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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

CHRISTIAN WYATT BARTON,

Plaintiff and Appellant,

v.

WILLIAM R. DAUSE, JR.,

Defendant and Respondent.

C064652

(Super. Ct. No.
CV034817)

Plaintiff Christian Wyatt Barton, a skydiver, jumped out of an airplane owned and flown by defendant William R. Dause, Jr., and hit the horizontal stabilizer on the plane's tail on his way to the ground (a "tailstrike"). Barton sued, claiming Dause was grossly negligent and increased the inherent risks of skydiving. After the jury returned a defense verdict, and the trial court denied a new trial motion, Barton timely filed this appeal.

As we shall explain, the trial court properly submitted the issue of primary assumption of risk to the jury, properly instructed the jury thereon, and did not abuse its discretion in

making certain evidentiary rulings. These conclusions appear to resolve the contentions raised by Barton's briefing on appeal (which is difficult to decipher). Accordingly, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises after a two-week jury trial. The parties submitted an appendix in lieu of a clerk's transcript. Barton, as the appellant, bears the burden to provide an adequate record to support his claims. (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.) "To the extent the record is incomplete, we construe it against him." (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 498 (*Sutter Health*).)

Pretrial Proceedings

Barton sued Dause and others not party to this appeal, alleging that on August 22, 2006, Barton was injured while skydiving, due to Dause's negligence.

Dause filed a pro per answer.¹ Dause denied the allegations and raised several affirmative defenses, including that Barton

¹ Barton complains that Dause--who is not a lawyer--should not have been allowed to answer for his business, but raises no specific claim that this matters on appeal. However, we note with disapproval that Dause's later-retained counsel repeatedly filed papers with both his name and Dause's name in the caption, stating counsel was "associated with" Dause. As we have said before, "A litigant may appear in his own person or by attorney but cannot do both." (*Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391; see 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 239, p. 312 (Witkin).)

"assumed the risk" of jumping, and had executed a written waiver releasing Dause from liability.²

During in limine motions, the trial court stated the case involved primary assumption of the risk. Dause included CACI No. 408, regarding primary assumption of the risk, in his list of proposed jury instructions.³

With leave of the court, Barton filed an amended complaint that alleged Dause's conduct "greatly increased the risks to which Plaintiff would otherwise have been exposed, well beyond the inherent risks of skydiving[.]"⁴

During in limine motions, both parties mentioned primary and secondary assumption of the risk, and Barton argued CACI No. 408 was *factually* inapplicable because Dause was a pilot, not a

² Dause claimed the release Barton purportedly signed had been stolen, and although that issue was hotly contested before trial, during opening statement, Barton's counsel effectively conceded Barton signed a release. The appendix contains many filings about this and other issues that may have been important *before* trial, but are now irrelevant.

³ In denying Barton's new trial motion, the trial court stated Barton requested CACI No. 408. Dause does not argue that the record supports this statement, but observes that Barton *acquiesced* to CACI No. 408 after the trial court rejected Dause's contention that he was not a coparticipant.

⁴ A standard recreational liability release would absolve Dause from claims of *ordinary* negligence. (*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 755-758; *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 342-346, cited with approval by *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 759, fn. 16 (*Santa Barbara*).) But it would not bar claims of *gross* negligence or recklessness. (*Santa Barbara, supra*, 41 Cal.4th at pp. 750-751.) That is evidently why Barton filed an amended complaint alleging Dause acted with gross negligence.

coparticipant, and Dause had been grossly negligent, increasing the inherent risks of skydiving.

Trial Theories

Barton's trial theory was that Dause did not operate the plane (a Beechcraft Model 99 or "Beech 99") to allow Barton a safe exit at 3,000 feet, but continued to climb to quickly reach a higher altitude from which other skydivers were going to jump. Dause (1) should have leveled the plane and slowed down to give Barton a safe exit, or (2) should have warned Barton of the hazard of *not* leveling and slowing the plane so Barton could adjust his exit technique, or (3) should have flown a different available plane (a de Havilland Twin Otter), that posed no danger of a tailstrike. Barton denied he jumped "up" as he exited, and denied he had been warned to avoid jumping "up" as he exited. Barton conceded he assumed "the inherent risks in the sport" but argued he did not assume the *increased* risks created by Dause's conduct.

Dause's trial theory was that Barton was an experienced skydiver who had recently been warned that he needed to jump "out" instead of "up," but disregarded this warning and caused his own injuries.

