Filed 7/25/18 Bridges v. Bellarmine-Jefferson High School CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JORDAN BRIDGES et al., Plaintiffs and Appellants, v. BELLARMINE-JEFFERSON HIGH SCHOOL et al., Defendants and Respondents.	B278124 (Los Angeles County Super. Ct. No. BC531049)

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Fields Goldstein, Judge. Affirmed.

Carpenter, Zuckerman & Rowley, John C. Carpenter and Gary S. Lewis, for Plaintiffs and Appellants.

Polsinelli, Daniel W. Bir, Mathew R. Groseclose, and David K. Schultz, for Defendants and Appellants.

Plaintiff and appellant Jordan Bridges (Jordan), a student at Bellarmine-Jefferson High School (Bellarmine-Jefferson), sustained a head injury while playing in a seven-on-seven non-contact football scrimmage. The opposing team was wearing soft, padded head coverings (like the parties, we will call them "soft helmets") and Jordan's team was not. Jordan ran to catch a pass, he appeared to get pushed, and, as he fell to the ground, an opposing player accidentally kneed Jordan in the head while attempting to leap over him to avoid contact. Jordan and his parents (collectively, plaintiffs) sued Bellarmine-Jefferson and other defendants[1] on negligence and breach of statutory duty theories. The trial court granted summary judgment for defendants, finding the primary assumption of the risk doctrine barred relief because defendants had not increased the risk of playing football beyond that inherent in the sport. We consider whether the grant of summary judgment was proper, focusing our attention on plaintiffs' chief contention on appeal: that defendants increased the risk of harm to Jordan by permitting him to play against a team wearing soft helmets—which plaintiffs theorize made the opposing players more aggressive.

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[1] The other defendants are the Roman Catholic Archbishop of Los Angeles, the Archdiocese of Los Angeles, and Archbishop Jose J. Gomez (defendants), plus the Los Angeles Unified School District (LAUSD) which was erroneously named as a defendant because plaintiffs mistakenly believed the other team participating in the scrimmage was fielded by an LAUSD school.

I. BACKGROUND

A. Pertinent Facts

In seven-on-seven football, seven offensive players attempt to complete pass plays (there are no running plays) and seven defensive players attempt to defend. Seven-on-seven is a "non-contact" exercise; tackling is not permitted. Play is halted when a pass is incomplete or intercepted, or when an offensive player with the ball is touched by a defensive player. Players are not permitted to wear hard plastic helmets like professionals wear. Scholastic league rules, however, permit players to wear soft helmets if they choose to do so.

During the summer of 2012, Jordan had just finished his freshman year at Bellarmine-Jefferson. He previously played two seasons of non-contact football, and he joined Bellarmine-Jefferson's summer seven-on-seven team, coached by David Machuca (Machuca), who was also head coach of the school's regular football team.[2]

During a scrimmage held at Panorama High School on June 7, 2012, Jordan played wide receiver. Machuca and five assistants supervised and coached Jordan's team. Their opponent in the scrimmage was a team from Granada Hills Charter High School (Granada Hills). The players from Granada Hills wore soft helmets during the scrimmage. Jordan described

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[2] When later deposed during this litigation, Machuca stated the "summer program is completely different than football in September through December . . . ." According to Machuca, the summer program is geared toward "learning fundamentals" and "learning techniques." He emphasized seven-on-seven is "not competitive" and is intended to be "a learning environment."

the soft helmets as "like wearing a cap" or "like a beanie that covered your ears" with "little pads on top of your head." The Bellarmine-Jefferson players were not wearing soft helmets.

At some point during the scrimmage, Jordan was running to catch a pass. A Granada Hills player appeared to push Jordan in the back. A second Granada Hills player had been running toward Jordan, and as Jordan fell to the ground, that second player attempted to jump over Jordan, apparently in an effort to avoid contact. The second Granada Hills player's knee made contact with Jordan's head, and Jordan suffered a head injury.

B. The Operative Complaint

Plaintiffs filed their original complaint against defendants in December 2013, and filed their first amended complaint (the operative complaint) a year later. Jordan alleged causes of action for "negligence including negligent supervision and care of students," breach of mandatory statutory duty, and negligent hiring, training, supervision, and retention.[3]

The operative complaint included allegations intended to establish defendants unnecessarily increased the risk of harm arising from participating in the seven-on-seven scrimmage. Specifically, it stated defendants "increased the risk of harm and amount of danger posed to those playing football" by "order[ing]" the Bellarmine-Jefferson players, including Jordan, to play without protective equipment while "simultaneously order[ing]" the players from the other school "to play with protective

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[3] Jordan's parents alleged a single cause of action for negligent infliction of emotional distress against all defendants.

equipment, including helmets." The complaint further alleged Jordan had suffered a severe traumatic brain injury.

