Filed 12/12/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DANIEL KEE-YOUNG KIM, JR., Plaintiff and Appellant, v. COUNTY OF MONTEREY et al., Defendants and Respondents.	H045577 (Monterey County Super. Ct. No. 16CV001236)

Appellant Daniel Kee-Young Kim, Jr., challenges an order granting summary judgment to the County of Monterey (the County) and to the Sports Car Racing Association of the Monterey Peninsula (SCRAMP) (collectively, respondents) on his claims of dangerous condition of public property and gross negligence. Kim's claims stem from injuries he incurred in 2015 during an amateur event at the Laguna Seca Raceway when the motorcycle he was riding collided with sandbags placed near the track. Because we conclude that Kim raised triable issues of fact material to these causes of action, we reverse the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The Raceway*

The Laguna Seca Raceway (the Raceway) is a motor racing circuit[2] located in Salinas and owned by the County. The County and SCRAMP are parties to a concession agreement under which they co-manage the Raceway. Pursuant to the concession agreement, SCRAMP manages the Raceway's day-to-day operations, and the County is responsible for drainage issues.

A variety of bodies govern professional motor racing, including the Fédération Internationale de Motocyclisme (FIM) and the Fédération Internationale de l'Automobile (FIA). These bodies issue racing standards, such as the FIM Standards for Road Racing Circuits (FIM Standards) and the FIA International Sporting Code (FIA Standards). In 2014, the Raceway obtained a license from FIM, which permitted the Raceway to hold FIM-sanctioned, professional motorcycle racing events. Professional races are not held at the Raceway during the winter, or "rainy season," which lasts from October through May.

The Raceway features a 2.238-mile, 11-turn race course, which includes the asphalt-paved track, verges, and run-off areas. Verges and run-off areas are among the

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[1] We draw the facts recited here from the parties' separate statements of undisputed material facts, evidence admitted in conjunction with the motion for summary judgment, and admissions in the parties' appellate briefs. (See *Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1186, fn. 4.)

[2] When describing the physical layout of the Raceway, we use definitions taken from industry standards, which define a "[c]ircuit" as "a closed course, permanent or non-permanent, beginning and ending at the same point, built or adapted specifically for automobile racing"; a "[c]ourse" as "a road or track, and the inherent installations, used for automobile competitions"; and a "[t]rack" as "a road specially built or adapted to be used for Circuit competitions" that "is defined by the outer edges of the racing surface." (FIA Standards at appen. O, art. 2.) "Verges" are the outer parts of the transversal profile of the track"; and the "[r]un-off area is the ground between the verge and first line of protective devices." (FIM Standards at § 4.8.1.) We do not imply any specific legal conclusions from the use of these definitions.

protective measures contemplated by the FIA and FIM to increase safety because these areas permit a driver or rider to regain control or decelerate after making a mistake, suffering a mechanical failure, or coming into contact with another driver or rider.

The FIM Standards state that "[v]erges should be completely flat without any kind of obstruction," and "[t]he transition from the verge to the run-off area should be very smooth." (FIM Standards at § 4.8.2.) The FIM Standards also provide that "[a]ll the required drainage channels at the sides of the Race Track and between the verge and the first line of protection should be installed in such a way that the covers do not represent any step or bump for the motorbikes and riders that have lost the racing line: i.e. they must be covered by a smooth metal wire mesh or an absorbent well must be used, in order to maintain, without any interruption, the normal surface of the verge and/or of the run-off area." (FIM Standards at § 4.4.)

At the Raceway, drains and ditches appear at various points around the track, either immediately adjacent to the track or within a three- to four-foot vicinity. A third-party engineering firm, Whitson Engineering, was responsible for the design and placement of the Raceway's drains and ditches. Since approximately 1981, sandbags have been placed at locations around and adjacent to the track during the rainy season. For professional racing events at the Raceway, the sandbags are removed and the drains and ditches are covered.

Organizations rent the Raceway for amateur events. A track renter has an opportunity to inspect the track before an event to assess its safety. SCRAMP will remove the sandbags if requested by a party renting the Raceway. Approximately two organizations that have rented the track have requested that sandbags be removed at certain areas of the Raceway before their events.

