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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KRISTIN ELLIOTT,

Plaintiff and Respondent,

v.

CONNECT THE DOTS, INC.,

Defendant and Appellant.

B290888

(Los Angeles County
Super. Ct. No. BC582866)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret L. Oldendorf, Judge. Reversed.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Brittany B. Sutton, Howard A. Slavin, Craig L. Dunkin, Judith J. Steffy and Lann G. McIntyre for Defendant and Appellant.

Kahn Roven, Robert A. Kahn and Jonathan Roven for Plaintiff and Respondent.

Kristin Elliott was injured while performing a cheerleading stunt for a film. She sued the film's producer, Connect the Dots, Inc. (Connect), for negligence. At trial, the trial court refused to instruct the jury on the primary assumption of risk doctrine. The jury returned a verdict for Elliott. Connect appeals, contending that the instructional error requires reversal. We agree.[1]

BACKGROUND

I. Elliott's background

At the time of trial, Elliott was 27 years old and had been doing gymnastics since she was five years old. She began cheerleading competitively in high school, and her team won nationals. Her high school coach described Elliott as the best athlete he had taught. After high school, Elliott continued cheerleading at the University of Memphis. She later returned to California where she had various entertainment-related jobs, including touring with a musical called Bring it On, and performing as a tumbler in a music video. She also worked for U.S.A. Cheer Staff, a cheerleading organization that hosts competitions and summer camps.

II. Production of cheerleading film

Connect produces videos, fashion films, and magazine editorials. In 2013, Connect produced a film highlighting the exploitation and hypersexualization of women in sports, specifically, cheerleading. Kathryn Ferguson directed the film.

Meghan Gallagher worked for Connect and was in charge of producing the film. As part of her production duties, Gallagher

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[1] Connect's motion to lodge deposition transcript and/or to augment the record filed March 25, 2019 is granted.

acted as a liaison between parties involved in the shoot, provided on-set necessities like catering, tents, and equipment, hired people to do hair and makeup, and oversaw the limited budget. She also asked a casting company to send out a notice for experienced cheerleaders. Elliott responded to the casting notice and auditioned for the role. During the audition, Elliott danced and performed a flip. Elliott understood that nobody, including the talent, would be paid. She participated in the project to enhance her portfolio.

According to Gallagher, producers are "the moms on set." When there is a potential for risk on a film, the producer ensures safety. But Gallagher did not make any safety arrangements for this production, such as hiring a stunt coordinator or a cheerleading coach, because she was not anticipating stunts would be performed. The film's storyboard[2] did not include stunts, only ground-based choreography. Had she known performers would be stunting, she would have made the proper safety arrangements before allowing any stunt to go forward.

III. The injury

On the day of filming, August 13, 2013, Ferguson asked the choreographer, Claude Racine, to add a stunt to the routine. Racine asked Elliott and the other performers if they knew how to stunt. They agreed to do a half-elevator in which two cheerleaders would lift Elliott, who would stand on top of their hands at half-level. Although Racine had no experience performing cheerleading stunts, she participated in the half-elevator, holding Elliott's right foot. They successfully practiced

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[2] A storyboard is a frame-by-frame illustration of what the film will capture.

the stunt at first, but Elliott fell during the last practice, breaking her right elbow. Gallagher was not on location when the accident happened, but production coordinator Cassandra Bickman was present.

The radial head in Elliott's right elbow had to be replaced with a metal head, her broken capitellum had to be surgically repaired, and her medial collateral ligament was stretched or torn. Elliott was unable to work for a few months after her elbow surgery. Within the year, the replacement failed, requiring a second surgery. She developed ulnar abutment syndrome which is a painful condition caused by the radius moving towards the elbow making the ulna knock into the side of the wrist. She also developed arthritis in her elbow. Her doctor therefore advised her to alter her activities. Three procedures were medically indicated: an arthroscopy, ulnar shortening osteotomy, and elbow replacement. Depending on when Elliott has elbow replacement surgery, she may require a second, as they last about 15 years.

