**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

**Department 10**
**Honorable Frederick S. Chung**

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

**DATE: October 24, 2024 TIME: 9:00 A.M.**

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

**The courthouse is open:** Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

**Scheduling motion hearings**: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

**CourtCall is no longer available**: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

**Recording is prohibited**: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

**Court reporters**: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 1 | 2014-1-CV-271941 | Carol Tran v. Mobile Tummy, Inc. et al. | Order of examination: parties to appear. |
| LINE 2 | 20CV373181 | Ao Wang et al. v. Bethany Liou et al. | Order of examination: parties to appear. |
| LINE 3 | 23CV428320 | Christo Zouves, M.D. et al v. The Estate of Ivan Pesic et al. | Click on LINE 3 or scroll down for ruling. |
| LINE 4 | 21CV382959 | Bauhaus LLC v. AK Construction Enterprises, Inc. | Motion to be relieved as counsel: parties to appear. |
| LINE 5 | 22CV402309 | Christopher James Castillo v. Carlos Gonzales | Motion to set aside entry of default: notice is proper, and the motion is unopposed. The court finds that the motion sets forth good cause under both CCP § 473(b) and CCP § 473.5 for setting aside the default. The motion is GRANTED. If defendant's estate wishes to bring a demurrer to the complaint (attached as an exhibit to the motion), it should be filed and noticed separately. |
| LINE 6 | 23CV413352 | Sonia Rivera et al. v. Intuitive Surgical, Inc. et al. | Application of Matthew Vinson to appear pro hac vice: parties to appear. If notice is proper (no proof of service is in the file), and if no party or third-party (*e.g.*, the State Bar of California) appears at the hearing to object to the application, the court will GRANT it. |
| LINE 7 | 23CV413352 | Sonia Rivera et al. v. Intuitive Surgical, Inc. et al. | Application of Ellen A. Presby to appear pro hac vice: parties to appear. If notice is proper (no proof of service is in the file), and if no party or third-party (*e.g.*, the State Bar of California) appears at the hearing to object to the application, the court will GRANT it. |

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| LINE # | CASE # | CASE TITLE | RULING |
|---|---|---|---|
| LINE 8 | 23CV413352 | Sonia Rivera et al. v. Intuitive Surgical, Inc. et al. | Application of Gale D. Pearson to appear pro hac vice: parties to appear. If notice is proper (no proof of service is in the file), and if no party or third-party (*e.g.*, the State Bar of California) appears at the hearing to object to the application, the court will GRANT it. |
| LINE 9 | 23CV413352 | Sonia Rivera et al. v. Intuitive Surgical, Inc. et al. | Application of Joshua M. Mankoff to appear pro hac vice: parties to appear. If notice is proper (no proof of service is in the file), and if no party or third-party (*e.g.*, the State Bar of California) appears at the hearing to object to the application, the court will GRANT it. |
| LINE 10 | 23CV413352 | Sonia Rivera et al. v. Intuitive Surgical, Inc. et al. | Application of Hadley E. Lundback to appear pro hac vice: parties to appear. If notice is proper (no proof of service is in the file), and if no party or third-party (*e.g.*, the State Bar of California) appears at the hearing to object to the application, the court will GRANT it. |
| LINE 11 | 23CV413352 | Sonia Rivera et al. v. Intuitive Surgical, Inc. et al. | Application of Katherine A. Kiziah to appear pro hac vice: parties to appear. If notice is proper (no proof of service is in the file), and if no party or third-party (*e.g.*, the State Bar of California) appears at the hearing to object to the application, the court will GRANT it. |
| LINE 12 | 23CV421020 | Jesus Villegas Alvaro v. Ford Motor Company et al. | OFF CALENDAR |

**- oo0oo -**

**Calendar Line 3**
**Case Name:** *Christo Zouves, M.D. et al v. The Estate of Ivan Pesic et al.*
**Case No.:** 23CV428320

Plaintiffs Christo Zouves and Zouves Fertility Center (collectively, "Zouves") filed this action against defendants The Estate of Ivan Pesic (the "Estate"), Katherine Pesic ("Kathy"), and Joyce Chin, seeking indemnity for attorney's fees and costs owed to Pesic.[1] The Estate, by and through Kathy, now demurs to the entire complaint and the first, second, third, and fourth causes of action in the complaint.

