for Defendant and Respondent. *10

DAVIS, Acting P. J.

In this personal injury action, plaintiff Patrick Connelly (Connelly) sued defendant Mammoth Mountain Ski Area (Mammoth) after colliding with a ski lift tower. In granting summary judgment for Mammoth, the trial court rejected Connelly's claim that Mammoth improperly padded the tower; instead, the court found the collision with the tower to be an obvious, avoidable and inherent risk for which Mammoth owed no duty under the primary assumption of risk doctrine defined in *Knight v. Jewett* (1992) 3 Cal.4th 296 [11 Cal.Rptr.2d 2, 834 P.2d 696]. We shall affirm the judgment. Pertinent facts will be set forth in the discussion that follows.

Discussion

1. *Standard of Review*

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) An appellate court determines on its own whether these criteria have been met. (*Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 844 [30 Cal.Rptr.2d 768].) For purposes of a summary judgment motion, "[a] defendant ... has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established ...." (Code Civ. Proc., § 437c, subd. (o)(2).)

2. *Background and Analysis*

On March 5, 1989, Connelly, who considered himself an advanced or expert skier at the time, collided with a ski lift tower on the Stump Alley Run at Mammoth, a run designated as "more difficult" (advanced intermediate). Connelly sustained serious injury. The accident occurred when one of Connelly's ski bindings released, causing Connelly to lose his ski, fall on his stomach, and slide downhill into the tower.

At the site of Connelly's collision, the Stump Alley Run is fairly wide and bisected by the ski lift. The tower into which Connelly collided was visible to approaching skiers for approximately 200 yards. On the day of the accident, the weather was sunny and the snow conditions were groomed and hardpacked. In his deposition, Connelly stated there was nothing dangerous or unusual that caused him to lose control and fall or that caused him to collide with the lift tower. *11

On the day of the accident, Connelly had skied at least one prior run down Stump Alley. In his skiing career, Connelly had skied past the fateful tower between 50 and 100 times.

In his complaint, Connelly sued Mammoth for premises liability and general negligence. Both theories were based on the following allegation of negligence: "Plaintiff [Connelly] lost control ... and struck one of the metal towers and as a result, suffered serious injury because the metal tower was not properly padded." In his summary judgment papers, Connelly elaborated on this point. The padding on the tower that Connelly struck was not at snow level and was inadequate in any event to cushion the blow and prevent his injuries.

Mammoth moved successfully for summary judgment, contending that ski lift tower collisions are an inherent risk of skiing and that Mammoth owed no duty to protect Connelly from this inherent risk. ([1]) A duty to use due care is one of the elements of a negligence cause of action; if there is no such duty, there is no negligence action. (See *Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 751 [33 Cal.Rptr.2d 732].)

Mammoth's position is grounded in the doctrine of primary assumption of risk as defined in *Knight v. Jewett, supra*, 3 Cal.4th 296. In *Knight* and a companion case, *Ford v. Gouin* (1992) 3 Cal.4th 339 [11 Cal.Rptr.2d 30, 834 P.2d 724], the California Supreme Court noted there were two types of assumption of risk, primary and secondary.

([2]) "Secondary assumption of risk [arises] where a defendant breaches a duty of care owed to the plaintiff but the plaintiff nevertheless knowingly encounters the risk created by the breach. Secondary assumption of risk is not a bar to recovery, but requires the application of comparative fault principles. (*Knight*, at pp. 314-315.)" (*Wattenbarger v. Cincinnati Reds, Inc., supra*, 28 Cal.App.4th at p. 751.)

Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent

risks; primary assumption of risk does bar recovery because no duty of care is owed as to such risks. (*Knight v. Jewett, supra*, 3 Cal.4th at pp. 314-316; *Wattenbarger v. Cincinnati Reds, Inc., supra*, 28 Cal.App.4th at p. 751.) "For example, an errantly thrown ball in baseball or a carelessly extended elbow in basketball are considered inherent risks of those respective sports." (*Wattenbarger*, *supra*, at p. 751.) The existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity ... and on the parties' general relationship to ***12** the activity, and is an issue to be decided by the court, rather than the jury." (*Knight*, *supra*, at p. 313, italics in original.)

([3]) Snow skiing is a sport that involves certain inherent risks. This court has listed those risks on a couple of occasions. " ' "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. (*Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 123 ..., quoting from Mich. Stat. Ann., § 18.483 (22)(2).)" ' "' (*Wattenbarger v. Cincinnati Reds, Inc., supra*, 28 Cal.App.4th at pp. 752-753; *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 253 [38 Cal.Rptr.2d 65], parallel citation omitted, italics added.) Because of the obvious danger, the very existence of a ski lift tower serves as its own warning. (See *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 122 [266 Cal.Rptr. 749].)

Connelly collided with a ski lift tower while skiing. This risk, as noted, is inherent in the sport. Consequently, the trial court properly ruled in Mammoth's favor on this point, concluding that Mammoth, under the doctrine of primary assumption of risk, owed no duty to protect Connelly against this inherent risk.

Additionally, Connelly argued that Mammoth breached a different duty, the duty not to *increase* the inherent risks of skiing; Mammoth breached this duty, Connelly asserted, by failing to maintain adequate padding on the lift towers at snow level. This argument is in line with *Knight*'s observation that "[a]lthough defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." (*Knight v. Jewett, supra*, 3 Cal.4th at pp. 315-316.)

There was no evidence, however, that Mammoth *increased* the inherent risk of colliding with a ski lift tower while skiing. For example, there was no evidence that Mammoth did or failed to do anything that caused Connelly to collide with the tower. Nor are we aware of any relevant legal authority in ***13** California, and we have not been directed to any, *requiring* a ski area operator to pad its ski lift towers. It would be anomalous to hold an operator who padded its towers-as Mammoth did here-more liable than an operator who failed to do so.

Two out-of-state decisions have considered and rejected arguments similar or analogous to the one Connelly advances about padding. We find these decisions persuasive. In *Leopold v. Okemo Mountain, Inc.* (D.Vt. 1976) 420 F.Supp. 781 (applying Vermont law), the plaintiff argued that the doctrine of assumption of risk should not be applied because an unpadded ski lift tower is not a *necessary* risk to the sport of skiing and therefore is not "assumed" by the skier. In rejecting this argument, the *Leopold* court said: "This theory misses the point. While it is arguable, perhaps, that some of the hazards created by towers situated [on the ski trail] could have been reduced or eliminated prior [to the date of the accident] and were therefore not absolutely 'necessary,' the fact is that those hazards *were* 'obvious and necessary' to any skier who chose to ski the trail on that date.... [¶] The towers ... were plainly visible .... [Plaintiff] knew or could easily observe that the towers were not padded .... Nothing was hidden from [plaintiff's] vision by accident or design. If [plaintiff] believed that the trail or the towers presented risks which were too great, he could have chosen not to proceed." (420 F.Supp. at pp. 786-787, italics in original.)

An analogous argument met an analogous fate in *Verro v. New York Racing Ass'n., Inc.* (1989) 142 A.D.2d 396 [536 N.Y.S.2d 262], which concerned the safety of jockeys riding at a horse racetrack. The court in *Verro* stated: "As is at least implicit in plaintiff's argument, ... the doctrine of no duty/assumption of risk ... would not apply to obvious, known conditions so long as a defendant could feasibly have provided safer conditions. Then, obviously, such risks would not be 'necessary' or 'inherent'. This would effectively emasculate the doctrine, ... changing the critical inquiry ... to whether the defendant had a feasible means to remedy [the dangers]." (*Id.*, at p. 265; accord, *Nagawiecki v. State* (1989)

150 A.D.2d 147 [545 N.Y.S.2d 954, 956] ["... the fact that materials are available to make fences and posts such as the one struck by claimant safer ... does not alter the logic of our conclusion [which dismissed a claim against a ski operator]," citing *Verro*].)

On the day of Connelly's accident, the ski lift tower that he struck could be seen by approaching skiers for about 200 yards. The tower was situated in a fairly wide part of the ski run. The weather was clear and the ski conditions were normal. Connelly had previously skied past the tower at least once on the day of the accident, and several dozen times in his skiing career. As ***14** noted, Connelly has not alleged that Mammoth did or failed to do anything that caused him to collide with the tower. Connelly's binding gave way, as well as his ski, and his slide to the tower began. This was simply a very unfortunate accident. But the law is clear in California under the facts presented in this case: colliding with a ski lift tower while skiing is an inherent risk within the doctrine of primary assumption of risk, and Mammoth owed no duty to Connelly to protect him from this inherent risk. Furthermore, there is no evidence that Mammoth increased this inherent risk. Consequently, Mammoth has shown that Connelly cannot establish the duty element of his negligence and negligence-based premises liability causes of action; therefore, as the trial court concluded, Mammoth is entitled to summary judgment.

The judgment is affirmed.

Raye, J., and Morrison, J., concurred.

Appellant's petition for review by the Supreme Court was denied December 13, 1995.

Footnotes

1 *Danieley* noted this Michigan statute was based on the common law and *Danieley* regarded it "as persuasive authority for what the common law in this subject-matter area should be in California." (*Danieley v. Goldmine Ski Associates, Inc., supra*, 218 Cal.App.3d at p. 123.)

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64 A.D.3d 251, 880 N.Y.S.2d 656, 2009 N.Y. Slip Op. 04020

Karen Cotty, Respondent
v
Town of Southampton et al., Appellants-Respondents, Suffolk County Water Authority, Appellant-Respondent/Fourth-Party Plaintiff-Respondent, and Elmore Associates Construction Corp., Defendant/Third-Party Plaintiff, et al., Defendant. Peter Deutch, Third-Party Defendant/Fourth-Party Defendant-Appellant, et al., Fourth-Party Defendant.
Supreme Court, Appellate Division, Second Department, New York

May 19, 2009

CITE TITLE AS: Cotty v Town of Southampton

SUMMARY

Appeals from an order of the Supreme Court, Suffolk County (Robert W. Doyle, J.), entered August 6, 2007. The order, insofar as appealed from, (1) denied the motion by defendant Town of Southampton for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, (2) denied the motion by defendants Suffolk County Water Authority and CAC Contracting Corp. for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, and (3) denied that branch of the cross motion of fourth-party defendant Peter Deutch which was for summary judgment dismissing the fourth-party complaint and all related cross claims insofar as asserted against him.

Cotty v Town of Southampton, 2007 NY Slip Op 32622 (U), affirmed.

HEADNOTE

Negligence

Assumption of Risk
Applicability—Operation of Bicycle on Paved Public Roadway

The doctrine of primary assumption of risk, which eliminates the duty of care that would otherwise exist when a person voluntarily participates in a sporting activity and thereby assumes the risk of injury-causing events inherent in that activity, was not applicable in a personal injury action brought by plaintiff bicyclist, who collided with an oncoming car after she swerved into the road in order to avoid colliding with the bicyclist immediately in front of her, who fell into her path after unsuccessfully attempting to avoid an unbarricaded "lip" created by road construction. Riding a bicycle on a paved public roadway normally does not constitute a sporting activity for purposes of applying the primary assumption of risk doctrine. It could not be said, as a matter of law, that merely by choosing to operate a bicycle on a paved public roadway, or by engaging in some other form of leisure activity or exercise such as walking, jogging or roller skating on a paved public roadway, a plaintiff consents to the negligent maintenance of such roadways by a municipality or a contractor.

RESEARCH REFERENCES

Am Jur 2d, Negligence §§ 763, 765, 790.

***252** NY Jur 2d, Negligence §§ 123, 125, 132, 133.

Prosser and Keeton, Torts (5th ed) § 68.

ANNOTATION REFERENCE

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path. 68 ALR4th 204.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: primary /2 assumption /2 risk & bicycle /s paved /4 public

APPEARANCES OF COUNSEL

Thomas C. Sledjeski, PLLC (*Anita Nissan Yehuda, P.C.*, Roslyn Heights, of counsel), for Town of Southampton, defendant-appellant-respondent.
Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (*Norman H. Dachs* and *Jonathan A. Dachs* of counsel), for Suffolk County Water Authority, defendant-appellant-respondent/fourth-party plaintiff-respondent and CAC Contracting Corp., defendant-appellant-respondent (one brief filed).
Loccisano & Larkin, Hauppauge (*Robert X. Larkin* of counsel), for Peter Deutch, third-party defendant/fourth-party defendant-appellant.
Rosenberg & Gluck, LLP, Holtsville (*Andrew Bokar* of counsel), for plaintiff-respondent.

OPINION OF THE COURT

Skelos, J.P.

When a person voluntarily participates in certain sporting events or athletic activities, an action to recover damages for injuries resulting from conduct or conditions that are inherent in the sport or activity is barred by the doctrine of primary assumption of risk. In this case, where the plaintiff was injured while riding a bicycle on a paved public roadway, we confront the threshold question of whether the plaintiff was engaged in an activity that subjected her to the doctrine of primary assumption of risk.

Beginning on July 24, 2002, pursuant to a contract with the defendant Suffolk County Water Authority (hereinafter SCWA), the defendant CAC Contracting Corp. replaced the asphalt in a trench that had been dug along the edge of Deerfield Road in Southampton for the purpose of installing a conduit for a water *253 main. Two layers of asphalt were to be laid to fill the trench and bring it level with the preexisting roadway, but at the time of the subject accident, only one layer of asphalt had been laid, leaving a "lip" approximately one inch deep, parallel to the length of the road, where the preexisting roadway and the newly paved section met. At the site of the accident, the lip was not marked by any barricades or traffic cones.

On July 27, 2002, the plaintiff, a member of a bicycle club which engaged in long-distance rides, was the last bicyclist in one of several groups of eight riders cycling on Deerfield Road during a 72-mile ride. The plaintiff testified at a deposition that the road "was not perfectly smooth," and contained potholes. She had previously ridden on the subject road approximately 20 to 30 times, as recently as two to four weeks before the accident, and was aware of construction activity on various portions of the road. The road had no shoulder, and the plaintiff was riding approximately one to two feet from the edge of the road, and approximately 1 to 1½ wheel lengths behind the fourth-party defendant, Peter Deutch, at a maximum speed of 17 to 18 miles per hour. The bicyclists in the front of the line began a "hopping" maneuver with their bicycles to avoid the "lip" in the road. Deutch unsuccessfully attempted the hopping maneuver, and fell in the plaintiff's path. Seeking to avoid Deutch, the plaintiff swerved and slid into the road where she collided with an oncoming car, sustaining injuries.

The plaintiff commenced this personal injury action against, among others, the Town of Southampton, the SCWA, and CAC Contracting Corp. (hereinafter collectively the defendants), and the SCWA impleaded Deutch. The defendants moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them, and Deutch cross-moved for summary judgment dismissing the fourth-party complaint and all related cross claims insofar as asserted against him. The defendants and Deutch (hereinafter collectively the appellants) contended, inter alia, that the plaintiff had assumed the risks commonly associated with bicycle riding. The Supreme Court denied the appellants' motions.

Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks which are inherent in the activity (*see* *Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *Turcotte v Fell*, 68 NY2d 432, 439 [1986]). Risks inherent in a sporting *254 activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation (*see* *Morgan v State of New York*, 90 NY2d at 484; *Turcotte v Fell*, 68 NY2d at 439). Because determining the existence and scope of a duty of care requires "an examination of plaintiff's reasonable expectations of the care owed him by others" (*Turcotte v Fell*, 68 NY2d at 437), the plaintiff's consent does not merely furnish the defendant with a defense; it eliminates the duty of care that would otherwise exist. Accordingly, when a plaintiff assumes the risk of participating in a sporting event, "the defendant is relieved of

legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence" (*id.* at 438, quoting Prosser and Keeton, Torts § 68, at 480-481 [5th ed]).

The policy underlying the doctrine of primary assumption of risk is "to facilitate free and vigorous participation in athletic activities" (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 657 [1989]). Without the doctrine, athletes may be reluctant to play aggressively, for fear of being sued by an opposing player. As long as the defendant's conduct does not unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk (*see Morgan v State of New York*, 90 NY2d at 485; *Benitez v New York City Bd. of Educ.*, 73 NY2d at 658; *Muniz v Warwick School Dist.*, 293 AD2d 724 [2002]).

The doctrine also has been extended to the condition of the playing surface. If an athlete is injured as a result of a defect in, or feature of, the field, court, track, or course upon which the sport is being played, the owner of the premises will be protected by the doctrine of primary assumption of risk as long as risk presented by the condition is inherent in the sport (*see Trevett v City of Little Falls*, 6 NY3d 884 [2006]; *Sykes v County of Erie*, 94 NY2d 912 [2000]; *Ribaudo v La Salle Inst.*, 45 AD3d 556 [2007]). If the playing surface is as safe as it appears to be, and the condition in question is not concealed such that it unreasonably increases risk assumed by the players, the doctrine applies (*see Fintzi v New Jersey YMHA-YWHA Camps*, 97 NY2d 669 [2001]; *Turcotte v Fell*, 68 NY2d at 439; *Rosenbaum v Bayis Ne'Emon, Inc.*, 32 AD3d 534 [2006]; *Joseph v New York Racing Assn.*, 28 AD3d 105, 108 [2006]).

The Court of Appeals has had no occasion to expound upon the threshold question of what type of activity qualifies as participation in a sporting event for purposes of applying the doctrine of primary assumption of risk. In *Turcotte v Fell*, for ***255** example, the Court had little difficulty in concluding that the doctrine applied to the plaintiff, a professional jockey riding in a horse race at a track owned and operated by the New York Racing Association. Here, had the plaintiff been a professional athlete involved in a bicycle race on a track or a closed course, the doctrine of primary assumption of risk clearly would apply (*cf. Morgan v State of New York*, 90 NY2d at 486; *Joseph v New York Racing Assn.*, 28 AD3d at 108-109). This case, however, presents different circumstances.

In determining whether a bicycle rider has subjected himself or herself to the doctrine of primary assumption of risk, we must consider whether the rider is engaged in a sporting activity, such that his or her consent to the dangers inherent in the activity may reasonably be inferred. In our view, it is not sufficient for a defendant to show that the plaintiff was engaged in some form of leisure activity at the time of the accident. If such a showing were sufficient, the doctrine of primary assumption of risk could be applied to individuals who, for example, are out for a sightseeing drive in an automobile or on a motorcycle, or are jogging, walking, or inline roller skating for exercise, and would absolve municipalities, landowners, drivers, and other potential defendants of all liability for negligently creating risks that might be considered inherent in such leisure activities. Such a broad application of the doctrine of primary assumption of risk would be completely disconnected from the rationale for its existence. The doctrine is not designed to relieve a municipality of its duty to maintain its roadways in a safe condition (*see Sykes v County of Erie*, 94 NY2d at 913 ["the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises"]), and such a result does not become justifiable merely because the roadway in question happens to be in use by a person operating a bicycle, as opposed to some other means of transportation (*see Caraballo v City of Yonkers*, 54 AD3d 796, 796-797 [2008] ["the infant plaintiff cannot be said, as a matter of law, to have assumed the risk of being injured by a defective condition of a pothole on a public street, merely because he was participating in the activity of recreational noncompetitive bicycling, and using the bicycle as a means of transportation" (citations omitted)]).

In prior decisions involving injuries sustained by bicycle riders, this Court has concluded that the doctrine of primary assumption of risk applies in some situations, but not in others. For example, in ***256** *Calise v City of New York* (239 AD2d 378 [1997]), the plaintiff was thrown from a mountain bike, which he was riding on an unpaved dirt and rock path in a park, when the bike struck an exposed tree root. This Court held that the plaintiff's action was barred by the doctrine of primary assumption of risk, reasoning that "[a]n exposed tree root is a reasonably foreseeable hazard of the sport of biking on unpaved trails, and one that would be readily observable" (*id.* at 379; *see Rivera v Glen Oaks Vil. Owners, Inc.*, 41 AD3d 817, 820-821 [2007] [doctrine of primary assumption of risk applied to plaintiff who was injured when his bicycle struck a hole in a dirt trail located in a wooded area]; *Restaino v Yonkers Bd. of Educ.*, 13 AD3d 432 [2004] [doctrine of primary assumption of risk applied to plaintiff whose bicycle struck "a pothole or rut in the closed parking lot/driveway area of a public school"]; *Goldberg v Town of Hempstead*,

289 AD2d 198 [2001] [doctrine of primary assumption of risk applied to plaintiff who was injured when her bicycle struck a hole in the ground as she rode on a dirt base path of a baseball field]).

By contrast, in both *Vestal v County of Suffolk* (7 AD3d 613 [2004]) and *Moore v City of New York* (29 AD3d 751 [2006]), this Court held that the plaintiffs, who were injured while riding their bicycles on paved pathways in public parks, " 'cannot be said as a matter of law to have assumed the risk of being injured as a result of a defective condition on a paved pathway merely because [they] participated in the activity of bicycling' " (*Moore v City of New York*, 29 AD3d at 752, quoting *Vestal v County of Suffolk*, 7 AD3d at 614-615; *see Caraballo v City of Yonkers*, 54 AD3d at 796-797; *Berfas v Town of Oyster Bay*, 286 AD2d 466 [2001] [defendant failed to establish, as a matter of law, that action by plaintiff, who was thrown from his bicycle when he hit a rut in a paved road, was barred by primary assumption of risk doctrine]). Significantly, this Court reached the same conclusion in *Phillips v County of Nassau* (50 AD3d 755 [2008]), holding that the doctrine of primary assumption of risk did not apply to a plaintiff who was injured when his bicycle struck a raised concrete mound on a public roadway, even though the plaintiff, like the plaintiff in the instant case, was "an avid bicyclist" and was participating in "a noncompetitive, recreational bicycle ride with about eight or nine other riders" (*id.* at 756).

These decisions recognize that riding a bicycle on a paved public roadway normally does not constitute a sporting activity for purposes of applying the primary assumption of risk doctrine. By contrast, mountain biking, and other forms of off-road ***257** bicycle riding, can more readily be classified as sporting activity. Indeed, the irregular surface of an unimproved dirt-bike path is "presumably the very challenge that attracts dirt-bike riders as opposed to riding on a paved surface" (*Schiavone v Brinewood Rod & Gun Club*, 283 AD2d 234, 237 [2001]).

Of course, the distinction between using a bicycle to engage in a sporting activity and using a bicycle for some other purpose will sometimes be elusive. It is important to draw that line, however, because " '[e]xtensive and unrestricted application of the doctrine of primary assumption of the risk to tort cases generally represents a throwback to the former doctrine of contributory negligence, wherein a plaintiff's own negligence barred recovery from the defendant' " (*Trupia v Lake George Cent. School Dist.*, 62 AD3d 67, 69 [3d Dept 2009], quoting *Pelzer v Transel El. & Elec. Inc.*, 41 AD3d 379, 381 [2007]). That tendency is illustrated by the appellants' briefs in this case, which repeatedly emphasize that the plaintiff was riding too closely behind Deutch. That argument is misplaced, since the issue of whether the plaintiff was following too closely, or otherwise acted negligently, is a matter of comparative fault, which must be determined by the factfinder at trial and not as a matter of law at the summary judgment stage (*see* CPLR 1411; *Roach v Szatko*, 244 AD2d 470, 471 [1997]; *Cohen v Heritage Motor Tours*, 205 AD2d 105 [1994]).

In sum, it cannot be said, as a matter of law, that merely by choosing to operate a bicycle on a paved public roadway, or by engaging in some other form of leisure activity or exercise such as walking, jogging, or roller skating on a paved public roadway, a plaintiff consents to the negligent maintenance of such roadways by a municipality or a contractor. Adopting such a rule could have the arbitrary effect of eliminating all duties owed to participants in such leisure or exercise activities, not only by defendants responsible for road maintenance, but by operators of motor vehicles and other potential tortfeasors, as long as the danger created by the defendant can be deemed inherent in such activities. We decline to construe the doctrine of primary assumption of risk so expansively.

For the foregoing reasons, the appellants failed to make a prima facie showing that the primary assumption of risk doctrine is applicable to the activity in which the plaintiff was engaged at the time of her accident. Thus, the Supreme Court properly denied the defendants' motions for summary judgment dismissing the complaint and all cross claims insofar as asserted ***258** against them and Deutch's cross motion for summary judgment dismissing the fourth-party complaint and all related cross claims insofar as asserted against him as barred by the doctrine of primary assumption of risk.

Moreover, the defendants failed to establish as a matter of law that the unbarricaded lip created by the road construction was not a "unique and . . . dangerous condition over and above the usual dangers that are inherent" (*Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 970 [1992]) in the activity of bicycle riding on a paved roadway (*see Vestal v County of Suffolk*, 7 AD3d 613, 614 [2004] [plaintiff did not assume risk of being injured while riding bicycle on defective paved pathway where there were "no signs, chains, or barriers" present "to indicate that it was not suitable for bicycling"]; *see also Phillips v County of Nassau*, 50 AD3d 755 [2008]; *Berfas v Town of Oyster Bay*, 286 AD2d 466 [2001]).

The appellants' remaining contentions are without merit.

Accordingly, we affirm the order insofar as appealed from.

Dillon, Santucci and Balkin, JJ., concur.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs payable by the appellants appearing separately and filing separate briefs.

6.

196 W.Va. 202
Supreme Court of Appeals of
West Virginia.

Judith S. KOFFLER, Plaintiff Below, Appellant,
v.
CITY OF HUNTINGTON, a West Virginia Municipal Corporation, Defendant Below, Appellee.
No. 23110. | Submitted Feb. 6, 1996. | Decided March 22, 1996.

Bicyclist brought suit against city for personal injuries received when bicycle tire dropped between slats of storm drain grate in center of alley. The Circuit Court, Cabell County, Alfred E. Ferguson, J., entered summary judgment in favor of city, ruling that city only had duty to maintain alley for vehicle traffic. Bicyclist appealed. The Supreme Court of Appeals, McHugh, Chief Justice, held that: (1) city had duty to maintain alley in reasonably safe condition for use by bicyclist, and (2) whether city breached duty was fact question.

Reversed.

West Headnotes (4)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Circuit court's entry of summary judgment is reviewed de novo on appeal.

