1. SLATER v. RALEY'S SOUTH Y CENTER, SC20210019

Case Management Conference

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 17, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM.

2. HAMILTON, ET AL. v. THE VAIL CORP., ET AL., SC20210148

Motion for Final Approval of Class Settlement

TENTATIVE RULING # 2: CLASS MEMBERS WHO OBJECT TO THE SETTLEMENT MAY APPEAR AT 1:30 P.M., FRIDAY, JUNE 17, 2022, IN DEPARTMENT FOUR, TO HAVE THEIR OBJECTION HEARD BY THE COURT. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM. ORAL ARGUMENT ON THE COURT'S TENTATIVE RULING RE: THE MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT IS CONTINUED TO 1:30 P.M., FRIDAY, AUGUST 5, 2022, IN DEPARTMENT FOUR. THE COURT WILL ISSUE ITS TENTATIVE RULING BY 2:00 P.M. ON THE DAY PRIOR TO THE HEARING.

3. JOHNSON, ET AL. v. JOHNSON, SC20180141

Referee's Motion for Order Declaring Defendant a Vexatious Litigant, Declaring Defendant in Contempt, Request for Instructions and No Contact Order

The Referee moves for an order declaring defendant Kent Johnson a vexatious litigant, for a prefiling order against defendant, for contempt sanctions against defendant, he requests instructions regarding the related probate action, and he requests a no contact or communication order against defendant. Defendant is opposed.

A. Motion for Order Declaring Defendant a Vexatious Litigant

The vexatious litigant statutes (Code of Civil Procedure ("CCP"), §§ 391–391.8) were "designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant v Girardi* (2011) 51 Cal.4th 1164, 1169.) These statutes are constitutional and do not deprive vexatious litigants of either due process of law or access to the courts. (*Fink v Shemtov* (2010) 180 Cal.App.4th 1160, 1166; *In re Marriage of Deal* (2020) 45 Cal.App.5th 613, 618 [*Deal*].)

"When considering a motion to declare a litigant vexatious, the court must weigh the evidence to decide whether the litigant is vexatious based on the statutory criteria and whether the litigant has a reasonable probability of prevailing." (*Goodrich v. Sierra Vista Reg'l Med. Ctr.* (2016) 246 Cal.App.4th 1260, 1265.) When determining whether the party has a reasonable probability of success in the litigation, the court is permitted to weigh the evidence and does not need to assume the truthfulness of the party's pleadings. (*Moran v. Murtaugh Miller Meyer & Nelson*, *LLP* (2007) 40 Cal.4th 780, 782.) "Furthermore, '[a]ny determination that a litigant is vexatious must comport with the intent and spirit of the vexatious litigant statute.… Therefore, to find that a litigant is vexatious, the trial court must conclude that the litigant['s] actions are unreasonably impacting the objects of [the other parties' or participants'] actions and the courts as contemplated by the statute.' [Citation.]" (*Goodrich*, *supra*, 246 Cal.App.4th at p. 1265.)

CCP § 391 sets forth four circumstances that define a "vexatious litigant." (*Id.*, subd. (b)(1)–(4).) Relevant here is subdivision (b)(3), which applies to any "*person*" who "[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (*Ibid*. [emphasis added].) " 'Litigation' " means "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (*Id.*, subd. (a).)

The vexatious litigant statutes do not apply only to plaintiffs. (*Deal*, *supra*, 45 Cal.App.5th at pp. 620–622.) A "vexatious litigant" means "*a person*," not a plaintiff only. (CCP § 391(b)(3) [emphasis added].) In *Deal*, *supra*, 45 Cal.App.5th 613, the court explained that the statute " '*applies to any litigant—plaintiff or defendant*—who, "acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers ... or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." ' " (*Id*. at p. 620 [emphasis added].) Thus, the nature of a party's conduct rather than their party designation determines whether the party is a vexatious litigant. Further, applying the relevant vexatious litigant provisions "to both plaintiffs and defendants advances the purpose of the statute—curbing abuse of the judicial system. Likewise, applying [the statute] to any litigant, whether plaintiff or defendant, who repeatedly litigates prior determinations is consistent with the statutory purpose." (*Ibid.*)

The court takes judicial notice of the entire case file in this action. (Evid. Code § 452(d)(1).) Additionally, the Referee presented evidence of defendant's numerous unmeritorious motions, oppositions and other papers, and he also details defendant's frivolous and harassing behavior and tactics against the Referee, plaintiffs, counsel, and other individuals involved in the partition sale. (Mot., Decl. of L. Mark Bissonnette & Exhibits.)