Barton's Case at Trial

Dause was called by Barton as an adverse witness and testified that he had been skydiving since 1964, began flying in 1968 or 1969, and had been a skydiving instructor for over 40 years. The skydiver "tells the pilot what to do" and if a skydiver asked, Dause would level the plane and slow down for a

low-altitude dive, otherwise "we'd go straight [to] altitude and drop people off on the way up." Neither the speed nor level of a Beech 99 increases the risk of a tailstrike "with the proper exit[,]" but, "You don't jump up to leave the airplane at whatever configuration it's in." The tail can be hit in any plane "because of an improper exit." Dause was told that in Barton's "jump or two just before [the accident], he had had a near miss on the tail," and Dause told Guillermo Da Silva (Dause's employee, who was also Barton's former instructor, and was in the plane the day of the accident) to talk to Barton "about changing his exit habits." On Barton's last jump, Dause was probably "close to maximum climb rate" and climbing speed. Barton had asked for a "pass" at 3,000 feet, which Dause performed, but Barton had not asked Dause to level the plane or slow down. In Dause's opinion, had Barton "made a dive-out exit" he would not have hit the plane, but Barton "lunged up on his exit[.]"

Dause also owned a Twin Otter, and testified that the tail is higher on a Twin Otter than on a Beech 99, but the tail configuration on the Beech 99 is common among other planes used for skydiving.

James Halliday, who had his own skydiving facility in Sonoma County, saw Barton jump *out*--but not *up*--and hit the horizontal stabilizer of the tail.

Barton's retained expert, Michael Turoff, testified Dause's actions were "an extreme departure" from accepted norms. First, the plane should have been leveled and slowed. Second, Dause

should have warned Barton--such as by a posted placard--about the danger of jumping in the altitude Dause flew. Third, if Dause allowed low-altitude jumps in a climbing altitude, he should have used a different plane, such as the Twin Otter, with a higher horizontal stabilizer.

On cross-examination, Turoff conceded that an "experienced" skydiver could safely jump from the Beech 99 in the altitude Dause flew it, defined such a person as someone with "200 jumps" as a benchmark, and conceded Barton's logbook reflected 197 jumps, and that he may have made more. Turoff conceded each skydiver is responsible for jumping safely. Turoff also conceded that Dause had peer-reviewed a skydiving textbook book Turoff coauthored.

Barton testified he began skydiving in 2004, and Da Silva had been his instructor. His logbook reflected 190 jumps, and about 75 were from the Beech 99. He had done 10 to 15 "hop and pop" jumps (deploying the parachute immediately, rather than experiencing free-fall), some between 3,000 feet (the minimum allowed) and 6,000 feet, but had never done a low-altitude jump from the Beech 99. On his last jump, he stepped "out and away" from the plane. Da Silva had not warned him about a "close call" earlier. Barton had had aspirations to become an aerial videographer.

Stephen Caperton, a friend of Barton's, testified that he retrieved Barton's belongings after the accident, including a helmet recorder, but Caperton claimed he accidentally recorded over the footage of Barton's exit.

Dause's Case

Dennis Murphy, an expert skydiver, testified a diving exit is best when jumping "a hop and pop" from the Beech 99, and jumpers are commonly warned to keep their head down. Had Barton left the plane as he described--"laterally"--he could not have hit the horizontal stabilizer. Murphy had made "hop and pop" exits from the Beech 99 while it was climbing at Dause's center, and had made other "hop and pop" exits at other skydiving centers in "a Pack 750" which has a similar tail configuration to the Beech 99. It was "a common practice" to permit "hop and pop exits" while the plane was climbing.

Roger Gill was on the plane when Barton jumped, and testified Barton "left in an upward motion almost leaping as he went out the door."

Michael Knight, an expert skydiver, had seen Barton make about 20 to 25 low-altitude hop and pops from Dause's Beech 99. On Barton's penultimate jump, Knight saw Barton make a "jumping up exit" at about 3,000 feet and nearly hit the horizontal stabilizer. Knight spoke to Da Silva, who said he would talk to Barton. On the next jump, Knight heard Da Silva tell Barton, "'Make sure you keep your head down. Don't jump up[,]' " and Barton "looked right at [Da Silva] and gave him a little wave, like nod of acknowledgement." Knight also heard Dause ask Da Silva to remind Barton to keep his head down. However, Barton "climbed out and then jumped up in a straight up vertical manner, which sent him straight back higher than before[,]" and then Barton hit the plane.

