

**S105735**

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**OLIVIA KAHN,**

*Plaintiff and Appellant,*

*vs.*

**EAST SIDE UNION HIGH SCHOOL DISTRICT, et al.,**

*Defendants and Respondents.*

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AFTER A DECISION BY THE COURT OF APPEAL  
SIXTH APPELLATE DISTRICT  
CASE No. H021239

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**APPLICATION TO FILE AMICI CURIAE BRIEF; AMICI CURIAE  
BRIEF OF THE AMERICAN YOUTH SOCCER ORGANIZATION,  
LITTLE LEAGUE BASEBALL, INCORPORATED, CALIFORNIA  
STATE UNIVERSITY, THE UNIVERSITY OF CALIFORNIA, AND  
GOLDEN EAGLE INSURANCE CORPORATION IN SUPPORT OF  
DEFENDANTS AND RESPONDENTS EAST SIDE UNION HIGH  
SCHOOL DISTRICT AND ANDREW MCKAY**

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THE UNIVERSITY OF CALIFORNIA, AND GOLDEN EAGLE INSURANCE  
CORPORATION**

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**APPLICATION TO FILE AMICI CURIAE BRIEF**

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To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the State of California:

Pursuant to California Rules of Court, rule 29.3(c), the American Youth Soccer Organization, Little League Baseball, Incorporated, California State University, the University of California, and Golden Eagle Insurance Corporation respectfully request permission to file the attached brief as amici curiae in support of defendants and respondents East Side Union High School District and Andrew McKay. This application is timely made pursuant to this court's October 24 order extending the time to November 22, 2002 for amici to file a brief.

The American Youth Soccer Organization (AYSO) conducts youth soccer programs in California and the United States for about 650,000 youth between the ages of 4 ½ and 19. AYSO, a non-profit corporation, has operated these programs since 1964, and does so with volunteer coaches, referees, and administrators. Over the years, AYSO has developed an extensive program to train coaches to help them safely teach soccer skills and coach soccer games. These programs have received national recognition for their content and quality. In the event liability can be imposed on AYSO for negligent coaching, AYSO's ability to continue offering soccer programs for youth will be significantly threatened by prohibitive insurance costs.

Little League Baseball, Incorporated (Little League), is the largest youth sports organization in the world. In the State of California alone, over 800 leagues, 25,000 teams, and 380,000 athletes are affiliated with Little League. In order to run its California leagues, Little League relies on over 125,000 volunteers to serve in a variety of roles, including as coaches. Little League is concerned that a holding limiting the application of the primary assumption of the risk doctrine to coaches will deter volunteers because it will expose coaches to potential liability for all athletic injuries, regardless of the coaching instruction given.

California State University (Cal State) is a public university system comprised of 23 campuses located throughout California. The system has approximately 407,000 students and 44,000 faculty. Cal State's campuses offer intercollegiate, club, and intramural sports. These programs are an important component of the mission of Cal State in both advancing and extending knowledge, learning, and culture and in providing opportunities for individuals to develop intellectually, personally, and professionally.

The University of California (UC) is a public university system that includes nine university campuses located throughout California, in or near

Berkeley, Davis, Irvine, Los Angeles, Riverside, San Diego, San Francisco, Santa Barbara, and Santa Cruz. Over 187,000 students attend the nine UC campuses. Intercollegiate and intramural athletics have always been an important aspect of the UC experience, and individual and team sports are a UC tradition among students and alumni. Athletic competition is an important complement to the rigors of academics and is a vital connection for UC alumni, prospective students and their parents, and nearby communities. Additionally, UC's Division of Agriculture and Natural Resources operates a 4-H development program that provides instruction to thousands of youth throughout the state involving physical activities such as horseback riding and swimming.

The universities believe that a holding by this court limiting application of the primary assumption of the risk doctrine to coaches will discourage coaches from participating in the universities' sports programs, increase their cost of obtaining insurance, and may undermine their ability to continue to offer intercollegiate, club, and intramural sports for all students.

Golden Eagle Insurance Corporation (Golden Eagle) is a major insurer organized and existing under the laws of the State of California that insures a number of recreational organizations. Golden Eagle is concerned that a holding by this court limiting application of the primary assumption of the risk doctrine to coaches will increase the potential liability of its recreation-related clients, thereby increasing the cost to insure them.

