

4th Civil No. D063991

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

NANCY L. BARRETT,

Plaintiff and Appellant,

vs.

JAMES E. LEECH,

Defendant and Respondent.

Appeal from San Diego Superior Court,
Case No. 37-2011-00098545-CU-PO-CTL
Honorable Joan M. Lewis, Judge Presiding

RESPONDENT'S BRIEF

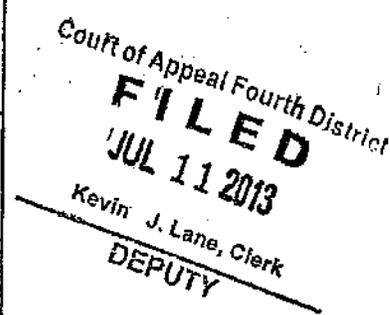
BOLES & DIMASCIO

John D. Culver, Jr. (SBN 171112)
3111 Camino Del Rio North, Suite 700
San Diego, California 92108
Telephone: (619) 584-3300
Facsimile: (619) 280-4588

**GREINES, MARTIN, STEIN &
RICHLAND LLP**

Robert A. Olson (Bar No. 109374)
*Gary J. Wax (Bar No. 265490)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
Email: gwax@gmsr.com

Attorneys for Defendant and Respondent
JAMES E. LEECH

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D063991
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Robert A. Olson (SBN 109374) / Gary J. Wax (SBN 265490) Greines, Martin, Stein & Richland LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, California 90036 TELEPHONE NO.: 310-859-7811 FAX NO. (Optional): 310-276-5261 E-MAIL ADDRESS (Optional): rolson@gmsr.com ATTORNEY FOR (Name): Respondent James E. Leech	Superior Court Case Number: 37-2011-00098545-CU-PO-CTL
APPELLANT/PETITIONER: NANCY L. BARRETT RESPONDENT/REAL PARTY IN INTEREST: JAMES E. LEECH	FOR COURT USE ONLY 
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2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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Date: **July 10, 2013**

GREINES, MARTIN, STEIN & RICHLAND LLP

Robert A. Olson

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

Horses behave unpredictably. A person who works professionally with horses assumes that risk as a matter of law. That includes a farrier—one who trims horse hooves as a profession. That's what the trial court held in this case. That ruling should be affirmed.

After attending specialized farrier school in the 1960s, Patrick Barrett worked as a horse farrier for more than 45 years. Just like veterinarians, dog groomers, and other animal handlers—who assume all risks inherent in their occupations—Mr. Barrett assumed the inherently dangerous nature of his occupation trimming horse hooves, including the risks associated with securing the horse for hoof-trimming and any open and obvious dangers he could perceive where he was hired to work. It was the farrier's responsibility to evaluate that he had a safe place to work given the inherent risks associated with equine skittishness.

When the defendant/respondent horse owner hired the farrier (for a second time) to trim his horses' hooves, one of the horses unexpectedly knocked the farrier down while he was attempting to secure it, causing the farrier to fall, hit his head on a rock, and sadly, pass away from his injuries. The farrier's widow, plaintiff/appellant Nancy Barrett, sued the owner for premises liability and wrongful death, arguing that the owner had negligently allowed his corral to remain rocky, contributing to her husband's death.

But, as the trial court found, the horse caused the fall, not the rocky terrain. The owner owed the farrier no legal duty under the “occupational assumption of risk” doctrine to protect the farrier from the risks of his inherently dangerous occupation. A long line of authorities holds that a worker who chooses an inherently risky line of work, such as a firefighter or veterinarian, is responsible for his own safety. There is no material fact issue as to the farrier’s occupation or its inherent dangers.

The opening brief ignores the governing “veterinarian rule” cases upon which the trial court relied. Instead, it relies on old, abolished common-law classifications to urge a legal duty where none exists. The veterinarian cases are controlling, however, and bar liability.

There’s another reason that the defendant owner owed the farrier no legal duty: The farrier was an independent contractor. Under *Privette v. Superior Court*, one who hires an independent contractor, delegating to the contractor the responsibility to safely conduct his task, owes no duty to protect him from the risks attendant to his occupation.

Each doctrine independently bars plaintiff’s lawsuit: the “occupational assumption of risk doctrine” and the *Privette* doctrine. The trial court’s summary judgment ruling should be affirmed.

STATEMENT OF FACTS

A. The Decedent: A Well-Trained Horse Farrier With More Than 45 Years Of Hoof-Trimming Experience.

The late Patrick Barrett was a horse farrier by trade; meaning, he was a specialist in trimming horses' hooves. (1 Clerk's Transcript (CT) 72 ¶5; 2 CT 240 ¶5.) After attending farrier school in 1963, he routinely trimmed thousands of horses' hooves for more than 45 years. (1 CT 72, 78; 2 CT 239-240 ¶¶4-7; Appellant's Opening Brief (AOB) 7-8 ¶12.)

It is undisputed that one of the hazards that horse farriers routinely face is the inherent unpredictability of a horse's behavior. (2 CT 243 ¶17, 287; Reporter's Transcript (RT) 9; AOB 9 ¶22.)

B. Defendant Owner Hires The Experienced Farrier—Who He Had Previously Hired—To Trim Horses' Hooves At An Outdoor Corral.

Defendant and respondent James Leech hired Mr. Barrett—who he had previously hired—to trim his horses' hooves at an outdoor corral that he owned. (1 CT 30 ¶3, 72 ¶1, 78 ¶1; 2 CT 239-240, 242-243 ¶¶1-2, 7, 14; AOB 7-8 ¶¶10, 13.) The farrier came with an assistant. (1 CT 120 ¶4, 157; 2 CT 242 ¶13.) He also came equipped with his own halter to secure the horses. (1 CT 164; 2 CT 241-242 ¶11.)

The owner left his horses loose in the corral for the farrier, which had always been his custom and practice, no matter which farrier came to work in his corral. (AOB 8 ¶17; 1 CT 30 ¶4, 191; 2 CT 241 ¶¶8-9.) The corral was extremely rocky. (1 CT 30 ¶6; AOB 6 ¶5.)