IV. The lawsuit

Elliott sued Connect for personal injury.[3] The matter proceeded to a jury trial. After Elliott rested, Connect moved for nonsuit under the primary assumption of risk doctrine. The trial court denied the motion and declined to instruct on the doctrine under CACI No. 472. The trial court instead instructed on

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[3] Elliott also sued Ferguson, Racine, Gallagher, and Wes Olson (Connect's owner). Before trial, Elliott dismissed all defendants except Connect and Ferguson and severed the complaint as to Ferguson.

comparative negligence (CACI No. 405) and apportionment of fault (CACI No. 406).

The jury found that Connect was negligent and that its negligence was a substantial factor in causing harm to Elliott. The jury found Elliott not negligent and Ferguson (the director) and Racine (the choreographer) negligent. The jury attributed 35 percent of responsibility to Connect, 50 percent to Ferguson, and 15 percent to Racine. The jury awarded Elliott $2,646,973.73 ($96,973.73 past economic loss; $225,000 future economic loss; $200,000 past noneconomic loss; and $2,125,000 future noneconomic loss).

Connect filed posttrial motions for a new trial and for judgment notwithstanding the verdict, both of which raised the trial court's failure to instruct on the primary assumption of risk doctrine. The trial court denied both motions, reasoning that the nature of the parties' relationship made the doctrine inapplicable as a matter of law.

DISCUSSION

Based on its finding that the relationship between Elliott and Connect showed that Connect owed a duty of care to Elliott, the trial court refused to instruct the jury on the primary assumption of risk doctrine. As we now explain, the doctrine applied and the instruction should have been given.

The general rule is each person has a duty to exercise reasonable care in the circumstances and is liable to those injured by the failure to use such care. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 160.) The assumption of risk doctrine is an exception to the rule. (*Harry v. Ring the Alarm, LLC* (2019) 34 Cal.App.5th 749, 758 (*Harry*).) There are two types of assumption of risk: primary and

secondary. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308–309.) Secondary assumption of risk arises when the defendant owes a duty of care, but the plaintiff knowingly encounters the risks attendant on the defendant's breach of that duty. (*Id.* at p. 315.) Secondary assumption of risk is thus merged into comparative fault. (*Ibid.*)

In contrast, primary assumption of risk is another way of saying no duty of care is owed as to risks inherent in a sport or activity. (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601.) "Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory v. Cott* (2014) 59 Cal.4th 996, 1001–1002 (*Gregory*).) The plaintiff's subjective appreciation or acceptance of the hazard involved is immaterial. (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435.) If the doctrine applies, then it is a complete bar to recovery. (*Gregory*, at p. 1001.) However, while a defendant generally has no duty to eliminate risk inherent in an activity or to protect the plaintiff from such risk, a defendant does have a duty not to increase the risk over and above that inherent in an activity. Whether primary assumption of risk applies is a question of law for a court and is therefore reviewed de novo on appeal. (*Harry*, *supra*, 34 Cal.App.5th at p. 758.)

Cases involving the doctrine often involve sports and recreational activities, where risks cannot be eliminated without altering the fundamental nature of the activity. But it also applies to operators of businesses providing recreational activities posing inherent risk of injury. (See, e.g., *Griffin v. The*

Haunted Hotel, Inc. (2015) 242 Cal.App.4th 490, 498, 504 [fright from haunted house].)

It similarly applies to inherent occupational hazards. Application of the primary assumption of risk doctrine in the occupational context first developed as the firefighter's rule. (*Gregory*, *supra*, 59 Cal.4th at p. 1001.) This application of the doctrine is premised on the unfairness in charging the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to confront. (*Id.* at pp. 1002, 1006.) Thus, in addition to firefighters and police officers, the doctrine has been extended to veterinarians and kennel workers, who assume the risk of being bitten by a dog. (*Id.* at pp. 1002–1003; *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132.)

