CASENOTE: STUDENT'S CLAIM FOR INJURIES SUSTAINED WHILE PLAYING TOUCH FOOTBALL DURING SCHOOL HOURS BARRED BY ASSUMPTION OF RISK DESPITE ALLEGATIONS OF TEACHERS FAILURE TO SUPERVISE

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STEVEN ARMON EARL, a Minor, etc., Plaintiff and Appellant, v. COMPTON UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B269446 (Los Angeles County Super. Ct. No. BC533000)

APPEAL from a judgment of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Affirmed.

A. Liberatore, Anthony A. Liberatore, M. Mary Margaryan and Dhave K. Balatero, for Plaintiff and Appellant.

Olivarez Madruga, Terence J. Gallagher and Ajay C. Shah, for Defendant and Respondent.

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[1]

Plaintiff Steven Armon Earl (Steven) appeals from the judgment entered after the trial court granted summary judgment in favor of defendant Compton Unified School District (the District) in this action for negligence based on an injury suffered by Steven during a football game in his seventh-grade physical education class. The issue presented is whether the trial court correctly applied the doctrine of primary assumption of the risk to defeat Steven's cause of action. We affirm.

Allegations of the Operative Complaint and the District's Answer

Steven was a student on December 19, 2012, at a middle school operated by the District, participating in a mandated physical education class. Jose Perez and Chris Holverson were physical education teachers employed by the District, acting within the scope of their employment. The District failed to exercise ordinary care by allowing students to play football without adequate or any supervision. The District had knowledge of other students being injured playing football in physical education class, and based on that

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[1] Because he is a minor, Steven brought this action through his guardian ad litem.

knowledge, prohibited football as part of the class. It was reasonably foreseeable that students would be injured playing football. The District allowed Steven to play football with approximately 60 other students without adequate supervision. As a result of the District's negligence, Steven suffered a left clavicle fracture requiring surgery, as well as trauma and pain to his body, resulting in undue harm and great emotional distress.

The District filed an answer consisting of a general denial and 24 affirmative defenses, including assumption of the risk.

The District's Motion for Summary Judgment

The District argued the doctrine of assumption of the risk barred liability for Steven's injury. Primary assumption of the risk applied to claims based on the conduct of instructors and coaches, such as Perez and Holverson. The "3-second hold" type of football played in this case is covered by the doctrine of primary assumption of the risk.

The District submitted the following as undisputed facts. Steven was a seventh-grade student at Walton Middle School during the 2012-2013 school year. Holverson and Perez were physical education teachers at that time. School records showed there were 55 students in Holverson's class and 53 in Perez's class on December 19, 2012. The class sizes met the standards set by the District and the District's agreement with Compton Education Associated Certificated Units, which permit a maximum of 60 students per class.

On December 19, Holverson and Perez combined their classes to conduct a "free play" program, in which students could choose to play a sport, including soccer, football, and basketball. Students were advised of the boundaries and

limitations of free play football—they could "'throw the ball, play catch [and] . . . punt,'" but tackling was prohibited. Perez testified in deposition that he was sure the students were not playing tackle football. Holverson and Perez monitored all of the students in the combined classes, with Holverson generally supervising basketball and activities on the hardtop, while Perez generally supervised soccer and football. Holverson and Perez sometimes stood near each other, but also walked around to monitor the students, checking that the students did not exceed the boundaries of appropriate conduct.

According to the school's principal, a monitored "free play" class structure allowing students to choose to participate among several physical activities which take place simultaneously is a conventional practice and appropriate for middle school physical education classes. At the beginning of class the teachers provide instruction, advising the students of the boundaries and limitations on what they are allowed to do. The school had an unwritten rule allowing students to play non-tackle football. Tackle football was prohibited by District guidelines.

Steven testified in deposition that he is familiar with football, having watched it on television and played it at school during lunch. He played flag football for his school in the sixth grade. He played football during class in the seventh grade on three or four occasions. Steven had played two-handed and one-handed touch football before. Students played touch football, including two-handed touch and "3-second hold them." Students asked to be in Perez's class so they could play football.

Between 6 to 12 students were playing football on the day of the incident. Steven understood there was not to be

any tackling, and he did not see any tackling that day. The group of students was playing 3-second hold, where "[y]ou put your arms around a person and count to three." The students placed backpacks on the ground to mark the boundaries of the football field. His injury occurred after Steven caught a pass and was running when another player, Miquell B., grabbed his shirt. Steven spun around, and as Miquell fell in front of him, Steven tried to jump over her and fell, landing on his shoulder and breaking his collarbone.

Perez testified in deposition that he never saw any students playing tackle football on the day of the incident.

