CASENOTE: MINOR CAN'T SUE RELATIVES FOR INJURIES ON A SKI SLOPE WHICH MINOR CLAIMS HE WAS MADE TO GO ON THAT EXCEEDED HIS SKILL LEVEL

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

ALVIN KIN, a Minor, etc., Plaintiff and Appellant, v. JOHN SUN et al., Defendants and Respondents.	H042413 (Santa Clara County Super. Ct. No. 114CV259665)

I. INTRODUCTION

Plaintiff Alvin Kin was 13 years old when he went skiing on a slope for intermediate skiers, failed to successfully negotiate a turn, crashed into a signpost, and suffered serious injury. His father, defendant Gordon Kin (father), had taken plaintiff on the ski trip. Father had asked his adult brother, defendant Johnson Kin (uncle), and his adult cousin, defendant John Sun (cousin), to take plaintiff skiing that day.

Through a guardian ad litem, who is plaintiff's mother and who was formerly married to plaintiff's father, plaintiff filed a negligence action against father, uncle, and cousin. Each defendant moved for summary judgment on the ground that plaintiff's action was barred by the

primary assumption of risk doctrine. Defendants argued that they owed no duty to protect plaintiff against risks inherent in skiing, and that they did not engage in reckless conduct or otherwise increase the risks to plaintiff. The trial court granted the motions and entered judgments in favor of defendants.

On appeal, plaintiff contends that the primary assumption of risk doctrine does not apply in this case and that, to the extent the doctrine applies, a triable issue exists as to whether defendants engaged in reckless conduct and increased the risk of injury over that inherent in skiing. For reasons that we will explain, we will affirm the judgments in favor of defendants.

II. FACTUAL BACKGROUND

Our factual summary is drawn from the parties' separate statements of fact and the evidence submitted in connection with the summary judgment motions and oppositions.

On December 23, 2013, the day of the incident, plaintiff was on a ski trip at Mt. Rose Ski Tahoe (Mt. Rose) with father, uncle, and cousin. Plaintiff's parents were divorced and plaintiff, who was 13 years old, was in the custody of father for winter break.

The ski runs at Mt. Rose are color-coded: green for beginners, blue for intermediate skiers, and black for advanced or expert skiers. Plaintiff had skied at Mt. Rose with his mother on a few occasions before the date of the incident.

Specifically, in 2010, plaintiff went on a ski trip with his mother and took two ski lessons, one at Mt. Rose and one at another ski location. In 2011, plaintiff again went skiing with his mother at Mt. Rose. By this trip, plaintiff's mother did not think plaintiff needed lessons. Plaintiff continued to improve on the green slope where he could ski down the slope without falling. In January 2013, plaintiff and his mother returned to Mt. Rose to ski. Plaintiff had no difficulty completing the green slope. He was able to turn and stop, and he could ski down the slope without falling. Plaintiff felt comfortable going down the slope, and he could ski the slope alone.

On the ski trip with defendants in December 2013, plaintiff did not want to take ski lessons or ski on the "bunny slope," a very beginner slope, because it was too boring and he believed his skill level was beyond that point. Plaintiff and father had talked about skiing together and having plaintiff teach father to ski because father had no experience skiing. Father, however, did not want plaintiff to be bored. Father suggested that plaintiff go skiing with uncle and cousin, while he (father) went skiing separately. Uncle and cousin were experienced skiers. Plaintiff responded, "sure," and indicated that he "likes to take [a] challenge." Plaintiff told father that he wanted to go on the green slope or try out the blue slope. Father said, "Sure," and, "Be careful." Plaintiff thought he had the skill to go down the blue slope.

Father asked uncle and cousin to take plaintiff skiing, and uncle expressly agreed. Uncle knew plaintiff had gone skiing a few times in the past, but neither uncle, father, or cousin had ever skied with plaintiff and none of them knew plaintiff's skiing ability.

Father told plaintiff to stay with uncle and cousin. Father never told uncle not to take plaintiff on the blue slope, and he never asked uncle to take plaintiff on the green slope before going on the blue slope. Uncle had taught his wife to ski, and he knew that a person should start learning on the green slope and then move to the blue slope.

Uncle, cousin, and plaintiff were going to ski on the green slope where plaintiff had previously skied with his mother, but uncle and cousin believed the line was too long. Uncle and cousin told plaintiff that they did not want to wait in line and that they would go to a blue slope

instead. Uncle and cousin also told plaintiff that "the blue slope was not much harder than the green slope." Cousin believed the blue slope where they were taking plaintiff was an "easier blue" because it was relatively flat and wide as compared to other blue slopes that cousin had been on. Plaintiff agreed to go on the blue slope.

Uncle did not have any concerns about plaintiff going on the blue slope. Plaintiff seemed confident about going down the blue slope. He was excited and thought he could ski down without uncle or cousin being with him. Prior to the incident, plaintiff never expressed any concern about the blue slope to either uncle or cousin.

In a subsequent declaration in opposition to the summary judgment motions, plaintiff stated that he thought it was safe for him to ski down the slope because uncle and cousin told him that it was not much harder than a green slope. Plaintiff further stated in his declaration that he had no basis for believing he would be safe other than relying on uncle and cousin to keep him safe.

The only blue slope that was open from the ski lift that plaintiff, uncle, and cousin took went down the Upper Northwest run and continued left onto the Kit Carson Traverse. To the right was a black slope. Plaintiff failed to successfully negotiate the left turn onto the Kit Carson Traverse. He skied through a rope that marked the outside edge of the turn on the blue slope and hit a padded signpost, which was located between the Upper Northwest run, a blue slope, and the Express, a black slope. The signpost was about 150 yards downhill from the ski lift. Plaintiff fractured his left leg in two places.

Plaintiff testified at his deposition that the turn he was attempting to make was one that he "usually would have been able to handle." As he approached the turn, he did not feel as though he was going faster than on any other occasion, and he thought it was a speed he would be able to handle. Plaintiff thought the snow conditions were "slightly icier than normal" because "usually" he is "able to turn a lot better." An incident form from Mt. Rose indicates that surface conditions at the scene were "packed powder."

In a subsequent declaration in opposition to the summary judgment motions, plaintiff stated that he tried to do a "wedge" with his skis to slow down, but he could not go slowly enough. Because he could not stop or turn, he crashed into the post.

Plaintiff testified at his deposition that he did not remember whether he started skiing down the slope by himself, and he did not remember where uncle and cousin were. In a subsequent declaration opposing the summary judgment motions, plaintiff stated that uncle and cousin "took off" in front of him and did not wait for him.

Uncle and cousin had planned to ski behind plaintiff so that they could watch him. However, there were a lot of people on the slope, plaintiff initially skied a little fast, and uncle and cousin were also skiing, so they lost sight of plaintiff and ended up skiing all the way to the bottom of the hill without him. Uncle waited at the bottom of the hill in case plaintiff was behind them. Uncle and cousin subsequently returned to the top of the hill to look for plaintiff and found him on the ground with the ski patrol. At the time of the incident, father was on a different slope.

Uncle sent an email to plaintiff's mother after the incident expressing sorrow. Uncle also stated, "We could have been more cautious about taking [plaintiff] up the hill. At the time, no-

body knows [plaintiff's] ability, and all we knew was that he had done skiing few times in the past."

Plaintiff's ski expert Larry Heywood stated in a declaration in opposition to the summary judgment motions that the angle of the slope from the top of the ski lift to the site where plaintiff was injured was approximately 17 to 19 degrees, which was steeper than the approximately 6 to 12 degree angle on the available green slopes. The turn that plaintiff failed to negotiate was almost a 90 degree angle. The green slopes were generally wide-open trails without such sharp turns. More advanced trails are generally steeper, less wide, and require sharper turns within a shorter distance. There was limited snow cover on the date of the incident, and all snow was machine made. Machine made snow tends to be denser and harder than natural snow and "can present additional challenges to all level of skiers."

