

**CASENOTE: PLAINTIFF'S CLAIM FOR INJURIES WHEN HORSE STRUCK HIM  
BARRED BY ASSUMPTION OF RISK. RIDERS IN ORGANIZED RIDING ACTIVITY  
DO NOT HAVE TO BE COMPETING AGAINST EACH OTHER. THE OFFENDING  
HORSE WAS JUST BEING A HORSE.**

**LAWATYOURFINGERTIPS®  
BY JAMES GRAFTON RANDALL, ESQ**

2017 WL 3016756

Court of Appeal,  
Fourth District, Division 1, California.

**KATHLEEN S. SWIGART, Plaintiff and Appellant,**

**v.**

**CARL BRUNO, Defendant and Appellant.**

D071072Filed 6/22/2017Certified for Partial Publication.\*

(Super. Ct. No. RIC1304282)

APPEALS from a judgment and a postjudgment order of the Superior Court of Riverside County, John W. Vineyard, Judge. Judgment and postjudgment order affirmed.

**Attorneys and Law Firms**

The Law Office of John Derrick and [John Derrick](#) for Plaintiff and Appellant.

Selman Breitman, [Elaine K. Fresch](#), [Rachel E. Hobbs](#) and [Melanie M. Smith](#) for Defendant and Appellant.

**Opinion**

[AARON](#), J.

\*1 Plaintiff Kathleen S. Swigart and defendant Carl Bruno participated in an organized endurance horseback riding event in Perris, together with approximately 47 other riders. Somewhat less than two hours into the 50-mile course, seven riders, including Swigart and Bruno, were stopping together, single-file, on the trail. Swigart was in the lead and had dismounted at a required checkpoint along the course. Although the evidence is in dispute as to exactly what happened at this point, there is no dispute that Bruno's **horse** struck Swigart while she was standing on the ground, injuring her. Swigart sued Bruno, alleging causes of action for negligence, reckless or intentional misconduct, and having an animal with a dangerous propensity.

The trial court granted Bruno's motion for summary judgment. After independently reviewing the record, we conclude that the doctrine of primary **assumption** of **risk** bars Swigart's cause of action for negligence, and that Swigart did not meet her burden of establishing a genuine issue of material fact as to Bruno's alleged recklessness or Bruno's **horse's** alleged propensity for danger. Accordingly, we affirm the judgment.

In postjudgment proceedings, Swigart moved to tax certain of Bruno's costs. Bruno appeals from the portion of the trial court's postjudgment order granting the motion in part and taxing \$1,962.50 in costs. By not including a complete copy of the order on appeal, Bruno failed to meet his burden of establishing error. In addition, based on what he did present, Bruno failed to

meet his burden of establishing that the trial court abused its discretion in taxing \$1,962.50 in costs. Accordingly, we affirm the postjudgment order.

## I.

### FACTUAL BACKGROUND<sup>1</sup>

“ 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion.' ” (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.) We consider all the evidence in the moving and opposing papers, except evidence to which objections were made and sustained,<sup>2</sup> liberally construing and reasonably deducing inferences from Swigart's evidence, and resolving any doubts in the evidence in Swigart's favor. (*Wilson*, at p. 717; *Code Civ. Proc.*, § 437c, subd. (c).)

\*2 The American Endurance Ride Conference (AERC) is a national governing and record-keeping body for “long distance horse riding.” Endurance rides conducted under the AERC's Endurance Rider's Handbook are run over a premarked, premeasured trail, with designated stops for horses to be examined by a veterinarian. The winner of an endurance ride is the rider and horse team that successfully completes the course in the fastest time, provided that the horse passes a final control examination conducted by a veterinarian. The AERC describes endurance riding as “ 'a highly competitive and demanding sport.' ” The AERC Ride Manager's Handbook describes endurance riding as both a “ 'sports activity' ” and an “ 'equestrian athletic event.' ”

Bruno's horse injured Swigart during an endurance ride that took place on March 3, 2012, at the Bar H Ranch and adjacent land in Perris (the Ride). Including Swigart and Bruno, there were approximately 49 riders who participated in the event — either 25 miles or 50 miles, at the option of the individual rider. The riders followed a specific course, collecting playing cards at set checkpoints along the route to verify having completed the entire course before crossing the finish line.