C. Defendants' Motion for Summary Judgment

1. The motion and supporting evidence

Defendants moved for summary judgment and argued the primary assumption of the risk doctrine barred plaintiffs' claims. The doctrine applied, they contended, because incidental collisions are inherent in seven-on-seven football and defendants had not done anything to increase the risk inherent in the sport.

In support of their motion, defendants submitted declarations from Christopher Fore (Fore), the varsity football coach for Sultana High School who had fifteen years of football coaching experience and was an expert on the rules and regulations of the governing scholastic sports league, the California Interscholastic Federation (CIF); Machuca, the Bellarmine-Jefferson coach who had fifteen years of experience playing and coaching football; and Adrian Beltran (Beltran), the head football coach at Panorama High School who was present at the scrimmage in question (because the game was played on the field at his school) and who had seven years of experience playing and coaching football. The declarations from all three men stated pro-style football helmets and other hard helmets are not permitted in seven-on-seven football, soft helmets are not *required* by CIF regulations and most seven-on-seven teams are not provided with soft helmets, but CIF regulations do *permit* players to wear soft helmets during seven-on-seven games.

Fore, Machuca, and Beltran also stated incidental contact can occur during seven-on-seven football, and such contact can result in injuries. All three further declared that because

"[a]pplicable CIF regulations do permit players to wear padded head coverings during seven-on-seven football," "it is not uncommon for scrimmages to occur in which some players wear the coverings, and others do not."

2. Plaintiffs' opposition and evidence, and defendants' evidentiary objections

Plaintiffs opposed defendants' motion for summary judgment, arguing (1) defendants had not satisfied their initial summary judgment burden (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*) ["the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact"]) and (2) regardless, there was a material factual dispute as to whether defendants had increased the inherent risks involved by allowing Jordan to play against a team wearing protective headgear (which, if true, would require a jury to decide whether primary assumption of risk principles should apply).

In support of their opposition, plaintiffs presented an expert declaration from Gavin Huntley-Fenner (Huntley-Fenner), a human factors and safety consultant, and excerpts from coach Machuca's deposition. They also presented excerpts from the depositions of Luis Machuca and John Matheus, Bellarmine-Jefferson's quarterbacks coach and principal, respectively.

Huntley-Fenner's declaration described his expert qualifications and disclosed he "reviewed documentation relating to this matter, including the deposition transcripts of Jordan Bridges, Aaron Bridges [Jordan's father], Claudia Bridges [Jordan's mother] and . . . Machuca." Huntley-Fenner opined "the fact that the opposing players wore protective headgear

made them play more aggressively and thereby increased the possibility of making injurious contact with Jordan Bridges' team than would be the case if they were not wearing such gear." He explained his opinion as follows: "Being protected, the opposing player's risk tolerance would increase as they would believe that they would be less likely to suffer injury . . . . thus tending to act more aggressively and be more likely to make aggressive contact . . . ." Huntley-Fenner further opined "that having Jordan Bridges play against a team that was wearing soft padded headgear increased the risks inherent in the activity and changed the nature of the game." Defendants objected to these statements in Huntley-Fenner's declaration, arguing they lacked foundation, were improper expert opinion, lacked proper bases for expert opinion, and were irrelevant.

The excerpts plaintiffs submitted from Machuca's deposition concerned his answers to questions about the possible effect of wearing protective gear on a player's aggressiveness. The submitted excerpts were these:

> Q. BY [plaintiffs' counsel]: Would you agree that you played—the individual football player plays the game differently when they wear protective gear versus not wearing protective gear; true?
> [Defense counsel]: Same objections.
> THE WITNESS: Yeah, that's true.
> Q. BY [plaintiffs' counsel]: Okay. And when you are wearing protective gear you play more aggressively; true?
> [Defense counsel]: Vague and ambiguous.
> Overbroad. Calls for speculation. Calls for an expert opinion.
> THE WITNESS: I assume so, yes.

