

1ST Civil No. A 121539
SFSC Case No. CGC-06-455768

COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

ANTHONY BENINATI,)	1 st Civil No. A 121539
Plaintiff and Appellant,)	
vs.)	
BLACK ROCK CITY, LLC, et al.,)	
Defendant and Respondent.)	

From a Judgment of the San Francisco Superior Court
Hon. Paul H. Alvarado, Judge presiding
[SFSC Case No. CGC-06-455768]

APPELLANT'S OPENING BRIEF

Evan D. Marshall [Bar No. 82444]
Thomas F. Yuhas [Bar No. 78679]
Law Offices of Ian Herzog
233 Wilshire Blvd., Suite 550
Santa Monica, CA 90401
(310) 458-6660
Fax: (310) 458-6660

Attorney for Plaintiff and Appellant
Anthony Beninati

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INTRODUCTION

Black Rock City produces the annual “Burning Man” festival of which the culminating event is a pyrotechnic display with a 60 foot burning figure designed to topple in front of a crowd of thousands, who then "participate" by approaching the burning debris and tossing personal items into the fire. Plaintiff Anthony Beninati was seriously burned in September 2005 when, an hour and a half after the figure fell, he approached the debris along what seemed to be a safe path, intending to throw a photo of his deceased friend in an area of low flames. As Plaintiff moved back from the debris, his foot caught on a cable or other solid portion and he fell into the embers, burning his hands and knees.

Black Rock admittedly had no meaningful form of crowd control or fire safety for the post-collapse burning rubble, nor did it dispute that an accident of this sort was foreseeable to the organizers. Its defense is not that it exercised due care under the circumstances but that Plaintiff should have realized that this was a deliberate free-for-all and that it was thus free to take no precautionary measures after having created this smoldering hazard.

Defendant's theory – adopted by the trial court on summary judgment – is that the artistic or spiritual nature of the event required that there be unsupervised and unrestrained movement into the ashes, embers and remaining fire as if the event had no organizers and no one responsible for the hazard created by the toppling of the Burning Man. Whether that theory has any validity is a question for a jury. Defendant's contention that the Plaintiff assumed the risk of Black Rock's neglect is a comparative fault issue, not an absolute defense, and unsupported by the opaque “assumption of risk” language on the back of the ticket or by case authority.

STATEMENT OF THE CASE

This action is for severe burns suffered by Plaintiff in September 2005 at the "Burning Man" 2005 event at a desert location in northwest Nevada. (App. 3, 17, 167) Burning Man is staged by Black Rock City, a limited liability company which promotes, sells tickets, builds and tears down the site every year. The signature Burning Man event is the burning of a 60 foot wood sculpture which is ignited with accelerant and left to burn until it topples toward the surrounding crowd. (App. 17, 20-21, 159-160, 243-244)

A. Plaintiff's Experience and Warnings at Burning Man

Plaintiff attended Burning Man in 2002, 2003 and 2005. (App. 54, 160) In each of these years the organizers had established sites for burning artwork trash or other materials as they liked (App. 154, 58-59, 160) This was referred to and sanctioned in the burning man "survival guide." (App. 154)

The climactic burning of the 60 foot figure occurred in front of a crowd of thousands. (App. 3, 160) The plaintiff had observed only a circle of rocks and perhaps tape but no barriers in previous years, and saw no organized aisles giving access to and from the front of the crowd. (App. 201, 202-205, 207, 208-209)

While defendant suggested that the event required some sort of anarchic abandonment of rules and safety measures by the participants in order to achieve its spiritual or artistic aims (App. 17-18, 160-161), Plaintiff found the event meticulously organized and controlled, with checkpoints, a city mapped out, and an array of rules set forth in the burning man survival guide. (App. 210-211) Plaintiff had, in fact, acquired a feeling of security from his previous experiences there

because it was much more organized than he had expected (App. 213) and there seemed to be a greater police presence in 2005. (App. 214-215)

Plaintiff had purchased a video showing previous years from the Burning Man web site which he watched before going to the 2005 event. It had explained about how the event was meticulously organized at a cost of \$7 million. That video cited the many volunteers used to organize the event and the extensive safety measures, making plaintiff feel more relaxed and secure than in previous years. (App. 238-239) The Burning Man Survival Guide contained numerous rules, admonitions and safety instructions directed to participants and regulating their conduct, the items they brought to the site, sanitation, care for public lands, drug use, law enforcement, aircraft and vehicle usage, fuel and hazardous materials storage, burning of artwork, and commercial activities. (App. 143, 145, 146, 148-155, 157)

While the Survival Guide contained a section on “Burning Etiquette” which allowed participants to “burn your art on our Public Burn Pyres located at the front of our city, at the end of every third latitudinal street” (App. 154), nothing therein seems to address safety or procedures for the Burning Man conflagration itself.