## I. BACKGROUND

According to the complaint, in October 2010, Ivan Pesic and Chin requested that Zouves assist them in conceiving a second child through fertility treatments. (Complaint, ¶ 3.) On February 5, 2011, Ivan and Chin signed a consent form entitled "Informed Consent and Agreement for Long Term Cryopreservation and Storage of Semen" (the "2011 Agreement"). (*Id.* at ¶ 4.) Between February 6 and February 11, 2011, Ivan presented Zouves with multiple semen samples for cryopreservation. (*Id.* at ¶ 5.) Ivan died in Japan on October 13, 2012, and the Estate inherited, acquired, and assumed all of his debts, liabilities, and obligations. (*Id.* at ¶ 6.) Neither Chin nor a representative of the Estate, nor any other person or entity, informed Zouves of Ivan's death at any time in 2012. (*Id.* at ¶ 7.) After Ivan's death, on November 3, 2012, Zouves performed an egg retrieval procedure on an ovum donor previously selected by Ivan and Chin. (*Id.* at ¶ 8.) Zouves transferred two fertilized embryos, created from donor ova and Ivan's cryopreserved semen, to Chin's uterus on November 8, 2012, resulting in the birth of twins in July 2013. (*Id.* at ¶ 9.)

Notwithstanding the foregoing, Kathy was the surviving spouse of Ivan at the time of his death. (*Id.* at ¶ 10.)

On October 15, 2014, Kathy filed a complaint in Santa Clara County Superior Court entitled "Katherine Pesic, individually and as Administrator of the Estate of Ivan Pesic v. Zouves Fertility Center, Shelley Tarnoff, Christo Zouves, Joyce Chin, and Does 1-50," Case No. 2014-1-CV- 271935 (the "2014 Litigation"), alleging causes of action against Zouves and other parties for conversion, breach of fiduciary duty, negligence, and violation of Penal Code section 496 (receiving stolen property). (Complaint, ¶ 14.) The case went to trial, and on October 30, 2019, a jury returned a verdict, finding Zouves not liable for violation of Penal Code section 496, but finding him liable for conversion of Ivan's cryopreserved semen. (*Id.* at ¶ 19.) The jury concluded that Zouves was liable for the attorney's fees and costs incurred by Kathy, for the value of the semen, and for emotional distress damages. (*Id.* at ¶ 20.) Zouves moved for judgment notwithstanding the verdict (JNOV) and for a new trial, the trial court granted both motions, and Kathy appealed that order. (*Id.* at ¶¶ 22-24.) On appeal, the Court of Appeal reversed the JNOV, reversed the order granting a new trial, and remanded the case for a new trial as to damages only. (*Id.* at ¶ 24.) The Court of Appeal's opinion is dated November 28, 2022.

[1] For clarity and consistency (including consistency with the Court of Appeal's opinion in the prior case), the court refers to Ivan Pesic as "Ivan" and Katherine Pesic as "Kathy." The court otherwise refers to everyone else by surname.

Zouves filed the complaint in the present case on December 28, 2023, alleging causes of action for: (1) contractual indemnity from the Estate and Chin for claims raised by Kathy; (2) equitable indemnity from the Estate and Chin for claims raised by Kathy; (3) comparative indemnity and contribution from the Estate and Chin for claims raised by Kathy; and (4) declaratory relief. On July 19, 2024, the Estate, by and through Kathy, filed the present demurrer to the entire complaint and each cause of action therein, which Zouves now opposes.

## II. REQUESTS FOR JUDICIAL NOTICE

With their demurrer, the Estate requests that the court judicially notice two documents under Evidence Code section 452, subdivisions (a) and (d). (See The Estate of Ivan Pesic's Request for Judicial Notice ("RJN"), pp. 2-3.) Exhibit A is a copy of the remittitur issued by the Sixth Appellate District Court of Appeal on February 1, 2023 in *Katherine Pesic v. Zouves Fertility Center et al.*, Case Nos. H047915 & H048180 (Trial Court Case No. 2014-1-CV-271935). Exhibit B is the signed jury verdict form from that case, dated October 30, 2019.

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the issues before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, fn. 18, citing *People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter." (Evid. Code, § 453, subd. (b).) Also, "[a] party requesting judicial notice of material under Evidence Code sections 452 or 453 must provide the court and each party with a copy of the material." (Cal. Rules of Court, rule 3.1306(c).)