Based on a review of the entire court record and the Referee's evidence, the court finds that defendant meets the definition of a vexatious litigant pursuant to CCP

§ 391(b)(3). Defendant's actions have unreasonably impacted the objects of the Referee's and plaintiffs' actions as well as the court, and defendant has no reasonable probability of success in this partition action, especially given that the court has already authorized the partition sale.

When a court finds a party to be a vexatious litigant, the court can grant relief to the moving party. It is true, however, that the statutes addressing the types of relief the court could order all assume the vexatious litigant is a plaintiff, not a defendant. (See CCP §§ 391.1, 391.3, 391.4, 391.6, 391.7.) But, as the statutory scheme undoubtedly applies to any "person" and not only plaintiffs, it follows that the court is authorized to order some variation of the forms of relief available, which include furnishing a security or a prefiling order.

One purpose of the vexatious litigant statute is to address the "serious financial results to the unfortunate objects of [the vexatious litigant's] attacks …." (*Goodrich*, *supra*, 246 Cal.App.4th at p. 1265.) The statute empowers the court to require a vexatious litigant to furnish a security to cover the reasonable costs, including attorney fees, incurred in defending against the vexatious litigant's attacks. (CCP § 391.3(a).)

Given that the court has already authorized the sale of the property at issue, it would seem the most appropriate form of relief would be to require defendant to furnish a security to cover plaintiffs' reasonable costs, including attorney fees, and the Referee's reasonable costs, including his compensation and any attorney fees, in exercising the authority conferred upon him by the court. If defendant fails to furnish a security by a date certain, the court would consider striking defendant's answer.

Additionally, pursuant to CCP §§ 391.7, the court, *sua sponte*, will enter a prefiling order prohibiting defendant from filing any new litigation in the courts of California in propria persona without first obtaining leave of the presiding judge or justice of the court where the litigation is proposed to be filed. (*Id.*, subd. (a).)

B. Motion for Order Declaring Defendant in Contempt of Court

On October 19, 2021, the court issued an order in which it stated, in part: "The court cautions the parties not to engage in conduct that could be construed as, inter alia, obstruction or sabotage of the marketing or sale of the property; intimidation of the referee, the real estate brokers or agents, the purchasers, or others involved in the sale; or waste of the real property, as doing so could be construed as a violation of the court's orders and could potentially result in contempt or other appropriate proceedings to compel compliance with the court's orders."

The court will issue an order to show cause to defendant to appear in court on a date to be determined, and show cause why he should not be held in contempt of court for disobeying a court order by: (1) failing to be present at the subject property and for failing to allow entry to the subject property on February 3, 2022, February 10, 2022, and February 17, 2022; and (2) engaging in intimidating and obstructive behavior when he forwarded a two-page letter and 74 pages of attachments via email and certified mail to Rhonda Kenton, the escrow officer at Old Republic Title handling the partition sale, which threatened, inter alia, $18 million in damages against her.

C. Request for Instructions

The Referee requests an instruction from the court regarding whether the Referee is able to file a motion in the related probate case which asks Judge DeVore to declare defendant a vexatious litigant in the probate action and, if he is able to file such a motion, should he proceed to do so.

The Referee is not a party to the probate action, and therefore cannot file a vexatious litigant motion in the probate case.

D. Request for a No Communication and No Contact Order

The Referee's request for an order that defendant not contact or communicate with any prospective purchaser, real estate agent, title insurance company, or other person

involved in any sale or potential sale of the subject premises is granted. (See CCP §§ 872.120, 872.130(c).)

