CASENOTE

JAMES GRAFTON RANDALL, ESQ.
LAWATYOURFINGERTIPS®

CLAIM OF UPS EMPLOYEE AGAINST SENDER OF PACKAGE FOR INJURIES ALLEGEDLY SUSTAINED BY ERROR ON SHIPPING LABEL MISSTATING WEIGHT OF PACKAGE BARRED BY ASSUMPTION OF RISK

Filed 12/28/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

STEPHEN MOORE, Plaintiff and Appellant, v. WILLIAM JESSUP UNIVERSITY, Defendant and Respondent.	C073433 (Super. Ct. No. SCV0030282)

APPEAL from a judgment of the Superior Court of Placer County, Michael A. Jacques, Judge. Affirmed.

Law Offices of Alan M. Laskin, Alan M. Laskin and Darren Guez for Plaintiff and Appellant.

Prout Le Vangie, Levangie Law Group, Michael J. Baytosh, Katy A. Cummings, and Michael J. Levangie for Defendant and Respondent.

Plaintiff Stephen Moore, a United Parcel Service (UPS) delivery driver, was injured when he lifted a box with a shipping label prepared by defendant William Jessup University (University) that inaccurately stated the weight of the box. Moore appeals from the judgment entered in favor of the University after the trial court granted summary judgment on Moore's sole cause of action for negligence. The trial court concluded the University owed Moore no legal duty of care and that the doctrine of primary assumption of risk barred Moore's action.

Moore contends the trial court erred in granting the University summary judgment because the doctrine of primary assumption of risk does not apply where the University increased the risk of injury to Moore by understating the weight of the box and failing to use highlighted tape to mark the box. Moore also claims the University owed him a duty of care under the test articulated in *Rowland v. Christian* (1968) 69 Cal.2d 108.[1]

Although a defendant has no duty to protect a plaintiff from risks inherent in an activity, a defendant has a duty not to increase the risks. The evidence in this case establishes that the risk of injury from lifting heavy boxes that may be labeled with inaccurate weight information was inherent in Moore's job as a UPS delivery driver. UPS does not require customers to weigh packages before labeling them, and customers sometimes inaccurately identify the weight of packages. UPS instructs its delivery drivers on proper

---

[1] *Rowland v. Christian* was superseded by statute on another point, as stated in *Smith v. Freund* (2011) 192 Cal.App.4th 466 at footnote 5.

lifting techniques and it trains its employees to test the weight of a package before lifting it.

Courts have held that, as a matter of public policy, it is unfair to impose a duty on a defendant to prevent an injury to a plaintiff arising from the very condition or hazard the defendant retained the plaintiff to confront. The primary assumption of risk doctrine does not require a plaintiff to assume every possible risk presented in an occupation, but here, by mislabeling the package, the University did not increase the risks beyond those that were inherent in Moore's job. Accordingly, the primary assumption of risk doctrine applies and bars Moore's negligence action, and we need not address whether the University owed Moore a duty of care under the factors set forth in *Rowland v. Christian*. We will affirm the judgment.

BACKGROUND

Moore began working for UPS in 1989. As of January 2010, he had been a UPS delivery driver for 15 years, and he had 20 years of experience lifting and handling packages for UPS. Moore lifted heavy boxes on a daily basis as a fundamental part of his occupation as a UPS delivery driver.

UPS instructed its employees on proper lifting techniques. It trained employees to test the weight of a package before lifting it, and to not lift packages weighing more than 70 pounds. UPS employees were supposed to "roll" heavy packages onto a hand truck and "roll" the package from the hand truck into the delivery truck. A UPS delivery driver may request assistance from other UPS personnel to move a package weighing 70 or more pounds.

UPS customers were required to attach warning labels to packages weighing 70 pounds or more. But UPS customers sometimes mislabeled packages.

Moore stopped at the University to deliver a "next day air" envelope on the morning of January 29, 2010. While at the University, Moore saw 24 boxes stacked in the UPS pick up area of the University's mailroom. The boxes were all approximately the

same size and shape. Each box was about the size of a photocopy-paper box. All of the boxes had UPS shipping labels attached. Moore looked at all the shipping labels on the boxes. Each label stated each box weighed 48 pounds.

Moore used a hand truck to move the boxes. Although he encountered shipping labels stating inaccurate weights at least weekly on his route, Moore relied on the weight stated on the shipping labels to determine how he would move the 24 boxes he encountered at the University that day.

Moore lifted four boxes onto his hand truck without incident. Based on his 20 years of experience, he estimated the first four boxes he lifted weighed about 48 pounds each. When he lifted the fifth box, Moore felt pain in his wrist, shoulder, and neck. Based on his 20 years of experience, Moore estimated the fifth box he lifted weighed approximately 70 to 80 pounds. If the shipping label on the fifth box had stated that the box weighed 80 pounds, Moore would have slid the box instead of lifting it and he may have asked for assistance.

Moore filed a workers' compensation claim and received all available workers' compensation benefits for his injuries. Most of his medical bills were paid by his employer's workers' compensation insurer. Workers' compensation doctors ultimately assessed Moore's condition as permanent and stable, and Moore received a cumulative disability rating of five percent.

Moore also sued the University, asserting a cause of action for negligence. The University moved for summary judgment on the ground that it did not owe a duty to protect Moore from injuries arising from lifting heavy boxes, which was an inherent risk of his employment, and the University did not increase the risk inherent in Moore's job.

Brian Lucas, manager of the University's bookstore, and Cameron Wilson, interim manager of the bookstore, submitted declarations in support of the University's summary judgment motion. Lucas and Wilson described the bookstore's practice in shipping four or more boxes of textbooks. But Lucas did not know whether any boxes UPS may have

picked up from the University on January 29, 2010, were from the bookstore. The bookstore was not the only entity within the University that shipped large boxes using UPS. Lucas did not find any records of a shipment left for UPS pick up on January 29, 2010. There were no records establishing what was in the boxes Moore picked up. And Lucas did not know the weight of any box Moore picked up from the University.

Wilson was the only person employed by the bookstore in January 2010. But he did not know who packed the boxes Moore picked up from the University on January 29, 2010. He did not know how any box Moore picked up from the University on that date was prepared for shipping.[2]

The trial court granted the University's motion and entered judgment in favor of the University and against Moore. The trial court concluded the University owed Moore no duty of care, and the doctrine of primary assumption of risk barred Moore's action.[3]

STANDARD OF REVIEW

---

[2] Wilson's declaration in support of the University's summary judgment motion suggested Wilson packed and prepared the shipping labels for the boxes Moore picked up from the University on January 29, 2010. The declaration states none of the 24 boxes Moore allegedly picked up from the University on January 29, 2010, weighed more than 55 pounds. However, admissions made during discovery govern over contrary declarations submitted in support of summary judgment. (*Visueta v. General Motors Corp*. (1991) 234 Cal.App.3d 1609, 1613.)

[3] The University submitted additional portions of the deposition testimony of Lucas and UPS employee David Moss in its reply to Moore's opposition to summary judgment in the trial court. Generally, a party moving for summary judgment may not rely on new evidence filed with its reply papers. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) A failure to object to new evidence may result in a forfeiture which permits the trial court to consider the new evidence. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140; *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1426.) The trial court did not, however, consider the new evidence submitted with the University's reply papers. Neither do we.

Summary judgment provides courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) A defendant moving for summary judgment may demonstrate that the plaintiff's cause of action has no merit by showing that one or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849.) This showing must be supported by evidence, such as affidavits, declarations, admissions, interrogatory answers, depositions, and matters of which judicial notice may be taken. (Code Civ. Proc., § 437c, subd. (b)(1); *Aguilar, supra*, 25 Cal.4th at p. 855.)