The court grants judicial notice of Exhibits A and B. Evidence Code section 452, subdivision (a), permits a court to take judicial notice of the "decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state." (Evid. Code, § 452, subd. (a).) Evidence Code section 452, subdivision (d), permits a court to take judicial notice of the records "of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." (Evid. Code, § 452, subd. (d).) Exhibits A and B are records of the California courts.

"Although a court cannot take judicial notice of hearsay allegations in a court record, it can take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. [Citation.]" (*Hawkins v. SunTrust Bank* (2016) 246 Cal.App.4th 1387, 1393.) "To determine whether to preclude relitigation on collateral estoppel grounds, judicial notice may be taken of a prior judgment and other court records." (*Ibid*., internal citations and quotations omitted.)

## III. DEMURRER

### A. General Legal Standards

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . [t]he pleading does not state facts sufficient to constitute a cause of

action." (Code Civ. Proc., § 430.10, subd. (e).) A demurrer may be brought by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, but not contentions, deductions[,] or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] It 'admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

**B. Discussion**

**1. Statute of Limitations**

In this case, Zouves has alleged that on February 5, 2011, Ivan and Chin entered into a written contract whereby Zouves, for due consideration, would cryopreserve semen produced by Ivan. (Complaint, ¶ 27.) Under that contract, Ivan and Chin also agreed to defend and indemnify him. (*Id.* at ¶ 29.) Zouves seeks indemnification from the Estate for all "fees, expenses, costs . . ." incurred in connection with Litigation brought by Kathy in 2014. (*Id.* at ¶ 31.) The second, third, and fourth causes of action seek indemnification on similar grounds. (See *id.* at ¶¶ 32-43.)

The Estate argues that the statute of limitations in Code of Civil Procedure section 366.2 bars the entire complaint. (Memorandum of Points and Authorities ("MPA"), pp. 5:10-6:11 ["it is clear from the face of the Complaint that it is time-barred by the one-year statute of limitations in Code of Civil Procedure section 366.2," because Ivan died in Japan on October 13, 2012, and Zouves filed the present action more than ten years later, on December 28, 2023].) Under Code of Civil Procedure section 366.2, if "a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." (Code Civ. Proc., § 366.2, subd. (a).) "Code of Civil Procedure section 366.2 provides for an outside time limit of one year for filing any type of claim against a decedent." (*Dobler v. Arluk Medical Center Industrial Group, Inc.* (2001) 89 Cal.App.4th 530, 535.) "This uniform one-year statute of limitations applies to actions on all claims against the decedent which survive the decedent's death. This limitations period, however, is tolled by (1) the timely filing of a creditor claim . . . [t]hus, if a claim is timely filed in the probate proceedings, it remains timely filed even though the representative or court acts on a claim by allowing, approving or rejecting the claim outside the limitations period. On the other hand, if a claim is not filed in a probate proceeding within either the claims filing period of Probate Code section 9100, or within the one-year limitation period of Code of Civil Procedure section 366.2, a creditor will be forever barred from asserting a claim against the decedent." (*Id.* at pp. 535-536.)

Zouves argues that section 366.2 does not apply here because the "cause of action upon which indemnity relief is sought did not exist at the time of Ivan Pesic's death." (Opposition, p. 8:1-3.) Zouves contends that the "courts have concluded that the statute applies where decedent either committed the injury or owed a collectible debt as of the time of death. Where neither of these conditions is satisfied, such as here, there is no liability of decedent that arose before death, and hence no liability that survived the death." (*Id.* at p. 8:12-28, citing *Dacey v. Taraday* (2011) 196 Cal.App.4th 962, 982 (*Dacey*).) In *Dacey*, an estate appealed from the portion of a judgment on a breach of contract claim, arguing that section 366.2 barred plaintiff's claim. (*Dacey, supra*, 196 Cal.App.4th at p. 967.) The Court concluded that at the time of decedent's death, "there was no wronged party, and [plaintiff] could not have filed any cause of action against [decedent] based on contract or tort." (*Id.* at p. 982.) As such, section 366.2 did not apply. The Court of Appeal stated that it was not "aware of any case that has applied the statute when the decedent did not commit the injury or did not already have a collectible debt at the time of death." (*Id.* at p. 984.)