The Raceway has undergone significant changes over the past two decades to meet evolving safety requirements by the FIM and other sanctioning bodies. At the time of Kim's accident (discussed further below), SCRAMP's track rental supervisor was

unfamiliar with FIM Standards and other equivalent standards for track safety. Neither SCRAMP's chief executive officer nor members of SCRAMP's board of directors possessed any experience or training on track safety. No one on SCRAMP's board of directors suggested ceasing track rentals during the winter months.

SCRAMP's vice president for facilities operations, Bohdan Beresiwsky, was the person responsible for safety at the Raceway. Beresiwsky's training about track design and safety involved " 'one or two seminars' on 'asphalt design.' " No one on Beresiwsky's staff possessed training in motorcycle safety, racetrack design, or drainage.

Without consulting track safety or design experts, Beresiwsky directed the placement of sandbags—provided by the County—around the Raceway for erosion control purposes. While Beresiwsky knew that the placement of sandbags in the safety zone violated FIM Standards, he believed that FIM Standards did not apply to amateur racing events. In the past, SCRAMP installed sandbags during the winter and then removed them during the summer for the professional racing season. SCRAMP could have installed a more permanent solution to drainage, such as a slotted or French drain used at other racetracks.

Pursuant to the concession agreement, both the County and SCRAMP have a "joint duty to operate and maintain . . . in good condition and repair," "to a standard equal to that performed by the [County's] Parks Department," designated joint areas of the Raceway with the "proceeds of the track rental fund." This joint duty to "maintain . . . in good condition and repair" includes necessary grading of the "[t]rack run-off and shoulders . . . to facilitate year-round track rental usage." The County maintains responsibility for drainage at the Raceway but defers to SCRAMP on track safety issues. No one working for the County at the time of Kim's accident possessed any expertise in track safety.

In 2006, Mazda Motor of America, Inc. (Mazda), and SCRAMP entered into a five-year, $7.5 million agreement (the 2006 Agreement) for title sponsorship of the

Raceway. The agreement was renewed in 2012 (the 2012 Agreement). The 2012 Agreement obligated SCRAMP to spend "no less than" 70 percent, or $5.25 million, of the sponsorship money for "capital improvements to the Laguna Seca racing facility," to "address safety issues," and for "participant and facility improvements."

B. *Kim's Accident*

On March 14, 2015,[3] Kim attended a "track day" event at the Raceway hosted by an organization called Keigwins@TheTrack (Keigwins) that had rented the Raceway for March 14 and 15. Kim had previously participated in other track days at the Raceway. At a track day, clubs, enthusiast groups, and individuals rent the Raceway to drive their automobiles or motorcycles around the circuit. A track day is not a professional-level race, but riders at these events may travel at speeds of up to 140 miles per hour. Kim signed a waiver and release prior to participating in the March 14 track day event.

Keigwins did not ask SCRAMP to remove any of the sandbags from the Raceway for the March track day event and generally deferred to SCRAMP regarding safety issues. Keigwins's employees did not inspect the Raceway before the event.

Keigwins instructed track day participants to " 'ride into the run off' " and to " 'stay off the brakes' " if they " 'get into the dirt.' " It was foreseeable that track day participants would lose control of their motorcycles and enter the safety zone. However, none of the participants were warned about the rows of unmarked, burlap-colored sandbags (which were dirty and generally the same color as the ground) placed around the race course, including in the safety zones.

During the March 14 track day event, Kim rode his motorcycle for 10 to 15 laps before he " 'ran wide' " at turn 5. At that turn, Kim rode into the safety zone and collided with one or more sandbags placed near the track. Kim was ejected from his motorcycle and suffered serious injuries.

[3] All dates are in 2015 unless otherwise stated.

C. *Kim's Complaint*

Based on the injuries he sustained at the March 14 track day event, Kim presented a claim for damages to the County. Following the County's rejection of Kim's claim, he filed suit against the County, SCRAMP, the Raceway's then-title sponsor Mazda, and the track day event sponsor, Keigwins (collectively, defendants).[4] As relevant to this appeal, Kim's complaint[5] alleged in the first cause of action a claim against the County for dangerous condition of public property (Gov. Code, § 835)[6] and in the second cause of action a claim against SCRAMP for gross negligence.[7]

Kim's complaint alleged "the sandbags on the track run-off created a dangerous condition on public property. These unmarked sandbags—placed in an intended safety zone—substantially increased the risk of injury beyond those inherent to motorcycle racing. This dangerous condition created a reasonably foreseeable risk that riders, such as [Kim], would enter the run-off, crash into the sandbags, and suffer significant injuries. In creating this dangerous condition, or being aware of it and failing to warn or repair or protect or safeguard [Kim] despite ample time to do so, [d]efendants were grossly negligent." Kim also alleged that on March 14 the "weather at the Raceway was warm,

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[4] Neither Keigwins nor Mazda is a party to this appeal.

