SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

MEREDITH WIES, a minor by and through her Guardian Ad Litem, FRANK WIES;

Plaintiff,

vs.

JOHN ALBAN, an individual; SAMUEL OESER, an individual; JARED ALBAN, an individual; ALBAN VINEYARDS, INC., a business entity; STEINBERG FARM SERVICES, INC., a business entity; and DOES 1 through 20, Inclusive,

Defendants.

AND RELATED CROSS-COMPLAINTS

CASE NO. 16CV0250

RULING AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Assigned Judge: Hon. Charles S. Crandall

Meredith Wies, through her guardian ad litem, Frank Wies, (Wies) brings this single cause of action for negligence against Alban Vineyards, Inc., Steinberg Farm Services, Inc., and their principal and owner, John Alban, and his son Jared Alban (Defendants). Wies suffered personal injuries when she was thrown to the ground while riding on an ATV being

driven by Samuel Oeser (Oeser). The ATV was owned by Defendants and the accident occurred on Defendants' 160-acre ranch and vineyard. Various cross-complaints for indemnity have been filed by Defendants, Oeser, and others.

On September 6, 2015, Wies and her friends, Sam Secord, Alexi Miller, and Oeser were looking for something to do. When their original plans were thwarted by the closure of Big Falls, the four teenagers called their friend, Jared Alban, because they were near his family's ranch.

Although Jared was not home, he agreed to meet his friends at his ranch to possibly ride ATVs. When the four arrived at the ranch, they were let onto the property by Jared's brother, Keenan. Before Jared arrived, Secord and Oeser, allegedly with Keenan's permission, began to drive Defendants' ATVs. Wies got on the back of the ATV being operated by Oeser. She was thrown to the ground and lost consciousness when Oeser lost control of the ATV he was driving.

Defendants bring this motion for summary judgment as to the complaint and related cross-complaints on the grounds they are not liable for Wies' injuries pursuant to the recreational use immunity set forth in Civil Code §846, and/or the primary assumption of the risk doctrine. Wies opposes the motion.

As the moving parties, Defendants have the initial burden to make a prima facie showing that there are no triable issues of material fact and that they are entitled to a judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850) If Defendants make a prima facie showing then the burden shifts to Wies to produce admissible evidence showing that a triable issue of material fact exists. [CCP §437(p)(2)] A defendant moving for summary adjudication must "show" that there is a complete defense to a cause of action or that one or more elements of a cause of action cannot be established. [CCP §437c(p)(2)]

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I. Recreational Use Immunity.

Civil Code §846 immunizes private landowners from liability for injuries sustained by recreational users of their property. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1098) "The statute provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming upon the land." (*Id.* at 1099)

Defendants take the position that this is a classic example of immunity under Civil Code §846 in that Wies and her companions entered Defendants' property and were engaged in a recreational activity, vehicular riding, when Wies was injured. Defendants contend that these facts establish the essential elements of the immunity defense: "(1) the defendant must be the owner of an 'estate or any other interest in real property, whether possessory or nonpossessory;' and (2) the plaintiff's injury must result from the 'entry or use [of the 'premises'] for any recreational purpose.'" (*Ornelas v. Randolph, supra,* 4 Cal.4th 1095, 1100) California courts have determined ATV riding to be a recreational activity within the meaning of section 846. (*Shipman v. Boething Treeland Farms, Inc.* (2000) 77 Cal.App.4th 1424, 1427–28, *disapproved on other grounds by Klein v. United States* (2010) 50 Cal.4th 68)

In *Klein v. United States* (2010) 50 Cal.4th 68, the plaintiff was riding his bicycle in the Angeles National Forest when he was struck head-on by a vehicle being driven by an employee of the U.S. Fish and Wildlife Service. The plaintiff sued the United States Government and the Ninth Circuit directed the case to the California Supreme Court to determine whether section 846 immunity applied to "acts of vehicular negligence committed by the landowner's employee in the course and scope of his employment that cause personal injury to a recreational user of that land." (*Klein* at 71-72)

The Supreme Court summarized the language of the statute, its application, and the exceptions as follows:

> Civil Code section 846, in its first paragraph, defines the scope of the immunity granted to California landowners, in these words: 'An owner of any estate or any other interest in real property, whether possessory or

> nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.' In its second paragraph, section 846 defines 'recreational purpose' by reference to a list of activities that qualify as 'recreational,' including among them all types of 'vehicular riding.' In its third paragraph, section 846 states that by allowing another to enter or use property for recreation the property's owner does not '(a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.' Finally, in its fourth paragraph, section 846 provides three limitations on, or exceptions to, the landowner immunity it has granted, stating that the immunity does not apply to 'willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity,' nor does it apply when permission to enter is granted for a consideration, nor when persons are expressly invited rather than merely permitted to enter the land. (*Klein v. United States, supra,* 50 Cal.4th 68, 77–78)