After the defendant meets its threshold burden, the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 850.) The plaintiff may not simply rely on the allegations of his complaint but, instead, must set forth the specific facts showing the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

In ruling on the motion, the trial court views the evidence and inferences therefrom in the light most favorable to the plaintiff. (*Aguilar, supra*, 25 Cal.4th at p. 843.) If the trial court concludes the evidence or inferences raise a triable issue of material fact, it must deny the defendant's motion. (*Id.* at p. 856.) But the trial court must grant the defendant's motion if the papers show there is no triable issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

We review an order granting summary judgment de novo. (*Aguilar, supra*, 25 Cal. 4th at p. 860.) We independently examine the record to determine whether a triable issue of material fact exists, liberally construing the evidence and resolving all doubts concerning the evidence in favor of the party opposing summary judgment. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499-500; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.)

DISCUSSION

Moore contends the trial court erred in granting summary judgment to the University based on the primary assumption of risk doctrine. He says that while his job as a professional delivery driver may have included a risk of injury when lifting a heavy package, the doctrine of primary assumption of risk does not bar his negligence action because the University increased the risk of injury to him by failing to state the true weight of the box and by failing to use highlighted tape to mark the box.

The California Supreme Court has described two categories for assumption of risk, primary and secondary. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 309, 314-315.) Secondary assumption of risk involves instances in which a defendant owes the plaintiff a duty of care and breaches that duty, but the plaintiff knowingly encounters a risk created by the breach of the duty. (*Id.* at p. 308.) The defendant's liability in such cases is determined under comparative fault principles. (*Id.* at pp. 310-311.)

Primary assumption of risk, on the other hand, excuses the defendant[4] from the usual duty of ordinary care which everyone owes to avoid injury to others. (Civ. Code, § 1714, subd. (a); *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1120-1121 ["A finding that the doctrine of primary assumption of risk applies in any given factual context is, in essence, a determination, reached as a matter of law, that the defendant should be excused from the usual duty of care based on some clear, overriding statutory or public policy."]; *Knight v. Jewett, supra,* 3 Cal.4th at p. 315.) If it applies, primary assumption of risk completely bars recovery in a negligence action because, as a matter of law, the defendant does not owe a legal duty of care to the plaintiff. (*Gregory v. Cott* (2014) 59 Cal.4th 996, 1001; *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658 (*Beninati*).)

Whether the defendant owes the plaintiff a duty is " ' "not an immutable fact of nature ' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' " ' " (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 160-161, italics omitted (*Avila*).) Thus, the existence of a duty and whether a case falls within the primary assumption of risk doctrine are questions of law to be decided by the court. (*Ibid.*; *Priebe v. Nelson, supra,* 39 Cal.4th at p. 1128; *Knight v. Jewett, supra,* 3 Cal.4th at p. 313; *Beninati, supra,* 175 Cal.App.4th at p. 656.)

"Primary assumption of risk applies only when a court, after examining the nature of the particular activity and the parties' relationship to that activity, concludes that a plaintiff engaged in the particular activity is harmed by the risks inherent in the activity. [Citation.] The conclusion that a particular activity necessarily encompasses risks inher-

---

The factors set forth in *Rowland v. Christian, supra,* 69 Cal.2d 108, when balanced together, may also justify a departure from the usual duty of ordinary care. (*Cabral v. Ralphs Grocery Co*. (2011) 51 Cal.4th 764, 771.) The primary assumption of risk doctrine is different from the concepts of tort liability enunciated in *Rowland v. Christian*. (*Krueger v. City of Anaheim* (1982) 130 Cal.App.3d 166, 169.)

ent in the nature of the activity means that [as a matter of law] the defendant has no duty to protect the plaintiff from those risks [citation]." (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 994; see *Knight v. Jewett, supra,* 3 Cal.4th at pp. 308, 314-315.) While a defendant has no duty to protect a plaintiff from risks inherent in an activity, however, a defendant has a duty to not increase the risks of that activity. (*Gregory v. Cott, supra,* 59 Cal.4th at p. 1010-1011; *Huffman, supra,* 84 Cal.App.4th at pp. 979, 994-995.)

" 'Judges deciding inherent risk questions . . . may consider not only their own or common experience with the . . . activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.' " (*Gregory v. Cott, supra,* 59 Cal.4th at p. 1006, fn. 6; see *Amezcua v. Los Angeles Harley-Davidson, Inc.* (2011) 200 Cal.App.4th 217, 233; *Luna v. Vela* (2008) 169 Cal.App.4th 102, 110-111.) The inquiry whether the primary assumption of risk applies and whether the defendant owes the plaintiff a duty to not increase the risks inherent in an activity is based on objective factors having to do with the nature of the subject activity and the relationship of the plaintiff and the defendant to that activity. (*Gregory v. Cott, supra*, 59 Cal.4th at pp. 1001-1002; *Priebe v. Nelson, supra*, 39 Cal.4th at pp. 1123, fn. 2, 1128; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482.) The plaintiff's subjective appreciation or acceptance of the foreseeable occupational hazard involved is immaterial. (*Priebe v. Nelson, supra*, 39 Cal.4th at p. 1123, fn. 2.)

The firefighter's rule, upon which the University relies, and the analogous veterinarian's rule, are examples of the primary assumption of risk doctrine applied in the employment context. (*Gregory v. Cott, supra,* 59 Cal.4th at p. 1001; *Priebe v. Nelson, supra,* 39 Cal.4th at p. 1121-1122, 1132.) Those rules are based on the public policy principle that " 'it is unfair to charge 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 remedy or confront.' " (*Gregory v. Cott, supra*, 59 Cal.4th at p. 1002.)

Cases applying the firefighter's rule in its most classic form have held a person who starts a fire owes no duty of care to the firefighter who is employed to respond to fires. (*Priebe v. Nelson, supra,* 39 Cal.4th at pp. 1121-1122; *Neighbarger v. Irwin Industries, Inc*. (1994) 8 Cal.4th 532, 541.) The firefighter's rule has been applied to police officers. (*Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1327.) In that context, it has been held that a member of the public whose misconduct called for police intervention does not owe a duty of care to the responding police officer with respect to the original misconduct which caused the officer to be summoned. (*Ibid*.)

The firefighter's rule has also been applied to bar a negligence action by a tow truck driver, injured while rendering assistance to a car owner who suffered a mechanical breakdown on the side of a freeway, when the tow truck driver had a contractual obligation (through the car owner's automobile club membership) to help the car owner. (*Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 64, 70-72.) The appellate court in *Dyer* held that the particular risk of harm in that case -- being injured while working on the shoulder of a freeway -- was the very risk the tow truck driver was contractually obligated to confront. (*Id.* at p. 71.) More recently, the California Supreme Court applied the firefighter's rule to bar an action by a professional in-home caregiver injured by an Alzheimer's patient; the caregiver was injured as a result of the very risk she was hired to encounter. (*Gregory v. Cott, supra*, 59 Cal.4th at pp. 999-1000, 1005-1009; see *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1765, 1772.)

The veterinarian's rule is an offshoot of the firefighter's rule. (*Priebe v. Nelson, supra*, 39 Cal.4th at p. 1119.) Cases applying the veterinarian's rule have held that a person who contracted with a veterinarian to treat his dog does not owe a duty of care to the veterinarian or the veterinarian's assistant if the dog bites the veterinarian or assistant during treatment. (*Id.* at p. 1122; *Nelson v. Hall* (1985) 165 Cal.App.3d 709, 715.) For example, this court concluded in *Nelson v. Hall* that the risk of dog bites during treatment is a hazard endemic to the occupation of a veterinary assistant. (*Id.* at p. 714;

see *Willenberg v. Superior Court* (1986) 185 Cal.App.3d 185, 187 ["a visit to the veterinarian's office can bring about unpredictable behavior in a normally docile animal, and this is an inherent risk which every veterinarian assumes"].) Additionally, "[t]he veterinarian determines the method of treatment and handling of the dog. He or she is the person in possession and control of the dog and is in the best position to take necessary precautions and protective measures. The dog owner who has no knowledge of its particular vicious propensities has no control over what happens to the dog while being treated in a strange environment and cannot know how the dog will react to treatment. A dog owner who does no more than turn his or her dog over to a qualified veterinarian for medical treatment should not be held strictly liable when the dog bites a veterinarian or a veterinary assistant while being treated." (*Nelson v. Hall, supra,* 165 Cal.App.3d at p. 715.)