Amici are vitally interested in the application of the primary assumption of the risk doctrine to coaches. The court's grant of review in the present case directly implicates that issue and therefore prompts this application and amici curiae brief.

Counsel for amici has reviewed the briefs on the merits filed in this case and believes this court will benefit from additional briefing on the public

policy implications of applying the primary assumption of the risk doctrine to coaches.

Accordingly, amici respectfully request the court accept and file the attached amici curiae brief.

Dated: August 4, 2003

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BASEBALL, INCORPORATED,  
CALIFORNIA STATE UNIVERSITY,  
THE UNIVERSITY OF CALIFORNIA,  
AND GOLDEN EAGLE INSURANCE  
CORPORATION**

## AMICI CURIAE BRIEF

### INTRODUCTION

Plaintiff Olivia Kahn was injured diving into a pool while practicing for a high school swim meet. Plaintiff sued her swim team coach Andrew McKay and her high school, East Side Union, for negligence. She alleges that her coach, who was aware she had a fear of diving, negligently gave her the choice of diving or not competing in that particular swim meet. For the reasons we discuss, the Court of Appeal correctly held the primary assumption of the risk doctrine bars her claims.

In *Knight v. Jewett* (1992) 3 Cal.4th 296, this court's seminal decision construing primary assumption of the risk, a plurality of this court held that imposing tort liability on co-participants for ordinary careless conduct in a sport might alter fundamentally the nature of the sport. To avoid that result, this court held that a co-participant has no legal duty to eliminate, or protect against, the risks inherent in the sport.

In this brief, we argue that the same policies this court recognized in *Knight v. Jewett* also require that, under the primary assumption of the risk doctrine, coaches have no legal duty to eliminate, or protect against, the risks inherent in learning or participating in sport. Imposing liability on coaches for injuries arising from ordinary negligence in sports instruction would likely change the fundamental nature of sport. For instance, coaches might instruct athletes to avoid conduct that, although important to the sport, might result in injury.

Further, imposing liability for negligent instruction would fundamentally change the nature of sports instruction. An inherent risk in learning a sport is that a coach will take a student beyond what, in hindsight,

is found to have been the student's abilities. Since coaching is subjective and not governed by well-defined standards of care, the fear that a jury would conclude a coach's judgment call was negligent may prompt many coaches to instruct students conservatively, reducing the likelihood that a student would be challenged to compete and learn to the best of his or her abilities.

Imposing liability for negligent instruction would also deter voluntary coaching. Nonprofit community and educational organizations, and the many volunteers who support them, are the backbone of organized youth sport. Imposing liability for the ordinary negligence of coaches would frustrate these organizations in their efforts to provide future generations of youth the opportunity to participate in organized sports.

When applied to this case, the assumption of the risk doctrine clearly bars plaintiff's claim. Sustaining an injury while diving is unquestionably a risk inherent in the sport of competitive swimming. Plaintiff's coach did not increase those risks because he gave her the *choice* of diving into the pool or not competing in the race. Thus, plaintiff voluntarily subjected herself to the risks of competitive swimming. Moreover, plaintiff's coach was at most negligent in seeking to take her beyond what she had already mastered. He did not increase the inherent risks of learning or participating in competitive swimming.

For all these reasons, this court should clarify that, under the primary assumption of the risk doctrine, a coach has no duty to protect an athlete from risks that are inherent in learning or participating in sport and is not liable for injuries resulting from negligent instruction.

## LEGAL ARGUMENT

**THE PRIMARY ASSUMPTION OF THE RISK DOCTRINE SHOULD PROTECT COACHES FROM LIABILITY FOR FAILING TO PROTECT AGAINST RISKS THAT ARE INHERENT IN LEARNING OR PARTICIPATING IN SPORT.**

- A. Imposing tort liability on coaches for failing to protect against risks inherent in learning or participating in sport would change the fundamental nature of sport and sport instruction.**
- 1. An important policy supporting the primary assumption of the risk doctrine is preserving the fundamental nature of sport.**

The primary assumption of the risk doctrine is an exception to the general rule that persons have a duty of care to avoid injury to others. (*Knight v. Jewett, supra*, 3 Cal.4th at pp. 314-315.) The doctrine applies “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 . . . .” (*Ibid.*) In such cases, the doctrine “operate[s] as a complete bar to the plaintiff’s recovery.” (*Id.* at p. 315.)