19 Cases that cite this headnote

[2] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

When language of statute is clear and without ambiguity, plain meaning is to be accepted without resorting to rules of interpretation.

1 Cases that cite this headnote

[3] **Automobiles**
Places to which liability extends
Automobiles
Care required as to condition of way in general

City had duty to maintain alley in reasonably safe condition for bicycle travel; duty to maintain alley in reasonably safe condition was not limited to use by vehicles. Code, 29–12A–4(c)(3).

2 Cases that cite this headnote

[4] **Judgment**
Tort cases in general

Whether city breached duty to maintain alley in reasonably safe condition for bicycle traffic was fact question precluding summary judgment in action by bicyclist for personal injuries received when bicycle tire dropped between slats of storm drain grate. Code, 29–12A–4(c)(3).

5 Cases that cite this headnote

646 *203 Syllabus by the Court

1. " 'A circuit court's entry of summary judgment is reviewed *de novo*.' Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 1, *Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995).

2. " ' "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).' Syl. pt. 1, *Peyton v. City Council of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1989)." Syl. pt. 3, *Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995).

3. Under *W.Va.Code*, 29–12A–4(c)(3) [1986], political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge. A political subdivision's duty to keep its public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds open, in repair, or free from nuisance does not extend exclusively to vehicles or vehicular travel.

Appeal from the Circuit Court of Cabell County, Honorable Alfred E. Ferguson, Judge, Civil Action No. 93–C–1309.

Attorneys and Law Firms

Jack H. Vital, III, Lockwood, Egnor & Vital, Huntington, for Appellant.

James A. Dodrill, Law Offices of Dwane L. Tinsley, Charleston, for Appellee.

Opinion

McHUGH, Chief Justice:

Plaintiff Judith S. Koffler instituted this negligence action in the Circuit Court of Cabell County after she sustained injuries while riding her bicycle in an alley located in the City of Huntington. Plaintiff now appeals an order entered March 31, 1995 which granted the City's motion for summary judgment.[1] This Court has before it the petition for appeal, all matters of record and the briefs and arguments of counsel. For the reasons stated below, the order of the circuit court is reversed.

I

The facts of this case are, for the most part, not in dispute. On June 20, 1992, plaintiff, in the City of Huntington visiting a friend, had ridden her bicycle to a local bank. Upon completing her business there, plaintiff rode her bicycle into the "4 1/2 Alley," intending to go "riding around." Plaintiff testified that while she was riding in the alley, a vehicle approached her from the rear, at which time she rode "to the left, or at least toward the middle instead of staying on the extreme right[.]" Not realizing there was two-way traffic in the alley, plaintiff was surprised when a second automobile subsequently approached her from the front, on the left side of the alley. According to plaintiff, she "did whatever [she] could to try to avoid getting into that car's way and yet, trying to avoid the car that was coming behind [her]." Consequently, plaintiff rode her bicycle into the center of the alley and over a storm drain grate. As she rode over the grate, the front tire of her bicycle dropped between the grate's parallel slats, became lodged there, stopping the bicycle and throwing plaintiff forward, over the handlebars. As a result of this accident, plaintiff sustained injuries to her face and other parts of her body.

On or about June 30, 1993, plaintiff instituted this action for damages against the City of Huntington (hereinafter "City"), alleging, *inter alia,* that at the time of plaintiff's accident, the City "owned, operated, controlled, managed and/or maintained" the alley where the accident took place and that the City "had a duty to maintain said premises ****647 *204** in a reasonably safe condition for the persons, such as ... Plaintiff, that were reasonably expected to use said alleyway[.]" Plaintiff specifically alleged, *inter alia,* that the City negligently and carelessly "placed and/or allowed to be maintained in said alleyway a grating, the slats of which were farther apart than a bicycle tire, and which grating would allow a bicycle tire to fall through the slats of the grating. The grating was designed in such a manner so that it had no cross members which would preclude the bicycle tire from falling through the area between the slats of the grating."

Following the March 17, 1995 hearing on the City's previously-filed motion for summary judgment, the circuit court granted the City's motion and made the following relevant conclusions of law:

B. THE QUESTION OF IMMUNITY

This action involves a claim for injury against a political

subdivision of the State of West Virginia. The question of immunity, therefore, arises pursuant to the *Governmental Tort Claims and Insurance Reform Act.* In short, the *Act* specifically excludes this tort claim from the several immunities contained within it.[2] The City is 'liable for injury, death or loss to persons or property caused by its negligent failure to keep ... alleys ... open, in repair, or free from nuisance ...' [*W.Va.*] Code, § 29–12A–4(c)(3).

C. THE STANDARD OF CARE

Since the City cannot avail itself of the several immunities afforded by the *Act,* the question necessarily becomes whether the City, in light of the undisputed facts, negligently failed to keep the 4 1/2 Alley 'open, in repair, or free from nuisance' with regard to [plaintiff]. Road design or maintenance liability in bicycle accident cases is fairly straight forward, and the road owner (here, the City) is liable for an accident **if the road is not reasonably safe for persons using the road in an ordinary fashion.** Roux v. Department of Transportation, 169 Mich.App. 582, 426 N.W.2d 714 (1988). The duty to maintain the roadway reasonably safe and fit for vehicular travel does not extend to bicycle travel. In granting the defendant City's motion for summary judgment, this Court concludes, as a matter of law, that the appropriate standard of care is based upon the defendant City's duty to maintain and repair the roadway for **vehicular travel.** Thus, the alleged defect must be unreasonably dangerous to a vehicle not a bicycle.

....

In the case at bar, [plaintiff] cannot demonstrate, by her own evidence and testimony, that the alleged defect in the Alley was unreasonably dangerous to vehicles. In fact, her evidence demonstrates just the opposite, i.e., the spacing between the grates might have been too wide for her narrow bicycle tire, but the drain cover is hardly unreasonably dangerous to vehicles traversing the 4 1/2 Alley.

(footnote added and emphasis provided).

Plaintiff now appeals the March 31, 1995 order granting the City's motion for summary judgment.

II

At issue is the circuit court's interpretation of W.Va.Code, 29–12A–4(c)(3) [1986], which provides:

Political subdivisions[3] *are liable for injury,* death, or loss *to persons* or property *caused by their negligent failure to keep* public roads, highways, streets, avenues, *alleys,* sidewalks, bridges, aqueducts, viaducts, or public grounds *within the political* *****648 *205*** *subdivisions open, in repair, or free from nuisance,* except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.

(emphasis and footnote added). As indicated in its order granting the City's motion for summary judgment, the circuit court concluded, as a matter of law, that while the City has a duty to maintain the 4 1/2 Alley so that it is reasonably safe and fit for *vehicular* travel, "the standard is not one of maintenance of the ... alley so that it is reasonably safe for **bicycles** [.]" (emphasis provided).

[1] This Court has held that " '[a] circuit court's entry of summary judgment is reviewed *de novo.*' Syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 1, Hose v. Berkeley County Planning Commission, 194 W.Va. 515, 460 S.E.2d 761 (1995). *See* syl. pt. 1, Miller v. Whitworth, 193 W.Va. 262, 455 S.E.2d 821 (1995). We find that the circuit court erroneously resolved the question of law before it.

[2] Our review of W.Va.Code, 29–12A–4(c)(3) [1986] is controlled by the following traditional principle of statutory analysis: " ' "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968).' Syl. pt. 1, Peyton v. City Council of Lewisburg, 182 W.Va. 297, 387 S.E.2d 532 (1989)." Syl. pt. 3, Hose, *supra.* The plain language of W.Va.Code, 29–12A–4(c)(3) [1986] does not support the circuit court's conclusion that plaintiff must "demonstrate, in order to recover, that the alleged defect in the Alley (the spacing between the grates in the drain cover) was unreasonably dangerous to **vehicles,** i.e., automobiles, not bicycles." (emphasis provided). Indeed, we find the analysis upon which this conclusion was based to be flawed in several respects.

[3] As support for its legal conclusion that the City has a duty to maintain the 4 1/2 Alley in a reasonably safe condition for

vehicular travel but not bicycle travel, the circuit court relied almost exclusively on the Michigan case of *Roux v. Department of Transportation*, 169 Mich.App. 582, 426 N.W.2d 714 (1988), in which a bicyclist was injured when he hit a "defective area" on the shoulder of the road on which he was riding. The applicable statutory provision in *Roux* provides, in pertinent part:

> 'Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him from such governmental agency.... The duty of the state and the county road commissions to repair and maintain highways, and the liability therefor, shall extend only to the improved portion of the highway designed *for vehicular travel*[.]'

Id. at 716 (quoting M.C.L. § 691.1402 and M.S.A. § 3.996(102)) (emphasis added). The Court of Appeals of Michigan determined that under this statute, the defendant's duty to maintain the improved portion of the highway so that it is reasonably safe and fit for vehicular travel depends, not upon the injured party's status as motorist or bicyclist, but upon the *location* at which he was injured. *Id.* The court then concluded that, on remand, "the appropriate standard of care shall be based on defendant's duty to maintain and repair the shoulder for vehicular travel. Thus, [in order for the injured bicyclist to recover,] the alleged defect must be unreasonably dangerous to a vehicle, not a bicycle." *Id.* at 716–17.

In that the language of *W.Va.Code*, 29–12A–4(c)(3) [1986] differs significantly from the aforementioned Michigan statute, the circuit court erroneously used *Roux* for the reasoning of the decision in the case now before us. *W.Va.Code*, 29–12A–4(c)(3) [1986], which provides that "[p]olitical subdivisions are liable for injury ... to persons ... caused by their negligent failure to keep ... alleys ... open, in repair, or free from nuisance[,]" does *not* predicate recovery by an injured bicyclist such as plaintiff upon proof that the City negligently failed to keep the 4 1/2 Alley open, in repair, or free from nuisance *for vehicles* or *for vehicular travel*. **649 *206 If a political subdivision's duty to keep its public roads and alleys open, in repair, and free from nuisance extended exclusively to vehicles or vehicular travel, our Legislature would have included language to that effect in *W.Va.Code*, 29–12A–4(c)(3) [1986]. *See O'Dell, supra.*

Additionally, we point out that it was error for the circuit court to resort to various statutory definitions of the term "vehicle" as further support of its summary judgment order. Though the circuit court concluded that "West Virginia, like Michigan, specifically excludes bicycles from the definition of the term 'vehicle[,]' [W.Va.] Code, §§ 17–1–4[4], 17B–1–1[5]," neither the term "vehicle" nor any derivation thereof appears in *W.Va.Code*, 29–12A–4(c)(3) [1986]. (footnotes added). Accordingly, resort to statutory definitions of the term "vehicle" for purposes of interpreting *W.Va.Code*, 29–12A–4(c)(3) [1986] was unwarranted.

[4] Under *W.Va.Code*, 29–12A–4(c)(3) [1986], political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge. A political subdivision's duty to keep its public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds open, in repair, or free from nuisance does not extend exclusively to vehicles or vehicular travel. Accordingly, the City may be liable for plaintiff's injuries if plaintiff can demonstrate that such injuries were caused by the City's negligent failure to keep the 4 1/2 Alley open, in repair, or free from nuisance for bicycle travel.[6] *See* syl. pt. 2, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994) (" ' " 'Questions **650 *207 of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.' Syl. pt. 1, *Ratlief v. Yokum*, [167 W.Va.

779], 280 S.E.2d 584 (1981), *quoting*, syl. pt. 5, *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964)." Syllabus Point 6, *McAllister v. Weirton Hosp. Co.*, 173 W.Va. 75, 312 S.E.2d 738 (1983).' Syllabus Point 17, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).")

III

For reasons discussed herein, the March 31, 1995 order of the Circuit Court of Cabell County is hereby reversed.

Reversed.

Parallel Citations

469 S.E.2d 645

Footnotes

1 Plaintiff filed a motion for relief from final summary judgment, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. Though a hearing thereon was held on April 4, 1995, the record before us provides no indication that the trial court ever ruled on this motion.

2 *See generally W.Va.Code*, 29–12A–1, *et seq.* The Governmental Tort Claims and Insurance Reform Act, which "grants broad, but not total, immunity from tort liability to political subdivisions of the State." *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 600, 425 S.E.2d 551, 555 (1992). Though the legislature has "specified seventeen instances in which political subdivisions would have immunity from tort liability [,] W.Va.Code, 29–12A–5(a)[,]" this case is not one of those instances. *Id.*

3 *See W.Va.Code*, 29–12A–3(b) and (c) [1986], in relevant part:
(b) 'Municipality' means any incorporated city, town or village and all institutions, agencies or instrumentalities of a municipality.
(c) 'Political subdivision' means any ... municipality[.]

4 *W.Va.Code*, 17–1–4 [1925] provides:
'Vehicle' shall mean and include any mechanical device for the conveyance, drawing or other transportation of persons or property upon the public roads and highways, whether operated on wheels or runners or by other means, except those propelled or drawn by human power or those used exclusively upon tracks.

5 *W.Va.Code,* 17B–1–1 [1990] provides, in relevant part:
The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this article:
(a) *Vehicle.*—Every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks[.]

We note that the introductory paragraph of this statute expressly states that the words and phrases used in Chapter 17B, entitled "Motor Vehicle Driver Licenses," "*for the purpose of this chapter,* have the meanings respectively ascribed to them in this article[.]" The statute at issue in this case, *W.Va.Code,* 29–12A–4(c)(3) [1986], is clearly not part of Chapter 17B.

6 We note that plaintiff contends that the City is further liable for her injuries under *W.Va.Code,* 17–10–17 [1969], which provides, in relevant part, that "[a]ny person who sustains an injury to his person ... by reason of any ... alley ... in any incorporated city ... being out of repair due to the negligence of the ... incorporated city ... may recover all damages sustained by him by reason of such injury in an action against the ... city ... in which such ... alley ... may be[.]" Plaintiff did not allege the City's liability under *W.Va.Code,* 17–10–17 [1969] in response to the City's motion for summary judgment. Rather, plaintiff first raised this issue in its motion for relief from summary judgment which, as we indicated earlier, was not ruled upon by the circuit court. *See* *W.Va.R.Civ.P.* 60(b) and n. 1, *supra.* Because plaintiff's arguments under *W.Va.Code,* 17–10–17 [1969], and the City's response thereto, were neither raised, argued nor considered by the circuit court on summary judgment, the subject of this appeal, they are not reviewable by this Court: " ' "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, *Sands v. Security Trust Co.,* 143 W.Va. 522, 102 S.E.2d 733 (1958).' Syl. pt. 2, *Duquesne Light Co. v. State Tax Dept.,* 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert denied,* 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985)." Syl. pt. 2, *Crain v. Lightner,* 178 W.Va. 765, 364 S.E.2d 778 (1987).
Similarly, in its brief to this Court, the City argues, for the first time, that plaintiff was merely a licensee to whom the City was not obliged to provide against dangers arising out of the existing condition of the alley inasmuch as plaintiff went upon the alley "subject to all the dangers attending such conditions." Syllabus, *Hamilton v. Brown,* 157 W.Va. 910, 207 S.E.2d 923 (1974). The City's argument regarding premises liability will likewise not be considered on appeal where such arguments were neither raised nor argued below. *See* *Crain* at syl. pt. 2.
Finally, the City maintains that plaintiff was not making lawful use of the alley as she, admittedly, was riding her bicycle in the center of the alley at the time of the accident, in violation of Huntington Codified Ordinance 313.05 (1995), which provides, in relevant part: "(a) Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable, exercising due care when passing a standing vehicle or one proceeding in the same direction." It is the City's contention that a street is not out of repair unless the City has permitted it to become unsafe for *ordinary* and *lawful* use. Syl. pt. 3, *Carder v. City of Clarksburg,* 100 W.Va. 605, 131 S.E. 349 (1926), *overruled on other grounds, Long v. City of Weirton,* 158 W.Va. 741, 214 S.E.2d 832 (1975). In that plaintiff was not lawfully using the alley at the time of the accident, the City contends it is, therefore, not liable for her injuries. We cannot agree with the City's position. Plaintiff's own negligence is a question of fact for jury resolution. *See* syl. pt. 10, *Anderson v. Moulder,* 183 W.Va. 77, 394 S.E.2d 61 (1990) ("Whether and to what extent the plaintiff in a civil action was contributorily negligent are ordinarily questions of fact to be resolved by the jury.").

End of Document

7.

3 Cal.4th 296, 834 P.2d 696, 11 Cal.Rptr.2d 2

KENDRA KNIGHT, Plaintiff and Appellant,
v.
MICHAEL JEWETT, Defendant and Respondent.
No. S019021.

Supreme Court of California
Aug 24, 1992.

SUMMARY

Plaintiff brought an action for negligence and assault and battery for injuries she sustained when defendant knocked her over and stepped on her finger during an informal touch football game. The trial court granted summary judgment for defendant. (Superior Court of San Diego County, No. N39325, Don Martinson, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D010463, affirmed.

The Supreme Court affirmed. Addressing the continued viability of the doctrine of implied assumption of risk in light of the adoption of comparative negligence principles, the court held that in cases involving primary assumption of the risk, where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury, the plaintiff's recovery is completely barred. By contrast, the court held, in cases involving secondary assumption of the risk, where the defendant does owe a duty of care to the plaintiff but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty, the doctrine has been 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. The court held that the trial court properly granted summary judgment for defendant, since he did not breach a legal duty of care owed to plaintiff when he engaged in the conduct that injured her and, therefore, her action was barred by the primary assumption of the risk doctrine. At most, the court held, the declarations established that defendant was careless or negligent, and his conduct was not even closely comparable to the type of conduct that is so reckless as to be totally outside of the range of the ordinary activity involved in the sport, which type of conduct is a prerequisite to the imposition of legal liability upon a participant in such a sport. (Opinion by George, J., with Lucas, C. J., and Arabian, J., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate concurring and dissenting opinion by Panelli, J., with Baxter, J., concurring. Separate dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e)
Negligence § 37--Exercise of Care by Plaintiff--Assumption of Risk--Viability in Light of Comparative Negligence Doctrine--Primary Versus Secondary Assumption of Risk:Words, Phrases, and Maxims--Primary Assumption of Risk; Secondary Assumption of Risk.
Primary assumption of the risk, which involves conduct of a defendant that does not breach a legal duty of care to the plaintiff, has not been merged into the comparative negligence system, but continues to operate as a complete bar to a plaintiff's recovery. This is so because by engaging in such conduct, the defendant has not breached a legal duty of care to the plaintiff, and thus there is no reason to invoke comparative fault principles. By contrast, secondary assumption of risk, which involves a breach of a duty owed to a plaintiff who knowingly encounters a risk of injury caused by that breach, has been merged into the comparative fault system, and a defendant's liability in such a case is assessed in terms of the percentage of his or her fault. In such a case, the injury may have been caused by the combined effect of the defendant's and the plaintiff's culpable conduct, and to retain assumption of risk as a complete defense in such a case would be contrary to the basic principle that when both parties are partially at fault, placing all of the loss on one of the parties is inherently inequitable.

[Effect of adoption of comparative negligence rules on assumption of risk, note, 16 **A.L.R.4th** 700. See also **Cal.Jur.3d,** Negligence, § 138 et seq.; 6 **Witkin,** Summary of Cal. Law (9th ed. 1988) Torts, § 1104 et seq.]

(2)
Negligence § 48.5--Exercise of Care Toward Particular Persons-- Fireman's Rule.
Under the firefighter's rule, a person who starts a fire is not liable for an injury sustained by a firefighter who is summoned to fight the fire. The most persuasive explanation for this rule is that the party who negligently started the fire had no legal duty to protect the firefighter from the very danger that he or she is employed to confront. (Per George, J.,

Lucas, C. J., and Arabian, J.)

(3)
Negligence § 9--Elements of Actionable Negligence--Duty of Care--Sports Activities--Question for Court.
In cases involving personal injury sustained during sports activities, the question of the existence and scope of a defendant's duty of care is a legal question that depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court rather than the jury. (Per George, J., Lucas, C. J., and Arabian, J.)

(4)
Negligence § 36--Exercise of Care by Plaintiff--Comparative Negligence.
The comparative fault doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury, whether their responsibility rests on negligence, strict liability, or other theories of responsibility, in order to arrive at an equitable apportionment or allocation of loss. (Per George, J., Lucas, C. J., and Arabian, J.)

(5)
Premises Liability § 6--Owner's Duty of Care--Dangerous Conditions.
A property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. (Per George, J., Lucas, C. J., and Arabian, J.)

(6a, 6b)
Premises Liability § 6--Owner's Duty of Care--Dangerous Conditions--Ski Resorts.
Although moguls on a ski run pose a risk of harm to skiers that might not exist if those configurations were removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. A ski resort does, however, have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The latter type of risk, posed by a ski resort's negligence, clearly is not an inherent risk of the sport assumed by a participant. (Per George, J., Lucas, C. J., and Arabian, J.)

(7a, 7b)
Negligence § 10--Elements of Actionable Negligence--Standard of Care--Lower Standard for Sports Activities.
Although a defendant generally has no legal duty to eliminate, or to protect a plaintiff against, the risks inherent in a sport, a defendant generally does have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. In some situations, the careless conduct of others is considered an inherent risk of a sport for which recovery is barred. (Per George, J., Lucas, C. J., and Arabian, J.)

(8a, 8b)
Negligence § 9--Elements of Actionable Negligence--Duty of Care--Sports Activities--Participant's Duty of Care.
A sporting event participant is not liable for ordinary careless conduct engaged in during the sport, but only for intentionally injuring another player or engaging in reckless conduct that is totally outside the range of ordinary activity involved in the sport. This is so because in the heat of an active sporting event, a participant's normal energetic conduct often includes accidentally careless behavior, and vigorous participation in sporting events might be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct. In such a sport, even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.

(9a, 9b)
Negligence § 37--Exercise of Care by Plaintiff--Assumption of Risk--Player Injured in Touch Football Game.
In a touch football player's action against an opposing player for negligence and assault and battery arising from an injury sustained during a touch football game, the trial court properly granted summary judgment for defendant. Defendant, in engaging in the conduct that injured plaintiff, did not breach a legal duty of care owed to plaintiff and, therefore, plaintiff's recovery was barred by the primary assumption of risk doctrine. The declarations filed in support of and in opposition to the motion established that defendant was, at most, careless or negligent in knocking over plaintiff, stepping on her hand, and injuring her finger. Although plaintiff maintained that defendant's rough play was reckless, the conduct alleged was not even closely comparable to the type of conduct that is so reckless as to be totally outside of the range of the ordinary activity involved in the sport, which type of conduct is a prerequisite to the imposition of legal liability upon a participant in such a sport.

[Liability of participant in team athletic competition for injury to or death of another participant, note, 77 **A.L.R.3d** 1300.]

COUNSEL
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Daley & Heft, Sarah H. Mason, Dennis W. Daley, Joseph M. Hnylka and Patricia A. Shaffer for Defendant and

Respondent.

GEORGE, J.

In this case, and in the companion case of *Ford v. Gouin, post,* page 339 [11 Cal.Rptr.2d 30, 834 P.2d 724], we face the question of the ***300** proper application of the "assumption of risk" doctrine in light of this court's adoption of comparative fault principles in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]. Although the *Li* decision itself addressed this issue, subsequent Court of Appeal decisions have differed in their interpretation of *Li*'s discussion of this point. We granted review to resolve the conflict among the Courts of Appeal.

I

We begin with a summary of the facts of this case, as set forth in the declarations and deposition transcripts submitted in support of and in opposition to defendant's motion for summary judgment.

On January 25, 1987, the day of the 1987 Super Bowl football game, plaintiff Kendra Knight and defendant Michael Jewett, together with a number of other social acquaintances, attended a Super Bowl party at the home of a mutual friend. During half time of the Super Bowl, several guests decided to play an informal game of touch football on an adjoining dirt lot, using a "peewee" football. Each team had four or five players and included both women and men; plaintiff and defendant were on opposing teams. No rules were explicitly discussed before the game.

Five to ten minutes into the game, defendant ran into plaintiff during a play. According to plaintiff, at that point she told defendant "not to play so rough or I was going to have to stop playing." Her declaration stated that "[defendant] seemed to acknowledge my statement and left me with the impression that he would play less rough prospectively." In his deposition, defendant recalled that plaintiff had asked him to "be careful," but did not remember plaintiff saying that she would stop playing.

On the very next play, plaintiff sustained the injuries that gave rise to the present lawsuit. As defendant recalled the incident, his team was on defense on that play, and he jumped up in an attempt to intercept a pass. He touched the ball but did not catch it, and in coming down he collided with plaintiff, knocking her over. When he landed, he stepped backward onto plaintiff's right hand, injuring her hand and little finger.

Both plaintiff and Andrea Starr, another participant in the game who was on the same team as plaintiff, recalled the incident differently from defendant. According to their declarations, at the time plaintiff was injured, Starr already had caught the pass. Defendant was running toward Starr, when he ran into plaintiff from behind, knocked her down, and stepped on her hand. Starr also stated that, after knocking plaintiff down, defendant continued ***301** running until he tagged Starr, "which tag was hard enough to cause me to lose my balance, resulting in a twisting or spraining of my ankle."

The game ended with plaintiff's injury, and plaintiff sought treatment shortly thereafter. After three operations failed to restore the movement in her little finger or to relieve the ongoing pain of the injury, plaintiff's finger was amputated. Plaintiff then instituted the present proceeding, seeking damages from defendant on theories of negligence and assault and battery.

After filing an answer, defendant moved for summary judgment. Relying on the Court of Appeal decision in *Ordway v. Superior Court* (1988) 198 Cal.App.3d 98 [243 Cal.Rptr. 536], defendant maintained that "reasonable implied assumption of risk" continues to operate as a complete defense after *Li v. Yellow Cab Co., supra,* 13 Cal.3d 804 (hereafter *Li*), and that plaintiff's action was barred under that doctrine. In this regard, defendant asserted that "[b]y participating in [the touch football game that resulted in her injury], plaintiff ... impliedly agreed to reduce the duty of care owed to her by defendant ... to only a duty to avoid reckless or intentionally harmful conduct," and that the undisputed facts established both that he did not intend to injure plaintiff and that the acts of defendant which resulted in plaintiff's injury were not reckless. In support of his motion, defendant submitted his own declaration setting forth his version of the incident, as summarized above, and specifically stating that he did not intend to step on plaintiff's hand or to injure her. Defendant also attached a copy of plaintiff's deposition in which plaintiff acknowledged that she frequently watched professional football on television and thus was generally familiar with the risks associated with the sport of football, and in which she conceded that she had no reason to believe defendant had any intention of stepping on her hand or injuring her.