The California Supreme Court extended the veterinarian's rule to commercial kennel workers in *Priebe v. Nelson, supra,* 39 Cal.4th 1112. The Supreme Court held that the plaintiff, by virtue of her employment as a kennel worker, assumed the risk of being bitten or otherwise injured by the dogs under her care and control while in the custody of the commercial kennel where she worked pursuant to a contractual boarding agreement. (*Id.* at p. 1132.) The Supreme Court also identified public policies that justified excusing a duty of care by dog owners to kennel workers: (1) kennel workers are trained to safely care for, walk, and handle dogs left in their exclusive care and control, and are in the best position to look out for their own safety when working with those dogs in the dog owners' absence; (2) the kennel has a contract with the dog owners, and kennel workers receive compensation for the services they provide, which services include the safe care and handling of dogs left in their charge, and (3) applying the veterinarian's rule would encourage dog owners to use the services of licensed commercial kennels, which serves the salutary purpose behind the dog bite statute, i.e., protecting the public from harm by dogs not properly under their owners' control. (*Id.* at pp. 1129-1131.)

Nevertheless, the primary assumption of risk doctrine does not require a plaintiff to assume every possible risk he may encounter while engaged in his occupation. (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 371.) Primary assumption of risk does not shield a defendant from liability for misconduct which is independent from that which necessitated the plaintiff's presence. (*Id.* at pp. 367-369; see *Cohen v. McIntyre* (1993) 16 Cal.App.4th 650, 655-656.) Thus, the firefighter's rule does not bar a firefighter's action against the owners of a chemical manufacturing plant who negligently or intentionally misinformed the firefighter, after he arrived at the scene of a chemical boilover to which he was summoned, that the chemicals involved in the boilover were not toxic. (*Lipson, supra,* 31 Cal.3d at pp. 365, 370.) The Supreme Court concluded the firefighter's rule did not apply in that case because the alleged misrepresentation occurred after the firefighter arrived on the scene, was misconduct independent of any tortious act which may have caused the chemical boilover, and enhanced the risk of harm to the firefighter. (*Id.* at pp. 370-373.) The Supreme Court said, "the risk that the owner or occupier of a burning building will deceive a firefighter as to the nature or existence of a hazard on the premises is not an inherent part of a firefighter's job. A fireman cannot reasonably be expected to anticipate such misconduct on the part of an owner or occupier of a building." (*Id.* at p. 371; see *Boon v. Rivera, supra,* 80 Cal.App.4th at p. 1330 [quoting *Lipson v. Superior Court, supra,* 31 Cal.3d 362 in case involving misrepresentation to a police officer].)

Applying the above principles to the facts of this case, we conclude the risk of injury from lifting heavy boxes that may be labeled with inaccurate weight information was inherent in Moore's job as a UPS delivery driver, and the University did not owe a duty to protect Moore from that risk; nor did the University increase the risk of harm to Moore.

Receiving an injury in the course of moving or lifting heavy objects is a risk inherent in Moore's occupation. (See, e.g., *Sepulveda-Vega v. Suffolk Bancorp*. (N.Y.Ap-

p.Div. 2014) 119 A.D.3d 850 [989 N.Y.S.2d 371] [a courier for an armored car service may not hold others responsible for his injury resulting from lifting a heavy bag of coins because such injury was an ordinary and obvious hazard of his job, he elected to lift the bag without assistance, and the bag was not over an accepted or contractually agreed upon weight]; *Bysczynski v. United Parcel Services, Inc*. (Fla.Dist.Ct.App. 2010) 53 So. 3d 328, 329 [UPS worker suffered neck and shoulder injury from lifting 90-pound package]; *Cantrell Supply, Inc. v. Liberty Mutual Ins. Co.* (Ky.Ct.App. 2002) 94 S.W.3d 381, 382 [delivery driver for UPS injured his back while lifting a heavy package]; *Anderson v. Bush Industries, Inc.* (N.Y.App.Div. 2001) 280 A.D.2d 949, 950 [720 N.Y.S.2d 699, 700] ["the hazard of being injured as a result of repeatedly lifting heavy boxes and loading them into a truck is inherent in the work of a UPS driver"].) The risk of injury based on inaccurate weight information on a shipping label prepared by a UPS customer was also an obvious risk of Moore's job. (*Priebe v. Nelson, supra,* 39 Cal.4th at pp. 1129-1130 [professional assumed the risk of being bitten during veterinary treatment where the risk of dog bites was a specific known hazard of his occupation]; *Avila, supra*, 38 Cal.4th at p. 164 [batter being intentionally hit by an opposing pitcher was an inherent risk in baseball where the practice was "accepted by custom"].)

The University secured the services of Moore's employer to ship the boxes that Moore was moving as part of his regular job duties when he was injured. (*Priebe v. Nelson, supra,* 39 Cal.4th at pp. 1130-1131 [the fact that the professional had a contractual relationship with the defendant and received compensation for her services, which included the safe handling of the defendant's dog, supported the application of the primary assumption of risk doctrine in a dog bite case].) There is no evidence UPS customers have borne the burden of ensuring that UPS delivery drivers used proper techniques to move or lift heavy boxes. To the contrary, like the kennel worker who was trained to safely handle dogs in *Priebe v. Nelson, supra,* 39 Cal.4th 1112, Moore was trained on proper lifting techniques. Although UPS customers state the weight of a package on the

shipping label, there is no evidence UPS customers (whether by virtue of contract or custom) provided such weight information so that UPS delivery drivers can determine how to safely handle a package. Instead, there is evidence that UPS customers mislabel packages and that Moore encountered shipping labels with inaccurate weights at least weekly on his route. Additionally, Moore did not dispute that UPS did not require its customers to use a scale to weigh packages. Thus, the circumstances in this case are distinguishable from those in *Lipson v. Superior Court, supra,* 31 Cal.3d 362, where the California Supreme Court held that a firefighter could not reasonably be expected to anticipate that the defendant would misrepresent the nature of the hazard he was called to contain. (*Id.* at p. 371.) Here, UPS delivery drivers had a reason not to rely on customer weight representations in determining how to move or lift packages. UPS prudently trained its employees to test the weight of a package before lifting it.

Moore had 20 years of experience lifting and handling packages for UPS. He controlled how he would move the boxes he encountered at the University. Moore had the option of calling for assistance from another UPS employee. Moore was in the best position to guard against lifting injuries. (*Priebe v. Nelson, supra,* 39 Cal.4th at p. 1130 [the fact that trained and paid professionals were in the best position to take necessary safety precautions supported the application of the primary assumption of risk doctrine to commercial kennel workers].)

Under the particular circumstances of this case, policy considerations based on the nature of Moore's job duties and the relationship between the parties do not support a conclusion that the University had a duty to protect Moore against his injuries or that the University increased the risk of harm to Moore. Moore's job included a risk of injury from lifting heavy boxes, including those mislabeled by UPS customers. The University did not do anything to increase that risk. Further, applying the doctrine of assumption of risk in cases like this promotes the use of commercial shipping or delivery services and properly places the burden of ensuring the safety of delivery persons, who have to move

or lift packages, on the businesses who employ them and can provide necessary training, supervision, and assistance in their work.