[5] The operative complaint is Kim's first amended complaint (complaint).

[6] Unspecified statutory references are to the Government Code.

[7] Although Kim's complaint asserted that the second cause of action for gross negligence was against "[a]ll [d]efendants," we construe Kim's gross negligence claim against the County as pleading an exception to the County's anticipated assertion of an affirmative defense to Kim's dangerous condition claim in the first cause of action. "[A] public entity is not liable for an injury '[e]xcept as otherwise provided by statute . . .' (Gov. Code, § 815.)" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127.) The statute under which Kim alleged the County was liable (asserted in the first cause of action) was section 835, which in turn is subject to the affirmative defense that "[n]either a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity" (§ 831.7, subd. (a)); except for "liability that would otherwise exist for . . . [¶] [a]n act of gross negligence by a public entity or a public employee that is the proximate cause of the injury." (§ 831.7, subd. (c)(1)(E).) The parties do not dispute that amateur motorcycle racing is a hazardous recreational activity.

sunny, and dry, as it had been for at least a week," that respondents postponed safety upgrades to the Raceway, and that "SCRAMP diverted funds from track sponsorships to operating or debt expenses rather than funding track improvements."

Kim's complaint alleged in the first cause of action that the County had a "duty to exercise reasonable care in the ownership, operation, management, construction, and/or maintenance of the Raceway" so as to not create a dangerous condition, as well as a "duty to not increase the risks inherent to motorcycle racing on the Raceway." Kim further alleged that the placement of the sandbags caused a dangerous condition on public property and the County created this dangerous condition through its "grossly negligent conduct, wrongful act, or omission, and/or had constructive notice of the dangerous condition prior to [Kim's March 14 accident], with sufficient time to have taken measures to protect against the dangerous condition."

Additionally, Kim alleged that defendants "violated international and American safety standards governing racetrack design by obstructing the Turn 5 track run-off with sandbags." A "reasonable entity" would have removed the sandbags prior to the March 14 track day "to avoid creating substantial risk of injury and a dangerous condition on public property," and "[d]efendants' lack of any care and/or extreme departure from the existing standard of care elevates their wrongful conduct to the level of gross negligence."

In the second cause of action for gross negligence, Kim's complaint made allegations substantially similar to those in the first cause of action. Both claims asserted defendants' liability based on alternative theories of misfeasance (by creating the risk) and nonfeasance (by failing to warn of the risk). In anticipation of defendants' affirmative defenses based on the written release and on the doctrine of assumption of risk, Kim asserted that defendants were nevertheless liable "on account of their gross negligence to Plaintiff, which substantially increased the risk of injury beyond those inherent to motorcycle racing on the Raceway."

D. *Summary Judgment Proceedings*

Defendants filed a number of motions to strike and for judicial notice. The trial court granted defendants' motion to strike Kim's claim for punitive damages and took judicial notice of the FIA Standards but denied the remaining motions to strike and requests for judicial notice. Defendants moved for summary judgment, which Kim opposed.

In support of his opposition, Kim presented an expert witness declaration from Robert Barnard, a motorsport consultant with track safety expertise. Barnard's declaration opined that SCRAMP's staff "have knowingly placed obstacles in the run-off areas, and worse, in the verge, which is a key area where a rider or driver should be able to maintain control after a small mistake. Instead of finding a safe solution to drainage problems, SCRAMP has spent time and money installing and removing sandbags and opening and closing drains and ditches. Despite clear indications from FIM that such obstacles are not allowed, no one has questioned this decision or sought expert advice, showing an utter disregard for rider safety. In [Barnard's] professional opinion, SCRAMP's operation of the [Raceway] was greatly below the standard of care expected in the industry."[8]

Respondents presented no rebuttal expert witness testimony and no evidence that the presence of sandbags near the track was a risk inherent to amateur motorcycle track racing.