In opposing the summary judgment motion, plaintiff first noted that, in contrast to the *Ordway* decision, the Court of Appeal decision in *Segoviano v. Housing Authority* (1983) 143 Cal.App.3d 162 [191 Cal.Rptr. 578] specifically held that the doctrine of "reasonable implied assumption of risk" had been eliminated by the adoption of comparative fault principles, and thus under *Segoviano* the basic premise of defendant's summary judgment motion was untenable and plaintiff was entitled to have the lawsuit proceed under comparative fault principles.

Furthermore, plaintiff maintained that even were the trial court inclined to follow the *Ordway* decision, there were numerous disputed material facts that precluded the granting of summary judgment in favor of defendant. First, plaintiff noted there was a clear dispute between defendant's and ***302** plaintiff's recollection of the specific facts of the play in which plaintiff was injured, and, in particular, of the details of defendant's conduct that caused plaintiff's injury. She claimed that under the facts as described by plaintiff and Starr, defendant's conduct was at least reckless.

Second, plaintiff vigorously disputed defendant's claim that, by participating in the game in question, she impliedly had agreed to reduce the duty of care, owed to her by defendant, to only a duty to avoid reckless or intentionally harmful conduct. Plaintiff maintained in her declaration that in view of the casual, social setting, the circumstance that women and men were joint participants in the game, and the rough dirt surface on which the game was played, she anticipated from the outset that it was the kind of "mock" football game in which there would be no forceful pushing or hard hitting or shoving. Plaintiff also asserted that the declarations and depositions of other players in the game, included in her opposition papers, demonstrated that the other participants, including defendant, shared her expectations and assumptions that the game was to be a "mellow" one and not a serious, competitive athletic event.[1] Plaintiff claimed that there had been no injuries during touch football games in which she had participated on previous occasions, and that in view of the circumstances under which the game was played, "[t]he only type of injury which I reasonably anticipated would have been something in the nature of a bruise or bump."

In addition, in further support of her claim that there was at least a factual dispute as to whether she impliedly had agreed to assume the risk of injury from the type of rough play defendant assertedly engaged in, plaintiff relied on the portion of her declaration in which she stated that (1) she specifically had told defendant, immediately prior to the play in question, that defendant was playing too rough and that she would not continue to play in the game if he was going to continue such conduct, and (2) defendant had given plaintiff the impression he would refrain from such conduct. Plaintiff maintained that her statement during the game established that a disputed factual issue existed as to whether she voluntarily had chosen to assume the risks of the type of conduct allegedly engaged in by defendant. ***303**

In his reply to plaintiff's opposition, defendant acknowledged there were some factual details-"who ran where, when and how"-that were in dispute. He contended, however, that the material facts were not in dispute, stating those facts were "that plaintiff was injured in the context of playing touch football."

After considering the parties' submissions, the trial court granted defendant's motion for summary judgment. On appeal, the Court of Appeal, recognizing the existing conflict in appellate court decisions with regard to the so-called "reasonable implied assumption of risk" doctrine, concluded that *Ordway v. Superior Court, supra,* 198 Cal.App.3d 98, rather than *Segoviano v. Housing Authority, supra,* 143 Cal.App.3d 162, should be followed, and further concluded that under the *Ordway* decision there were no disputed material facts to be determined. The Court of Appeal, holding that the trial court properly had granted summary judgment in favor of defendant, affirmed the judgment.

As noted, we granted review to resolve the conflict among Court of Appeal decisions as to the proper application of the assumption of risk doctrine in light of the adoption of comparative fault principles in *Li, supra,* 13 Cal.3d 804.

II

As every leading tort treatise has explained, the assumption of risk doctrine long has caused confusion both in definition and application, because the phrase "assumption of risk" traditionally has been used in a number of very different factual settings involving analytically distinct legal concepts. (See, e.g., Prosser & Keeton on Torts (5th ed. 1984) § 68, pp. 480-481; 4 Harper et al., The Law of Torts (2d ed. 1986) § 21.0, pp. 187-189; Schwartz, Comparative Negligence (2d ed. 1986) § 9.1, p. 154; 3 Speiser et al., The American Law of Torts (1986) §§ 12:46- 12:47, pp. 636-640.) Indeed, almost a half-century ago, Justice Frankfurter described the term "assumption of risk" as a classic example of a felicitous

phrase, "undiscriminatingly used to express different and sometimes contradictory ideas," and whose uncritical use "bedevils the law." (*Tiller v. Atlantic Coast Line R. Co.* (1943) 318 U.S. 54, 68 [87 L.Ed. 610, 618, 63 S.Ct. 444, 143 A.L.R. 967] (conc. opn. of Frankfurter, J.).)

In some settings-for example, most cases involving sports-related injuries-past assumption of risk decisions largely have been concerned with defining the contours of the legal duty that a given class of defendants-for example, owners of baseball stadiums or ice hockey rinks-owed to an ***304** injured plaintiff. (See, e.g., *Quinn v. Recreation Park Assn.* (1935) 3 Cal.2d 725, 729 [46 P.2d 144] [baseball stadium owner]; *Shurman v. Fresno Ice Rink* (1949) 91 Cal.App.2d 469, 474-477 [205 P.2d 77] [hockey rink owner].) In other settings, the assumption of risk terminology historically was applied to situations in which it was clear that the defendant had breached a legal duty of care to the plaintiff, and the inquiry focused on whether the plaintiff knowingly and voluntarily had chosen to encounter the specific risk of harm posed by the defendant's breach of duty. (See, e.g., *Vierra v. Fifth Avenue Rental Service* (1963) 60 Cal.2d 266, 271 [32 Cal.Rptr. 193, 383 P.2d 777] [plaintiff hit in eye by flying piece of metal in area adjacent to drilling]; *Prescott v. Ralphs Grocery Co.* (1954) 42 Cal.2d 158, 161-162 [265 P.2d 904] [plaintiff injured on wet sidewalk on store premises].)

Prior to the adoption of comparative fault principles of liability, there often was no need to distinguish between the different categories of assumption of risk cases, because if a case fell into either category, the plaintiff's recovery was totally barred. With the adoption of comparative fault, however, it became essential to differentiate between the distinct categories of cases that traditionally had been lumped together under the rubric of assumption of risk. This court's seminal comparative fault decision in *Li, supra,* 13 Cal.3d 804, explicitly recognized the need for such differentiation, and attempted to explain which category of assumption of risk cases should be merged into the comparative fault system and which category should not. Accordingly, in considering the current viability of the assumption of risk doctrine in California, our analysis necessarily begins with the *Li* decision.

In *Li,* our court undertook a basic reexamination of the common law doctrine of contributory negligence. As *Li* noted, contributory negligence generally has been defined as " 'conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.' " (*Li, supra,* 13 Cal.3d at p. 809, quoting Rest.2d Torts, § 463.) Prior to *Li,* the common law rule was that " '[e]xcept where the defendant has the last clear chance, the plaintiff's contributory negligence *bars recovery* against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.' " (*Li, supra,* at pp. 809-810, italics added, quoting Rest.2d Torts, § 467.)

In *Li, supra,* 13 Cal.3d 804, we observed that "[i]t is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of contributory negligence. The essence of that criticism has been constant and ***305** clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault .... *The basic objection to the doctrine-grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability-remains irresistible to reason and all intelligent notions of fairness.*" (*Id.* at pp. 810-811, italics added.) After taking additional note of the untoward practical consequences of the doctrine in the litigation of cases and the increasing rejection of the doctrine in other jurisdictions, the *Li* court concluded that "[w]e are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery-and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (*Id.* at pp. 812-813.)

After determining that the "all-or-nothing" contributory negligence doctrine should be replaced by a system of comparative negligence, the *Li* court went on to undertake a rather extensive discussion of the effect that the adoption of comparative negligence would have on a number of related tort doctrines, including the doctrines of last clear chance and assumption of risk. (*Li, supra,* 13 Cal.3d at pp. 823-826.)

Under the last clear chance doctrine, a defendant was rendered totally liable for an injury, even though the plaintiff's contributory negligence had played a role in the accident, when the defendant had the "last clear chance" to avoid the accident. With regard to that doctrine, the *Li* decision, *supra,* 13 Cal.3d 804, observed: "Although several states which apply comparative negligence concepts retain the last clear chance doctrine [citation], the better reasoned position seems

to be that when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault. [Citations.]" (*Id.* at p. 824.) Accordingly, the court concluded that the doctrine should be "subsumed under the general process of assessing liability in proportion to fault." (*Id.* at p. 826.)

([1a]) With respect to the effect of the adoption of comparative negligence on the assumption of risk doctrine-the issue before us today-the *Li* decision, *supra*, 13 Cal.3d 804, stated as follows: "As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed ... that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a ***306** specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence .... Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.' (*Grey v. Fibreboard Paper Products Co.* (1966) 65 Cal.2d 240, 245-246 [53 Cal.Rptr. 545, 418 P.2d 153]; see also *Fonseca v. County of Orange* (1972) 28 Cal.App.3d 361, 368-369 [104 Cal.Rptr. 566]; see generally, 4 Witkin, Summary of Cal. Law [(8th ed. 1974)], Torts, § 723, pp. 3013-3014; 2 Harper & James, The Law of Torts [(1st ed. 1956)] § 21.1, pp. 1162-1168; cf. Prosser, Torts [(4th ed. 1971)] § 68, pp. 439-441.) We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. (See generally, Schwartz, [Comparative Negligence (1st ed. 1974)] ch. 9, pp. 153-175.)" (*Li, supra*, 13 Cal.3d at pp. 824-825, original italics.)

As this passage indicates, the *Li* decision, *supra*, 13 Cal.3d 804, clearly contemplated that the assumption of risk doctrine was to be *partially* merged or subsumed into the comparative negligence scheme. Subsequent Court of Appeal decisions have disagreed, however, in interpreting *Li*, as to what category of assumption of risk cases would be merged into the comparative negligence scheme.

A number of appellate decisions, focusing on the language in *Li* indicating that assumption of risk is in reality a form of contributory negligence "where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence" (13 Cal.3d at p. 824), have concluded that *Li* properly should be interpreted as drawing a distinction between those assumption of risk cases in which a plaintiff "unreasonably" encounters a known risk imposed by a defendant's negligence and those assumption of risk cases in which a plaintiff "reasonably" encounters a known risk imposed by a defendant's negligence. (See, e.g., *Ordway v. Superior Court, supra*, 198 Cal.App.3d 98, 103-105.) These decisions interpret *Li* as subsuming into the comparative fault scheme those cases in which the plaintiff acts *unreasonably* in encountering a specific known risk, but retaining the assumption of risk doctrine as a complete bar to recovery in those cases in which the plaintiff acts *reasonably* in encountering such a risk. Although aware of the apparent anomaly of a rule under which a plaintiff who acts *reasonably* is *completely barred* from recovery while a plaintiff who acts *unreasonably* ***307** only has his or her recovery *reduced*, these decisions nonetheless have concluded that this distinction and consequence were intended by the *Li* court.[2]

In our view, these decisions-regardless whether they reached the correct result on the facts at issue-have misinterpreted *Li* by suggesting that our decision contemplated less favorable legal treatment for a plaintiff who reasonably encounters a known risk than for a plaintiff who unreasonably encounters such a risk. Although the relevant passage in *Li* indicates that the assumption of risk doctrine would be merged into the comparative fault scheme in instances in which a plaintiff " '*unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence' " (13 Cal.3d at p. 824), nothing in this passage suggests that the assumption of risk doctrine should survive as a total bar to the plaintiff's recovery whenever a plaintiff acts *reasonably* in encountering such a risk. Instead, this portion of our opinion expressly contrasts the category of assumption of risk cases which " 'involve contributory negligence' " (and which therefore should be merged into the comparative fault scheme) with those assumption of risk ***308** cases which involve " 'a reduction of defendant's duty of care.' " (*Id.* at p. 825.)

Indeed, particularly when the relevant passage in *Li, supra*, 13 Cal.3d at pages 824-825, is read as a whole *and in conjunction with the authorities it cites*, we believe it becomes clear that the distinction in assumption of risk cases to which the *Li* court referred in this passage was not a distinction between instances in which a plaintiff unreasonably encounters a known risk imposed by a

defendant's negligence and instances in which a plaintiff reasonably encounters such a risk. Rather, the distinction to which the *Li* court referred was between (1) 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-the category of assumption of risk that the legal commentators generally refer to as "primary assumption of risk"-and (2) 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-what most commentators have termed "secondary assumption of risk."[3] Properly interpreted, the relevant passage in *Li* provides that the category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff's recovery continues to be completely barred involves those cases in which the defendant's conduct did not breach a legal duty of care to the plaintiff, i.e., "primary assumption of risk" cases, whereas cases involving "secondary assumption of risk" properly are merged into the comprehensive comparative fault system adopted in *Li*.[4] ***309**

Although the difference between the "primary assumption of risk"/"secondary assumption of risk" nomenclature and the "reasonable implied assumption of risk"/"unreasonable implied assumption of risk" terminology embraced in many of the recent Court of Appeal decisions may appear at first blush to be only semantic, the significance extends beyond mere rhetoric. First, in "primary assumption of risk" cases-where the defendant owes no duty to protect the plaintiff from a particular risk of harm-a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable *or unreasonable*. Second, in "secondary assumption of risk" cases-involving instances in which the defendant has breached the duty of care owed to the plaintiff-the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was *reasonable* rather than unreasonable. Third and finally, 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. ([2])**(See fn. 5.)** For these reasons, use of the "reasonable implied assumption of risk"/"unreasonable implied assumption of risk" terminology, as a means of differentiating between the cases in which a plaintiff is barred from bringing an action and those in which he or she is not barred, is more misleading than helpful.[5] ***310**

([1b]) Our reading of *Li, supra,* 13 Cal.3d 804, insofar as it draws a distinction between assumption of risk cases in which the defendant has not breached any legal duty to the plaintiff and those in which the defendant has breached a legal duty, is supported not only by the language of *Li* itself and the authorities it cites, but also, and perhaps most significantly, by the fundamental principle that led the *Li* court to replace the all-or-nothing contributory negligence defense with a comparative fault scheme. In "primary assumption of risk" cases, it is consistent with comparative fault principles totally to bar a plaintiff from pursuing a cause of action, because when the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever, and thus there is no occasion at all for invoking comparative fault principles. (See Prosser & Keeton on Torts, *supra,* § 68, at pp. 496-497.) By contrast, in the "secondary assumption of risk" context, the defendant has breached a duty of care owed to the plaintiff. When a risk of harm is created or imposed by a defendant's breach of duty, and a plaintiff who chose to encounter the risk is injured, comparative fault principles preclude automatically placing all of the loss on the plaintiff, because the injury in such a case may have been caused by the combined effect of the defendant's and the plaintiff's culpable conduct. To retain assumption of risk as a complete defense in such a case would fly in the face of *Li*'s basic holding that when both parties are partially at fault for an injury, a rule which places all of the loss on one of the parties is inherently inequitable. (See *id.* at pp. 497-498.)

Thus, just as the court in *Li* reasoned it would be improper to retain the last clear chance doctrine as a means of imposing *all liability on a defendant* in cases in which the defendant is aware of the risk of harm created by the plaintiff's negligence but fails to take the "last clear chance" to avoid the injury (*Li, supra,* 13 Cal.3d at p. 824), we believe the *Li* court similarly recognized that, in the assumption of risk context, it would be improper to ***311** impose *all responsibility on a plaintiff* who is aware of a risk of harm created by the defendant's breach of duty but fails to avert the harm. In both instances, comparative fault principles call for a sharing of the burden of liability.

The dissenting opinion suggests, however, that, even when a defendant has breached its duty of care to the plaintiff, a plaintiff who reasonably has chosen to encounter a known risk of harm imposed by such a breach may be totally precluded from recovering any damages, without doing violence to

comparative fault principles, on the theory that the plaintiff, by proceeding in the face of a known risk, has "impliedly consented" to any harm. (See dis. opn. by Kennard, J., *post,* pp. 331-333.) For a number of reasons, we conclude this contention does not withstand analysis.

First, the argument that a plaintiff who proceeds to encounter a known risk has "impliedly consented" to absolve a negligent defendant of liability for any ensuing harm logically would apply as much to a plaintiff who *unreasonably* has chosen to encounter a known risk, as to a plaintiff who *reasonably* has chosen to encounter such a risk. As we have seen, however, *Li* explicitly held that a plaintiff who " *'unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence' " (*Li, supra,* 13 Cal.3d at p. 824) is *not* completely barred from recovery; instead, the recovery of such a plaintiff simply is reduced under comparative fault principles. Thus, the dissenting opinion's implied consent argument is irreconcilable with *Li* itself.

Second, the implied consent rationale rests on a legal fiction that is untenable, at least as applied to conduct that represents a breach of the defendant's duty of care to the plaintiff. It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity or sport "consents to" or "agrees to assume" the risks inherent in the activity or sport itself, such as the risks posed to a snow skier by moguls on a ski slope or the risks posed to a water skier by wind-whipped waves on a lake. But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur.

A familiar example may help demonstrate this point. Although every driver of an automobile is aware that driving is a potentially hazardous activity and that inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another, a person who voluntarily ***312** chooses to drive does not thereby "impliedly consent" to being injured by the negligence of another, nor has such a person "impliedly excused" others from performing their duty to use due care for the driver's safety. Instead, the driver reasonably expects that if he or she is injured by another's negligence, i.e., by the breach of the other person's duty to use due care, the driver will be entitled to compensation for his or her injuries. Similarly, although a patient who undergoes elective surgery is aware that inherent in such an operation is the risk of injury in the event the surgeon is negligent, the patient, by voluntarily encountering such a risk, does not "impliedly consent" to negligently inflicted injury or "impliedly agree" to excuse the surgeon from a normal duty of care, but rather justifiably expects that the surgeon will be liable in the event of medical malpractice.

Thus, there is no merit to the dissenting opinion's general claim that simply because a person is aware an activity involves a risk of harm that may arise from another's negligence and voluntarily proceeds to participate in that activity despite such knowledge, that person should be barred from obtaining any recovery on the theory that he or she impliedly consented to the risk of harm. As we shall discuss in part III, legal liability for an injury which occurs during a sporting event *is* significantly affected by the assumption of risk doctrine, but only because the doctrine has been utilized in framing the duty of care owed by a defendant in the context of a sporting event, and not because the plaintiff in such a case has, in any realistic sense of the term, "consented" to relieve the defendant of liability.

Third, the dissenting opinion's claim that the category of cases in which the assumption of risk doctrine operates to bar a plaintiff's cause of action after *Li* properly should be gauged on the basis of an implied consent analysis, rather than on the duty analysis we have described above, is, in our view, untenable for another reason. In support of its implied consent theory, the dissenting opinion relies on a number of pre-*Li* cases, which arose in the "secondary assumption of risk" context, and which held that, in such a context, application of the assumption of risk doctrine was dependent on proof that the *particular* plaintiff *subjectively* knew, rather than simply should have known, of both the *existence* and *magnitude* of the *specific* risk of harm imposed by the defendant's negligence. (See *Vierra v. Fifth Avenue Rental Service, supra,* 60 Cal.2d 266, 271-275; *Prescott v. Ralphs Grocery Co., supra,* 42 Cal.2d 158, 161-162.) Consequently, as the dissenting opinion acknowledges, were its implied consent theory to govern application of the assumption of risk doctrine in the sports setting, the basic liability of a defendant who engages in a sport would depend on variable factors that the defendant frequently would have no way of ascertaining (for example, the particular plaintiff's subjective knowledge and expectations), rather than on ***313** the nature of the sport itself. As a result, there would be drastic disparities in the manner in which the law would treat defendants who engaged in precisely the same conduct, based on the often unknown, subjective expectations of the particular plaintiff who happened to be injured by the defendant's conduct.

Such an approach not only would be inconsistent with the principles of fairness underlying the *Li* decision, but also would be inimical to the fair and efficient administration of justice. If the application of the assumption of risk doctrine in a sports setting turned on the particular plaintiff's subjective knowledge and awareness, summary judgment rarely would be available in such cases, for, as the present case reveals, it frequently will be easy to raise factual questions with regard to a *particular* plaintiff's *subjective* expectations as to the *existence* and *magnitude* of the risks the plaintiff voluntarily chose to encounter. ([3]) By contrast, the question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury. (See, e.g., 6 Witkin, Summary of Cal. Law, *supra,* Torts, § 748, pp. 83-86 and cases cited.) Thus, the question of assumption of risk is much more amenable to resolution by summary judgment under a duty analysis than under the dissenting opinion's suggested implied consent approach.

([1c]) An amicus curiae in the companion case has questioned, on a separate ground, the duty approach to the post-*Li* assumption of risk doctrine, suggesting that if a plaintiff's action may go forward whenever a defendant's breach of duty has played some role, however minor, in a plaintiff's injury, a plaintiff who voluntarily engages in a highly dangerous sport-for example, skydiving or mountain climbing-will escape *any* responsibility for the injury so long as a jury finds that the plaintiff was not "unreasonable" in engaging in the sport. This argument rests on the premise that, under comparative fault principles, a jury may assign some portion of the responsibility for an injury to a plaintiff only if the jury finds that the plaintiff acted *unreasonably,* but not if the jury finds that the plaintiff knowingly and voluntarily, but reasonably, chose to engage in a dangerous activity. Amicus curiae contends that such a rule frequently would permit voluntary risk takers to avoid all responsibility for their own actions, and would impose an improper and undue burden on other participants.

Although we agree with the general thesis of amicus curiae's argument that persons generally should bear personal responsibility for their own actions, the suggestion that a duty approach to the doctrine of assumption of risk is inconsistent with this thesis rests on a mistaken premise. ([4]) Past ***314** California cases have made it clear that the "comparative fault" doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss." (See *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 734-742 [144 Cal.Rptr. 380, 575 P.2d 1162]; *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 328-332 [146 Cal.Rptr. 550, 579 P.2d 441]; *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 804, fn. 7 [251 Cal.Rptr. 202, 760 P.2d 399].)

([1d]) Accordingly, contrary to amicus curiae's assumption, we believe that under California's comparative fault doctrine, a jury in a "secondary assumption of risk" case would be entitled to take into consideration a plaintiff's voluntary action in choosing to engage in an unusually risky sport, whether or not the plaintiff's decision to encounter the risk should be characterized as unreasonable, in determining whether the plaintiff properly should bear some share of responsibility for the injuries he or she suffered. (See, e.g., *Kirk v. Washington State University* (1987) 109 Wn.2d 448 [746 P.2d 285, 290-291]. See generally Schwartz, Comparative Negligence, *supra,* § 9.5, p. 180; Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine* (1991) 52 Ohio St. L.J. 717, 748-749.) Thus, in a case in which an injury has been caused by both a defendant's breach of a legal duty to the plaintiff and the plaintiff's voluntary decision to engage in an unusually risky sport, application of comparative fault principles will not operate to relieve either individual of responsibility for his or her actions, but rather will ensure that neither party will escape such responsibility.

It may be helpful at this point to summarize our general conclusions as to the current state of the doctrine of assumption of risk in light of the adoption of comparative fault principles in *Li, supra,* 13 Cal.3d 804, general conclusions that reflect the view of a majority of the justices of the court (i.e., the three justices who have signed this opinion and Justice Mosk (see conc. and dis. opn. by Mosk, J., *post,* p. 321)).[6] In cases involving "primary assumption of risk"-where, by virtue of the nature of the activity and the parties' ***315** relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury-the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving "secondary assumption of risk"-where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty-the doctrine 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.

Accordingly, in determining the propriety of the trial court's grant of summary judgment in favor of the defendant in this case, our inquiry does not turn on the reasonableness or unreasonableness of plaintiff's conduct in choosing to subject herself to the risks of touch football or in continuing to participate in the game after she became aware of defendant's allegedly rough play. Nor do we focus upon whether there is a factual dispute with regard to whether plaintiff subjectively knew of, and voluntarily chose to encounter, the risk of defendant's conduct, or impliedly consented to relieve or excuse defendant from any duty of care to her. Instead, our resolution of this issue 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. We now turn to that question.

III

As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. (See Civ. Code, § 1714.) ([5]) Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. (See, e.g., *Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496].) In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. ([6a]) Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. (See generally Annot. (1987) 55 A.L.R.4th 632.) In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant.

([7a]) Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well ***316** established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. ([6b]) Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant. (See generally Annot. (1979) 95 A.L.R.3d 203.)

([7b]) In some situations, however, the careless conduct of others is treated as an "inherent risk" of a sport, thus barring recovery by the plaintiff. For example, numerous cases recognize that in a game of baseball, a player generally cannot recover if he or she is hit and injured by a carelessly thrown ball (see, e.g., *Mann v. Nutrilite, Inc.* (1955) 136 Cal.App.2d 729, 734-735 [289 P.2d 282]), and that in a game of basketball, recovery is not permitted for an injury caused by a carelessly extended elbow (see, e.g., *Thomas v. Barlow* (1927) 5 N.J. Misc. 764 [138 A. 208]). The divergent results of the foregoing cases lead naturally to the question how courts are to determine when careless conduct of another properly should be considered an "inherent risk" of the sport that (as a matter of law) is assumed by the injured participant.