Anderson v. Bush Industries, Inc., supra, 720 N.Y.S.2d 699, supports our conclusion. The appellate court in that case held a UPS customer had no duty to protect a UPS driver from injury related to lifting heavy boxes. (*Id*. at p. 700.) The driver in *Anderson v. Bush Industries* alleged the customer's employees were negligent in piling boxes to a height that required the driver to reach over his head. (*Ibid.*) The appellate court said the risk of injury from repeatedly lifting heavy boxes and loading them into a truck was inherent in the driver's employment, and the driver's injury resulted from that risk, which was the subject of the contract between UPS and the customer. (*Ibid.*) The appellate court concluded the customer did not have a duty to protect the UPS driver from the hazards resulting from methods over which the customer exercised no supervisory control. (*Ibid.*)

Here, as we have explained, the University did not supervise Moore's work in lifting or moving packages. Injury from lifting heavy boxes that may be mislabeled by UPS customers was a risk inherent in Moore's job. The University did not have a duty to protect Moore from injury that resulted from that risk.

Secondary assumption of risk does not apply because we conclude the University did not have a duty to prevent injuries that result from a risk inherent in Moore's occupation. (*Gregory v. Cott, supra*, 59 Cal.4th at p. 1007 [secondary assumption of risk is predicated on the existence of a duty].) Because the existence of a duty is a necessary element of a negligence action (*Bigbee v. Pacific Tel. & Tel. Co*. (1983) 34 Cal.3d 49, 54, fn. 3) and the University owed Moore no duty in the circumstances present, the trial court did not err in granting the University summary judgment. Having held that the University did not owe Moore a duty under the primary assumption of risk doctrine, we need not address Moore's contention that the University owed him a duty of care under the factors set forth in *Rowland v. Christian, supra*, 69 Cal.2d 108. (*Priebe v. Nelson, supra,* 39 Cal.

4th 1112 [no analysis of *Rowland v. Christian* factors in case applying the primary assumption of risk to bar action]; *Knight v. Jewett, supra*, 3 Cal.4th 296 [same]; *Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88, fn. 1 [the primary assumption of risk doctrine is an exception to applicability of the *Rowland v. Christian* test].)

DISPOSITION

The judgment is affirmed. The University shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

/S/
Mauro, J.

We concur:

/S/
Raye, P. J.

/S/
Hull, J.

NOTE: PREVIOUS UNPUBLISHED OPINION BARRING CLAIM OF PLAINTIFF FOR INJURIES ARISING FROM ACTIVITIES AT HAUNTED HOUSE ATTRACTION ORDERED PUBLISHED. SEE BELOW:

Filed 10/23/15 Certified for Publication 11/20/15 (order attached)

DOCTRINE OF ASSUMPTION OF RISK BARS CLAIM FOR INJURIES SUFFERED IN HAUNTED HOUSE ATTRACTION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

SCOTT GRIFFIN, Plaintiff and Appellant, v. THE HAUNTED HOTEL, INC., Defendant and Respondent.	D066715 (Super. Ct. No. 37-2013-00044186-CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Katherine A. Bacal, Judge. Affirmed.

Ardalan & Associates, P. Christopher Ardalan and Mark K. Drew for Plaintiff and Appellant.

Murchison & Cumming, Jefferson S. Smith, David M. Hall and Scott J. Loeding for Defendant and Respondent.

In October 2011 Appellant Scott Griffin purchased a ticket to experience The Haunted Trail, an outdoor haunted house type of attraction where actors jump out of dark spaces often inches away from patrons, holding prop knives, axes, chainsaws, or severed body parts. After passing what he believed was the exit and "giggling and laughing" with his friends about how

much fun they had, Griffin unexpectedly was confronted by a final scare known as the "Carrie" effect—so named because, like the horror film Carrie, patrons are led to believe the attraction is over, only to be met by one more extreme fright. This was delivered by an actor wielding a gas powered chainsaw (the chain had been removed), who approached Griffin, frightened him, and gave chase when Griffin ran away. Griffin was injured when he fell while fleeing. Griffin sued The Haunted Hotel, Inc. (Haunted Hotel), which operates The Haunted Trail, alleging negligence and assault.

"Under the primary assumption of risk doctrine, there is no duty to eliminate or protect a plaintiff against risks that are inherent in a sport or [recreational] activity." (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 115.) The trial court granted Haunted Hotel's motion for summary judgment, determining under the primary assumption of risk doctrine Haunted Hotel did not breach any duty to Griffin.

We affirm. The risk that a patron will be frightened, run, and fall is inherent in the fundamental nature of a haunted house attraction like The Haunted Trail. Moreover, on this record there is no evidence creating a triable issue Haunted Hotel unreasonably increased the risk of injury beyond those inherent risks or acted recklessly.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Haunted Trail*

Haunted Hotel operates four Halloween attractions in San Diego County, including The Haunted Trail located in Balboa Park. The Haunted Trail operates from September through October, ending on Halloween.

The Haunted Trail features actors in ghoulish costumes who frighten, startle and sometimes chase patrons amid loud noises and flashing strobe lights in a one mile loop in Balboa Park. Patrons follow a narrow trail in the natural park setting, passing from one horror set to the next, each telling a different gruesome story. Along the way, actors jump out of dark spaces or spring from around corners, often inches away from patrons, holding bloody prop knives, axes or other weapons, or a severed body part.

If a patron becomes frightened and runs away, one of the actors will often chase after the person. The Haunted Trail played an orientation audiotape for every group of visitors who attended the attraction in 2011, which states:

> "Our creatures will not grab you, however, they may accidentally bump into you. Oh, you will be scared sh–less and try to run away, but in the end our creatures will chase you down like the chickens that you are!"[5]

---

[5] Griffin's lawyers admitted the audiotape was played for "every" group of visitors who attended in 2011. However, Griffin testified in his deposition he did not remember hearing it.

In 2011 the "Frequently Asked Questions" part of The Haunted Trail's Web site stated, "[Y]ou will not be grabbed or pushed," and warned, "Running is the main cause of minor injuries. Make sure to follow the rules and DON'T run and you should be fine!" Signs at the entrance stated, "Due to natural surroundings of the park the ground may be uneven with some obstacles such as tree roots, rocks, etc. Be careful."

The parties do not dispute that the ticket Griffin purchased states, "This attraction contains high impact scares" and "is not suitable for people with heart conditions or people prone to seizures; is not recommended for children under age 10; and pregnant women, infants and children being carried will not be allowed entry." The Haunted Trail instructs its employees to "stay away" if a child is crying, not to chase children at all, and to "stay clear of people who are crying."

In 2011 The Haunted Trail employed uniformed off-duty San Diego police officers, a private security force, and an emergency medical technician service to be on-site all weekend nights. All were present the night Griffin attended.

Photographs on The Haunted Trail Web site featured costumed actors holding chainsaws. Griffin purchased his ticket on the Web site. The chainsaw-wielding actors are the most popular feature of The Haunted Trail. The chainsaw scenes have been mentioned in radio advertising or shown on television.

At the final scene along the trail, three people with prop chainsaws—gas powered chainsaws with the chains removed—menace patrons as they walk to an opening in the temporary chain link fence, covered with a dark screen, that runs along the edge of the trail. That opening appears to be the exit, the end of the attraction.

What follows is something Haunted Hotel calls the "Carrie" effect, a final scare patterned after the closing scene of the horror movie Carrie when the audience is led to believe that the terror is over, only to be given one last jolting scare. When patrons have walked through the opening in the fence, they regroup on the park access road, thinking the attraction is over. But this is a fake exit. The access road is controlled by Haunted Hotel. A chainsaw-wielding actor with a gas powered chainsaw suddenly appears, starts the chainsaw, and charges at the patrons—providing a final scare. Although the chain has been removed from the chainsaw, it "still has the whole sound, the whole smell of a chain saw, and that's what gives the effect of—people think it's a real chain saw." During this last encounter, patrons are most prone to run away, with the actor giving chase.

The access road is visible to surrounding public space. Families "actually come and camp out and watch" because "it's fun to see when someone gets freaked out when a chain saw comes and chases an individual."