The California Supreme Court held that recreational use immunity only applies to negligence claims based on premises liability and not negligence claims related to the operation of motor vehicles. It concluded: "Although section 846 is broad in many respects, it is not all-encompassing, and it does not release landowners or their employees from their basic duty to use due care while engaged in potentially hazardous activities such as driving a motor vehicle." (*Id.* at 81)

Had Wies and her companions merely entered Defendants' property and later been injured while riding ATVs they themselves owned and had brought onto the property, there would be a stronger argument for recreational immunity. Here, however, there is a factual issue as to whether Wies and her friends were invited by Jared onto the property.

Weis presents evidence that Jared "invited" the group to meet him at his house. In his deposition testimony, Secord stated that, when he asked Jared if he "wanted to hang out," Jared said yes and that he would meet them at his property. Jared testified that when he got the call from his friends about hanging out and riding ATVs, he agreed to meet his friends at the property, but told them not to ride the ATVs until he arrived.

In *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114, the court discussed an exception to recreational use immunity when individuals are personally invited on the premises:

> By carving out an exception for those persons who are personally invited, the Legislature showed it did not have a similar concern with encouraging property owners to provide access for the owner's personal guests. This distinction makes sense. Property owners do not need governmental encouragement to permit personal guests to come onto their land. (*Id.* at 114)

The evidence that Jared agreed to "hang out" with his friends and meet them at his property is sufficient to create a triable issue as to whether Weis and her friends were expressly invited for purposes of exception to the section 846 immunity. The holding in *Wang v. Nibbelink* (2017) 4 Cal.App.5th 1, 33, cited by Defendants, is inapposite.[1]

II. Assumption of the Risk.

In *Knight v. Jewitt* (1992) 3 Cal.4th 296, the California Supreme Court established that, under the doctrine of primary assumption of the risk, co-participants in a sporting activity owe no legal duty of care to protect another participant from the particular risks of the activity. (*Id.* at 320) The *Knight* court explained its holding, as follows:

> In reaching the conclusion that a coparticipant's duty of care should be limited in this fashion, the cases have explained that, in the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that vigorous 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. The cases have recognized that, in such a sport, even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by

[1] Because the issue of invitation is dispositive, the Court need not delve into the affirmative defenses discussed by the parties in this motion. Toward that end, the Court need only observe that the first exception, related to the willful and malicious failure to protect a party, is extraordinarily difficult to prove. (*Manuel v. Pac. Gas & Elec. Co.* (2009) 173 Cal.App.4th 927, 947.)

> deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule. (*Knight,* 3 Cal.4th at 318–319.)

The doctrine applies to recreational and physical activities beyond "sporting" events. (*Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 333—"primary assumption of the risk is not limited to sports but applies to any physical activity that involves an element of risk or danger as an integral part of the activity.") Protection under the assumption of the risk doctrine goes beyond co-participants and applies to owners and operators of facilities where the injury occurred. (See *Rostai,* 138 Cal.App.4th at 326; *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650; *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8)

In *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, the Court of Appeal held that the primary assumption of the risk doctrine is applicable to off-road motorcycle riding:

> Applying the *Knight* rule, we hold that the sport of off-roading involves inherent risks that the participants in this recreational activity may be involved in inadvertent motor vehicle collisions and may suffer serious injury or death. These inherent risks include the risk that coparticipants ascending a blind hill in motor vehicles from opposite directions might not be able to see one another in time to avoid a collision. We also hold that a participant in the sport of off-roading owes a duty to other participants not to injure them intentionally or to engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport, and a person who is injured while participating in such activity may not sue a coparticipant for negligence. (*Id* at 1254)

Based upon *Distefano v. Forester, supra,* 85 Cal.App.4th 1249, Defendants have made a prima facie showing that Wies' negligence claim is barred by assumption of risk. The burden now shifts to Wies to establish a triable issue of material fact to avoid the primary assumption of the risk doctrine. Wies points out several exceptions to the primary assumption of the risk doctrine, one of which stands out: As owners of the ATVs and the ranch property where the riding and accident occurred, Defendants may have a duty not to increase the risks to Plaintiff over and above those risks inherent in the activity. (*Knight,* 3 Cal.4th at 316; *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 591)

Wies argues that Defendants owned the equipment used for the activity and provided access to their vineyard for riding the ATVs. Weis produces evidence that Defendants failed to secure the keys to the ATVs (leaving the keys in the ignition), failed to provide accessible safety gear (which they normally provided to guests riding ATVs on their property), failed to provide training (which they normally provided), and failed to provide supervision of the riders, all of which increased the risk to participants over and above those inherent in the sport of ATV riding.