Gregory, *supra*, 59 Cal.4th 996 applied these principles to an in-home caregiver. In that case, defendant Cott contracted with a home health care agency to care for his wife, who had Alzheimer's. (*Id.* at p. 1000.) Plaintiff caregiver was injured while caring for the wife. *Gregory* found that Alzheimer's patients are not liable for injuries to in-home caregivers, as caregivers are employed specifically to assist these disabled persons, who are known to have combative tendencies.[4] (*Id.* at p. 1011.)

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[4] The majority's rationale rested in part on a conclusion that workers' compensation, rather than tort recovery, was the appropriate means to compensate hired caregivers for injuries caused by Alzheimer's patients but otherwise declined to contemplate the nature and extent of such compensation for caregivers. (*Gregory*, *supra*, 59 Cal.4th at p. 1015 (maj. opn. of Corrigan, J.).) In dissent, Justice Rubin noted that the worker's

Our California Supreme Court in *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532 considered the doctrine's application in the private sector. An oil company employed plaintiff Neighbarger as a safety supervisor. As he had training in industrial firefighting, his duties included responding to emergencies at the plant. (*Id.* at p. 535.) A third party, defendant Irwin, provided maintenance services at the plant and, while providing those services, negligently caused a valve to release a flammable substance. (*Ibid.*) Neighbarger was injured while trying to close the valve. He sued Irwin, which argued that the primary assumption of risk doctrine barred Neighbarger's action. The court declined to apply the doctrine, in part based on its analysis of the parties' relationship. The public purchases exoneration from the duty of care and should not have to pay twice, through taxation and through individual liability, for a firefighter's services. In contrast, a privately employed safety worker lacks a relationship with a third party that justifies exonerating that third party from a duty of care. (*Id.* at p. 543.) The third party has not paid in any way to be relieved of the duty of care toward the private employee. "Having no relationship with the employee, and not having contracted for his or her services, it would not be unfair to charge the third party with the usual duty of care." (*Ibid.*) The primary assumption of risk

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compensation system will not always mitigate damages to such a caregiver where, for example the caregiver is an independent contractor. (*Id.* at pp. 1026–1028 (dis. opn. of Rubin, J.).) The record here similarly suggests that Elliott did not receive workers' compensation benefits. The parties do not address the relevancy, if any, of this fact. As it was not developed below or on appeal, we do not address it.

doctrine thus does not apply "when the defendant is a third party who has not secured the services of the plaintiff or otherwise entered into any relationship with the plaintiff." (*Id.* at p. 545.)

Harry, *supra*, 34 Cal.App.5th 749 applied *Neighbarger*. The defendant homeowner in *Harry* rented his house for events. The rental contract between the defendant and the renter required the renter to have a site representative present at the event. (*Harry*, at p. 753.) Plaintiff, a site representative, was injured when, during an event, he fell off a platform that had no railings. *Harry* found that the primary assumption of risk doctrine did not apply, in part because there was no contract between the defendant homeowner and Harry; as such, the defendant had not paid in any way to be relieved of the duty of care. (*Id.* at p. 761.)

Applying this law here, we first ask, what was the nature of the activity in which Elliott engaged and, second, what was the relationship of Connect and Elliott to that activity? As to the first inquiry, Connect argues that Elliott engaged in the activity of cheerleading. Elliott responds that she was an actress hired to play the role of a cheerleader and to do ground-based dancing. We conclude that Elliott, a cheerleader, was engaged to perform cheerleading activities. She was not just an actress hired for her acting ability. Rather, the casting notice asked for experienced cheerleaders and did not limit the scope of cheerleading activity to ground-based dancing. Moreover, Elliott did a flip during her audition. Thus, Elliott was specifically hired for her cheerleading abilities and to perform cheerleading activities. Her role was therefore more akin to a stuntperson who is hired to engage in a hazardous activity, not to act. That the film's storyboard did not originally include a stunt does not change what Elliott was hired

for and asked to do. When asked to perform a stunt, Elliott agreed. "Being a modern cheerleader requires team work, athletic skill, physical strength, and the courage to attempt a potentially dangerous gymnastic stunt." (*Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1115, fn. 1.) The risk of injury during a dance routine or during a cheerleading stunt was an inherent risk in the job Elliott was asked to do.