He saw Steven fall at the end of the class period as Perez was trying to get the football and move the students to the next class. As Steven was running with the ball, it appeared to Perez that a student tripped and cut him off, and Steven fell while trying to avoid her. Perez, who is a football coach, does not teach football to seventh graders, because he believes they cannot learn and appreciate the nuances of running traditional football plays in a three week unit. He did not recall telling the students not to run plays that day. The rule against tackling had been explained to the students, who understood.

Football was not in Holverson's curriculum. Holverson testified in deposition that Perez was going to provide proper supervision of the students playing football. Holverson would have stopped students from running plays. Holverson agreed with Perez that there was no tackling, but he had a different recollection about running plays being prohibited.

Miquell, the student involved in the incident with Steven, was in Perez's physical education class. She testified in her deposition that the students played football in teams. She had no recollection whether the teachers gave instruc-

tion on how to play football that day or in general. The coaches never gave them permission to play tackle football. The teachers had said to play safely so students would not be injured. She explained her understanding of the difference between touch and tackle football—"[t]ouch is when you touch them instead of push them like tackle them," and tackle is "when you push them." She has played 3-second hold, in which one player touches another for three seconds. She recalled they were playing tackle football on the day Steven was injured. Miquell did not recall the coaches seeing them play tackle or telling them to stop. They played football for 35 to 40 minutes. At the end of class, Steven caught the ball and she tackled him by pushing him.

She ran at Steven from the side, grabbed his waist, he fell, and hit the ground. She did not recall how he fell or if he spun around because she "fell with him," doing a somersault. She was trying to make Steven drop the ball.

Steven's Opposition to the Motion for Summary Judgment

The opposition relied on legal arguments against application of the doctrine of primary assumption of the risk as well as disputed issues of material fact. On the former issue, Steven argued the District failed to meet its burden of showing there were no triable issues of material fact on the question of whether the District had a duty to protect Steven. Steven contended primary assumption of the risk did not apply because the District had a duty to supervise students at all times, but the District's teachers permitted students to play football "within eyesight and earshot" for 35 minutes even though team football was not played during physical education class. Tackling occurred during the football game in which Steven was injured, and Steven was injured when tackled. Under these circumstances, Steven argued his negligence cause of action should be decided on the prudent person standard of care.

As to the argument there were disputed issues of material fact, Steven contended that even if the District met its initial burden of proof, there were triable issues of material facts as to whether the District owed a duty to protect him from harm during physical education class, whether students were allowed to play non-tackle football (3-second hold), and if the teachers increased the risk of injury to Steven by not stopping conduct that exceeded the scope of permissible free play.

Ruling of the Trial Court

The trial court ruled Steven was injured while playing "'3-second hold'" football when Miquell grabbed his shirt, Steven spun around, Miquell fell in front of him, and Steven fell over her and broke his collarbone. The injury occurred in a recreational game of touch football, as in *Knight v. Jewitt* (1992) 3 Cal.4th 296 (*Knight*). Assumption of the risk applies to recreational activity, whether in sports or non-sport activity, citing *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1157 (*Nalwa*). Assumption of the risk can be invoked by instructors, citing *Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 469. Steven's injury was due to an inherent risk in playing non-tackle football.

The court rejected the contention that there was a triable issue of material fact regarding whether the class was allowed to play football. The court ruled Perez told the students they could play catch, punt, or throw the football, and also that they could not play tackle football. As a result, "the Court finds the evidence demonstrates that the students could play football, as long as they did not tackle each other." The court additionally found that the lack of instruction on how to play football did not increase Steven's risk of injury. Based on Perez's testimony that the students were not ready to learn the nuances of football in a short period of time, further instruction may have actually increased the risk of injury to them. The court rejected the argument that adequate supervision was not provided, finding it was based on the er-

roneous assumption that non-tackle football was prohibited,[2] a proposition rejected earlier in the court's ruling.

DISCUSSION

Steven first argues the doctrine of primary assumption of the risk does not absolve the District of its duty to supervise students during physical education class because football was neither taught nor allowed. He next contends imposing the duty to supervise will not chill participation in or alter the fundamental nature of physical education class. Steven reasons that the authorities relied on by the District are distinguishable from this case. The District's breach of its duty to supervise students during physical education class was the cause in fact of Steven's injury.

Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.)

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[2] Having found there was no duty based on the doctrine of primary assumption of the risk, and there were no material issues of disputed fact, the court declined to address the District's further argument that Steven could not prove proximate cause.

In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' (Code Civ. Proc., § 437c, subd. (*o*)(2); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854–855.)" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476–477.)

Negligence

The elements of a negligence claim are "a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) "'The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court.' [Citations.]" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1012.)

Primary Assumption of the Risk

In *Knight*, *supra*, 3 Cal.4th 296, our Supreme Court addressed and defined the application of the doctrines of primary and secondary assumption of the risk.