The *Dacey* court compared the facts before it to those of *Bradley v. Breen* (1999) 73 Cal.App.4th 798, 804-805, a case cited by the Estate in support of the demurrer. (MPA, p. 6:7-11.) "[I]n *Bradley*, the decedent pled guilty to a criminal charge of lewd acts with a minor and the minor sued him in civil court." (*Dacey, supra*, 196 Cal.App.4th at pp. 984-985, citing *Bradley, supra*, 73 Cal.App.4th at p. 800.) "After the decedent died, the minor sued the defendants, alleging that they aided and abetted the molestation . . . . The defendants cross-complained against the estate for indemnity and other relief . . . . The appellate court rejected the argument that it was inequitable to apply section 366.2 to a cross-action for equitable indemnity simply because the defendants seeking indemnity from the estate had not paid a judgment or settlement within one year of the decedent's death and could not have filed their claims any sooner." (*Dacey, supra*, 196 Cal.App.4th at p. 985, citing *Bradley, supra*, 73 Cal.App.4th at p. 805.) "In *Bradley*, the decedent committed the molestation; thus, the defendants' cause of action against the estate – unlike the present case – was based on the decedent's wrongful conduct." (*Dacey, supra*, 196 Cal.App.4th at p. 985.)

The court finds the circumstances here far more analogous to the facts of *Dacey* than the facts of *Bradley*. Zouves seeks indemnity for liabilities arising from a lawsuit filed in 2014 by the Estate's representative, Kathy, based on a contract Ivan allegedly signed in 2011. As in *Dacey*, "there was no wronged party, and [plaintiff] could not have filed any cause of action against [the Estate] based on contract or tort" at the time of Ivan's death, such that Code of Civil Procedure section 366.2 would have applied. (See *Dacey, supra*, 196 Cal.App.4th at 982.)

Indeed, the Estate appears to concede this argument on reply, as it does not address it in its brief. (See, e.g., Reply; *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 [failure to challenge a contention, results in the concession of that argument].) The Estate points to no authority other than Code of Civil Procedure 366.2 itself (and related cases) for its statute of limitations argument.

The court overrules the Estate's demurrer on statute of limitations grounds.[2]

**2. Probate Claim Filing Compliance**

The Estate demurs to the entire complaint on the ground that it fails to comply with Probate Code section 9351. (See MPA, pp. 4:19-5:9.) Section 9351 provides: "An action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is first filed as provided in this part and the claim is rejected in whole or in part."

"[Probate Code] [s]ection 9000 et seq. details the procedures pertaining to creditor claims against a decedent's estate. Creditors must file a claim in a probate proceeding within the later of four months after the appointment of a personal representative, or 60 days after notice." (*Estate of Yool* (2007) 151 Cal.App.4th 867, 873, citing Prob. Code, § 9100, subd. (a)(1), (2).) "The term 'claim' is defined as including 'a demand for payment for any of the following, whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated: (1) Liability of the decedent, whether arising in contract, tort, or otherwise.'" (*Ibid.*, citing Prob. Code, § 9000, subd. (a)(1).) "Once a claim has been filed and rejected, in whole or in part, the creditor has three months to commence an action on the claim." (*Ibid.*, citing Prob. Code, §§ 9351, 9353, subd. (a).)

Probate Code section 9103 provides, in relevant part, that "[u]pon petition by a creditor, the court may allow a claim to be filed after expiration of the time for filing a claim provided in Section 9100 if either of the following conditions is satisfied . . . [t]he creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30 days prior to the time for filing a claim as provided in Section 9100, and the petition is filed within 60 days after the creditor has actual knowledge of both of the following: (A) The existence of the facts reasonably giving rise to the existence of the claim. (B) The administration of the estate." (Prob. Code, § 9103, subd. (a)(2).)

The court agrees with the Estate that these provisions of the Probate Code are directly on point. As the Estate notes, it "is undisputed that Zouves's lawsuit has been commenced against Mr. Pesic's personal representative on a cause of action against Mr. Pesic." (MPA, p. 5:2-3.) Zouves has not alleged that he filed the requisite claim with the Estate. (*Id.* at p. 5:3-5.) Failure to allege compliance with the claim filing requirement under the Probate Code is a basis to sustain a demurrer. (See *Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 834 [describing the Probate Code's claim filing requirement to be "so fundamental that it applies at the pleading stage"]; *Rupp v. Kahn* (1966) 246 Cal.App.2d 188, 193 ["It has been held that such an allegation is a necessary allegation in an action on a rejected claim and that its omission is fatal. [Citation.] This omission, however, is one which might have been cured by amendment and, while it was a proper ground for sustaining a demurrer, it does not sustain a