In addition to the Survival Guide, language on the Burning Man ticket states "you voluntarily assume the risk of serious injury or death by attending" the event. (App. 139) The warning tells participants they must bring sufficient food, water, shelter and first aid to survive a week in a “harsh desert environment,” requires compliance with the Survival Guide, and protects Black Rock’s intellectual property rights in the event (App. 139), but says nothing about the risk from fire or other artificial conditions, much less the toppling of the 60 foot figure.

B. The Accident

The Burning Man statue is erected using steel guy wires. Black Rock's Person Most Knowledgeable regarding safety at the 2005 event, Joseph Pred, identified steel guy wires running from the ground to the top of the figure and testified that they are used during the performance to guide the direction and timing of the fall, and that the guy-wires remain in the ash and fire remnants as the wood and other combustibles are consumed. (App. 193)

On the evening Burning Man was burned, Plaintiff arrived at the site of the burned figure after it had toppled. (App. 95) He heard the rush of the crowd as he rode his bike towards it: he understood that it burned quickly because of chemical accelerants, and that it would burn within an hour of being lit. (App. 96)

Plaintiff had a photograph of a recently deceased friend which he wanted to throw in the fire, but was concerned with approaching the ashes while there was still a crowd of people running around the perimeter of the fire, so he spent approximately an hour and a half circling and taking photographs until there were fewer people running around and the fire was lower. (App. 216-220) People were walking among the ashes and throwing things into the fire where portions still burned (App. 221-223), but on his three circumnavigations of the fire he saw no security or firemen. (App. 238)

Beninati saw others walking through or standing in an area of ash and low flames and thought it was safe to approach to throw in the photo of his late friend. (App. 226-229) He approached a portion of the debris along what seemed to be a safe path used by several other people, to a spot where there was still fire, and threw in the photograph while standing three or four feet from the embers. (App. 224-226, 230) The presence of others in the ashes made him think it was safe there.

(App. 227-228, 231) The entire area was covered in ash in which others were standing and walking, and there were no security personnel or firemen. (App. 221-223) He was no closer to the fire than others. (App. 229)

After throwing the picture in, Beninati began down a path that looked relatively free of people, seemingly a safer way to exit, and took a few steps before his foot caught on a cable or something solid under the ash. He fell into the embers, burning his hands and knees. (App. 231-234) In pain, he tried to move out of the area through the other side where it was clear of people, twisted his foot and fell again into the fire. (App. 232-233)

People came to help, poured water on his hands, but the skin was burned from both hands. (App. 234-235) Beninati was later evacuated by helicopter to Reno and then the Las Vegas Burn Center. (App. 235-237)

C. Procedural History

The Complaint herein was filed in February 2006. (App. 1-6)

Black Rock filed a motion for summary judgment in October 2007 (App. 11-34) asserting that Plaintiff assumed the risk of injury from what it characterized as an “obvious, avoidable and inherent” danger (App. 15) - *i.e.* assumption of the risk in its primary form – and that it had no duty to minimize a known hazard. (App. 14-32) Black Rock asserted that Beninati had been aware that fires were still burning, that he had read the Survival Guide and was generally aware that it and the ticket identified risks associated with the desert environment, and that he had willingly walked to the fire to throw in his friend’s picture. (App. 17-23, 159-170)

Plaintiff asserted in opposition that he had in fact been reassured by his

previous experience and by the representation in Burning Man videos and literature that the event was carefully organized and regulated to assure safety, and that in approaching the fire he acted believed he was acting with reasonable care and using a safe approach that had been used by others without difficulty. (App. 177-179, 261-264)

The trial court granted summary judgment on the grounds asserted by defendant, that Black Rock had no duty to Plaintiff by reason of the “obvious and inherent” risk of the fire. (App. 278-289)

3.

APPEALABILITY OF JUDGMENT

Appeal is taken from a summary judgment concluding the entire action (App. 286), which is final and appealable under C.C.P. §904.1(a)(1).

4.