According to Heywood, uncle and cousin should have assessed plaintiff's ability to ski before taking plaintiff skiing, and especially before taking plaintiff to a trailhead for blue and black slopes. Heywood believed that plaintiff was a beginner level skier who had the ability to safely handle a green slope, and that plaintiff should not have been taken to a blue slope. Even if plaintiff was interested in skiing a blue slope, Heywood opined that uncle and cousin should have started plaintiff on the green slopes. This would have allowed plaintiff to warm up, refresh his skills, and test the snow conditions while uncle observed plaintiff's skiing ability.

Heywood opined that uncle and cousin increased the danger to plaintiff by taking him to a blue/black trailhead and by "abandoning" him at the top of the trailhead. Heywood stated that the Upper Northwest run and the signpost that plaintiff hit were visible from the top of run, and therefore plaintiff could have been observed skiing from the chairlift all the way to the point where he hit the signpost if uncle or cousin had tried to watch him. Further, uncle or cousin should have remained in verbal contact with plaintiff at all times so that one of them could, for example, tell plaintiff to sit down to stop skiing and avoid injury. Uncle or cousin should have also skied next to plaintiff so that one of them could prevent plaintiff from skiing out of bounds. Alternatively, uncle and cousin could have skied with one in front and one behind plaintiff to "buffer him from danger."

Regarding plaintiff's father, Heywood opined that father should have observed and learned plaintiff's ski ability before permitting him to go skiing on an advanced slope. Also, father should have only authorized uncle and cousin to take plaintiff, a beginner level skier, to green slopes and not to a blue or black slope. Further, father should have also requested that uncle and cousin stay with plaintiff to guide him on the slope.

III. PROCEDURAL BACKGROUND

A. *The Pleadings*

In January 2014, plaintiff filed a complaint for negligence against father, uncle, and cousin. Plaintiff alleged that he was a minor and a skier with limited experience, that defendants were supervising and/or taking him skiing, and that he was dependent on defendants to care for his safety while skiing at Mt. Rose. Plaintiff alleged that defendants had a duty to supervise, protect, guide, warn and otherwise take reasonable measures for his safety to prevent him from injuring himself while skiing, and that defendants breached their duty. Plaintiff alleged defendants were "negligent" "including" by: (1) failing to determine plaintiff's ability to ski before taking

him on a blue slope, (2) misrepresenting the difficulty and the risk of danger of the blue slope as compared to the green slope, (3) failing to take plaintiff on a green slope as planned because the ski lift line was crowded and instead taking him on a blue slope, and (4) abandoning him on the blue slope instead of guiding him down the slope. Plaintiff alleged that he was unable to safely control himself going down the blue slope due to the nature and conditions of the slope, that he was unable to safely turn, stop, or avoid crashing into a pole on the slope, and that he suffered severe and permanent injury to his left lower extremity during the crash.

Father, uncle, and cousin each filed an answer alleging assumption of risk as an affirmative defense.

B. ***The Motions for Summary Judgment***

Each defendant filed a motion for summary judgment contending that downhill skiing is an activity subject to the assumption of risk doctrine, and that plaintiff's negligence action was barred by the doctrine. Defendants argued that they had no duty to protect plaintiff against risks inherent in the activity itself, such as icy surface conditions and collisions with objects. Defendants further contended that there was no evidence that they engaged in reckless conduct that was totally outside the range of ordinary activity involved in the sport, or conduct that increased the risks to plaintiff that were over and above those inherent in downhill skiing. Father also argued that he was not present when plaintiff was injured and that any duty he had to prevent plaintiff's injuries ceased when he entrusted plaintiff to uncle and cousin.

C. ***Oppositions to Motions for Summary Judgment***

Plaintiff argued that the assumption of risk doctrine did not apply, and that the acts and omissions of defendants were totally outside the ordinary activity of skiing and increased the risk of danger inherent in the sport for a beginner. In particular, plaintiff contended that father failed to take reasonable measures to ensure plaintiff's safety before permitting him to go skiing, such as setting "parameters" on him skiing on beginner slopes and with instructors who would follow industry safety standards. Plaintiff argued that father as a parent owed a duty to plaintiff before the inherently dangerous activity began, and that the doctrine of primary assumption of risk did not apply. Plaintiff argued that the other two defendants, uncle and cousin, agreed to supervise the minor who was a beginner skier, took him to a black diamond trailhead and then abandoned him, misrepresented the difficulty of the blue trail as being similar to a green trail, and failed to inform him that he would have to navigate a black diamond area. In opposition to each defendant's motion, plaintiff submitted declarations from himself, his mother, and the ski expert Heywood.

D. ***Replies in Support of Motions for Summary Judgment***

In reply defendants contended that plaintiff's declaration should be disregarded because it contradicted his deposition testimony. Defendants also argued that expert Heywood's declaration was inadmissible because the issue of a defendant's duty, or whether a defendant has increased the risks of the activity beyond those inherent in the sport, was for the trial court to decide. Defendants continued to contend that the primary assumption of risk doctrine applied, and that they did not engage in conduct that increased the risks inherent in downhill skiing.

E. ***The Trial Court's Orders***

Uncle's motion for summary judgment was set for hearing first, and the motions by cousin and father were heard a few weeks later by a different judge.

Uncle's motion for summary judgment was granted by written order filed on February 4, 2015. The trial court determined that uncle met his initial burden to show that he owed no duty to plaintiff under the primary assumption of risk doctrine. Specifically, uncle demonstrated that he and plaintiff were coparticipants in skiing, and that uncle did not act recklessly or otherwise increase the inherent risks of skiing by causing or allowing plaintiff to ski down the blue slope. The trial court overruled uncle's objections to plaintiff's evidence. The court nevertheless determined that plaintiff failed to provide sufficient evidence to raise a triable issue of material fact as to whether uncle increased the risks inherent in skiing. Further, evidence that uncle agreed to supervise plaintiff, or that uncle's conduct violated generally accepted skiing practices and norms, did not preclude application of the assumption of risk doctrine. The court also determined that the opinion of plaintiff's expert – that the conduct of uncle was outside the range of ordinary activity in skiing – was "unsupported by evidence and insufficient to raise a triable issue of material fact."

The motions for summary judgment by cousin and father were granted by written order on February 13, 2015. The trial court determined that each defendant had established a complete defense under the primary assumption of risk doctrine. Cousin showed that he was merely a coparticipant in the activity and, even if he was a coach or instructor, he was not liable to plaintiff. There was also no evidence that cousin engaged in reckless conduct totally outside the range of ordinary activity involved in skiing. Regarding father, the court determined that he was not on the slope and thus he could not be considered a coparticipant or an instructor. Even if he was an instructor, the primary assumption of risk doctrine precluded his liability to plaintiff. The court also determined that the doctrine precluded father's liability for the purported negligent breach of his parental duty of care, a "theory . . . not alleged in the Complaint" according to the court. The court further indicated that the declaration from plaintiff's expert did not create triable issues. The court stated that recreational downhill snow skiing and its inherent risks were not " 'an arena of esoteric activity,' " and that the court did "not require any aid beyond common knowledge and the published decisions in this area to evaluate the issues presented as Plaintiff and all three defendants were simply recreational skiers."

Judgments were entered in favor uncle, cousin, and father.

IV. DISCUSSION

On appeal, plaintiff contends that the primary assumption of risk doctrine does not apply in this case because defendants were responsible for supervising him as a minor, and uncle and cousin made misrepresentations to him about certain dangers. Plaintiff also argues that, to the extent the doctrine applies, a triable issue exists as to whether defendants engaged in reckless conduct and increased the risk of injury over that inherent in skiing. Plaintiff further argues that the trial court erred in determining that his expert's opinion in opposition to uncle's summary judgment motion was "unsupported by evidence," and erred in determining that his expert's opinion in opposition to father's summary judgment motion was unnecessary because the case involved recreational skiing and not an " 'esoteric activity.' "

Uncle and cousin contend that the primary assumption of risk doctrine applies in this case, that they were merely coparticipants with plaintiff while skiing, and that they did not increase the risks inherent in skiing. They also contend that they did not make a misrepresentation to plaintiff that would preclude application of the primary assumption of risk doctrine. Father

similarly contends that the primary assumption of risk doctrine applies in this case, and that he did not increase the risks inherent in skiing. Defendants also contend that the trial court properly disregarded or excluded the opinion of plaintiff's expert.