"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, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Knight*, *supra*, at pp. 314–315.)

As the *Knight* court explained, "In a game of touch football, for example, there is an inherent risk that players will collide; to impose a general duty on coparticipants to avoid the risk of harm arising from a collision would work a basic alteration—or cause abandonment—of the sport." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003 (*Kahn*); see also *Pirkle v. Oakdale Union Etc. School Dist.* (1953) 40 Cal.2d 207, 211 [free play games are a recognized and desirable part of physical education, and "the evidence is to the effect that touch football is not a dangerous or rough game"].) The *Knight* court observed that application of primary assumption of the risk "'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.' (*Id.* at p. 309; see also *id.* at pp. 316–317; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.)

We emphasized that the question of 'the existence and scope' of the defendant's duty is one of law to be decided by the court, not by a jury, and therefore it generally is 'amenable to resolution by summary judgment.' (*Knight, supra,* 3 Cal.4th at p. 313.)" (*Kahn*, *supra*, 31 Cal.4th at p. 1004.)

"[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.' [Citation.]" (*Nalwa, supra*, 55 Cal.4th at p. 1156.) Of particular relevance here, our Supreme Court has held "that the standard set forth in *Knight, supra,* 3 Cal.4th 296, as it applies to coparticipants, generally should apply to sports instructors, keeping in mind, of course, that different facts are of significance in each setting. In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' (*Knight, supra,* 3 Cal.4th at p. 318) involved in teaching or coaching the sport." (*Kahn*, *supra*, 31 Cal.4th at p. 1011.)

Case law has also addressed the relationship between primary assumption of the risk and the duty of school authorities to students.

In *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939 (*Lilley*), the Court of Appeal considered the plaintiff's contention that Education Code section 44807[3] "is a statutorily imposed duty of supervision, placed upon teachers in order to protect school children, that supersedes the doctrine of primary assumption of the risk in the school sports setting because the statute imposes the duty of care which otherwise does not exist under the doctrine. He argues that, '[a]bsent further statutory enactment designed to limit the duty of our public schools to our children, the doctrine of primary assumption of the risk in relation to supervision of minor school children must stop at the school door.'"

The *Lilley* court rejected the plaintiff's contention. "[Education Code s]ection 44807 imposes on school authorities a general duty to supervise pupils on school property during school hours in order to '"'"regulate their conduct so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars under their custody."'" [Citations.]

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[3] Education Code section 44807 provides in pertinent part as follows: "Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess. A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning."

"The statute 'does not make school districts insurers of the safety of pupils at play or elsewhere' [citation], and, by its terms, section 44807 does not purport to impose a duty on teachers to insure students against the risks of injury inherent in the participation in extracurricular school sports.

"If the Legislature wanted to do so, it would be a simple, linguistic task to abrogate primary assumption of the risk with respect to school children engaged in extracurricular sports activities. The Legislature has not chosen to do so expressly. Nevertheless, plaintiff would have this court reach that result through extension of the general duty of supervision set forth in section 44807.

"We decline to construe the general duty of supervision embodied in section 44807 to foreclose application of the primary assumption of the risk doctrine to those risks inherent in school sports. Nothing in the statute evinces an intent to modify common law assumption of the risk principles. [Citation.] Moreover, the policy factors governing primary assumption of the risk in a general sports setting apply equally to students participating in extracurricular school sports. [Citations.] Imposition of a duty to protect student athletes from any risk inherent in a sport like wrestling would fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether because the threat of liability would make schools reluctant to offer sports as an extracurricular activity. [Citation.] Such a result would have a significant social ramification.

"For many, sports are part of the school learning experience, among other things teaching students how to deal properly with both success and failure, and instilling in them an understanding of the importance of teamwork, good

sportsmanship, discipline, and respect for coaches, teammates and opposing players.
Another important part of the experience is that students and their parents learn about accepting responsibility for the consequences of one's choices and actions. By choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.

"In other words, application of the doctrine of primary assumption of the risk in the extracurricular school sports setting is consistent with, rather than inimical to, the goals and responsibilities of elementary and secondary schools.

"Accordingly, section 44807 does not preclude application of primary assumption of the risk to injuries suffered by a student while participating in extracurricular school sports." (*Lilley*, *supra*, 68 Cal.App.4th at pp. 946, fn. omitted.)

Analysis

Primary Assumption of the Risk as a Matter of Law

We are satisfied the trial court correctly applied the doctrine of primary assumption of the risk to the undisputed facts in this case. Touch football, whether as a sport offered in a physical education class or played as a recreational endeavor, involves an inherent risk of injury. (*Knight*, *supra*, 3 Cal.4th at pp. 318-319.) Even if Steven is correct that team football was not to be played, the free play game of touch football engaged in by the students was the type of recreational activity that falls under primary assumption of the risk. (See *Nalwa*, *supra*, 55 Cal.4th at p. 1156.)