[2] At the same time, the court remains puzzled as to why a different limitations period does not necessarily apply here—e.g., statutes of limitations for indemnity or contribution under California law—given that Zouves almost certainly had all of the relevant facts for a potential cause of action for indemnity or contribution when he was sued by Ms. Pesic in 2014, or certainly before the trial in that case in 2019. All of that occurred 5-10 years ago. The dates of the prior case and the events in that case are all subject to judicial notice, so the court does not understand why the Estate has unduly focused on section 366.2, rather than on statutes of limitations that might actually be applicable.

refusal of leave to amend . . ."]; *Chahon v. Schneider* (1953) 117 Cal.App.2d 334, 346 [even if the complaint had stated facts sufficient to constitute a cause of action, it would still be insufficient because it did not allege that the plaintiff presented a claim against the estate of the deceased]; *Hays v. Bank of America Nat. Trust & Savings Assn.* (1945) 71 Cal.App.2d 301, 303-304 ["The complaints failed to allege that claims therefor had been presented to the estate as required by law. A complaint filed against an estate, which is based upon contract or contingent thereon, fails to state a valid cause of action unless it alleges the presenting of the claim within the time allowed in accordance with the provisions of the Probate Code."].)

Zouves is correct that Probate Code section 9103 allows a party to file a late claim if certain conditions are met. (Prob. Code, § 9103, subd. (a)(2).) Here, he argues that he could not have known to file a claim under Probate Code section 9351, because Ivan died in October 2012 and "[i]n February 2013, four months after his death, Zouves was still unaware that Ivan Pesic (1) had died, or (2) had a wife other than Joyce Chin." (Opposition, p. 7:6-8.) Similarly, Zouves contends that Kathy's argument "is clearly disingenuous where defendant could not have complied with the Probate Code requirements where Mrs. Pesic delayed in bringing any claims that would have alerted Zouves until long after the Probate Code timeline had expired. Notwithstanding Mrs. Pesic's efforts to preclude Zouves from asserting these rights, Zouves has complied with the Probate Code and filed a timely Petition for Late Claim." (Opposition, p. 7:16-23.)

The court finds this argument to be extraordinarily weak. Even if Zouves did not know of Ivan's death in early 2013, he undoubtedly knew about it by the time Kathy sued him for conversion in 2014, and there is no indication that he filed a "timely" petition for late claim in the intervening 10 years. In any event, Zouves did not comply with the requirements of the relevant Probate Code sections *in his complaint—i.e.*, by alleging compliance with the probate claim filing requirement—and so the demurrer must be sustained. (See Prob. Code, §§ 9000; 9100, subd. (a)(1), (2); 9351; 9353, subd. (a).) The court cannot consider extrinsic evidence—*e.g.*, the exhibits attached to the declaration of Plaintiffs' counsel in opposition to the demurrer. (See Declaration of J. Julia Hansen-Arenas in Support of Opposition to Defendant Pesic Demurrer to Complaint ("Hansen-Arenas Decl." or "Hansen-Arenas Declaration"), ¶ 4; *Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, 597, fn. 1 [on demurrer, court's focus is limited to the facts alleged on the face of the pleading and its exhibits, and any facts subject to judicial notice].) And even if it could consider this extrinsic evidence, the mere act of filing a petition entitled "Late Claim against the Estate of Ivan Pesic" does not address the pre-filing requirements outlined by the Probate Code. (Hansen-Arenas Decl., ¶ 4.)

As for whether Zouves is entitled to be granted leave to amend, the court agrees with the Estate that it is "impossible" for Zouves to cure the defect as a matter of law. (Reply, p. 2:10-15.) That is because the statutory ground for a late petition is that it must be filed "within 60 days after the creditor has actual knowledge of both of the following: (A) The existence of the facts reasonably giving rise to the existence of the claim [and] (B) The administration of the estate." (Prob. Code, § 9103, subds. (a)(2)(A) and (a)(2)(B).) Here, the court has already taken judicial notice of the Court of Appeal's remittitur (and opinion) in the 2014 Litigation and concludes that Zouves had "actual knowledge" of the facts "reasonably giving rise to the existence of a claim" and the "administration of the estate" through that prior litigation years before he filed this case and years before he filed his Petition for Late Claim in the probate court.

Accordingly, the court sustains the demurrer as to the entirety of the complaint without leave to amend.

Although the foregoing is fully dispositive, the court goes on to address the individual causes of action in the complaint.