Da Silva had been a skydiving instructor since 1995. He would have had Barton sign a standard release form during Barton's first jump course. On Barton's penultimate jump, Da Silva saw Barton make an unsafe "hop and pop" from the Beech 99, because Barton launched himself up, and narrowly missed the tail. Da Silva warned Barton not to jump up on exit. When Barton said that he had been practicing jumping up out of the Twin Otter, Da Silva explained that the Beech 99 had a lower tail, and Barton said he understood. During Barton's last jump, Da Silva reminded Barton to keep his head down, and Barton indicated he understood. However, as Barton "squatted down, he gave it all he had. He threw it up as hard as he could[.]" Barton's method of exit caused the accident, and he would have hit the tail even had the plane been level. While Barton was in the hospital, Barton told Da Silva he did not remember the jump.

When Dause was recalled, the jury was shown what remained of the helmet video Barton recorded. Dause testified it had shown "a very extreme jump up" by Barton, but that that part of the tape had been recorded over.

CACI No. 408

The parties appear to agree that CACI No. 408, as modified to fit this case, provided as follows:

"Christian Barton claims he was harmed while participating in the sport of skydiving and that Bill Dause is responsible for that harm. To establish this claim, Christian Barton must prove all of the following:

"1. That Bill Dause acted so recklessly that his conduct was entirely outside the range of ordinary activity involved in skydiving; and

"2. That Christian Barton was harmed; and

"3. That Bill Dause's conduct was a substantial factor in causing Christian Barton's harm.

"Conduct is entirely outside the range of ordinary activity involved in the sport of skydiving if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the sport of skydiving.

"Bill Dause is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent."⁵

The jury asked for clarification of "so recklessly" and for a copy of a blank release form the trial court had excluded. The parties found the jury had been given an incorrect special verdict form, which the trial court modified by blackening out references to intentional conduct. The trial court refused to give the jury the excluded document, and merely referred the jury back to CACI No. 408 in answer to the question about the "so recklessly" language. The jury later returned a defense verdict.⁶

In a special verdict, the jury answered "no" to the first and dispositive question, which asked: "Did BILL DAUSE act so

⁵ This language is taken from Dause's brief, and Barton does not dispute that it is accurate. We deem this to be a concession as to the text of the instruction as given. (See *County of El Dorado v. Misura* (1995) 33 Cal.App.4th 73, 77 [appellate court may accept facts agreed in the briefs].)

⁶ Barton asserts the verdict came 10 minutes later, but the record citation given does not support this assertion.

recklessly that his conduct was entirely outside the range of ordinary activity involved in the sport?"

Posttrial Proceedings

A defense judgment was entered on January 28, 2010. Barton moved for a new trial, which was denied on March 19, 2010. He timely filed his notice of appeal on March 29, 2010.

DISCUSSION

I

Primary Assumption of the Risk

Barton raises several contentions attacking the submission to the jury of the issue of primary assumption of the risk. We conclude each of these contentions is forfeited or lacks merit or both. Before addressing Barton's specific contentions, we review the doctrine of assumption of risk.

"The doctrine of assumption of risk in negligence cases embodies two components: (1) primary assumption of risk—where the defendant owes no duty to the plaintiff to protect him or her from the particular risk, and (2) secondary assumption of risk—where the defendant owes the plaintiff a duty, but the plaintiff knowingly encounters a risk created by the breach of that duty. [Citation.] Primary assumption of risk operates as a complete bar to the plaintiff's cause of action, while the doctrine of secondary assumption of risks is part of the comparative fault scheme, where the trier of fact considers the relative responsibility of the parties in apportioning the loss." (*Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 178.)

"Primary assumption of risk occurs where a plaintiff voluntarily participates in a sporting event or activity involving certain inherent risks. For example, an errantly thrown ball in baseball or a carelessly extended elbow in basketball are considered inherent risks of those

respective sports. [Citation.] Primary assumption of risk is a complete bar to recovery. [Citation.]

“Primary assumption of risk is merely another way of saying no duty of care is owed as to risks inherent in a given sport or activity. The overriding consideration in the application of this principle is to avoid imposing a duty which might chill vigorous participation in the sport and thereby alter its fundamental nature.” (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 751-752.)

Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. (See, e.g., *Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631 [arena owners and spectators]; *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 943-946 [students and instructors]; *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1633-1634 [figure skaters] (*Staten*).) The doctrine applies to activity that is “done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury” (*Record v. Reason* (1999) 73 Cal.App.4th 472, 482) or involves “an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity” (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658).