[¶] . . . [¶]

Q. BY [plaintiffs' counsel]: But isn't the point of wearing protective gear so if you have a collision you will get less hurt?

[Defense counsel]: Same objections.

THE WITNESS: Yes.

Q. BY [plaintiffs' counsel]: Okay. And so, when you are wearing protective [*sic*] knowing that you can have a collision and get less hurt, you'll play more aggressively; true?

[Defense counsel]: Same objections.

THE WITNESS: True.

Defendants objected to receiving these excerpts in evidence. Among other proffered reasons, defendants contended the excerpts were vague and ambiguous, irrelevant, and called for speculation.

The deposition excerpts plaintiffs submitted from Luis Machuca and Matheus addressed their familiarity with the use of soft helmets in seven-on-seven activities. Luis Machuca testified he could recall seeing a team wearing them once, at a tournament in 2009. Matheus, the school principal, had not known soft helmets existed until the incident.

3. The trial court's ruling

The trial court granted defendants' summary judgment motion.

As to defendants' evidentiary objections, the trial court sustained both, i.e., those to Huntley-Fenner's declaration and those to Machuca's deposition testimony. The court's ruling indicated only that the objections were "sustained," but the court

explained during the summary judgment hearing that it "thought the experts' declarations were hypothetical . . . . speculative opinions not based on this [scrimmage]."

As to the summary judgment calculus, the court found the primary assumption of the risk doctrine applied (and barred recovery) because Jordan voluntarily participated in seven-on-seven football, and being struck in the head by the knee of a defensive player, "i.e., a participant's normal energetic conduct," is an risk inherent to the sport. The trial court believed "the padded helmets did not . . . increase the inherent risk of accidental contact by making players more likely to play aggressively because aggressive play is an integral part of football" and "there is no evidence that aggressive play led to the Plaintiff's injury." The court found it was "not reasonable to draw an inference from the fact that the other team had padded helmets that this increased or caused a risk of a knee striking the Plaintiff's head when the Plaintiff was knocked down while attempting to catch a pass."

The trial court entered judgment in favor of all defendants.[4]

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[4] LAUSD filed its own motion for summary judgment, arguing it was immune from liability under Government Code section 831.7 because it had only provided the grounds on which the seven-on-seven scrimmage was conducted. LAUSD also argued the doctrine of primary assumption of the risk barred plaintiffs' claims. Plaintiffs did not oppose LAUSD's motion. At the summary judgment hearing, plaintiffs acknowledged they did not oppose the motion because LAUSD was " the wrong defendant," and "[i]t wasn't their team playing the scrimmage." The trial court granted LAUSD's motion and plaintiffs do not challenge the grant of that motion on appeal.

II. DISCUSSION

There can be no dispute that the primary assumption of the risk doctrine generally applies to seven-on-seven football games. We need only decide whether defendants carried their initial summary judgment burden to make a prima facie showing that the doctrine applies here (because they had not increased the risk of playing seven-on-seven football), and if so, whether plaintiffs' evidentiary showing nevertheless requires a trial to resolve factual questions concerning the doctrine's applicability. Our answer to both questions compels affirmance. Accidental collisions and aggressive play by opponents are ordinary features of seven-on-seven football and risks inherent to the sport. On the admissible evidence, there is no dispute defendants did nothing to increase the risk by permitting their players to scrimmage against a team wearing soft helmets—as permitted by CIF rules.

A. Standard of Review

A party is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see also *Aguilar*, *supra*, 25 Cal.4th at p. 843.) A defendant may move for summary judgment on the ground the plaintiff's action lacks merit. (Code Civ. Proc., § 437c, subd. (a)(1).) The defendant bears an initial burden of production to come forward with evidence establishing a prima facie case that the plaintiff has not established, and reasonably cannot be expected to establish, one or more elements of the cause of action in question. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at pp. 850-851 ["A prima facie showing is one that is sufficient to support the

position of the party in question. [Citation.] No more is called for"].) If the defendant carries that burden, the plaintiff may defeat summary judgment by presenting evidence "that a triable issue of one or more material facts exists as to the cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 850.)

We review a grant of summary judgment de novo. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499.) We consider the record before the trial court at the time of its ruling, with the exception of evidence the trial court appropriately excluded. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 367-368.) Because the trial court granted summary judgment for defendants, "we liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

B. Primary Assumption of the Risk in Sports

"'Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), some activities—and, specifically, many sports—are inherently dangerous. Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.' (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003[(*Kahn*)].) The primary assumption of risk doctrine, a rule of limited duty, developed to avoid such a chilling effect. [Citations.]" (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 (*Nalwa*).)