### 3. First Cause of Action: Express Contractual Indemnity

The Estate argues that the first cause of action for express indemnity fails because the 2011 agreement excludes willful and negligent acts, and because the doctrine of collateral estoppel prevents Zouves from relitigating the issue of indemnification. (MPA, pp. 7:15-8:24; Reply, pp. 4:22-5:12.)

The court addresses collateral estoppel first. Collateral estoppel, or issue preclusion, precludes relitigation of issues argued and decided in prior proceedings. (*Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556.) "Collateral estoppel precludes the relitigation of an issue only if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. [Citation.]" (*Zenvik v. Super. Ct.* (2008) 159 Cal.App.4th 76, 82.) "[I]n deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation. [Citation.]" (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875.)

For issues to be deemed identical for purposes of precluding subsequent litigation on the same, the two actions must involve identical factual allegations. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481-482.) This "is not an easy rule to apply, for the term 'issue' as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted." (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880-881.) The "factual predicate of the legal issue decided in the prior case must be sufficient to frame the identical legal issue in the current case, even if the current case involves other facts or legal theories that were not specifically raised in the prior case." (*Textron Inc. v. Travelers Casualty & Surety Co.* (2020) 45 Cal.App.5th 733, 747.)

The Estate's collateral estoppel argument is premised on the notion that the issue of indemnity was actually litigated and addressed in the prior litigation, but it fails to make such a showing. The 2011 Agreement does contain an indemnity provision, which covers "matters connected with this Agreement, or which arise out of any acts or omissions relating to this Agreement, including any claim made against the undersigned physician(s) by a child or offspring or by any heirs or administrators of a child born as a result of the procedures described in this Agreement." (Complaint, Ex. 1 at p. 3.) The Estate argues that because the Court of Appeal already decided that the 2011 Agreement expired prior to Ivan's death, the Court necessarily decided that there could be no indemnification under the Agreement: "[the] agreement had long been expired so Plaintiffs[']  conduct thereafter could not possibly have

arisen from it, and Plaintiff[s] [do] not suggest otherwise." (*Id.* at p. 6:18-20.) But this does not address the whole issue. The indemnification obligation in the 2011 Agreement extends to any "acts or omissions *relating* to this Agreement," which could arise even after the Agreement itself had expired. It does not appear that either the trial court or the appellate court in the prior case specifically addressed the issue of indemnification—Zouves does not present any judicially noticeable facts that even remotely suggests that the parties *actually litigated* this issue. The court therefore finds that the doctrine of collateral estoppel does not apply to the first cause of action.[3]

The Estate also argues that a jury found Zouves liable for conversion in the 2014 Litigation, conversion is an intentional tort, and the 2011 Agreement between Zouves and Ivan does not extend to "willful misconduct." (MPA, p. 7:15-24, citing *Multani v. Knight* (2018) 23 Cal.App.5th 837, 853 (*Multani*).) Zouves responds that "willful misconduct is more than a failure to perform a statutory duty and more than gross negligence. Willful misconduct 'involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences.'" (Opposition, p. 9:12-15, citing *Meek v. Fowler* (1935) 3 Cal.2d 420, 425.) Zouves contends that he did not engage in willful misconduct because it "is undisputed that Zouves did not know Ivan Pesic was married to Katherine Pesic at the time Ivan Pesic cryopreserved his semen or at the time the semen was used to fertilize the donor ovum. Moreover, it is undisputed that Zouves did not know Ivan Pesic had died at the time of the November 2012 fertility treatment." (Opposition, p. 9:16-19.) In its reply, the Estate then expands its argument by noting that the indemnity provision also excludes "negligent" acts and omissions.

California "courts have developed over the years a concept that a defendant's conduct, while still embraced by the general term negligence, may be sufficiently opprobrious or culpable to warrant stripping defendant of the defense of contributory negligence and invoking the legal consequences of an intentional tort. Varying titles, sometimes misleading, such as 'willful negligence,' 'wanton and willful misconduct,' 'gross negligence' and 'wanton and reckless misconduct' have been used to describe this type of conduct. [Citation.]" (*Mahoney v. Corralejo* (1974) 36 Cal.App.3d 966, 973.) "As was stated in *Pelletti v. Membrila*, 234 Cal.App.2d 606, 611, '[i]f conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, regardless of the actual state of mind of the actor and his actual concern for the rights of others, we call it wilful misconduct, and apply to it the consequences and legal rules which we use in the field of intended torts.'" (*Ibid.*) "Conversion is an intentional tort. [Citation.]" (*Multani, supra,* 23 Cal.App.5th at p. 853.)