In the 14 years The Haunted Trial has been operating, over 250,000 patrons have attended the event. In the three years preceding Griffin's incident, between 10 and 15 people fell while running from the chainsaw-wielding actor in this final scare. Three people fell the night Griffin attended. None of the15 who fell reported being injured.

B. *Griffin's Incident*

Near Halloween in October 2011 Griffin learned some friends were planning to attend The Haunted Trail. Griffin had previously attended Knott's "Scary" Farm and possibly "Fright

Night" at Universal Studios. He had been to Balboa Park before, but he had never heard of The Haunted Trail and knew nothing about the attraction.

Griffin and his group entered the attraction, but Griffin recalled little about the preliminaries, acknowledging that he was "not paying attention" to his surroundings, but rather "laughing, visiting" with friends. As he walked through The Haunted Trail, Griffin was, to use his own words, "scared pretty darn good." He was not chased along the trail and said "it was fun."

At the final scene along the trail, Griffin heard chainsaws. At first, he was "shocked," but he just "walk[ed] through . . . I knew we were almost ending . . . we had already had so much fun already through the thingy, so it was okay."

After this final scene, Griffin headed for the "gate," which he believed was an exit, "ending the experience."

> "[T]here was clearly, to me, an exit that the event is over because inside everything is roped off, you are on a path. It's very clear where you're going. And the gates and the exit, to me, were clear that we were done with the experience."

Griffin and his friends were standing on the access road, "giggling and laughing" and saying "how fun was that?" This area, a "well-lit even surface," is actually controlled by The Haunted Trail and is part of the show

Griffin testified in deposition that suddenly, a "gentleman" started a chainsaw and "came at me with it." Griffin tried to "back away from him" but "he just kept following me." Griffin asked the man to "stop" and when he did not stop, Griffin "started running away because it felt unsafe with his chainsaw because he was pointing it at me . . . ."

Griffin testified, "I started to try to get away from him, and, boy, he seemed to really enjoy that" and "I really got scared because he was really at me, with me at it, he was unlike the other people. And we had already exited the venue. He was right into my space." "He was literally coming at me. He selected me . . . . [¶] . . . He was pointing it [chainsaw] right at me and it was live and active; you could literally smell the gas . . . hear the sound and everything. Yes, I felt like he was handling that very dangerous [*sic*]. . . . [¶] . . . [¶] It was a real chainsaw. . . . [¶] . . . [¶] . . . This gentlemen did not keep a safe distance . . . and the more I backed away, the more he followed me. I asked him to stop; he wouldn't. I started running. He was literally running after me. And I really felt unsafe. And then I started getting really fearful that something was going to happen, because here's some stranger—I don't even know who he is—with a live, active chainsaw running after me with it. [¶] . . . [¶] . . . I was fearful for my safety big time." "I really felt that he could have tripped, that chainsaw could have fell down, and I could dangerously [*sic*] get hurt by it. That's what I felt."

While being chased and running an unspecified distance, Griffin fell, injuring his wrist. In deposition, Griffin acknowledged "it is the point of The Haunted Trail to scare the people who attend" and "not many people would attend the event if it were not scary."

A representative of The Haunted Trail testified in deposition, "you scare the hell out of them as much as you possibly can, and that's what they're paying us for, that's why they come." He stated Griffin "was never in harm. . . . He ran. He chose to run. You can't chase a human

that doesn't run. If he had just stood there and said 'stop,' then it's not fun. You move on. You scare somebody else."

C. *The Trial Court Grants Summary Judgment*

In March 2014 Griffin filed a first amended complaint against Haunted Hotel for general negligence, negligent hiring, training, supervision, and retention, and assault. Overruling a defense motion to strike, the trial court allowed the amended complaint to allege punitive damages, in part because "the FAC [first amended complaint] now alleges that defendant trained employees to chase patrons beyond the exit."

In June 2014 the Haunted Hotel filed a motion for summary judgment, asserting "the primary assumption of risk doctrine, as recently applied by the California Supreme Court in *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148 [(*Nalwa*)], operates as a bar against claims by the patrons of 'scare' attractions or 'haunts' for injuries allegedly sustained as a result of being frightened, startled, chased or otherwise menaced during the activity by actors who are employed to do just that."

Griffin filed opposition, asserting the "fatal flaw" in Haunted Hotel's theory was "Mr. Griffin was not injured while on the Haunted Trail, and the reason why he ran had nothing to do with being scared by an actor's fantasy role play." (Emphasis omitted.) Citing *Luna v Vela* (2008) 169 Cal.App.4th 102, 113, Griffin's lawyers also asserted, "the primary assumption of the risk doctrine does not apply in context where a Defendant is accused of engaging in oppressive, malicious or reckless conduct." (Emphasis omitted.)

At the hearing, the trial court focused on whether the Carrie effect scare occurred inside the attraction:

> "The Court: Well, let me ask you this because it appeared to me that major issue is whether the gate was, in fact, an exit and the end of the show or whether the gate was what appears, at least defendants are arguing, a fake exit and all part of the show. [¶] And if that's the case and the plaintiff was still within the bounds of what was controlled by defendant, that's the experience he paid for. . . . [¶] . . . [¶] . . . That's the question. Where does the experience end?"

After oral argument, the court granted the motion for summary judgment, stating, "the argument that defendant went beyond its boundaries is not supported by the evidence. It appears all the activities took place on and within defendant's boundaries, although plaintiff was unaware of that fact. That awareness, that subjective awareness is not what is required. And given further what the inherent nature of this event was, it does not appear inappropriate or actionable." In its order, the trial court added:

> "Patrons of The Haunted Trail pay for the opportunity to be scared and The Haunted Trail, by design, is scary. Plaintiff argues the assumption of risk doctrine does not apply because he was chased after he believed the event was over and 'even football fields have sidelines.' [Citation.] However, the doctrine 'does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk.' *Knight*[*v. Jewett* (1992)] 3 Cal.4th [296,] 316 [(*Knight*)]. [¶] . . . [W]hile the plaintiff believed he

had gone through an exit he was still within the scary experience he purchased. The risk that plaintiff might be scared enough to run away is inherent in the fundamental nature of a haunted house attraction.
[¶] . . . [W]ho would want to go to a haunted house that is not scary?"

The court entered judgment in favor of The Haunted Hotel. Griffin timely appealed.

DISCUSSION

I. *Standard of Review*

"We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Luna v. Vela*, *supra*, 169 Cal.App.4th at p. 107.) "Determining whether the primary assumption of risk doctrine applies is a legal question to be decided by the court." (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 656 (*Beninati*).)

II. *The Primary Assumption of Risk Doctrine*

Under the primary assumption of risk doctrine, an operator of a business that provides a recreational activity posing inherent risks of injury has no duty to eliminate those inherent risks. (*Nalwa, supra,* 55 Cal.4th at p. 1162.) *Knight, supra,* 3 Cal.4th 296 illustrates the concept in the context of a ski resort, explaining that because moguls on a ski run are an inherent risk of the sport, a resort operator would have no liability to a plaintiff who fell while skiing over a mogul. (*Id.* at pp. 315–316.)

In *Nalwa*, *supra,* the Supreme Court held primary assumption of risk is not limited to sports, but also applies to other recreational activities "'involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.'" (*Id.* at p. 1156.) In *Nalwa*, the Court applied primary assumption of risk where the plaintiff was injured on an amusement park bumper car ride.

Primary assumption of risk has been applied in other recreational contexts. For example, in *Beninati, supra,* 175 Cal.App.4th 650, the court applied the doctrine where the plaintiff, who attended the Burning Man Festival, was himself burned when he tripped and fell into the remnants of the burning man effigy. The court also applied primary assumption of risk in *Amezcua v. Los Angeles Harley-Davidson, Inc.* (2011) 200 Cal.App.4th 217, which involved a noncompetitive group motorcycle ride.