A. *The Standard of Review*

The standard of review for an order granting a motion for summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) The trial court's stated reasons for granting summary judgment are not binding on the reviewing court, "which reviews the trial court's ruling, not its rationale. [Citation.]" (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 498 (*Ramalingam*).)

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

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

If a defendant moves for summary judgment on the ground of primary assumption of risk, " ' "he or she has the burden of establishing the plaintiff's primary assumption of the risk by demonstrating that the defendant owed no legal duty to the plaintiff to prevent the harm of which the plaintiff complains." [Citation.]' " (*Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821, 826.) "[W]hen the plaintiff claims the defendant's conduct increased the inherent risks of a sport, summary judgment on primary assumption of risk grounds is unavailable unless the defendant disproves the theory or establishes a lack of causation. [Citations.]" (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 740.)

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

In determining whether the parties have met their respective burdens, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar, supra*, 25 Cal.4th at p. 843.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850, fn. omitted.) "Thus, a party 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145.)

B. *General Principles Regarding Assumption of Risk*

1. No Duty to Protect Against Risks Inherent in the Sport

"Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others. (Civ. Code, § 1714, subd. (a) . . . .)" (*Shin v. Ahn* (2007) 42 Cal.4th 482, 488 (*Shin*).) In the parent-child context, a parent has the duty to exercise the care that a reasonably prudent parent would exercise in similar circumstances. (*Gibson v. Gibson* (1971) 3 Cal.3d 914, 921; *West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 956.) Similarly, a person who has undertaken to care for a child has a duty to exercise the care that a prudent person would exercise under like circumstances. (See *Wallace v. Der-Ohanian* (1962) 199 Cal.App.2d 141, 144; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1045-1046, 1054-1055.)

However, "[t]he existence of a duty is not an immutable fact of nature, but rather an expression of policy considerations providing legal protection. [Citation.]" (*Shin*, *supra*, 42 Cal. 4th at p. 488.) " '[S]ome activities—and, specifically, many sports—are inherently dangerous.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 (*Nalwa*).) "When a sports participant is injured, the considerations of policy and duty necessarily become intertwined with the question of whether the injured person can be said to have assumed the risk. [Citation.]" (*Shin*, *supra*, at p. 489.) " 'Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.' [Citation.] The primary assumption of risk doctrine, a rule of limited duty, developed to avoid such a chilling effect. [Citations.]" (*Nalwa*, *supra*, at p. 1154.)

Under the primary assumption of risk doctrine, "the defendant owes no duty to protect a plaintiff from a particular risk that the plaintiff is construed to have assumed. In the sports context, the plaintiff is deemed to have assumed those risks inherent in the sport in which plaintiff chooses to participate." (*Shin*, *supra*, 42 Cal.4th at p. 498.) "Accordingly, *defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport*." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004 (*Kahn*), italics added.)

"The primary assumption of risk doctrine rests on a straightforward policy foundation: the need to avoid chilling vigorous participation in or sponsorship of recreational activities by imposing a tort duty to eliminate or reduce the risks of harm inherent in those activities. It operates on the premise that imposing such a legal duty 'would work a basic alteration—or cause abandonment' of the activity. [Citations.] The doctrine's parameters should be drawn according to that goal." (*Nalwa*, *supra*, 55 Cal.4th at pp. 1156-1157.)

In order to determine whether the defendant owes a duty to protect the plaintiff from the particular risk of harm, a court " 'must evaluate the fundamental nature of the sport and the defendant's role in or relationship to that sport.' " (*Shin*, *supra*, 42 Cal.4th at p. 489.) The inquiry does *not* turn on " 'what risks a particular plaintiff subjectively knew of and chose to encounter.' " (*Ibid*.; accord, *Kahn*, *supra*, 31 Cal.4th at p. 1016 ["the doctrine of primary assumption of risk, including the issue of the scope of defendants' duty of care, does not turn on plaintiff's subjective awareness of the risk or [plaintiff's] decision to encounter it voluntarily"].)

" '[T]he existence and scope' of the defendant's duty is one of law to be decided by the court, not by a jury." (*Kahn*, *supra*, 31 Cal.4th at p. 1004.)
" 'Judges deciding inherent risk questions . . . may consider not only their own or common experience with the . . . activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.' [Citation.]" (*Gregory v. Cott* (2014) 59 Cal.4th 996, 1006, fn. 6; *see id.* at pp. 1005-1006.) However, a court may "not rely upon expert opinion testimony to establish the legal question of duty." (*Kahn*, *supra*, at p. 1017.)

2. Duty Not to Increase Risks Inherent in the Sport, and Breach of Duty

Where the doctrine of primary assumption of risk applies, the defendant owes the plaintiff "only the duty not to act so as to *increase* the risk of injury over that inherent in the activity. [Citations.]" (*Nalwa*, *supra*, 55 Cal.4th at p. 1154.) This is a "*limited duty of care . . . to refrain from intentionally injuring . . . another or engaging in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport*.' [Citation.]" (*Shin*, *supra*, 42 Cal.4th at pp. 489-490, italics added.) This is " 'a duty not to increase the risks inherent in the sport, not a duty to decrease the risks.' [Citations.]" (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 166.)

In determining whether a defendant breached the limited duty by acting recklessly, the nature of the sport and the totality of the circumstances surrounding the defendant's conduct and the plaintiff's injury must be considered. (*Shin*, *supra*, 42 Cal.4th at pp. 499-500; *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1495 (*Cohen*).) Although a trial court may "not rely upon expert opinion testimony to establish the legal question of duty," the court may receive " '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.' [Citations.]" (*Kahn*, *supra*, 31 Cal.4th at pp. 1017-1018.) Questions of fact may arise as to whether a defendant breached a limited duty of care to a plaintiff by engaging in conduct that is so reckless as to be totally outside the range of the ordinary activity. In such a case, summary judgment may be properly denied. (*Shin*, *supra*, at p. 488; *Kahn*, *supra*, at pp. 996-997.) On the other hand, if the record supports a finding, as a matter of law, that the defendant did not act recklessly, the case may be resolved on summary judgment. (*Shin*, *supra*, at p. 500.)

3. Assumption of Risk Doctrine and Minors

The doctrine of primary assumption of risk has been applied to claims by minors who were injured while participating in sports. (See e.g., *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 264-265 (*Souza*) [eight-year-old skier's negligence claim against ski resort after she collided with a snowmaking hydrant was barred by primary assumption of risk doctrine]; *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 941-942 (*Lilley*) [14-year-old wrestler's negligence action against coach and school district for injury during after-school wrestling program was barred by primary assumption of risk doctrine]; *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1630-1631 [16-year-old figure skater's personal injury action against another skater, who collided with her, and the other skater's parents, was barred by primary assumption of risk doctrine].

C. *Analysis*

In determining whether defendants owed a duty to protect plaintiff from the particular risk of harm involved in his claim, we first consider the nature of skiing and the relationship of defendants and plaintiff to that sport. (*Shin*, *supra*, 42 Cal.4th at p. 489; *Kahn*, *supra*, 31 Cal.4th at p. 1004.)

1. Nature of the Activity and the Inherent Risks

"The risks inherent in snow skiing have been well catalogued and recognized by the courts. Those risks include injuries from variations in terrain, surface or subsurface snow or ice conditions, moguls, bare spots, rocks, trees, and other forms of natural growth or debris. They also include collisions with other skiers, ski lift towers, and other properly marked or plainly visible objects and equipment. [Citations.]" (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1202 (*Lackner*).) "The challenge and fun of the sport consists largely in the skier's skill in encountering . . . conditions" such as moguls, ice, bare spots, tree stumps, and so forth. (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1367 (*Allan*).)