C. The Farrier Is Knocked Down By A Horse While Attempting To Secure It For Hoof-Trimming; He Hits His Head On A Rock, And Later Dies.

In attempting to secure one of the horses for hoof-trimming, the farrier was hit by the horse's chest (and possibly, the horse's face), which caused him to fall and hit his head on one of the rocks that covered the corral area. (1 CT 73 ¶22, 80 ¶22, 165, 179; 2 CT 242 ¶12, 259 ¶10; RT 10-11; see also 1 CT 179 [only eyewitness reporting that "there was just the blow of the horse against him, and then he fell to the ground"].) He suffered a serious head trauma. (1 CT 3-4 ¶12, 41, 87.)¹ He later died from the injuries he sustained. (1 CT 41; 2 CT 239 ¶1, 247 ¶13.)

It is undisputed that the owner "had no knowledge and received no prior complaints that the horse involved in the Incident had ever been

¹ There is no admissible evidence in the record that the rock caused the farrier's accident. There is, however, evidence that a rock on the ground may have increased the *severity* of the injury. (1 CT 166-167.) There's also evidence that the horse may have stepped on the farrier after he fell. (1 CT 166, 180.)

difficult to control or had a high strung, volatile temperament.” (AOB 9 ¶21; 1 CT 30 ¶7; 2 CT 243 ¶16, 287.)

D. The Farrier’s Surviving Spouse Sues The Owner For Premises Liability And Wrongful Death.

The farrier’s widow, Nancy Barrett, sued the owner for premises liability and wrongful death, arguing that the owner acted negligently by:

- (1) failing to secure and restrain the horses prior to the farrier’s arrival;
- (2) failing to maintain the corral grounds in a reasonably safe condition;
- (3) permitting thousands of rocks to remain on the corral grounds;
- (4) failing to warn the farrier that the corral contained thousands of rocks;
- and (5) failing to warn the farrier that the horse allegedly had a volatile disposition and temperament. (1 CT 4-5.)

E. The Trial Court Grants Summary Judgment, Finding That Primary Assumption Of Risk Applies To The Farrier’s Inherently Dangerous Profession.

The owner moved for summary judgment, arguing that: (1) the primary assumption of risk doctrine applied to the inherently dangerous horse-farrier occupation, barring recovery for attendant risks; and (2) as the farrier was hired as an independent contractor, *Privette v. Superior Court* and its progeny barred recovery for safety issues undertaken by the horse farrier. (1 CT 16-27.)

Plaintiff argued that a “special relationship” of landowner/invitee existed, imposing a legal duty on the owner to take affirmative measures to protect or come to the farrier’s aid. (1 CT 112-113.) She also argued that the owner had increased the risks in hoof trimming by creating and maintaining a rocky corral. (1 CT 113, 116-117.)

The trial court granted summary judgment. (2 CT 280, 287.) It ruled that primary assumption of risk applies to the inherently dangerous occupation of a horse farrier, barring the suit as a matter of law. (2 CT 287; RT 11 [court finding that Mr. Barrett “did this as a profession”; and “(t)here’s risks to that profession”]; see also RT 12 [plaintiff’s counsel acknowledging “what you do is you look at what are the inherent risks of this job”].)

It found that the farrier was “doing his job” when he was injured, causing an unfortunate, job-related accident: “[T]he horse knocked him over; and, unfortunately, he was killed as a result of his fall.” (RT 11-12.) “[T]he horse is what caused him to fall, not the rocks.” (RT 12.) At the hearing, the court found it “curious” that plaintiff hadn’t attempted to distinguish, or even address, the “veterinary cases,” holding that the primary assumption of risk doctrine bars injuries caused during the course of working in inherently dangerous animal-handling occupations. (RT 11.) That the farrier worked with an inherently dangerous animal conclusively supported the doctrine’s application. (*Ibid.*)

The court also concluded that the exception to primary assumption of risk—applicable where a defendant increases the activity’s risks—did not apply. (2 CT 287.) The owner did nothing to increase the risks beyond those that the farrier could perceive and should have understood. The trial court didn’t reach the *Privette* issue—i.e., that by hiring an independent contractor, the owner was not liable for safety issues within the purview of the contractor. (*Ibid.*)²

F. The Trial Court Enters Judgment And Plaintiff Timely Appeals.

The court entered judgment in favor of the defendant owner. (2 CT 288.) Plaintiff timely appealed. (2 CT 300-301; see 2 CT 292.)

² The trial court sustained the owner’s evidentiary objections 1, 5, and 6, while overruling his remaining objections. (*Ibid.*) These rulings are not challenged on appeal.

ARGUMENT

I. THE TRIAL COURT PROPERLY BARRED PLAINTIFF'S TORT CLAIMS UNDER PRIMARY ASSUMPTION OF RISK GIVEN THAT WORKING AS A HORSE FARRIER IS AN INHERENTLY DANGEROUS OCCUPATION.

A. The Horse Owner Owed No Duty To Protect The Farrier From The Risks Of His Inherently Dangerous Occupation.

1. Primary assumption of risk bars claims involving inherently dangerous occupations.

The primary assumption of risk doctrine is a complete bar to liability in tort, establishing that a defendant—as a matter of law—owes *no* legal duty to the plaintiff. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314-315.)

The Supreme Court's leading case on the doctrine, *Knight v. Jewett*, dictates that any tort analysis begins with a threshold inquiry of whether the defendant owed a legal duty to the plaintiff. (*Id.* at p. 306.) If the defendant owed the plaintiff no duty, the plaintiff's claim is barred as a matter of law without any further inquiry or analysis. (*Id.* at pp. 308-309.)

