

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOHN PAUL ARNESON,

Plaintiff and Appellant,

v.

MOTORCYCLE SAFETY
FOUNDATION, INC. et al.,

Defendants and Respondents.

B270206

(Los Angeles County
Super. Ct. No. BC572919)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lori Ann Fournier, Judge. Affirmed.

Kirbys Law, James W. Kirby and Steven C. Kirby for Plaintiff and Appellant.

Murchison & Cumming and Edmund G. Farrell, III for Defendants and Respondents.

I. INTRODUCTION

John Paul Arneson (Plaintiff) was injured while participating in a basic rider training class conducted by Motorcycle Safety Foundation, Inc. (the Foundation) at Cerritos Community College (the College), which is operated by Cerritos Community College District (the District). Plaintiff sued defendants and another participant in the class named Kenny Montes for, inter alia, negligence. The Foundation and the District moved for summary judgment, citing a waiver signed by plaintiff. The trial court granted summary judgment. We affirm.

II. BACKGROUND

A. Factual Background

The Foundation is an organization sponsored by motorcycle manufacturers that offers classes to new and experienced motorcycle riders. Plaintiff alleged he attended one such class on February 16, 2014, at the College campus. While the class was in session, Montes struck plaintiff's motorcycle while plaintiff was on it, causing injury to plaintiff's leg.

Two days before the class, plaintiff signed a form entitled **"CMSP MOTORCYCLE SAFETY COURSE WAIVER & INDEMNIFICATION"** The most relevant paragraphs of the waiver state:

"I, on behalf of myself, my personal representatives and my heirs, hereby assume all risks and all responsibility, and agree to release the Safety Course Providers [including the Foundation and the College] for any

injuries, losses and/or damages, including those caused solely or in part by the negligence of the Safety Course Providers, or any other person. . . .

“[¶] . . . [¶]

“I HAVE READ THIS RELEASE AGREEMENT AND BY SIGNING BELOW I AGREE TO ASSUME ALL RISKS AND RELEASE THE ABOVE-NAMED SAFETY COURSE PROVIDERS FROM LIABILITY FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH CAUSED BY NEGLIGENCE OR ANY OTHER CAUSE.

“I have had the opportunity to ask any questions about the above waiver and release and I understand its terms and meaning.”

(Bold and upper case in original).

Plaintiff is fully fluent in English, but claims he was rushed when he signed the waiver and did not have a chance to read it.

B. Operative Complaint and Summary Judgment Motion

On February 18, 2015, plaintiff filed a complaint against defendants and Montes¹ for negligence, gross negligence,² negligent entrustment, and negligent training and supervision. Plaintiff filed the operative pleading on October 13, 2015. On October 29, 2015, defendants moved for summary judgment.

¹ Montes is not a party to this appeal.

² Gross negligence is not a separate cause of action from negligence. (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 552, fn. 3.) Rather, gross negligence is distinct from ordinary negligence by degree. (*Anderson v. Fitness International, LCC* (2016) 4 Cal.App.5th 867, 881.) For ease of reference, we will refer to the cause of action as gross negligence.

They asserted the waiver signed by plaintiff barred all of the causes of action. Plaintiff asserted the gross negligence cause of action survived, citing the allegations in the first amended complaint. He also argued the waiver was unenforceable because of fraud under Civil Code section 1571. Finally, he contended the waiver was unenforceable as a matter of public policy, citing *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 (*Tunkl*).

On January 15, 2016, the trial court issued its ruling and granted defendants' summary judgment motion. As to plaintiff's first argument, the court found plaintiff failed to provide any evidence indicating the existence of a gross negligence cause of action. The court also found plaintiff failed to demonstrate that the waiver should be void because of fraud. The court found failure to read the waiver was not a basis to find fraud.³ Finally, the trial court determined a motorcycle safety training class is not the type of activity that implicates a public interest against an exculpatory clause. Judgment was entered February 16, 2016. This appeal followed.⁴

³ Plaintiff did not appeal summary adjudication as to the fraud argument. The argument is thus waived. (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1511.)

