

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

OLIVIA KAHN, a minor, etc.,  
  
Plaintiff and Appellant,

v.

EAST SIDE UNION HIGH SCHOOL  
DISTRICT, et al.,  
  
Defendants and Respondents.

H021239  
(Santa Clara County  
Super.Ct.No. CV753025)

In this personal injury action, an injured student athlete sued her coach and her school district, claiming negligence and premises liability. The trial court granted the defendants summary judgment on both causes of action. Addressing the plaintiff's negligence claim, the court determined that it was barred by the doctrine of primary assumption of the risk. As to the plaintiff's premises liability claim, the court concluded that there was no material factual dispute requiring trial of that cause of action.

As we explain below, we agree with the trial court's determinations. We therefore affirm the judgment.

**FACTS**

The plaintiff and appellant in this action is Olivia Kahn (plaintiff). The defendants and respondents are East Side Union High School District (District) and Andrew McKay (McKay), a District employee and plaintiff's swim coach. This lawsuit arose out of a tragic

diving accident, which occurred just prior to a swim meet at Mount Pleasant High School in October 1994.

At the time of the accident, plaintiff was 14 years old. She had joined the Mount Pleasant High School girls' swim team the previous month, at the start of her freshman year at the high school. Prior to that time, plaintiff had never swum competitively, even though she learned to swim at an early age and had been swimming most of her life.

Despite her experience as a swimmer, and despite her ability to dive into a deep pool, plaintiff had a lifelong fear of diving into a shallow pool. At the time she joined the swim team, plaintiff communicated that fear to defendant McKay, her coach. In response, McKay indicated that he would assign plaintiff to the first leg of the relay—an assignment that allowed her to start the race from inside the pool and obviated the need to dive.

There is a factual dispute about the extent of the diving training, if any, that plaintiff received from her coaches while on the swim team. McKay recalls training plaintiff to dive, working with her several times in the deep pool and at least once in the shallow racing pool. But according to plaintiff's declaration, "neither Mr. McKay nor [the other swim coach] Ms. Tracy ever taught me or gave me any instruction, oral or written, on how to dive into either the deep pool or the racing pool. . . . [¶] The only instruction I ever received on diving before the accident was on one occasion off the deck in the deep pool, from two girls on the swim team . . . ."

Plaintiff participated in at least two swim meets before the day of the accident, without being required to dive during those competitions. In each of those early meets, she swam the first leg of the relay race, starting from inside the pool.

The day of the accident presented a different challenge, however. On that day, plaintiff's team was competing in its home pool against a team from another high school. Shortly before the meet was to start, McKay told plaintiff that she would not be swimming the first leg of the relay. That meant that plaintiff could not start from inside the pool, but instead would have to dive into the water from the starting blocks or from the edge of the

pool. According to plaintiff's declaration, the coach's decision "put me in a state of panic. I begged the coach to change the rotation so that I could start from inside the pool. I told him I was afraid to dive, that I did not know how to do the dive and that I had never dove into the racing pool in my life. Mr. McKay said you either dive in off the blocks or you are not swimming."

With the relay race scheduled to start minutes later, plaintiff took it upon herself to practice the racing dive, with assistance from two of her fellow swimmers. According to his declaration and his deposition testimony, McKay did not know plaintiff was practicing the racing dive. Plaintiff offered no evidence to the contrary, although she did assert that the coach "could reasonably expect that . . . she would try and prepare herself." Plaintiff completed two practice dives from the starting blocks into the shallow racing pool without incident. On the third dive, she broke her neck.

The salient facts about Mount Pleasant High School's racing pool are undisputed. The racing pool is three and one-half feet deep at each end. The pool has six swimming lanes. Each lane has a starting block. The starting blocks are 18 inches above the surface of the racing pool and slant toward the water at a 10-degree angle. The top surface of the blocks is a grainy-textured, anti-slip material. The racing pool and the starting blocks conform to the applicable specifications of the National Federation of State High School Associations in effect at the time of plaintiff's accident.

#### PROCEDURAL HISTORY

Plaintiff filed this lawsuit in October 1995. Because she was a minor at the time she commenced this action, plaintiff brought suit by and through her guardian ad litem, Sandy Kahn. Plaintiff named the District and McKay as defendants, along with Does 1-10. Plaintiff's complaint included two causes of action, one for premises liability and one for negligence.

In November 1999, defendants moved for summary judgment as to both causes of action. Plaintiff opposed the motion.

Following a hearing in January 2000, the trial court granted summary judgment in defendants' favor. The court first determined that defendants were entitled to judgment as a matter of law on plaintiff's negligence cause of action, based on the doctrine of primary assumption of the risk. The court further determined that plaintiff failed to raise a triable issue of fact with respect to her cause of action for premises liability. Judgment for defendants was entered on January 21, 2000.

Thereafter, plaintiff moved for a new trial. The court heard and denied the motion in February 2000.

This timely appeal by plaintiff ensued.