THE DANGER WHICH EVENTUATED IN PLAINTIFF’S INJURY WAS NEITHER “INHERENT” NOR “OBVIOUS” WITHIN THE MEANING OF THE DOCTRINE OF PRIMARY ASSUMPTION OF THE RISK

The “assumption of the risk” theory advanced by Black Rock and adopted by the Superior Court misconstrues both the danger which injured plaintiff and the doctrine of primary implied assumption of the risk. Nothing in the Burning Man activity required that a crowd milling through the collapsed burning figure encounter as an “inherent” or “obvious” risk the danger of concealed cables or under-foot obstructions, nor prevented reasonable measures to prevent injury from still-burning debris. No "inherent" feature of the event inhibited defendant from

slowing access, warning, making provision to identify or remove guy wires, or providing personnel to deal with the artificial hazard which Black Rock created.

Defendant's argument and the trial court's ruling depend on the notion that the risk was open, obvious and inherent. None of these concepts are, on close analysis, applicable to the instant case.

The term "inherent risk" has generally been applied in the context of a sport with specified rules and characteristics which define and shape the risks encountered by participants. Courts are able to identify risks as inherent only because they are familiar with the rules and practices of the sport – because that activity is "rule-based" and the sport is such that the risks defined by the nature of the athletic endeavor cannot be eliminated without fundamentally altering the nature of the sport. Knight v. Jewett (1992) 3 Cal.4th 296, 317-319, 11 Cal.Rptr.2d 2; Regents of University of California v. Superior Court (1996) 41 Cal.App.4th 1040, 1046-1047, 48 Cal.Rptr.2d 922 ("Falling, whether because of one's own slip, a co-climber's stumble, or an anchor system giving way, is the very risk inherent in the sport of mountain climbing and cannot be completely eliminated without destroying the sport itself.")

"Inherent risks" are those which cannot be eliminated without fundamentally altering the nature of the activity. For example, the risk of being hit by a boom while engaging in a sailing competition (Stimson v. Carlson (1992) 11 Cal.App.4th 1201, 14 Cal.Rptr.2d 670), the risk that a horse will "act as a horse" and be spooked (Harrold v. Rolling J Ranch (1993) 19 Cal.App.4th 578, 23 Cal.Rptr.2d 671), or the risk of being cut by another skater's blades while practicing on an ice skating rink. Staten v. Superior Court (1996) 45 Cal.App.4th 1628, 53 Cal.Rptr.2d 657.

What exactly is “inherent” in an activity which, according to its promoters seems to have no particular rules, no safety standards, no criteria by which to measure any particular participant’s conduct other than the notion of due care by a “reasonable man,” the standard by which we assess conduct generally?

And what is “open and obvious” here, where the danger which culminated in the injury was not just the dying fire but the concealed wire or other obstruction which was assuredly not “obvious.” On what evidence could the court determine that attendees wishing to toss a personal object in the fire were aware that they were liable to be caught by a cable hidden in the ashes – even on a previously trod path through the debris?? It can hardly be said that participants were led to believe that they were engaging in some sort of athletic or gambling activity in which they were invited to test their luck and skill against concealed obstacles, guy wire or other threats to one doing no more than walking in a normal manner. This is not a sport where the object is to avoid invisible trip-wires. Whatever may be said about the threat of fire when one is invited to throw objects therein, the threat of underlying and concealed wires is quite another risk and not one that any reasonable person would consider an inherent part of an artistic or spiritual event.

Put differently, the risk which Beninati encountered might have been readily eliminated through some other method of securing the Burning Man or confining its fall without leaving concealed wires. Guy wires have little to do with the spiritual aspect of the fire which Black Rock identifies as the attraction -- unlike sports cases where the “inherent risk” – the thrown ball, snow moguls or trees encountered on a ski run, a rearing horse – is the very attraction of an activity and cannot be eliminated without altering the experience. Guy wires have little artistic or spiritual relevance. As our Supreme Court has noted, “the object to be served by the doctrine of primary assumption of risk in the sports setting is to avoid recognizing a

duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in the activity.” Kahn v. East Side Union High School Dist. (2003) 31 Cal.4th 990, 1011, 4 Cal.Rptr.3d 103. No such threat is imposed by the elimination of concealed risks such as Beninati encountered.