At the time of the Ride, both Swigart and Bruno had extensive experience with endurance riding. Swigart was a professional horse trainer at the Bar H Ranch and had been participating and winning prizes in, and even acting as the ride manager for, endurance riding events since 1991. Bruno had owned approximately 30 to 35 horses since 1982, had bred horses from 1994 to 2000, had trained endurance horses from 1994 to 2012, had entered approximately 148 endurance riding events and had won prizes.

Until Swigart's injury, Swigart and Bruno had spent most of the Ride with the lead group of approximately seven riders.<sup>3</sup> Less than two hours into the Ride, as the group approached the second card stop at the eight-mile checkpoint, the seven horses were close together in a single line — with Swigart in front, Bruno in the rear and Diane Stevens immediately in front of Bruno. At the checkpoint, Swigart dismounted to retrieve cards for all of the riders in the group, as Stevens and Bruno were slowing down from behind. In the process of retrieving the cards, Bruno's horse bumped the rear of Stevens's horse, Stevens's horse kicked Bruno's horse, Bruno was thrown from his horse, and Bruno's horse bolted to the left of Stevens's horse, sideswiping two horses ahead and striking Swigart, who was still standing on the ground.<sup>4</sup>

## II.

### PROCEDURAL BACKGROUND

Swigart filed the underlying complaint against Bruno, alleging causes of action for reckless or intentional misconduct, negligence and having an animal with a dangerous propensity. Following discovery, Bruno filed a motion for summary judgment or, in the alternative, for summary adjudication, and Swigart opposed the motion.

The trial court issued a tentative ruling granting Bruno's motion. The parties requested oral argument, and at the conclusion of the hearing the court confirmed the tentative ruling. In the related minute order, the court granted Bruno's motion for summary judgment; granted in part and denied in part Bruno's request for judicial notice and each party's respective evidentiary objections; and directed Bruno to prepare a formal order and judgment. The court later filed a written order granting Bruno's motion for summary judgment, ruling in relevant part that the primary **assumption** of **risk** doctrine barred Swigart's negligence cause of action and that Swigart had not met her burden of establishing a triable issue of material fact as to gross negligence.<sup>5</sup>

\*3 The trial court filed a judgment in favor of Bruno and against Swigart, and Swigart timely appealed.

In postjudgment proceedings, Bruno filed a memorandum of costs in the amount of \$45,694.71. Swigart filed a motion to tax \$31,891.56 of the costs claimed. Bruno opposed the motion, and Swigart replied to Bruno's opposition. The day before the hearing, in response to Swigart's reply, Bruno lodged additional exhibits.

At the hearing on Swigart's motion, following the argument of counsel, the trial court sustained Swigart's objection to Bruno's late-filed evidence, confirmed its tentative ruling and continued the hearing for two weeks to give counsel time to determine whether they could agree on a written order; if they could not agree, they were to appear in court in two weeks to finalize the order. Counsel agreed to an order, which the court approved and filed without a further hearing. The order provides in relevant part that "the court issued a tentative ruling (copy attached) which became the final ruling of the court after hearing oral argument." We infer from the order that the tentative ruling granted the motion in part and taxed certain items, and we know from the order that counsel met and conferred and agreed that \$1,962.50 was a reasonable amount of costs to be taxed for Bruno's attempt to locate a potential witness.<sup>6</sup> Bruno timely appealed from this postjudgment order.<sup>7</sup>

### III. DISCUSSION

Because the trial court's judgment and postjudgment order are both "'presumed correct,'" Swigart has the burden of establishing reversible error as to the judgment, and Bruno has the burden of establishing reversible error as to the postjudgment order. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*)). Neither has met this burden.