#### ISSUES

On appeal, plaintiff asserts that triable issues of material fact preclude summary judgment here, both as to negligence and as to premises liability.

#### DISCUSSION

##### I. Summary Judgment.

##### A. Standard and Scope of Review.

Since summary judgment involves pure matters of law, we review a grant of summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60; *Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1187.) We are not bound by the trial court's stated reasons for granting summary judgment. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.) “ ‘We review the ruling, not its rationale.’ [Citation.]” (*Ibid.*)

In undertaking our independent review of the evidence submitted, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the

opposing party has demonstrated the existence of a triable, material fact issue. (*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 886-887.)

#### B. Entitlement to Summary Judgment: Required Showing

A summary judgment motion “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).) To be entitled to judgment as a matter of law, the moving party must show by admissible evidence that the “action has no merit or that there is no defense.” (Code Civ. Proc., § 437c, subd. (a).) A defendant moving for summary judgment meets this burden by presenting evidence demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 213-214.) Once the defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (o)(2). See, *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) Material facts are those that relate to the issues in the case as framed by the pleadings. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67; *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 122.) The moving party’s evidence is strictly construed, while that of the opponent is liberally construed. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107; *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 840-841.)

#### C. Application to this case.

With those principles in mind, we consider whether defendants have established entitlement to summary judgment as to either or both of plaintiff’s causes of action.

With respect to plaintiff’s cause of action for negligence, our determination will turn on whether the doctrine of assumption of the risk applies in this case as a matter of

law. To the extent our decision rests on an analysis of defendants' legal duty toward plaintiff, it is particularly amenable to resolution by summary judgment. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313 (*Knight*); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465.)

As to plaintiff's premises liability claim, we must determine whether there are any triable disputed issues of material fact.

We first take up plaintiff's negligence claim, which the trial court concluded was barred by the doctrine of primary assumption of the risk.

## II. Assumption of the Risk.

Nearly a decade ago, a plurality of the California Supreme Court clarified the doctrine of assumption of the risk in light of its earlier adoption of comparative fault principles. (See, *Knight, supra*, 3 Cal.4th 296 and its companion case *Ford v. Gouin* (1992) 3 Cal.4th 339.) On several occasions since then, our high court has revisited and confirmed the principles it articulated in *Knight*. (See, *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 537-538, 541; *Parsons v. Crown Disposal Co., supra*, 15 Cal.4th at pp. 479-481; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1067-1068.)

The doctrine of assumption of the risk focuses on the question of duty. (*Cheong v. Antablin, supra*, 16 Cal.4th at pp. 1067-1068; *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 943.) In cases involving liability for sports injuries, "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. [Citation.]" (*Knight, supra*, 3 Cal.4th at p. 313; original italics.)

In *Knight*, the court started by acknowledging the general rule that "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.)" (*Knight, supra*, 3 Cal.4th at p. 315.) The court then explained that the general rule does not apply to co-participants in a

sport, where dangerous “conditions or conduct . . . often are an integral part of the sport itself.” (*Ibid.*) As the court put it, “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself” because the plaintiff assumes those risks by participating in the activity. (*Id.* at p. 315.) But even where the assumption of the risk doctrine applies, “defendants do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.” (*Id.* at p. 316.)

The lead opinion in *Knight* distinguished primary and secondary assumption of the risk and summarized the legal consequences of the distinction. “In cases involving ‘primary assumption of 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 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 . . . .” (*Knight, supra*, 3 Cal.4th at pp. 315-316.)

Since *Knight*, the doctrine has been interpreted and applied in a variety of different factual circumstances. As a result, a number of corollary principles have emerged from the decisions following *Knight*, several of which have relevance here. First, primary assumption of the risk may apply even where the parties’ relationship is one of student and instructor or coach. “An instructor is not an insurer of the student’s safety.” (*Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 50. See also, e.g., *Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 532; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1117.) Second, the doctrine may apply even where the participant is a minor. (*Balthazor v. Little League Baseball, Inc., supra*, 62 Cal.App.4th 47; *Aaris v. Las Virgenes Unified School Dist., supra*, 64 Cal.App.4th 1112; *Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746.) Third, primary

assumption of the risk may apply even to school-sponsored extracurricular activities. (*Aaris v. Las Virgenes Unified School Dist.*, *supra*, 64 Cal.App.4th 1112; *Lilley v. Elk Grove Unified School Dist.*, *supra*, 68 Cal.App.4th at p. 946.) Fourth, a school district's duty to supervise its students does not " 'trump' the doctrine of primary assumption of the risk." (*Aaris v. Las Virgenes Unified School Dist.*, *supra*, 64 Cal.App.4th at p. 1119; *Lilley v. Elk Grove Unified School Dist.*, *supra*, 68 Cal.App.4th at pp. 944-946. Cf., *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 477-478.) Fifth, the doctrine may apply even though the injury occurred in practice, rather than in play. (*Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1633, fn. 4.)