Knight v. Jewett, *supra*, 3 Cal.4th 296, held that cases previously analyzed as implied assumption of the risk comprehended two distinct categories of defense: (1) instances in which the assumption of the risk doctrine is essentially a legal conclusion that the defendant owes no duty to protect the plaintiff from a particular risk; (2) instances in which defendant does owe a duty of care to plaintiff, but plaintiff knowingly encounters that risk (whether reasonably or unreasonably). The first category, known as "primary assumption of risk," depends upon an analysis of whether defendant's conduct breached any duty of care to plaintiff under the circumstances. The second category, "secondary assumption of risk", is a variety of comparative negligence and is subsumed within the comparative fault system.

Thus, in a case in which an injury has been caused by both the defendant's breach of a legal duty to the plaintiff and the plaintiff's voluntary decision to engage in an unusually risky sport, application of comparative fault principles would not operate to relieve either individual of responsibility for his or her actions, but rather will ensure that neither party will escape such responsibility.

[Knight, *supra*, 3 Cal.4th at 314]

Defendant's assertion of "assumption of the risk" in its primary form – *i.e.* no duty to protect plaintiff from the risk in question – relies largely on cases dealing with the duty of care as between co-participants in a sport or organizers of athletic competitions. The relationship of the proprietor and participants here are rather different. The instant case involves the proprietor of an event who holds it

open for a fee for entertainment and “artistic” purposes – not for competitive sports – and who effectively controls the activity as reflected in the extensive set of rules in its Survival Guide. Black Rock created the danger and controlled the scope of the risk, unlike the sports cases where risk is defined by the commonly accepted rules of a game or sport. Moreover, this case involves a risk which, properly analyzed, certainly is not inherent and which could have been removed without diminishing or altering the experience.

Even in the sport cases involving “inherent risks,” the Supreme Court has noted that

The nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself. Additionally, the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport. [Knight, *supra*, 3 Cal.4th 316-318]

Knight declined to impose liability on co-participants for mere negligence because this would impair the vigor of the sport and have an “undesirable chilling effect,” on the participant's conduct, inhibit the ordinary play of such sport and have a generally deleterious effect on the nature of the sport as a whole. Ford v. Guoin (1992) 3 Cal.4th 339, 345, 11 Cal.Rptr.2d 30; Cheong v. Antablin (1997) 16 Cal.4th 1063, 68 Cal.Rptr.2d 859. Similarly, courts have declined to impose liability on operators or owners of recreational facilities for failure to eliminate risks which could not be removed without altering the nature of the sport.

The present case, by contrast, deals not with co-participants, nor with a theory of liability that would impede or inhibit the conduct of the recreational activity, but rather with the proprietor's maintenance of a artificially created hazard

(“artistic” or not) that is not necessary to any recreational activity. Compare O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal.App.4th 188, 192, 35 Cal.Rptr.2d 467 (ski resort had no duty to protect skier from danger inherent in natural forest area that bordered ski run) with Branco v. Kearny Moto Park (1995) 37 Cal.App.4th 184, 189, 43 Cal.Rptr.2d 392 (owner of moto-cross course may be liable for increasing risks inherent in the sport by improperly designing a jump) and Morgan v. Fuji Country USA (1995) 34 Cal.App.4th 127, 130, 40 Cal.Rptr.2d 249, discussed below.

There is no evidence that the manner in which access was allowed to the burning remains was crucial to any “experience,” or that the presence of the concealed guy wires or other obstacles added the artistic value of the experience. Nor would the imposition of liability somehow impair the ability to burn the figure. The risk of concealed obstructions left by the fallen figure and the absence of any warning, supervision or safety personnel is not inherent in the burning.

The applicable rule is that one who creates a hazardous condition as by the use of fire has a duty to remedy or protect those who will foreseeably be exposed to it. 6 Witkin, Summary Cal. Law 10th, Torts, §§906, 918, 922, 1129. “The risk incident to dealing with fire, firearms, explosive or highly inflammable matters . . . requires a great deal of care to be exercised. In other words, the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence.” Warner v. Santa Catalina Island Co. (1955) 44 Cal.2d 310, 317, 282 P.2d 12.

Where defendant is responsible for the existence or persistence of a defective or dangerous condition, neglect by another actor will not absolve the defendant of liability. Warner v. Santa Catalina Island Co., *supra*, 44 Cal.2d 310,

319; Stewart v. Cox (1961) 55 Cal.2d 857, 13 Cal.Rptr. 521.