2. Defendants' Roles in the Activity

The California Supreme Court has emphasized that "defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty not to increase the risk of harm beyond what is inherent in the sport. [Citation.] [¶] But the question of duty depends not only on the nature of the sport, but also on the 'role of the defendant whose conduct is at issue in a given case.' [Citation.] Duties with respect to the same risk may vary according to the *role* played by particular defendants involved in the sport." *Kahn*, *supra*, 31 Cal.4th at p. 1004.)

"In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit—vigorous deployment of a bat in the course of a game being an integral part of the sport—a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. For the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport. [Citation.]" (*Kahn*, *supra*, 31 Cal.4th at p. 1004.) In the sport of skiing, "although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. [Citation.]" (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315 (plur. opn. of George, J.).) At the same time, "although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant. [Citation.]" (*Id.* at p. 316 (plur. opn. of George, J.).)

In this case, plaintiff contends that, due to the roles and responsibilities of father, uncle, and cousin to supervise him, the primary assumption of risk doctrine should not apply in this case. Further, regarding father, plaintiff argues that the primary assumption of risk doctrine is not applicable because father was not a "co-participant in the actual activity of skiing" at the time plaintiff was injured nor was father "actively involved as a ski instructor" or as an "owner/operator of the ski resort."

Regarding uncle and cousin, plaintiff additionally argues that the primary assumption of risk doctrine is not available to them because they made misrepresentations to him about certain dangers and that, to the extent the doctrine applies, uncle and cousin assumed the role of coaches or instructors.

Father, uncle, and cousin contend that the primary assumption of risk doctrine applies in this case. Uncle and cousin in particular contend that they were merely coparticipants with plaintiff while skiing or, at most, a coach or instructor of plaintiff, and that they did not make a misrepresentation that would preclude application of the primary assumption of risk doctrine. Father contends that the doctrine applies notwithstanding his status as plaintiff's parent and even though he was not present when plaintiff was injured.

"[C]oparticipants breach a duty of care to each other only if they 'intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.' [Citation.]" (*Kahn*, *supra*, 31 Cal.4th at p. 1005, fn. omitted.) By comparison, " 'a coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student. [Citations.]' [Citation.]" (*Id*. at pp. 1005-1006, italics omitted.) "A sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is 'totally outside the range of the ordinary activity' [citation] involved in teaching or coaching the sport." (*Id*. at p. 996; see *id.* at p. 1011.)

Regarding the duty of care owed by instructors, the California Supreme Court has explained that "[n]ovices and children need instruction if they are to participate and compete," and the duty of care must not be defined "in terms that would inhibit adequate instruction and learning or eventually alter the nature of the sport." (*Kahn*, *supra*, 31 Cal.4th at p. 1011.) "[A]n instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence. . . . [I]nstruction in a sport frequently entails challenging or 'pushing' a student to attempt new or more difficult feats, and . . . '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.' [Citation.] As a general matter, . . . a student's inability to meet an instructor's legitimate challenge is a risk that is inherent in learning a sport. To impose a duty to mitigate the inherent risks of learning a sport by refraining from challenging a student . . . could have a chilling effect on the enterprise of teaching and learning skills that are necessary to the sport." (*Id.* at pp. 1006-1007; see also *id.* at pp. 996, 1010-1011.)

Regarding the roles of the parties in this case, the evidence presented in the moving and opposition papers reflects that father took plaintiff on the ski trip and ultimately directed plaintiff to stay with uncle and cousin while skiing. Although father was not skiing with plaintiff at the time of injury, father still owed a duty of care to his son, who was a 13-year-old minor. Skiing involves inherent risks of injury from terrain and other conditions. Under the primary assumption of risk doctrine, father did *not* have a duty to protect plaintiff from, or to eliminate, the risks inherent in skiing, such as the risk of injury from terrain variations, snow or ice conditions, and collisions with plainly visible objects. (*Kahn*, *supra*, 31 Cal.4th at p. 1004; *Lackner*, *supra*, 135 Cal.App.4th at p. 1202.)

Father did, however, have a duty not to increase the risk of injury by engaging in reckless conduct. (*Nalwa*, *supra*, 55 Cal.4th at p. 1154; *Shin*, *supra*, 42 Cal.4th at pp. 489-490.)

Regarding uncle and cousin, father asked them to take plaintiff skiing while father skied separately.[1] In response to father's request to take plaintiff skiing, uncle affirmatively agreed to the arrangement. A reasonable inference arises that cousin likewise agreed to take plaintiff skiing, in view of (a) uncle's later email referring to the responsibilities of uncle and cousin in taking plaintiff up the hill and (b) the evidence that uncle and cousin had discussed staying right behind plaintiff in order to watch him as he skied down the hill. Under the circumstances, uncle and cousin were at a minimum coparticipants with plaintiff, as all three were on the same slope skiing. (*Bjork v. Mason* (2000) 77 Cal.App.4th 544, 551, fn. 3 [where minors were waterskiing and tubing under "guidance" of adult boat driver, adult boat driver was a coparticipant under primary assumption of risk doctrine].) We need not decide whether uncle and cousin were also coaches or instructors because, as we will later explain, plaintiff failed to present sufficient evidence to create a triable issue as to whether uncle and cousin engaged in reckless conduct as coaches or instructors. As coparticipants or as coaches/instructors, uncle and cousin did not have a duty to protect plaintiff from the risks inherent in skiing, but they did have a duty not to increase the risks inherent in skiing, or the risks inherent in the learning process. (*Nalwa*, *supra*, 55 Cal.4th at p. 1154; *Kahn*, *supra*, 31 Cal.4th at pp. 1005-1006.)

3. Primary Assumption of Risk Doctrine May Apply in This Case

We agree with defendants that the primary assumption of risk doctrine may apply in this case, and we are not persuaded by plaintiff's contention that the doctrine cannot apply where a defendant is his parent or is an adult otherwise responsible for supervising him.

As an initial matter, before we address plaintiff's contention, we reject father's suggestion that plaintiff needed, but failed, to plead "an independent negligence claim (based on breach of parental duty)" against father. Plaintiff stated his date of birth in the complaint and stated that he is a minor. He also alleged that defendants were "adults who were supervising and/or taking" him skiing, that he was "dependant" on them to care for his safety, and that they had a "duty to supervise, protect, guide, warn and otherwise take reasonable measures" for his safety while skiing. Plaintiff also included allegations regarding breach. Given the absence of any dispute in the record that defendant Gordon Kin is plaintiff's father, and the apparent lack of any dispute that Gordon Kin in general has a duty to supervise, protect, guide, warn and otherwise take reasonable measures for plaintiff's safety as a result of being plaintiff's father, we do not believe further allegations were required in order to raise father's parental duty as an issue in this case.

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[1] Cousin in his respondent's brief asserts that father did not speak to him about taking plaintiff skiing. The record citation provided by cousin does not support cousin's assertion. Moreover, in opposition to cousin's summary judgment motion, plaintiff provided deposition testimony from father who testified that he spoke to uncle and cousin "together" about taking plaintiff skiing. On appeal, we must view the evidence and all inferences reasonably drawn therefrom in the light most favorable to the opposing party. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

We next turn to plaintiff's contention that the primary assumption of risk doctrine cannot apply where a defendant is his parent or is an adult otherwise responsible for supervising him.

First, plaintiff does not cite any authority for the proposition that the doctrine may not be relied on by an adult who is responsible for the care or supervision of a minor. The primary assumption of risk doctrine is available to schools, which have supervisory authority over children. (*Lilley, supra,* 68 Cal.App.4th at pp. 941-942, 944-946 [holding that Ed. Code, § 44807, which imposes a general duty on teachers to supervise students, does not preclude application of assumption of risk principles]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1119 [same].) Given the analogous relationship between schools and minor children, and parents and their minor children, we are not persuaded that the primary assumption of risk doctrine should not be available to parents or other adults who are supervising children. (See *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 935 [the "relationship between school personnel and students is analogous in many ways to the relationship between parents and their children" regarding responsibilities toward a student/child].)