The trial court ultimately granted summary judgment to all defendants except for Keigwins, finding triable issues of fact regarding whether Keigwins's failure to request

[8] Respondents did not object to these statements in the Barnard declaration.

that the sandbags be removed and failure to discontinue the track day amounted to gross negligence.[9]

In the summary judgment proceedings, respondents filed a number of evidentiary objections to Barnard's declaration but did not challenge his qualification as an expert on motorsport safety and practices. The trial court's summary judgment order did not expressly rule on any specific objection. Instead, the order states that "Barnard's declaration is replete with statements lacking foundation . . . argument, rhetoric and statements outside the scope of admissible opinion," but the order also relies on facts drawn from the Barnard declaration in concluding that Keigwins's motion for summary judgment should be denied.

On appeal, Kim does not challenge the trial court's evidentiary rulings, and we therefore do not review them here.[10] Although the trial court's order does not clarify which statements from the Barnard declaration it found inadmissible, we assume that the trial court sustained respondents' objections and consider only those portions of Barnard's declaration to which respondents raised no objection in the trial court.

II. DISCUSSION

Kim appeals the trial court's grant of summary judgment to the County and SCRAMP, contending there are triable issues of material fact as to both causes of action. Specifically, Kim argues there are triable issues whether SCRAMP increased the risk of injury by using a "haphazard drainage control plan that included the placement of

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[9] Keigwins, which is not a party to this appeal, subsequently filed in this court a petition for writ of mandate, or alternatively, for prohibition, directing the trial court to vacate its order denying Keigwins's motion for summary judgment and to enter a new order granting summary judgment. Keigwins also requested a stay pending writ review. This court denied Keigwins's petition and stay request.

[10] As Kim has not in this appeal challenged the trial court's evidentiary rulings, we need not address respondents' contention that this court misinterpreted *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 in its decision in *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451 (concluding an appellate court should review de novo a trial court's evidentiary rulings on a summary judgment motion).

sandbag obstacles—indistinguishable from the surrounding dirt at riding speeds—in a line perpendicular across the safety zone of the Raceway." Kim argues SCRAMP's conduct was grossly negligent in placing the sandbags, in not highlighting their presence with safety cones or other physical alterations to the track, and in failing to warn track renters and riders about their presence near the track. Kim asserts there are also triable issues as to the County's gross negligence in that it was primarily responsible for "drainage issues at the Raceway during the winter season," and it made no effort to determine whether the drainage plan implemented by SCRAMP (which included the placements of the sandbags) complied with standards for track safety.

Respondents counter that erosion during the rainy season undisputedly poses a serious safety hazard to persons using the Raceway and that Kim "introduced no evidence to show that respondents' drainage system fails to reduce the risk of harm from erosion" and "submitted no proof that the drainage system's design is unreasonable, let alone so unreasonable as to amount to a want of even scant care." Respondents argue that alternatives to the sandbags such as French or slotted drains are not "practically or financially feasible" and that Kim failed to show that marking sandbags with safety cones "would increase safety to any substantial degree." SCRAMP and the County also assert that Kim cannot show gross negligence as a matter of law because Kim failed to "first show there [was] an established industry standard applicable to the defendant's conduct."

A. *Summary Judgment Standards*

"[G]enerally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A defendant moving for summary judgment has the burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of

action." (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 49, quoting *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945.)

On appeal from an order granting summary judgment, " ' "we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' " (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.)

"In performing an independent review of the granting of summary judgment, we conduct the same procedure employed by the trial court. We examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to 'decide whether the opposing party has demonstrated the existence of a triable, material fact issue.' " (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 630.) We review the trial court's ruling and not its rationale. (*Ibid*.)

B. *Legal Elements of Kim's Claims*

Kim's first cause of action alleges a dangerous condition of public property. (§ 835.) His second cause of action alleges gross negligence.

To establish public entity liability for an injury caused by a dangerous condition of its property, section 835 " 'requires a plaintiff to prove, among other things, that either of two conditions is true: "(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition or [¶] (b) The public entity had actual or constructive notice of the dangerous condition

under Section 835.2[11] a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." ' " (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130 (*Metcalf*).) We determine section 835 liability using ordinary negligence principles. (*Id*. at p. 1139.)

If a defendant affirmatively demonstrates as a matter of law that a plaintiff cannot establish breach amounting to ordinary negligence, then it follows that a claim for gross negligence likewise fails. (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 32 (*Hass*).) Therefore, we first examine both of Kim's causes of action under the principles of ordinary negligence and then discuss principles related to gross negligence.