Defendants respond that failing to secure the keys, failing to provide safety equipment, failing to train, and failing to supervise did not increase the risks over and above those inherent in the sport. Defendants repeat the holding of *Distefano*, i.e., that off-road riding involves an inherent risk of collisions and accidents such as flipping during a turn. Defendants claim that their conduct did nothing to make the risk of flipping more likely.

In its tentative ruling and at oral argument, the Court focused the parties' attention on what it means to "increase the risks over and above those inherent in the sport." The phrase is discussed in the use notes to Judicial Council of California Civil Jury Instruction ("CACI") 410 (the jury instruction for assumption of the risk regarding facility owners and operators):

> "... whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)"

As stated earlier in this ruling, Plaintiff has raised a factual dispute as to whether she and the other teenagers were invited onto Defendants' property. If the jury finds Plaintiff was on the property by express permission, it might also find that Defendants had a duty not to unreasonably increase the risks of injury to Plaintiff while participating in the sport of ATV riding on their property. (CACI 410.)

Estate of McNeil v. Freestylemx.com, Inc. (S.D. Cal. 2016) 177 F.Supp.3d 1260 involved the death of an individual engaged in freestyle motocross who was jumping over a

motorhome onto a landing ramp. Although serious personal injury was a risk inherent in freestyle motocross, the court nevertheless concluded that an issue of fact was raised in terms of whether the owner-operator *increased* the risk of *more serious or fatal injury* for its failure to pad the landing ramp with airbags or decrease the gap between the end of the motorhome and the landing ramp:

> "... there is a question of fact as to whether, in November 2011, airbags were in standard use to protect riders from injuries additional to those they may suffer when they assumed the risk of falling. (*Estate of McNeil v. Freestylemx.com, Inc.* (S.D. Cal. 2016) 177 F.Supp.3d 1260, 1272-75.)

Although the issue is not free from doubt, it would appear the term "injury" means not only the fact of injury but also the extent of injury. (See also *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255. ("Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft.")); *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1163 (discussing duty of bumper car operator to provide routine safety measures such as seat belts, functioning bumpers and appropriate speed controls).

Relatedly, a close reading of the relevant cases shows that the duty *not to increase* a risk is just another way of stating the duty *to minimize a risk.* (*Estate of McNeil*, 177 F.Supp.3d at 1272; *Ferrari,* 32 Cal.App.4th at 255; *Nalwa,* 55 Cal.4th at 1163.) In other words, Defendants may have an affirmative duty to minimize the risk of more serious injury, such as through securing their ATV keys, providing safety gear, and training and supervising riders.

Through the supplemental authority submitted and the Court's own research, it appears that a factual issue exists which will need to be resolved by the jury. [2]

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[2] Although Wies argues the assumption of the risk doctrine is not applicable because she was merely a passenger, the Court is not persuaded. In *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 869, the primary assumption of the risk doctrine was applied to claims made by the family of a women killed when she was a passenger on a personal watercraft. "It is evident from the nature of the vehicle that the activity is done for enjoyment or thrill. The vessel is open to the elements, with no hull or cabin. It is designed for high performance, speed and quick turning maneuvers. The thrill of riding the vessel is shared by both the operator and the passenger." (*Truong v. Nguyen, supra,* 156 Cal.App.4th 865, 888–889) Further, the

Defendants' request for judicial notice is granted.

Defendants' evidentiary objection nos. 1 through 29 are sustained. Wies provides a declaration from Brad Avrit, a safety and liability expert, who opines that Defendants' actions were reckless and also increased the risks inherent in operating ATVs. However, the expert's legal conclusion that the activity was "reckless" or "increased the risks" has little if any probative weight. (*Towns v. Davidson, supra,* 147 Cal.App.4th 461, 472—"Although the expert's testimony may embrace an ultimate factual issue (Evid.Code, §805), it may not contain legal conclusions.")

Dated: June 23, 2017

CHARLES S. CRANDALL
Judge of the Superior Court

CSC:jn

"reckless" exception appears to be applicable only to actions taken by Oeser, a coparticipant in the activity. (*Knight v. Jewett, supra,* 3 Cal.4th 296, 320) ("Accordingly, we conclude 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.")