Whether a duty exists depends on the nature of the activity in which the defendant is engaged and the relationship of the defendant and plaintiff to that activity. (*Knight, supra*, 3 Cal.4th at p. 309.) The test is objective; it does not depend on a particular plaintiff's subjective knowledge, or appreciation of, the potential for risk. (*Id.* at p. 315; *Bushnell v. Japanese-*

American Religious & Cultural Center (1996) 43 Cal.App.4th 525, 534 [“plaintiff’s knowledge or expectations are not relevant to the defense of primary assumption of risk”].) The scope of a defendant’s duty (if any) is an issue of law for the court to decide. (*Knight, supra*, 3 Cal.4th at p. 313.) Thus, if primary assumption of risk applies, it is generally “amenable to resolution by summary judgment.” (*Ibid.*)

Primary assumption of risk bars liability where conduct or conditions that might otherwise be viewed as dangerous are integral to the activity itself—that is, the activity is “inherently dangerous.” (*Knight, supra*, 3 Cal.4th at p. 315; see *Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 332-333; *Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 867.) “This includes risks associated with the condition of the surface on which the activity is performed, and any open and obvious condition thereon.” (*Nigro v. New York Racing Ass’n, Inc.* (2012) 939 N.Y.S.2d 565 [93 A.D.3d 647, 648]; see also *O’Donoghue v. Bear Mountain Ski Resort* (1994) 30 Cal.App.4th 188, 193 [confronting obstacles such as variations in terrain and changes in surface are inherent risks of skiing].) A determination of whether a particular risk is “inherent” to an activity is necessarily made by “the common knowledge of judges, and not the opinions of experts.” (*Amezcuca v. Los Angeles Harley-Davidson* (2011) 200 Cal.App.4th 217, 233, additional quotation marks and citations omitted.)

The doctrine commonly applies to bar liability for injuries sustained while engaging in recreational sports (see, e.g., *Knight, supra*, 3 Cal.4th at

pp. 314-315 [touch football]; *Ford v. Gouin* (1992) 3 Cal.4th 339, 363-364 [waterskiing]; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1010-1011 [competitive swimming]; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1066 [downhill skiing]; *Whelihan v. Espinoza* (2003) 110 Cal.App.4th 1566, 1573 [jet skiing]), including equestrian sports (see, e.g., *Shelly v. Stepp* (1998) 62 Cal.App.4th 1288, 1294-1295 [horse racing]; *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817, 822 [horse jumping]). Even non-contact sports like golf are considered to be inherently risky and, thus, subject to the doctrine. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 497.)

Plaintiff argues that *Knight v. Jewett*'s application is limited to sports. (AOB 16.) But the doctrine is not so limited. It encompasses "any physical activity that involves an element of risk or danger as an integral part of the activity." (*Rostai, supra*, 138 Cal.App.4th at p. 415; see also, e.g., *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1163-1164 [bumper car ride at amusement park is inherently dangerous].) *Knight* governs in *all* primary assumption of risk cases in California, including those involving an inherently dangerous occupation. (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132 [kennel worker bitten by dog].)

Plaintiff conceded below the threshold inquiry: "[W]hat you do is you look at what are the inherent risks of this job." (RT 12.)

The first application of the doctrine in the dangerous-occupation context involved firefighters, so at common law, courts initially termed it

the “firefighter’s rule.” Since then, courts have applied the rule in so many different workplace settings that the doctrine is now broadly referred to as “occupational assumption of the risk.” (*Priebe, supra*, 39 Cal.4th at p. 1119.) Occupations held to be inherently dangerous—and thus, subject to the doctrine—are wide-ranging. Some examples are:

- firefighters (e.g., *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 542-543);
- peace officers (*Kelhi v. Fitzpatrick* (1994) 25 Cal.App.4th 1149, 1161);
- private security guards (*Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 489-490);
- lifeguards (*City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 282, 285);
- movie stunt performers (*Angelotti v. Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1401, 1406-1407);
- kennel workers (*Priebe, supra*, 39 Cal.4th at p. 1132);
- shark handlers (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1480-1481); and most analogous here,
- veterinarians and their assistants (*Cohen v. McIntyre* (1993) 16 Cal.App.4th 650, 654-655; *Willenberg v. Superior Court* (1986) 185 Cal.App.3d 185, 186-187; *Nelson v. Hall* (1985) 165 Cal.App.3d 709, 714-715).

The inherently dangerous nature of these occupations renders the possibility of injury obvious and an integral part of the work performed, and thus, negates any possibility of a duty of care owed by the defendant for the particular risks of harm. (*Saville, supra*, 133 Cal.App.4th at p. 867.) If a person contracted to do work deals with hazards as a regular part as his job, “he cannot complain of negligence in the creation of the very occasion for his engagement.” (*Neighbarger, supra*, 8 Cal.4th at p. 540.) A layperson hires a professional to encounter and deal with dangers that the hirer is unequipped or unwilling to face. That cannot be negligent, it is prudent.

2. The veterinarian cases govern this appeal and bar plaintiff’s tort claims.

The classic situation where a defendant owes no duty of care due to the nature of the activity and the relationship of the defendant to the plaintiff is in the veterinarian context. (*Cohen, supra*, 16 Cal.App.4th at p. 655; see *Priebe, supra*, 39 Cal.4th at pp. 1121-1125 [adopting the “veterinarian’s rule”].) When a veterinarian is injured during the course of treating an animal under his or her control, the animal owner owes the veterinarian no legal duty, as a matter of law, because the job carries with it a well-known risk of being attacked and bitten. (*Priebe*, at p. 1130; *Cohen, supra*, at p. 655; *Nelson, supra*, 165 Cal.App.3d at p. 714.) “In other words, the veterinarian, like the firefighter, cannot recover for injuries

arising out of the very conditions he or she was hired to confront.”

(*Rosenbloom, supra*, 66 Cal.App.4th at p. 1480.)

The cases applying the “veterinarian’s rule” govern where, as here, a plaintiff confronts unpredictable animals as an inherent part of the job. (*Priebe, supra*, 39 Cal.4th at p. 1122 [collecting cases].) According to the Supreme Court, “veterinarians, their trained assistants, and those in similarly situated professions (e.g., dog groomers, kennel technicians) are in the best position, *and usually the only position*, to take the necessary safety precautions and protective measures to avoid being bitten or otherwise injured by [an animal] left in their care and control.” (*Id.* at p. 1130, italics in original.)

