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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BRADFORD DAVID JONES, et al., Plaintiffs and Appellants, v. THE BARGE, LLC, et al., Defendants and Respondents.	B265456 Los Angeles County Super. Ct. No. NC044616

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Reversed with directions.

Alderlaw, Michael Alder, Lyssa A. Roberts and Cioffi C. Remmer for Plaintiffs and Appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, Ian A. Stewart, Spencer Davidson and Robert Cooper for Defendants and Respondents.

INTRODUCTION

Bradford David Jones and his son Forbes Bradford Jones[1] collided while riding jet skis—Bradford was injured in the collision. Bradford, Forbes, and Bradford's wife (Maria Jones) sued The Barge, LLC and David Hubert for negligence and other tort claims. The trial court granted summary adjudication in Hubert's favor on three of the four causes of action, finding that Bradford and Forbes released Hubert from liability when they rented jet skis from The Barge, LLC. After plaintiffs dismissed the remaining cause of action, the court entered judgment for Hubert and The Barge, LLC.

Plaintiffs contend the court erred by granting summary adjudication because Hubert is not a party to the releases and there is no evidence that he owns The Barge, LLC, the releases are unenforceable as a matter of law, and a triable issue of fact exists on the gross negligence question. For his part, Hubert contends the appeal must be dismissed as untimely, and in any event the trial court's ruling was correct. We conclude the appeal is timely, and Hubert did not meet his initial burden of demonstrating that the releases in favor of The Barge, LLC applied to him. We therefore reverse with directions.

FACTS AND PROCEDURAL BACKGROUND

1. The Parties, the Releases, and the Accident

Hubert owns The Barge, a sole proprietorship engaged in the business of renting personal watercrafts (PWC), commonly

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[1] For ease of reference, we sometimes refer to persons sharing the same last name by their first names. We refer to Bradford, Forbes, and Maria collectively as plaintiffs.

known as jet skis. Hubert acquired the business in 2006 and became the sole owner in 2010. When he purchased the business in 2006, it was a partnership. Although Hubert purchased the business from Leslie Lieberman, her brother was "a big part of the deal." After he purchased it, Hubert renamed the business The Barge Watercraft Rentals.

On July 2, 2012, Bradford and his 16-year-old son Forbes rented jet skis from The Barge, LLC. Bradford had ridden jet skis in the past, but Forbes had not. Before renting the equipment, Bradford confirmed with attendants that Forbes was old enough to rent a jet ski and would be taught "everything he need[ed] to know" to operate it.

Bradford signed identical documents, one for himself and one for Forbes, releasing The Barge, LLC from liability. The documents were double-sided. On one side was a release (Release); on the other was a Use Agreement. Bradford signed his own Release and Use Agreement using his own name. Bradford signed Forbes's Release signing Forbes's name. Bradford signed Forbes's Use Agreement using his (Bradford's) own name.

The Release stated in relevant part as follows:

> **"ASSUMPTION AND ACKNOWLEDGEMENT OF RISKS AND RELEASES OF LIABILITY AGREEMENT**
>
> In consideration of being allowed to participate in water sports events and activities and/or being provided with water sports recreational property or services, for myself and any minor children for whom I am parent, legal guardian or otherwise responsible, and for me/our heirs, personal representatives or assigns:

(1) ACKNOWLEDGEMENT OF RISKS. I am aware that the use of a personal watercraft (pwc) or other supplemental equipment may involve certain risks and dangers. These risks may include but are no [*sic*] limited to (a) Changing water flow, tides, currents, wave action and ship wakes. (b) Collision with any other watercraft or any man-made or natural objects. (c) Wind sheer, inclement weather, lightning, variances and extremes of wind, weather and temperature. (d) My sense of balance, physical condition, ability to operate equipment, swim and/or follow directions. (e) Capsizing, sinking or other hazard which results in wetness, injury, exposure to the elements, immersion in cold water, hypothermia, swallowing water and/or drowning. (f) The presence of insects and exposure to dangerous marine life, exposure to pollution, bacteria and other unhealthy environmental conditions.
(g) Equipment failure or operator error. (h) Heat or sun related injuries or illnesses, including sunburn, sun stroke, or dehydration. (i) Fatigue, chill and/or dizziness which may diminish your reaction time and increase the risk of an accident." [¶] . . . [¶]

After paragraphs indicating the signatory expressly assumed the risks of participation and agreed to wear a flotation device, the document stated:

"(3) RELEASE. I hereby release The Barge, LLC, Yamaha Motor Corp., BRP USA, Inc., City of Avalon, its principals, directors, officers, agents, employers, and volunteers, their insurers and each and every land owner, municipality and/or government agency upon whose property an activity is conducted ('owner') and their insurers, if and (Collectively 'Releases') FROM ANY AND ALL LIABILITY OF ANY NATURE FOR ANY AND ALL INJURY OR DAMAGE (INCLUDING DEATH) TO ME OR MY MINOR CHILDREN AND OTHER PERSONS as

a result of my participation in the activity. I further understand that by participating in this activity, I take the risk of being injured or killed through my own negligence, or that of my fellow sportsman, or the failure of the equipment provided to me.

I HAVE READ THIS ASSUMPTION AND ACKNOWLEDGMENT OF RISKS AND RELEASE OF LIABILTY AGREEMENT. I UNDERSTAND THAT BY SIGNING THIS AREEMENT, I AM WAIVING VALUABLE LEGAL RIGHTS, INCLUDING ANY AND ALL RIGHTS THAT I MIGHT HAVE AGAINST THE OWNERS, THE OPERATOR NAMED ABOVE, OR THEIR EMPLOYEES, AGENTS, SERVANTS OR ASSIGNS."