"Primary assumption of the risk arises when, as a matter of law and policy, a defendant owes no duty to protect a plaintiff from particular harms. [Citation.] Applied in the sporting context, it precludes liability for injuries arising from those risks deemed inherent in a sport; as a matter of law, others have no legal duty to eliminate those risks or otherwise protect a sports participant from them. [Citation.] Under this duty approach, a court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant's role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161 (*Avila*).)

"[C]oaches and instructors have a duty not to increase the risks inherent in sports participation" (*Avila*, *supra*, 38 Cal.4th at p. 162), as well as a duty "not to increase the risks inherent in the learning process undertaken by the student." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482.) However, "this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether . . . .' [Citations.]" (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436-1437.) Nor does it impose a duty to decrease the risks inherent in a sport. (*Avila*, *supra*, at p. 166.)

"'When a defendant moves for summary judgment on the basis of implied assumption of the risk, he or she has the burden of establishing the plaintiff's primary assumption of the risk by demonstrating that the defendant owed no legal duty to the plaintiff to prevent the harm of which the plaintiff

complains. [Citation.]' (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395[ ].)" (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 656.) A court analyzing whether the defendant owes a duty to the plaintiff in a sports setting "is to determine the question of duty as a function of the scope and definition of a given active sport's inherent risks." (*Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1632-1633.) This initial determination often leads to a second analysis regarding the defendant's duty not to increase the risks of the activity beyond those inherent in the sport. "This second determination of duty, however, still hinges upon the trial court's determination of the question of duty in the first instance, by defining the risks inherent in the sport at issue." (*Ibid*.)

Plaintiffs do not dispute the primary assumption of the risk doctrine generally applies to participation in seven-on-seven football. Nor do they argue defendants have some duty other than a duty not to increase the risks inherent in participation. Rather, plaintiffs contend defendants failed to meet their initial summary judgment burden of production. Specifically, they contend defendants were required to come forward with evidence specifically demonstrating the disparity in protective gear did not increase the risk of harm. In considering the scope of defendants' initial burden of production, we first discuss the risks inherent in seven-on-seven football.

C. Seven-on-Seven Football's Inherent Risks

In analyzing the risks inherent in seven-on-seven football, we "'may consider not only [our] own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced

by the parties on a motion for summary judgment.' (*Nalwa*, *supra*, 55 Cal.4th at pp. 1158-1159.)" (*Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 656; see also *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 538-539; *Honeycutt v. Meridian Sports Club, LLC* (2014) 231 Cal.App.4th 251, 257.)

1. Accidental collisions and aggressive opponents are inherent risks of seven-on-seven football

Both California cases considering the risks inherent in football and common experience with the sport confirm accidental collisions and aggressive play are inherent.

In *Knight v. Jewett* (1992) 3 Cal.4th 296, 318, our Supreme Court analyzed the potential for tort liability arising out of a game of touch football in which the defendant, who was playing roughly, collided with the plaintiff, knocked her down, and stepped on her hand. (*Ibid.*) In concluding the rough play and resulting injury were part of the inherent risk of the activity, the court noted, "in the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior." (*Ibid.*)

Even more analogous to the facts here, in *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 433 (*Fortier*), the Third Appellate District addressed a coach's liability for injuries sustained during an advanced football class in which students performed various non-contact drills, including a seven-on-seven drill. (*Id.* at pp. 432-433.) Because the drills were non-contact exercises, helmets and pads were neither required nor provided. (*Id.* at p. 433.) Fortier was injured when another player's elbow collided with his face as they both reached for the football. (*Ibid.*) The trial court granted summary

judgment applying primary assumption of risk principles, and the Court of Appeal affirmed, holding the injuries suffered by the plaintiff were inherent in the sport of football. (*Id.* at p. 434.) The Court of Appeal reasoned that "[w]hether in the seven-on-seven drill, or even a game such as touch or flag football, 'non-contact' means no tackling. It is not and in the nature of the sport cannot be a guarantee of absolutely no contact." (*Id.* at pp. 437-438.) The *Fortier* court also concluded encouraging participants to be aggressive during the drills did not increase the inherent risk of the sport because "[f]ootball is a sport which is characterized by aggressive play." (*Id.* at p. 436.)

