

CERTIFIED FOR PUBLICATION

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

ELLYN LEVINSON et al.,

Plaintiffs and Appellants,

v.

BERT OWENS et al.,

Defendants and Respondents.

C057565
(Super.Ct.No. CI56965)

ORDER MODIFYING
OPINION AND DENYING
REHEARING; NO CHANGE
IN JUDGMENT

THE COURT:

It is ordered that the opinion filed in this case on August 26, 2009, be modified as follows:

On page 27, line 17, after the sentence in the paragraph under subheading "F," add the following:

Contrary to plaintiffs' claim, we are not required to credit the opinion of their expert as creating a triable issue of material fact as to whether defendants recklessly increased the risk of harm inherent in horseback riding. In plaintiffs' words, their expert

"opined that when [defendants] put an inexperienced rider . . . on Pistol they recklessly increased riding's inherent risks." However, their expert's opinion is based on the false premise that defendants had a duty to inquire about Levinson's horseback riding experience and to warn and instruct her accordingly. As we have explained, defendants had no such duty. That plaintiffs' expert feels otherwise does not create a triable issue of material fact. (See *Knight, supra*, 3 Cal.4th at p. 313 ["the question of the existence and scope of a defendant's duty of care is a *legal* question . . . and is an issue to be decided by the court, rather than the jury"]; *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 884 ["`experts may not give opinions on matters which are essentially within the province of the court to decide'"].)

This modification does not change the judgment.

The petition for rehearing is denied.

FOR THE COURT:

SCOTLAND, P. J.

NICHOLSON, J.

CANTIL-SAKAUYE, J.