Because the issues in Swigart's appeal from the judgment and Bruno's appeal from the postjudgment order are entirely independent, we will address each independently.

#### A. Swigart's Appeal from the Judgment

We review de novo the summary judgment ruling in this appeal. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*); *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003 (*Kahn*) [appeal from grant of defense summary judgment based on primary **assumption** of the **risk**].) As a practical matter, "we assume the role of a trial court and apply

the same rules and standards which govern a trial court's determination of a motion for summary judgment.' ” (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1124.)

\*4 A defendant is entitled to a summary judgment on the basis that the “action has no merit” (Code Civ. Proc., § 437c, subd. (a)) only where the court is able to determine from the evidence presented 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” (*id.* subd. (c)). A cause of action “has no merit” if, as a matter of law, one or more of the elements of the cause of action cannot be established, or an affirmative defense to the cause of action can be established. (*Id.*, subd. (o).)

Thus, the defendant has the ultimate burden of *persuasion* that one or more elements of the cause of action at issue “cannot be established” or that “there is a complete defense to the cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 849, 850, 853-854.) In attempting to meet this burden, the defendant has the initial burden of *production* to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar*, at p. 850.) If the defendant meets this burden, then the burden of *production* shifts to the plaintiff to establish the existence of a triable issue of material fact. (*Id.* at pp. 850-851.)

In this appeal from the grant of a defense summary judgment, therefore, we determine first whether Bruno's initial showing establishes an entitlement to judgment in his favor; if so, we then determine whether Swigart's responsive showing establishes a triable issue of material fact. (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168.)

## 1. **Primary Assumption of Risk Bars Swigart's Claims for Negligence**

### a. **Law**

“Everyone is responsible ... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person ....” (Civ. Code, § 1714, subd. (a).) Stated differently, “each person has a duty to use ordinary care and 'is liable for injuries caused by his [or her] failure to exercise reasonable care in the circumstances.’” (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) “Duty, being a question of law, is particularly amenable to resolution by summary judgment.” (*Parsons*, at p. 465.) Primary **assumption of risk** is a defense that relieves a defendant of any duty to the plaintiff when the plaintiff is injured due to a **risk** that is inherent in an activity in which the plaintiff chose to participate. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308 (*Knight*); *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 (*Nalwa*) [primary **assumption of the risk** supported defense summary judgment].)

In *Knight, supra*, 3 Cal.4th 296, the Supreme Court considered the application of the **assumption of risk** doctrine in light of the court's adoption of comparative fault principles in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804. The court distinguished between *primary assumption of risk* — i.e., “those instances in which the **assumption of risk** doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular **risk**” — and *secondary assumption of risk* — i.e., “those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a **risk** of injury caused by the defendant's breach of that duty.”<sup>9</sup> (*Knight*, at p. 308.) When applicable, primary **assumption of risk** “operate[s] as a complete bar to the plaintiff's recovery.” (*Id.* at p. 315.) In contrast, when applicable, secondary **assumption of risk** “is merged into the comparative fault scheme, and the trier

of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties.” (*Ibid.*)

\*5 Primary **assumption** of the **risk** does not depend on whether the plaintiff subjectively appreciated the **risks** involved in the activity; instead, the focus is an objective one that takes into consideration the **risks** that are “inherent” in the activity at issue. (*Knight, supra*, 3 Cal.4th at pp. 316-317.) Because “certain dangers are often integral” to the activity itself, defendants generally have no duty to protect a plaintiff from such **risks**. (*Nalwa, supra*, 55 Cal.4th at p. 1155.)