Contrary to the implied consent approach to the doctrine of assumption of risk, discussed above, the duty approach provides an answer which does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk. Even where the plaintiff, who falls while skiing over a mogul, is a total novice and lacks any knowledge of skiing whatsoever, the ski resort would not be liable for his or her injuries. (See *Brown v. San Francisco Baseball Club* (1950) 99 Cal.App.2d 484, 488-492 [222 P.2d 19] [baseball spectator's alleged ignorance of the game did not warrant imposing liability on stadium owner for injury caused by a carelessly thrown ball].) And, on the other hand, even where the plaintiff actually is aware that a particular ski resort on occasion has been negligent in maintaining its towropes, that knowledge would not preclude the skier from recovering if he or she were injured as a result of the resort's repetition of such deficient conduct. In the latter context, although the plaintiff may have acted with knowledge of the potential negligence, he or she did not consent to such negligent conduct or agree to excuse the resort from liability in the event of such negligence.

Rather than being dependent on the knowledge or consent of the particular plaintiff, resolution of the question of the defendant's liability in such cases turns on whether the defendant had a legal duty to avoid such conduct or to ***317** protect the plaintiff against a particular risk of harm. As already noted, the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself. Additionally, the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport.

The latter point is demonstrated by a review of one of the numerous cases involving an injury sustained by a spectator at a baseball game. In *Ratcliff v. San Diego Baseball Club*

(1938) 27 Cal.App.2d 733 [81 P.2d 625], a baseball spectator was injured when, walking in the stands between home plate and first base during a game, she was hit by an accidentally thrown bat. She sued both the player who threw the bat and the baseball stadium owner. The jury returned a verdict in favor of the player, but found the stadium owner liable. On appeal, the Court of Appeal affirmed.

Had the *Ratcliff* court utilized an implied consent analysis, the court would have looked only to the knowledge of the particular plaintiff (the spectator) to determine whether the risk of being hit by an accidentally thrown bat was an inherent risk of the sport of baseball assumed by the plaintiff, and would have treated the plaintiff's action against both defendants similarly with regard to such risk. The *Ratcliff* court did not analyze the case in that manner, however. Instead, the court implicitly recognized that two different potential duties were at issue-(1) the duty of the ballplayer to play the game without carelessly throwing his bat, and (2) the duty of the stadium owner to provide a reasonably safe stadium with regard to the relatively common (but particularly dangerous) hazard of a thrown bat. Because each defendant's liability rested on a separate duty, there was no inconsistency in the jury verdict absolving the batter of liability but imposing liability on the stadium owner for its failure to provide the patron "protection from flying bats, at least in the area where the greatest danger exists and where such an occurrence is reasonably to be expected." (*Ratcliff v. San Diego Baseball Club, supra,* 27 Cal.App.2d at p. 736.)

Other cases also have analyzed in a similar fashion the duty of the owner of a ballpark or ski resort, in the process defining the risks inherent in the sport not only by virtue of the nature of the sport itself, but also by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport. (See, e.g., *Quinn v. Recreation Park Assn., supra,* 3 Cal.2d 725, 728-729 [discussing separately the potential liability of a player and a baseball stadium owner for injury to a spectator]; *Shurman v. Fresno Ice Rink, supra,* 91 Cal.App.2d 469, 474-477 [discussing duty owed by owner of ice hockey rink to spectators].) ***318**

Even a cursory review of the numerous sports injury cases reveals the diverse categories of defendants whose alleged misconduct may be at issue in such cases. Thus, for example, suits have been brought against owners of sports facilities such as baseball stadiums and ski resorts (see, e.g., *Quinn v. Recreation Park Assn., supra,* 3 Cal.2d 725; *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111 [266 Cal.Rptr. 749]), against manufacturers and reconditioners of sporting equipment (see, e.g., *Holdsworth v. Nash Mfg., Inc.* (1987) 161 Mich.App. 139 [409 N.W.2d 764]; *Gentile v. MacGregor Mfg. Co.* (1985) 201 N.J.Super. 612 [493 A.2d 647]), against sports instructors and coaches (see, e.g., *Scroggs v. Coast Community College Dist.* (1987) 193 Cal.App.3d 1399 [239 Cal.Rptr. 916]; *Morris v. Union High School Dist. A* (1931) 160 Wash. 121 [294 P. 998]), and against coparticipants (see, e.g., *Tavernier v. Maes* (1966) 242 Cal.App.2d 532 [51 Cal.Rptr. 575]), alleging that such persons, either by affirmative misconduct or by a failure to act, caused or contributed to the plaintiff's injuries. These cases demonstrate that in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.

In the present case, defendant was a participant in the touch football game in which plaintiff was engaged at the time of her injury, and thus the question before us involves the circumstances under which a participant in such a sport may be held liable for an injury sustained by another participant.

([8a]) The overwhelming majority of the cases, both within and outside California, that have addressed the issue of coparticipant liability in such a sport, have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport-for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game-and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport. (See, e.g., *Gauvin v. Clark* (1989) 404 Mass. 450 [537 N.E.2d 94, 96-97] and cases cited.)

In reaching the conclusion that a coparticipant's duty of care should be limited in this fashion, the cases have explained that, in the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct. The cases have recognized that, in such a sport, even when a participant's conduct violates a rule of the game and ***319** may subject the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport

by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.

A sampling of the cases that have dealt with the question of the potential tort liability of such sports participants is instructive. In *Tavernier v. Maes, supra,* 242 Cal.App.2d 532, for example, the Court of Appeal upheld a verdict denying recovery for an injury sustained by the plaintiff second baseman as an unintended consequence of the defendant baserunner's hard slide into second base during a family picnic softball game. Similarly, in *Gaspard v. Grain Dealers Mutual Insurance Company* (La.Ct.App. 1961) 131 So.2d 831, the plaintiff baseball player was denied recovery when he was struck on the head by a bat which accidentally flew out of the hands of the defendant batter during a school game. (See also *Gauvin v. Clark, supra,* 404 Mass. 450 [537 N.E.2d 94, 96-97] [plaintiff hockey player injured when hit with hockey stick by opposing player; court held that defendant's liability should be determined by whether he acted "with reckless disregard of safety"]; *Marchetti v. Kalish* (1990) 53 Ohio.St.3d 95 [559 N.E.2d 699, 703] [child injured while playing "kick the can"; "we join the weight of authority ... and require that before a party may proceed with a cause of action involving injury resulting from recreational or sports activity, reckless or intentional conduct must exist"]; *Kabella v. Bouschelle* (1983) 100 N.M. 461 [672 P.2d 290, 294] [plaintiff injured in informal tackle football game; court held that "a cause of action for personal injuries between participants incurred during athletic competition must be predicated upon recklessness or intentional conduct, 'not mere negligence' "]; *Ross v. Clouser* (Mo. 1982) 637 S.W.2d 11, 13-14 [plaintiff third baseman injured in collision with baserunner; court held that "a cause of action for personal injuries incurred during athletic competition must be predicated on recklessness, not mere negligence"]; *Moe v. Steenberg* (1966) 275 Minn. 448 [147 N.W.2d 587, 33 A.L.R.3d 311] [plaintiff ice skater denied recovery for injury incurred when another skater, who was skating backwards, accidentally tripped over her after she had fallen on the ice]; *Thomas v. Barlow, supra,* 5 N.J. Misc. 764 [138 A. 208] [recovery denied when appellate court concluded that plaintiff's injury, incurred during a basketball game, resulted from an accidental contact with a member of the opposing team].)

By contrast, in *Griggas v. Clauson* (1955) 6 Ill.App.2d 412 [128 N.E.2d 363], the court upheld liability imposed on the defendant basketball player who, during a game, wantonly assaulted a player on the opposing team, apparently out of frustration with the progress of the game. And, in *Bourque v. Duplechin* (La.Ct.App. 1976) 331 So.2d 40, the court affirmed a judgment ***320** imposing liability for an injury incurred during a baseball game when the defendant baserunner, in an ostensible attempt to break up a double play, ran into the plaintiff second baseman at full speed, without sliding, after the second baseman had thrown the ball to first base and was standing four to five feet away from second base toward the pitcher's mound; in upholding the judgment, the court stated that defendant "was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players." (*Id.* at p. 42.) (See also *Averill v. Luttrell* (1957) 44 Tenn.App. 56 [311 S.W.2d 812] [defendant baseball catcher properly held liable when, deliberately and without warning, he hit a batter in the head with his fist]; *Hackbart v. Cincinnati Bengals, Inc.* (10th Cir. 1979) 601 F.2d 516 [trial court erred in absolving defendant football player of liability when, acting out of anger and frustration, he struck a blow with his forearm to the back of the head of an opposing player, who was kneeling on the ground watching the end of a pass interception play]; *Overall v. Kadella* (1984) 138 Mich.App. 351 [361 N.W.2d 352] [hockey player permitted to recover when defendant player intentionally punched him in the face at the conclusion of the game].)

In our view, the reasoning of the foregoing cases is sound. Accordingly, we conclude that a participant in an active sport breaches a legal duty of care to other participants-i.e., engages in conduct that properly may subject him or her to financial liability-only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.

([9a]) As applied to the present case, the foregoing legal principle clearly supports the trial court's entry of summary judgment in favor of defendant. The declarations filed in support of and in opposition to the summary judgment motion establish that defendant was, at most, careless or negligent in knocking over plaintiff, stepping on her hand, and injuring her finger. Although plaintiff maintains that defendant's rough play as described in her declaration and the declaration of Andrea Starr properly can be characterized as "reckless," the conduct alleged in those declarations is not even closely comparable to the kind of conduct-conduct so reckless as to be totally ***321** 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.

Therefore, we conclude that defendant's conduct in the course

of the touch football game did not breach any legal duty of care owed to plaintiff. Accordingly, this case falls within the primary assumption of risk doctrine, and thus the trial court properly granted summary judgment in favor of defendant. Because plaintiff's action is barred under the primary assumption of risk doctrine, comparative fault principles do not come into play.

The judgment of the Court of Appeal, upholding the summary judgment entered by the trial court, is affirmed.

Lucas, C. J., and Arabian, J., concurred.

MOSK, J.,

Concurring and Dissenting.

([1e]), ([8b]), ([9b]) Because I agreed with the substance of the majority opinion in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393] (see *id.* at p. 830), I concur generally with Justice George's analysis as set forth in part II of the lead opinion. And like the lead opinion, I conclude that the liability of sports participants should be limited to those cases in which their misconduct falls outside the range of the ordinary activity involved the sport. As part I of the lead opinion explains, the kind of overexuberant conduct that is alleged here was not of that nature. I therefore agree that defendant was entitled to summary judgment, for the reasons set forth in part III of the lead opinion.

But I would go farther than does the lead opinion. Though the opinion's interpretation of *Li v. Yellow Cab Co. (supra,* 13 Cal.3d 804) is reasonable, I believe the time has come to eliminate implied assumption of risk entirely. The all-or-nothing aspect of assumption of risk is as anachronistic as the all-or- nothing aspect of contributory negligence. As commentators have pointed out, the elements of assumption of risk "are accounted for already in the negligence prima facie case and existing comparative fault defense." (Wildman & Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California* (1991) 25 U.S.F. L.Rev. 647, 679.) Plaintiffs' behavior can be analyzed under comparative fault principles; no separate defense is needed. (See *ibid.*) Wildman and Barker explain cogently that numerous California cases invoke both a duty analysis-which I prefer-and an unnecessary implied assumption of risk analysis in deciding a defendant's liability. (See *id.* at p. 657 & fn. 58.) In the case before us, too, the invocation of assumption of risk is superfluous: far better to limit the ***322** analysis to concluding that a participant owes no duty to avoid conduct of the type ordinarily involved in the sport.

Were we to eliminate the doctrine of assumption of risk, we would put an end to the doctrinal confusion that now surrounds apportionment of fault in such cases. Assumption of risk now stands for so many different legal concepts that its utility has diminished. A great deal of the confusion surrounding the concept "stems from the fact that the term 'assumption of risk' has several different meanings and is often applied without recognizing these different meanings." (*Rini v. Oaklawn Jockey Club* (8th Cir. 1988) 861 F.2d 502, 504-505.) Courts vainly attempt to analyze conduct in such esoteric terms as primary assumption of risk, secondary assumption of risk, reasonable implied assumption of risk, unreasonable implied assumption of risk, etc. Since courts have difficulty in assessing facts under the rubric of such abstruse distinctions, it is unlikely that juries can comprehend such distinctions.

Justice Frankfurter explained in a slightly different context, "The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." (*Tiller v. Atlantic Coast Line R. Co.* (1943) 318 U.S. 54, 68 [87 L.Ed. 610, 618, 63 S.Ct. 444, 143 A.L.R. 967] (conc. opn. of Frankfurter, J.).) Thus the *Rini* court, in attempting to determine the viability of assumption of risk in light of the Arkansas comparative fault law, was forced to identify "four types of assumption of risk ...." (*Rini v. Oaklawn Jockey Club, supra,* 861 F.2d at p. 505.) These included "implied secondary reasonable assumption of risk" and "implied secondary unreasonable assumption of risk." (*Id.* at p. 506.)

I would eliminate the confusion that continued reliance on implied assumption of risk appears to cause, and would simply apply comparative fault principles to determine

liability.

PANELLI, J.,

Concurring and Dissenting.

I concur in the majority opinion solely with respect to the result reached. The majority correctly affirms the judgment of the Court of Appeal, which upheld the summary judgment entered by the trial court. I dissent, however, from the reasoning of the majority opinion. Instead, I reach a like result by adopting and applying the "consent-based" analysis set forth in the dissenting opinion by Justice Kennard. While I subscribe to the analysis of the dissenting opinion with respect to the doctrine of implied assumption of the risk, I am not in accord ***323** with how it would dispose of this case. I believe that defendant met the burden of demonstrating that plaintiff assumed the risk of injury by her participation in the touch football game.

As the dissenting opinion explains: "To establish the defense [of implied assumption of the risk], a defendant must prove that the plaintiff voluntarily accepted a risk with knowledge and appreciation of that risk. (*Prescott v. Ralphs Grocery Co.* [(1954)] 42 Cal.2d 158, 161 [265 P.2d 904].)" (Dis. opn., *post,* p. 326.) As the dissenting opinion further explains: "A defendant need not prove, however, that the plaintiff 'had the prescience to foresee the exact accident and injury which in fact occurred.' (*Sperling v. Hatch* (1970) 10 Cal.App.3d 54, 61 [88 Cal.Rptr. 704].)" (*Ibid.*)

There is no question that plaintiff voluntarily chose to play touch football.[1] The undisputed facts in this case also show that plaintiff knew of and accepted the risks associated with the game. Plaintiff was an avid football fan. She had participated in games of touch football in the past. She was aware of the fact that in touch football players try to deflect the ball from receiving players. Plaintiff admitted that the players in the game in question could expect to receive "bumps" and "bruises." These facts indicate that plaintiff knew and appreciated that physical injury resulting from *contact,* such as being knocked to the ground, was possible when playing touch football. Defendant was not required to prove more, such as that plaintiff knew or appreciated that a "serious injury" or her particular injury could result from the expected physical contact.

To support the conclusion that summary judgment be reversed under the consent-based approach, the dissenting opinion stresses the broad range of activities that can be part of a "touch football game" and that few rules were delineated for the particular game in which plaintiff was injured. I find these facts to be irrelevant to the question at hand. The risk of physical contact and the possibility of resulting injury is inherent in the game of football, no matter who is playing the game or how it is played. While the players who participated in the game in question may have wanted a "mellow" and "noncompetitive" game, such expectations do not alter the fact that anyone who has observed or played any form of football understands that it is a contact sport and that physical injury can result from such physical contact. ***324**

The undisputed facts of this case amply support awarding defendant summary judgment based upon plaintiff's implied assumption of the risk. I, therefore, concur in affirming the judgment of the Court of Appeal.

Baxter, J., concurred.

KENNARD, J.

I disagree with the plurality opinion both in its decision to affirm summary judgment for defendant and in its analytic approach to the defense of assumption of risk.

We granted review in this case and its companion, *Ford v. Gouin* (*post,* p. 339 [11 Cal.Rptr.2d 30, 834 P.2d 724]), to resolve a lopsided conflict in the Courts of Appeal on whether our adoption 17 years ago of a system of comparative fault in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393] (hereafter *Li*) necessarily abolished the affirmative defense of implied assumption of risk.[1] When confronted with this issue, the overwhelming majority of appellate courts in this state have held that, except to the extent it was subsumed within the

former doctrine of contributory negligence this court abolished in *Li,* implied assumption of risk continues as a complete defense. I would so hold in this case, adhering to the traditional analysis of implied assumption of risk established by a long line of California cases, both before and after *Li.*

Not content with deciding the straightforward issue before us-whether the defense of implied assumption of risk survived *Li*-the plurality opinion uses this case as a forum to advocate a radical transformation of tort law. The plurality proposes to recast the analysis of implied assumption of risk from a subjective evaluation of what a particular plaintiff knew and appreciated about the encountered risk into a determination of the presence or absence of duty legally imposed on the defendant. By thus transforming an affirmative defense into an element of the plaintiff's negligence action, the plurality would abolish the defense without acknowledging that it is doing so.

The plurality opinion also announces a rule that those who engage in active sports do not owe coparticipants the usual duty of care-as measured by the standard of a reasonable person in like or similar circumstances-to avoid inflicting physical injury. According to the plurality, a sports participant has no duty to avoid conduct inherent in a particular sport. Although I agree that in organized sports contests played under well-established rules participants have no duty to avoid the very conduct that constitutes the sport, ***325** I cannot accept the plurality's nearly boundless expansion of this general principle to eliminate altogether the "reasonable person" standard as the measure of duty actually owed between sports participants.

The ultimate question posed by this case is whether the trial court properly granted summary judgment for defendant. Deriving the facts from the evidence that the parties presented to the trial court on defendant's motion for summary judgment, and relying on well-established summary judgment principles, I conclude that defendant is not entitled to summary judgment. In reaching a contrary conclusion, the plurality mischaracterizes the nature of the athletic contest during which plaintiff incurred her injury. The evidence reveals that rather than an organized match with well-defined rules, it was an impromptu and informal game among casual acquaintances who entertained divergent views about how it would be played. This inconclusive record simply does not permit a pretrial determination that plaintiff knew and appreciated the risks she faced or that her injury resulted from a risk inherent in the game.

I

To explain my conclusion that implied assumption of risk survives as an affirmative defense under the system of comparative fault this court adopted in *Li* in 1975, I first summarize the main features of the defense as established by decisions published before *Li.*

In California, the affirmative defense of assumption of risk has traditionally been defined as the voluntary acceptance of a specific, known and appreciated risk that is or may have been caused or contributed to by the negligence of another. (*Prescott v. Ralphs Grocery Co.* (1954) 42 Cal.2d 158, 162 [265 P.2d 904]; see *Hayes v. Richfield Oil Corp.* (1952) 38 Cal.2d 375, 384-385 [240 P.2d 580].) Assumption of risk may be proved either by the plaintiff's spoken or written words (express assumption of risk), or by inference from the plaintiff's conduct (implied assumption of risk). Whether the plaintiff knew and appreciated the specific risk, and voluntarily chose to encounter it, has generally been a jury question. (See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1110, p. 523.)

The defense of assumption of risk, whether the risk is assumed expressly or by implication, is based on consent. (*Vierra v. Fifth Avenue Rental Service* (1963) 60 Cal.2d 266, 271 [32 Cal.Rptr. 193, 383 P.2d 777]; see Prosser & Keeton, Torts (5th ed. 1984) § 68, p. 484.) Thus, in both the express and implied forms, the defense is a specific application of the maxim that one "who consents to an act is not wronged by it." (Civ. Code, § 3515.) This ***326** consent, we have explained, "will negative liability" (*Prescott v. Ralphs Grocery Co., supra,* 42 Cal.2d 158, 161; see also *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498, fn. 10 [102 Cal.Rptr. 795, 498 P.2d 1043] ["In assumption of the risk the negligent party's liability is negated ...."]), and thus provides a complete defense to an action for negligence.

The elements of implied assumption of risk deserve some explanation. To establish the defense, a defendant must prove that the plaintiff voluntarily accepted a risk with knowledge and appreciation of that risk. (*Prescott v. Ralphs Grocery Co., supra,* 42 Cal.2d 158, 161.) The normal risks inherent in everyday life, such as the chance that one who uses a public highway will be injured by the negligence of another motorist, are not subject to the defense, however, because they are general rather than specific risks. (See *Hook v. Point Montara Fire Protection Dist.* (1963) 213 Cal.App.2d 96, 101 [28 Cal.Rptr. 560].)

The defense of implied assumption of risk depends on the plaintiff's "actual knowledge of the specific danger involved." (*Vierra v. Fifth Avenue Rental Service, supra,* 60 Cal.2d 266, 274.) Thus, one who "knew of the general danger in riding in a bucket of the mine owner's aerial tramway, did not assume the risk, of which he *had no specific knowledge,* that the traction cable was improperly spliced." (*Id.* at p. 272, italics added, referring to *Bee v. Tungstar Corp.* (1944) 65 Cal.App.2d 729, 733 [151 P.2d 537]; see also *Carr v. Pacific Tel. Co.* (1972) 26 Cal.App.3d 537, 542-543 [103 Cal.Rptr. 120].) A defendant need not prove, however, that the plaintiff "had the clairvoyance to foresee the exact accident and injury which in fact occurred." (*Sperling v. Hatch* (1970) 10 Cal.App.3d 54, 61 [88 Cal.Rptr. 704].) "Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge and there may be an assumption of the risk ...." (*Prescott v. Ralphs Grocery Co., supra,* 42 Cal.2d at 162.) Indeed, certain well-known risks of harm may be within the general "common knowledge." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 546 [51 Cal.Rptr. 575].)

As set forth earlier, a person's assumption of risk must be voluntary. "The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him [or her] no reasonable alternative course of conduct in order to [¶] (a) avert harm to himself [or herself] or another, or [¶] (b) exercise or protect a right or privilege of which the defendant has no right to deprive him [or her]." (Rest.2d Torts, § 496E, subd. (2); see also *Curran v. Green Hills Country Club* (1972) 24 Cal.App.3d 501, 505-506 [101 Cal.Rptr. 158].) ***327**

This requirement of voluntariness precludes assertion of the defense of assumption of risk by a defendant who has negligently caused injury to another through conduct that violates certain safety statutes or ordinances such as those designed to protect a class of persons unable to provide for their own safety for reasons of inequality of bargaining power or lack of knowledge. (See *Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 430-431 [218 P.2d 17] [violation of fire- safety ordinance]; *Fonseca v. County of Orange* (1972) 28 Cal.App.3d 361, 366, 368 [104 Cal.Rptr. 566] [violation of safety order requiring scaffolding and railings at bridge construction site]; see also *Mason v. Case* (1963) 220 Cal.App.2d 170, 177 [33 Cal.Rptr. 710].) Thus, a worker who, to avoid loss of livelihood, continues to work in the face of safety violations does not thereby assume the risk of injury as a result of those violations. (See, e.g., Lab. Code, § 2801; *Fonseca v. County of Orange, supra,* 28 Cal.App.3d 361.) In such cases, the implied agreement upon which the defense is based is contrary to public policy and therefore unenforceable.

Our 1975 decision in *Li, supra,* 13 Cal.3d 804, marked a fundamental change in California law governing tort liability based on negligence. Before *Li,* a person's own lack of due care for his or her safety, known as contributory negligence, completely barred that person from recovering damages for injuries inflicted by the negligent conduct of another. In *Li,* we held that a lack of care for one's own safety would no longer entirely bar recovery, and that juries thereafter should compare the fault or negligence of the plaintiff with that of the defendant to apportion loss between the two. (*Id.* at pp. 828-829.)

Before it was abolished by *Li, supra,* 13 Cal.3d 804, the defense of contributory negligence was sometimes confused with the defense of implied assumption of risk. Although this court had acknowledged that the two defenses may "arise from the same set of facts and frequently overlap" (*Vierra v. Fifth Avenue Rental Service, supra,* 60 Cal.2d 266, 271), we had emphasized that they were nonetheless "essentially different" (*ibid.*) because they were "based on different theories" (*Prescott v. Ralphs Grocery Co., supra,* 42 Cal.2d 158, 161). Contributory negligence was premised on a lack of due care or, stated another way, a departure from the reasonable person standard, whereas implied assumption of risk has always depended on a voluntary acceptance of a risk with knowledge and appreciation of that risk. (*Id.* at pp. 161-162; *Gonzalez v. Garcia* (1977) 75 Cal.App.3d 874, 878 [142 Cal.Rptr. 503].)

The standards for evaluating a plaintiff's conduct under the two defenses were entirely different. Under contributory negligence, the plaintiff's conduct was measured against the objective standard of a hypothetical reasonable person. (*Gonzalez v. Garcia, supra,* 75 Cal.App.3d 874, 879.) Implied ***328** assumption of risk, in contrast, has always depended upon the plaintiff's subjective mental state; the relevant inquiry is whether the plaintiff actually knew, appreciated, and voluntarily consented to assume a specific risk of injury. (*Grey v. Fibreboard Paper Products Co.* (1966) 65 Cal.2d 240, 243-245 [53 Cal.Rptr. 545, 418 P.2d 153].)

We said in *Li,* albeit in dictum, that our adoption of a system of comparative fault would to some extent necessarily impact the defense of implied assumption of risk. (*Li, supra,* 13 Cal.3d 804, 826.) We explained: "As for assumption of risk,

we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed ... that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he [or she] may encounter that risk in a prudent manner, is in reality a form of contributory negligence .... Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him [or her]. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.' [Citations.] We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence." (*Li, supra,* 13 Cal.3d 804, 824-825, original italics.)

Although our adoption in *Li* of a system of comparative fault eliminated contributory negligence as a separate defense, it did not alter the basic attributes of the implied assumption of risk defense or call into question its theoretical foundations, as we affirmed in several cases decided after *Li.* For example, in *Walters v. Sloan* (1977) 20 Cal.3d 199 [142 Cal.Rptr. 152, 571 P.2d 609], we said that "one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby." (At p. 204; see also *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 406 [143 Cal.Rptr. 13, 572 P.2d 1155] [acknowledging the continued viability of the assumption of risk defense after the adoption of comparative fault].) Thereafter, in *Lipson v. Superior Court* (1982) 31 Cal.3d 362 [182 Cal.Rptr. 629, 644 P.2d 822], we reiterated that "the defense of assumption of risk arises when the plaintiff voluntarily undertakes to encounter a specific known risk imposed by defendant's conduct." (At p. 375, fn. 8.)