Which risks are inherent in a given recreational activity is suitable for resolution on summary judgment. (*Nalwa, supra,* 55 Cal.4th at p. 1158.) Such a determination is a legal question within the province of the courts and is reached from common knowledge. (*Luna v. Vela*, *supra*, 169 Cal.App.4th at p. 110.) The court may also consider its "own or common experience with the recreational activity . . . and documentary evidence introduced by the parties on a motion for summary judgment." (*Nalwa*, *supra*, 55 Cal.4th at p. 1158.)

Under the primary assumption of risk doctrine, "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 [recreational activity] and the defendant's role in or relationship to that [activity] 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*).)

Primary assumption of risk does not provide absolute immunity. A participant and an owner/operator still owe certain duties of care. Such duties vary according to the *role* played by particular defendant involved in the activity. (*Luna v. Vela*, *supra*, 169 Cal.App.4th at p. 109.) For example, a batter, i.e., a *participant* in a baseball game, has no duty to avoid carelessly throwing a bat after hitting a ball—such conduct being an inherent risk of the sport. However, the ballpark *owner*, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. (*Ibid*.)

Owners and operators "owe participants the duty not to unreasonably increase the risk of injury" beyond those inherent in the activity. (*Nalwa*, *supra*, 55 Cal.4th at p. 1162; *Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1059 (*Fazio*).)

Coparticipants in a recreational activity may be liable if their conduct is "so reckless as to be totally outside the range of the ordinary activity" involved. (*Knight*, *supra*, 3 Cal.4th at p. 320.) Conduct is """totally outside the range of ordinary activity involved""" if prohibiting that conduct would """neither deter vigorous participation""" in the activity nor """otherwise fundamentally alter""" its nature. (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 470.)

In moving for summary judgment, Haunted Hotel had the burden to establish: (1) primary assumption of risk applied to this recreational activity; and (2) the undisputed evidence established as a matter of law Haunted Hotel did not (i) unreasonably increase the risk of harm beyond those risks inherent in the Haunted Trail; and (ii) intentionally or recklessly injure Griffin. (*Fazio*, *supra*, 233 Cal.App.4th at pp. 1060, 1063.)

III. *The Trial Court Properly Entered Summary Judgment*

A. *Primary Assumption of Risk Applies to the Haunted Trail*

The trial court correctly applied primary assumption of risk to the recreational activity of the Haunted Trail. The doctrine applies to recreational activities "'involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.'" (*Nalwa*, *supra*, 55 Cal.4th at p. 1156.) In *Nalwa*, the Supreme Court applied primary assumption of risk to a bumper car amusement ride because the whole point of a bumper car is to bump and "[y]ou pretty much can't have a bumper car unless you have bumps." (*Id.* at p. 1157.) Bumper car collisions carry an inherent risk of minor injuries, and the risk cannot be eliminated without changing the basic character of the activity. "'Indeed, who would want to ride a *tapper car* at an amusement park?'" (*Id*. at p. 1158.)

Similarly here, the point of The Haunted Trail is to scare people, and the risk that someone will become scared and react by running away cannot be eliminated without changing the basic character of the activity. As the trial court aptly noted, "[W]ho would want to go to a haunted house that is not scary?" (See also Moar, *Case Law from the Crypt, The Law of Halloween* 83-Oct N.Y. St. B.J. 10, (Oct. 2011) [discussing haunted house personal injury cases and concluding, "Patrons in a Halloween haunted house are expected to be surprised, startled and scared by the exhibits but the operator does not have a duty to guard against patrons reacting in bizarre, frightened and unpredictable ways."].)

B. *Griffin's Arguments Against Applying Primary Assumption of Risk Are Without Merit*

On appeal, Griffin concedes primary assumption of risk applies to a haunted house activity, at least to the extent injuries occur within the boundaries of the attraction. Nevertheless, for a variety of reasons, Griffin contends the court erred in applying the doctrine in this case. As explained below, none of Griffin's contentions has merit.

1. *Duty is a question of law*

Citing *Luna v. Vela*, *supra*, 169 Cal.App.4th at pages 112-114, Griffin contends "[w]hether a particular risk is within the inherent risk of a particular activity is a triable issue of fact for the jury to decide and is inappropriate for resolution at the summary judgment stage."

However, Griffin incorrectly states the law. "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1635; *Nalwa*, *supra*, 55 Cal.4th at p. 1158.) "Judges may rely on their own or common experience with recreational activity in deciding 'inherent risk questions.'" (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 469.) "Since the existence of the primary assumption of the risk is dependent upon the existence of a legal duty, and since duty is an issue of law to be decided by the court, the applicability of that defense is amenable to resolution by summary judgment." (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395.)

The case upon which Griffin relies, *Luna v. Vela*, does not support, but rather refutes, Griffin's argument. In *Luna v. Vela* the court held, "'The determinant of duty, "inherent risk," is to be decided solely as a question of law and . . . is necessarily reached from the common knowledge of judges . . . .'" (*Luna v. Vela*, *supra*, 169 Cal.App.4th at p. 110.)[6]

2. *Griffin's subjective fear*

Griffin also asserts that even if being frightened is an inherent risk of the Haunted Trail, there is a triable issue about the "type" of "fear" Griffin experienced. More specifically, Griffin contends his injuries were not caused by his reaction to "fun" fear—which he defines as "the purpose for why he and others go to such scare events." Rather, Griffin asserts, he was fearful of the "real, actual danger of physical injury that an irresponsible employee was creating" by mishandling the chainsaw. According to Griffin's lawyers, "Mr. Griffin made it clear [in his deposition testimony] that his fear was not a mere reaction to a startling, scary appearance as a scary

---

6 On the entirely *separate issue* of whether the defendant unreasonably increased the risk of harm beyond the inherent risk of the activity, *Luna v. Vela* held that on the record there, a triable issue of fact existed precluding summary judgment. (*Luna v. Vela*, *supra*, 169 Cal.App.4th at p. 112.)

maniac, but instead, the real and actual fear that one of Respondent's employees was acting in a dangerous and reckless manner and, as a result, was creating an actual physical danger."

We reject Griffin's argument for two reasons. First, Griffin's deposition testimony does not support his lawyer's theory that Griffin ran away because he knew the person chasing him was a Haunted Trail actor and was fearful of the way the employee was handling the chainsaw. As quoted below, Griffin testified he thought the Haunted Trail attraction had already ended, and he believed the chainsaw-wielding assailant was *not* part of the show:

> "[H]e started his chainsaw, and his chainsaw was going, and I really got scared because he was really at me, with me at it, *he was unlike the other people. And we had already exited the venue.* He was right into my space." (Italics added.)
>
> [U]nlike the ones inside, they are behind the guided ropes, and it felt completely self [sic] and staged, and it felt safe and I never got scared."
>
> But that was not what this gentleman did with his chainsaw. This gentleman did not keep a safe distance. He did come at me with it, and the more I backed away, the more he followed me. I asked him to stop; he wouldn't. I started running. He was literally running after me. And I really felt unsafe."
>
> And then I started getting really fearful that something was going to happen, *because here's some stranger—I don't even know who he is*—with a live, active chainsaw running after me with it." (Italics added.)

Contrary to his assertions on appeal, Griffin's deposition testimony dovetails perfectly into applying primary assumption of risk. The risk inherent in the Haunted Trail's Carrie effect ending—that a patron would be lulled into a false sense of safety by a fake exit, and then be confronted with an extreme scare event that would cause the person to flee (and fall while fleeing)—is exactly the risk Griffin experienced.