Despite judicial refinements over the years, the basic precepts of the doctrine remain clear. "Primary assumption of the risk occurs when a party voluntarily participates in a sporting event or activity involving inherent risk." (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 434, citing *Knight*, *supra*, 3 Cal.4th at pp. 314-316.) "Primary assumption of the risk negates duty and constitutes a complete bar to recovery. [Citation.] Whether primary assumption of the risk applies depends on the nature of the sport or activity in question and the parties' relationship to that activity. [Citation.]" (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 826, citing *Knight*, *supra*, 3 Cal.4th at pp. 309-310, 314-316, 313.) "In the context of sports, the question turns on 'whether a given injury is within the "inherent" risk of the sport.' [Citation.]" (*Campbell v. Derylo*, *supra*, 75 Cal.App.4th at p. 826.) Primary assumption of the risk does not apply when the defendant's conduct is reckless or intentionally harmful. (*Knight*, *supra*, 3 Cal.4th at p. 320.) In such cases, ordinary fault principles instead apply. Similarly, "[g]eneral rules of liability attach when the defendant's conduct is not an inherent risk of the activity or when the defendant's conduct increased the inherent risks in the activity." (*Bushnell v. Japanese-American Religious & Cultural Center*, *supra*, 43 Cal.App.4th at p. 530.)

Applying the principles of the doctrine to the facts of this case, the trial court found that plaintiff's injury resulted from an inherent risk of the sport of competitive swimming,

diving into a shallow pool. The court also determined that defendants had not increased that inherent risk in any way. The court therefore concluded that plaintiff's negligence action against defendants was barred by the doctrine of primary assumption of the risk.

Plaintiff argues that the trial court erred in concluding that primary assumption of the risk bars her action, citing three separate grounds. First, plaintiff asserts, defendants failed to show that the harm she suffered resulted from an inherent risk of the sport of competitive swimming. Second, according to plaintiff, defendants failed to prove that they did not take plaintiff beyond her level of experience and ability. Third, plaintiff argues, defendants did not demonstrate conclusively that they did not increase the inherent risks of the activity. We examine each of plaintiff's claims in turn.

A. Did plaintiff's injury result from an inherent risk of competitive swimming?

The California courts of appeal have formulated various analytic approaches to the question of whether a particular risk inheres in a given sport. As one court put it, "the key inquiry . . . is whether the risk which led to plaintiff's injury involved some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game." (*Lowe v. California League of Prof. Baseball, supra*, 56 Cal.App.4th at p. 123 [mascot's antics are not an integral part of baseball].) Other courts have considered "the range of ordinary activity involved in the sport" as a means of testing whether a specific danger inheres in the particular sport. (See, e.g., *Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1393-1394, fn. omitted [alcohol consumption is not an ordinary activity involved in skiing].) Despite variations in articulating the test, the analysis in each case ultimately comes down to this: a risk is inherent if its elimination would chill vigorous participation in the sport and thereby alter the fundamental nature of the activity. (See, e.g., *Knight, supra*, 3 Cal.4th at pp. 318-319; *Balthazor v. Little League Baseball, Inc., supra*, 62 Cal.App.4th at p. 52; *Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040, 1046; *Freeman v. Hale, supra*, 30 Cal.App.4th at pp. 1393-1394.)

Over the years, the courts have analyzed and defined the particular risks of a wide variety of activities. (See, e.g., cases collected at 6 Witkin, Summary of Cal. Law (9th ed. 1988, Supp. 2001) §§ 1090C – 1090D, pp. 301-312.) Thus, for example, errant shots are among the inherent risks of golf. (*American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 33, 38.) Wild pitches, changing lighting conditions, and foul balls are all dangers inherent in baseball. (*Balthazor v. Little League Baseball, Inc.*, *supra*, 62 Cal.App.4th at p. 52; *Lowe v. California League of Prof. Baseball*, *supra*, 56 Cal.App.4th at p. 123.) Aggressive play is an inherent risk of football. (*Fortier v. Los Rios Community College Dist.*, *supra*, 45 Cal.App.4th at pp. 436-437.) Rock-climbers, skateboarders, and equestrians all face the inherent risk of falling. (*Regents of University of California v. Superior Court*, *supra*, 41 Cal.App.4th at p. 1047; *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116; *Harrold v. Rolling J Ranch* (1993) 19 Cal.App.4th 578, 587.) Snow skiers face a variety of inherent risks, including collisions with objects or other skiers. (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12; *Campbell v. Derylo*, *supra*, 75 Cal.App.4th at p. 827.)

But despite the impressive volume of cases arising from sports injuries and the wide variety of recreational pursuits that those cases involve, we are not aware of any published case in California that has analyzed the inherent risks of interscholastic competitive swimming. (Cf., *Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428 [junior lifeguard competition].) Furthermore, our research has disclosed only one decision from another jurisdiction on the question. (See, *Clark v. Sachem School Dist. at Holbrook* (1996) 227 A.D.2d 366, 641 N.Y.S.2d 890, 892 [New York appellate decision holding that competitive swimmer assumed the inherent risk of a racing dive from starting blocks into shallow water].) We therefore consider the risks of that sport as a matter of first impression here.