It is undisputed that “Skydiving is a . . . ‘risk-laden’ recreational sport.” (*Dare v. Freefall Adventures, Inc.* (App. Div. 2002) 349 N.J.Super. 205, 214 [793 A.2d 125, 131] (*Dare*).)

We now address Barton’s specific claims of error.

A. *Notice of Defense Theory*

Barton contends the trial court should not have instructed on primary assumption of the risk because that issue was not raised by the pleadings. This claim is forfeited, and in any event lacks merit.

First, Barton never objected that the trial evidence varied from the pleadings until *after* the verdict, in his new trial motion. Barton's failure to claim a material variance during trial forfeits the claim of error, because of what we long ago characterized as "the well-recognized rule of practice that, where a cause is tried upon the theory that a certain fact is in issue, and evidence thereon is received without objection, it is too late thereafter to complain that no such issue was presented." (*McCord v. Martin* (1920) 47 Cal.App. 717, 723; see *Vaughn v. Jonas* (1948) 31 Cal.2d 586, 605; *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 15-16.) Raising the issue in the new trial motion, after the cause was submitted to the jury, was insufficient to preserve it.

Second, as the trial court found in denying the new trial motion, Dause's answer alleged Barton was trained to make a safe low-altitude jump, and "assumed the risk of the consequences that would occur by exiting the airplane for a low altitude jump with an improper technique." And Barton's amended complaint clearly raised the issue. We are not persuaded by Barton's undeveloped claim that the answer merely raised *secondary* assumption of the risk because it referenced the way Barton jumped.

Moreover, Barton has not demonstrated exactly how, if at all, he was prejudiced. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106 (*Paterno*).) Barton claims he had no opportunity to conduct discovery into assumption of the risk, or attack the doctrine by means of a summary judgment motion, but he provides no record citations to support these claims, nor are they plausible in light of the fact that both counsel were well aware of the issues and thus the possible application of the doctrine before trial.

Accordingly, we reject the claim of material variance.

B. *Lack of Pretrial Hearing on Assumption of the Risk*

Barton next contends the trial court should have conducted a hearing outside the presence of the jury to determine the applicability of the doctrine--arguing the issue of application was solely a legal matter. The claim is forfeited, and in any event we are not persuaded.

Barton has not shown that he requested a hearing and objected to its omission--he merely argues the trial court did not *offer* to hold a hearing after stating the case involved primary assumption of the risk. "An appellate court will ordinarily not consider procedural defects or erroneous rulings in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower

court by some appropriate method.” (9 Witkin, *supra*, Appeal, § 400, p. 458.) We conclude the point is forfeited.⁷

In any event, no pretrial hearing was warranted here.

It is true, as Barton emphasizes, that, “The existence and scope of a defendant’s duty of care in the primary assumption of risk context ‘is a *legal* question which depends on the nature of the sport or activity . . . and on the parties’ general relationship to the activity, and is an issue to be decided by the court, rather than the jury.’” (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11-12.) For this reason, in many cases there is no dispute about the inherent risks, and such cases are often resolved without trial, such as by a summary judgment motion. (See, e.g., *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248 (*Ferrari*).)

However, whether conduct is “‘so reckless as to be totally outside the range of the ordinary activity’” a plaintiff chose to engage in may well pose a *factual* question rather than a *legal* question. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 486 (*Shin*).) For example, discussing golf, our Supreme Court noted: “In determining whether defendant acted recklessly, the trier of fact will have to consider both the nature of the game and the

⁷ Buried in this same section of his brief, Barton seems to assert that the trial court also mishandled *secondary* assumption of the risk. This claim is forfeited for the failure to separately head and argue it, as well as for the reasons explained above. (See *Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 482; *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 807 (*Utz*).)

totality of circumstances surrounding the shot.” (*Shin, supra*, 42 Cal.4th at p. 499; see also *Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1127-1128 (*Priebe*) [dog-bite case generally barred by the “veterinarian’s rule” but plaintiff might show defendant’s acts exposed kennel workers “to an unknown risk of injury well beyond that normally associated with work at a dog kennel”]; *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 592 [where primary and secondary assumption are factually intertwined, jury must determine whether defendant increased inherent risks so that secondary assumption of risk should be considered] (*Vine*).)