In *Knight v. Jewett, supra*, 3 Cal.4th 296, a plurality of this court held that under the primary assumption of the risk doctrine, a co-participant has no legal duty to eliminate, or protect against, a risk inherent in a sport. Instead,

a participant breaches a legal duty of care to another participant “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.” (*Id.* at p. 320.) A majority of this court reaffirmed that holding in *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.

The foundation of the doctrine is that “conditions or conduct that otherwise might be viewed as *dangerous* often are an integral part of the sport itself.” (*Knight v. Jewett, supra*, 3 Cal.4th at p. 315, emphasis added; *Cheong v. Antablin, supra*, 16 Cal.4th at p. 1068, emphasis added.) Thus, imposing tort liability on co-participants for ordinary careless conduct in a sport “might well *alter fundamentally the nature of the sport* by deterring participants from vigorously engaging in activity” within the sport. (*Id.* at p. 319, emphasis added.) “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.” (*Knight v. Jewett, supra*, 3 Cal.4th at p. 318; *Cheong v. Antablin, supra*, 16 Cal.4th at p. 1068.)

**2. Imposing tort liability on coaches for negligent instruction would change the fundamental nature of sport.**

Just as imposing tort liability on co-participants for ordinary careless conduct would risk altering the fundamental nature of sport (*Knight v. Jewett, supra*, 3 Cal.4th at p. 319; *Cheong v. Antablin, supra*, 16 Cal.4th at p. 1068), so too would imposing tort liability for careless conduct on coaches. Faced with such liability, coaches might well instruct athletes to refrain from sporting activity that could be perceived as dangerous, no matter how integral

to the sport. In other words, coaches would instruct students to act in ways that would eliminate or minimize risks inherent in sport.

The ramifications of such liability would not be limited to a few isolated sports. Were coaches faced with potential liability for risks inherent in learning or participating in sport, the nature of all competitive sports could be altered. For example,

- a football coach faced with possible liability might instruct the quarterback always to fall to the ground rather than risk being hit by a large defensive player.
- a baseball coach might instruct the catcher not to block home plate if an opposing player has rounded third base; and
- a swim coach might instruct swimmers to compete by entering the pool feet first rather than diving head first.

This court has already once extended the primary assumption of the risk doctrine beyond participants in competitive sports. In *Ford v. Gouin* (1992) 3 Cal.4th 339, this court held the doctrine applied to “participants engaged in *noncompetitive* but active sports activity, such as a ski boat driver towing a water-skier.” (*Id.* at p. 345, emphasis added.) It reasoned that imposing liability for ordinary negligence on noncompetitive participants would have a “generally deleterious effect” on the nature of sport as a whole. (*Ibid.*)

As demonstrated, the same is true here. The policies underlying *Knight v. Jewett* require that the primary assumption of the risk doctrine apply equally to protect co-participants and coaches alike. Thus, the rule applicable to

coaches should be similar to the rule applicable to co-participants: a coach breaches a duty of care only if the coach acts intentionally or recklessly. Such a rule is necessary to preserve the fundamental nature of sport.

**3. Imposing liability on coaches for negligent instruction would also change the nature of sports instruction.**

The existence and scope of a defendant's duty of care under the primary assumption of the risk doctrine "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 . . ." (*Knight v. Jewett, supra*, 3 Cal.4th at p. 313, emphasis omitted.) Here, the relationship of coaching to sports requires extending the primary assumption of the risk doctrine to protect coaches from liability for negligent instruction because negligent instruction is a risk inherent in learning a sport.

Students seek instruction by coaches to improve their skill level and maximize their results at competitive events. However, an inherent risk of sports instruction is that a coach will negligently instruct an athlete. For example, "[a] coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368-1369.) Yet some students will not be able to meet those challenges. Thus, an inherent risk of sport is that a coach will ask a "student to take action beyond what, with hindsight, is found to have been the student's abilities." (*Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 532.)