In this case, plaintiff contends that diving into a shallow pool is not an inherent part of the sport of competitive swimming.

To assess that contention, we first consider whether the act of diving is integral to competitive swimming, without regard to the pool's depth. According to the undisputed

evidence below, the second, third, and fourth swimmers in a relay race all dive into the pool. Since at least three-quarters of relay swimmers begin competition with a dive, such a start unquestionably falls within “the range of ordinary activity involved in the sport.” (*Freeman v. Hale, supra*, 30 Cal.App.4th at p. 1394.) Furthermore, it appears to us that eliminating the diving start would fundamentally alter the nature of competitive swimming. Requiring competitors to slide or climb carefully into the pool would slow the speed of swim races and would chill vigorous competition. (Cf., *Lupash v. City of Seal Beach, supra*, 75 Cal.App.4th at p. 1437, refusing to impose “a rule of care that would require junior lifeguards to walk (rather than run) down a beach before entering the water and to then carefully shuffle across the ocean floor to ascertain the bottom conditions before trying to swim.”) We therefore conclude that the act of diving is an integral part of competitive swimming.

Apparently, plaintiff does not challenge the proposition that diving is a fundamental aspect of competitive swimming; rather, her arguments on this point focus on the depth of the pool. Plaintiff thus contends: “Shallow depth is neither essential nor integral to a swim relay and is not an ‘inevitable’ or ‘unavoidable’ aspect of the sport. Use of a deeper pool would in no way dampen vigorous participation in relay swimming nor fundamentally alter the nature of the sport.” We disagree. It is undisputed that the Mount Pleasant High School pool conforms to applicable national standards governing the depth of racing pools. To impose a duty on schools and coaches to provide equipment or facilities that exceed national standards “would have enormous social and economic consequences. [Citation.] The opportunities to participate in [the sport] would be significantly diminished.” (*Fortier v. Los Rios Community College Dist., supra*, 45 Cal.App.4th at p. 439.)

Because diving is fundamental to competitive swimming, and because requiring deeper pools would chill opportunities for participation in the sport, we conclude that a racing dive into a shallow pool is an integral part of competitive swimming. Given that

conclusion, it follows that the danger associated with such a dive is an inherent risk of that sport.

Having determined that plaintiff's harm resulted from an inherent risk of her sport, we next consider whether defendants nevertheless are liable for plaintiff's injury, either because they pushed plaintiff beyond her capabilities or because they increased her risk in some other way.

B. Are defendants subject to tort liability for taking plaintiff beyond her skill level?

As a factual matter, plaintiff asserts that coach McKay took her beyond her level of experience and capability by insisting that she dive into the racing pool. In legal argument, plaintiff contends that liability may be imposed given those circumstances. According to plaintiff, the "better-reasoned cases" permit the imposition of liability on coaches and instructors who take their students beyond their ability level. Relying on those cases, plaintiff posits that instructors and coaches who are moving for summary judgment on the ground of primary assumption of the risk must establish that they did not push their students beyond their ability level.

For purpose of our analysis here, we accept the factual premise of plaintiff's argument and we assume that plaintiff was taken beyond her level of experience and capability. However, we cannot so easily accept plaintiff's legal argument that liability should be imposed as a consequence. Contrary to plaintiff's view, we conclude that the "better-reasoned" decisions are those that decline to impose liability on instructors and coaches who merely challenge their students.

As other courts have said: "To instruct is to challenge, and the very nature of challenge is that it will not always be met. It is not unreasonable to require a plaintiff who has chosen to be instructed in a particular activity to bear the risk that he or she will not be able to meet the challenges posed by the instructor . . . ." (*Bushnell v. Japanese-American Religious & Cultural Center, supra*, 43 Cal.App.4th at p. 534.) "Learning any sport inevitably involves attempting new skills. 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.) “There is nothing tortious about a coach who pushes student athletes to keep trying even when they are tired or upset.” (*Lupash v. City of Seal Beach, supra*, 75 Cal.App.4th at p. 1440.) “Instruction . . . necessarily requires pushing a student to move more quickly, attempt a new move, or take some other action that the student previously may not have attempted. That an instructor might ask a student to do more than the student can manage is an inherent risk of the activity. Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student’s abilities. To hold otherwise 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.)

In support of her opposing view, plaintiff cites several cases for the proposition that instructors have a duty not to take their students beyond their level of experience or ability. But none of the cited cases persuades us to impose such a duty here. In the first place, it appears to us that the instructor in each cited case undertook some action, beyond merely challenging the student, which increased the inherent risk of the activity. Moreover, to the extent that those cases may be interpreted as imposing liability solely for taking students beyond their skill level, we disagree with that view.