Priebe v. Nelson, supra, 39 Cal.4th at p. 1132, held that the veterinarian’s rule barred a claim by an injured kennel worker who, by virtue of her dangerous animal-handling occupation, assumed the risk of being injured by the dogs under her care and control. In so holding, the Court refused to hold the dog owner liable because the owner had completely relinquished the care, custody, and control of his dog to an animal-handling professional, specifically trained to care for and safely handle the animals. (*Id.* at p. 1129.) It held that the owner was in no position to supervise or prevent any conduct on the part of the dog because determining “‘the best way to handle the dog while at the kennel, and what protective measures, if any, should be taken to ensure employee safety’” fell squarely on the plaintiff—the professional animal handler. (*Ibid.*)

In adopting the veterinarian's rule, *Priebe* cited and discussed with approval several cases holding that animal-handling jobs are inherently dangerous, and that ensuring personal safety is an inherent part of such jobs. For instance, in *Nelson v. Hall, supra*, 165 Cal.App.3d at p. 715, the court affirmed summary judgment for a defendant dog owner where a dog undergoing veterinary treatment bit the plaintiff, the veterinarian's assistant. *Nelson* held that the assistant's tort claim was barred by assumption of risk because the "risk of dog bites during treatment is a specific known hazard endemic to the very occupation in which plaintiff voluntarily engaged." (*Id.* at pp. 714-715.)

The court stressed that the duty of handling the animal falls squarely on the hired specialist: "The veterinarian determines the method of treatment and handling of the dog. He or she is the person in possession and control of the dog and is in the best position to take necessary precautions and protective measures." (*Id.* at p. 715; accord, *Priebe, supra*, 39 Cal.4th at p. 1130.)

One year later, *Willenberg v. Superior Court, supra*, 185 Cal.App.3d at p. 187, applied *Nelson's* "veterinarian's rule" to bar a claim by a veterinarian injured when a dog he was treating suddenly leapt off the examination table. The court noted that "a visit to the veterinarian's office can bring about unpredictable behavior in a normally docile animal, and this is an inherent risk which every veterinarian assumes." (*Ibid.*)

Cohen v. McIntyre, supra, applied the same analysis as *Nelson* and *Willenberg* and arrived at the same conclusion: Where a licensed veterinarian is injured during the course of treating an animal under his or her control, the primary assumption of risk defense bars his or her negligence claim. (16 Cal.App.4th at p. 655.) In such cases, there are no factual issues for a jury to decide. (*Id.* at p. 657.) Thus, summary judgment in favor of the defendant is proper. (*Ibid.*)

In all of these cases, the bottom line is that the animal handler assumes the *sole* responsibility of determining whether there are safety issues at the job site and, if so, taking the necessary safety precautions, even if that means not rendering service at that time and place.

In this case, the defendant owner cited and discussed these governing authorities in moving for summary judgment. (See 1 CT 21-22.) Plaintiff chose not to even address them in opposing summary judgment. (See 1 CT 112-117.) The court commented on this choice as “curious” because the veterinarian cases clearly governed the issue and were, thus, unavoidable. (RT 11.) Nevertheless, the opening brief also inexplicably fails to address these cases. Reply will be too late for her to do so.

She cannot avoid the veterinarian cases; they are fatal to her appeal.

3. Working as a horse farrier is an inherently dangerous occupation.

a. Plaintiff concedes that horses are inherently unpredictable.

The opening brief concedes that working as a horse farrier is an inherently dangerous occupation: “One of the hazards farriers face is the unpredictable nature of horses.” (AOB 9, citing 2 CT 243 ¶17.) Of course plaintiff had no choice but to admit this fact on appeal; she admitted the same undisputed fact at trial. (2 CT 243 ¶17.)

b. Courts uniformly hold that horses are inherently dangerous.

It is axiomatic that horses, by their nature, are unpredictable and “difficult to control.” (*Shelly, supra*, 62 Cal.App.4th at pp. 1294-1295.) Given their large size and strength, that also makes them inherently dangerous. For instance, there is always a risk that a horse will “buck, bite, break into a trot, stumble or ‘spook’ when confronted by a frightening event,” causing a person to suffer an injury. (*Harrold v. Rolling J Ranch* (1993) 19 Cal.App.4th 578, 587-588.) Likewise, it is not unusual for a horse to “rear up” or “sidestep” without warning. (*Shelly, supra*, 62 Cal.App.4th at pp. 1294-1295.) Courts have described these risks as nothing more than “a ‘horse behaving as a horse.’” (*Harrold*, at p. 588; see also *Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1538 [social

guest who professed to have horse riding experience assumed risk for her inability to control a horse and “has only herself to blame for her inability to control a horse that behaved as a horse when it uncharacteristically galloped off”].)

Indeed, these behaviors are common for *all* horses, “even those that are well trained and appear calm and docile.” (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1486.) There is always an inherent risk that horses will act “without warning and without apparent cause” in response to external stimuli such as movement of people and other horses. (*Ibid.*) “[E]ven the rather tame sport of riding on the back of walking horses in an afternoon trail ride, carries some inherent risk of injury.” (*Harrold, supra*, 19 Cal.App.4th at p. 587.) A horse’s sudden movements are equally as inherent in equestrian activities as confronting moguls on a ski slope is to skiers. (*Ibid.*) The danger of injury, in either case, is inherent as well.

Not surprisingly, cases involving horse trainers and horseshoers uniformly hold that such occupations are inherently dangerous, in large part, because it is well-known among such professionals that horses often kick their handlers. (See *Vanderlei v. Heideman* (1980) 83 Ill.App.3d 158, 163 [403 N.E.2d 756] [“getting kicked is a ‘normal’ risk which (plaintiff) envisioned as a horseshoer . . . it was known by himself and within his profession that horses will sometimes kick while being shod”]; *Smith v. Hunting View Farm* (1999) 695 N.Y.S.2d 802 [265 A.D.2d 928, 928-929] [plaintiff assumed risks inherent in horse training, and thus owner of horse training facility was not liable for injuries sustained when trainer was

kicked in head while helping to groom horse, where she had been working with horses for years, was in advanced horse training class, had competed in numerous horse shows, and had previously worked with the horses at this facility].)