Where the inherent risks of an activity are not commonly known, expert testimony may be required “for purposes of weighing whether the inherent risks of the activity were increased by the defendant’s conduct.” (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1017 (*Kahn*), quoting *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23; see also *Staten, supra*, 45 Cal.App.4th at pp. 1635-1636; accord *Dare, supra*, 349 N.J.Super. at pp. 215-216 [793 A.2d at p. 132] [“because of the complexities and variables involved in applying pertinent skydiving guidelines, expert testimony was necessary to establish what standard of care applied to Johnson, and how he deviated from that standard”].)

In this case, competing expert opinions raised a factual question, whether Dause increased the inherent risks of skydiving, by failing to level and slow the plane, by failing to warn of the danger of a tailstrike, or by failing to use a

different plane. It would have been improper to deprive either party of the right to a jury trial on these material factual disputes. (See Cal. Const., art. I, § 16; Code Civ. Proc., § 592 ["In actions for . . . money claimed as due . . . for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered"]; cf. *County of Butte v. Superior Court* (1989) 210 Cal.App.3d 555, 557-559.)

Therefore, we reject Barton's contention the trial court should have conducted a hearing to determine the inherent risks of skydiving, as applicable to the facts of this case.

C. *Application of Primary Assumption of the Risk*

Barton contends primary assumption of the risk did not apply because Dause was a pilot operating a for-profit venture and was a common carrier. Barton had objected to CACI No. 408 on the ground that Dause was not a coparticipant with Barton in the sport of skydiving.

We observe that the evidence, viewed in the light favorable to the jury verdict, shows that Dause acted properly both when choosing to fly the Beech 99 and while flying the plane before Barton jumped, but that Barton jumped upwards as he left the plane, *after a specific warning not to do so*. This is the prism through which we must assess Barton's factual claims.⁸ However,

⁸ Barton fails to describe the evidence *in the light most favorable to the jury verdict* anywhere, as required. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (Foreman); *Akins v. State of California* (1998) 61 Cal.App.4th 1, 36.)

where he contends the trial court "gave an erroneous instruction" we must "view the evidence in the light most favorable to the claim of instructional error." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 845-846.)

1. *Dause as a Venue Operator*

Barton contends Dause was the pilot and owner of a commercial facility that charged Barton a fee to skydive, and therefore owed him a duty of care.

A pilot is integral to the sport of skydiving, and therefore can, indeed, be deemed to be a "coparticipant" with the jumper. (See *Bjork v. Mason* (2000) 77 Cal.App.4th 544, 551 [boat driver a coparticipant in "tubing"].)

Further, characterizing Dause as a venue operator would not change the result, because in such capacity his duty was limited to providing reasonably safe skydiving services that did not increase the inherent risks of skydiving. (See *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 134 [golf course owner has duty to "provide a reasonably safe golf course" and "'minimize the risks without altering the nature of'" golf]; *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 364-367 [fact issue whether ski resort altered the ski run so as increase the inherent risks of ordinary downhill skiing]; *Ferrari, supra*, 32 Cal.App.4th at pp. 254-255; accord, *Dare, supra*, 349 N.J.Super at pp. 216-218 [793 A.2d at pp. 132-133] [duty to operate facility so as not to increase inherent risks

of skydiving].) These issues were tendered to and resolved by the jury.

In short, characterizing Dause as a venue operator would not have changed his duties as presented to this jury, nor would it have changed the jury's assessment of the facts.

2. *Common Carrier Liability*

Barton contends the trial court found Dause was a "common carrier," and argues primary assumption of risk should not apply when a common carrier commits gross negligence. However, Barton's amended proposed jury instruction list did not include any of the pattern instructions (CACI Nos. 900 et seq.) specific to common carrier liability. Failure to request an instruction on a theory bars a party from raising that theory on appeal. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534-1535 (*Null*)).

Moreover, Barton has not demonstrated that a common carrier liability theory was necessarily applicable to this case, and more importantly, that it was not fully subsumed within the theories tendered to and resolved by the jury.

Civil Code section 2100 provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Civil Code section 2101 provides: "A carrier of persons for reward is bound to provide vehicles safe and fit for the

purpose to which they are put, and is not excused for default in this respect by any degree of care.”

Precedent provides some *general* support for Barton’s view that Dause was a common carrier, notwithstanding that Barton was not traveling from one place to another, like a train passenger. Our Supreme Court has viewed common carrier liability broadly and has held that a “passenger’s purpose does not affect the duty of the carrier to exercise the highest degree of care for the safety of the passenger.” (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1136 (*Gomez*) [holding, over dissent, that a roller coaster operator was a common carrier].)