Second, even assuming Griffin's lawyer's theory is correct, i.e., Griffin knew the whole scene was fake, but was afraid because the actor was mishandling what appeared to be a live chainsaw—Griffin's subjective state of mind is simply irrelevant in this context. Because primary assumption of risk focuses on the question of duty, it is *not* dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk. (*Knight*, *supra*, 3 Cal.4th at p. 316.) Thus, even if Griffin was injured from his reaction to "scary fear" rather than "fun" fear, his subjective mental state is irrelevant. (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471.) "[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 [activity] and the defendant's role in or relationship to that [activity] in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm." (*Avila*, *supra*, 38 Cal.4th 148 at p. 161.)

3. *The location of the Carrie effect scare*

Griffin also contends that primary assumption of risk does not apply because "the location of the final scare took place *outside* the boundary of the Haunted Trail." (Emphasis omitted.) He contends there should be a "simple bright line rule" that a haunted house confines its "scary conduct" to the "boundaries of the event."

Griffin's argument fails because the boundaries of the attraction are defined by Haunted Hotel, not its patrons. It is undisputed the attraction included the access road where Griffin was chased, ran, and apparently fell. Undisputed fact #25 states, "When parties have 'exited' through opening in the fence, they regroup on the park access road, *also controlled by Defendant during the weeks of the event*, thinking the attraction is over. Then, one of the chainsaw-wielding actors suddenly appears and charges at the patrons one last time—providing a final scare." (Italics added.) Undisputed facts #50 and #51 state Griffin was standing on this access road when the chainsaw-wielding actor appeared and started chasing him. The record does not contain evidence of the exact location where Griffin fell; however, there is no evidence Griffin was chased beyond the access road, which was controlled by Haunted Hotel and part of The Haunted Trail activity. Indeed, after inviting Griffin's lawyer to identify evidence that the incident occurred off-site, and hearing him cite none, the trial court concluded, "the argument that defendant went beyond its boundaries is not supported by the evidence."

Griffin also argues that "at minimum," whether his proposed "bright line rule" would inherently alter the basic nature of scare events like The Haunted Trail is a jury question that should not be resolved on summary judgment. However, as already noted, determining what risks are "inherent" is a question of law. (*Nalwa*, *supra*, 55 Cal.4th at p. 1158.)

4. *Revoked consent*

Finally, Griffin argues there is a triable issue he revoked his consent to assuming the risk of being frightened because he repeatedly told the actor chasing him to "stop." However, Griffin's argument fails because "[p]rimary assumption of risk focuses on the legal question of duty." (*Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 943.) Primary assumption of risk "does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant." (*Ibid*.) For example, in *Cann v. Stefanec*, *supra*, the plaintiff was injured by a weight dropped by a fellow swim team member during a workout session. The plaintiff argued primary assumption of risk did not apply because "she did not impliedly consent to having a weight dropped on her head." (*Cann, supra,* 217 Cal.App.4th at p.

471.) The appellate court rejected that argument, stating primary assumption of risk "'does not depend upon a plaintiff's implied consent to injury . . . .'" (*Ibid*.)

C. *There Is No Evidence Creating a Triable Issue That Haunted Hotel Unreasonably Increased the Risks Beyond Those Inherent in the Activity*

The doctrine of primary assumption of risk "'does not grant unbridled legal immunity to all defendants.'" (*Fazio v. Fairbanks Ranch Country Club*, *supra*, 233 Cal.App.4th at p. 1059.) An owner or operator still has a duty to use due care not to increase the risks to a participant over and above those inherent in the activity. (*Ibid*.) Accordingly, a defendant who moves for summary judgment must establish its conduct did not increase the risk of harm to participants. (*Id*. at p. 1060.)

The Supreme Court has stated that "on a sufficient record," summary judgment is appropriate in primary assumption of risk cases. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500.) For example, in *Beninati*, *supra*, 175 Cal.App.4th at pages 660-661, involving an attendee at the burning man event who fell into the fire, the court affirmed summary judgment because there was no evidence defendant "did anything that increased the inherent risk of harm to [plaintiff] normally associated with entering an area surrounded by fire." In contrast, this Court reversed summary judgment in a primary assumption of risk case involving a fall injury where there was conflicting evidence on the adequacy of lighting where plaintiff fell. (*Fazio*, *supra,* 233 Cal.App.4th at p. 1063.)

Griffin contends summary judgment was improperly granted, asserting there is a triable issue Haunted Hotel unreasonably increased the inherent risk of harm. Griffin notes The Haunted Trail's website warns patrons not to run: "Running is the main cause of minor injuries. Make sure to follow the rules and DON'T run and you should be fine." Yet, Griffin argues, the Haunted Trail failed to follow its own safety rule by encouraging its patrons to run by stating: "Oh, you will be scared sh–less and try to run away, but in the end our creatures will chase you down like the chickens that you are." Moreover, Griffin claims Haunted Hotel "chose to encourage running *in the dark in the woods* . . . ."! (Italics added.)(AOB 27)! In his reply brief, Griffin states

---

/

For the first time in his reply brief, Griffin argues that fear of physical harm "is not something that is an inherent part of the *cultural experience of Halloween*." (Italics added, original emphasis omitted.) Arguments made for the first time in a reply brief are not considered. Moreover, this case does not involve the cultural experience of Halloween, i.e., pumpkin carving, trick or treating with young children, or even bobbing for apples. It involves an adult who pays money to experience extreme fright, and receives exactly what he paid for.

Haunted Hotel failed to respond to this argument in its own brief, and therefore, "Respondent's failure to contest this area, independently, warrants reversal."

Addressing Griffin's last point first—Haunted Hotel's brief does address this issue, albeit obliquely, and only in a footnote at the bottom of page 50. There, Haunted Hotel states, "The *Nalwa* Court also expressly rejected Appellant's argument that the Haunted Trail's website rules discouraging running impose a legal tort duty upon Respondent."

While placing a respondent's argument in a footnote may be a tactical mistake because it could be easily overlooked, even a respondent's *complete failure* to address an appellant's argument does not require us to treat the failure to respond as a concession the argument has merit. (*Kruger v. Department of Motor Vehicles* (1993) 13 Cal.App.4th 541, 546.) In fact, if a respondent in a civil case files no brief at all, we still examine the record to see if it supports any claims of error made by the appellant. (*Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 734, fn. 1.)

Griffin cites no authority for his contention "reversal is compelled" when a respondent fails to address an appellant's argument. We could reject his argument on that ground alone. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.) Moreover, if such a rule were adopted, it would require a respondent to respond to his or her opponent's every argument, no matter how meritless. This would often needlessly lengthen briefs and resulting needless expense to clients. Failing to respond to an opponent's argument does not warrant the inflexible forfeiture rule Griffin proposes. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3 overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Turning to the merits, Griffin's arguments are unsupported by the record. For example, Griffin contends the Haunted Trail "chose to encourage running in the dark woods." However, it is undisputed the area where Griffin was chased was not in the woods but rather was on *even pavement* and was "*well-lit*." (Italics added.)

It is true that Haunted Hotel recognized there was a risk of harm from running, and yet knew patrons were prone to run while being chased in the Carrie effect scene. But Griffin errs in concluding these facts create a triable issue Haunted Hotel unreasonably increased the risk of harm *beyond* those inherent in a haunted house experience. As explained, an inherent risk of a fright-event such as The Haunted Trail is patrons will become frightened and run. Therefore, under the primary assumption of risk doctrine, Haunted Hotel had no duty to protect Griffin from or eliminate that risk.

The scope of Haunted Hotel's duty is to not unreasonably *increase* the inherent risk a patron would be surprised, started, or scared by the Carrie effect scene, causing the patron to run and fall. Griffin cites no evidence raising even a reasonable inference that any action or inaction by Haunted Hotel increased the risk of harm to Griffin *beyond those inherent* in an intensely scary amusement attraction, or that such risk could have been mitigated without altering the nature of the attraction Griffin was voluntarily participating in.