The risks inherent in handling horses are limitless. (See AOB 9 [conceding that horses act unpredictably].) They are risks, though, that experienced, professional horse handlers assume, as the farrier did here.

c. The inherently dangerous nature of the farrier's job combined with his specialized training bar plaintiff's claim.

As part of his job as a horse farrier, Mr. Barrett regularly subjected himself to several occupational dangers, including the risk of being kicked, pushed or bumped by a horse as well as the irregular conditions of the corrals and stables where he worked.

Mr. Barrett was a true expert in the field of horse farriering. (1 CT 72 ¶5; 2 CT 240 ¶5.) He attended specialized farrier school and trimmed literally thousands of hooves over a 45-year period. (1 CT 72, 78; 2 CT 239-240 ¶¶4-7; AOB 7-8 ¶12.) He commonly trimmed or shod between six and eight horses per day. (1 CT 157.) He even had previous experience trimming the hooves of Mr. Leech's horses. (AOB 8 ¶13; 2 CT 240 ¶7.) As an expert entrusted with control of the horses, Mr. Barrett, not the owner, was "in the best position to take necessary precautions and

protective measures” to avoid injury. (*Priebe, supra*, 39 Cal.4th at p. 1130, quoting *Nelson, supra*, 165 Cal.App.3d at p. 715.) The fact that he brought an assistant and his own halter with him on the day of the accident only bolsters this point. (1 CT 164; 2 CT 241-242 ¶¶11.)

As the Supreme Court has held: “Where a person accepts responsibility for controlling an animal, [he] cannot maintain a cause of action for injuries resulting from [his] own failure to control the animal.’ [Citation.]” (*Priebe, supra*, 39 Cal.4th at pp. 567-568.) A horse owner hiring a farrier to trim horse-hooves is no different than a shark-aquarium owner hiring a shark handler to move his shark to a new aquarium or a dog owner hiring a veterinarian to treat his pet: In each case, based upon the inherently dangerous nature of the jobs, the owner owes the animal handler no duty of care when he turns over care and control of the animal. (See *Rosenbloom, supra*, 66 Cal.App.4th at p. 1480, fn. 4 [“it is undisputed the Club contracted with a shark expert, entrusting its shark to (the aquarium) company’s professional care and control. Just as a dog owner owes no duty to hired veterinarians or their assistants (citation), the (defendant) owed none to (the shark handler) or the crew acting under his control and supervision,” citing *Nelson, supra*, 165 Cal.App.3d at p. 714].)

Here, the record shows that the owner left his horses under the farrier’s exclusive care and control on the date of the accident, which had always been his custom and practice, including the previous time he hired *this* farrier. (AOB 8 ¶¶13-14, 17; 2 CT 241 ¶¶8-10.) The farrier—as a horse-handling expert—was in the best position to secure the horses. Thus,

the owner cannot be liable for the farrier's inability to control the horse on the date of the accident.

4. Evaluating whether the locale and surroundings are safe to trim horse hooves is an inherent part of the horse farrier occupation.

The opening brief places much emphasis on the fact that the “entire corral area was blanketed with rocks, many of which were large and pointed.” (AOB 2, 9.) Plaintiff’s contention is that somehow the corral was unduly dangerous. The claim, however, is not that the corral was unduly dangerous for its normal use (as a horse corral) or unduly dangerous for people in the abstract, but rather that it was an unduly dangerous place *for a horse farrier to work*.

The principle behind primary assumption of the risk is that risk (and liability) should be allocated to those who voluntarily assume it and who are in the best position to evaluate it. That includes assessing the safety risks involved in the activity. (*Nelson, supra*, 165 Cal.App.3d at p. 715.) The owner hires a professional to assess the risks (see § III., *post*) and make appropriate judgments.

Part of working as a professional horse farrier is assessing and evaluating when and where it is safe and appropriate to trim a horse’s hooves. That’s not the owner’s responsibility; it’s an inherent part of the farrier’s job—certainly at least as to the obvious nature of the surrounding

environment where the horse is to be worked on (i.e., the land, corral, or barn). Determining whether the terrain and surroundings are safe enough to trim horse hooves is the farrier's responsibility, not the responsibility of a lay horse owner.

Dealing with uneven, rocky terrain is a potential inherent risk in any outdoor activity. (See *Nigro, supra*, 939 N.Y.S.2d 565 [93 A.D.3d at p. 648] [court upholding application of assumption of risk based on evidence that highly experienced professional exercise rider appreciated the risks posed by loose gravel on asphalt road intersecting the horse path and was aware of gravel condition before she began to cross path]; *O'Donoghue, supra*, 30 Cal.App.4th at p. 193 [an inherent risk of skiing is variation in terrain].) This is especially true where other inherent risks, such as being bumped by a horse, are what make the ground dangerous.

Assessing hoof-trimming safety-risks was the farrier's job. The owner owed the horse farrier no duty of care.

5. The risk that came to pass and caused the accident was that which the farrier was hired to confront—an unpredictable horse.

The opening brief's focus on the defendant as a landowner is misplaced for another reason as well. The record clearly shows that the *horse* caused the farrier to fall, not the rocks. (RT 12; AOB 9 ¶23; 2 CT 242 ¶12 [undisputed that the farrier "was injured when *he was struck by the*

thoroughbred he was there to work on and fell backwards,” italics added].) Specifically, the horse’s chest (and possibly, the horse’s face) most likely hit the farrier, causing him to fall backwards and hit his head on one of the many rocks that covered the corral area. (1 CT 73 ¶22, 80 ¶22; 2 CT 242 ¶12, 259 ¶10; RT 10-11.)

The only eyewitness to the accident was the farrier’s assistant, who reported that the horse “lifted his front legs up, perhaps one and a half or two feet high,” and then he moved toward the farrier, and “there was just the blow of the horse against [the farrier], and then he fell to the ground.” (1 CT 165, 179.) The assistant did not see the farrier’s head hit the ground, but he later testified that the horse may have stepped on the farrier’s head after knocking him down, and there was a pointed rock underneath his head when he moved it. (1 CT 166-167.)