Primary **assumption** of the **risk** does not depend on whether the defendant is competing with or against the plaintiff; the doctrine also applies to coparticipants in the same activity. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 494 (*Shin*) [social golf]; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068 (*Cheong*) [snow skiers on the same run].) “A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent.” (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [water skier injured by boat driver's alleged negligence].) Courts should not “hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport,” because “in the heat of an active sporting event ... , a participant's normal energetic conduct often includes accidentally careless behavior. .... [V]igorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct.”<sup>10</sup> (*Knight, supra*, 3 Cal.4th at p. 318 [touch football].)

For these reasons, the general test is “that a participant in an active sport breaches a legal duty of care to other participants — i.e., engages in conduct that properly may subject him or her to financial liability — only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.” (*Knight, supra*, 3 Cal.4th at p. 320, quoted in *Cheong, supra*, 16 Cal.4th at p. 1068.) Although a defendant has no duty of care to a plaintiff with regard to inherent **risks**, a defendant still has a duty not to increase those **risks**. (*Shin, supra*, 42 Cal.4th at p. 486.)

In analyzing whether Bruno owed Swigart a duty at the Ride, we consider whether the **risk** of being struck by a coparticipant's **horse** that follows other **horses** so closely as to come into contact with them is “inherent in” the activity of endurance riding.<sup>11</sup> (*Nalwa, supra*, 55 Cal.4th at p. 1155; see *id.* at pp. 1156-1158; see generally *Knight, supra*, 3 Cal.4th at pp. 315-317.) In determining whether a **risk** is inherent in an activity, we consider “the record and common sense.” (*Zipusch v. LA Workout, Inc.* (2007) 155 Cal.App.4th 1281, 1292.)

#### b. *Analysis — Negligence*

\*6 Swigart argues that because she met her burden of presenting conflicting evidence as to what is inherent in the activity of endurance riding, the trial court erred in granting summary judgment. We disagree. Our review of the record on appeal — which includes the documentary evidence and the more than 40 minutes of video of the Ride — enables us to determine what is inherent in the activity of endurance riding. Applying case law concerning **horses**,<sup>12</sup> as well as common sense, to the undisputed facts surrounding the Ride and Swigart's injury, we conclude that, as a matter of law, primary **assumption** of the **risk** bars Swigart's claim for negligence. Swigart first directs us to testimony from her expert that endurance riding “is a non-contact sport or recreational activity.” The expert contrasted endurance riding with track races, emphasizing

both that contact is “not integral” to endurance riding and that endurance riders are (or should have been) taught “to always maintain a safe distance behind the horse ahead.” From this evidence, Swigart argues that because Bruno's riding involved Bruno's horse having physical contact with other horses on various occasions during the eight miles prior to the accident — i.e., behavior not inherent to the activity — she did not assume the risk of an injury caused by contact. We are not persuaded. In *Avila, supra*, 38 Cal.4th 148, the Supreme Court ruled that even though a pitcher is “forbidden by the rules of baseball” from “intentionally throwing at a batter” (*id. at p. 165*), the possibility that a batter will be “intentionally hit” is an “inherent risk of the sport” (*id. at p. 164*). Stated differently, a pitcher intentionally hurling a ball at a batter is as much an inherent risk in baseball as physical contact (e.g., rear-ending<sup>13</sup>) is in endurance riding; while neither may be encouraged — and, as in *Avila*, may even be prohibited — under the rules of the sport, each is nevertheless an inherent risk in its respective activity.<sup>14</sup>

Our conclusion that primary assumption of the risk applies in this case is consistent with the general statement in *Levinson, supra*, 176 Cal.App.4th at page 1546, that horseback riding is an “inherently dangerous sport” to which, as a general rule, “the principles of primary assumption of the risk apply.” If a social guest's horseback ride at a barbecue at a ranch is an inherently dangerous activity for purposes of primary assumption of the risk (*id. at pp. 1537, 1536, 1545, 1551*), then so too is a 25- or 50-mile endurance ride over challenging terrain at which the riders are timed as they complete the designated course.