"The elements of a cause of action for negligence are (1) the existence of a legal duty to use due care; (2) a breach of that duty; and (3) the breach as a proximate cause of the plaintiff's injury." (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1210–1211.) As none of the parties on appeal meaningfully addresses the elements of causation and injury, we confine our analysis to the issues of duty and breach.

1. Duty and Assumption of Risk

"Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others. (Civ. Code, § 1714, subd. (a); [citation].) The existence of a duty is not an immutable fact of nature, but rather an expression of policy considerations providing legal protection. [Citation.] Thus, the existence and scope of a defendant's duty is a question for the court's resolution. [Citation.] When a sports participant is injured, the

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11 Section 835.2 provides in relevant part: "(a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. [¶] (b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

considerations of policy and duty necessarily become intertwined with the question of whether the injured person can be said to have assumed the risk." (*Shin v. Ahn* (2007) 42 Cal.4th 482, 488–489 (*Shin*).)

Kim's complaint concedes some departure from the ordinary duty of care is warranted because he was engaged in an activity involving inherent risk and thus assumed those inherent risks under the primary assumption of risk doctrine.[12] "Under the primary assumption of risk doctrine, the defendant owes no duty to protect a plaintiff from particular harms arising from ordinary, or simple negligence." (*Shin, supra,* 42 Cal.4th at p. 489, italics omitted.)

In the sporting context, the primary assumption of risk doctrine "precludes liability for injuries arising from those risks deemed inherent in a sport; as a matter of law, others have no legal duty to eliminate those risks or otherwise protect a sports participant from them." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161.) An express agreement releasing future liability for negligence, such as the one Kim signed, can also " 'be viewed as analogous to primary assumption of risk.' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 779, fn. 57 (*City of Santa Barbara*).)

"[A] purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482.) Determining the scope of respondents' duty to Kim requires considering whether his injuries resulted from a risk inherent to amateur

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[12] The primary assumption of risk defense is available to the County through section 831.7. (See fn. 7, *ante*.) While assumption of risk is technically an affirmative defense, we discuss it here because, if it applies, " ' " 'the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.' " ' " (*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 357.)

motorcycle track racing and, if the risks are inherent, whether he alleges respondents did anything to increase them.[13]

"In the sports setting . . . conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315 (*Knight*).)[14] Nevertheless, defendants "do have a duty to use due care not to increase the risks to a participant *over and above those inherent in the sport*. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm." (*Id*. at p. 316, italics added.)

"[T]he nature of a sport is highly relevant in defining the duty of care owed by the particular defendant." (*Knight*, *supra*, 3 Cal.4th at p. 315.) "For example, one must ride a horse in dressage, barrel racing and the Kentucky Derby, and falling off of a horse is an inherent risk of horseback riding. But if a person put a barrel in the middle of the Churchill Downs racetrack, causing a collision and fall, we would not say that person owed no duty to the injured riders, because falling is an inherent risk of horseback riding." (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 365.) "While the operator or organizer of a recreational activity has no duty to decrease risks inherent to the sport, it does have a duty to reasonably minimize extrinsic risks so as not to

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[13] We recognize that a "track day" is not technically a racing event. However, given that it is uncontested that the riders would ride at speeds of up to 140 miles per hour at these events, we refer to the sport generally as amateur motorcycle track racing. In using this phrase, we do not draw any legal conclusions about whether professional standards, such as those promulgated by the FIM or FIA, govern the activity.

[14] Although only three justices signed on to the lead opinion in *Knight*, the California Supreme Court has subsequently described its basic principles as the "controlling law." (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1067.)

unreasonably expose participants to an increased risk of harm." (*Hass, supra,* 26 Cal.App.5th at p. 38.)

In their briefing respondents focus on the "risk of harm from erosion," but that is not the proper formulation of the duty of care here. Instead, the relevant duty of care is a duty not to increase the risks to a participant over and above those inherent in the sport. Kim's complaint alleged that the presence of unmarked sandbags near the track "substantially increased the risk of injury[ ] beyond those inherent to motorcycle racing," and both the County and SCRAMP were responsible for the presence of the sandbags. The County and SCRAMP did not introduce any evidence that the presence of sandbags is an inherent risk of amateur motorcycle track racing, and common sense does not suggest any inherent relationship between the sport and sandbags.