The Courts of Appeal directly addressed this issue in several cases, which were decided after *Li, supra,* 13 Cal.3d 804, and which considered whether, ***329** and to what extent, implied assumption of risk as a complete defense survived our adoption in *Li* of a system of comparative fault. The first of these cases was *Segoviano v. Housing Authority* (1983) 143 Cal.App.3d 162 [191 Cal.Rptr. 578] (hereafter *Segoviano*).

In *Segoviano,* the plaintiff was injured during a flag football game when an opposing player pushed him to the ground as the plaintiff was running along the sidelines trying to score a touchdown. Although the jury found that the opposing player was negligent, and that this negligence was a legal cause of the plaintiff's injury, it also found that the plaintiff's participation in the game was a negligent act that contributed to the injury. Applying the instructions it had been given on comparative negligence, the jury apportioned fault for the injury between the two players and reduced the plaintiff's award in accord with that apportionment. (143 Cal.App.3d at p. 166.)

To determine whether the jury had acted properly in making a comparative fault apportionment, the *Segoviano* court began its analysis by distinguishing those cases in which the plaintiff's decision to encounter a known risk was "unreasonable" from those in which it was "reasonable." (*Segoviano, supra,* 143 Cal.App.3d 162, 164.) In so doing, *Segoviano* relied on this court's language in *Li,* which I have quoted on page 328, *ante,* that a plaintiff's conduct in "unreasonably" undertaking to encounter a specific known risk was "a form of contributory negligence" that would be merged "into the general scheme of assessment of liability in proportion to fault." (*Li, supra,* 13 Cal.3d 804, 824-825.)

The *Segoviano* court defined an "unreasonable" decision to encounter a known risk as one that "falls below the standard of care which a person of ordinary prudence would exercise to avoid injury to himself or herself under the circumstances." (*Segoviano, supra,* 143 Cal.App.3d 162, 175, citing Rest.2d Torts, § 463.) The *Segoviano* court cited a person's voluntary choice to ride with a drunk driver as an example of an "unreasonable" decision. (*Id.* at p. 175; see *Gonzalez v. Garcia, supra,* 75 Cal.App.3d 874, 881; *Paula v. Gagnon* (1978) 81 Cal.App.3d 680, 685 [146 Cal.Rptr. 702].) Because an "unreasonable" decision to risk injury is neglect for one's own safety, the *Segoviano* court observed, a jury can appropriately compare the negligent plaintiff's fault with that of the negligent defendant and apportion responsibility for the injury, applying comparative fault principles to determine the extent of the defendant's liability. (*Segoviano, supra,* at pp. 164, 170.)

By contrast, the plaintiff's decision to play flag football was, in the *Segoviano* court's view, an example of a "reasonable" decision to encounter a known risk of injury. Although the risk of being injured during a flag ***330** football game could be avoided altogether by choosing not to play, this did not render the plaintiff's decision to play "unreasonable." (*Segoviano, supra,* 143 Cal.App.3d 162, 175.) Rather, the court said, a person who participates in a game of flag

football is not negligent in doing so, because the choice does not fall below the standard of care that a person of ordinary prudence would exercise to avoid being injured. The *Segoviano* court concluded that such cases, in which there is no negligence of the plaintiff to compare with the negligence of the defendant, cannot be resolved by comparative fault apportionment of the plaintiff's damages. (*Id.* at pp. 174-175.)

The *Segoviano* court next considered whether the defense of implied assumption of risk, to the extent it had not merged into comparative fault, continued to provide a complete defense to an action for negligence following our decision in *Li* (*supra*, 13 Cal.3d 804). The court asked, in other words, whether a plaintiff's voluntary and nonnegligent decision to encounter a specific known risk was still a complete bar to recovery, or no bar at all.

In resolving this issue, the court found persuasive a commentator's suggestion that " 'it would be whimsical to treat one who has unreasonably assumed the risk more favorably ... than one who reasonably assumed the risk ....' " (*Segoviano, supra*, 143 Cal.App.3d 162, 169, quoting Fleming, *The Supreme Court of California 1974-1975, Forward: Comparative Negligence at Last-By Judicial Choice* (1976) 64 Cal.L.Rev. 239, 262.) To avoid this "whimsical" result, in which "unreasonable" plaintiffs were allowed partial recovery by way of a comparative fault apportionment while "reasonable" plaintiffs were entirely barred from recovery of damages, the *Segoviano* court concluded that our decision in *Li, supra*, 13 Cal.3d 804, must mean that the defense of implied assumption of risk had been abolished in all those instances in which it had not merged into the system of comparative fault, and that only express assumption of risk survived as a complete defense to an action for negligence. (*Segoviano, supra*, 143 Cal.App.3d 162, 169-170.) The *Segoviano* court thus held that the defense of implied assumption of risk "plays no part in the comparative negligence system of California." (*Id.* at p. 164.) Various Court of Appeal decisions soon challenged this holding of *Segoviano*.

One decision characterized *Segoviano*'s analysis as "suspect." (*Rudnick v. Golden West Broadcasters* (1984) 156 Cal.App.3d 793, 800, fn. 4 [202 Cal.Rptr. 900].) Another case disregarded it entirely in reaching a contrary result (*Nelson v. Hall* (1985) 165 Cal.App.3d 709, 714 [211 Cal.Rptr. 668] ["Where assumption of the risk is not merely a form of contributory negligence," it remains "a complete defense."]; accord, *Neinstein v. Los Angeles Dodgers, Inc.* (1986) 185 Cal.App.3d 176, 183 [229 Cal.Rptr. 612]; *Willenberg v. Superior Court* (1986) 185 Cal.App.3d 185, 186-187 [***331** 229 Cal.Rptr. 625]). And in *Ordway v. Superior Court* (1988) 198 Cal.App.3d 98, 104 [243 Cal.Rptr. 536] (hereafter *Ordway*), the court rejected *Segoviano* outright, holding instead that "reasonable" implied assumption of risk continued as a complete defense under the newly adopted system of comparative fault.

The Court of Appeal that decided *Ordway, supra,* interpreted *Li*'s reference to a form of assumption of risk under which " 'plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him [or her]' " (*Li, supra*, 13 Cal.3d at p. 824) as describing a doctrine that the *Ordway* court termed "reasonable" implied assumption of risk. This doctrine, the *Ordway* court concluded, was unaffected by *Li*'s adoption of a system of comparative negligence and remained a complete defense after *Li*. (*Ordway, supra*, 198 Cal.App.3d 98, 103-104.) According to *Ordway,* a plaintiff who voluntarily and reasonably assumes a risk, "whether for recreational enjoyment, economic reward, or some similar purpose," is deemed thereby to have agreed to reduce the defendant's duty of care and "cannot prevail." (*Id.* at p. 104.)

After concluding that the defense of implied assumption of risk remained viable after this court's decision in *Li, supra*, 13 Cal.3d 804, the *Ordway* court discussed the preclusive impact of the defense on the facts of the case before it. *Ordway* involved a negligence action brought by a professional jockey who had been injured in a horse race when another jockey, violating a rule of the California Horse Racing Board, crossed into the plaintiff's lane. The court first noted that professional jockeys must be aware that injury-causing accidents are both possible and common in horse racing, as in other sports activities. (*Ordway, supra*, 198 Cal.App.3d 98, 111.) The court observed that although the degree of risk to be anticipated would vary with the particular sport involved, a plaintiff may not recover from a coparticipant for a sports injury if the coparticipant's injury-causing actions fell within the ordinary expectations of those engaged in the sport. (*Id.* at pp. 111-112.) On this basis, the *Ordway* court held that the plaintiff jockey's action was barred.

Other decisions by the Courts of Appeal that have addressed implied assumption of risk have followed *Ordway, supra*, 198 Cal.App.3d 98. (*Nunez v. R'Bibo* (1989) 211 Cal.App.3d 559, 562- 563 [260 Cal.Rptr. 1]; *Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1477-1478 [255 Cal.Rptr. 755]; *King v. Magnolia Homeowners Assn.* (1988) 205 Cal.App.3d 1312, 1316 [253 Cal.Rptr. 140].) In my view, *Ordway* was correct in its conclusions that the defense of implied

assumption of risk survived this court's adoption in *Li (supra,* 13 Cal.3d 804) of a system of comparative fault, and that the defense remains a complete bar to recovery in negligence cases in which the plaintiff has knowingly and voluntarily consented to encounter a specific risk. ***332**

Ordway was also correct in its observation that the terms "unreasonable" and "reasonable" are confusing when used to distinguish the form of implied assumption of risk that has merged into the system of comparative fault from the form that has not so merged. As *Ordway* suggested, the reasonable/unreasonable labels would be more easily understood by substituting the terms "knowing and intelligent," for "reasonable," and "negligent or careless" for "unreasonable." (*Ordway, supra,* 198 Cal.App.3d 98, 105.)

The defense of implied assumption of risk is never based on the "reasonableness" of the plaintiff's conduct, as such, but rather on a recognition that a person generally should be required to accept responsibility for the normal consequences of a freely chosen course of conduct. (See Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference* (1987) 67 B.U. L.Rev. 213, 258 ["consent is neither reasonable nor unreasonable[;] [i]t simply expresses what plaintiff wants or prefers"].) In implied assumption of risk situations, the plaintiff's conduct often defies legal characterization as either reasonable or unreasonable. Even when this is not so, and a court or jury could appropriately determine whether the plaintiff's conduct was reasonable, the distinction to be drawn is not so much between reasonable and unreasonable conduct. Rather, the essential distinction is between conduct that is deliberate and conduct that is merely careless. Referring to "reasonable" implied assumption of risk lends unwarranted credence to the charge that the law is "whimsical" in treating unreasonable behavior more favorably than behavior that is reasonable. There is nothing arbitrary or whimsical in requiring plaintiffs to accept responsibility for the consequences of their considered and deliberate choices, while at the same time apportioning liability between a plaintiff and a defendant who have both exhibited carelessness.

In those cases that have merged into comparative fault, partial recovery is permitted, not because the plaintiff has acted unreasonably, but because the unreasonableness of the plaintiff's apparent choice provides compelling evidence that the plaintiff was merely careless and could not have truly appreciated and voluntarily consented to the risk, or because enforcement of the implied agreement on which the defense is based would be contrary to sound public policy. In these cases, implied assumption of risk is simply not available as a defense, although comparative negligence may be.

In those cases in which a plaintiff's decision to encounter a specific known risk was not the result of carelessness (that is, when the plaintiff's conduct is not merely a form of contributory negligence), nothing in this court's adoption in *Li (supra,* 13 Cal.3d 804) of a system of comparative fault suggests that implied assumption of risk must or should be eliminated ***333** as a complete defense to an action for negligence. I would hold, therefore, that the defense continues to exist in such situations unaffected by this court's adoption in *Li* of a comparative fault system.

II

The plurality opinion approaches the viability of implied assumption of risk after *Li, supra,* 13 Cal.3d 804, in a fashion altogether different from the traditional consent analysis I have described. It begins by conceding that *Li* effected only a partial merger of the assumption of risk defense into the system of comparative fault. It then concludes, with no foundational support in California law, that the actual effect of this partial merger was to bifurcate implied assumption of risk into two subcategories that the plurality calls "primary" and "secondary" assumption of risk.

The plurality's "secondary assumption of risk" category includes those situations in which assumption of risk is merely a variant of contributory negligence. In those situations, under the plurality approach, implied assumption of risk merges into comparative fault; a trial court presented with a "secondary" case would therefore instruct the jury only on the principles of damage apportionment based on comparative fault, but not on implied assumption of risk as a separate and complete defense. Thus, implied assumption of risk does not survive as a separate and complete defense in these "secondary" cases.

Under the plurality's approach, implied assumption of risk fares no better in the "primary assumption of risk" cases. That category includes only those cases in which the defendant owes no duty to the plaintiff. Without duty, of course, there is no basis for a negligence action and thus no need for an affirmative defense to negligence. Consequently, implied assumption of risk ceases to operate as an affirmative defense in these "primary" cases.

The plurality purports to interpret *Li, supra,* 13 Cal.3d 804,

but instead works a sleight-of-hand switch on the assumption of risk defense. In those situations in which implied assumption of risk does not merge into comparative fault, the plurality recasts what has always been a question of the plaintiff's implied consent into a question of the defendant's duty. This fundamental alteration of well-established tort principles was not preordained by *Li* nor was it a logical evolution of California law either before or after this court's decision in *Li*. Seizing on *Li*'s statement that a plaintiff who assumes the risk thereby *reduces* a defendant's duty of care, the plurality concludes that defendants had no duty of care in the first place. The plurality presents its analysis as merely an integration of the defense of implied ***334** assumption of risk into the system of comparative fault, but this "integration" is in truth a complete abolition of a defense that California courts have adhered to for more than 50 years. I see no need or justification for this drastic revision of California law.

III

On a motion for summary judgment, a defendant can establish implied assumption of risk as a complete defense to negligence by submitting uncontroverted evidence that the plaintiff sustained the injury while engaged in voluntarily chosen activity under circumstances showing that the plaintiff knew or must have known that the specific risks of the chosen activity included the injury suffered. (See Code Civ. Proc., § 437c, subds. (a), (c), (f); *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1560 [142 Cal.Rptr. 503]; *Fireman's Fund Ins. Co. v. City of Turlock* (1985) 170 Cal.App.3d 988, 994 [216 Cal.Rptr. 796].) In this case, the trial court entered summary judgment for defendant, ruling that the evidence supporting the motion established assumption of risk under the traditional consent analysis.

The undisputed, material facts are as follows: Plaintiff, defendant, and six or eight other guests gathered at the home of a mutual friend to watch a television broadcast of the 1987 Super Bowl football game. During the game's half time, the group went to an adjacent dirt lot for an informal game of touch football. The participants divided into two teams, each including men as well as women. They used a child's soft, "peewee-size" football for the game. The players expected the game to be "mellow" and "noncompetitive," without any "forceful pushing, hard hitting or hard shoving."

Plaintiff and defendant were on opposing teams. Plaintiff was an avid fan of televised professional football, but she had played touch football only rarely and never with this particular group. When defendant ran into her early in the game, plaintiff objected, stating that he was playing too roughly and if he continued, she would not play. Plaintiff stated in her declaration that defendant "seemed to acknowledge [her] statement" and "left [her] with the impression that he would play less rough." On the very next play, defendant knocked plaintiff down and inflicted the injury for which she seeks recovery.

We have held that summary judgment "is a drastic measure" that should "be used with caution." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) On appeal from a summary judgment, well-settled rules dictate that the moving party's evidence supporting the motion be strictly construed and that doubts about granting the motion be ***335** resolved in favor of the party that opposed the motion. (*Ibid.*) Applying those rules here, I conclude that defendant has not established implied assumption of risk as a complete defense to plaintiff's action for negligence.

Notably missing from the undisputed facts is any evidence that plaintiff either knew or must have known that by participating in this particular game she would be engaging in a sport that would subject players to being knocked to the ground. She had played touch football only rarely, never with these players, and just before her injury had expressly told defendant that her participation in the touch football game was conditioned on him not being so rough. Moreover, the game was not even a regular game of touch football. When deposed, defendant conceded that this touch football game was highly unusual because the teams consisted of both men and women and the players used a child's peewee ball. He agreed that the game was not "regulation football," but was more of a "mock" football game.

"Touch football" is less the name of a game than it is a generic description that encompasses a broad spectrum of activity. At one end of the spectrum is the "traditional" aggressive sandlot game, in which the risk of being knocked down and injured should be immediately apparent to even the most casual observer. At the other end is the game that a parent gently plays with young children, really little more than a game of catch. Here, defendant may prevail on his summary judgment motion only if the undisputed facts show that plaintiff knew this to be the type of game that involved a risk of being knocked to the ground. As explained above, such knowledge by the plaintiff was not established. Accordingly, the trial court erred in granting summary judgment for defendant on the ground that plaintiff had assumed the risk of injury.

IV

To uphold the grant of summary judgment for defendant, the plurality relies on a form of analysis virtually without precedent in this state. As an offshoot of its advocacy of the primary/secondary approach to implied assumption of risk, the plurality endorses a categorical rule under which coparticipants in active sports have no duty to avoid conduct "inherent" in the sport, and thus no liability for injuries resulting from such conduct. Applying the rule to the facts shown here, the plurality concludes that plaintiff's injury resulted from a risk "inherent" in the sport she played and that defendant owed her no duty to avoid the conduct that caused this injury.

Generally, a person is under a legal duty to use ordinary care, measured by the conduct of a hypothetical reasonable person in like or similar circumstances, to avoid injury to others. (Civ. Code, § 1714, subd. (a).) Judicially ***336** fashioned exceptions to this general duty rule must be clearly supported by public policy. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1079 [9 Cal.Rptr.2d 615, 831 P.2d 1197].) The plurality's no-duty-for-sports rule is such a judicially fashioned exception to the general duty rule. Under the plurality's rule, a sports participant's conduct is not evaluated by the "reasonable person" standard. Rather, the player is exempted from negligence liability for all injuries resulting from conduct that is "inherent" in the sport.

The plurality's no-duty-for-sports rule derives from cases in a few jurisdictions concluding that a participant's liability for injuries to a coparticipant during competitive sports must be based on reckless or intentional conduct. (See *Gauvin v. Clark* (1989) 404 Mass. 450 [537 N.E.2d 94]; *Kabella v. Bouschelle* (1983) 100 N.M. 461 [672 P.2d 290]; *Ross v. Clouser* (Mo. 1982) 637 S.W.2d 11; *Nabozny v. Barnhill* (1975) 31 Ill.App.3d 212 [334 N.E.2d 258, 77 A.L.R.3d 1294].) Although these courts have chosen to explain the rule in terms of the absence of duty, the consent analysis of implied assumption of risk would provide an equally satisfactory explanation. (See *Ordway, supra,* 198 Cal.App.3d 98, 110-112.) The reason no duty exists in these competitive sports situations is that, as the Massachusetts Supreme Court has explained in *Gauvin,* each participant has a right to infer that the others have agreed to undergo a type of physical contact that would otherwise constitute assault and battery.[2] (*Gauvin v. Clark, supra,* 537 N.E.2d at p. 96.) Without some reference to mutual consent or implied agreement among coparticipants, the no-duty-for-sports rule would be difficult to explain and justify. Thus, the rationale of the rule, even in no-duty garb, is harmonious with the traditional logic of implied assumption of risk.

Although there is nothing inherently wrong with the plurality's no-duty rule as applied to organized, competitive, contact sports with well- established modes of play, it should not be extended to other, more casual sports activities, such as the informal "mock" football game shown by the evidence in this case. Outside the context of organized and well-defined sports, the policy basis for the duty limitation-that the law should permit and encourage vigorous athletic competition (*Gauvin v. Clark, supra,* 537 N.E.2d at p. 96)-is considerably weakened or entirely absent. Thus, the no-duty-for-sports rule logically applies only to organized sports contests played under well-settled, official rules (*Gauvin v. Clark, supra,* 537 N.E.2d 94 [college varsity hockey game]; *Ross v. Clouser, supra,* 637 S.W.2d 11 [church league softball game]; *Nabozny v. Barnhill, supra,* 334 N.E.2d 258 [organized, ***337** amateur soccer game]), or on unequivocal evidence that the sport as played involved the kind of physical contact that generally could be expected to result in injury (*Kabella v. Bouschelle, supra,* 670 P.2d 290).

The plurality may believe that its no-duty rule for sports participants will facilitate early resolution of personal injury actions by demurrer or motions for summary judgment and thus provide relief to overburdened trial courts by eliminating the need for jury trials in many of these cases. But the plurality fails to explain just how trial courts will be able to discern, at an early stage in the proceedings, which risks are inherent in a given sport.

Under the plurality's no-duty-for-sports rule, a sports participant is exempted from negligence liability for all injuries resulting from conduct that is within "the range of ordinary activity involved in the sport." (Plur. opn., *ante,* at p. 320.) Under this approach, as the plurality acknowledges, "the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself." (*Id., ante,* at p. 317.)

The issue framed by the plurality's no-duty approach can be decided on demurrer only if the plaintiff has alleged in the complaint that the injury resulted from a risk inherent in an injury-causing sport, something careful pleaders are unlikely to do. And because summary judgment depends on uncontroverted material facts, early adjudication of the duty issue by summary judgment is equally doubtful. In cases involving all but the most well-known professional sports, plaintiffs will usually be able to counter defense evidence seeking to establish what risks are inherent in the sport. Cases

that cannot be resolved by demurrer or summary judgment will, under the plurality's approach, proceed to trial solely under comparative fault, leaving the jury no opportunity to decide whether the plaintiff made a knowing and voluntary decision to assume the risk.

The plurality's resolution of this case amply illustrates the difficulty of attempting to decide the question of duty by motion for summary judgment. To sustain summary judgment under the plurality's approach, the defendant must have conclusively negated the element of duty necessary to the plaintiff's negligence case. (*Molko v. Holy Spirit Assn., supra,* 46 Cal.3d 1092, 1107.) Therefore, under the plurality approach, defendant here is entitled to summary judgment only if he negated the element of duty by presenting undisputed evidence showing that his injury-causing conduct was within the range of activity ordinarily involved in the sport he was then playing.

But what is "the range of the ordinary activity" involved in touch football? As I have previously explained, the generic term "touch football" encompasses such a broad range of activity that it is difficult to conceive of an ***338** " ordinary" game. Even if such a game could be identified, defendant offered no evidence in support of his motion for summary judgment to show that players are knocked to the ground in the "ordinary" game. In the absence of uncontroverted evidence on this material fact, defendant was not entitled to summary judgment.

As mentioned earlier, defendant admitted at his deposition that this was not a "regulation football" game, and that it was more of a "mock" game because it was played by both men and women using a child's peewee ball. Given the spontaneous and irregular form of the game, it is not surprising that the participants demonstrated uncertainty about the bounds of appropriate conduct. One participant, asked at deposition whether defendant had done anything "out of the normal," touched the nub of the problem by replying with this query: "Who's [*sic*; whose] normal? My normal?"

Defendant did not present uncontroverted evidence that his own rough level of play was "inherent" in or normal to the particular game being played. In the view of one of the players, defendant was playing "considerably rougher than was necessary." Other players described defendant as a fast runner and thought he might have been playing too hard. Absent uncontroverted evidence that defendant's aggressive style of play was appropriate, there is no basis for the plurality's conclusion that his injury-causing conduct in knocking plaintiff to the ground was within the range of ordinary and acceptable behavior for the ill-defined sports activity in which plaintiff was injured.

Defendant did not meet his burden to establish by undisputed evidence a legal entitlement to summary judgment. The record fails to support summary judgment under either the traditional consent approach to the defense of assumption of risk or the plurality's no-duty approach. Thus, the trial court erred in granting defendant's motion for summary judgment, and the Court of Appeal erred in affirming that judgment. I would reverse. ***339**

Footnotes

1 The portion of defendant's deposition attached to plaintiff's opposition included the following passage:
"Q: .... [F]rom your perspective-and I asked this same question of both of your friends yesterday-is the standard of care in which you were going to be dealing with people out there in the play field different, in your opinion, when you're playing in that kind of a game, that is, the one that happened on that day versus if you're out there playing in the exact same place and with a bunch of guys and no girls.
"A: Yeah, it would be different. Yes.
"Q: So, theoretically, you should be much more careful when the women are out there than if it was a bunch of guys?
"A: Right."

2 In *Ordway v. Superior Court, supra,* 198 Cal.App.3d 98, the court suggested that the differentiation in the treatment accorded reasonable and unreasonable plaintiffs under an approach viewing "reasonable implied assumption of risk" as a complete bar to recovery was only "superficially anomalous" (*id.* at p. 104), and could be explained by reference to "the expectation of the defendant. He or she is permitted to ignore reasonably assumed risks and is not required to take extraordinary precautions with respect to them. The defendant must, however, anticipate that some risks will be unreasonably undertaken, and a failure to guard against these may result in liability." (*Id.* at p. 105.)
Even when the matter is viewed from the defendant's perspective, however, this suggested dichotomy is illogical and untenable. From the standpoint of a potential defendant, it is far more logical to require that the defendant take precautions with respect to risks that the defendant reasonably can foresee being undertaken, than it would be to impose liability only for risks that the defendant is less likely to anticipate will be encountered.
Ordway also attempted to explain the anomaly by reformulating the distinction between reasonable and unreasonable assumption of risk as one between plaintiffs who make a "knowing and intelligent" choice and those who act "negligent[ly] or careless[ly]" (*Ordway v. Superior Court, supra,* 198 Cal.App.3d 98, 105), and the dissenting opinion cites this reformulated terminology with approval. (See dis. opn. by Kennard, J., *post,* p. 332.) The *Li* decision, however, specifically subsumed within comparative fault those assumption of risk cases in which a defendant " 'unreasonably undertakes to encounter a specific *known* risk' " (*Li, supra,* 13 Cal.3d 804, 824, italics omitted and added), i.e., cases in which a defendant makes a *knowing,* but unreasonable, choice to undertake a risk. Indeed, in recasting the "unreasonable" assumption of risk category to include only those cases in which the plaintiff merely was careless and did not act with actual knowledge of the risk, *Ordway* inadvertently redefined the unreasonable assumption of risk category out of existence. The pre-*Li* decisions clearly held that where a plaintiff was injured as the result of a defendant's breach of duty, the assumption of risk doctrine applied only to those instances in which the plaintiff actually knew of and appreciated the specific risk and nonetheless chose to encounter the risk. (See, e.g., *Vierra v. Fifth Avenue Rental Service, supra,* 60 Cal.2d 266, 271 ["Actual, and not merely constructive, knowledge of the danger is required."].)