Second, the policy reasons for the primary assumption of risk doctrine are equally applicable to parents and adults supervising or otherwise responsible for a minor in the skiing context. The "challenge and fun" of skiing includes a person's skill in encountering variations in terrain and conditions. (*Allan*, *supra*, 51 Cal.App.4th at p. 1367.) Imposing a duty on an adult, who is supervising or otherwise responsible for a child, to mitigate the inherent dangers in skiing, such as injuries from variations in the terrain or surface snow conditions, could alter the nature of skiing or inhibit vigorous participation in or sponsorship of the sport. (See *Nalwa*, *supra*, 55 Cal. 4th at pp. 1154, 1156; *Lackner*, *supra*, 135 Cal.App.4th at p. 1202.) Significantly, the primary assumption of risk doctrine has been applied to instructors teaching sports to children. (See, e.g., *Kahn*, *supra*, 31 Cal.4th at p. 1011.) In that context, the California Supreme Court has explained: "Novices and children need instruction if they are to participate and compete, and we agree with the many Court of Appeal decisions that have refused to define a duty of care in terms that would inhibit adequate instruction and learning or eventually alter the nature of the sport." (*Ibid*.) If the primary assumption of risk doctrine applied to everyone connected to a minor's participation in skiing, such as the ski resort operator, the ski instructor, and the other skiers on the slope, but *not* to the person who ultimately decides whether the minor will participate at all, that is, the parent or other caregiver, such potential liability of parents and caregivers could inhibit their sponsorship of the sport and children's participation in the sport. We therefore determine that the primary assumption of risk doctrine may be applicable to a parent or other caregiver who is responsible for a child's participation in skiing.

Moreover, we are not persuaded by plaintiff's contention that the primary assumption of risk doctrine is not available to father because he was not actually skiing with plaintiff at the time of the injury. "[A]pplication of primary assumption of the risk is not limited to situations in which a plaintiff is engaged in the exact same activity as the party causing the injury." (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 469.) Duties depend on the role played by the particular defendant. (*Kahn*, *supra*, 31 Cal.4th at p. 1004; *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 468 (*Towns*).) In this case, plaintiff seeks to impose liability on father for injuries plaintiff sustained while skiing. Father authorized plaintiff, his minor child, to go skiing, including on a blue slope, with the other defendants. Given father's relationship to plaintiff and role in allowing

plaintiff to go skiing with the other defendants on a blue slope where plaintiff was ultimately injured, we are not persuaded by plaintiff's argument that the assumption of risk doctrine is not available to father simply because he was not skiing with plaintiff or instructing him at the time of the injury. As we have just explained, to hold otherwise and allow a minor to seek liability against his or her parent could inhibit parents' sponsorship of the sport and children's participation in the sport.

Lastly, we are not persuaded by plaintiff's contention that the primary assumption of risk doctrine does not apply because uncle and cousin "misrepresented and/or hid the danger" from plaintiff and father. Plaintiff argues that uncle and cousin misled him about (a) "whether an intermediate level slope was the equivalent of a beginner slope, and about his own ability to be able to safely ski down the location where they were intending to [take] him," (b) "the actual level of slope where he would be skiing," and (c) whether he "would be supervised or left to ski alone."

Regarding plaintiff's contention that a misrepresentation was made regarding the slope being equivalent to a beginner slope, the evidence reflects that uncle and cousin told plaintiff only that "the blue slope was not much harder than the green slope." Even assuming this statement was not an accurate description of the slope that plaintiff skied on, the factors that may have contributed to plaintiff's injury, including the steepness of the slope, the snow conditions, and the signpost that plaintiff collided with, are all "well catalogued" factors that contribute to the inherent risk of injury in skiing. (*Lackner*, *supra*, 135 Cal.App.4th at p. 1202; see *Towns*, *supra*, 147 Cal.App.4th at p. 473 ["The nature and risks of downhill skiing are commonly understood"].) Regarding the condition of the particular slope where plaintiff was injured, plaintiff's own expert, Heywood, stated in a declaration that the Upper Northwest run and the signpost that plaintiff hit were visible from the top of the run, and that plaintiff could have been observed skiing from the ski lift to the point where he hit the signpost if uncle or cousin had tried to watch him. Thus, the steepness of the slope, the general snow conditions, and an object that a skier might collide with, must have been visible to plaintiff to the same extent as uncle and cousin before any of them skied down the slope. In view of these obvious risks, we are not persuaded that an earlier statement by uncle and cousin comparing blue and green slopes before they arrived at the top of the hill constitutes a misrepresentation or omission that prevents application of the primary assumption of risk doctrine. (See *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12 (*Connelly*) ["[b]ecause of the obvious danger, the very existence of a ski lift tower serves as its own warning"]; *Souza*, *supra*, 138 Cal.App.4th at p. 271 [large metal snowmaking hydrant served as its own warning to skier].)

Regarding plaintiff's contention that uncle and cousin misled him about skiing on a blue slope rather than a black slope, the undisputed evidence reflects that plaintiff skied on a *blue* slope where he failed to negotiate a turn and ended up between blue and black slopes. Plaintiff's own expert, Heywood, described the slope as follows: "On December 23, 2013, the only *Blue Square trail route* open on the day of the injury from the top of the North West Passage chair lift was *down Upper Northwest continuing onto the Kit Carson Traverse*. From Upper Northwest, it was necessary for skiers, including [plaintiff] Alvin Kin, to make an almost 90 degree turn onto the Kit Carson Traverse trail." (Italics added.) Heywood explained that "the Ski Patrol had placed a rope line to identify the outside edge of the left ha[n]d turn from Upper Northwest onto

the Kit Carson Traverse trail." Heywood further stated that "[plaintiff] *Alvin Kin skied through an out of bounds rope* and skied into the sign plaza and the signpost on the bottom, *outside of this turn onto the Kit Carson Traverse trail*. Beyond and below the sign plaza was a tree island. . . . Beyond and below the tree island are even steeper Black Diamond trail runs." (Italics added.) The documents generated by Mt. Rose after the incident, which reflect that the signpost plaintiff hit was located between "NW & Express" trails in a black diamond location, do not create a triable issue regarding the color of the slope that uncle and cousin took plaintiff to. Plaintiff was in the location of the signpost only because he went *out of bounds* from the blue slope where uncle and cousin took him.

Regarding plaintiff's contention that uncle and cousin misrepresented whether he "would be supervised or left to ski alone," plaintiff fails to provide sufficient evidence showing that uncle or cousin intended to abandon him or intended to mislead him in this regard. For example, plaintiff stated in declarations opposing the summary judgment motions that uncle and cousin "took off" in front of him and did not wait for him. However, plaintiff had previously testified at his deposition that he did not remember what happened at the top of the slope, he did not remember whether he started skiing down the slope by himself, and he did not remember where uncle and cousin were located. Plaintiff did not offer any explanation for his ability to recall details about uncle's and cousin's location and conduct on the top of the hill only *after* the summary judgment motions were filed. "[A] party cannot create an issue of fact by a declaration which contradicts his prior discovery responses. [Citations.]" (*Shin*, *supra*, 42 Cal.4th at p. 500, fn. 12; accord, *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 549 ["We cannot accept as substantial evidence of a triable issue of fact a declaration that directly contradicts the declarant's prior statement, where the contradiction is unexplained"].)

In opposition to the summary judgment motions plaintiff also provided a declaration from Heywood, the skiing expert who visited the slope where plaintiff was injured. Heywood stated that the Upper Northwest run and the signpost that plaintiff hit were visible from the top of run, and therefore plaintiff could have been observed skiing from the chairlift all the way to the point where he hit the signpost if uncle or cousin had tried to watch him. The inference from Heywood's declaration is that uncle and cousin did not watch plaintiff. However, uncle testified there were a lot of people on the slope, plaintiff initially skied a little fast, and uncle and cousin were also skiing, and for those reasons they lost sight of plaintiff and ended up skiing all the way to the bottom of the hill without him. Heywood's declaration regarding the *theoretical* visibility of plaintiff on the slope does not create a triable issue regarding whether uncle or cousin *actually* lost sight of plaintiff due to particular conditions on the day of the incident, such as the existence of other skiers on the slope, the speed that plaintiff was skiing, and the efforts of uncle and cousin themselves to ski down the slope. Heywood's declaration also does not create a triable issue regarding whether uncle and cousin *intended* to abandon plaintiff on the top of the slope.