TENTATIVE RULING # 3: THE PARTIES ARE REFERRED TO THE FULL TEXT OF THE TENTATIVE RULING. APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 17, 2022, IN DEPARTMENT FOUR TO FIX AN AMOUNT FOR THE SECURITY DEFENDANT MUST FURNISH AS WELL AS THE DEADLINE FOR FURNISHING THE SECURITY, AND TO SET A HEARING DATE FOR THE ORDER TO SHOW CAUSE RE: CONTEMPT OF COURT FOR DEFENDANT'S FAILURE TO OBEY A COURT ORDER. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM.

4. E.D.C. GROWERS ADVOC. ALLIANCE v. EL DORADO COUNTY, 21CV0161

Case Management Conference

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 17, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM.

5. DIAL v. LYCETT, SC20210064

Case Management Conference

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 17, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM.

6. HANSEN v. FISCHER, SC20200005

Case Management Conference

TENTATIVE RULING # 6: A NOTICE OF SETTLEMENT OF ENTIRE CASE HAVING BEEN FILED ON JUNE 10, 2022, MATTER IS DROPPED FROM THE CALENDAR.

7. WEILAND v. EL DORADO COUNTY ASSESSMENT APPEALS BD., 22CV0341

CMC Re: Status of Service, Response, Record, Briefing Schedule

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 17, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM.

8. OTANI v. GENERAL MOTORS, LLC, SC20200176

OSC Re: Dismissal

A Notice of Settlement of Entire Case was filed April 19, 2022. To date, there is no Request for Dismissal in the court's file.

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 17, 2022, IN DEPARTMENT FOUR. PARTIES MAY APPEAR IN PERSON. IF ANY PARTY WISHES TO APPEAR REMOTELY, THEY MUST APPEAR BY ZOOM. IF A REQUEST FOR DISMISSAL IS FILED PRIOR TO THE HEARING, THE MATTER WILL BE TAKEN OFF CALENDAR AND APPEARANCES WILL NOT BE REQUIRED.

9. MATTER OF SHERIDAN, 22CV0549

OSC Re: Name Change

TENTATIVE RULING # 9: PETITION IS GRANTED.

10. MATTER OF ZEPEDA, 22CV0466

OSC Re: Name Change

Mother petitions to change her minor child's last name. The biological father did not join in the petition. On April 22, 2022, the father was personally served with the order to show cause as well as a copy of the petition. (Code of Civ. Proc. § 1277(a).) The court finds that notice to the father was given as required by law.

No objections have been filed.

Proof of Publication was filed.

TENTATIVE RULING # 10: PETITION IS GRANTED.

11. FORBES v. LAKE TAHOE BOAT RIDES, INC., ET AL., SC20190113

Motion for Summary Judgment

Plaintiff Samantha Forbes's complaint, filed in June 2019, asserts a single cause of action for general negligence against defendants Lake Tahoe Boat Rides and Scott Hoffman (erroneously sued as Captain "Scott"). Pending is defendants' motion for summary judgment. The motion is made on the basis that plaintiff signed an express waiver of liability prior to embarking on the boat ride, and therefore defendants are entitled to judgment as a matter of law.

Allegations of the Complaint

"[T]he pleadings set the boundaries of the issues to be resolved at summary judgment." (*Oakland Raiders v. Nat'l Football League* (2005) 131 Cal.App.4th 621, 648.) The complaint alleges that on August 3, 2017, plaintiff was one of several passengers in a boat owned, maintained, and operated by defendants. Plaintiff was sitting in the front of the boat. A large wake appeared in the distance out in front of the boat. At the time, the boat was towing a passenger(s) on rubber tubes. The captain of the boat, Scott Hoffman, "gunned" the engine and drove into the wake full speed. The impact threw plaintiff up into the air, and her subsequent fall into the boat caused severe injuries.