⁴ As pointed out by defendants, plaintiff appeals from the order granting summary judgment, not the judgment itself. The order granting summary judgment is nonappealable. (*Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 14, fn. 1; *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) However, the Court of Appeal has discretion to construe an appeal taken from an order granting summary judgment as an appeal from the judgment. (*Kasparian v. AvalonBay*

III. DISCUSSION⁵

A. *Standard of Review*

“[F]rom 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. That is because of the general principle that a party who seeks a court’s action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of

Communities, supra, 156 Cal.App.4th at p. 14, fn. 1; *Levy v. Skywalker Sound, supra*, 108 Cal.App.4th at p. 761, fn. 7; see Cal. Rules of Court, rule 8.104(d)(2) [“The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.”].) In the interests of justice, we will exercise our discretion and construe the appeal as an appeal from the judgment.

⁵ Defendants urge us to strike plaintiff’s brief and/or ignore the points he makes in it as having been waived because it fails to comply with California Rules of Court, rule 8.204(c). While we agree that the opening brief is defective because it does not provide citations to the record, we will disregard the noncompliance given that such references to the record are set forth in plaintiff’s reply brief.

material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . [¶] A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] [Fns. omitted.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851; see *Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 877-878.)

We review an order granting summary judgment de novo. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court’s stated reasons for granting summary judgment are not binding because we review its ruling not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco, supra*, 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, disapproved on a different point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.) These are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

B. Summary Judgment Motion

Defendants asserted the waiver and release signed by plaintiff barred all of plaintiff’s causes of action. Under the terms

of the waiver, plaintiff released defendants from all injury caused by their negligence or the negligence of others. Defendants have met their initial burden of production. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) The burden shifts to plaintiff to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 850.)

C. Gross Negligence

Plaintiff contends the gross negligence cause of action survives the waiver. However, plaintiff's only document in support was the unverified first amended complaint. A party cannot rely on its own pleadings as evidence to support or oppose a summary judgment motion. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7.) Code of Civil Procedure section 437c, subdivision (b)(1) requires the opposing party to demonstrate a triable issue of material fact by "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1290.) Plaintiff has failed to demonstrate a triable issue of material fact exists for gross negligence. Defendants are entitled to judgment as a matter of law as to that cause of action. (Code Civ. Proc., § 437c, subd. (c).)

D. Unenforceable as Against Public Policy

Plaintiff also contends the waiver is unenforceable as against public policy, citing *Tunkl*. Civil Code section 1668 provides, "All contracts which have for their object, directly or

indirectly, to exempt any one 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.” Numerous cases have found Civil Code section 1668 does not apply to exemptions from liability for ordinary negligence if the matter does not involve the public interest. (See, e.g., *Tunkl, supra*, 60 Cal.2d at p. 96 [“The cases have consistently held that the exculpatory provision may stand only if it does not involve ‘the public interest.’”]; *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, 1258, 1259 [release absolved ski resorts from liability for ordinary negligence; courts consistently do not apply *Tunkl* to recreational sports context]; *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 716.)

There are six characteristics typical of contracts affecting the public interest: “[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards. [4] 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. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence. [6]

Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.’ ([*Tunkl, supra*, 60 Cal.2d] at pp. 98-101, fns. omitted.)” (*Henriouille v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 518.)

Plaintiff asserts all six characteristics appear here. We disagree. Applying the *Tunkl* factors here, there are several distinctions. A motorcycle riding training class is not subject to a high level of public regulation, unlike the medical and hospital services provided in *Tunkl, supra*, 60 Cal.2d at page 101. Also, a motorcycle riding training class is not an activity of great importance to the general public and is not a matter of necessity. The class was not mandatory for plaintiff to lawfully ride a motorcycle.⁶ A motorcycle riding training class can hardly be considered essential. “[U]nless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. ‘The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and . . . should be exercised only in cases

⁶ The trial court referred to plaintiff’s request for judicial notice when determining defendants were not the only entities offering a motorcycle riding training class; and that it was not mandatory for plaintiff to take such a course for a motorcycle license. Plaintiff’s request for judicial notice is not in the record before us. A trial court’s judgment is presumed correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Failure to provide an adequate record on an issue requires the issue be resolved against appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Thus, we find the court’s findings based on plaintiff’s request for judicial notice are undisputed.

free from doubt.”” [Citations.]” (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777, fn. 53.)

Plaintiff has failed to meet his burden of production. Defendants are entitled to judgment as a matter of law on all of plaintiff’s causes of action. (Code Civ. Proc., § 437c, subd. (c).)

IV. DISPOSITION

The judgment is affirmed. Defendants, Motorcycle Safety Foundation, Inc. and Cerritos Community College District, may recover their costs on appeal from plaintiff John Paul Arneson.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief pursuant to article VI, section 6 of the California Constitution.