The Estate directs the court to Exhibit B to its request for judicial notice, arguing that "the jury found [in the 2014 Litigation], and the Sixth District upheld, that Plaintiff knowingly or intentionally interfered with the cryopreserved semen and that the damages were a natural and proximate consequence of Plaintiff's wrongdoing." (Reply, p. 5:7-9, citing RJN, Ex. B.) Exhibit B is the jury verdict form from the 2014 Litigation. (See RJN, Ex. B.) The jury found that "ZFC and Dr. Zouves substantially interfere[d] with Ms. Pesic's property by knowingly or

[3] In its reply, the Estate also adds a new wrinkle to this argument: that regardless of the application of collateral estoppel principles, the contractual indemnity provision cannot apply because the contract expired at the time of the conversion in November 2012. This new wrinkle is being presented for the first time on reply and will not be considered.

intentionally preventing Ms. Pesic from having access to the cryopreserved semen." (RJN, Ex. B, p. 1.) Plaintiffs' conduct was a "substantial factor causing Ms. Pesic's harm." (*Id.* at p. 2.)

The court ultimately agrees with the Estate. Although Zouves is correct that the tort of conversion does not necessarily require a "wrongful intent"—indeed, the Court of Appeal's opinion makes it clear that the trial court's jury instruction stating that "a wrongful intent is not necessary" was correct (Opinion, p. 33)—it is still an intentional tort, because it involves an act that must be knowingly or intentionally performed. Because the 2011 Agreement excludes not only "willful misconduct" but also "any negligent acts or negligent omissions," the court interprets this provision as excluding the level of intent that the jury found Zouves engaged in here. Even if Zouves did not intend to do harm, he acted intentionally when he deliberately did not discard Ivan's sperm (as required by the 2011 Agreement), and when he allowed Chin to use the sperm despite Chin's failure to present a death certificate (as required by the 2011 Agreement). At a bare minimum, these actions were negligent, and so they are not encompassed by the contractual indemnification provision of the 2011 Agreement.

The court sustains the Estate's demurrer to the first cause of action without leave to amend. A "[p]laintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Zouves has not done so, and the court cannot envision how he can possibly amend the pleading to assert this cause of action properly.

**4. Second and Third Causes of Action: Equitable Indemnity and Comparative Indemnity**

Zouves brings separate causes of action for equitable indemnity and comparative indemnity. California courts do not distinguish between the two. "Rather than recognizing different forms of equitable indemnity, California has but a single comparative indemnity doctrine 'which permits partial indemnification on a comparative fault basis in appropriate cases.'" (*City of Huntington beach v. City of Westminster* (1997) 57 Cal.App.4th 220, 224, citing *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 808.) "Comparative equitable indemnity includes the entire range of possible apportionments – from no indemnity to total indemnity. Rather than being different in kind from comparative indemnity, total equitable indemnity is merely a possible result at one end of the spectrum when one party bears 100 percent of the fault and another bears none. Even with a total shifting of loss, 'the indemnitee's equitable indemnity claim does not differ in its fundamental nature from other comparative equitable indemnity claims.' [Citation.]" (*Ibid*.) Therefore, the court will discuss both causes of action together.

The Estate argues that Zouves seeks a remedy at law, and so the second cause of action for an "equitable" remedy fails if Zouves's first cause of action is allowed to proceed. (MPA, p. 9:9-19.) The Estate also argues that the action for equitable indemnity fails because the complaint does not allege that Ivan is a joint tortfeasor. (*Id.* at pp. 9:20-10:4.) Without citing any case law or other authority, Zouves responds that the Estate cannot "bar the concurrent claim for equitable indemnity just because the contractual indemnity claims have been asserted. Zouves seeks indemnity from Ivan Pesic for the conduct that gave rise to the conversion liability finding. That indemnity arises from both principles of contract and equity. Moreover, to enforce these indemnity rights, Pesic [sic] need not show a pre-existing finding of

liability against Ivan Pesic. Zouves has fulfilled its pleading obligations by making the allegation of liability alone." (Opposition, p. 10:16-22.)