Plaintiff alleges that any experienced boat driver knows the dangers of driving a boat directly into a large wake, and that Hoffman should have immediately slowed the boat to a stop or, at a minimum, slowed the boat while turning into the wake. By "gunning" the engine and driving into the wake full speed, plaintiff asserts that Hoffman acted negligently, carelessly, and recklessly toward plaintiff, and his conduct directly and proximately caused significant and permanent injuries to plaintiff. (Compl., p. 4, Attach. to Compl.)

Standard of Review

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there

is a complete defense to the cause of action. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (*Ibid*.)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet*, *Inc*. (1965) 62 Cal.2d 412, 417.)

Preliminary Matters

Defendants' Objections to the Declaration of Plaintiff

¶ 3 (re: Hoffman's gross negligence): Sustained.

¶ 3 (re: plaintiff's purported injuries): Overruled.

¶¶ 4, 7–9, 12, 13, 16, 18, 20, 21, 23, 26, 28–33, 35: Overruled.

¶¶ 5, 6, 10, 11, 14, 24, 27, 37: Sustained.

¶ 19 (re: Hoffman's negligence): Sustained.

¶ 19 (re: details about passengers): Overruled.

Defendants' Objections to the Declaration of Richard Forbes

Defendants' counsel states that Richard Forbes's declaration is substantially similar to plaintiff's, and therefore they incorporate by reference the objections made to plaintiff's declaration as their objections to Richard Forbes's declaration. The court compared the two declarations and they begin to diverge from one another beginning with paragraph 15.

Incorporating evidentiary objections by reference is not in compliance with California Rules of Court, rule 3.1354. Given the divergence in the two declarations, the court cannot make evidentiary rulings as to Forbes's declaration using the objections defendants made to plaintiff's declaration.

Discussion

Plaintiff's complaint asserts a single cause of action for general negligence. The elements of a cause of action for negligence are well established. The elements are: (1) a legal duty to use due care; (2) a breach of that duty; (3) a reasonably close causal connection between that breach and the plaintiff's resulting injury; and (4) actual loss or damage to the plaintiff. (*Wattenbarger v. Cincinnati Reds*, *Inc*. (1994) 28 Cal.App.4th 746, 751.)

As an affirmative defense to the complaint, defendants argue that plaintiff's express waiver of liability serves as a complete bar to plaintiff's negligence action, even if defendants were negligent.

In order for an express assumption of risk to relieve a defendant of a legal duty to a plaintiff, the agreement may not violate public policy. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308, fn. 4.) "No public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party …." (*Tunkl v. Regents of Univ. of Cal*. (1963) 60 Cal.2d 92, 101.) A waiver that is invalid for public policy reasons typically has the following characteristics:

> The party seeking exculpation is engaged in performing a service of great importance to the public, [fn. omitted] which is often a matter of practical necessity for some members of the public. [Fn. omitted.] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [Fn. omitted.] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member

> of the public who seeks his services. [Fn. omitted.] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, [fn. omitted] and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [Fn. omitted.] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, [fn. omitted] subject to the risk of carelessness by the seller or his agents.

(*Tunkl*, *supra*, 60 Cal.2d at pp. 98–101.)

"Exculpatory agreements in the recreational sports context do not implicate the public interest." (*Allan v. Snow Summit* (1996) 51 Cal.App.4th 1358, 1374.) An exception to the rule exists where the defendant violated a statute, committed fraud, or intentionally injured the plaintiff. In such cases, even if the defendant is a recreational sports provider, an express assumption of risk will not allow the defendant to avoid liability for these acts. (*Capri v. L.A. Fitness Int'l*, *LLC* (2006) 136 Cal.App.4th 1078, 1084.) This exception derives from Civil Code § 1668, which provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." (*Ibid*.)