But Barton was not *merely* a passenger on a conveyance, such as on an amusement park ride (see *Gomez, supra*, 35 Cal.4th 1125) or on a chairlift (see *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499) when he was injured. He *jumped out of the airplane*, to engage in the inherently hazardous activity of skydiving. (Cf. *Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1258, 1262-1263 [Kindrich hurt debarking boat because portable stairs were missing, held, over dissent, he was merely a passenger and was not engaged in hazardous activity].) Barton provides no *specific* authority extending common carrier liability to a person who voluntarily jumps out of a plane mid-flight--or out of any moving vehicle for that matter.

Moreover, Dause makes no coherent argument for prejudice; that is, he fails to analyze the facts, arguments and other jury instructions to show it is reasonably likely the jury would have

found Dause liable on this alternate theory, nor has he spelled out exactly how the purported error caused a miscarriage of justice. (See *Paterno, supra*, 74 Cal.App.4th at pp. 105-106.) Barton merely asserts he was prevented from submitting his "gross negligence" claim to the jury. But the record shows that gross negligence was submitted to the jury, and the jury found that Dause *did not* act with gross negligence.

For each of these reasons, we reject Barton's contention that common carrier liability compels reversal in this case.

D. *Evidence Dause Increased Risk of Skydiving*

Barton contends the evidence shows Dause increased the risk of skydiving. He invites us to reweigh the evidence, which we decline to do. (*Foreman, supra*, 3 Cal.3d at p. 881.) The jury was properly presented with substantial evidence that Barton was an experienced skydiver who had been warned *on his prior jump* not to jump "up" when leaving a plane, yet he did just that, causing his own injuries, and that Dause's actions fell well within accepted skydiving standards. The jury was not required to credit Barton's contrary evidence. (See *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660.)

Barton's opening brief mentions in passing a federal aviation regulation, but he does not head an argument about it or coherently analyze it, and his discussion about it in the reply brief comes too late, therefore the issue is forfeited. (See *Utz, supra*, 109 Cal.App.2d at pp. 807-808.) In any event, the regulation, as described at trial, states a general prohibition on operating an aircraft in a "careless and reckless

manner," and does not proscribe any *specific* actions Dause took in this case.

In this portion of his brief, Barton also asserts that the jury was confused about the "so reckless" language.

CACI No. 408 required Barton to prove that Dause "acted so recklessly that his conduct was entirely outside the range of ordinary activity involved in skydiving[.]" BAJI No. 4.70 also requires a plaintiff to show a defendant's conduct "was so reckless as to be totally outside the range of the ordinary activity involved in the sport." The "so reckless" language stems from the California Supreme Court's decision in *Knight v. Jewett* (1992) 3 Cal.4th 296, at page 320 (plur. opn. of George, J.), and has been reiterated in several later cases. (See, e.g., *Shin, supra*, 42 Cal.4th at p. 486; *Kahn, supra*, 31 Cal.4th at p. 1005.) When the jury asked about this language, the trial court referred it back to CACI No. 408, and the jury later returned its verdict. Presumably, any questions the jury had were resolved upon re-reading the instruction. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852 ["Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions"].) Therefore this issue avails Barton naught.

E. *Burden of Proof on Primary Assumption of the Risk*

Barton contends CACI No. 408 improperly shifted the burden of proof. Before addressing this claim, we must explain the procedural context in which it arises.

Near the end of trial, the trial court directed counsel to meet and confer regarding jury instructions so that the court needed to address only those instructions in dispute. After both parties had rested, the trial court conducted an instructional conference on the record.

When Dause had sought to introduce a blank version of his standard release form, to show what Barton had signed, Barton objected that it was irrelevant to the case, because he was proceeding on gross negligence, which would not be barred by the release. (See fn. 4, *ante*.) The trial court excluded the release form because "there is no negligence case here, only gross negligence. That is what plaintiff's counsel told us at the beginning of this case. That is how the case is being tried. That's what's going to go to the jury." Barton's counsel did not object to this characterization.

The trial court reiterated this point during the instructional conference, and referenced CACI No. 408. Barton's counsel stated he *agreed* with the trial court's characterization of CACI No. 408, "which is why I told you earlier that we had to modify the special verdict." The parties later discussed modifications to CACI No. 408. Barton's counsel never asserted that CACI No. 408 improperly shifted the burden of proof.