Moreover, plaintiff admits that the evidence reflects that uncle and cousin planned to ski behind him to watch him, but that they "lost track of him once they got off the ski lift and did not find him." In the absence of sufficient evidence showing that uncle and cousin intended to leave plaintiff unsupervised as he skied down the slope or intended to mislead him about whether they would supervise him, we are not persuaded that the primary assumption of risk doctrine is inapplicable in this case due to a purported misrepresentation about supervision by uncle and cousin.

We next consider the evidence presented with the motion and opposition papers to determine whether summary judgment was properly granted in this case because plaintiff's claims are barred under the doctrine of primary assumption of risk.

4. The Allegations of the Complaint and the Parties' Evidence

Plaintiff generally alleged that defendants had a duty to supervise, protect, guide, warn and otherwise take reasonable measures for his safety to prevent him from injuring himself while skiing, and that defendants breached their duty. Plaintiff alleged that he "was unable to safely control himself going down the blue slope due to the nature and conditions of the blue-level slope," that he was "unable to safely turn and/or stop and/or avoid . . . crashing into a pole," and that he was injured as a result.

The undisputed evidence in this case reflects that plaintiff had skied at Mt. Rose on prior occasions and had taken ski lessons. As of two years prior to the incident, plaintiff's mother did not think plaintiff needed any further ski lessons in order to ski on the green slope. Plaintiff had also been skiing at Mt. Rose with his mother earlier the same year as the trip with defendants. During that most recent trip with his mother, plaintiff was able to turn and stop on a green slope, and he could ski down the slope without falling. He felt comfortable skiing down the slope, and he could ski the slope alone.

On the day of the incident, plaintiff did not want to take lessons or ski on a "bunny slope" because it was too boring and he believed his skill level was beyond that point. He told his father that he wanted to go on the green slope or try a blue slope. Plaintiff thought he had the skill to go on the blue slope. When father asked plaintiff whether he wanted to ski with his uncle and cousin, plaintiff responded affirmatively and indicated that he liked to "take [a] challenge."

Uncle and cousin wanted to go on a blue slope, and plaintiff was in agreement. Plaintiff was excited and thought he could ski the slope without uncle or cousin.

Plaintiff was injured when he failed to successfully negotiate a turn on the blue slope, skied out of bounds, and hit a signpost. The factors that appear to have contributed to his injury include: the condition of the slope (such as the steepness, sharpness of the turn, and/or surface snow conditions), the existence of the signpost, and his level of ski ability.

Under California law, plaintiff assumed the inherent risk of injury due to surface conditions or due to a collision with a plainly visible object when he skied down the slope. None of the defendants had a duty to either protect plaintiff from the inherent risk of injury due to surface conditions or a collision with an object, or to eliminate those risks. (*Shin*, *supra*, 42 Cal.4th at p. 498; *Kahn*, *supra*, 31 Cal.4th at p. 1004; *Lackner*, *supra*, 135 Cal.App.4th at p. 1202.)

Defendants did, however, have a duty not to increase the risks of injury inherent in skiing and, as for uncle and cousin, we will assume they also had a duty not to increase the risks inherent in the learning process undertaken by plaintiff. (*Nalwa*, *supra*, 55 Cal.4th at p. 1154; *Kahn*, *supra*, 31 Cal.4th at pp. 1005-1006.) As we set forth above, this is a limited duty of care to refrain from engaging in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport or in teaching the sport. (*Shin*, *supra*, 42 Cal.4th at pp. 489-490; *Kahn*, *supra*, at p. 996.) In determining whether a defendant breached the limited duty by acting recklessly, the nature of the sport and the totality of the circumstances surrounding the defendant's conduct and the plaintiff's injury must be considered. (*Shin*, *supra*, 42 Cal.4th at pp. 499-500; *Cohen*, *supra*, 159 Cal.App.4th at p. 1495.) The plaintiff's skill level may be a relevant

factor. (*Cohen*, *supra*, at p. 1495.) Expert opinion may be proper although not to the extent the expert opinion constitutes a conclusion of law. (*Kahn*, *supra*, at p. 1017.)

As an initial matter, we reject cousin's objection that plaintiff's complaint contains no allegation that cousin acted recklessly. It is "unnecessary" for a plaintiff "to allege the legal conclusion that the [defendant's] acts and omissions were reckless" so long as the plaintiff "adequately alleged facts and produced evidence sufficient to support such a conclusion." (*Kahn*, *supra*, 31 Cal.4th at p. 1013, fn. 4; accord, *Cohen*, *supra*, 159 Cal.App.4th at p. 1496.)

In this case, we determine that plaintiff's allegations and evidence are insufficient to create a triable issue as to whether any defendant acted recklessly. Plaintiff alleged that defendants: (1) failed to determine his ability to ski before allowing or taking him on a blue slope, (2) misrepresented the difficulty and the risk of danger of the blue slope as compared to the green slope, (3) failed to take him on a green slope as planned because the ski lift line was crowded and instead took him to a blue slope, and (4) abandoned him on the blue slope instead of guiding him down the slope.

a. *Failure to determine in advance plaintiff's ability to ski*

First, regarding defendants' alleged failure to determine plaintiff's ski ability before allowing or taking him on a blue slope, the undisputed evidence establishes that father and uncle had some knowledge about plaintiff skiing in the past. Indeed, plaintiff and father had even talked about plaintiff teaching father to ski. Father did not want plaintiff to be bored by them skiing together, so he suggested that plaintiff go skiing with uncle and cousin. Uncle likewise knew that plaintiff had gone skiing on prior occasions. This is not a case, therefore, where father sent, and uncle took, a new skier without any ski abilities to an intermediate level blue slope.

Further, the undisputed evidence reflects that plaintiff possessed sufficient ability to ski the green slopes by himself and without falling. This included the ability to turn and stop on the green slopes. Neither plaintiff nor father wanted plaintiff to be bored skiing, and plaintiff expressed a desire to take a "challenge" by skiing with his uncle and cousin and by going on a blue slope. Uncle did not have any concerns about plaintiff going on the blue slope, and plaintiff seemed confident about going down the slope. Indeed, plaintiff thought he could ski the blue slope without his uncle and cousin being with him, and he was excited to go down the blue slope.

Based on this record, although plaintiff was ultimately injured after unsuccessfully attempting to negotiate a turn on a blue slope, he fails to raise a triable issue regarding whether defendants engaged in conduct that is " 'so reckless as to be totally outside the range of the ordinary activity involved in the sport' " (*Shin*, *supra*, 42 Cal.4th at p. 490), or in "teaching . . . the sport" (*Kahn*, *supra*, 31 Cal.4th at p. 996). Plaintiff had reached a level of ability in skiing such that he was able to ski a green slope alone and without falling. After successfully skiing green slopes, a blue slope would be the natural course of progression for a skier wanting a challenge and wanting to improve skiing skills, and would likewise be the natural choice of a parent or other adult taking a minor with such skills skiing.

In opposition to the summary judgment motions, plaintiff provided a declaration from his mother regarding his beginner-level skiing ability. Specifically, plaintiff's mother stated in a declaration that on the date of the incident, plaintiff "was only a beginner ability skier" and that he "did not have the ability to safely ski" on a blue slope. Plaintiff's mother's statement about

plaintiff's inability to safely ski a blue slope is conclusory. She does not explain why plaintiff was not ready for a blue slope despite having successfully skied on the green slopes.