Contract principles apply when interpreting an express assumption of risk. (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1483.) "[A] release need not achieve perfection." (*Nat'l & Int'l Brotherhood of St. Racers*, *Inc. v. Superior Court* (1989) 215 Cal.App.3d 934, 938.) "To be valid and enforceable, a written release purporting to exculpate a tortfeasor from damage claims based on its future negligence or misconduct must clearly, unambiguously, and explicitly express this specific intent of the subscribing parties. [Citation.] ' " 'If a tortfeasor is to be released from such liability the language used "must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement." ' " ' [Citations.]" (*Leon v. Family Fitness Ctr. (#107)*, *Inc*. (1998) 61 Cal.App.4th 1227, 1233.) But, use of the word "negligence" or any

particular verbiage is not required. Rather, the waiver must inform the releasor that it applies to misconduct on the part of the releasee. (*Cohen*, *supra*, 159 Cal.App.4th at p. 1489.)

The meaning of the language in the release is a question of law. (*Solis v. Kirkwood Resort Co*. (2001) 94 Cal.App.4th 354, 360.) "To decide if the release is enforceable … [the court] should inquire whether its enforcement would defeat the reasonable expectations of the parties to the contract." (*Paralift*, *Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 756.) " 'An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.] An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence.' [Citation.] The circumstances under which a release is executed can give rise to an ambiguity that is not apparent on the face of the release. [Citation.] If an ambiguity as to the scope of the release exists, it should normally be construed against the drafter." (*Benedek v. PLC Santa Monica*, *LLC* (2002) 104 Cal.App.4th 1351, 1357.)

Courts require the express terms of the release to be applicable to the particular negligence or misconduct of the defendant, but every possible act of negligence need not be specifically included in the express waiver. (*Sanchez v. Bally's Total Fitness Corp*. (1998) 68 Cal.App.4th 62, 68–69.) Furthermore, when a waiver expressly releases the defendant from any liability, the plaintiff need not have had specific knowledge of the particular risk or danger that resulted in injury. (*Paralift*, *supra*, 23 Cal.App.4th at p. 757.) Rather, "it is only necessary that the act of negligence, which results in injury to the releasor, be reasonably related to the object or purpose for which the release is given." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 601.) "An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release." (*Benedek*, *supra*, 104 Cal.App.4th at p. 1358.)

Here, the Release of Liability form ("Release") refers to participation in waterskiing, wakeboarding, tubing and excursion tours. (Mot., Decl. of Edward Baldwin, ¶ 3 & Ex. A

to Ex. B, p. 1 of 2.) The Release states that the participant is assuming "all risks of participating in the Activities and using the Equipment ...." (*Id.*, p. 1 of 2, ¶ 2.)

If a participant were to suffer "any loss, damage, injury, death, or expenses … arising out of his/her participation in the Activities," "even those caused by the negligent acts or conduct of the Host, its owners, affiliates, operators, employees, agents, officers, and/or any entity to which the Host owes a contractual indemnification obligation[,]" the participant would "releas[e] any and all claims that arise or may arise from any negligent acts or conduct of the Host, its owners, affiliates, operators, employees, agents, officers, and/or any entity to which the Host owes a contractual indemnification obligation, to the fullest extent permitted by law. However, nothing in this Agreement shall be construed as a release for conduct that is found to constitute gross negligence or intentional conduct[.]" (*Id.*, p. 1 of 2, ¶¶ 2, 3.) The Release warns of "inherent risks of participating in the Activities and using the Equipment, which may be both foreseen and unforeseen and include serious physical injury or death." (*Id.*, p. 1 of 2, ¶ 2.)

At deposition, Hoffman testified that he does not "really explain [the Release] to [passengers]. [He] asks them to read over the waiver. And if they have any questions, please feel free to ask." (Supp. Opp'n, Decl. of Counsel, Attached Deposition of Scott Hoffman, 16:5–7.) Hoffman stated there were no questions asked. (*Id.*, 16:8–10.)

By signing the Release, plaintiff agreed that she read and understood the Release and that she was aware that by signing the Release she may be waiving certain legal rights, including the right to sue. (Mot., Decl. of Edward Baldwin, Ex. A to Ex. B, p. 2 of 2.) Plaintiff admitted to signing the Release and she authenticated a copy of the Release she signed. (*Id.*, ¶¶ 3, 4 & Exs. B, C.)