Crucially, defendant was not a co-participant, but was in control of the activity. See Wattenbarger v. Cincinnati Reds (1994) 28 Cal.App.4th 746, 754, 33 Cal.Rptr.2d 732; Lowe v. California League of Professional Baseball (1995), 56 Cal.App.4th 112, 114; Bush v. Parents Without Partners (1993) 17 Cal.App.4th 322, 21 Cal.Rptr.2d 178.

An instructive case is Morgan v. Fuji Country USA, *supra*, 34 Cal.App.4th 127, 130, involving a golfer who was injured by an errant golf ball. The Court held that while there was an inherent risk in golf of being struck by an errant ball, liability might lie based on the layout of the fourth and fifth holes on the golf course and the removal of trees which increased the risk of being struck. The Court noted that while moguls on a ski run pose a risk of harm to skiers that might not exist were they removed, they are part of the sport of skiing; but a ski resort clearly has a duty of due care with respect to artificial conditions created on the property:

Here, if the relationship between the parties was one of co-participants, i.e., if the defendant here were the golfer who hit the errant ball, this would clearly be a primary assumption of the risk case under Knight and the defendant would have no liability towards Morgan because there is an inherent risk that the defendant would hit an errant ball. Morgan, however, is not suing the other player; he is suing the owner and the operator of the golf course.

Fuji, as owner and operator of the Castle Creek Golf course owes a different duty to Morgan and other golfers . . . the duty of a golf course towards a golfer is to provide a reasonably safe golf course. This duty requires the golf course owner to 'minimize the risk without altering the nature of the sport' . . ."
[34 Cal.App.4th 134]

Branco v. Kearney Moto Park, *supra*, 37 Cal.App.4th 184, held that the owner of a bicycle moto-cross course could be liable for increasing the risks inherent in the sport by improperly designing a jump. Reversing summary judgment, the Court noted the distinction "between the degree of control exercised over the creation of the nature-made obstacles involved in the sport of skiing . . . as compared to the man-made obstacles of the BMX course involved in the instant case." (*Id.* at 193)

Black Rock relied heavily on Connelly v. Mammoth Mountain Ski Area (1995) 39 Cal.App.4th 8, 45 Cal.Rptr.2d 855, where a skier who lost control while snow skiing collided with a ski lift tower and alleged that the resort owner negligently failed to pad the legs of the tower. Connelly reasoned that no protective measures to reduce risks could be required where the "inherent risk" of collision is deemed subject to a primary assumption of the risk analysis. Black Rock seems to contend that eliminating or protecting the concealed guy wires is the equivalent of padding the tower legs in Connelly: both are instances of a failure to reduce inherent risks, not of a defendant increasing risks to participants.

On the most basic level, the analogy fails since the guy wires are concealed here, not obvious, and since encountering obstacles is no part of the Burning Man artistic experience. As Connelly notes, the ski lift tower serves as its own warning. (*Id.* at 12) Here, it is not mere non-feasance, for Black Rock engineered the manner in which the Burning Man was to burn and fall, and controlled (or failed to control) crowd access to the fallen figure. Thus it may be found to have engaged in misfeasance by creating or increasing the risk to attendees. See Huffman v. City of Poway (2000) 84 Cal.App.4th 975, 101 Cal.Rptr.2d 325, finding a triable issue as to whether the absence of highlighting mechanisms or warning devices substantially increased the risk of injury from a trap door on a stage.

Even where the court can determine the issue of what the inherent risks are, the question of whether the defendant in fact increased those risks under the circumstances of a particular case may be a question for the jury. Vine v. Bear Valley Ski Co. (2004) 118 Cal.App.4th 577, 13 Cal.Rptr.3d 370; Kahn v. East Side Union High School Dist., *supra*, 31 Cal.4th at 1018; Campbell v. Derylo (1999) 75 Cal.App.4th 823, 829-830, 89 Cal.Rptr.2d 519.

Thus the instant case is that readily distinguishable upon the grounds that the risk that actually caused this injury was neither inherent nor obvious in the sense that those terms are used in the participant sport cases.

5.

**THE "ASSUMPTION OF THE RISK" LANGUAGE IN THE
TICKET IS VAGUE AND DOES NOT RELEASE OR WAIVE
LIABILITY FOR DEFENDANT'S NEGLIGENCE**

Defendant cited language on the Burning Man ticket stating: "you voluntarily assume the risk of serious injury or death by attending" the event. Exactly how this language diminishes its duty of care the defendant did not explain. To all appearances, the cited language is no more than a re-statement of the common law principle concerning assumption of the risk in its secondary sense in which it constitutes a form of comparative fault. There is nothing to advise the holder that he is releasing anyone from liability for carelessness.