\*7 Swigart's claim for negligence — which Swigart supports with evidence that Bruno was unable to control his horse, refused to heed safety warnings from coparticipants and continued to participate in the event after becoming aware of these safety risks — is premised primarily on evidence that Bruno's horse tailgated and rear-ended other horses. Based on our review of Stevens's video, given the amount of tailgating by many of the riders in the first group in the Ride — particularly as the group approached the second card stop at the eight-mile checkpoint immediately before Swigart's injury — testimony that such behavior is not part of the sport of endurance riding simply is not credible.<sup>15</sup> For example, on too many occasions to count, Stevens allowed her horse to tailgate, and even come up next to the rear of the horse in front of hers — despite the fact that the horse in front of hers wore a red ribbon in its tail, which, Stevens testified, is used by a rider “to designate a horse likely to kick on a trail ride.”

Swigart was injured by Bruno's horse, which bolted out of control as a group of seven horses in a single file line came to a stop in a narrow area. In the process of slowing down, Bruno's horse bumped the rear of Stevens's horse, Stevens's horse kicked Bruno's horse, Bruno was thrown from his horse, and Bruno's horse took off, sideswiping two horses ahead and striking Swigart, who was standing on the ground at a Ride checkpoint. Because this type of equine conduct is among the risks inherent in endurance riding, the assumption of the risk doctrine applies to Swigart's claims based on Bruno's alleged negligence. Accordingly, as a matter of law, Bruno did not owe Swigart a duty of due care to protect her from the risk of the harm that she suffered during the Ride.

As the *Levinson* court summarized, where the application of primary assumption of the risk results in “ ‘no duty’ on the part of the defendant to protect the plaintiff from a particular risk” (*Knight, supra*, 3 Cal.4th at p. 308), a defendant like Bruno owes a plaintiff like Swigart only two duties: “(1) to not ‘intentionally’ injure the rider; and (2) to not ‘increase the risk of

harm beyond what is inherent in [horseback riding]' (*Kahn, supra*, 31 Cal.4th at p. 1004) by 'engag[ing] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport' (*Knight, supra*, 3 Cal.4th at p. 320)." (*Levinson, supra*, 176 Cal.App.4th at pp. 1545-1546.) Swigart does not argue on appeal that Bruno intentionally injured her. We discuss recklessness in part III.A.2., *post*.

## **2. Swigart Did Not Meet Her Burden of Establishing a Material Issue of Fact as to Her Claims for Gross Negligence and Recklessness**

In her second cause of action based on negligence, Swigart pleaded a claim for gross negligence. In her first cause of action, Swigart also pleaded a claim for recklessness.

Ordinary negligence is "an unintentional tort[ and ]consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753-754.) Gross negligence — which is not a distinct cause of action, but merely "a degree of negligence" (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 552, fn. 3) — requires a showing of "either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara*, at p. 754.) Recklessness "describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*Id.* at p. 754, fn. 4.)

\*8 Swigart tells us: "There is no meaningful distinction — at least, *for the purposes of this appeal* — between [recklessness] and gross negligence."<sup>16</sup> (Italics added.) Bruno does not contend otherwise and, indeed, seems to agree. Swigart argues that the following facts should defeat summary judgment as to her claims based on recklessness and gross negligence: "Bruno was riding *recklessly* by repeatedly rear-ending other **horses**, knowing that this could cause one of them to react defensively. To go on doing this, even after being repeatedly warned by other riders not to do so, and with Bruno's experience in endurance riding, was *grossly negligent*." (Italics added.) Swigart contends that these facts are sufficient to demonstrate that Bruno increased the **risk** of harm beyond what is inherent in endurance riding by engaging in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in endurance riding. (See *Kahn, supra*, 31 Cal.4th at p. 1004; *Knight, supra*, 3 Cal.4th at p. 320).