Imposing liability for negligent instruction would fundamentally alter the nature of sports instruction. Educational instruction in general is subjective

and thus affords no readily acceptable standards of care. (See, e.g., *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 824 [“Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might – and commonly does – have his own emphatic views on the subject”]; *Loughran v. Flanders* (D.Conn. 1979) 470 F.Supp. 110, 115 [“questions of methodology and educational priorities [are] issues not appropriate for resolution by this Court, since they present a ‘ . . . myriad of “intractable economic, social, and even philosophical problems””]; *Ross v. Creighton University* (N.D.Ill. 1990) 740 F.Supp. 1319, 1328, *affd.* (7th Cir. 1992) 957 F.2d 410, 414 [“the nature of education radically differs from other professions. . . . Good teaching method may vary with the needs of the individual student. . . . Both the process and the result are subjective, and proof or disproof extremely difficult”]; *Page v. Klein Tools, Inc.* (Mich. 2000) 610 N.W.2d 900, 904 [““Since education is a collaborative and subjective process whose success is largely reliant on the student . . . there is no workable standard of care”]; see also *Sellers v. School Bd. of the City of Manassas, Virginia* (E.D.Va. 1997) 960 F.Supp. 1006, 1014 [“But for the lone exception of the Supreme Court of Montana, the federal and state courts that have considered . . . educational malpractice claims have unanimously declined to recognize them as valid causes of action”].)

Coaching, one form of educational instruction, is no different. A coach’s advice varies depending on the skill of the athlete, the conditions of play, the nature of the opponent, and the theory of coaching subscribed to by the coach. For example, a swim coach faced with the circumstances in this case – a swimmer with a fear of diving – might conclude that the athlete will be most likely to overcome her fear if asked, without notice, to confront her

fear by diving, before the athlete's fear can overwhelm the athlete and prevent the dive. A different coach may be more conservative, opting to allow the athlete to progress at her own pace.

To allow a jury in hindsight to determine whether a coach's subjective judgment call was negligent would have a deleterious impact on the nature of coaching. It "would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole." (*Bushnell v. Japanese-American Religious & Cultural Center, supra*, 43 Cal.App.4th at p. 532.) With no guidance as to the type of conduct that would subject a coach to liability, a coach would naturally refrain from pushing students to achieve at new levels, reducing the opportunity for students to achieve their potential.

**B. Imposing liability for negligent instruction would deter nonprofit community and educational organizations from providing opportunities for youth to participate in organized sports.**

"Thousands of children benefit from the availability of recreational and sports activities." (*Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1564). Through such activities "many children learn how to work as a team and how to operate within an organizational structure." (*Zivich v. Mentor Soccer Club* (1998) 82 Ohio St.3d 367, 371 [696 N.E.2d 201, 205].) Such activities offer an invaluable respite from a sedentary life centered around television. (King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities – the Alternative to 'Nerf (R)' Tiddlywinks*, 53 Ohio St. L.J. 683, 688-689.) Unfortunately, however, the opportunities to participate in

organized sports activities “are steadily decreasing.” (*Hohe v. San Diego Unified Sch. Dist.*, *supra*, 224 Cal.App.3d at p. 1564.)

Courts have weighed the importance of preserving the opportunities to participate in sport when applying the primary assumption of the risk doctrine. In *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, for example, the court rejected a claim that schools should be required to provide protective equipment not ordinarily used in non-contact football because such a duty “would have enormous social and economic consequences. The opportunities to participate in organized, recreational football would be significantly *diminished*.” (*Id.* at p. 439, emphasis added; accord *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 52.)

Imposing liability on coaches for negligent instruction risks dramatically reducing the availability of sporting activities for today’s youth by discouraging nonprofit and educational organizations from offering such activities. “Due in great part to the assistance of volunteers, nonprofit organizations are able to offer [organized sports] activities at minimal cost.” (*Zivich v. Mentor Soccer Club*, *supra*, 82 Ohio St.3d at p. 371.) “Yet the threat of liability strongly deters many individuals from volunteering for nonprofit organizations.” (*Ibid.*) The United States Congress recognized this threat when it passed the Volunteer Protection Act of 1997. (See 42 U.S.C. § 14501(a) [“The Congress finds and declares that – . . . the willingness of volunteers to offer their services is deterred by the potential for liability actions against them”].)<sup>1</sup>

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<sup>1</sup>/ The Act protects individual volunteers of nonprofit organizations or governmental entities from liability for harm caused by them in the scope of their responsibilities, if the harm is not caused by “willful or criminal misconduct, gross negligence, reckless misconduct or a conscious, flagrant  
(continued...)