The language on the ticket should be contrasted with the sort of language which constitutes a legitimate release or waiver of liability. Typical provisions identify the parties to be released or held harmless and specify that they shall not be held responsible even in the event that they have acted negligently. There is no

such language here and no indication that the cited language is intended to reduce or abolish the duty of reasonable care owed to participants.

Above all, the "assumption" does not indicate that the participant assumes the risk of defendant's negligence as opposed to other risks which might be inherent in the event such as heat stroke or snake bite. In other words, this is not a case where the Plaintiff consented to a wrongful act or anticipated that defendant would be held harmless for its own negligence.

In Celli v. Sports Car Club of America, Inc. (1972) 29 Cal.App.3d 511, 105 Cal.Rptr. 904, spectators were struck by an out-of-control race car while watching the race from the pit area of a race track. Defendant owners and operators were alleged to have failed to take known safety measures (such as pit walls and barriers). They sought to introduce admission passes signed by plaintiffs, containing a general release from liability for injuries "resulting from any accident or other occurrence," but which did not state that defendants were released from liability for injuries caused by their own negligence. This was held properly excluded since the release was drawn by defendants, was phrased in general language, and plaintiffs' injuries were proximately caused by defendants' own active negligence. The Court of Appeal stated

The well established rule in this state is that where the language of an instrument purporting to exculpate one of the parties for its future negligence, was prepared entirely by the party relying on it, words clearly and explicitly expressing that this was the intent of the parties are required . . . Woodall v. Wayne Steffner Productions, 201 Cal.App.2d 800 [20 Cal.Rptr. 572], specifically held (at p. 802) that an agreement purporting to release from "any and all responsibility, liability or claims" did not absolve the defendant from liability from its own negligence that led to the injury of the plaintiff, a stunt man.

“. . . the law . . . , looks with disfavor on such attempts to avoid liability or secure exemption from one's personal negligence, and construes such provisions strictly against the person relying on them, especially when he is the author of the document; to be sufficient as an exculpatory provision against one's own negligence, the party seeking to rely thereon must select words or terms clearly and explicitly expressing that this was the intent of the parties; and that seemingly broad language will not be isolated from its context and will be read with due regard to the maxim of strict construction.”

[Celli, at 518-519]

Celli further observed that the language of the pit passes “must be construed most strongly against defendants as a product of their own draftsmanship and ‘designed to whittle down the normal and ordinary rights of a customer’,” and the Supreme Court had recognized and adopted this rule of strict construction for an exculpatory indemnity clause in Vinnell Co. v. Pacific Elec. Ry. Co. (1959) 52 Cal.2d 411, 414-415, 340 P.2d 604 and Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 Cal.2d 40, 48, 41 Cal.Rptr. 73, distinguishing indemnity agreements that merely shift the risk from one negligent tortfeasor to another from exculpatory agreements, like the one here, where a negligent tortfeasor attempts to shift the risk of his negligence back to the victim.

Celli found that the track operator had been actively negligent in holding the race and allowing spectators into the pit knowing the risk and knowing that the more stringent safety measures had not been taken: “defendants' release agreement, phrased in general language, cannot provide a release where, as here, active negligence is a proximate cause of the injury.”

. . . one is passively negligent in merely failing to act in fulfillment of a duty of care imposed by law, while one is actively negligent by participating in some manner in

the conduct of omission that caused the injury. As this court (division one) said in Cahill Bros., Inc. v. Clementina Co., 208 Cal.App.2d 367 at page 382 [25 Cal.Rptr. 301]: “. . . if the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement, he is deprived of the right of indemnity.”
[Celli, at 519-520]

Black Rock organized and staged the burning, had complete control, of the event and site, undertook the responsibility for warning and providing security, and thus its neglect was active. Its ticket does not even contain release language, let alone any mention of exempting defendants from their own negligence.

Release provisions lacking any reference to negligence or express waiver of liability, and which were thus not clear, unambiguous, or comprehensible, were also held unenforceable in Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal.App.3d 309, 195 Cal.Rptr. 90, Scroggs v. Coast Community College Dist. (1987) 193 Cal.App.3d 1399, 239 Cal.Rptr. 916, and Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal.App.3d 1559, 274 Cal.Rptr. 647.