One such case is *Tan v. Goddard* (1993) 13 Cal.App.4th 1528. In that case, the plaintiff, a student at a school for jockeys, was given an injured horse and told to ride on a rocky area of the track. The horse’s legs gave way on the track, injuring plaintiff. The court held that the instructor breached “a duty of ordinary care to see to it that the horse he assigned Tan to ride was safe to ride under the conditions he prescribed for that activity.” (*Id.* at p. 1535.) A fair interpretation of *Tan* is that the court imposed liability because the instructor increased the risk to his student by failing to provide a fit animal and a safe track.

As another court aptly observed: “Nothing in *Tan* supports the argument that, absent reckless conduct or an intention to cause injury, an instructor who asks a student to take on a challenge in order to better his or her skills will be liable for injuries resulting from the student’s failure to meet that challenge.” (*Bushnell v. Japanese-American Religious & Cultural Center*, *supra*, 43 Cal.App.4th at p. 533.)

Plaintiff also relies on *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817. There, the plaintiff, a student at a riding club, was preparing for an upcoming horse show. Her instructor changed the jumps, making the course more difficult and more dangerous. The plaintiff’s horse was unable to clear one of the modified jumps, and the plaintiff was thrown off and injured. Faced with those facts, the *Galardi* court refused to apply the doctrine of assumption of the risk. As we read *Galardi*, the instructor was subject to tort liability because she increased the risk to her student by altering the jumping array. As plaintiff reads *Galardi*, the instructor was subject to tort liability because she took her student beyond her level of ability. If plaintiff’s interpretation of *Galardi* reflects its true holding, then we respectfully disagree with that holding. (Accord, *Bushnell v. Japanese-American Religious & Cultural Center*, *supra*, 43 Cal.App.4th at pp. 533-534.) We likewise disagree with the other cases cited by plaintiff to the extent they embrace or suggest such a rule. (See, *Regents of University of California v. Superior Court*, *supra*, 41 Cal.App.4th at pp. 1046-1047; *Aaris v. Las Virgenes Unified School Dist.*, *supra*, 64 Cal.App.4th at p. 1118. See also *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 366 which states in dictum: “Inducing a sports participant to exceed his or her abilities may generate a duty.”)

In our view, sports instruction would be severely hampered by a rule imposing liability on coaches or instructors who merely challenge their students to accomplish more. We see no reason—either in policy or in binding precedent—to subject sports instructors to tort liability solely for pushing their students to take on new challenges. Consistent with *Knight*, we hold that sports instructors may be held liable for their students’ injuries only

where their conduct toward their students is intentionally harmful or reckless or where that conduct increases the inherent risk of learning or participating in the sport.

In this case, plaintiff has not alleged that defendants intended to harm her or that their conduct was reckless.<sup>1</sup> But she does contend that defendants' conduct increased the risk of harm inherent in her sport. We consider that contention now.

C. Did defendants increase the inherent risk of competitive swimming?

As our high court recently reiterated, “a coach or sports instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student.” (*Parsons v. Crown Disposal Co.*, *supra*, 15 Cal.4th at p. 482.)

Plaintiff asserts that defendants breached that duty by engaging in conduct that increased the risks inherent in her chosen sport. According to plaintiff, that risk-enhancing conduct includes her coach's broken promise that she would not have to dive, and his insistence that she dive despite her lack of skill. Additionally, plaintiff asserts, the coaches did not warn her about the dangers of shallow dives, they did not instruct her in proper diving techniques, they did not require her to practice, and they did not supervise her, all of which increased her risk of injury.

We first address plaintiff's claims concerning her coach's broken promise and his insistence that she dive without the necessary skills. As we explained *ante*, coaches who merely challenge their students to improve their skills should not be subject to tort liability. We see no reason in policy or law to apply a harsher rule to coaches who issue such

---

<sup>1</sup> In both of her briefs on appeal, plaintiff describes defendants' conduct as reckless. But our independent review of the record does not disclose evidence of recklessness on defendants' part. Furthermore, plaintiff does not support her charge of recklessness, either with argument or with citations to the record. Unsupported contentions are deemed abandoned. (See, e.g., *Overland Plumbing, Inc. v. Transamerica Ins. Co.* (1981) 119 Cal.App.3d 476, 482.) In any event, plaintiff did not allege recklessness in her complaint. The propriety of summary judgment is measured against the issues as framed by the pleadings. (See, e.g., *Ferrari v. Grand Canyon Dories*, *supra*, 32 Cal.App.4th at p. 248.) For all of these reasons, we do not address any claim of recklessness.

challenges after previously assuring their students that they would not be encouraged or required to learn new skills. More to the point, plaintiff was not forced to accept her coach's challenge; she could have refused to swim. By voluntarily rising to the challenge of attempting an unfamiliar dive, plaintiff assumed the risk that she would be unable to meet that challenge. (*Allan v. Snow Summit, Inc.*, *supra*, 51 Cal.App.4th at pp. 1368-1369; *Bushnell v. Japanese-American Religious & Cultural Center*, *supra*, 43 Cal.App.4th at p. 532.) It also bears noting that neither the coach's challenge nor his broken promise caused plaintiff's injury, nor did either act increase the inherent risk of the harm plaintiff faced.