As for the third cause of action for comparative indemnity and contribution, the Estate argues that this cause of action applies only to strictly liable tortfeasors. (MPA, p. 10:7-10.) According to the Estate, the complaint contains no allegations that the Estate is strictly liable for converting Ivan's sperm, and Zouves cannot allege that the Estate "is a strictly liable tortfeasor because Ivan was dead when Plaintiffs converted his frozen sperm." (*Id.* at p. 10:17-20.) Zouves argues in response that an "intentional tortfeasor may obtain comparative indemnity from a concurrent intentional tortfeasor based on their relative culpability." Here, Zouves alleges that Ivan Pesic concealed the nature of his marital relationship, and Zouves can therefore seek indemnity from Ivan Pesic for this conduct that ultimately gave rise to liability for conversion in the 2014 Litigation. (Opposition, pp. 10:23-11:3.)

The court disagrees with the Estate that the doctrine of comparative indemnity applies only to strictly liable tortfeasors. (See MPA, p. 10:11-16.) "Comparative equitable indemnification exists to correct potential injustice. 'Quite simply, [it] is a matter of fairness.' [Citation.] The doctrine is applied to multiple tortfeasors to apportion loss in relation to their relative culpability. [Citation.]" (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 689-690 (*Baird*).) Comparative indemnity "has been applied in a vast range of tort cases. [*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578] applied comparative equitable indemnity between multiple negligent tortfeasors. [Citation.] Subsequent cases have allowed its application to multiple strictly liable defendants and among negligent defendants and strictly liable defendants. [Citations.] Furthermore, the comparative principles apply when one party is negligent and the other is guilty of wilful misconduct. [Citations.] And the doctrine has been applied to allow a negligent defendant to shift the loss to an intentional tortfeasor. [Citation.]" (*Baird, supra,* 21 Cal.App.4th at p. 690.)

Nevertheless, the court agrees with the Estate's argument that Zouves has failed to allege that Ivan Pesic is (was) jointly and severally liable with Zouves. "It is well settled in California that equitable indemnity is only available among tortfeasors who are jointly and severally liable for the plaintiff's injury. [Citations.]" (*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Med. Grp.* (2006) 143 Cal.App.4th 1036, 1040.) "Joint and several liability is a prerequisite for equitable indemnity. [Citation.]" (*Leko v. Cornerstone Bldg. Inspection Serv.* (2001) 86 Cal.App.4th 1109, 1115.) "When the negligent acts of two tortfeasors are both a proximate cause of an indivisible injury, the tortfeasors are jointly and severally liable for that injury. [Citation.]" (*Ibid*.)

Furthermore, "when parties by express contractual provision establish a duty in one party to indemnify another, the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity. When, however, the duty established by contract is by the terms and conditions of its creation inapplicable to the particular factual setting before the court, the equitable principles of implied indemnity may indeed come into play." (*E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 508, internal citations and quotations omitted.) The 2011 Agreement contains an express contractual provision establishing a duty of one party to indemnify the other. (Complaint, Ex. 1 at p. 3.) The court cannot envision how Zouves would argue that the indemnification clause in the 2011 Agreement does not apply to the facts at hand, given his express reliance on the indemnification clause in the 2011 Agreement in his first cause of action.

The court therefore sustains the Estate's demurrer to the second and third causes of action. Although this would be an instance in which the court would, under other circumstances, grant leave to amend, based solely on the arguments that are specific to the second and third causes of action, the court denies leave to amend here, because it has already determined that leave to amend is not appropriate for the complaint as a whole.

### 5. Fourth Cause of Action

The Estate argues that the court should sustain its demurrer to the fourth cause of action because "the fourth cause of action for declaratory relief is derivative of the indemnity causes of action." (MPA, p. 10:26-27.) "A general demurrer to a declaratory relief cause of action is proper when the plaintiff does not allege facts sufficient to state the derivative claim. [Citations.]" (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 54.) Zouves's fourth cause of action seeks declaratory relief concerning "express contractual indemnity, equitable indemnity, total indemnity and/or comparative indemnity and/or contribution." (Complaint, p. 8:12-13.) As such, the fourth cause of action is "derivative" of the first, second, and third causes of action. The court has found these causes of action to be insufficiently pled.

The court sustains the demurrer to the fourth cause of action, again without leave to amend.

## IV. CONCLUSION

The court OVERRULES the demurrer on the basis of the statute of limitations and the doctrine of collateral estoppel, but the court otherwise SUSTAINS the Estate's demurrer to the complaint as a whole, as well as to each of the individual causes of action, WITHOUT leave to amend.

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