The most the record reflects, given that plaintiff actually fell on the blue slope, is that defendants may have incorrectly assessed plaintiff's ability to ski on the blue slope and allowed him to ski on a slope that involved skills beyond those he had already mastered. However, facts showing that defendants simply provided plaintiff with an opportunity to challenge himself, or that defendants made an assessment error regarding plaintiff's abilities or regarding the challenges posed by the particular blue slope, are insufficient to raise a triable issue as to reckless conduct by defendants.

For example, in *Allan*, the appellate court affirmed summary judgment against the adult plaintiff who was injured during ski lessons. (*Allan*, *supra*, 51 Cal.App.4th at pp. 1362-1363, 1378.) The plaintiff told the ski instructor that he was a novice. (*Id.* at p. 1363.) During a second lesson, the instructor told the plaintiff that he was "ready to go to the 'top of the mountain.' . . . [The instructor] told [the plaintiff] he could not ski on the beginners' slope forever, and that the only way to learn to ski properly was to be aggressive and 'go after the challenge.' " (*Ibid*.) The instructor also told the plaintiff that "the ski run at the top of the mountain was much wider than the beginners' slope, and was thus easier to ski, and that the slope was much like the beginners' area, but that it was slightly steeper in a few spots." (*Ibid.*) The plaintiff went to ski at the top of the mountain. He was not able to turn as well as in the beginners' area, and he fell many times. The plaintiff subsequently experienced back pain and needed surgery. (*Id.* at pp. 1363-1364.)

The appellate court determined that the primary assumption of risk doctrine applied in the coach/student context, and that in order to establish liability, the plaintiff had to show that the "coach actively did something—besides teaching, encouraging, or 'pushing' the student—which increased the risk of injury beyond the risks inherent in the sport." (*Allan*, *supra*, 51 Cal.App.4th at p. 1369, italics omitted.) The court explained that "[l]earning 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." (*Id.* at pp. 1368-1369.) The court determined that the evidence showed only that "the instructor provided a challenge which [the plaintiff] could not meet." (*Id.* at p. 1371, fn. omitted.) Specifically, the instructor "instructed, encouraged and challenged [the plaintiff]; the instrumentalities of his injury consisted only of his inability to meet the instructor's challenge (inherent in learning a sport), falling (inherent in skiing), and icy conditions (inherent in skiing)." (*Id.* at p. 1372.) The court concluded that " 'primary assumption of the risk' should apply as a complete bar to [the plaintiff's] case, as [the instructor] owed no duty to [the plaintiff] to prevent him from experiencing the inherent risks of skiing." (*Ibid*.)

In *Kane v. National Ski Patrol System, Inc.* (2001) 88 Cal.App.4th 204 (*Kane*), an appellate court similarly concluded that the defendant ski clinic operator was entitled to summary judgment. The plaintiff was severely injured and her husband was killed when they participated in the defendant's clinic for skiers who wanted to become members of a voluntary ski patrol. (*Id*. at p. 206.) The couple each had approximately 30 years of skiing experience. (*Ibid.*) During one clinic, the husband fell while skiing, slid into a canyon, and died. (*Id.* at p. 208.) The plaintiff went after her husband and also fell into the canyon. (*Ibid.*)

The appellate court determined that the doctrine of assumption of risk barred the defendant ski clinic operator's liability "in the absence of [the instructor's] recklessness or other conduct which increased the inherent risk involved in the clinic." (*Kane*, *supra*, 88 Cal.App.4th at p. 209.) The court found that the evidence "did not show recklessness or other conduct outside the inherent risk of training to be a ski patrol member." (*Id.* at p. 214.) In particular, the plaintiff's skiing expert presented nothing more than a "criticism of [the instructor's] assessment of the difficulty of the terrain, the relative skill of the [couple] and the hazard created by [the canyon]." (*Id.* at p. 213.) The court observed that falling and being injured or killed are "inherent dangers of skiing," and that those risks are "also inherent in attempting to improve one's skiing skills to such a level that one can take responsibility for other injured skiers." (*Id.* at p. 214.) The court determined that "an instructor's assessment errors—either in making the necessarily subjective judgment of skill level or the equally subjective judgment about the difficulty of conditions—are in no way 'outside the range of the ordinary activity involved in the sport.' [Citation.] Instructors must of necessity make such judgments in order to sufficiently challenge skiers so that they will in fact improve their skills. [Citation.]" (*Ibid*.)

Similarly, in this case, a defendant's assessment errors, if any, as to plaintiff's skiing ability and/or the challenges presented by the particular blue slope where plaintiff was injured are "in no way 'outside the range of the ordinary activity involved in the sport' " of skiing or in teaching the sport. (*Kane*, *supra*, 88 Cal.App.4th at p. 214.) Defendants allowed plaintiff the opportunity to challenge himself on a blue slope, which was the next level above the green slopes that he had previously skied on successfully. Plaintiff fails to show that his failure to meet the challenge and his resulting injury from the type of risks inherent in skiing (injury due to terrain, surface snow conditions, and collision with a signpost) occurred because of reckless conduct on the part of defendants. (See *Allan*, *supra*, 51 Cal.App.4th at pp. 1368-1369, 1371, 1372.)

b. *Misrepresentation regarding the blue slope*

Regarding defendants' alleged misrepresentation about the difficulty and risk of danger of the blue slope as compared to the green slope, as we have explained, the evidence reflects that uncle and cousin told plaintiff only that "the blue slope was not much harder than the green slope." The only evidence plaintiff provided about slope difficulty that is specific to the blue slope he skied is concerning the *beginning* portion of the slope: the initial angle of the slope was several degrees steeper than the available green slopes, the turn where plaintiff skied out of bounds was almost a 90 degree turn, and the slope began at the top of a mountain that provided a 360 degree, "awe-inspiring" view which may be intimidating for beginner skiers. Although plaintiff provided evidence that more advanced trails are generally steeper, less wide, and require sharper turns within a shorter distance, plaintiff provided no evidence regarding the particulars of the blue slope that uncle and cousin took him on, other than as to the very beginning portion of the slope. In addition, as the trial court observed in connection with uncle's summary judgment motion, a blue slope is the next most challenging level after a green slope. In view of the record, plaintiff fails to raise a triable issue as to whether it was a misrepresentation for defendants to state that "the blue slope was not much harder than the green slope."

Further, as we explained above, even assuming this statement was not an accurate description of the slope that plaintiff skied on, the factors that may have contributed to plaintiff's injury, including the steepness of the slope, the snow conditions, and the signpost that plaintiff

collided with, are all "well catalogued" factors that contribute to the inherent risk of injury in skiing. (*Lackner*, *supra*, 135 Cal.App.4th at p. 1202; see *Towns*, *supra*, 147 Cal.App.4th at p. 473.) Based on the declaration of plaintiff's own expert, the presence and nature of these factors must have been visible to plaintiff to the same extent as uncle and cousin before any of them skied down the slope. (See *Connelly, supra,* 39 Cal.App.4th at p. 12 ["[b]ecause of the obvious danger, the very existence of a ski lift tower serves as its own warning"]; *Souza*, *supra*, 138 Cal.App. 4th at p. 271 [large metal snowmaking hydrant served as its own warning to skier].) To the extent uncle or cousin incorrectly assessed the level of difficulty of the blue slope where they took plaintiff, such "subjective judgment about the difficulty of conditions [] are in no way 'outside the range of the ordinary activity involved in the sport.' " (*Kane*, *supra*, 88 Cal.App.4th at p. 214.)

c. *Failure to take plaintiff on green slope as planned*

Regarding plaintiff's allegation and evidence that uncle and cousin failed to take him on a green slope because it was crowded and instead took him on a blue slope, plaintiff fails to raise a triable issue regarding reckless conduct by uncle and cousin. As we have explained, uncle knew plaintiff had skied before, plaintiff possessed sufficient ability to ski the green slopes by himself and without falling, plaintiff was interested in challenging himself and trying a blue slope, a blue slope is the next level of difficulty above a green slope, and plaintiff's injury resulted from him not meeting the challenge and the risks that are inherent in skiing. Providing plaintiff with this challenge and any assessment error on uncle's or cousin's part as to plaintiff's level of ability or the difficulty presented by the blue slope are insufficient to raise a triable issue as to reckless conduct by them. (*Allan*, *supra*, 51 Cal.App.4th at pp. 1368-1369, 1371, 1372; *Kane*, *supra*, 88 Cal.App.4th at p. 214.)