Getting unexpectedly knocked down by a horse is undoubtedly inherent in any horse handling activity. (See § I.A.3., *ante*.) A landowner owes no duty to provide a safe place for a land-entrant to fall where the fall is caused by an inherent assumed risk. (2 CT 287; see *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 115-118 [where skateboarder was injured falling on a metal pipe located in a planter on defendant’s driveway, court held that falling is an inherent risk of skateboarding and presence of the pipe in the planter had nothing to do with plaintiff falling down, it only made the injury *more severe*; thus, primary assumption of the risk barred claim].)

The risk at issue here—getting knocked down by a horse—is inherent in the farrier profession. The primary assumption of risk doctrine bars plaintiff’s suit.

B. The Owner Did Not Increase The Risk Of Injury To The Farrier.

Plaintiff argues that primary assumption of risk does not apply because Mr. Leech “significantly increased the risk to Patrick Barrett” by: (1) “creating and maintaining a dangerous surface”; and (2) “failing to secure or restrain the horse, or to even assist in that activity.” (AOB 15.) Nonsense.³

1. The owner owed no duty to clear open and obvious rocks from his corral.

The owner may have had a duty not to *increase* the risk of harm beyond the inherent risks in the farrier’s job (see *Amezcuca, supra*, 200 Cal.App.4th at pp. 231-232), but he had no duty to *decrease* the risk of harm (*Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 52). A landowner owes no duty to remedy or warn of an obvious

³ Nor did the owner here fail to warn the farrier that a particular animal was known to be inordinately dangerous. It is undisputed that the owner “had no knowledge and received no prior complaints that the horse involved in the Incident had ever been difficult to control or had a high strung, volatile temperament.” (AOB 9 ¶21; 1 CT 30 ¶7; 2 CT 243 ¶16, 287.)

danger on his or her property. (*Danieley v. Goldmine Ski Associates* (1990) 218 Cal.App.3d 111, 121-122.) That's especially true where the only danger is related to a particular activity that is otherwise controlled by a hired professional (i.e., horse handling). Thus, a homeowner should not have to warn a roofer that an obviously rickety roof might be dangerous.

“Generally, if a danger is so obvious that a person could reasonably be expected to see it, *the condition itself serves as a warning*, and the landowner is under no further duty to remedy or warn of the condition.” (*Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393, italics added; see also *Allen v. Jim Ruby Construction Co.* (1956) 138 Cal.App.2d 428, 434 [“possessor of land has no duty toward persons who come upon the land to change the method of his operations which are carried on so openly as to be obvious to all observers,” including “the conditions of the surface” where work is being performed].) “Knowledge of the hazard may be inferred from the circumstances.” (*Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 32.)

The opening brief states, unequivocally and repeatedly, that the “entire corral area was blanketed with rocks” and a number of these rocks “were six inches or larger in diameter.” (AOB 2, 6.) The assistant who accompanied the farrier on the day of the accident testified that he noticed the ground’s surface “was very uneven” and that it had “[I]ots of rocks.” (1 CT 160.) Plaintiff cannot complain that the rocks were left in the corral negligently because they were obvious. The assistant reported the rocks were *so* obvious on the day of the accident that he “had to be careful where

[he] walked.” (1 CT 177.) The owner had no duty to warn about any dangers that obvious rocks might pose to a horse farrier. Nor did he have a duty to minimize the risk to the farrier of working his craft in this particular location. Had the farrier thought the location unsafe for his occupation, he should have declined to work there.

The opening brief attempts to analogize the rocky terrain on Mr. Leech’s property to “large exposed sharp rocks” on a ski slope. (AOB 17.) The analogy works, but disproves plaintiff’s argument. A ski resort has *no* duty to remove open and obvious obstructions that are on, or next to, a ski run because they are deemed *obvious* dangers that, themselves, serve as warnings. (*Danieley, supra*, 218 Cal.App.3d at p. 124; *O’Donoghue, supra*, 30 Cal.App.4th at p. 192; *Knight, supra*, 3 Cal.4th at pp. 315-316.) Such obvious dangers include trees or rocks. (*Danieley*, at p. 124.)

“Skiing is an outdoor sport over mountainous terrain. Skiers can expect to encounter moguls on a ski run [citation], trees bordering a ski run [citation], snow-covered stumps [citation], and numerous other conditions or obstacles such as variations in terrain, changes in surface or subsurface snow conditions, bare spots, other skiers, snow-making equipment, and myriad other hazards which must be considered inherent in the sport of skiing.” (*O’Donoghue, supra*, 30 Cal.App.4th at p. 193; see also *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 267 [“we are not aware of any relevant legal authority, and we have not been directed to any, requiring a ski area operator to pad its plainly visible snowmaking equipment”].) The same holds true regarding the uneven terrain in the

corral: It is undisputed that the rocks were out in the open and obvious. (AOB 2, 6; 1 CT 160, 177.) It was up to the farrier to evaluate whether they posed any undue danger to his occupation. Thus, plaintiff's ski-slope analogy supports affirmance, not reversal.

The opening brief also contends that the owner "placed *rocks* in the corral areas of his property" thereby "*creating*" a dangerous surface. (AOB 6 ¶3, citing 2 CT 244 ¶4; 1 CT 186:6-10; AOB 15 ¶1, italics added.) But that misstates the evidence. (See 2 CT 255 ¶4.) The owner testified that he added "boulders" to the corral areas for his llamas to climb on. (1 CT 186:6-22.) So what? The boulders and other rocks did not make the corral inherently dangerous. The only supposed danger was caused by the farrier's exercise of his occupation there. Any such danger was open and obvious to the farrier. An owner does not increase a risk where someone working in a dangerous occupation knows about it and decides to proceed anyways.

2. The owner owed no duty to secure or restrain the horses for the farrier.

The opening brief also asserts that the owner had an affirmative duty to secure or restrain his horses for the farrier or to assist him in that activity. (AOB 15 ¶2.) Wrong. Securing the horses was an essential part of the job for which the farrier was hired. An animal handler like a horse farrier is in the best position to take the necessary safety precautions and protective

measures. (See § I.A.2.-3., *ante*.) That includes securing the animal.