We conclude that Kim's complaint adequately alleged that the presence of sandbags on or near a track is not an inherent risk of amateur motorcycle track racing, and that respondents did not carry their burden as the moving party on summary judgment of producing evidence that it was. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849; cf. *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 362 (*Willhide-Michiulis*) [concluding summary judgment was properly granted where a snowboarder suffered injuries after colliding with a snowcat where the undisputed evidence demonstrated "the use of snowcats and their tillers on ski runs during business hours is inherent to the sport of snowboarding"].)

Therefore, the County and SCRAMP failed to show that they were entitled to a grant of summary judgment on the ground that they did not owe a duty of due care to Kim in the use of sandbags at the Raceway. We turn next to whether there is a material issue of disputed fact as to whether the County or SCRAMP breached that duty of due care.

2. Breach

There is a "crucial distinction" between a court's role in determining that no duty was owed from a "broad level of factual generality" (i.e., "the category of negligent conduct at issue") (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772) and the jury's role in answering the "fact-specific question of whether or not the defendant acted reasonably under the circumstances." (*Id*. at p. 774.) Resolving whether respondents breached their duty to Kim "requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112.) A defendant moving for summary judgment in the assumed risk context must show, as a matter of law, that it did not unreasonably increase risks to the plaintiff over and above those inherent in the activity. (*Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1060.)

" 'Gross negligence' long has been defined in California . . . as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.' " (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 754.) " 'Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always.' " (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640.) Having reviewed the evidence in the record, we conclude that there are a number of triable issues of material fact as to whether respondents breached their duty of care to Kim in a manner amounting to gross negligence.

Through the Barnard declaration, Kim introduced evidence (in the words of the trial court) that "failure to keep both areas [Barnard] labels a 'verge' and a 'runoff,' respectively, free of obstructions violates the basic safety standards of the industry." Respondents do not appear to contest that sandbags qualify as an "obstruction."

Nevertheless, respondents contend that the sandbags are not hidden, are generally visible, and have been used for more than three decades to control erosion and water

during the rainy season. Respondents argue that these efforts helped to increase track safety by keeping water, mud, and other debris off the asphalt surfaces and by preventing the rain from carving erosion channels in the soil. Kim, in turn, relying on Barnard's declaration, argues that respondents should have engaged in alternative methods of drainage control (such as installing a permanent slotted drain), removed the sandbags before the track day event, used cones or distinctive markings to make the sandbags more visible, or warned track day riders about the sandbags.

Respondents' arguments here that they did not breach the duty of care amounting to gross negligence depend on contested facts, including the number, location, visibility, and cost of removal of the sandbags. Under these circumstances, respondents are not entitled to summary judgment on the question of breach.

Respondents also argue that summary judgment was properly granted because Kim failed to show that slotted or French drains were "practically or financially feasible as a means of avoiding hazardous erosion at the Raceway." However, the record reflects no evidence, much less undisputed evidence, that respondents were entitled to summary adjudication on this issue. Respondents concede as much in their briefing by relying on "[c]ommon sense" for the proposition that "neither of Barnard's proposed alternatives is practical at the Raceway or financially feasible," rather than on any facts in the record before the trial court.

The defendant raised similar arguments in *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707 (*Ducey*), a case involving the state's liability "for an injury assertedly caused by the state's failure to place median barriers on a highway." (*Metcalf, supra*, 42 Cal.4th at p. 1139 [discussing *Ducey*].) Like respondents here, the state in *Ducey* contended "that as a matter of financial reality it [could] not afford to construct median barriers on all freeways on which such barriers are needed" (*Ducey*, at p. 720) and introduced evidence that that the State Highway Commission had appropriated funds for median barriers, but subsequently withdrew the appropriation because it planned to widen and otherwise

change the configuration of the highway. (*Id.* at pp. 713–714.) Given this economic evidence, the state argued "as a matter of policy, [it should be relieved] of liability resulting from its failure to install such barriers." (*Id.* at p. 720.)

The California Supreme Court rejected the state's contention. The court concluded that summary judgment should not have been granted because "the reasonableness of the state's action in light of the practicability and cost of the applicable safeguards [were] matter[s] for the jury's determination." (*Ducey*, *supra*, 25 Cal.3d at p. 720.) We reach the same conclusion here.