3 The introductory passage from the Harper and James treatise on The Law of Torts, that was cited with approval in *Li,* stated in this regard: "The term assumption of risk has led to no little confusion because it is used to refer to at least two different concepts, which largely overlap, have a common cultural background, and often produce the same legal result. But these concepts are nevertheless quite distinct rules involving slightly different policies and different conditions for their application. (1) In its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it. Volenti non fit injuria. (2) A plaintiff may also be said to assume a risk created by defendant's breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, except possibly in master and servant cases, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is a form of contributory negligence. Hereafter we shall call this 'assumption of risk in a secondary sense.' " (2 Harper & James, The Law of Torts (1st ed. 1956) § 21.1, p. 1162, fns. omitted, cited in *Li, supra,* 13 Cal.3d 804, 825.)

4 Although in the academic literature "express assumption of risk" often has been designated as a separate, contract-based species of assumption of risk distinct from both primary and secondary assumption of risk (see, e.g., Prosser & Keeton on Torts (5th ed. 1984) § 68, p. 496), cases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk. One leading treatise describes express assumption of risk in the following terms: "In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone .... *The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.*" (Prosser & Keeton on Torts, *supra,* § 68, pp. 480-481, fn. omitted, second italics added.)
Since *Li,* California cases uniformly have recognized that so long as an express assumption of risk agreement does not violate public policy (see, e.g., *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 95-101 [32 Cal.Rptr. 33, 383 P.2d 441, 6 A.L.R.3d 693]), such an agreement operates to relieve the defendant of a legal duty to the plaintiff with respect to the risks encompassed by the agreement and, where applicable, to bar completely the plaintiff's cause of action. (See, e.g., *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 597-602 [250 Cal.Rptr. 299], and cases cited.)

5 In addition to the sports setting, the primary assumption of risk doctrine also comes into play in the category of cases often described as involving the "firefighter's rule." (See *Terhell v. American Commonwealth Associates* (1985) 172 Cal.App.3d 434, 437 [218 Cal.Rptr. 256].) In its most classic form, the firefighter's rule involves the question whether a person who negligently has started a fire is liable for an injury sustained by a firefighter who is summoned to fight the fire; the rule provides that the person who started the fire is not liable under such circumstances. (See, e.g., *Walters v. Sloan* (1977) 20 Cal.3d 199, 202 [142 Cal.Rptr. 152, 571 P.2d 609].) Although a number of theories have been cited to support this conclusion, the most persuasive explanation is that the party who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront. (See, e.g., *Baker v. Superior Court* (1982) 129 Cal.App.3d 710, 719-721 [181 Cal.Rptr. 311]; *Nelson v. Hall* (1985) 165 Cal.App.3d 709, 714 [211 Cal.Rptr. 668]. See generally 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 739, pp. 69-70 [discussing rule as one illustration of duty approach]; *Anicet v. Gant* (Fla.Dist.Ct.App. 1991) 580 So.2d 273, 276 ["a person specifically hired to encounter and combat particular dangers is owed no independent tort duty by those who have created those dangers ...."].) Because the defendant in such a case owes no duty to protect the firefighter from such risks, the firefighter has no cause of action even if the risk created by the fire was so great that a trier of fact could find it was unreasonable for the firefighter to choose to encounter the risk. This example again demonstrates that primary assumption of risk is not the same as "reasonable implied assumption of risk."

6 Although Justice Mosk agrees that, in this context, a defendant's liability should be analyzed under a duty analysis, he is of the view that the "primary" and "secondary" assumption of risk terminology is potentially confusing and would prefer entirely to eliminate the doctrine of implied assumption of risk as a bar to recovery and simply to apply comparative fault principles to determine liability. (See conc. and dis. opn. by Mosk, J., *post,* pp. 321-322.) Because the *Li* decision, *supra,* 13 Cal.3d 804, 824-825, indicated that the preexisting assumption of risk doctrine was to be only partially merged into the comparative fault system, the analysis set forth in the present opinion (distinguishing between primary and secondary assumption of risk) in our view more closely reflects the *Li* holding than does Justice Mosk's proposal.

7 As suggested by the cases described in the text, the limited duty of care applicable to coparticipants has been applied in situations involving a wide variety of active sports, ranging from baseball to ice hockey and skating. Because the touch football game at issue in this case clearly falls within the rationale of this rule, we have no occasion to decide whether a comparable limited duty of care appropriately should be applied to other less active sports, such as archery or golf. We note that because of the special danger to others posed by the sport of hunting, past cases generally have found the ordinary duty of care to be applicable to hunting accidents. (See, e.g., *Summers v. Tice* (1948) 33 Cal.2d 80, 83 [199 P.2d 1, 5 A.L.R.2d 91].)

1 Plaintiff points to her request to the defendant during the game to temper his roughness to demonstrate that she did not assume the risk of being injured. She claims that defendant "seemed to acknowledge [her] statement" and "left [her] with the impression that he would play less rough." Plaintiff's reported request to defendant does not defeat summary judgment. She continued to play the game. As demonstrated below, she knew that physical contact and resulting injury could occur during a touch football game.

1 Of the several Court of Appeal decisions that considered this issue, only one concluded that our adoption in *Li* of a system of comparative fault necessarily abolished the traditional defense of assumption of risk.

2 In adopting a rule of no duty for organized competitive sports, the Massachusetts court candidly acknowledged that legislative abolition of the assumption of risk defense had forced it to shift the focus of analysis from the plaintiff's knowing confrontation of risk to the scope of the defendant's duty of care. (*Gauvin v. Clark, supra,* 537 N.E.2d at p. 97, fn. 5.)

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8.

883 F.2d 269
United States Court of Appeals,
Third Circuit.

LINKSTROM, Deborah, as Administratrix of the Estate of Sylvestre Garcia, Jr., Deceased, Appellant,
v.
GOLDEN T. FARMS Trumbower, Douglas Franklin Trumbower, Ord Gallardo, Marcelo and Gallardo, Criselda.

No. 89-1009. | Argued June 1, 1989. | Decided Aug. 28, 1989.

Administratrix of estate of deceased farm worker filed wrongful death action. The United States District Court for the Eastern District of Pennsylvania, Robert F. Kelly, J., excluded testimony of a farm safety expert. Administratrix appealed. The Court of Appeals, A. Leon Higginbotham, Jr., Circuit Judge, held that the farm safety expert's testimony would have been helpful to the jury, even using a "reasonable man theory" as the standard of liability and, thus, the testimony should have been admitted.

Vacated and remanded.

West Headnotes (1)

[1] **Evidence**
Conduct of Business

Testimony of farm safety expert about safety practices reasonable and prudent farmer would follow was potentially helpful to jury in wrongful death action arising out of farm accident and, thus, testimony should have been admitted, even using "reasonable man theory" to decide liability issues; jurors with no farming experience could form clearer idea and develop better informed standards of care with assistance of expert testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

23 Cases that cite this headnote

Attorneys and Law Firms

*269 Peter M. Patton (argued), Joseph Lurie, Gelfand, Berger, Lurie & March, Philadelphia, Pa., for appellant.

Francis X. Brennan (argued), Swartz, Campbell & Detweiler, Philadelphia, Pa., for appellees.

Before HIGGINBOTHAM, GREENBERG and HUTCHINSON, Circuit Judges.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.

This wrongful death action concerns a young migrant farm worker who died in an agricultural accident. The trial judge refused to permit the plaintiff's farm safety expert to testify regarding the safety practices a reasonable and prudent farmer would follow, and the plaintiff appeals that ruling. We review an evidentiary ruling of the district court for abuse of discretion. *In re Japanese Electronic Products*, 723 F.2d 238, 260 (3d Cir.1983), *rev'd on other grounds*, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In our review, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right

of the party is affected ..." Fed.R.Evid. 103(a).

I.

The facts of this case as recounted below are simple and essentially undisputed. On the day of his death, Sylvestre Garcia, Jr. ("Garcia"), age 14, was working on the farm of Douglas Trumbower as a "dumper," a person who stands on the back of a flat-bed truck and dumps tomatoes picked by others into bins. Appellant's Appendix ("App.") at 37, 91.

At the time of the fatal accident, the tomato picking operation was moving from one tomato field to another, through an apple orchard, and Garcia was standing on the flat-bed truck as it went. App. at 88-89, 91-92. Ord Trumbower, the father of Douglas Trumbower, owner of the farm that his son leased and allegedly his son's agent, knew that dumpers sometimes rode between fields standing on trucks. On the *270 day of the accident Ord Trumbower drove through the orchard, aware that a flat-bed truck was behind him. App. at 22-23, 50-51, 54-58, 84-86. No one saw the accident. A few moments after the flat-bed truck drove into the orchard, Garcia lay unconscious on the ground, under the damaged branch of an apple tree; he died almost immediately thereafter. App. at 95-97.

II.

The appellant, Deborah Linkstrom, administratrix of Garcia's estate, claims that the trial judge abused his discretion in refusing to permit a farm safety expert to testify. We agree.

The admissibility of expert opinion evidence is governed by Rule 702 of the Federal Rules of Evidence. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702.

This court has noted that "[h]elpfulness is the touchstone of Rule 702," *Breidor v. Sears, Roebuck and Co.*, 722 F.2d 1134, 1139 (3d Cir.1983). It has further indicated that it will interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.

> "[D]oubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions. The jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations."

In re Japanese Electronic Products, 723 F.2d at 279 (quoting 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[03], at 702-14-15 (1982) (footnotes omitted)). *See, e.g., U.S. v. Theodoropoulos*, 866 F.2d 587 (3d Cir.1989); *Salas by Salas v. Wang*, 846 F.2d 897 (3d Cir.1988); *but see U.S. v. Dowling*, 855 F.2d 114 (3d Cir.1988).

Moreover, there is no requirement that expert testimony be "beyond the jury's sphere of knowledge." *In re Japanese Electronic Products*, 723 F.2d at 279. Such a requirement is, in our view,

> "incompatible with the standard of helpfulness expressed in Rule 702. First, it assumes wrongly that there is a bright line separating issues within the comprehension of jurors from those that are not. Secondly, even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful."

Id. (quoting 3 J. Weinstein and M. Berger, *Weinstein's Evidence*, ¶ 702[02] at 702-9-10 (1982)) (footnotes omitted).

The proffer of the farm safety expert's testimony, as contained in the Pre-Trial Order, reads as follows:

> Mr. Jester will testify as an expert witness that the practice of farm labor crew members

> traveling from field to field while riding on the back of flat-bed trucks created a severe risk of injury to farm labor crew members. Mr. Jester will testify that a reasonable and prudent person in the position of the Defendants would have identified the hazard associated with such transportation practices, and employed reasonable accident measures to reduce or eliminate the severe risk of injury including, but not limited to, prohibiting farm labor crew members from standing on beds or appendages any time such trucks were moving.

App. at 256. More generally, Linkstrom intended her expert to testify as to "what a reasonable farmer does while employing contract labors [sic] as far as issuing safety rules and seeing that the work is conducted in a safe manner." App. at 140. She argued "that there are standards of good practice in the farm industry regarding safety of operations such as this. And that the farmer, in this case Mr. Trumbower, violated those standards." App. at 141.

The Trumbowers claimed that the standard in the industry had nothing to do with whether they had acted properly, and that *271 the question was, simply, whether they had exercised reasonable care, which was "a judgment call" that the jury could make unassisted. App. at 143. The trial judge did not elaborate his reasons for excluding the expert's testimony, but he seemed to agree with the Trumbowers when he said, "I think I'm going to stick with the reasonable man theory and I'm going to exclude your expert ..." App. at 144. Under the standard approved in *In re Japanese Electronic Products*, 723 F.2d at 279, barring strong factors favoring exclusion, the testimony should have been allowed if there was some reason to think it might have been useful. The thrust of the Trumbowers' argument was that the testimony was useless because it was irrelevant to the jury's understanding of what a reasonable person in the Trumbowers' position would do. The district court agreed. We do not.

Jurors can be assumed to know how a reasonable and prudent person behaves, but a reasonable and prudent person does not automatically know how to act in a situation with which he or she is unfamiliar, and a jury is not automatically able to establish a reasonable standard of care for circumstances with which it is unfamiliar. Counsel for the plaintiff asserted that none of the jury members had ever worked on a farm or been involved in farming, and there was no rebuttal to that assertion. App. at 9. The conditions of work faced by migrant farm laborers were outside their experience and very likely outside their knowledge. Jurors in a district with many urban residents may be less familiar with standards of care for farming practices than with standards of care for subway systems. An agricultural expert could bring within such jurors' vision a better understanding of the events that may have contributed to the death of a young farm worker on a flatbed truck. Even if the jurors had some knowledge of farming, the testimony could still have been useful. As this court has noted, expert testimony need not be beyond the jury's sphere of knowledge to be helpful. *In re Japanese Electronic Products*, 723 F.2d at 279.

We can think of several respects in which the testimony of the farm safety expert might have assisted the jury. First, and most important, there is assistance suggested in appellant's proffer of the expert's testimony. App. at 256. Where the jurors were called on to formulate standards of reasonable behavior in circumstances with which they were unfamiliar, a farm safety expert could have made certain that they understood the dangers of which the Trumbowers were aware or should have been aware, and the precautions which the Trumbowers knew or should have known they could have taken to avert those dangers. Second, a farm safety expert could have helped the jury to distinguish widespread, yet unsafe, practices from safe and reasonable ones. Third, where some of the farm laborers who testified were not completely fluent in English (App. at 96-7), an expert familiar with the conditions under which they worked could have assisted the jury in understanding those conditions. Finally, where there was ambiguity as to how the accident occurred, an expert familiar with agricultural accidents might have offered some insight that would help the jury understand what happened. The testimony of the farm safety expert could have been helpful to the jury in any or all of these ways.

The Trumbowers made no argument that the testimony of the expert would be harmful or prejudicial, only that it was irrelevant. The district court did not discuss the question of potential harm

or prejudice. The only basis the record reveals for the court's exclusion of the expert's testimony was that the court wanted to "stick with the reasonable man theory." Our reading of the law is that the testimony of the farm safety expert would not compete with a "reasonable man theory," but rather would enhance its application. A jury with no farming experience could no doubt form some idea on its own of what a reasonable and prudent farmer would do in the circumstances, but it could form a clearer idea and develop better informed standards of care with the help of expert testimony. We conclude that the district court excluded testimony that was potentially helpful to ***272** the jury without sufficient grounds for so doing, and thereby abused its discretion. The exclusion of the testimony affected a substantial right of the plaintiff in that it withheld from the jury information that might have led it to make a different evaluation of the farm safety practices of the Trumbowers and, as a result, might have led to a different verdict. It was, therefore, reversible error.

III.

For the foregoing reasons, we will vacate the district court's order of October 13, 1988 and remand the matter to the district court for a new trial consistent with this opinion.[1]

Parallel Citations

28 Fed. R. Evid. Serv. 860

Footnotes

1 We have reviewed and found without merit appellant's claims that:
(1) the trial court abused its discretion in refusing to admit testimony from a Pennsylvania state trooper on the position of the victim before the accident and the course of the truck;
(2) the trial court erred in refusing to submit to the jury appellant's claim that appellee's violation of 29 U.S.C. § 1842 was negligence per se that caused the appellant's injuries.

We have also reviewed and will deny appellee's motion to quash the appeal.

A default judgment was obtained against defendants Marcelo and Griselda Gallardo on March 13, 1988. Upon motion of plaintiff's counsel, the district court dismissed them as defendants in an order of December 8, 1988. Thus, for purposes of this appeal, the only parties who were defendants below are Golden T. Farms, Douglas Trumbower and Ord Trumbower.

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9.

551 So.2d 592
District Court of Appeal of Florida,
Second District.

Annette MOFFAT and Annette Moffat, as guardian of the property of Jerome Bongyor, a minor, Appellants,
v.
U.S. FOUNDRY & MANUFACTURING CORPORATION, Appellee.
No. 89–00844. | Nov. 3, 1989.

Mother of injured bicyclist brought action against, inter alia, manufacturer of drainage **grate** which child was trying to avoid when struck by automobile while crossing bridge. The Circuit Court, Pinellas County, David Seth Walker, J., dismissed complaint, and appeal was taken. The District Court of Appeal, Altenbernd, J., held that complaint was sufficient to state cause of action.

Reversed and remanded.

West Headnotes (2)

[1] **Products Liability**
Nature of Product and Existence of Defect or Danger
Products Liability
Miscellaneous Products

Allegation that slots in drainage **grate** were large enough to trap **bicycle tires**, thereby creating hazard for bicyclist, was sufficient to state cause of action against manufacturer for **negligence**, in action by bicyclist injured when struck by automobile on bridge while trying to avoid danger of **grate**.

1 Cases that cite this headnote

[2] **Products Liability**
Negligence or Fault
Products Liability
Miscellaneous Products

Drainage **grate** manufacturer owed duty to bicyclist injured when struck by automobile on bridge while trying to avoid hazardous grating; though bicyclist was not consumer or user of its product, he was foreseeable plaintiff.

1 Cases that cite this headnote

Attorneys and Law Firms

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Stephen C. Chumbris of Greene & Mastry, P.A., St. Petersburg, for appellee.

Opinion

ALTENBERND, Judge.

The plaintiff, Mrs. Moffat, appeals an order dismissing her third amended complaint against U.S. Foundry with prejudice because it failed to state a cause of action. The trial court determined, exclusively on the plaintiff's allegations, that the injuries sustained by Mrs. Moffat's son were not proximately caused by the alleged **negligence** of U.S. Foundry. We reverse because the third amended complaint contains a short and plain statement of the ultimate facts authorizing relief. Fla.R.Civ.P. 1.110(b). The issue of causation in this case requires a careful consideration of factual details which need not be alleged.

[1] The plaintiff's third amended complaint alleges that her seven-year-old son, Jerome Bongyor, was struck by an automobile on March 20, 1985, while he was riding his **bicycle** home from grade school. The accident occurred while the young boy was riding on a bridge in Pinellas County. The bridge allegedly was designed with a pathway for pedestrians and bicyclists. The pathway allegedly had been designed and constructed with a drainage **grate** across one portion of the pathway. The **grate** contained slots which were parallel to the

pathway. The slots were large enough to trap **bicycle tires** and created a hazard for bicyclists. Allegedly, the boy was aware of the **grate** and chose to ride in the active lanes of automobile traffic on the bridge in order to avoid the danger of the **grate**. The accident occurred while he was avoiding the risk created by the **grate**.

*593 Mrs. Moffat alleges that U.S. Foundry designed, manufactured, and marketed the **grate**. She also alleges that U.S. Foundry was aware of the danger of its **grates**. She even attaches, as an exhibit to the third amended complaint, an advertisement from a company which sold a guard to eliminate the danger created by the slots in such drainage **grates**. U.S. Foundry allegedly knew that its **grates** would be installed in areas where **bicycles** and automobiles were operated in close proximity to each other, and that it was foreseeable that a bicyclist could be injured by an automobile while avoiding the risk of an accident on a **grate**.

Mrs. Moffat sued U.S. Foundry for both **negligence** and strict liability. She also sued the automobile driver, the corporations which designed and constructed the bridge, and Pinellas County. The trial court dismissed only U.S. Foundry.

U.S. Foundry successfully argued in the trial court that the **negligence** of the driver or one of the other defendants was an independent, efficient, intervening cause which relieved it of responsibility as a matter of law. It relied primarily upon *Pope v. Cruise Boat Co.*, 380 So.2d 1151 (Fla. 3d DCA 1980), and *Puhalski v. Brevard County*, 428 So.2d 375 (Fla. 5th DCA 1983). Mrs. Moffat urged that the issue of causation must be resolved by a jury, and relied upon *Stahl v. Metropolitan Dade County*, 438 So.2d 14 (Fla. 3d DCA 1983). The trial court granted U.S. Foundry's motion to dismiss and expressly relied on *Pope*. Although *Pope* and *Puhalski* resolved the issue of causation as a matter of law, they did so on motions for summary judgment.

While we reverse the trial court's resolution of this issue on a motion to dismiss, we do not suggest that the issue must ultimately be submitted to a jury. It is possible that the undisputed facts established during discovery could permit the trial court to determine that the drainage **grate** "simply provided the occasion" for this accident, and that some later **negligence** was an independent, efficient proximate cause as a matter of law. *Dep't of Transp. v. Anglin*, 502 So.2d 896 (Fla.1987). *See also Wha Ja Yu v. Neenah Foundry*, 164 Ill.App.3d 975, 116 Ill.Dec. 13, 518 N.E.2d 635 (Ill.App.Ct.1987); *Widefield Homes v. Griego*, 160 Colo. 225, 416 P.2d 365 (Colo.1966).

[2] On appeal, U.S. Foundry also argues that it owes no duty to this child in either **negligence** or strict liability because the child was not a consumer or user of its product. It argues that a person who is injured in the vicinity of a product is only owed a duty if the injury is caused by some explosion or other active defect in the product. We do not interpret the duty under strict liability to "innocent bystanders," established in *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 89 (Fla.1976), so narrowly. Although not relying upon *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y.1928), U.S. Foundry clearly argues that this child was not a foreseeable plaintiff to whom a duty was owed because its alleged **negligence** was "passive." The fact that the **grate** did not actively cause the child's injuries may ultimately prove significant in determining the issue of causation. Nevertheless, we perceive no reason to limit the duty owed in **negligence** or strict liability by an active/passive distinction which has not proven to be a manageable distinction in the past. *See Houdaille Indus. Inc. v. Edwards*, 374 So.2d 490 (Fla.1979).

Reversed and remanded for proceedings consistent herewith.

SCHEB, A.C.J., and RYDER, J., concur.

Parallel Citations

14 Fla. L. Weekly 2558

14 Fla. L. Weekly 2558

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196 W.Va. 202
Supreme Court of Appeals of
West Virginia.

Judith S. KOFFLER, Plaintiff Below, Appellant,
v.
CITY OF HUNTINGTON, a West Virginia Municipal Corporation, Defendant Below, Appellee.
No. 23110. | Submitted Feb. 6, 1996. | Decided March 22, 1996.

Bicyclist brought suit against city for personal injuries received when **bicycle tire** dropped between slats of storm drain **grate** in center of alley. The Circuit Court, Cabell County, Alfred E. Ferguson, J., entered summary judgment in favor of city, ruling that city only had duty to maintain alley for vehicle traffic. Bicyclist appealed. The Supreme Court of Appeals, McHugh, Chief Justice, held that: (1) city had duty to maintain alley in reasonably safe condition for use by bicyclist, and (2) whether city breached duty was fact question.

Reversed.

West Headnotes (4)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Circuit court's entry of summary judgment is reviewed de novo on appeal.

19 Cases that cite this headnote

[2] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

When language of statute is clear and without ambiguity, plain meaning is to be accepted without resorting to rules of interpretation.

1 Cases that cite this headnote

[3] **Automobiles**
Places to which liability extends
Automobiles
Care required as to condition of way in general

City had duty to maintain alley in reasonably safe condition for **bicycle** travel; duty to maintain alley in reasonably safe condition was not limited to use by vehicles. Code, 29–12A–4(c)(3).

2 Cases that cite this headnote

[4] **Judgment**
Tort cases in general

Whether city breached duty to maintain alley in reasonably safe condition for **bicycle** traffic was fact question precluding summary judgment in action by bicyclist for personal injuries received when **bicycle tire** dropped between slats of storm drain **grate**. Code, 29–12A–4(c)(3).

5 Cases that cite this headnote

****646 *203 Syllabus by the Court***

1. " 'A circuit court's entry of summary judgment is reviewed *de novo*.' Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 1, *Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995).

2. " ' "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).' Syl. pt. 1, *Peyton v. City Council of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1989)." Syl. pt. 3, *Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995).

3. Under *W.Va.Code*, 29–12A–4(c)(3) [1986], political subdivisions are liable for injury, death, or loss to persons or property caused by their **negligent** failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge. A political subdivision's duty to keep its public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds open, in repair, or free from nuisance does not extend exclusively to vehicles or vehicular travel.

Appeal from the Circuit Court of Cabell County, Honorable Alfred E. Ferguson, Judge, Civil Action No. 93–C–1309.

Attorneys and Law Firms

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Opinion

McHUGH, Chief Justice:

Plaintiff Judith S. Koffler instituted this **negligence** action in the Circuit Court of Cabell County after she sustained injuries while riding her **bicycle** in an alley located in the City of Huntington. Plaintiff now appeals an order entered March 31, 1995 which granted the City's motion for summary judgment.[1] This Court has before it the petition for appeal, all matters of record and the briefs and arguments of counsel. For the reasons stated below, the order of the circuit court is reversed.

I

The facts of this case are, for the most part, not in dispute. On June 20, 1992, plaintiff, in the City of Huntington visiting a friend, had ridden her **bicycle** to a local bank. Upon completing her business there, plaintiff rode her **bicycle** into the "4 1/2 Alley," intending to go "riding around." Plaintiff testified that while she was riding in the alley, a vehicle approached her from the rear, at which time she rode "to the left, or at least toward the middle instead of staying on the extreme right[.]" Not realizing there was two-way traffic in the alley, plaintiff was surprised when a second automobile subsequently approached her from the front, on the left side of the alley. According to plaintiff, she "did whatever [she] could to try to avoid getting into that car's way and yet, trying to avoid the car that was coming behind [her]." Consequently, plaintiff rode her **bicycle** into the center of the alley and over a storm drain **grate**. As she rode over the **grate**, the front **tire** of her **bicycle** dropped between the **grate's** parallel slats, became lodged there, stopping the **bicycle** and throwing plaintiff forward, over the handlebars. As a result of this accident, plaintiff sustained injuries to her face and other parts of her body.

On or about June 30, 1993, plaintiff instituted this action for damages against the City of Huntington (hereinafter "City"), alleging, *inter alia,* that at the time of plaintiff's accident, the City "owned, operated, controlled, managed and/or maintained" the alley where the accident took place and that the City "had a duty to maintain said premises ****647 *204** in a reasonably safe condition for the persons, such as ... Plaintiff, that were reasonably expected to use said alleyway[.]" Plaintiff specifically alleged, *inter alia,* that the City **negligently** and carelessly "placed and/or allowed to be maintained in said alleyway a grating, the slats of which were farther apart than a **bicycle tire**, and which grating would allow a **bicycle tire** to fall through the slats of the grating. The grating was designed in such a manner so that it had no cross members which would preclude the **bicycle tire** from falling through the area between the slats of the grating."