The reasoning in these cases is consistent with common experience. Even where no tackling is permitted or intended, football players run at fast speeds and quickly change directions; balls are thrown; chaos sometimes reigns. Accidents are bound to happen and aggression is often a primary ingredient of success. That Bellarmine-Jefferson's seven-on-seven program was "noncompetitive" does not change these inherent features of the game, meaning, the inevitability of accidental collisions or frequent encounters with an aggressive opponent. Rather, these risks are inherent in many noncompetitive "vigorous, athletic activit[ies]," including waterskiing (*Ford v. Gouin* (1992) 3 Cal.4th 339, 345), and also in practices and warm-up drills, which are meant "to place the players in situations that replicate game conditions" (*West v. Sundown Little League of Stockton, Inc.* (2002) 96 Cal.App.4th 351, 360; see also *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 944).

Plaintiffs argue the *Fortier* court's description of football, particularly its characterization of football as an inherently aggressive sport, is inapposite here because of factual differences

between the seven-on-seven drill in *Fortier* and the scrimmage in which Jordan played. Plaintiffs contend the risks inherent in a competitive football game do not exist in a non-competitive football drill, and they assert accidental collisions cannot be deemed an inevitable part of the activity in which Jordan was injured. Common sense requires us to disagree. As the *Fortier* court explained, in seven-on-seven drills, "[w]ide receivers run pass patterns and attempt to catch footballs passed to them. Defensive backs react, attempting to cover the receivers and knock down or intercept the passes intended for the receivers. Neither the game of football nor the particular exercise in which plaintiff was injured [a seven-on-seven drill], which is an integral part of the game, can be authentically performed if the participants are not carrying out their respective roles aggressively." (*Fortier*, *supra*, 45 Cal.App.4th at pp. 436-437.) That characterization seems even truer here, where Jordan's team was playing in a scrimmage against another school, than it did in *Fortier*, where the plaintiff was participating in a class exercise. A version of football that does not involve the inherent risks of accidental collisions and aggressive play would be a largely unrecognizable version of the game.

2. Differing protective gear is an inherent risk of seven-on-seven

Having concluded seven-on-seven football involves the inherent risk of accidental collision, and thus the attendant risk of injury, we must also consider whether the specific risk of which Jordan complains—playing against a team wearing soft helmets when he was not wearing comparable protective headgear—is inherent to seven-on-seven. While no case we have found

addresses this specific question, a handful of cases have addressed whether the absence of a safety precaution is a normal, or inherent, aspect of an activity. Though the contexts in which the cases analyze the question differ, they all employ a similar analytical framework and look to the industry norm or standard when determining whether a risk is inherent.

For example, in *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, the court considered whether a baseball organizer's provision of helmets without face guards rather than helmets with face guards increased the risk of the sport. In affirming application of primary assumption of the risk to bar liability, the court noted "the face guard which Balthazor argues should have been required was not part of the normal safety equipment used by the League." (*Id.* at p. 52; see also *id.* at p. 51 ["each factor was in reality a normal aspect of Little League baseball as played by youngsters everywhere"].)

Similarly, in *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, the court analyzed whether the placement of yardage markers increased the risk of harm to golf players. In concluding it did not, the court noted "[t]he standards in the industry define the nature of the sport" and explained the yard markers at issue were "common in the golf industry" and the system used by the defendant could be found on 20 to 25 percent of golf courses nationwide. (*Id.* at pp. 37-38.) Other cases have used a similar analytical framework even when concluding the particular risk complained of was *not* inherent in the sport or activity. (Compare *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 176 [assumption of risk did not excuse injury where marathon organizer failed to provide sufficient quantities of water and electrolyte replacement because it was customary

for organizers to provide such fluids] with *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1086-1087 [assumption of risk did not apply where motocross track lacked standard safety mechanism].)