We next consider plaintiff's claim that inadequate warning, instruction, practice, or supervision increased the inherent risks of competitive swimming.

With respect to warnings, there is a dispute about whether defendants cautioned plaintiff about the risks of diving into shallow water. But there is no dispute that plaintiff was aware of those dangers, even if defendants did not specifically warn her of them. Plaintiff testified that even before her accident, she thought it was "stupid" to dive into shallow water. As she put it: "I never really wanted to try diving in a shallow pool because it was always my big fear to dive in the pool and hit my head on the bottom and my head was going to crack open and there was going to be blood all over." Since plaintiff appreciated the danger she was encountering, that risk was not increased by any failure to warn her about it. (Cf., *Fortier v. Los Rios Community College Dist.*, *supra*, 45 Cal.App.4th at p. 438 [plaintiff understood that football practice involved contact].)

Plaintiff also claims that defendants increased the inherent risks of competitive swimming because they failed to give her adequate diving instruction, they did not require her to practice diving, and they failed to supervise her. While we recognize that factual disputes exist with respect to all three claims, we do not agree that those disputes create triable issues. In our view, plaintiff's argument that more training, practice, or supervision would have prevented the injury is speculative. (See, e.g., *Aaris v. Las Virgenes Unified School Dist.*, *supra*, 64 Cal.App.4th at p. 1119 [rejecting the assumption that more

supervision would have prevented the injury]; *Lupash v. City of Seal Beach, supra*, 75 Cal.App.4th at pp. 1438-1439 [refusing to permit the jury to speculate whether further instruction would have prevented the injury].) Plaintiff seeks to distinguish the *Aaris* decision on the ground that the cheerleader who was injured in that case clearly had received “ ‘adequate safety and technique instruction.’ ” (*Aaris v. Las Virgenes Unified School Dist., supra*, 64 Cal.App.4th at p. 1116.) That instruction included formal training during a four-day cheerleader training camp, audio-visual aids, and written materials. (*Ibid.*) Based on those facts, plaintiff argues: “There is no suggestion in *Aaris* that ‘Primary Assumption of Risk’ would have been applied if the requisite training had not been given. Implicit in the decision is that all possible training had in fact been given.” We disagree. The *Aaris* court expressly rejected the argument that the coach “owed a greater duty of care because some of the cheerleaders had not mastered the cradle stunt.” (*Id.* at p. 1119.) As the court said: “The argument lacks merit and assumes that more supervision would have reduced the risk of harm.” (*Ibid.*) Similarly, in the *Lupash* case, the court refused “to permit the jury to speculate whether further instruction [in directing junior lifeguards to perform checks of the ocean bottom] would have prevented the accident.” (*Lupash v. City of Seal Beach, supra*, 75 Cal.App.4th at pp. 1438-1439.) As the court noted in that case, the plaintiff had already had sufficient opportunity on the morning of the accident to assess the bottom conditions at the beach where he was injured. For that reason, the court said, “we cannot conclude that yet one more bottom check would have been any more fruitful. A mere possibility of causation is not enough, and ‘when the matter remains one of pure speculation or conjecture . . . it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law[.]’ [Citation.]” (*Id.* at p. 1439.) Here, too, plaintiff’s argument that more training or supervision would have prevented her injury is based on pure speculation.

Finally, we are not persuaded that the declaration of plaintiff’s expert raises a triable dispute on the question of whether the coach’s failure to instruct plaintiff in diving

increased the inherent risks of the sport of interscholastic competitive swimming. “It will always be possible for a plaintiff who suffers a sports injury to obtain expert testimony that the injury would not have occurred if the recreation provider had done something differently. Such expert testimony is not sufficient to establish that the recreation provider increased the inherent risks of the sport. Such expert opinion does not create a triable issue of fact on a motion for summary judgment based on the primary assumption of the risk defense.” (*American Golf Corp. v. Superior Court*, *supra*, 79 Cal.App.4th at p. 39. Cf., *Staten v. Superior Court*, *supra*, 45 Cal.App.4th at p. 1636 [expert testimony not admissible on the issue of inherent risk]. But see, *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23: “[W]e perceive no reason to preclude a trial court from receiving expert testimony on the customary practices in an arena of esoteric activity for purposes of weighing whether the inherent risks of the activity were increased by the defendant’s conduct.”)

Disregarding the opinion of plaintiff’s expert, and putting aside plaintiff’s own speculation, we simply find no evidence in the record—disputed or otherwise—that the defendants’ failure to instruct or supervise increased the risk of plaintiff’s injury. Rather, plaintiff was injured because she voluntarily participated in a dangerous activity, she chose to remain in the competition even though she could have refused to swim, and she took it upon herself to practice an unfamiliar dive without her coach’s knowledge.

In sum, we find nothing in defendants’ conduct that increased the inherent risk of injury in plaintiff’s chosen sport. (Cf., *Balthazor v. Little League Baseball, Inc.*, *supra*, 62 Cal.App.4th at p. 51.)