There are additional triable issues whether respondents' conduct amounted to gross negligence. It is undisputed that FIA and FIM Standards prohibit the placement of sandbags or other obstacles in those very areas for safety reasons, although the parties dispute the extent to which these standards are relevant to the track day event, an issue we address further below. Nevertheless, a reasonable fact finder could determine that the use of sandbags was a severe departure from the "first-class manner" that SCRAMP was contractually obligated to operate the Raceway.

Similarly, a reasonable fact finder could conclude that, because local climate conditions made erosion a foregone conclusion at the Raceway and in light of the $5.25 million Mazda sponsorship revenue contractually-designated for "capital improvements," it was grossly negligent for SCRAMP to "divert[ ]" this money to its operations instead of creating a permanent erosion control solution. Furthermore, a reasonable fact finder could determine that respondents were grossly negligent for relying entirely on the assessments of a SCRAMP executive with virtually no track safety training to devise a reasonably safe solution to the problem of erosion while not increasing the risks inherent to amateur motorcycle track racing.

Respondents' contention that they did not breach any duty of care because it was the track renter's obligation to request removal of the sandbags itself raises triable issues as to whether their conduct was grossly negligent. The undisputed evidence is that very

few track renters request removal of the sandbags; therefore, respondents knew to a near certainty that such a request would likely not be made. A reasonable jury could find this knowledge—to which only respondents were privy—as indicative of a higher degree of breach amounting to gross negligence.

We briefly address two additional issues raised by the parties.

First, the parties vigorously dispute whether certain professional standards apply to the track day event at issue here. Respondents contend that the FIM Standards do not apply to amateur events, while Kim argues that they were applicable to the March 14 track day event either under the terms of the FIM license or because the Raceway promoted itself as a "world-class" motor racing venue. We find it unnecessary to resolve this dispute in order to conclude that the trial court erred in granting summary judgment to respondents.

Respondents contend that, to show gross negligence, Kim "must first show there is an established industry standard applicable to the defendant's conduct." In support of this assertion, respondents cite *Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867 (*Anderson*), a case involving a plaintiff who suffered injuries after slipping on the floor in a health club shower. The *Anderson* court reviewed cases addressing gross negligence and summarized the relevant principle: "conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence." (*Id.* at p. 881.) For the reasons stated above, we have concluded a reasonable fact finder could determine the evidence here satisfies this test.

While the court in *Anderson* also noted "[e]vidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence" (*Anderson, supra,* 4 Cal.App.5th at p. 881), it did

not hold that a plaintiff is required to establish an industry standard as a matter of law to defeat a motion for summary judgment.[15]

We conclude that the applicability of the professional racing standards is not dispositive to whether summary judgment should have been granted. Even if the FIA and FIM Standards did not apply to an amateur track day event (an issue we do not resolve here), a fact finder could still consider them, as well as Barnard's expert opinion regarding industry practices, informative on the question of breach.

A fact finder could reasonably accept these standards and practices to be useful in determining the importance of keeping the track and safety zones clear of obstructions, such as sandbags, and how reasonable or unreasonable it was for respondents to keep them in place in periods where there had been no rain (as Kim alleged to be the case on March 14). A fact finder could also reasonably infer that, although a track day event was not a professional-level endeavor, if the presence of obstructions in the run-off area was unacceptable for professional (and presumably more skilled) motorcycle riders, then their presence would be unacceptable for amateur riders. Alternatively, a fact finder could be persuaded by respondents' evidence that another racing circuit also deploys sandbags in the outfield areas adjacent to the track surface for erosion control.

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[15] In concluding that the trial court properly granted the defendant's motion for summary judgment on a claim for gross negligence, the court in *Anderson* observed the plaintiff did "not allege facts demonstrating that L.A. Fitness engaged in any conduct to actively increase the risk inherent [to] its shower facility." (*Anderson*, *supra*, 4 Cal.App.5th at p. 882.) Here, by contrast, Kim alleged that respondents' placement of sandbags near the track *did* increase the risk inherent in amateur motorcycle track racing. Respondents' reliance on *Willhide-Michiulis* is similarly misplaced. In affirming the grant of summary judgment, the *Willhide-Michiulis* court found it significant that the plaintiff "presented no expert evidence regarding the safety standards applicable to snowcat drivers." (*Willhide-Michiulis*, *supra*, 25 Cal.App.5th at p. 366.) Here, Kim's expert Barnard opined that respondents' placement of obstructions in the run-off area fell "greatly below the standard of care expected in the industry." As respondents concede, the trial court deemed admissible Barnard's opinion that the verges and run-off must be kept free of obstructions and that failure to do so violates basic industry safety standards.