Following the March 17, 1995 hearing on the City's previously-filed motion for summary judgment, the circuit court granted the City's motion and made the following relevant conclusions of law:

B. THE QUESTION OF IMMUNITY

This action involves a claim for injury against a political

subdivision of the State of West Virginia. The question of immunity, therefore, arises pursuant to the *Governmental Tort Claims and Insurance Reform Act.* In short, the *Act* specifically excludes this tort claim from the several immunities contained within it.[2] The City is 'liable for injury, death or loss to persons or property caused by its **negligent** failure to keep ... alleys ... open, in repair, or free from nuisance ...' [*W.Va.*] Code, § 29–12A–4(c)(3).

C. THE STANDARD OF CARE

Since the City cannot avail itself of the several immunities afforded by the *Act,* the question necessarily becomes whether the City, in light of the undisputed facts, **negligently** failed to keep the 4 1/2 Alley 'open, in repair, or free from nuisance' with regard to [plaintiff]. Road design or maintenance liability in **bicycle** accident cases is fairly straight forward, and the road owner (here, the City) is liable for an accident **if the road is not reasonably safe for persons using the road in an ordinary fashion.** Roux v. Department of Transportation, 169 Mich.App. 582, 426 N.W.2d 714 (1988). The duty to maintain the roadway reasonably safe and fit for vehicular travel does not extend to **bicycle** travel. In granting the defendant City's motion for summary judgment, this Court concludes, as a matter of law, that the appropriate standard of care is based upon the defendant City's duty to maintain and repair the roadway for **vehicular travel.** Thus, the alleged defect must be unreasonably dangerous to a vehicle not a **bicycle.**

....

In the case at bar, [plaintiff] cannot demonstrate, by her own evidence and testimony, that the alleged defect in the Alley was unreasonably dangerous to vehicles. In fact, her evidence demonstrates just the opposite, i.e., the spacing between the **grates** might have been too wide for her narrow **bicycle tire,** but the drain cover is hardly unreasonably dangerous to vehicles traversing the 4 1/2 Alley.

(footnote added and emphasis provided).

Plaintiff now appeals the March 31, 1995 order granting the City's motion for summary judgment.

II

At issue is the circuit court's interpretation of W.Va.Code, 29–12A–4(c)(3) [1986], which provides:

Political subdivisions[3] *are liable for injury,* death, or loss *to persons* or property *caused by their* ***negligent*** *failure to keep* public roads, highways, streets, avenues, *alleys,* sidewalks, bridges, aqueducts, viaducts, or public grounds *within the political* *****648 *205*** *subdivisions open, in repair, or free from nuisance,* except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.

(emphasis and footnote added). As indicated in its order granting the City's motion for summary judgment, the circuit court concluded, as a matter of law, that while the City has a duty to maintain the 4 1/2 Alley so that it is reasonably safe and fit for *vehicular* travel, "the standard is not one of maintenance of the ... alley so that it is reasonably safe for **bicycles** [.]" (emphasis provided).

[1] This Court has held that " '[a] circuit court's entry of summary judgment is reviewed *de novo.*' Syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 1, Hose v. Berkeley County Planning Commission, 194 W.Va. 515, 460 S.E.2d 761 (1995). *See* syl. pt. 1, Miller v. Whitworth, 193 W.Va. 262, 455 S.E.2d 821 (1995). We find that the circuit court erroneously resolved the question of law before it.

[2] Our review of W.Va.Code, 29–12A–4(c)(3) [1986] is controlled by the following traditional principle of statutory analysis: " ' "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968).' Syl. pt. 1, Peyton v. City Council of Lewisburg, 182 W.Va. 297, 387 S.E.2d 532 (1989)." Syl. pt. 3, Hose, *supra.* The plain language of W.Va.Code, 29–12A–4(c)(3) [1986] does not support the circuit court's conclusion that plaintiff must "demonstrate, in order to recover, that the alleged defect in the Alley (the spacing between the **grates** in the drain cover) was unreasonably dangerous to **vehicles,** i.e., automobiles, not **bicycles.**" (emphasis provided). Indeed, we find the analysis upon which this conclusion was based to be flawed in several respects.

[3] As support for its legal conclusion that the City has a duty to maintain the 4 1/2 Alley in a reasonably safe condition for

vehicular travel but not **bicycle** travel, the circuit court relied almost exclusively on the Michigan case of *Roux v. Department of Transportation*, 169 Mich.App. 582, 426 N.W.2d 714 (1988), in which a bicyclist was injured when he hit a "defective area" on the shoulder of the road on which he was riding. The applicable statutory provision in *Roux* provides, in pertinent part:

> 'Any person sustaining bodily injury or damage to his property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him from such governmental agency.... The duty of the state and the county road commissions to repair and maintain highways, and the liability therefor, shall extend only to the improved portion of the highway designed *for vehicular travel*[.]'

Id. at 716 (quoting M.C.L. § 691.1402 and M.S.A. § 3.996(102)) (emphasis added). The Court of Appeals of Michigan determined that under this statute, the defendant's duty to maintain the improved portion of the highway so that it is reasonably safe and fit for vehicular travel depends, not upon the injured party's status as motorist or bicyclist, but upon the *location* at which he was injured. *Id.* The court then concluded that, on remand, "the appropriate standard of care shall be based on defendant's duty to maintain and repair the shoulder for vehicular travel. Thus, [in order for the injured bicyclist to recover,] the alleged defect must be unreasonably dangerous to a vehicle, not a **bicycle**." *Id.* at 716–17.

In that the language of *W.Va.Code*, 29–12A–4(c)(3) [1986] differs significantly from the aforementioned Michigan statute, the circuit court erroneously used *Roux* for the reasoning of the decision in the case now before us. *W.Va.Code*, 29–12A–4(c)(3) [1986], which provides that "[p]olitical subdivisions are liable for injury ... to persons ... caused by their **negligent** failure to keep ... alleys ... open, in repair, or free from nuisance[,]" does *not* predicate recovery by an injured bicyclist such as plaintiff upon proof that the City **negligently** failed to keep the 4 1/2 Alley open, in repair, or free from nuisance *for vehicles* or *for vehicular travel*. ****649 *206** If a political subdivision's duty to keep its public roads and alleys open, in repair, and free from nuisance extended exclusively to vehicles or vehicular travel, our Legislature would have included language to that effect in *W.Va.Code*, 29–12A–4(c)(3) [1986]. *See O'Dell, supra.*

Additionally, we point out that it was error for the circuit court to resort to various statutory definitions of the term "vehicle" as further support of its summary judgment order. Though the circuit court concluded that "West Virginia, like Michigan, specifically excludes **bicycles** from the definition of the term 'vehicle[,]' [W.Va.] Code, §§ 17–1–4[4], 17B–1–1[5]," neither the term "vehicle" nor any derivation thereof appears in *W.Va.Code*, 29–12A–4(c)(3) [1986]. (footnotes added). Accordingly, resort to statutory definitions of the term "vehicle" for purposes of interpreting *W.Va.Code*, 29–12A–4(c)(3) [1986] was unwarranted.

[4] Under *W.Va.Code*, 29–12A–4(c)(3) [1986], political subdivisions are liable for injury, death, or loss to persons or property caused by their **negligent** failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge. A political subdivision's duty to keep its public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds open, in repair, or free from nuisance does not extend exclusively to vehicles or vehicular travel. Accordingly, the City may be liable for plaintiff's injuries if plaintiff can demonstrate that such injuries were caused by the City's **negligent** failure to keep the 4 1/2 Alley open, in repair, or free from nuisance for **bicycle** travel.[6] *See* syl. pt. 2, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994) (" ' " 'Questions ****650 *207** of **negligence**, due care, proximate cause and concurrent **negligence** present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.' Syl. pt. 1, *Ratlief v. Yokum*, [167 W.Va.

779], 280 S.E.2d 584 (1981), *quoting*, syl. pt. 5, *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964)." Syllabus Point 6, *McAllister v. Weirton Hosp. Co.*, 173 W.Va. 75, 312 S.E.2d 738 (1983).' Syllabus Point 17, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).")

III

For reasons discussed herein, the March 31, 1995 order of the Circuit Court of Cabell County is hereby reversed.

Reversed.

Parallel Citations

469 S.E.2d 645

Footnotes

1 Plaintiff filed a motion for relief from final summary judgment, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. Though a hearing thereon was held on April 4, 1995, the record before us provides no indication that the trial court ever ruled on this motion.

2 *See generally W.Va.Code*, 29–12A–1, *et seq.* The Governmental Tort Claims and Insurance Reform Act, which "grants broad, but not total, immunity from tort liability to political subdivisions of the State." *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 600, 425 S.E.2d 551, 555 (1992). Though the legislature has "specified seventeen instances in which political subdivisions would have immunity from tort liability [,] W.Va.Code, 29–12A–5(a)[,]" this case is not one of those instances. *Id.*

3 *See W.Va.Code*, 29–12A–3(b) and (c) [1986], in relevant part:
(b) 'Municipality' means any incorporated city, town or village and all institutions, agencies or instrumentalities of a municipality.
(c) 'Political subdivision' means any ... municipality[.]

4 *W.Va.Code*, 17–1–4 [1925] provides:
'Vehicle' shall mean and include any mechanical device for the conveyance, drawing or other transportation of persons or property upon the public roads and highways, whether operated on wheels or runners or by other means, except those propelled or drawn by human power or those used exclusively upon tracks.

5 *W.Va.Code,* 17B–1–1 [1990] provides, in relevant part:
The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this article:
(a) *Vehicle.*—Every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks[.]

We note that the introductory paragraph of this statute expressly states that the words and phrases used in Chapter 17B, entitled "Motor Vehicle Driver Licenses," "*for the purpose of this chapter,* have the meanings respectively ascribed to them in this article[.]" The statute at issue in this case, *W.Va.Code,* 29–12A–4(c)(3) [1986], is clearly not part of Chapter 17B.

6 We note that plaintiff contends that the City is further liable for her injuries under *W.Va.Code,* 17–10–17 [1969], which provides, in relevant part, that "[a]ny person who sustains an injury to his person ... by reason of any ... alley ... in any incorporated city ... being out of repair due to the **negligence** of the ... incorporated city ... may recover all damages sustained by him by reason of such injury in an action against the ... city ... in which such ... alley ... may be[.]" Plaintiff did not allege the City's liability under *W.Va.Code,* 17–10–17 [1969] in response to the City's motion for summary judgment. Rather, plaintiff first raised this issue in its motion for relief from summary judgment which, as we indicated earlier, was not ruled upon by the circuit court. *See W.Va.R.Civ.P.* 60(b) and n. 1, *supra.* Because plaintiff's arguments under *W.Va.Code,* 17–10–17 [1969], and the City's response thereto, were neither raised, argued nor considered by the circuit court on summary judgment, the subject of this appeal, they are not reviewable by this Court: " ' "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, *Sands v. Security Trust Co.,* 143 W.Va. 522, 102 S.E.2d 733 (1958).' Syl. pt. 2, *Duquesne Light Co. v. State Tax Dept.,* 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert denied,* 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985)." Syl. pt. 2, *Crain v. Lightner,* 178 W.Va. 765, 364 S.E.2d 778 (1987).
Similarly, in its brief to this Court, the City argues, for the first time, that plaintiff was merely a licensee to whom the City was not obliged to provide against dangers arising out of the existing condition of the alley inasmuch as plaintiff went upon the alley "subject to all the dangers attending such conditions." Syllabus, *Hamilton v. Brown,* 157 W.Va. 910, 207 S.E.2d 923 (1974). The City's argument regarding premises liability will likewise not be considered on appeal where such arguments were neither raised nor argued below. *See Crain* at syl. pt. 2.
Finally, the City maintains that plaintiff was not making lawful use of the alley as she, admittedly, was riding her **bicycle** in the center of the alley at the time of the accident, in violation of Huntington Codified Ordinance 313.05 (1995), which provides, in relevant part: "(a) Every person operating a **bicycle** upon a roadway shall ride as near to the right side of the roadway as practicable, exercising due care when passing a standing vehicle or one proceeding in the same direction." It is the City's contention that a street is not out of repair unless the City has permitted it to become unsafe for *ordinary* and *lawful* use. Syl. pt. 3, *Carder v. City of Clarksburg,* 100 W.Va. 605, 131 S.E. 349 (1926), *overruled on other grounds, Long v. City of Weirton,* 158 W.Va. 741, 214 S.E.2d 832 (1975). In that plaintiff was not lawfully using the alley at the time of the accident, the City contends it is, therefore, not liable for her injuries. We cannot agree with the City's position. Plaintiff's own **negligence** is a question of fact for jury resolution. *See* syl. pt. 10, *Anderson v. Moulder,* 183 W.Va. 77, 394 S.E.2d 61 (1990) ("Whether and to what extent the plaintiff in a civil action was contributorily **negligent** are ordinarily questions of fact to be resolved by the jury.").

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105 Cal.App.4th 1211, 130 Cal.Rptr.2d 198, 03 Cal. Daily Op. Serv. 987, 2003 Daily Journal D.A.R. 1320

CHRISTIAN MOSER, Plaintiff and Appellant,
v.
JOANNE RATINOFF, Defendant and Respondent.
No. B153258.

Court of Appeal, Second District, Division 5, California.
Jan. 31, 2003.

SUMMARY

A participant in an organized, long-distance bicycle ride on public highways brought an action against a coparticipant, alleging that defendant was negligent in swerving into him and causing him to fall off his bicycle and sustain injuries. The trial court granted summary judgment for defendant on the basis of the primary assumption of the risk doctrine. (Superior Court of Los Angeles County, No. BC225431, Gregory C. O'Brien, Jr., Judge.)

The Court of Appeal affirmed. It held that a waiver, signed by plaintiff prior to participating in the ride, that released the event holders, sponsors, and organizers and acknowledged the risks of the ride, including those caused by other participants, did not inure to the benefit of defendant. However, the court held the primary assumption of the risk doctrine was applicable. Organized, long-distance bicycle rides are an activity to which the doctrine applies, since they are engaged in for enjoyment or thrill, require physical exertion and skill, and involve a challenge containing a risk of injury. Further, the risk that one cyclist will swerve into another is inherent in such rides. The court also held that the fact that defendant's movements may have violated various Vehicle Code sections did not preclude application of the doctrine. (Opinion by Mosk, J., with Turner, P. J., and Grignon, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Summary Judgment § 26--Appellate Review--Scope of Review.
A grant of summary judgment is reviewed de novo. The appellate court makes an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. Under Code Civ. Proc., § 437c, subd. (p)(2), a defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action.

(2)
Negligence § 98--Actions--Trial and Judgment--Questions of Law and Fact--Assumption of Risk--Summary Judgment.
When a defendant moves for summary judgment on the basis of implied assumption of the risk, he or she has the burden of establishing the plaintiff's primary assumption of the risk by demonstrating that the defendant owed no legal duty to the plaintiff to prevent the harm of which the plaintiff complains. Determining whether the primary assumption of risk doctrine applies is a legal question to be decided by the court.

(3)
Negligence § 37--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk.
A defense to a claim of negligence is that the plaintiff either expressly or impliedly assumed the risk.

(4)
Negligence § 38--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk--Effect of Express Waiver.
A participant in an organized, long-distance bicycle ride on public highways did not assume the risk of negligence by a coparticipant in the ride by signing, prior to taking part in the ride, a waiver that released the event holders, sponsors, and organizers and acknowledged the risks of the ride, including those caused by other participants. An express assumption of risk agreement does not inure to the benefit of those not parties to that agreement.

(5)
Negligence § 37--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk--Effect.
The doctrine of primary assumption of the risk embodies a legal conclusion that there is no duty on the part of the

defendant to protect the plaintiff from a particular risk. Where the doctrine applies, the plaintiff's assumption of the risk acts as a complete bar to liability.

(6)

Negligence § 37--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk--Competitive Sports.

Under the doctrine of primary assumption of the risk, a defendant owes no duty of care to protect a plaintiff against the risks inherent in a particular competitive sport voluntarily played by the plaintiff, absent some reckless or intentional misconduct, but does owe a duty not to increase the risk of harm above that inherent in the sport. Whether the doctrine applies depends on the nature of the sport or activity in question and on the parties' general relationship to the activity. The overriding consideration in the application of the doctrine is to avoid imposing a duty that might chill vigorous participation in the implicated activity and thereby alter its fundamental nature.

(7)

Negligence § 37--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk--Analytical Framework.

In assumption of the risk analysis, 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.

(8a, 8b)

Negligence § 38--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk--Organized Bicycle Ride.

In an action by a participant in an organized, long-distance bicycle ride on public highways, in which plaintiff alleged that defendant, a coparticipant, was negligent in swerving into him and causing him to fall off his bicycle and sustain injuries, the trial court properly granted summary judgment for defendant on the basis of the primary assumption of the risk doctrine. Such organized, long-distance bicycle rides are an activity to which the doctrine applies, since they are engaged in for enjoyment or thrill, require physical exertion and skill, and involve a challenge containing a risk of injury. Further, the risk that one cyclist will swerve into another is inherent in such rides. Defendant's movements may have been negligent, but they were not intentional, wanton, or reckless, nor were they totally outside the range of ordinary activity involved in the sport. Thus, the accident was within the risks assumed by plaintiff and defendant when they chose to participate.

[See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1090C; West's Key Number Digest, Negligence ⚖ 565.]

(9)

Negligence § 37--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk--Risks Not Assumed.

Even if an activity is one to which the primary assumption of the risk doctrine applies, there are certain risks that are deemed not assumed and certain injury-causing actions that are not considered assumed risks of the activity. An activity that is not inherent in the sport is not subject to the doctrine. Drinking alcoholic beverages, for example, is not an activity inherent in the sport of skiing. On the other hand, in various sports, going too fast, making sharp turns, not taking certain precautions, and proceeding beyond one's abilities are actions held not to be totally outside the range of ordinary activities involved in those sports.

(10)

Negligence § 40--Exercise of Care by Particular Persons--Exercise of Care by Plaintiff--Assumption of Risk--Violation of Safety Law--Vehicle Code Provisions Applicable to Bicycle Riding.

In an action by a participant in an organized, long-distance bicycle ride on public highways, in which plaintiff alleged that defendant, a coparticipant, was negligent in swerving into him and causing him to fall off his bicycle and sustain injuries, the fact that defendant's movements may have violated various Vehicle Code sections did not preclude application of the primary assumption of the risk doctrine. The doctrine is not displaced by a violation of a statute that does not evince a legislative intent to eliminate the assumption of the risk defense.

COUNSEL

Law Offices of Michael L. Oran, Michael L. Oran, Kathy B. Seuthe; Law Offices of Garry S. Malin and Garry S. Malin for Plaintiff and Appellant.

Barry Bartholomew & Associates, Michael A. Nork and Kathryn Albarian for Defendant and Respondent.

MOSK, J.

Plaintiff and appellant Christian Moser (Moser) and defendant and respondent Joanne Ratinoff (Ratinoff) participated in an organized, long-distance bicycle ride on

public highways involving hundreds of participants. Moser signed an "Accident Waiver and Release of Liability" form for the benefit of the event holders, sponsors and organizers in which Moser expressly assumed the risk of various injuries, including those caused by other participants. During the ride, Ratinoff swerved into Moser, causing him to crash and sustain injuries. Moser sued Ratinoff for general negligence. Ratinoff filed a motion for summary judgment on the ground that a collision between bicycle riders was an inherent risk in the ride, and ***1215** therefore the action was barred by the primary assumption of risk doctrine enunciated in *Knight v. Jewett* (1992) 3 Cal.4th 296 [11 Cal.Rptr.2d 2, 834 P.2d 696] (*Knight*). Moser opposed the motion on the grounds that the primary assumption of risk doctrine did not apply because the collision was not an inherent risk of the activity and because Ratinoff's violation of provisions of the California Vehicle Code precluded application of the doctrine. The trial court granted summary judgment in Ratinoff's favor. We hold that the primary assumption of risk doctrine applies to the organized bicycle ride, and that a violation of a statute does not displace that doctrine. Accordingly, we affirm the summary judgment.

Factual and Procedural Background[1]

Moser and Ratinoff collide during a bicycle ride

In February 1999, Moser registered to participate in the Death Valley Double Century bicycle ride, a 200-mile, noncompetitive bicycle ride on public highways. Hugh Murphy Productions organized the ride in which approximately 600 bicycle riders participated.[2] Before participating in the ride, Moser signed a document provided by the organizers entitled "Accident Waiver and Release of Liability" (the release), releasing the organizers and stating, "I acknowledge that this athletic event is an extreme test of a person's physical and mental limits and carries with it the potential for death, serious injury and property loss. The risks include, but are not limited to those caused by ... actions of other people including but not limited to participants.... I hereby assume all of the risks of participating &/or volunteering in this event." The organizer required riders to wear helmets and to have bicycle lights.

The ride had no designated start time. On the day of the accident, Moser and his friend, David Warshawsky (Warshawsky), began the ride at 4:00 a.m. At a rest stop, Moser and Warshawsky encountered Ratinoff, another participant in the ride. The three cyclists left the rest stop together, with Warshawsky and Ratinoff riding side-by-side and Moser riding behind them. At some point, they began riding single file.

Moser was cycling close to the right-hand side of the road. Ratinoff said that she came from behind Moser's left side and passed him or rode at his left side. Moser said Ratinoff came up from behind him and rode next to him on his left side. While she was riding on Moser's left side, an Inyo County Sheriff's Deputy pulled his car approximately four or five car lengths behind ***1216** them and stayed there for several minutes. Ratinoff turned to look at the police car, and she then told Moser, "I have to come over." According to Ratinoff, a "split second" later, she moved to her right toward Moser.

As Ratinoff moved to her right, she made contact with Moser, who nevertheless was able to retain control of his bicycle. Within seconds, Ratinoff again collided with Moser, causing him to fall off his bike and to sustain injuries. At the time of the collision, Ratinoff and Moser were riding at an approximate speed of 15 to 20 miles per hour.

Moser sues Ratinoff, and Ratinoff files a motion for summary judgment

Moser commenced an action against Ratinoff and in his complaint alleged that Ratinoff "negligently, recklessly and carelessly operated, owned, controlled and maintained" her bicycle "so as to collide with" Moser's bicycle. Ratinoff alleged assumption of risk as an affirmative defense.

Ratinoff filed a motion for summary judgment in which she contended that she was not liable to Moser because under the primary assumption of risk doctrine she did not breach a duty of care owed to him. Moser, in opposition to the motion, argued that the primary assumption of risk doctrine does not apply to noncompetitive bicycle riding and that Ratinoff violated Vehicle Code sections 21202, subdivision (a) (operating a bicycle as close "as practicable to the right-hand curb or edge of the roadway"), and 22107 (moving a vehicle to the left or right "with reasonable safety"), thereby giving rise to a presumption of negligence and rendering the primary assumption of risk doctrine inapplicable.

The trial court granted the summary judgment motion and entered judgment against Moser. The trial court denied Moser's motion for new trial. Moser does not raise the denial of his new trial motion as a basis for his appeal.

Standard of Review

([1]) We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].) We make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222 [38 Cal.Rptr.2d 35].) A defendant moving for summary judgment meets its burden of showing that ***1217** there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853 [107 Cal.Rptr.2d 841, 24 P.3d 493].)

([2]) "When a defendant moves for summary judgment on the basis of implied assumption of the risk, he or she has the burden of establishing the plaintiff's primary assumption of the risk by demonstrating that the defendant owed no legal duty to the plaintiff to prevent the harm of which the plaintiff complains." (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395 [36 Cal.Rptr.2d 418].) Determining whether the primary assumption of risk doctrine applies is a legal question to be decided by the court. (*Knight, supra,* 3 Cal.4th at p. 313; *Record v. Reason* (1999) 73 Cal.App.4th 472, 479 [86 Cal.Rptr.2d 547].)

Discussion

A person is generally responsible "for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Civ. Code, § 1714.) ([3]) But a defense to a claim of negligence is that the plaintiff either expressly or impliedly assumed the risk. (*Knight, supra,* 3 Cal.4th at pp. 308, fn. 4, 309-321.)

I. Express assumption of risk

Before reaching the issue of implied assumption of risk, we must determine if Moser expressly assumed the risk of a collision based on the release he signed. An express assumption of risk is a complete defense to a negligence claim. (*Knight, supra,* 3 Cal.4th at p. 308, fn. 4; *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1372 [59 Cal.Rptr.2d 813]; *Allabach v. Santa Clara County Fair Assn.* (1996) 46 Cal.App.4th 1007, 1012 [54 Cal.Rptr.2d 330].)

Moser released the "event holders, sponsors and organizers," and also acknowledged the risks of the ride, including those caused by other participants. The document does not purport to be a release of anyone other than the "event holders, sponsors and organizers."

In *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715 [22 Cal.Rptr.2d 781] (*Westlye*), the plaintiff, who was injured skiing, filed an action against the ski shop from which he rented allegedly defective ski ***1218** equipment and the distributors of the equipment. He had signed a written agreement with the ski shop in which he accepted the equipment for use "as is"; agreed that he understood that there " 'are no guarantee[s] for the user's safety' "; acknowledged that there is " 'an inherent risk of injury in the sport of skiing, and the use of any ski equipment, and expressly assume[d] the risks for any damages to any persons or property resulting from the use of this equipment' "; and released the ski shop from any liability. (*Id.* at p. 1725.)

The distributors of the equipment contended that "as a matter of law an express assumption of risk is good as against the whole world" and therefore precluded any liability against the distributors. (*Westlye, supra,* 17 Cal.App.4th at p. 1729.) In holding that the plaintiff had not released the distributors of the equipment, the court said, "defendants fail to submit, and we have not discovered, any authority for [the distributors'] proposition. The doctrine of express assumption of the risk is founded on express agreement. [Citations.] 'Although in the academic literature "express assumption of risk " often has been designated as a separate, contract-based species of assumption of risk ..., cases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk.' [Citations.] Such an agreement, if valid, 'operates to relieve the defendant of a legal duty to the plaintiff with respect to the risks encompassed by the agreement....' [Citation.] That express assumption of risk is founded on an express agreement undercuts the distributor defendants' claim that it is good as against the world. [¶] ... [¶] We conclude the distributor defendants have failed to establish that they are entitled to the benefit of the written agreement between plaintiff and [the ski shop]." (*Id.* at pp. 1729-1730.)