D. Conclusion: Plaintiff assumed the risk of her injury.

Plaintiff’s injury resulted from a racing dive into a shallow pool, which is an inherent risk of the sport of competitive swimming. Absent evidence that defendants acted recklessly or with the intent to harm, they may not be held liable for taking plaintiff beyond her existing skill level. There is no allegation of recklessness or intentionally harmful conduct here. Furthermore, there is no evidence that any conduct by defendants increased

the risks inherent in the sport of competitive swimming. We therefore apply the doctrine of primary assumption of the risk in this case. That doctrine operates to completely bar plaintiff's negligence action against defendants.

### III. Premises Liability.

In addition to her negligence claim, plaintiff also sued the District for premises liability. As to that cause of action, plaintiff's complaint alleges: "The starting platforms were located in the shallow end of the pool, and the rubber on the platforms was worn. This is a dangerous condition of property owned or controlled by defendants East Side Union High School District, creating a substantial risk of injury to this plaintiff." In response to defendants' summary judgment motion, however, plaintiff conceded that the surfaces of the starting blocks were not worn. Thus, in the present posture of this case, plaintiff's premises liability claim rests solely on her contention that the District created or maintained a dangerous condition on its property by locating the starting blocks at the shallow end of the pool.

"As a general rule, the issue of whether a given set of facts and circumstances amounts to a dangerous condition is a question of fact." (*Dominguez v. Solano Irrigation Dist.* (1991) 228 Cal.App.3d 1098, 1103.) Nevertheless, that question may be decided as a matter of law if no reasonable person could conclude that the property's condition is dangerous as that term is statutorily defined. (*Ibid.* Accord, *Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465; *Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 82-83, 86.) In such cases, summary judgment is proper. (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1382; *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 704.) We consider whether this is such a case. Our analysis necessarily starts with a review of the basic legal principles governing public entity tort liability.

"The tort liability of public entities in California is governed by statute. [Citation.]" (*Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1157.) By statute, a public entity may be liable in tort for a dangerous condition on public property it owns or controls. (Gov.

Code, § 835; *Huffman v. City of Poway*, *supra*, 84 Cal.App.4th at pp. 989-990.) A condition is dangerous if it creates a substantial risk of injury when the property is used with due care in a reasonably foreseeable manner. (Gov. Code, § 830, subd. (a).) On the other hand, a condition is not dangerous if the risk of injury it poses is minor, trivial or insignificant. (Gov. Code, § 830.2; *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.) The intent of the statute “is to impose liability only when there is a substantial danger which is *not* apparent to those using the property in a reasonably foreseeable manner with due care. [Citations.]” (*Fredette v. City of Long Beach*, *supra*, 187 Cal.App.3d at p. 131.)

The *Fredette* case is instructive. Like the case before us, *Fredette* involved a diving accident. (*Fredette v. City of Long Beach*, *supra*, 187 Cal.App.3d at p. 126.) There, the plaintiff was seriously injured when he dove from a municipal pier into a shallow lagoon. He sued the city, alleging that a dangerous public condition caused his injuries. At trial, the jury absolved the city of liability. On appeal, the court affirmed the defense judgment. As the appellate court observed, “no reasonable person could conclude that a swimmer, exercising due care and confronted with the notice that the condition itself provided, would have used the pier as a diving platform. The assertion that the placement of guard rails or the posting of warning signs may have been of some value in no way suggests that the absence of such precautionary measures contributed in any way to the creation of the defective or dangerous condition. The danger, if present at all, had to be *obvious* to anyone using the pier.” (*Id.* at p. 132, original italics.) Thus, the court concluded, the public property did not constitute a dangerous condition where “the shallowness of the water” was “apparent to all users.” (*Ibid.*)

*Fredette* stands for the proposition that premises liability may not be imposed on a public entity where the danger of its property is readily apparent. We agree with that proposition. We observe, moreover, that *Fredette*’s holding has been applied even in cases where the plaintiff is a child exercising a lower standard of care. (See, e.g., *Schonfeldt v. State of California*, *supra*, 61 Cal.App.4th at pp. 1467-1468; *Mathews v. City of Cerritos*,

*supra*, 2 Cal.App.4th at p. 1385.) And it has been applied even in cases that were decided as a matter of law. (See, e.g., *Schonfeldt v. State of California*, *supra*, 61 Cal.App.4th at p. 1465; *Mathews v. City of Cerritos*, *supra*, 2 Cal.App.4th at p. 1382.) We conclude that this is a proper case for application of that proposition.

Plaintiff urges us not to resolve her premises liability claim as a matter of law, asserting the existence of a material factual dispute about the dangerousness of the shallow pool. In support of that assertion, plaintiff cites the testimony of her expert, who declared: “Any swimming pool constructed where a diver would be required to dive into 3 ½ feet of water off starting blocks or off the deck is dangerously constructed.”

We do not agree that the expert’s opinion creates a material factual dispute on the question of whether the shallow depth of the District’s pool constituted a dangerous property condition. “[T]he fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court’s statutory task ... of independently evaluating the circumstances.” (*Davis v. City of Pasadena*, *supra*, 42 Cal.App.4th at p. 705, citing Gov. Code, § 830.2.)