We do not suggest the weight the fact finder should give to this evidence; we observe merely that these questions, which involve contested issues of material fact going to whether respondents breached their duty in a manner amounting to gross negligence, are for the jury—and not the court—to resolve.

Second, the parties devote considerable attention to the issue of whether there have been any prior accidents involving sandbags at the Raceway. Respondents state that the "paucity of accidents" from the use of sandbags for the past 35 years should be dispositive on the issue of breach. Kim, in turn, requests that we take judicial notice of evidence of at least one prior accident at the Raceway involving a sandbag.

Turning to respondents' contention first, while the number of prior accidents will likely be a relevant consideration for the fact finder at trial, it does not establish as a matter of law that respondents did not breach the duty of due care they owed Kim. Under the circumstances of this case, whether the "paucity of accidents" is "attributable to luck rather than expertise" necessarily involves factual inferences that are reserved for a jury. (*Hass, supra,* 26 Cal.App.5th at p. 34, fn. 6.)

In light of this conclusion, we deny Kim's request for judicial notice and have not considered the proffered documents in reaching our disposition. "Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' " (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) We conclude that no exceptional circumstances exist in this case that would justify deviating from this principle.

In sum, because triable issues exist as to whether SCRAMP's and the County's conduct was grossly negligent and whether the County is liable for injury caused by a dangerous condition of its property, the trial court erred in its grant of summary judgment to respondents.

III. DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings. The trial court is instructed to enter an order denying respondents' motion for summary judgment. Kim is entitled to recover his costs on appeal.

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DANNER, J.

I CONCUR:

_____
GREENWOOD, P.J.

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Kim v. County of Monterey et al.

Grover, J., Dissenting

Exposing another to harm by acting unreasonably is ordinary negligence. Gross negligence arises from a failure to exercise virtually any caution or circumspection. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753 [gross negligence is a " ' " 'want of even scant care' " ' "].) Failing to prevent, remedy, or warn of a dangerous property condition typically does not rise to the level of gross negligence. (*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 365.) Respectfully, I am unable to join the majority analysis because I believe it risks collapsing these distinct *legal* concepts—ordinary negligence versus gross negligence—into a single question to be determined only by the trier of fact.

I acknowledge that the existence of gross negligence is a fact dependent question which is often not appropriate for summary judgment, and that the evidence must be viewed in the light most favorable to the nonmoving party. But the Supreme Court has emphasized "the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in appropriate circumstances." (*City of Santa Barbara v. Superior Court*, *supra*, 41 Cal.4th at p. 767.) Where to draw the line between ordinary and gross negligence as a legal matter is not well developed, and I find it a close question on the facts presented here.

It is significant in my view that the controlling facts are undisputed. A trier of fact could easily conclude that respondents acted unreasonably when they placed sandbags in a raceway area that relevant safety standards dictate should remain clear, and they did so without performing a risk benefit analysis and with the knowledge that it violated industry practices. But the undisputed reason for the sandbags was to guard against erosion, which itself could create a dangerous condition on or near the track. Even if the method employed to mitigate the erosion risk was inconsistent with accepted practices, I disagree that the evidence here shows the utter lack of circumspection that is the defining

characteristic of gross negligence. (See, e.g., *Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 359.)

The distinction is critical here for appellant and for respondents. Appellant expressly waived all ordinary negligence claims against respondents by agreement signed the day before the event; he confirmed the waiver by separate written agreement on the day of the event. As a public entity, respondent County is additionally protected by statute from ordinary negligence liability for injuries sustained during a hazardous recreational activity. (Gov. Code, § 831.7, subd. (c)(1)(E).) Blurring the distinction between gross and ordinary negligence at the summary judgment stage would undermine the policy objective the Legislature sought to promote when it immunized public entities from ordinary negligence liability arising from recreational use of public facilities: " 'to encourage public entities to open their property for public recreational use, because "the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use." ' " (*County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, 468.)

I believe the circumstances here call for maintaining a meaningful distinction between gross and ordinary negligence. I would affirm the grant of summary judgment to respondents.

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GROVER, J.

Trial Court:	Monterey County Superior Court Superior Court No. 16CV001236
Trial Judge:	Hon. Thomas W. Wills
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