([4]) *Westlye, supra,* 17 Cal.App.4th 1715, states the existing law that an express assumption of risk agreement does not inure to the benefit of those not parties to that agreement. Accordingly, Moser did not expressly assume the risk of negligence by a coparticipant in the ride. A person's written

acknowledgment of the risks inherent in an activity may, however, have an effect on determinations concerning implied assumption of risk. (See discussion *post*.)

II. *Implied assumption of risk*

The subject of implied assumption of risk has generated much judicial attention. Its modern history began when California eliminated contributory negligence and adopted a comparative negligence system in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 ***1219** [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]. Thereafter, the California Supreme Court-in two companion cases, *Knight, supra*, 3 Cal.4th 296, and *Ford v. Gouin* (1992) 3 Cal.4th 339 [11 Cal.Rptr.2d 30, 834 P.2d 724, 34 A.L.R.5th 769] (*Ford*)-considered the "proper application of the 'assumption of risk' doctrine in light of [the] court's adoption of comparative fault principles." (*Knight, supra*, 3 Cal.4th at p. 300.)

([5]) In *Knight, supra*, 3 Cal.4th 296, the Supreme Court, in a plurality opinion, set forth the doctrine of primary assumption of the risk. That doctrine, which is now established as "the controlling law" (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1067 [68 Cal.Rptr.2d 859, 946 P.2d 817] (*Cheong*)), "embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk...." (*Knight, supra*, 3 Cal.4th at p. 308.) When the doctrine applies, the plaintiff's assumption of the risk acts as a complete bar to liability. (*Ibid.*)[3]

([6]) In *Knight, supra*, 3 Cal.4th 296, the court concluded that a defendant owes no duty of care to protect a plaintiff against the risks inherent in a particular competitive sport (in that case, an informal touch football game) voluntarily played by the plaintiff, absent some reckless or intentional misconduct, but does owe a duty not to increase the risk of harm above that inherent in the sport. The court said that "[i]n some situations ... the careless conduct of others is treated as an 'inherent risk' of a sport, thus barring recovery by the plaintiff." (*Id.* at p. 316.) In *Ford*, the court applied the rule to noncompetitive, non-team-sporting activities-in that case waterskiing. (*Ford, supra*, 3 Cal.4th 339.)

Whether the primary assumption of risk doctrine applies-which issue is, as noted above, a question of law-"depends on the nature of the sport or activity in question and on the parties' general relationship to the activity." (*Knight, supra*, 3 Cal.4th at p. 313.) "The overriding consideration in the application of primary assumption of risk is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 253 [38 Cal.Rptr.2d 65].)

III. *Activity subject to primary assumption of risk*

([7]) In *Knight, supra*, 3 Cal.4th at page 309, the court said that "whether the defendant owed a legal duty to protect the plaintiff from a particular risk ***1220** 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." The court suggested that generally, the primary assumption of risk doctrine applies in a "sports setting." (*Id.* at pp. 309-310, fn. 5.) ([8a]) Thus, the issue in the instant case is whether an organized, noncompetitive, long-distance bicycle ride is one of those sports activities to which the primary assumption of risk doctrine applies.

The court in *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1635 [53 Cal.Rptr.2d 657], stated, "*Knight* may require a court to determine a question of duty in sports settings while factually uninformed of how the sport is played and the precise nature of its inherent risks." To make a decision concerning duty we must know the nature of a particular sport, and even if we do have such knowledge, we still may have no idea how imposing liability will affect or "chill" the sport-which is a major factor in making a determination of duty. (See *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] [court said "expert opinion may inform the court on these questions"].) Nevertheless, under the current state of the law established by *Knight*, we must somehow make such a determination.

As guidance, there are cases in which courts have determined whether or not the primary assumption of risk applies to a particular activity. There are a number of cases involving sports activities in which the court found a primary assumption of risk. (*Cheong, supra*, 16 Cal.4th 1063 [snow skiing]; *Ford, supra*, 3 Cal.4th 339 [waterskiing]; *Knight, supra*, 3 Cal.4th 296 [touch football]; *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703 [128 Cal.Rptr.2d 529] [collegiate baseball]; *Distefano v. Forester* (2001) 85 Cal.App.4th 1249 [102 Cal.Rptr.2d 813] (*Distefano*) [off-roading]; *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108 [96 Cal.Rptr.2d 394] [skateboarding]; *American Golf Corp. v. Superior Court, supra*, 79 Cal.App.4th 30 [golf]; *Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428 [89 Cal.Rptr.2d 920] [lifeguard training]; *Record v. Reason, supra*, 73 Cal.App.4th 472 [tubing behind a motorboat];

Lilley v. Elk Grove Unified School Dist. (1998) 68 Cal.App.4th 939 [80 Cal.Rptr.2d 638] [wrestling]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [gymnastics stunt during cheerleading]; *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47 [72 Cal.Rptr.2d 337] [little league baseball]; *Domenghini v. Evans* (1998) 61 Cal.App.4th 118 [70 Cal.Rptr.2d 917] [cattle roundup]; *Mosca v. Lichtenwalter* (1997) 58 Cal.App.4th 551 [68 Cal.Rptr.2d 58] [sport fishing]; *Staten v. Superior Court, supra,* 45 Cal.App.4th 1628 [ice skating]; ***1221** *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430 [52 Cal.Rptr.2d 812] [football practice drill]; *Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [judo]; *Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040 [48 Cal.Rptr.2d 922] [rock climbing]; *Ferrari v. Grand Canyon Dories, supra,* 32 Cal.App.4th 248 [river rafting]; *O'Donoghue v. Bear Mountain Ski Resort* (1994) 30 Cal.App.4th 188 [35 Cal.Rptr.2d 467] [snow skiing]; *Stimson v. Carlson* (1992) 11 Cal.App.4th 1201 [14 Cal.Rptr.2d 670] [sailing].) In some other recreational activities, courts have held that there was no primary assumption of risk. (*Shannon v. Rhodes* (2001) 92 Cal.App.4th 792 [112 Cal.Rptr.2d 217] [boating passenger]; *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322 [21 Cal.Rptr.2d 178] [recreational dancing].)

We have found no case that considers primary assumption of risk in connection with organized, noncompetitive, recreational bicycle riding. Nevertheless, this sport appears to fall within those activities to which these cases apply the assumption of risk doctrine. As the court in *Record v. Reason, supra,* 73 Cal.App.4th at page 482, said upon "[c]ompiling all of the distinguishing factors" from the cases, an activity is a "sport" to which the primary assumption of risk doctrine applies if that activity "is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." That delineation is a useful one and covers the bicycle ride here.

It is true that bicycle riding is a means of transportation-as is automobile driving. Normal automobile driving, which obviously is not an activity covered by the assumption of risk doctrine, requires skill, can be done for enjoyment, and entails risks of injury. But organized, long-distance bicycle rides on public highways with large numbers of riders involve physical exertion and athletic risks not generally associated with automobile driving or individual bicycle riding on public streets or on bicycle lanes or paths.[4] Bicycle rides of the nature engaged in by the parties here are activities done for enjoyment and a physical challenge. Moser acknowledged in the release he signed that the activity is "an athletic event that is an extreme test of a person's physical and mental limits and carries with it the potential for death, serious injury and property loss." In view of these considerations, the organized, long-distance, group bicycle ride qualifies as a "sport" for purposes of the application of the primary assumption of risk doctrine.

IV. *Inherent risk*

([9]) Even if the activity is one to which the primary assumption of risk applies, there are certain risks that are deemed not assumed, and certain ***1222** injury-causing actions that are not considered assumed risks of the activity. The primary assumption of risk rule "does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that '... it is well established that defendants generally do have a duty to use due care *not to increase the risks to a participant over and above those inherent in the sport.*' ([*Knight, supra,*] 3 Cal.4th at pp. 315-316, italics added.) Thus, even though 'defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,' they may not increase the likelihood of injury above that which is inherent. (*Id.* at p. 315.)" (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 827 [89 Cal.Rptr.2d 519].) Conduct is not inherent in the sport if that conduct is "totally outside the range of ordinary activity involved in the sport ... [and] if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport." (*Freeman v. Hale, supra,* 30 Cal.App.4th at p. 1394.) A participant injured in a sporting activity by another participant may recover from that coparticipant for intentional infliction of injury or tortious behavior "so reckless as to be totally outside the range of the ordinary activity involved in the sport" but not for mere negligence. (*Knight, supra,* 3 Cal.4th at pp. 320-321.)

Certain activities have been held not to be inherent in a sport and thus not subject to the primary assumption of risk doctrine. For example, drinking alcoholic beverages is not an activity inherent in the sport of skiing. (*Freeman v. Hale, supra,* 30 Cal.App.4th at p. 1388.) On the other hand, in various sports, going too fast, making sharp turns, not taking certain precautions, or proceeding beyond one's abilities are actions held not to be totally outside the range of ordinary activities involved in those sports. (See *Cheong, supra,* 16 Cal.4th 1063; *Distefano, supra,* 85 Cal.App.4th 1249; *Record v. Reason, supra,* 73 Cal.App.4th 472.)

([8b]) The analogies derived from the risks in other sports suggest that one cyclist riding alongside another cyclist and swerving into the latter is a risk that is inherent in a long-distance, recreational group bicycle ride.[5] The release Moser signed warns of the risk of accidents caused by the participants, thus indicating that such accidents are an inherent risk of the activity. If liability attached to entanglements and collisions among 600 bicycle riders, the recreational sport of an organized bicycle ride likely would be adversely affected.

Ratinoff's movements toward the right side of the road that caused her to collide with Moser may have been negligent, but they were not intentional, ***1223** wanton or reckless or conduct "totally outside the range of ordinary activity involved in the sport." (*Knight, supra,* 3 Cal.4th at pp. 320-321.) Therefore, the accident at issue in this case is within the assumed risks of the organized bicycle ride in which Moser and Ratinoff were engaged.[6]

V. *Effect of statute*

Moser asserts that the primary assumption of risk doctrine does not bar a claim when, as here, Ratinoff has violated statutes.

A. *Pleading requirement*

Moser's failure to allege in his complaint that defendant's conduct violated any statutory duties owed to plaintiff would, under *Distefano, supra,* 85 Cal.App.4th at page 1266, procedurally bar plaintiff from raising the effect of a statutory violation in opposing a motion for summary judgment. Although this holding in *Distefano* appears inconsistent with long-standing authority that a plaintiff's allegations of negligence include statutory violations that constitute negligence per se (*Brooks v. E. J. Willig Truck Transp. Co.* (1953) 40 Cal.2d 669, 680 [255 P.2d 802]; *Karl v. C. A. Reed Lumber Co.* (1969) 275 Cal.App.2d 358, 361-362 [79 Cal.Rptr. 852]), we need not determine this procedural issue because of our conclusion that the statutory violations do not, under present law, preclude the assumption of risk doctrine.

B. *Statutory violations do not displace the Knight rule*

([10]) Moser contends that defendant's violations of various Vehicle Code sections constitute negligence per se, and thus preclude the application of the primary assumption of risk doctrine. The California Supreme Court has addressed this issue in two cases-*Ford, supra,* 3 Cal.4th 339, and *Cheong, supra,* 16 Cal.4th 1063-and has produced a number of opinions, leading one court to say "there appears to be no clear consensus on the high court about this issue." (*Campbell v. Derylo, supra,* 75 Cal.App.4th at p. 829, fn. 3.) Nevertheless, a majority of the present California Supreme Court have expressed the view that a violation of a statute such as involved here does not displace the primary assumption of risk doctrine. ***1224**

The lead opinion in *Ford, supra,* 3 Cal.4th 339, which case involved a waterskiing accident, dealt with whether Harbors and Navigation Code section 658, subdivision (d),[7] coupled with the negligence per se doctrine (as codified in Evid. Code, § 669),[8] established a rebuttable presumption that the defendant breached his duty of care to the plaintiff. That opinion concluded that the violation of Harbors and Navigation Code section 658 was inapplicable because the plaintiff did not fall within the statute's protected class. (*Ford,* at p. 350.) Three of the justices found that the plaintiff was within the class of persons Harbors and Navigation Code section 658 was intended to protect, and therefore, under Evidence Code section 669, the defendant violated a legal duty of care to the plaintiff. (*Ford,* at pp. 364-369 (conc. & dis. opn. of George, J.); *id.* at p. 369 (dis. opn. of Mosk, J.).)[9] Three other justices who had disagreed with the *Knight* plurality opinion and would have "adhere[d] to the traditional consent approach" to assumption of risk (*Ford,* at p. 351, fn. 1 (conc. opn. of Kennard, J.)), stated that the statute is not "the type of safety enactment that would preclude defendant ... from asserting assumption of risk as a defense barring plaintiff ... from recovering damages in his negligence action." (*Id.* at p. 363 (conc. opn. of Kennard, J.).)

In *Cheong, supra,* 16 Cal.4th 1063, two friends were skiing together and collided, resulting in litigation. The trial court granted summary judgment in the defendant's favor on the ground that a collision is an inherent risk of downhill skiing. On appeal, the plaintiff argued that the defendant's violation of a county ordinance delineating the duties of skiers resulted in liability under Evidence Code section 669 and foreclosed the application of the primary assumption of risk doctrine. The ordinance expressly provided that a skier assumes the "inherent risks" of skiing, including the risk of collision with other skiers. (*Cheong,* at pp. 1069-1070.) The majority held that the ordinance did not create any duty other than that available under common law. The court said that "a number of the justices who have signed this ***1225** majority opinion" in *Cheong* questioned the conclusion of four justices in *Ford* that if the elements of Evidence Code section 669 were satisfied, a "statute creates tort liability between coparticipants in an active sport despite the *Knight* doctrine of primary assumption of risk." (*Cheong,* at p. 1071.) The court added that the point need not be resolved because the

elements of Evidence Code section 669 had not been met-the plaintiff had "not demonstrated that he is one of the class of persons the ordinance was intended to protect." (*Ibid.*) The court therefore affirmed the grant of summary judgment.

A concurring opinion, joined by two justices, expressed the view that "[t]he *Knight* standard of primary assumption of risk still applies even if the violation of an ordinance or statute, combined with Evidence Code section 669, creates a presumption of negligence." (*Cheong, supra,* 16 Cal.4th at p. 1079 (conc. opn. of Chin, J.,[10] joined by Baxter, J. and Brown, J.).) A fourth justice stated that statutory obligation along with Evidence Code section 669 did not impose a duty of care when *Knight* eliminated a sports participant's duty of care. (*Cheong*, at p. 1074 (conc. opn. of Kennard, J.).) Three justices took a contrary view, with one stating that the violation of a statute displaces the "no-duty rule of *Knight*" (*id.* at p. 1073 & fn. 1 (conc. opn. of Mosk, J.)) and the others stating that Evidence Code section 669 "may transform an appropriate statute into a legal duty of due care upon the defendant." (*Cheong*, at p. 1077 (conc. opn. of Werdegar, J., joined by George, C. J.).)

The Supreme Court has not conclusively determined whether or not a violation of law can displace the primary assumption of risk doctrine. Nevertheless, four justices presently sitting on the California Supreme Court[11] -a majority-expressed the view that Evidence Code section 669 does not itself override *Knight,* but rather that one must ascertain whether the violated statute was intended to do so. Only two justices now on the court[12] have concluded that the violation of a safety statute or ordinance designed to protect persons in the position of a plaintiff precludes the application of the implied assumption of risk doctrine.

The appellate court in *Distefano, supra,* 85 Cal.App.4th 1249, addressed this question. In that case, two men, one on a motorcycle and another in a dune buggy, were "off-roading." After coming up opposite sides of a blind hill, they collided. Plaintiff contended that the *Knight* rule did not bar his action because defendant owed him statutory duties under Vehicle Code sections 38305 (proscribing driving off-road vehicles at an unreasonable or ***1226** imprudent speed) and 38316 (proscribing driving off-road vehicles with a willful and wanton disregard for the safety of other persons or property). (*Distefano*, at p. 1265.)

Although the court held that a claim based on a violation of a statute was barred for procedural reasons, the court proceeded to address the merits of the contention that the Vehicle Code, along with Evidence Code section 669, imposed a tort duty that rendered the primary assumption of risk doctrine unavailable. (*Distefano, supra,* 85 Cal.App.4th at pp. 1266-1267.) The court stated that Vehicle Code sections 38305 and 38316, which provisions were enacted before the Supreme Court's decision in *Knight*, did not evince any legislative intent to supersede or modify an assumption of risk doctrine later declared by *Knight*. (*Distefano*, at p. 1273.) The court therefore concluded that the statutory provisions "do not abrogate the *Knight* primary assumption of the risk doctrine, and thus do not impose on participants in the sport of off-roading a higher or different duty in tort than is established under *Knight*." (*Id.* at p. 1274.)

Because a majority of the current Supreme Court justices have expressed the view that a violation of a statute that indicates no legislative intent to eliminate the assumption of risk defense does not displace the primary assumption of risk doctrine, and because there are no cases inconsistent with that view, we adopt the *Distefano* court's conclusion. (*Distefano, supra,* 85 Cal.App.4th 1249.) Although the facts show that Ratinoff violated provisions of the Vehicle Code designed to protect persons using public roads, based on our conclusion as to the present state of the law, such violations do not nullify Moser's assumption of the risk.

Conclusion

Under the present state of the law, as applied here, the result is reasonable. By knowingly participating in a sporting event in which what occurred is an evident risk, Moser is not entitled to a recovery from Ratinoff.

Disposition

The judgment is affirmed. Respondent shall recover costs on appeal.

Turner, P. J., and Grignon, J., concurred.

Appellant's petition for review by the Supreme Court was denied April 23, 2003. ***1227**

Footnotes

1 We state the facts in accordance with the standard of review stated *post*.

2 One of the forms refers to the promoter as "Badwater Adventure Sports."

3 But see the Restatement Third of Torts, section 2 and comment i, pages 19, 25 ("Most courts have abandoned implied assumptions of risk as an absolute bar to a plaintiff's recovery").

4 We express no opinion as to such other forms of recreational bicycle riding.

5 Compare *Mark v. Moser* (Ind.Ct.App. 2001) 746 N.E.2d 410 (inherent risk in a competitive cycling race is that a competitor may attempt to cut in front of a coparticipant to advance position).

6 There are traffic-related risks that might not be considered inherent in the activity involved here, such as those involving automobile negligence. (See *Story v. Howes* (1973) 41 A.D.2d 925 [344 N.Y.S.2d 10] ["mere riding of a bicycle does not mean the assumption of risk by the rider that he may be hit by a car"]; *Bell v. Chawkins* (1970) 62 Tenn.App. 213 [460 S.W.2d 850] [bicyclist did not assume risk dog would bite her].)

7 Harbors and Navigation Code section 658 provides that no person shall operate a vessel so as to cause, among other things, water skis to collide with any object or person.

8 Evidence Code section 669, subdivision (a), provides: "The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (See also *Vesely v. Sager* (1971) 5 Cal.3d 153, 164-165 [95 Cal.Rptr. 623, 486 P.2d 151].)

9 "Justice Arabian's [lead] opinion in *Ford* implicitly assumed, and the opinions of Justice George, joined by Chief Justice Lucas, and Justice Mosk expressly concluded, that if the four elements of section 669(a) were satisfied, that statute creates tort liability between coparticipants in an active sport despite the *Knight* doctrine of primary assumption of risk." (*Cheong, supra,* 16 Cal.4th at p. 1071.)

10 Justice Chin also authored the majority opinion.

11 Justices Baxter, Kennard, Chin and Brown.

12 Chief Justice George and Justice Werdegar.

End of Document

11.

JEANINE SPENCE, Plaintiff -- Appellant, v. UNITED STATES OF AMERICA, Defendant -- Appellee.

No. 09-15774

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

374 Fed. Appx. 717*; *2010 U.S. App. LEXIS 5967

March 10, 2010 ", Submitted, San Francisco, California

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

March 23, 2010, Filed

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of California. D.C. No. 1:07-CV-00676-LJO-DLB. Lawrence J. O'Neill, District Judge, Presiding.

Spence v. United States, 629 F. Supp. 2d 1068, 2009 U.S. Dist. LEXIS 29202 (E.D. Cal., 2009)

DISPOSITION: AFFIRMED.

COUNSEL: For JEANINE SPENCE, Plaintiff?-?Appellant: Stephen R. Cornwell, Attorney, Judith M. Harless, Attorney, CORNWELL & SAMPLE, Fresno, CA.

For UNITED STATES OF AMERICA, Defendant?-?Appellee: Jason S. Ehrlinspiel, Esquire, Assistant U.S. Attorney, United States Attorney's Office, Sacramento, CA.

JUDGES: Before: FERNANDEZ, GRABER, and McKEOWN, Circuit Judges.

OPINION

[*718] **MEMORANDUM** *

* This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

Jeanine Spence appeals the district court's grant of summary judgment to the United States in her action under the Federal Tort Claims Act (FTCA). *See 28 U.S.C. § 2674*. We affirm.

(1) The district court determined that California's primary assumption of the risk doctrine barred Spence's claim. We agree. Under California law, because Spence was injured due to a risk inherent in the sport she was engaging in, she is deemed to have assumed the risk of the injuries she suffered therefrom. *See Knight v. Jewett, 3 Cal. 4th 296, 315-16, 834 P.2d 696, 708, 11 Cal. Rptr. 2d 2, 14 (1992)* [**2] (plurality opinion); *Connelly v. Mammoth Mountain Ski Area, 39 Cal. App. 4th 8, 11-12, 45 Cal. Rptr. 2d 855, 857-58 (1995)*. In that regard, there can be little doubt that road hazards are inherent in the sport of organized, long-distance bike riding. *See Moser v. Ratinoff, 105 Cal. App. 4th 1211, 1219-21, 130 Cal. Rptr. 2d 198, 203-05 (2003)*; *see also Buchan v. U.S. Cycling Fed'n, Inc., 227 Cal. App. 3d 134, 148, 277 Cal. Rptr. 887, 895 (1991)*. Spence encountered a road hazard, took a bad fall, and was injured, but her claim is barred under California law.

Moreover, Spence has not shown that the United States violated some particular legal duty to her when it failed to make the road in question safer for her purposes. *See W. Radio Servs. Co., Inc. v. Espy, 79 F.3d 896, 900-01 (9th Cir. 1996)*; *see also Cheong v. Antablin, 16 Cal. 4th 1063, 1069-70, 946 P.2d 817, 820-21, 68 Cal. Rptr. 2d 859, 862-63 (1997)* (where enactment shows no clear intent to modify assumption of risk principles, they continue to apply); *Distefano v. Forester, 85 Cal. App. 4th 1249, 1274, 102 Cal. Rptr. 2d 813, 831 (2001)* (same).

(2) The district court also determined that the United States was immune from suit pursuant [**3] to *California Civil Code section 846* (recreational use immunity). Again, we agree. Despite Spence's argument to the contrary, the United States is treated as a private person for FTCA purposes. *See Ravell v. United States,*

22 F.3d 960, 961 (9th Cir. 1994). In addition, Spence was using the property for a recreational purpose, and the fact that she was proceeding along a paved road is of no significance. *See Mattice v. U.S. Dep't of Interior, 969 F.2d 818, 821 (9th Cir. 1992)*; *Hubbard v. Brown, 50 Cal. 3d 189, 192, 197, 785 P.2d 1183, 1184, 1187, 266 Cal. Rptr. 491, 492, 495 (1990)*. The evidence will not bear an interpretation that the United States was guilty of willful or malicious conduct. *See Mattice, 969 F.2d at 822*. The existence of the hazard was not hidden; in fact, paint had even been applied to make it more obvious. Moreover, on this record it cannot be said that the hazard presented a probability of injury to cyclists engaged in the sport at hand. [1] Finally, while the receipt of compensation by the United States would have obviated the immunity, [2] the evidence will not support a determination that the United States directly or indirectly charged an entrance fee for use of [**4] the road in question. [3]

1 The absence of known incidents over many, many years is not dispositive, but it is a relevant consideration. *See Lostritto v. S. Pac. Transp. Co., 73 Cal. App. 3d 737, 745, 140 Cal. Rptr. 905, 909 (1977)*.

2 *See Cal. Civ. Code § 846*.

3 *See Miller v. Weitzen, 133 Cal. App. 4th 732, 739-40, 35 Cal. Rptr. 3d 73, 78-79 (2005)* (discussing consideration exception); *Johnson v. Unocal Corp., 21 Cal. App. 4th 310, 316-17, 26 Cal. Rptr. 2d 148, 152-53 (1993)* (same); *Moore v. City of Torrance, 101 Cal. App. 3d 66, 72, 166 Cal. Rptr. 192, 196 (1979)* (same), *disapproved on other grounds in Delta Farms Reclamation Dist. No. 2028 v. Superior Court, 33 Cal. 3d 699, 710, 660 P.2d 1168, 1175, 190 Cal. Rptr. 494, 501 (1983)*.

[*719] (3) Because either of the above bases bars this action, we need not, and do not, determine whether the release signed by Spence would also bar this action.

AFFIRMED. [4]

4 We have not overlooked the miscellaneous procedural issues raised by Spence, but have determined that if there were errors, they would not affect the result.

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

PAMELA O'NEILL, a single person,
Appellant,

vs.

THE CITY OF PORT ORCHARD, a municipal corporation,

Respondent.

CASE #47149-3-II

DECLARATION OF SERVICE

Plaintiff alleges:

I, Karen Alfano, declare under penalty of perjury under the laws of the State of Washington, that on this day I sent by electronic mail a copy of Brief of Appellant addressed to:

Patrick McMahon
Carlson, McMahon & Sealby, PLLC
Patm@Carlson-McMahon.org

Signed on this 11th day of June, 2015, at Port Orchard, Kitsap County, Washington.

Karen Alfano

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ANTHONY OTTO LAW OFFICE

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