When analyzing whether a defendant increased the **risk** of harm associated with an activity subject to the primary **assumption** of the **risk** doctrine, duties with respect to the same **risk** will vary according to "the *role* played by particular [persons] involved in the sport" (*Kahn, supra*, 31 Cal.4th at p. 1004)<sup>17</sup> and "the nature of the particular riding activity at issue" (*Levinson, supra*, 176 Cal.App.4th at p. 1546). Here, the persons involved in the sport were *coparticipants*, and the nature of the activity was a timed event where the riders who finished were told where they placed based on their times. Significantly, during this timed event, there was tailgating by many of the **horses** in the first group, which included coparticipants Swigart and Bruno. On occasions too numerous to list by the recorded time on the video, as **horses** rode single-file, particularly on sloped terrain, they often tailgated the **horse** in front of them. Even if some of the tailgating may have resulted in contact, such action is not, in the words of *Knight, supra*, 3 Cal.4th at page 320, "so reckless as to be totally outside the range of the ordinary activity involved in [endurance rid-

ing].” To the contrary, because **horses** are “natur[ally]” unpredictable and “difficult to control” (*Shelly, supra*, 62 Cal.App.4th at pp. 1294-1295), where there is tailgating, contact cannot be deemed to be reckless.

Accordingly, Swigart did not meet her burden of establishing an issue of material fact as to whether Bruno's actions during the Ride increased the **risk** of harm beyond what is inherent in the sport of endurance horseback riding.

### ***3. Swigart Did Not Meet Her Burden of Establishing a Material Issue of Fact as to Her Strict Liability Claim***

\*9 “A common law strict liability cause of action may ... be maintained if the owner of a domestic animal that ... injures another person knew or had reason to know of the animal's vicious propensities.” (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1115; see CACI No. 462.) If the defendant knew or should have known of the animal's vicious propensities and failed to inform the plaintiff of such facts, then the defendant can be found liable for having exposed the plaintiff to an *unknown risk* and thereby can be held strictly liable for the plaintiff's injuries. (*Ibid.*) “Under such circumstances, the defense of primary **assumption of risk** would not bar [the plaintiff's] claim since she could not be found to have assumed a **risk** of which she was unaware.” (*Id.* at p. 1116.)

In her third cause of action, Swigart alleged a strict liability claim against Bruno for having a domestic animal with a dangerous propensity.<sup>18</sup> More specifically, Swigart alleged that Bruno rode his dangerous **horse** into the area in which Swigart had dismounted and gone to collect the cards at the second stop, proximately causing her injuries.

Swigart argues that there is a triable issue of material fact “as to whether Bruno was aware of the *dangerous propensities* of his **horse** prior to the accident — both before the day of the accident and during the one-to-two hours of riding leading up to the accident.” (Italics added.) However, because we have concluded as a matter of law that that Bruno's **horse's** behavior — which, for purposes of Swigart's motion, includes tailgating and rear-ending — was not outside the range of the ordinary activity in endurance riding (see pt. III.A.2., *ante*), we further conclude that the propensities of Bruno's **horse** on which Swigart relies were not dangerous as a matter of law for purposes of Swigart's common law strict liability cause of action.

Because Bruno's **horse** merely “'act[ed]’ ” or “'behav[ed] as a **horse**’ ” (*Harrold, supra*, 19 Cal.App.4th at p. 588; see *Levinson, supra*, 176 Cal.App.4th at p. 1547), Swigart did not meet her burden of establishing an issue of material fact as to whether Bruno's **horse** had vicious or dangerous propensities.

### ***4. The Judgment Is Affirmed***

Because the primary **assumption of risk** doctrine bars Swigart's claim for negligence and because the facts do not, as a matter of law, support claims for recklessness or gross negligence or for having an animal with a dangerous propensity, we affirm the judgment.<sup>19</sup>

### ***B. Bruno's Appeal from the Postjudgment Order\*\****

#### DISPOSITION

The judgment and postjudgment order are each affirmed. Bruno is entitled to his appellate costs in Swigart's appeal, and Swigart is entitled to her appellate costs in Bruno's appeal.

WE CONCUR:



[HUFFMAN](#), Acting P. J.