The second inquiry necessary to apply the primary assumption of risk doctrine concerns the nature of the parties' relationship to the activity. Elliott and Connect were not coparticipants in a sport or recreational activity. Nor was Connect Elliott's coach or instructor. Elliott was hired—albeit not for pay—to perform in a film. As such, the relationship between the parties occurred in a context akin to employment. Even if Connect was not the party who technically hired Elliott, Connect also was not a third party or an entity with no relationship to Elliott. (See, e.g., *Gordon v. ARC Manufacturing, Inc.* (2019) 43 Cal.App.5th 705.) As producer on the film set, it was responsible for overseeing the project. Moreover, Gallagher admitted that producers are responsible for safety on the set. Connect therefore had a direct relationship with Elliott. Under such circumstances, it is unfair to charge Connect with a duty of care to prevent injury to Elliott arising from the very condition or hazard Elliott was engaged to confront. (See *Neighbarger v. Irwin Industries, Inc.*, *supra*, 8 Cal.4th at p. 542.) That Elliott was not paid money for her services does not alter our conclusion. Application of the doctrine does not turn exclusively on the fact or amount of compensation but is a consideration. (*Gordon*, at pp. 715–716.) She and everyone else involved in the project worked

for the credit (Elliott was listed in the film's credits) and to build their portfolios.

Having concluded that the nature of the activity and the parties' relationship to it indicates that the primary assumption of risk doctrine applies, a plaintiff may nonetheless recover if the defendant unreasonably increased the risks to the plaintiff over and above those inherent in the activity. (See CACI No. 473.) Whether a defendant's conduct increased the risks otherwise inherent in an activity is a question for the jury. (*Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1061–1063.) In *Fazio*, the plaintiff musician fell off a stage. Although falling off a stage is an inherent risk of performing on a stage, the defendant failed to present evidence to refute plaintiff's claim that construction of the stage increased the risk of falling beyond that otherwise inherent in the activity. In another example, a plaintiff who was injured while skiing on a racecourse that was allegedly not properly marked as such survived summary judgment, as it was for the trier of fact to decide whether the defendant increased the risk inherent in skiing. (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 366.)

As we have said, falling is an inherent risk of cheerleading. Even so, Elliott argues that Connect unreasonably increased the risk of harm, for example, by allowing Racine to participate in the stunt. Racine, the choreographer, had cheerleading experience. But she did not have experience stunting. Nonetheless, she participated in the stunt by positioning herself as part of the base, i.e., one of two people responsible for lifting Elliott and lowering her. Although it is not clear what caused the fall, there is evidence that Racine's and the other half of the base's timing was off, in that they did not lower Elliott's feet at the same time.

Per Connect, the casting notice was for experienced cheerleaders, which Racine was not. Yet, she put herself in the stunt in a crucial position. Connect's argument that it did not hire Racine or instruct her to participate in the stunt is of no moment. As we have said, Connect was not a third party in this activity. Rather, per Gallagher, the producer is the entity on set responsible for safety, the "mom." The risk of falling otherwise inherent in stunting could have been increased by Racine's participation, which is an issue for the jury. Accordingly, the jury should have been instructed on the primary assumption of risk doctrine.[5] (See, e.g., CACI No. 473.)

DISPOSITION

The judgment is reversed and remanded for a new trial. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.

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[5] Because we reverse on this ground, we do not reach Connect's remaining arguments regarding excessive damages and plaintiff's allegedly improper references to insurance.