For this reason, the instant case is far different from *Luna v. Vela*, *supra*, 169 Cal.App.4th at page 112, where there was evidence the defendant increased the risk of tripping over a front-yard volleyball net, and *Fazio v. Fairbanks Ranch Country Club*, *supra*, 233 Cal.App.4th at p. 1063, where there was conflicting evidence on the adequacy of lighting on the stage where plaintiff fell.

The warnings Haunted Hotel gave to not run, and its conduct in encourage patrons to run do not change the analysis. In *Nalwa,* the Supreme Court considered a similar argument and upheld summary judgment. There, Plaintiff's injury occurred when her bumper car was bumped head-on. (*Nalwa*, *supra,* 55 Cal.4th at p. 1152.) The defendant amusement ride owner in *Nalwa* had established rules designed to discourage head-on bumping, but knew head-on bumping still occurred. Affirming summary judgment, the *Nalwa* Court rejected the argument the defendant's rules created a triable issue it had unreasonably increased the risk of harm. The Court stated, "[W]hile plaintiff points to defendant's efforts to discourage head-on bumping, such voluntary efforts at minimizing risk do not demonstrate defendant bore a legal duty to do so; not every rule imposed by an organizer or agreed to by participants in a recreational activity reflects a legal duty enforceable in tort." (*Id.* at p. 1163.) Similarly here, Haunted Hotel's efforts to minimize risks does not create a triable issue Haunted Hotel unreasonably increased the risk of falling beyond that inherent in the frightening event.

D. *There Is No Evidence Creating a Triable Issue That Haunted Hotel Acted Recklessly*

In applying primary assumption of risk, a coparticipant in a sport breaches a duty of care "only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport." (*Knight*, *supra*, 3 Cal.4th at p. 320, fn. omitted.) In a primary assumption of risk case, summary judgment is appropriate where there is no evidence the defendant intentionally or recklessly injured the plaintiff. (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1066.)

Griffin contends the court erred in granting summary judgment because there is a triable issue Haunted Hotel "recklessly and intentionally caused customers, including Mr. Griffin, to run despite being aware of a serious trip and fall hazard." Griffin contends Haunted Hotel acted recklessly because prior to Griffin's incident, 15 people had run and fallen at The Haunted Trail, and "at least" 10 of these were on the access road when patrons were chased by the actor carrying the chainsaw.

Reckless conduct involves a "'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.'" (*Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1373.) Reckless conduct is the ""deliberate disregard" of the "high degree of probability" that an injury will occur.'" (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 470.)

Here, viewing the evidence in the light most favorable to Griffin, in the 14 years The Haunted Trail has been operating before this incident, at least 250,000 patrons attended, and only 10 of those fell on the access road during the Carrie effect. And, none of those 10 were injured, except for Griffin. The trial court correctly determined this is *not* a "high probability that an injury will occur."

Griffin also contends Haunted Hotel was reckless because there were "areas in the park, the grounds could be different levels, there could be cracks, things on the ground the people can trip on" and "[s]ome areas could be dark." However, this testimony about what "could be" is too speculative to create a triable issue of any increased risk of harm. (See *Kachadoorian v. Calwa County Water Dist.* (1979) 96 Cal.App.3d 741, 749-750 [testimony about what "could be" is

speculative].) Speculative possibilities are not substantial evidence. (See *Citizen Action To Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 756.)

Moreover, the witness who testified what "could be" was not asked what "areas in the park" he was referring to—and perhaps more to the point, Griffin conceded as an "undisputed fact" the Carrie effect occurred "on a well-lit even surface."

Griffin also contends the court erred in determining there is no triable issue of recklessness because (1) the court allowed Griffin to allege punitive damages, and (2) the factual allegations upon which the court allowed the punitive damage claim "have full factual basis . . . ."

Griffin incorrectly states his allegations were supported by the evidence. His punitive damage claim primarily rested on allegations Haunted Hotel trained its employees to chase patrons beyond the physical boundary of the event. On summary judgment, this allegation was refuted. In short, a trial court's ruling that punitive damages was adequately *pleaded* does not require a finding on summary judgment, an evidentiary motion, that a triable issue of punitive damages exists.

The cases involving reckless conduct Griffin cites, where summary judgment has been denied, are materially distinguishable from Griffin's case. For example, in *Mammoth Mountain Ski Area v. Graham*, *supra,* 135 Cal.App.4th 1367, a ski instructor was injured when struck by a teenaged snowboarder, while the snowboarder's attention was directed toward his brother, with whom he was engaged in a downhill high speed snowball fight. The court held there was a triable issue the defendant snowboarder was reckless because "[w]hile many cold-weather activities involve the throwing of snowballs, participation in snowboarding or skiing does not carry with it the inherent risk of being struck by another snowboarder or skier engaged in a snowball fight." (*Id*. at pp. 1373-1374.)

Similarly, in *Lackner v. North* (2006) 135 Cal.App.4th 1188, defendant snowboarded at high speed into a flat area at the base of an advanced run where people stop to rest, was not looking where he was going, and collided with a skier at a complete stop. The force of impact was so strong, the plaintiff's husband, standing nearby, heard the bones being crushed. The defendant's conduct in *Lackner* was analogous to a freeway driver exiting the freeway without slowing down or looking for other cars, and as a result, crashes into one that has stopped and is waiting to turn onto a connecting street. On those facts, the court held there was a triable issue the defendant was reckless. (*Id.* at pp. 1194-1195.)

In stark contrast here, the very purpose of the Haunted Trail is to frighten patrons. Haunted Hotel informed patrons the event had "high impact scares." Patrons in a Halloween haunted house are expected to be surprised, startled, and scared by the exhibits. That is what Griffin paid money to experience. At bottom, his complaint here is Haunted Hotel delivered on its promise to scare the wits out of him.

Galan v. Covenant House New Orleans (La.Ct.App. 1997) 695 So.2d 1007, 1008 fully supports the result here. In *Galan*, after a haunted house patron walked through a fake "exit," a chainsaw carrying actor jumped out to frighten the patrons "one last time." Plaintiff sued alleging defendants breached their duty "by placing their last exhibit outside of the exit . . . at a point where patrons would no longer expect to be frightened." The *Galan* court rejected the argument, concluding:

> "Patrons in a Halloween haunted house are expected to be surprised, startled and scared by the exhibits but the operator does not have a duty to guard against patrons reacting in bizarre, frightened and unpredictable ways." (*Id.* at p. 1009.)

A basic part of the scares at The Haunted Trial is the startling, frightening, menacing and chasing of patrons by actors in ghoulish costumes, some carrying chainsaws with the chain removed. There is an inherent risk that a patron may decide to run and fall. Because there is no evidence that anyone associated with The Haunted Trail intentionally injured Griffin, and because being chased in the Carrie effect scene is neither reckless nor outside the range of ordinary activity involved in a scare attraction, the trial court properly determined that as a matter of law, Haunted Hotel breached no duty to Griffin.

Being chased within the physical confines of The Haunted Trail by a chainsaw carrying maniac is a fundamental part and inherent risk of this amusement. Griffin voluntarily paid money to experience it. "It is not the function of tort law to police such conduct." (*Avila*, *supra*, 38 Cal.4th at p. 165.)

DISPOSITION

The judgment is affirmed. Haunted Hotel to recover costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.

Filed 11/20/15

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

SCOTT GRIFFIN,
Plaintiff and Appellant,
v.
THE HAUNTED HOTEL,
Defendant and Respondent.
D066715
San Diego County No. 37-2013-00044186-CU-PO-CTL

THE COURT:

On November 2, 2015, this Court issued an order denying respondent's October 23, 2015 request for publication.

Thereafter, the Court received three additional requests for publication, one from a law firm representing the California Attractions and Parks Association that represent clients in cases arising out of the operation of amusement and entertainment venues. Based on the persuasive reasoning set forth in these additional publication requests, the court now concludes that the opinion meets the criteria for publication in California Rule of Court, rule 8.1105(c).

Therefore, the opinion is ordered published.

BENKE, Acting P. J.