Nevertheless, plaintiffs cite a handful of cases that they contend support the proposition that a risk inherent to an activity may be increased, and thus no longer fall within the rubric of an inherent risk, by behavior that makes the risk more likely to occur. We disagree with plaintiffs' characterization of these cases. The determinative issue in the opinions plaintiffs cite is not whether the behavior makes an inherent risk more likely to occur, but whether the behavior complained of is a normal aspect of the sport or activity. In each of the cases plaintiffs cite, the behavior that allegedly increased the plaintiff's risk was behavior outside of the norm for the activity. (See *Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1060 [defendant failed to present evidence demonstrating construction of stage with gaps between the wall and the stage was within industry standard]; *Freeman v. Hale*, *supra*, 30 Cal.App.4th at p. 1396 [consumption of alcoholic beverages was not within range of ordinary activity involved in skiing]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [mascot's distracting antics were not an essential or integral part of baseball game]; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 500 [evidence presented on summary judgment was insufficient to determine whether golfer's behavior was so reckless as to be totally outside the range of ordinary activity involved in the sport].) None of these cases is persuasive here.

Our analysis of the issue under consideration accordingly turns on whether differences in protective gear are a normal

aspect of seven-on-seven football. The record contains the following pertinent uncontroverted facts. CIF regulations, which apply to high school football, permit—but do not require—seven-on-seven teams to wear soft helmets. Most seven-on-seven teams are not provided with soft helmets. And "it is not uncommon for scrimmages to occur in which some players wear [soft helmets], and others do not." Thus, while not all scrimmages involve one team wearing optional safety gear while the other does not, the occurrence is "not uncommon," and CIF has not seen fit to prohibit it. In other words, differences in optional safety gear is a normal aspect, and an inherent risk, of seven-on-seven football.

D. Summary Judgment for Defendants Was Proper

1. Defendants satisfied their initial burden of production

As our discussion thus far has already foreshadowed, the evidence submitted with defendants' summary judgment sufficed to establish a prima facie case that the injury Jordan suffered fell within the inherent risks of seven-on-seven football, and thus, that primary assumption of risk principles compelled a judgment in their favor.

Plaintiffs maintain defendants failed to meet their initial burden because they did not produce any evidence that demonstrated allowing Jordan to play against a team wearing soft helmets did not increase the likelihood of a collision[5] and

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[5] On reply, plaintiffs appear to shift the focus of their theory, arguing defendants failed to establish the inherent risks of seven-on-seven because they failed to present evidence establishing "the actual activity in which the plaintiff was injured." This argument fails for two reasons. First, arguments raised for the

because they believe the trial court "necessarily concluded" the only way to increase the risks involved in a sport is to create a new risk. Neither of these arguments is persuasive.

Rather than attempting to prove a negative, defendants could have, and did, produce evidence (specifically the evidence concerning CIF regulations and related testimony) demonstrating the lack of parity in optional safety gear was an inherent part of seven-on-seven football much the same way the use of kneepads or goggles might be in basketball (or an elbow guard while batting during a baseball game might be). In addition, the trial court's grant of summary judgment does not mean the trial court "necessarily concluded" the only way to increase the risks involved in a sport is to create a new risk. As discussed above, an inherent risk may be increased if the activity that allegedly increased the risk violates some pertinent standard or norm. Defendants made out a prima facie case that the activity at issue here was, in contrast, within the norm.

The burden, therefore, properly shifted to plaintiffs to provide evidence of a triable issue of material fact as to primary

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first time in reply are waived. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6.) Second, to the extent plaintiffs argue defendants failed to properly explain the nature of the activity because they did not describe it as "non-competitive" or "cooperative," the evidence plaintiffs submitted in opposition to the summary judgment motion filled in any such gaps. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 751 [trial court "must consider all of the papers before it," and it may find the opposing party's papers, combined with moving party's papers, present sufficient evidence to shift the burden of production to the opposing party].)

assumption of the risk. Because we conclude the trial court's evidentiary rulings were proper, plaintiffs did not carry their burden; plaintiffs had no admissible evidence to defeat application of the primary assumption of the risk doctrine.

2. The trial court correctly sustained defendants' evidentiary objections, which left plaintiffs unable to carry their burden

Plaintiffs contend the trial court erred by sustaining defendants' objections to portions of Huntley-Fenner's declaration and excerpts from Machuca's deposition. Defendants, in turn, argue the evidence was properly excluded for a litany of reasons. We find persuasive the arguments that the key paragraphs of Huntley-Fenner's declaration were foundationless and speculative while the Machuca deposition excerpts were irrelevant and inadmissible for other reasons.

Although our Supreme Court has not yet settled the standard of review for summary judgment evidentiary rulings, "[a]ccording to the weight of authority, appellate courts 'review the trial court's evidentiary rulings on summary judgment for abuse of discretion.'" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852; see also *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.) Although we doubt our conclusion would be any different under a de novo standard, we follow the weight of authority and review the rulings at issue here for abuse of discretion.