The owner had no duty to secure the horses in the first place once he gave up care and control to the specialist (*Priebe, supra*, 39 Cal.4th at p. 1130 [owner owed kennel worker to duty to restrain dog]); thus, he could not have *increased* a risk by not doing the same (2 CT 287).

There may not have been any express agreement to secure the horses (as the opening brief points out). But the farrier secured the horses the first time the owner had hired him. (2 CT 240-241 ¶¶7-10.) And the farrier brought his own assistant and halter to help with the task. (AOB 8 ¶18; 1 CT 164; 2 CT 241-242 ¶11.) Clearly, securing the horse was his expectation too. In any event, the farrier, assumed the risks inherent in horse-handling when he undertook to secure the horse. Whether that was his obligation or not is irrelevant; it was a risk he voluntarily assumed.⁴ The owner cannot be at fault for a risk the farrier assumed.

⁴ Nor is the price that the farrier charged relevant in determining what risk he assumed. Plaintiff cites no authority in arguing otherwise. (See AOB 15.) Certainly, no court has asked how much a fireman, veterinarian, or kennel worker earns for a particular service before recognizing primary assumption of risk. Nor should that question be asked. In the sports setting, for example, parties often are paid nothing, yet primary assumption of risk applies. In the occupational setting, the risks—to policemen, security guards, firemen, veterinarians, kennel workers, farriers, and other animal handlers—are inherent in the occupation, not just one particular job.

C. The Farrier's Invitee Status Did Not Create A Legal Duty Where One Otherwise Did Not Exist.

The opening brief next contends that the farrier and the owner had a “special relationship” due to the farrier’s status as an “invitee” on the premises. (AOB 12, 16.) Wrong again. The old common law classifications for determining the duty of a landowner based on the injured person’s status as an invitee, licensee, or trespasser were abolished in California long ago. (*Lundy v. California Realty* (1985) 170 Cal.App.3d 813, 818, citing *Rowland v. Christian* (1968) 69 Cal.2d 108, 119-120.) Thus, the status of the injured person no longer dictates whether the landowner owed any duty, nor does the reason that person was on the premises.

The farrier was in the same position as a roofer, electrician, dog groomer, or shark handler who comes on property to pursue their occupations. If they are injured by an obvious occupational hazard, they cannot seek to hoist a duty on the landowner to prevent the very risk they assumed.

In any event, even under the old classifications, an invitee could not recover “where the danger was obvious.” (*Henderson v. McGill* (1963) 222 Cal.App.2d 256, 259; see *Pauly v. King* (1955) 44 Cal.2d 649, 653 [holding that a landowner “is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.” (Citations.)]); Rest.2d Torts, § 343A(1), p. 218.) If the

risk was “inherent in the nature of the activity itself”—such as working as a horse farrier—the risk was deemed “obvious” even under the old classifications. (Rest.2d Torts, § 343A(1), com. c, p. 219.) And even under the old common-law classifications, “[t]he inviter [wa]s not an insurer of the safety of invitees.” (*Henderson*, at p. 259.) Here, the danger posed by horses and a rocky corral was obvious, at least to a professional farrier.

The owner owed no duty to ensure the farrier’s safety from horses in an obviously rocky corral. The farrier assumed the risks of his inherently dangerous occupation and all of its associated risks.

II. THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT.

Plaintiff next claims that three triable issues of material fact exist:

(1) The farrier never placed a halter on the horse even though he had one with him; (2) the rocky terrain was atypical of horse corrals; and (3) it was physically possible to remove the rocks from the owner’s property. The opening brief, however, fails to explain how any of these facts are material.

“[N]ot every issue of fact is worth submission to a jury. On summary judgment the trial court must separate those cases in which there are *material* issues of fact meriting a trial from those in which there are no such issues.” (*Hosanna Homes v. County of Alameda* (2005) 129 Cal.App.4th 1440, 1450, italics in original.)

“‘[E]vidence which does not relate to a matter in issue is *immaterial*.’ [Citation.]” (*Juge v. County of Sacramento* (1993)

12 Cal.App.4th 59, 67, italics in original].) Materiality “‘is determined mainly by the pleadings, the rules in pleading and the substantive law relating to the particular kind of case. [Citations.]” (*Ibid.*) “[I]t is the specification of an undisputed fact as *material* which, when coupled with the pleadings, establishes the legal significance of the undisputed material fact.” (*Id.* at p. 69, italics added.)

In this case, once the owner/defendant made a prima facie showing that primary assumption of the risk applied, plaintiff needed to make a showing in her separate statement that the facts supposedly in dispute were *material* to the substantive issues framed by the pleadings in order to successfully oppose summary judgment. (Code. Civ. Proc., § 437c, subs. (b)(3), (o)(2) & (p)(2) [once defendant makes prima facie showing that judgment as a matter of law is proper, plaintiff opposing summary judgment must show triable issue of fact is *material* in order to prevail]; see also *Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 467, fn. 1 [precise mechanism of how weight-training injury occurred not material dispute relating to assumption of risk issue]; *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 891 [characterization of how equipment was used or specific action occurring at moment of injury are immaterial to application of assumption of risk].)

Plaintiff did not, and cannot, explain why these facts are material to the substantive issues here. (See 1 CT 110-119; 2 CT 242-243 ¶¶13-15, 253 ¶¶13, 15.) That’s because they aren’t:

The halter. Whether the farrier actually succeeded in placing the halter on and restraining the horse is irrelevant. He brought a halter to restrain the horse. He entered the corral to work on the horse, a horse was obviously not yet restrained. He had thereby assumed all of the dangers and risks of being in close proximity to horses.

The atypical corral. Assuming that the corral was atypical, so what? The corral's configuration and composition were obvious and apparent. It was up to the farrier to assess the risks and safety of working with horses. He did and moved forward with his task. There can be no greater example of assuming a risk.