Plaintiff cites *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817, and *Tan v. Goddard* (1993) 13 Cal.App.4th 1528, for the proposition that uncle and cousin, as plaintiff's supervisors, had a duty to take plaintiff on a "natural progression of improvement" and not to take plaintiff to a slope that was beyond his capability. (Italics and internal quotations omitted.) Plaintiff further argues that "a complaint raising the issue of coach or instructor *negligence* during training" does not implicate the primary assumption of risk doctrine. (Italics added.)

We are not persuaded by plaintiff's argument. First, as we have explained, taking plaintiff to the blue slope was the natural progression after plaintiff had successfully skied the green slopes alone and without falling. Second, it is "inconsistent with [California Supreme Court precedent] to impose liability on a coach or instructor on the basis of ordinary negligence in urging students to go beyond their current level of competence." (*Kahn*, *supra*, 31 Cal.4th at p. 1009.) "[T]he imposition of a duty to avoid challenging a student to perform beyond his or her current capacity would have a chilling effect on the enterprise of teaching and learning skills that are necessary to the sport. . . . [A] coach or athletic instructor must challenge his or her students, and . . . learning itself can be a risky process, sometimes unavoidably so. . . . [W]hile a student is engaged in the process of learning, he or she frequently is at greater risk than a proficient athlete would be, and a coach does not have a duty to eliminate all the risks presented by inexperience." (*Id.* at pp. 1010-1011.) Thus, "[i]n 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' [citation] involved in teaching or coaching the sport." (*Id.* at p. 1011, italics added.) Here, plaintiff fails to show a triable issue of reckless conduct based on uncle and cousin taking him to a blue slope instead of a green slope.

d. *Abandoning plaintiff on the blue slope*

Lastly, regarding uncle and cousin's alleged abandonment of plaintiff on the blue slope, as we have explained plaintiff fails to provide sufficient evidence showing that uncle and cousin intended to leave him unsupervised as he skied down the slope. To the contrary, the evidence reflects that uncle and cousin planned to ski behind plaintiff so that they could watch him. They lost sight of him and ended up skiing to the bottom of the hill without him. Plaintiff fails to present sufficient facts showing that this conduct by uncle and cousin, which resulted in plaintiff skiing by himself, was " 'so reckless as to be totally outside the range of the ordinary activity involved in the sport' " (*Kahn*, *supra*, 31 Cal.4th at p. 1005) or "involved in teaching or coaching the sport" (*id.* at p. 996).

e. *Other evidence of purported reckless conduct*

The declarations by plaintiff's ski expert, Heywood, in opposition to the summary judgment motions are also insufficient to raise a triable issue regarding whether defendants' conduct was " 'so reckless as to be totally outside the range of the ordinary activity involved in the sport' " (*Kahn*, *supra*, 31 Cal.4th at p. 1005) or "involved in teaching or coaching the sport" (*id.* at p. 996).

Much of Heywood's opinion is based on the assumption that plaintiff was a beginner-level skier who did not belong on the blue slope. Similar to the declaration by plaintiff's mother, Heywood fails to articulate why plaintiff was not ready for the challenge of a blue slope despite having successfully skied the green slopes. Providing plaintiff with the challenge of the blue slope and any assessment error by defendants regarding plaintiff's ability to handle the blue slope are insufficient to raise a triable issue regarding recklessness. (*Allan*, *supra*, 51 Cal.App. 4th at pp. 1368-1369, 1371, 1372; *Kane*, *supra*, 88 Cal.App.4th at p. 214.)

Heywood opines that father should have requested that uncle and cousin "actually remain with" plaintiff while skiing and "take proper care and caution with the minor, beginner skier." Regarding uncle and cousin, Heywood opines that they should have done certain things while skiing the blue slope with plaintiff, such as remaining in verbal contact, skiing next to plaintiff, and/or skiing one in front and one behind him to "buffer him from danger."

As we have explained, the record reflects that uncle and cousin planned to ski with plaintiff, but that they separated from him when they actually started skiing down the slope. Plaintiff fails to show a triable issue regarding whether this unintentional separation was the result of conduct by uncle and cousin that was " 'so reckless as to be totally outside the range of the ordinary activity involved in the sport' " (*Kahn*, *supra*, 31 Cal.4th at p. 1005) or "involved in teaching or coaching the sport" (*id.* at p. 996).

Likewise, with respect to father, we do not believe a triable issue of recklessness exists regarding his basic request to uncle and cousin to take plaintiff skiing. Uncle and cousin were adult relatives of plaintiff and experienced skiers. Uncle had also taught another person to ski. Father knew plaintiff had skied before, and father's understanding based on his discussion with

plaintiff was that plaintiff would be skiing on a green or blue slope. Father did not want plaintiff to be bored and knew that plaintiff was agreeable to being challenged on the slopes. Plaintiff had already successfully skied on the green slopes. There is no evidence in the record to suggest that father had any reason to believe uncle or cousin would not exercise due care with respect to plaintiff skiing with them, such as by deliberately abandoning plaintiff on a slope that was outside of his skill level. Based on the record, plaintiff fails to demonstrate a triable issue of reckless conduct by father, including regarding father's failure to specifically request that uncle and cousin "actually remain with" plaintiff or "take proper care and caution" with plaintiff.

In view of our determination that plaintiff's expert's declaration fails to establish a triable issue regarding reckless conduct by defendants, we need not address plaintiff's contentions on appeal regarding erroneous rulings the trial court purportedly made regarding the declaration. Any error was not prejudicial.

Lastly, we understand plaintiff to contend that the trial court erred by limiting and/or misconstruing his theory or theories of liability. Based on the trial court's detailed written orders, we do not believe the trial court misunderstood plaintiff's arguments in opposition to the summary judgment motions. Moreover, on appeal we conduct a de novo review of the trial court's decision to grant the summary judgment motions, not its rationale. (*Aguilar*, *supra*, 25 Cal.4th at p. 860; *Ramalingam*, *supra*, 151 Cal.App.4th at p. 498.)

Based on our de novo review, we conclude that the trial court properly granted defendants' summary judgment motions. The undisputed evidence reflects, among other facts, that plaintiff had the ability to successfully ski a green slope by himself and without falling, and that he was permitted by father, and taken by uncle and cousin, to ski a slope of the next level of difficulty – a blue slope – where he suffered injury after failing to negotiate a turn and hitting a signpost. Defendants had no duty to protect plaintiff from the risks inherent in skiing, including the risk of injury from terrain variations, surface snow or ice conditions, or a collision with a plainly visible object. (*Lackner*, *supra*, 135 Cal.App.4th at p. 1202.) Plaintiff failed to provide sufficient evidence of a triable issue regarding conduct by defendants that was " 'so reckless as to be totally outside the range of the ordinary activity involved in the sport' " or "involved in teaching or coaching the sport." (*Kahn*, *supra*, 31 Cal.4th at pp. 996, 1005.)

Our determination that the trial court properly granted summary judgments in this case is supported by the policy behind the primary assumption of risk doctrine, that is, to avoid chilling vigorous participation in or sponsorship of skiing, and to avoid chilling the activity of teaching and learning skills that are necessary to skiing. (*Nalwa*, *supra*, 55 Cal.4th at pp. 1156-1157; *Kahn*, *supra*, 31 Cal.4th at pp. 1007, 1010-1011.) To conclude otherwise in this case could have a chilling effect on parents' and other adults' sponsorship of recreational skiing by minors, including in the context of family outings such as in this case.

V. DISPOSITION

The judgments in favor of defendants Gordon Kin, Johnson Kin, and John Sun are affirmed. The parties are to bear their own costs on appeal.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.