In paragraph nine of his two-page declaration, Huntley-Fenner opined "the fact that the opposing players wore protective headgear made them play more aggressively and thereby increased the possibility of making injurious contact with Jordan

Bridges' team than would be the case if they were not wearing such gear." He further opined in paragraph ten "that having Jordan Bridges play against a team that was wearing soft padded headgear increased the risks inherent in the activity and changed the nature of the game." These two declaration paragraphs, which were the subject of defendants' objection, lacked sufficient foundation and were speculative.[6] Huntley-Fenner had not spoken to any member of the purportedly aggressive opposing Granada Hills team (or read testimony by any Granada Hills player or coach, as none were deposed or submitted declarations). The only proffered foundation for his opinion concerning aggressive play by Granada Hills players, offered based on his "education, background, training and experience," was his review of statements by those affiliated with *Bellarmine-Jefferson*, along with two general paragraphs summarizing his resume.[7] This was

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[6] The latter of these statements in paragraph ten was also improper for another reason. "Courts ordinarily do not consider an expert's testimony to the extent it constitutes a conclusion of law . . . ." (*Kahn*, *supra*, 31 Cal.4th at p. 1017.)

[7] In full, these paragraphs stated: "2. I am a human factors and safety consultant. I have a bachelor of arts degree in cognitive sciences from Vassar and a Ph.D. in brain and cognitive sciences from the Massachusetts Institute of Technology. I am a member of the Human Factors and Ergonomics Society (HFES), the Association for Psychological Science and the American Psychological Association, among other professional affiliations. I am a peer reviewer for the HFES, the National Science Foundation, Cognition, Psychological Science and the Psychological Bulletin, among others. I have served on the Irvine Unified School District Board, including two terms as board president. During my tenure on the Board, I participated in risk

insufficient foundation and rendered his opinion speculative. The trial court did not abuse its discretion in excluding the salient paragraphs of Huntley-Fenner's declaration.

As to the excerpts from Machuca's deposition, his answers were given in response to questions that were vague, called for irrelevant testimony as phrased, and otherwise sought to elicit speculation (or would have called for expert testimony supported by a proper foundation). Machuca agreed when asked whether "the individual football player plays the game differently when they wear protective gear versus not wearing protective gear." He also answered "I assume so" when asked if "when you are wearing protective [*sic*] knowing that you can have a collision and get less hurt, you play more aggressively." Whether Machuca would play more aggressively if he were wearing unspecified protective equipment (which he could have imagined to be full pro-style pads and a hard helmet) has no bearing on whether defendants increased the risk of Jordan's football participation by permitting him to participate in a non-contact scrimmage against opponents wearing soft helmets. And whether "the individual football player plays the game differently when they wear

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analysis to limit injuries of high school students involved in sports. [¶] 3. Over the last 20 years I have conducted research, authored papers and lectured in the human factors field, and for the last 12 years I have been a human factors consultant. My education, background and work has provided me with extensive experience in risk perception, risk assessment and human behavior. I have qualified in California courts as an expert in risk perception, safety and human decision-making. A true and correct copy of my curriculum vitae is attached as Exhibit 1 and further outlines my experience."

protective gear" is, as defendants argued in their objection, "not specific to the facts and circumstances of the incident at issue."[8] The trial court did not abuse its discretion in excluding the excerpts.

Without resort to the critical portions of Huntley-Fenner's declaration, plaintiffs are unable to establish a triable issue of material fact relevant to application of the primary assumption of the risk doctrine. They offer only the unavailing argument that the *Fortier* decision (holding primary assumption of the risk applicable to seven-on-seven football) helps rather than hurts their case. Specifically, plaintiffs refer to a portion of *Fortier* in which the court opined wearing football helmets without any other protective gear could increase the number and severity of injuries. (*Fortier*, *supra*, 45 Cal.App.4th at p. 439.) The *Fortier* court, however, was referring to pro-style hard football helmets. While playing with hard football helmets without any other protective gear might increase the risk of a seven-on-seven football game, the observation simply does not apply in this situation.

Summary judgment was properly granted for defendants.

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[8] Of course, this answer by Machuca also does not reveal what the difference in play would be.

DISPOSITION

The judgments are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P.J.

We concur:

MOOR, J.

KIM, J.*

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