From our independent evaluation of the circumstances of this case, it is apparent that the shallowness of the District’s pool was obvious to all users. For that reason, we conclude, as a matter of law, that the placement of the starting blocks at the shallow end of the District’s pool does not constitute a dangerous condition of public property.

#### CONCLUSION

Plaintiff’s cause of action for negligence is barred by the doctrine of primary assumption of the risk. Plaintiff’s cause of action for premises liability claim is properly resolved in defendants’ favor as a matter of law, as plaintiff has failed to raise a triable disputed material fact issue concerning that claim.

#### DISPOSITION

The judgment is affirmed.

---

Wunderlich, J.

I CONCUR:

---

Bamattre-Manoukian, Acting P.J.

O'FARRELL, J., Dissenting

I respectfully dissent.

In California it has been “long established that a school district bears a legal duty to exercise reasonable care in supervising students in its charge and may be held liable for injuries proximately caused by the failure to exercise such care.” (*Hoyem v. Manhattan Beach City School District* (1978) 22 Cal.3d 508, 513.)

In 1992, the Supreme Court held that one who voluntarily participates in a sport assumes the risks inherent in that sport. (*Knight v. Jewett* (1992) 3 Cal.4th 296 (*Knight*)). Absent reckless or intentional conduct or action by a defendant that increases the inherent risk of the activity, the co-participants owe no duty to one of their number who may suffer injury. And, *where the facts are not materially in dispute*, the applicability of this doctrine of primary assumption of risk is a question of law to be decided by the court.

The specific question presented in this appeal is whether the facts compel a finding that the doctrine applies. Put another way, are there no triable issues relative to this question?

*Knight* involved adults consensually engaging in a “touch” football game. Subsequent case law has expanded this holding to include minors and broadened the sphere of those protected to include coaches. (*Aaris v. Las Virgenes Unified School District* (1998) 64 Cal.App.4th 1112 (*Aaris*)). However, as *Knight* points out, a defendant has 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 p. 316.) The majority “find[s] nothing in defendant’s conduct that increased the inherent risk of injury in plaintiff’s chosen sport.” I cannot agree. The record supports a finding that plaintiff was given specific directions that increased the risk of harm when she was told she had to perform the dive. I believe one increases the risk of harm over that inherent in a sport when an authority figure, such as a coach, pushes a young person to engage in a dangerous maneuver without first providing basic instruction.

*Aaris* involved a student injured while attempting to execute a risky cheerleading stunt. At the hearing on the summary judgment motion, the judge expressed his concern that a cheerleading group who occupied the position known as the “flyer” may not have received adequate instruction, thereby contributing to plaintiff’s injury. The court continued the hearing and ordered the parties to file supplemental papers addressing that issue. Thereafter, a declaration of the “flyer” was submitted which detailed the extensive formal instruction in safety and technique that she had received. Only then was summary judgment granted. The trial court found that, under these circumstances, “the instructor did not increase the inherent risk of harm in the sporting activity.” (*Aaris, supra*, 64 Cal.App.4th at p. 1116.)

No such inquiry was pursued here. A factual dispute exists as to whether plaintiff was given any instruction on how to safely execute a shallow water dive. Given that dispute, summary judgment can only be justified if, accepting plaintiff’s version as true, her claim is nevertheless barred because she assumed the risk.

I cannot accept the premise that simply because plaintiff desires to engage in a high school sport, those who otherwise would owe her a duty of care are absolved of that duty under the circumstances here presented. An inexperienced high school freshman takes up a sport, not only to compete, but also to learn. And whereas a part of learning comes from being challenged, an instructor has a duty to avoid unreasonable risk of injury to his or her pupil.

Plaintiff’s evidence was that she was panicked by the prospect of having to dive into a shallow pool, had told her coach about her fears, and was promised that it would not be required. To then, in the midst of a competitive meet, demand that she execute that very dive, raises a triable issue as to whether she was inappropriately taken beyond her level of experience and capability, placing her in a situation that presented an unreasonable risk of injury.

“The question, as always, is whether the imposition of liability would chill vigorous participation in the activity” (*Bushnell v. Japanese-American Religious and Cultural Center* (1996) 43 Cal.App.4th 525, 534.) The requirement that basic safety and skill training be given a novice before having her undertake a maneuver that holds the potential for grave danger is not likely to chill participation in sports. One could reasonably expect it would have just the opposite effect.

I would reverse the order granting summary judgment as to the cause of action for negligence.

---

O’FARRELL, J.\*

---

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

Trial Court:

Santa Clara County Superior Court  
No. CV753025

Trial Judge:

Hon. Read Ambler

Attorneys for Plaintiff  
and Appellant:

Patrick R. McMahon  
Lydia J. Carlsgaard

Attorney for Defendants  
and Respondents:

Mark E. Davis  
Needham, Davis, Kirwan & Young LLP