Ability to remove rocks. Again one can assume this fact and it has no impact on the duty analysis. The rocks were obvious. That the horses were in a corral with rocks was obvious. Yet, the farrier decided to assume the risks with the horses under *these* conditions. Whether there might have been other conditions that could have been safer does not lessen that the farrier determined to assume the risk of *these* conditions. It's no different than when a skier skis down a slope with moguls. She's assumed the risk posed by moguls, even if they could have been easily removed, because she knows the condition she is confronting and decides to confront it.

The bottom line: There is no *material* fact issue.

III. PRIVETTE V. SUPERIOR COURT AND ITS PROGENY BAR THE FARRIER'S CLAIM; THE OWNER HIRED THE FARRIER AS AN INDEPENDENT CONTRACTOR.

The farrier here was an independent contractor. He had complete control of how he performed his task. His occupation was independent. He brought his own tools and assistant.

In a series of cases beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689, the Supreme Court has shielded from liability persons who hire independent contractors for work-safety-related injuries, even for inherently dangerous work, where the contractor has control. Generally, hirers cannot be liable in a negligence action brought by a contractor or contractor's employee for personal injuries arising from the manner in which the contract work was performed. (See generally *id.* at pp. 698-702; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 270; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202.) The premise of this line of cases is that in hiring an independent contractor to perform a dangerous task, the owner delegates responsibility for safety to the contractor. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671.)

The *Privette* doctrine applies to landowners; indeed, *Privette* itself involved a landowner. (5 Cal.4th at p. 692.) Under the doctrine, "there is no legal distinction between a general contractor and a landowner who hires independent contractors; both are 'hirers' within the meaning of the doctrine." (*Michael v. Denbeste Transp., Inc.* (2006) 137 Cal.App.4th

1082, 1097; see also *Bell v. Greg Agee Construction, Inc.* (2004) 125 Cal.App.4th 453, 468 [Supreme Court held that *Privette* doctrine extends “equally to ‘a general contractor, a landowner, or any other hirer of an independent contractor. . . ,” quoting *Toland, supra*, 18 Cal.4th at pp. 269-270].)

All hirers, including landowners, have “the right to delegate to independent contractors the responsibility of ensuring the safety of their own workers.” (*Toland, supra*, 18 Cal.4th at p. 269.)

The *Privette* doctrine limits hirer liability even in cases where contractors’ and their employees seek to hold hirers *directly* liable for work-related injuries. (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1238, 1244-1245 [applying doctrine in context of negligent retention action]; *Hooker, supra*, 27 Cal.4th at p. 202 [applying doctrine to retained control theory of liability]; *Kinsman, supra*, 37 Cal.4th at p. 664 [applying doctrine in premises liability action]; *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225 [hirer not liable for injuries to contractors’ employees caused by defective equipment unless hirer supplied equipment or supervised its use]; *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595, 614 [*Privette* doctrine limits scope of hirer’s liability on alleged non-delegable duty theory of liability]; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673-674 [same].)

Privette’s rationale is that because the independent contractor has full safety responsibility, he should have the sole liability, and an

independent contractor's employee's remedy should be limited to workers' compensation. (*Kinsman, supra*, 37 Cal.4th at pp. 673-674.) Nonetheless, the doctrine applies even when workers' compensation benefits are unavailable. (See *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 444-445 [hirer shielded from liability notwithstanding contractor's failure to procure workers' compensation insurance].)

The core concept under *Privette*, thus, is to align safety responsibilities with liability. We are aware of no published case that has applied *Privette* to an injured independent contractor as opposed to the contractor's employee. But the rationale behind the doctrine suggests no reason for a different result. The independent contractor—the farrier here— is in the best position to evaluate and take necessary safety precautions. The independent contractor can protect himself with health or life insurance or elect to be covered by workers' compensation insurance. (See Lab. Code, §§ 4150 et seq.) It would be inconsistent to bar an independent contractor's *employee* from suing a hirer under *Privette*, but to allow the independent contractor himself to sue.

Here, the owner retained no control over the farrier's job or the manner in which the farrier performed it. The farrier brought his own halter and was left to secure the horses as he saw fit. (AOB 8 ¶¶17-18; 1 CT 30 ¶4, 164, 191; 2 CT 241-242 ¶¶8-9, 11.) He had been to the property before. (AOB 8 ¶13; 2 CT 240 ¶7.) It was up to him to determine how to trim the horses' hooves. The record clearly shows that the farrier was an independent contractor hired to perform a task that he controlled.

Even though the trial court did not reach the *Privette* issue, as a purely legal matter, it too required judgment as a matter of law in the defendant's favor.

CONCLUSION

Working as a horse farrier is an inherently dangerous occupation; no different than working as a veterinarian, dog groomer, or other animal handler. Those who work with horses assume the risks that a horse may kick them, push them, or knock them over, as occurred in this case. And, it is up to the farrier to ensure that the environment (whether in an outdoor corral, stable, etc.) is safe enough to perform his work on a horse. There's no dispute that the horse caused the fall in this case. And there's no dispute that the farrier was an independent contractor in full control of safety in performing his task.

The trial court properly granted summary judgment in the owner's/defendant's favor. That judgment should be affirmed.

Respectfully submitted,

April 8, 2014

BOLES & DiMASCIO

John D. Culver, Jr.

GREINES, MARTIN, STEIN &
RICHLAND LLP

Robert A. Olson
Gary J. Wax

By



Gary J. Wax

Attorneys for Respondent JAMES E. LEECH

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this RESPONDENT'S BRIEF contains **8,328** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: April 8, 2014



Gary J. Wax

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **April 8, 2014**, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the parties in this action by serving:

Steven Berkowitz
Law Offices of Steven Berkowitz
360 N. Bedford Dr., Suite 204
Beverly Hills, CA 90210
Attorney for Appellant,
Nancy L. Barrett

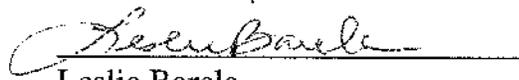
Honorable Joan Lewis
San Diego Superior Court
Hall of Justice, Fourth Floor
330 West Broadway
San Diego, CA 92101

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
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Executed on **April 8, 2014**, at Los Angeles, California.

(X) (State): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Leslie Barela