Although the record on appeal is replete with irrelevant documents (see fn. 2, *ante*), *it lacks the jury instructions*. The reporter did not transcribe the instructions as read and the appendix merely contains counsel's numerical lists of *proposed* pattern instructions. The trial court conducted an

instructional conference and modifications were discussed, but the record does not reveal the instructions as ultimately given to the jury.

This court has previously declined to speculate about what instructions the jury received by parsing between proposed numerical lists of instructions and proposed modifications discussed at an instructional conference. (*Null, supra*, 206 Cal.App.3d at pp. 1535-1536.) It was Barton's burden, as the appellant, to provide this court with a record adequate for review of his contentions, therefore; to "the extent the record is incomplete, we construe it against him." (*Sutter Health, supra*, 171 Cal.App.4th at p. 498; see *Null, supra*, at pp. 1532-1533.)

The *challenged* instruction (CACI No. 408) although not in the record, is agreed on by the parties (see fn. 9, *ante*), and therefore we may consider whether it accurately states the law *in the abstract*. But without *the other instructions*, we would be unable to assess prejudice even if we were to find the challenged instruction to be improper. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570-571, 580-581 (*Soule*) [when evaluating prejudice from improper instruction, the appellate court in part must consider "'the effect of other instructions'" on the error].) More specifically, *Barton* would be unable to *demonstrate* prejudice, as is his burden. (*Paterno, supra*, 74 Cal.App.4th at pp. 105-106.)

Thus, *Barton* is limited to arguing CACI No. 408, in the abstract, both erroneously states the burden of proof *and* that

giving it was *necessarily* prejudicial, without regard to the facts of this case. (*Paterno, supra*, 74 Cal.App.4th at p. 106.)

But such an argument is untenable. Even if we concluded the instruction improperly shifted the burden of proof, this conclusion of itself would *not* show a miscarriage of justice. We emphasized this point in a case, where, after we found that an instruction improperly shifted the burden of proof on a key issue, we considered in detail the state of the evidence, the effect of other instructions, the effect of closing arguments, any indications the jury was misled, and other factors to determine whether the error caused prejudice based on *that particular record*, rather than deeming the error prejudicial in the abstract. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 393-398 (*Buzgheia*); see *Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1107-1109; *Vine, supra*, 118 Cal.App.4th at pp. 600-603.)

Nor does Barton present a developed argument about the evidence, the arguments, and other factors relevant to a determination of prejudice from an instructional error. (See *Soule, supra*, 8 Cal.4th at pp. 570-571, 580-581; *Buzgheia, supra*, 60 Cal.App.4th at pp. 393-398.) He has not demonstrated prejudice. (See *Paterno, supra*, 74 Cal.App.4th at pp. 105-106.)

Moreover, on the merits, Barton cites no authority holding or even implying that CACI No. 408 improperly shifts the burden of proof. He instead relies on the rule that a defendant bears the burden to prove an affirmative defense. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 54.)

But, although denominated a "defense," the doctrine of "primary assumption of the risk" limits a defendant's duty of care toward a plaintiff, and for that reason may be challenged by demurrer. (See *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162-168 (*Avila*).) After all, it is the *plaintiff's* burden to establish that a defendant breached a duty of care. (*Avila, supra*, 38 Cal.4th at p. 160.) For this reason, some judges have characterized the doctrine as "a limitation on the plaintiff's cause of action rather than an affirmative defense." (*Priebe, supra*, 39 Cal.4th at p. 1135 (dis. opn. of Kennard, J.).)

Generally, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) More specifically, "The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue." (Evid. Code, § 521.)

The manner in which the doctrine of primary assumption is raised matters, because the pleadings define the legal and factual issues to be decided. (Code Civ. Proc., § 588; see *Fuentes v. Tucker* (1947) 31 Cal.2d 1, 4; 4 Witkin, *supra*, Pleading, § 1, p. 65.) For example, if a plaintiff pleaded a defendant battered her, *and no more*, the defendant would have the burden to plead and prove that, at the time, the two were engaged in an activity triggering the doctrine of primary assumption of the risk, such as playing basketball. But once defendant established that fact, either by a pretrial ruling or

a jury determination, the plaintiff would have the burden to show the defendant increased the risks inherent in basketball, for example, by donning and employing elbow spikes.

In *this* case, the amended complaint *itself* pleaded that Barton was injured while skydiving *because Dause increased the inherent risks* of that activity, thereby triggering application of the doctrine. In such circumstances, although denominated as an "affirmative" defense, the doctrine in reality limited the scope of Dause's duty to Barton, and cast on Barton the burden to prove Dause's conduct breached that limited duty, by showing Dause did something outside the inherent risks of skydiving.