In Leon v. Family Fitness Center (# 107), Inc. (1998) 61 Cal.App.4th 1227, 71 Cal.Rptr.2d 923, plaintiff joined a health club by an application which contained a release and assumption of the risk provision. The plaintiff was injured when a sauna bench on which he was lying collapsed beneath him at defendant's facility. Reversing summary judgment for the defendant, the Court observed: “Of particular relevance, there is no language to alert a reader that Family Fitness intended the release to exculpate it from claims based on its own negligence. Where such

exculpation is sought, the release must contain specific words ‘clearly and explicitly expressing such intent.’” (*Id* at 1233)

To be valid and enforceable, a written release purporting to exculpate a tortfeasor from damage claims based on its future negligence or misconduct must clearly, unambiguously, and explicitly express this specific intent of the subscribing parties. (Allabach v. Santa Clara County Fair Assn. (1996) 46 Cal.App.4th 1007, 1015, 54 Cal.Rptr.2d 330.) “If a tortfeasor is to be released from such liability the language used ‘must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.’” (*Ibid.*, quoting Paralift, Inc. v. Superior Court (1993) 23 Cal.App.4th 748, 755, 29 Cal.Rptr.2d 177.) [Leone at 1234]

Every one of the above releases was more comprehensive and explicit than that in Black Rock’s ticket.

Leone further held that assumption of the risk language in that application was also defective, noting that Restatement Second of Torts §496B, com. d, p. 566, states that “In order for the agreement to assume the risk to be effective, it must also appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm. Again, where the agreement is drawn by the defendant and the plaintiff passively accepts it, its terms will ordinarily be construed strictly against the defendant.”

What risk is assumed? One might say “inherent risks” in the sports context, but neglect is not inherent in a theatrical or artistic event. Even in sports cases, the organizer has a duty to organize a reasonably safe event, minimizing risks without

altering the nature of the sport. Saffro v. Elite Racing, Inc. (2002) 98 Cal.App.4th 173, 179, 119 Cal.Rptr.2d 497; Morgan v. Fuji Country USA, Inc., *supra*, 34 Cal.App.4th at 134 (owner of golf course had obligation to design a course that would minimize the risks that players would be hit by golf balls and affirmatively provide protection for players from being hit in the area of the course where the greatest danger existed.)

The requisites for express assumption of the risk are stated in BAJI 4.30:

If, prior to an event in which the plaintiff was injured as a result of defendant's negligence, the plaintiff had **expressly assumed the risk of such injury by specifically agreeing with the defendant that he, the plaintiff, would not hold the defendant responsible if an injury should be caused by the defendant's negligence**, the plaintiff may not recover damages from the defendant for that injury.

[Emphasis added]

“When parties intend for an express assumption of risk provision to exceed the inherent risk of the endeavor for which the release is signed, it is especially important for parties to clearly, explicitly and comprehensibly state the inclusion of non-inherent risks.” Zipusch v. LA Workout, Inc. (2007) 155 Cal.App.4th 1281, 1278, 66 Cal.Rptr.3d 704 (finding that assumption of risk language did not release defendant where it did not specifically exculpate it from its own liability.) See also Madison v. Superior Court (1998) 203 Cal.App.3d 589, 597, 250 Cal.Rptr. 299 (express assumption of risk must clearly indicate that it exculpates the defendant from his own neglect.) The instant “assumption of the risk” plainly fails this test.

Further, the purported “release” on the ticket was not even signed or acknowledged by purchasers as in the above cases. It was an adhesive and unilateral term that shows no indication of genuine contractual intent or force.

Civil Code §2176, while providing that the acceptance of a ticket by a customer constitutes an agreement by him or her to the stated limitation on the ticket of a carrier's liability for certain types of harm, nevertheless requires the customer to sign the ticket in order to form a valid agreement that would limit liability for personal bodily injury. This never happened, nor was there any other event that could reasonably be said to constitute an agreement.

6.

**DEFENDANT'S RELIANCE ON CASES REGARDING
"PATENT AND OBVIOUS DANGER" IS MISPLACED**

Defendant cites "assumption of the risk" cases holding there is no liability for a danger which is "patent and obvious." The Order follows this formulation. The "patent" nature of a risk is pertinent only to **secondary** assumption of the risk, which has been subsumed in comparative fault under California law and thus does not negate the defendant's liability. Knight, *supra*, 3 Cal.4th at 314.