Based upon that evidence, the court finds that defendants met their initial burden of making a prima facie showing there is a valid and enforceable Release that plaintiff signed and that the affirmative defense of express waiver bars plaintiff's complaint for negligence.

The burden of production now shifts to plaintiff to make a prima facie showing that there are triable issues of material fact. In this regard, plaintiff asserts that defendants' gross negligence prevents enforcement of the Release.

Ordinary negligence is an unintentional tort, consisting of a failure to exercise the degree of care that a reasonable person under similar circumstances would employ. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753–54.) "Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] 'The state of mind of a person who acts with conscious indifferences to the consequences is simply, "I don't care what happens." ' [Citation.] The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved." (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036; see also *City of Santa Barbara*, *supra*, 41 Cal.4th at pp. 753–754; *Eastburn v. Reg'l Fire Prot. Auth.* (2003) 31 Cal.4th 1175, 1185–1186.)

" ' " '[M]ere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty,' " amounts to ordinary negligence. [Citation.] However, to support a theory of " '[g]ross negligence,' " a plaintiff must allege facts showing "either a ' " 'want of even scant care' " ' or ' " 'an *extreme* departure from the ordinary standard of conduct.' " ' [Citations.]" [Citations.] " ' "[G]ross negligence" falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind.…' " ' [Citation.]" (*Willhide-Michiulis v. Mammoth Mountain Ski Area*, *LLC* (2018) 25 Cal.App.5th 344, 358.) "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. [Citation.]" (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358.)

Plaintiff cites to Hoffman's deposition testimony in support of her opposition. Essentially, plaintiff cites passages from Hoffman's testimony and then she makes a conclusory assertion that "[t]he events that occurred that day amount to gross negligence …." (Supp. Opp'n, 3:20.) "[T]he opposition to summary judgment will be

deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation." (*Buehler v. Alpha Beta Co*. (1990) 224 Cal.App.3d 729, 733.)

Further, plaintiff did not submit an expert declaration as to the standard of care in opposition to defendants' motion, and she does not argue she or her father, Richard Forbes—who both submitted declarations—are experts. Rather, plaintiff seems to assert or suggest that the "common knowledge exception" applies to her statements and those of Forbes. This exception would allow a lay person to establish the standard of care of a professional without expert opinion when " 'a layperson" … [can] say as a matter of common knowledge" ' " that a professional breached the standard of care. (*Scott v. Rayher* (2010) 185 Cal.App.4th 1535, 1543.)

Declarations from expert witnesses are required for summary judgment proceedings when expert witness testimony would be required at trial. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) "Generally, expert testimony is required to establish the standard of care that applies to a professional. However, an exception exists where the circumstances fall within the realm of common knowledge. 'In negligence cases arising from the rendering of professional services, ... the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the lay person's common knowledge includes the conduct required by the particular circumstances. [Citation.]' [Citation.]" (*Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 138.)

The court finds that the "common knowledge exception" does not apply with regard to the standard of care for a professional boat captain who is driving a boat that is engaged in the recreational activity of tubing, and therefore expert testimony would be required at trial. Since the court was not provided with expert testimony about the relevant standard of care and whether Hoffman breached that standard, the court cannot conclude

there are triable issues as to gross negligence. Accordingly, plaintiff has not met her burden of demonstrating there are triable issues of material fact.

Defendants' motion for summary judgment is granted.

TENTATIVE RULING # 11: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

12. SUTTER TAHOE LP v. SILVER STATE INVESTORS, LLC, 21CV0280

Motion for Stay and to Refer to Binding Arbitration

This matter was continued from March 25, 2022, and April 22, 2022. The grounds for the prior request for continuance was that no responsive papers had been filed by defendant's counsel and the parties were engaged in settlement negotiations that may wholly resolve the case. At the time this tentative ruling was prepared, no further request for continuance has been received by the court, and responsive papers still have not been filed by defendant's counsel. Thus, the court will proceed with deciding the motion.