This applies the "settled rule that when a party seeks relief the burden is upon him to prove his case, and he cannot depend wholly upon the failure of the defendant to prove his defenses." (*California Employment Com. v. Malm* (1943) 59 Cal.App.2d 322, 323; see *People v. Atwood* (2003) 110 Cal.App.4th 805, 811.)

Therefore, on the merits of this case, we conclude that the instruction requiring Barton to prove Dause increased the inherent risks of skydiving was accurate.

II

Evidentiary Rulings

Barton challenges two evidentiary rulings made during trial. We find no abuse of discretion by the trial court.

A. Limiting Cross-Examination of Dause

Dause initially testified he "probably" had read an "incident report" in *Parachutist* magazine about Barton's

accident, but when Barton attempted to move the magazine into evidence, the trial court sustained a hearsay objection. Later, the trial court offered Barton the opportunity to recall Turoff to lay a foundation for admitting three issues of the magazine containing relevant articles--purportedly authored by Jim Crouch--to cross-examine Dause. Turoff testified outside the presence of the jury that Crouch was "the director of safety and training of the US Parachuting Association" and Crouch authored the articles, but Turoff did not know on what material Crouch based them.

When the issue was revisited, Dause objected that there had been no showing Dause had *relied* on the proffered materials. Barton argued Dause had *read* the materials and therefore necessarily considered them. The trial court ruled that *Parachutist* was not a learned treatise, the testimony had not established the author of the relevant material, and Barton had not established that Dause had considered that material in reaching his expert conclusions, but invited Barton to lay a further foundation.

When Dause was recalled, he testified he had probably *not* read the article about this accident. The trial court ultimately excluded the proffered material.

On appeal, Barton fails to explain how, *if* the evidentiary ruling was erroneous, it is reasonably probable a different result would have been obtained. (Cal. Const., art VI, § 13; Code Civ. Proc., § 475.) Again, absent a developed prejudice

argument, we need not address contentions of error. (See *Paterno, supra*, 74 Cal.App.4th at pp. 105-106.)

Further, the trial court's rulings on such foundational questions are reviewed for an abuse of discretion. (*Laird v. T.W. Mather, Inc.* (1958) 51 Cal.2d 210, 219 ["the trial court is given a wide discretion in controlling cross-examination affecting the knowledge and credibility of an expert witness"].)

Although an expert may be questioned about "the matter upon which his or her opinion is based and the reasons for his or her opinion" (Evid. Code, § 721, subd. (a)), giving deference to the trial court's ruling, Barton did not show Dause even had read the materials, far less considered them in reaching his opinion. Absent a showing the expert relied on a publication, the expert cannot be cross-examined about it unless, "The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." (Evid. Code, § 721, subd. (b)(3).) Barton failed to show that the publication qualified as a "reliable authority" under this statute, either.

Accordingly, Barton has not demonstrated that the trial court abused its discretion in excluding this evidence.

B. Admitting Murphy's Expert Testimony

Barton complains that Murphy testified about "hop and pops" while a plane was climbing, at drop zones other than Dause's, over Barton's relevancy objection.

On appeal, Barton provides no legal authority in this portion of his briefing, and does not discuss the legal standard

of relevancy, the trial court's scope of discretion, other evidence on the subject in the record, or prejudice.

We deem the point to be forfeited for lack of adequate analysis. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["conclusory claims of error" are deemed forfeited].)

Further, whether low-altitude "hop and pop" exits were "common" in the industry was relevant to whether Dause acted within the standard of care or acted with gross negligence and increased the inherent risks of skydiving. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) In determining relevance, "a wide discretion is left to the trial judge, which discretion will not be disturbed unless there is a clear showing of abuse thereof." (*Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 420, cited with approval on this point by *In re Angelia P.* (1981) 28 Cal.3d 908, 922.)

As the trial court later explained, Barton "clearly made it an issue what training is received at this facility and what has happened at other facilities, and you have asked those questions[,] and in denying a new trial the trial court found Barton opened the door to Murphy's testimony by asking his own expert, Turoff, about industry practices. We agree with the trial court's view.

We find Barton has not established an abuse of discretion by the trial court in making this relevancy ruling.

DISPOSITION

The judgment is affirmed. Barton shall pay Dause's costs of this appeal. (See Cal. Rules of Court, rule 8.278.)

DUARTE, J.

We concur:

RAYE, P. J.

HULL, J.