Without the protection of the primary assumption of the risk doctrine, the threat of liability would frustrate nonprofit community and educational organizations in their attempts to introduce future youth to organized sports. (See *Rowland v. Christian* (1968) 69 Cal.2d 108, 113 [before recognizing a duty, the courts must evaluate the consequences to the community of imposing the duty].)

Thus, this court should hold that the primary assumption of the risk doctrine protects coaches from liability for negligent instruction. Anything less would diminish the opportunities for the next generation of youth to participate in organized sport.

**C. Defendants here had no duty to protect plaintiff from the inherent risks of diving in the pool because, at most, defendants acted negligently in giving her a choice to dive.**

For the reasons we have shown, the primary assumption of the risk doctrine should protect coaches from liability for risks inherent in learning or participating in sport, including the risk that a coach will negligently instruct an athlete. When applied to this case, the doctrine clearly bars plaintiff's claim.

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1/ (...continued)  
indifference to the rights or safety of the individual harmed by the volunteer.” (42 U.S.C. § 14503(a)(3).) However, the Act does not “affect the liability of any nonprofit organization or governmental entity with respect to harm caused by any person.” (42 U.S.C. § 14503(c).) Moreover, immunity under the Act depends on factual questions that may prevent some coaches from obtaining summary judgment. For example, the Act only protects those volunteers who perform services without receiving compensation, or another thing of value in lieu of compensation exceeding \$500.00 per year. (See 42 U.S.C. § 14505(6)).

First, plaintiff was injured while diving into the pool. As the Court of Appeal below held, the dangers associated with such a dive are an inherent risk of competitive swimming. (Typed opn., p. 12.)

Second, her coach did not increase the risks inherent in the sport. Plaintiff voluntarily participated on her high school's swim team and, prior to the relay race in which she was injured, was given a *choice* to dive into the pool or not compete in that race. (Typed opn., p. 2.) She chose to dive, despite her fears. There is no evidence that plaintiff would have faced any negative repercussions if she had elected not to dive. Thus, the Court of Appeal below correctly held that: “[b]y voluntarily rising to the challenge of attempting an unfamiliar dive, plaintiff assumed the risk that she would be unable to meet that challenge.” (Typed opn., p. 16.)

Were this court to impose liability on plaintiff's coach for the consequences of plaintiff's voluntary decision to dive into the pool, this court would deter coaches from allowing athletes to make such choices. And if athletes were to be denied the right to make such choices, they would be denied the opportunities to improve their skills and compete successfully, the very purposes of seeking sports instruction in the first place.

Finally, plaintiff's coach was at most negligent in presenting plaintiff with the choice of diving or not competing. Since negligent instruction is a risk inherent in learning a sport, he did not increase the inherent risks of learning and participating in competitive swimming.<sup>2</sup>

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<sup>2/</sup> Plaintiff suggests that the primary assumption of the risk doctrine does not apply because her coach breached a duty of supervision. (See OBOM pp. 12-13.) But a duty of supervision encompasses issues outside the scope of instruction, such as ensuring that equipment is safe. (See, e.g. *Allan v. Snow Summit, Inc.*, *supra*, 51 Cal.App.4th at p. 1370.) A supervisory duty cannot include coaching instruction because, as discussed, such a rule would change the nature of the sport and sports instruction.

For all three reasons, the primary assumption of the risk doctrine applies and bars plaintiff's negligence claims.

### **CONCLUSION**

For the reasons set forth above, this court should hold that, under the primary assumption of the risk doctrine, a coach has no duty to protect an athlete from risks inherent in learning or participating in a sport and therefore cannot be liable for injuries resulting from negligent instruction.

Dated: August 4, 2003

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AND GOLDEN EAGLE INSURANCE  
CORPORATION**

**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, rule 14(c)(1).)**

The text of this brief consists of 3,902 words as counted by the Corel WordPerfect version 8 word-processing program used to generate the brief.

DATED: August 4, 2003

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Robert H. Wright