[HALLER](#), J.

### All Citations

--- Cal.Rptr.3d ----, 2017 WL 3016756, 17 Cal. Daily Op. Serv. 6932

### Footnotes

\*

IT IS HEREBY CERTIFIED that the opinion, with the exception of part III.B., meets the standards for publication as specified in California Rules of Court, rule 8.1105(c); and the opinion herein be partially published in the Official Reports.

1

In this part of the opinion, we will describe generally what happened. In part III., *post*, we will supplement these facts as necessary to the discussion of particular issues.

2

In his respondent's brief, Bruno cites to evidence as to which the trial court sustained Swigart's objections. We have disregarded all such references in his brief.

We further disapprove of Bruno's counsel's blatant violation of [California Rules of Court, rule 8.204\(c\)\(1\), \(4\)](#), which limits his principal briefs to a total of 28,000 words. Bruno's combined principal briefs are 133 pages and contain 27,952 words. (*Ibid.*) However, *throughout the 133 pages*, counsel intentionally omitted spaces and inserted slashes (/) in case and record citations, apparently so that the word processing program would consider each multi-word citation as one word. For example, by citing “1Supp.CT/57,2Supp.CT/492-496,” counsel has misrepresented that this record reference is one word rather than eight; and by citing “*Martinez, supra*, 56Cal.4th/1014, and “(1998)198Cal.App.3d/1225,1240,” counsel has misrepresented that these case citations are each one word rather than five. Accordingly, because Bruno's principal briefs contain more than 28,000 total words, the briefs are noncompliant for purposes of [California Rules of Court, rule 8.204](#). We decline to strike them on our own motion (*id.*, [rule 8.204\(e\)\(2\)\(B\)](#)) *only* because we do not want to further delay disposition of this appeal.

3

Before participating in the Ride, Swigart signed a one-page “Release of Liability” and a one-page “Agreement and Release of Liability.” Because we decide the appeal from the judgment based on issues unrelated to either of these releases, we do not discuss their contents or their potential effect on the outcome of the appeal.

4

Stevens had a video camera attached to her helmet. Swigart submitted a DVD that contains a recording of approximately 40 minutes of Stevens's ride with the group — ending with the injury to Swigart. To the extent that Swigart's witnesses' testimony was inconsistent with the video, we do not consider such inconsistency a disputed fact and have relied on the evidence in the video.

5

The order did not mention Swigart's claims for reckless or intentional misconduct or for having an animal with a dangerous propensity.

6

The parties agreed to tax an additional \$11,813.87 in costs, and there are no issues on appeal as to those costs. We observe that the sum of the costs that the parties agreed should be taxed (\$13,776.37) is \$38 more than the “Total” stated in the order (\$13,738.37).

7

In designating the record on appeal, Bruno did not include the court's tentative ruling; in confirming its tentative ruling at the hearing on Bruno's motion, the court did not state what its tentative ruling was; and the clerk's transcript does not contain a copy of the postjudgment order that has an attached copy of the tentative ruling.

8

Although *Knight* was a plurality opinion, “[a] majority of th [e] court has since embraced the *Knight* approach.” (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161 (*Avila*).)

9

In comparison to primary and secondary **assumption** of **risk**, *express assumption* of **risk** occurs when “as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing **risk**.” (*Knight, supra*, 3 Cal.4th at p. 308, fn. 4.) Such an agreement relieves the defendant of a legal duty to the plaintiff concerning the **risks** covered by the agreement and results in a complete bar to the plaintiff's claim. (*Ibid.*)

10

Although we have no difficulty concluding that endurance riding is a “sport” for purposes of **assumption** of the **risk** — and the parties do not argue otherwise — the doctrine applies to any recreational activity involving an inherent **risk** of injury to voluntary participants that cannot be eliminated without affecting the basic nature of the activity. (*Nalwa, supra*, 55 Cal.4th at p. 1156 [amusement park bumper cars].)