California law rejects defendant's argument that "assumption of the risk" for a known dangerous condition bars plaintiff's recovery. See Donohue v. San Francisco Housing Authority (1993) 16 Cal.App.4th 658, 665-666, 20 Cal.Rptr.2d 148, and Curties v. Hill Top Developers, Inc. (1993) 14 Cal.App.4th 1651, 1656, 18 Cal.Rptr.2d 445, holding that where plaintiff knowingly encounters a dangerous condition which the defendant had negligently maintained on the premises, comparative fault governs the determination of the parties' relative fault.

The further contention that there is no liability for any risk which is "open and obvious" was rejected in Osborn v. Mission Ready Mix (1990) 224 Cal.App.3d 104, 118-119, 273 Cal.Rptr. 457, and Beauchamp v. Los Gatos Golf Course (1969) 273 Cal.App.2d 20, 33, 77 Cal.Rptr. 914. The modern rule holds that "while a

readily apparent danger may relieve the property owner of a duty to *warn*, it no longer necessarily absolves him of a duty to *remedy* that situation." Donohue v. San Francisco Housing Authority, *supra*, 16 Cal.App.4th 658, 665 (no bar to plaintiff's recovery when he undertook to traverse steps which he knew to be wet and lacking skid-resistant surface). Restatement 2d Torts §157, §343A; 62 Am.Jur.2d, Premises Liability, §156. See also Neel v. Mannings (1942) 19 Cal.2d 647, 122 P.2d 576, where the plaintiff struck her head on a projecting ceiling board while ascending the steps of a restaurant. While the board was in plain sight and plaintiff was familiar with the stairway, her attention was distracted by the necessity of avoiding collision with others coming downstairs. The Supreme Court held that this presented a question of contributory negligence (a question of fact, not law) rather than being a factor that negated any liability whatsoever.

The fact that there are concurring causes - even some attributable to the plaintiff - does not relieve the tortfeasor of liability. Muffett v. Royster (1983) 147 Cal.App.3d 289, 307, 195 Cal.Rptr. 73. Assuming *arguendo* some fault attributable to plaintiff, this is no bar under secondary assumption of the risk (comparative fault) to recovery from Black Rock unless it is a superseding cause (*i.e.* both the conduct and risk of harm are unforeseeable). Pappert v. San Diego Gas & Elect. (1982) 137 Cal.App.3d 205, 209-211, 186 Cal.Rptr. 847, Bush v. Parents Without Partners, *supra*, 17 Cal.App.4th 322. This it assuredly is not.

7.

CONCLUSION

Beninati did not encounter any "inherent risk" as that concept is applied in the doctrine of primary assumption of the risk - a risk which could not be eliminated without chilling some endeavor which necessarily required that he submit himself to wires or other obstacles concealed in a field of ash. He was led

by Black Rock to believe that Burning Man was a safe and well-regulated event, and believed he was acting with due care at the time he approached the fire given that there was uncontrolled access to the debris by participants, no security personnel, warning or barriers, and that he had allowed the fire to subside. Black Rock created a danger and nothing inherent in the situation prevented it from taking reasonable precautions for the safety of its participants, just as it controlled participants' activities in other respects.

The judgement should accordingly be reversed and the action remanded for trial.

Respectfully Submitted,

Dated October 7, 2008

THE LAW OFFICES OF IAN HERZOG
A Professional Corporation

By: _____
Evan D. Marshall
Attorneys for Plaintiff and Appellant
Anthony Beninati

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Opening Brief is produced using 13 point Roman type and contains approximately 6,627 words, which is less than the 14,000 words permitted by the Rule. Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: October 7, 2008

Evan D. Marshall

PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am employed at 233 Wilshire Blvd., Suite 550, Santa Monica, CA 90401. On October 7, 2008, I served the attached APPELLANT’S OPENING BRIEF the parties in this action by placing a true copy in a sealed envelope with proper postage in the U.S. mail at Santa Monica, California, addressed as follows:

William Kronenberg, Esq.
MURPHY, PEARSON, BRADLEY
88 Kearney Street, 11th Floor
San Francisco, CA 94108

Counsel for Respondent
Black Rock City

Clerk for
Hon. Paul H. Alvarado, Judge
San Francisco Superior Court
400 McAllister Street, Dept. 302
San Francisco, CA 94102-4514

Superior Court

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

(4 Copies)

I declare under penalty of perjury, that the foregoing is true and correct.
Executed at Los Angeles, California on October 7, 2008.