The trial court correctly ruled that the evidence presented on summary judgment established only that touch football was played. Steven himself testified he saw no one tackled while playing.

Perez did not see Steven tackled, but instead saw him fall over Miquell in the same fashion described in Steven's deposition testimony. Miquell testified she did not see how Steven fell as she was doing a somersault after grabbing Steven's waist in an attempt to knock the ball from his possession. All witnesses agreed that the students were told not to play tackle football. The only witness to suggest that tackle football was played was Miquell. Miquell testified that tackling was pushing. Miquell never testified that the students were taken to the ground, as tackling is commonly understood. Miquell's deposition testimony is insufficient to constitute disputed evidence of a material fact.

We note that other sports played during free play on the day of Steven's injury carried their own inherent risks. As a practical matter, youths are subject to injury resulting from tripping over another player in soccer and basketball, both of which were offered in free play. The District is not an insurer against all injury in these types of traditional youth sporting activities. Imposition of liability for injuries of the sort suffered by Steven would result in elimination of various sports traditionally played in the public schools. This is precisely the type of chilling effect the doctrine of primary assumption of the risk is intended to avoid.

Failure to Supervise

Steven's further argument that there is a triable issue of material fact on the question of whether the District provided proper supervision also fails. The extensive discussion

of the law set forth above in *Lilley*, *supra*, 68 Cal.App.4th at pp. 945–946, which we will not repeat here, is a sufficient answer to Steven's general argument that there was a failure to supervise.

The contention also fails as a factual matter. The undisputed evidence was that Perez warned the students against playing tackle football during free play. Assuming the students were not permitted to play touch football—a point correctly rejected by the trial court—"the only consequence of the District's" permitting the game was that Steven, "who chose to participate, [was exposed] to the ordinary inherent risks of the sport . . . ." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 163 (*Avila*) [rejecting the argument that a college district permitting a baseball game out of season and against college rules enhanced the risk of the activity].)

Certainly there is no evidence Perez or Holverson, acting on behalf of the District, did anything to increase the risk of harm to Steven. Steven can point to no evidence that an "instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' (*Knight, supra,* 3 Cal.4th at p. 318) involved in teaching or coaching the sport." (*Kahn*, *supra*, 31 Cal.4th at p. 1011; cf. *Avila*, *supra*, 38 Cal.4th at p. 164 [even being intentionally hit with a pitch is an inherent risk of the sport of baseball].) Perez did nothing to encourage Steven and the other students to play football outside of their skills, but even if he had, "[c]oaches must be free to push their players to levels that may, in hindsight, be beyond the student's abilities." (*West v. Sundown Little League of Stockton, Inc.* (2002) 96 Cal.App.4th 351 360.)

Finally, we reject Steven's reliance on *Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594 (*Jimenez*). The plaintiff in *Jimenez* was injured while attempting flips in a room where break dancing was practiced.

The teacher who had allowed the break dancing activity in his classroom had not been informed by other school officials that flips were being performed, and the teacher left the students unattended when the plaintiff was injured. The Court of Appeal held: "We adhere to our holding in *Lilley*. However, just as section 44807 cannot be construed as undermining assumption of the risk in all cases involving school children, nothing in *Lilley* can be construed to eliminate the general duty of supervision in all cases involving children when it is *that* duty—and not the supposed duty of sports coparticipants to each other or the supposed duty of coaches to students—that provides a basis for liability. Here, Jimenez is suing on the theory that a group of middle-school students should not have been left unsupervised in a classroom with the knowledge that they would be dancing, particularly when some had been seen flipping on campus in the recent past and had been ordered to stop. A jury could find it was foreseeable that the District's employees tolerated a dangerous situation on its property and failed to ameliorate that danger by supervising the children. [Citations.]" (*Jimenez*, *supra*, at p. 607.)

The facts and circumstances in *Jimenez* bear no similarity to the instant case. The teacher in *Jimenez* left the students unattended, providing no supervision. In contrast, Perez explained the rule against tackling, which Steven understood, and Perez and Holverson remained present on the school yard to supervise the free play activities. Moreover,

there was evidence in *Jimenez*, albeit in dispute, to show "that flips are *not* an integral part of ordinary break dancing." (*Jimenez*, *supra*, 247 Cal.App.4th at p. 602.) Running, falling, and collisions are inherent risks in traditional school yard activities such as soccer, basketball, volleyball, or football.

Injuries suffered in these various sports generally present the type of situation in which the doctrine of primary assumption of the risk applies. Such is the case with Steven's unfortunate broken collarbone.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the Compton Unified School District.

KRIEGLER, J.

We concur:

TURNER, P. J.
BAKER, J.