Plaintiff Sutter Tahoe LP's ("Sutter") complaint, filed December 8, 2021, asserts a single cause of action for breach of contract. On February 18, 2022, defendant Silver State Investors, LLC ("Silver State") filed a cross-complaint against Sutter asserting causes of action for breach of contract, declaratory relief, and equitable relief/specific performance.

On February 23, 2022, Sutter filed a motion to stay the action and to refer the matter to binding arbitration. To date, Silver State has not filed any responsive papers.

1. Legal Principles

Sutter's motion is made pursuant to the California Arbitration Act ("CAA"), Code of Civil Procedure § 1280, et seq. The CAA sets forth "a comprehensive scheme regulating private arbitration in this state." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) California has a " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citations.]" (*Ibid.*) "Consequently, courts will ' "indulge every intendment to give effect to such proceedings." ' " (*Ibid.*) "In cases involving private arbitration, '[t]he scope of arbitration is ... a matter of agreement between the parties' [citation] …." (*Id*. at pp. 8–9.) "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) Furthermore, except for specifically enumerated exceptions, the court

must order the parties to arbitrate a controversy if the court finds that a written agreement to arbitrate the controversy exists. (Code Civ. Proc., § 1281.2.)

Arbitration agreements are governed by state contract law and are "construed like other contracts to give effect to the intention of the parties." (*Crowell v. Downey Cmty. Hosp. Found*. (2002) 95 Cal.App.4th 730, 734, disapproved of on other grounds in *Cable Connection*, *Inc. v. DIRECTV*, *Inc*. (2008) 44 Cal.4th 1334.) A motion "to compel arbitration is simply a suit in equity seeking specific performance of that contract." (*Engineers & Architects Ass'n v. Cmty. Dev. Dep't* (1994) 30 Cal.App.4th 644, 653.) If the contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) " 'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.' [Citations.]" (*Adajar v. RWR Homes*, *Inc*. (2008) 160 Cal.App.4th 563, 569.)

The moving party always bears the burden of persuasion to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.) The court's determination involves a three-step burden-shifting process.

In the first step of the process, the moving party bears the initial "burden of producing 'prima facie evidence of a written agreement to arbitrate the controversy.' [Citation.] The moving party 'can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature.' [Citation.] Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. [Citations.] For this step, 'it is not necessary to follow the normal procedures of document authentication.' [Citation.] If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.

"If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement. [Citation.] The opposing party can do this in several ways. For example, the opposing party may testify under oath or declare under penalty of perjury that the party never saw or does not remember seeing the agreement, or that the party never signed or does not remember signing the agreement. [Citations.]

"If the opposing party meets its burden of producing evidence, then in the third step, the moving party must establish with admissible evidence a valid arbitration agreement between the parties. The burden of proving the agreement by a preponderance of the evidence remains with the moving party. [Citation.]" (*Gamboa v. Northeast Cmty. Clinic* (2021) 72 Cal.App.5th 158, 165–166.)

2. Discussion

Attached to Sutter's complaint is a copy of the Operating Agreement ("Agreement") between the parties. (Compl., Ex. A.) Additionally, Silver State also attached a copy of the parties' Agreement to its cross-complaint. (Cross-compl., Ex. A.)

By both parties attaching a copy of the Agreement to their complaints against one another, each one concedes the existence of a written agreement to arbitrate the controversy. Section 10.1 of the Agreement provides that "[a]ny dispute resolution of any sort relating to this Agreement shall be resolved by binding arbitration in El Dorado County, California." (Compl., Ex. A, p. 9, § 10.1.) The Agreement bears both parties' signatures. (*Id.*, p. 12.)

Based on the foregoing, the court finds that Sutter met its initial burden of producing prima facie evidence of the existence of a written agreement to arbitrate. The burden now shifts to Silver State to establish a defense to the enforcement of the arbitration agreement, including the burden of demonstrating that an exemption from arbitration

applies. Because Silver State did not file any responsive papers, it has failed to meet its burden.

Sutter's motion is granted.

TENTATIVE RULING # 12: SUTTER TAHOE'S MOTION TO STAY ACTION AND TO REFER THE MATTER TO BINDING ARBITRATION IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.