Beneath the Release, and separated from it by a black line, was a section entitled "RENTER'S OBLIGATIONS." That section confirmed, among other things, that the renter would operate the equipment in strict compliance with all safety and operating procedures and instructions given by The Barge, LLC employees; that a minor would under no circumstances operate the equipment; and that renters would not operate the equipment while under the influence. Subdivision (c) stated: "I hereby assume responsibility for all persons in my party. I am at least 18 years of age, in good health, not under any influence of alcohol or drugs, and capable of safely operating the equipment. I agree on behalf of myself, and all members of my party for whom I am acting as agent, to be bound by all the terms and condition [sic] of this agreement." At the bottom of the page was a signature block, following the statement "I FULLY UNDERSTAND THIS CONTRACT AND AM SIGNING THIS ON MY OWN FREE WILL."

The flip side of the document was entitled "PERSONAL WATERCRAFT – USE AGREEMENT." It contained four sections, separated by black lines, with capitalized, underlined headings for "terms of the agreement," "responsibility for damage to equipment," "list of charges for damage [sic] equipment," and "important safety considerations & rules." Among other things, by signing the Use Agreement renters promised to follow directions and safety rules, exercise good judgment, maintain a minimum distance of 600 feet from any other personal watercraft, and travel at the lowest possible speed when approaching, departing, or operating the jet ski within 600 feet of the "sports float." The agreement stated: "The Barge, LLC has no way to determine either the level of ability, or the full extent of knowledge of the renter, and I, the renter, accept full responsibility for my own actions and by any of the below-named authorized operators and passengers (minors) for whom I take responsibility, in use of the equipment."

Just above the signature block the Use Agreement stated: "BY SIGNING THIS USE AGREEMENT, YOU HAVE AGREED TO THE RULES AND REGULATION ABOVE" and "I FULLY UNDERSTAND THIS CONTRACT AND AM SIGNING THIS ON MY OWN FREE WILL."

After signing the documents, Bradford, Forbes, and other renters traveled by water taxi to a barge. Once there, customers were met by two individuals, Michael Fekete and Stephen Hubert (Hubert's nephew), and provided with life jackets.

Stephen gathered the renters, including Bradford and Forbes, around him for a safety presentation and instructions. Stephen informed renters that, among other things, jet skis do not have brakes, so renters should not put themselves in a

position where they needed to use brakes; they should maintain a minimum distance away from other jet skis or watercraft; the jet skis could not be accelerated within 200 yards around the barge; waving one's arms above the head was the universal distress signal; and racing was permitted if renters remained parallel to each other at a sufficient distance and broke outward. After soliciting questions, Stephen directed the customers to the jet skis. Stephen boarded one of the jet skis to demonstrate the location of the various controls and operation of the craft. Stephen showed renters the start/stop switch and how to start the jet ski. He explained use of the "thumb-trigger accelerator," and the fact that the harder one squeezes the throttle, the faster the jet ski travels. He explained the jet ski's key would be clipped to the operator's life jacket and would act as a "kill switch," stopping the jet ski if the operator fell off. He advised that renters should take time to acclimate to the speed and turning capability of the craft before operating it too aggressively. Further, he explained that a jet ski is jet-powered, and will turn very sharply while the gas is engaged but will turn very poorly if the throttle is released. Stephen described what to do if seaweed became stuck in the jet ski, what to do if the jet ski flipped over, how to mount the jet ski after falling off, and how to return the jet ski at the conclusion of the rental period.

Thereafter, the customers were allowed to mount the jet skis. One of the instructors spent half a minute showing Forbes, one-on-one, how to steer and where the accelerator was. For the next two minutes, Forbes familiarized himself with the jet ski's controls and attempted to get a feel for the jet ski, driving slowly in circles. He also set up a GoPro camera.

Two minutes later, Bradford entered the water and drove past Forbes on Forbes's left. Forbes followed his father, expecting that he and Bradford would talk about what they wanted to do while in the water. After several seconds, Bradford turned to the right and then pivoted sharply to his left, bringing his jet ski to a stop facing back towards Forbes, directly in Forbes's path of travel. Bradford did not know where Forbes was at the time, except that Forbes was behind him. Forbes, who was surprised by his father's sharp stop and turn, collided with Bradford's jet ski, causing Bradford to sustain injuries.

2. Legal Proceedings

Bradford, Forbes, and Bradford's wife filed suit against The Barge, LLC and David Hubert, in October 2012.[2] The Barge, LLC and Hubert were served in 2012. The operative second amended complaint, filed in October 2013, alleged causes of action for negligence and/or recklessness, negligent infliction of emotional distress, negligent misrepresentation, and loss of consortium. The pleading alleged that defendant The Barge, LLC "is a California company doing business in Los Angeles County, California, and at all relevant times was a rental company that rented personal water crafts." Defendant Hubert "was the owner of the personal water crafts being operated by" Forbes and Bradford. Hubert's answer alleged numerous affirmative defenses, including assumption of the risk and waiver and release.

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[2] Joe John Guadagnino, Hubert's former business partner, was also sued. He was not named as a defendant in the second amended complaint, however.

In August 2014, Hubert moved for summary judgment or, in the alternative, summary adjudication against plaintiffs. Although the motion was brought only by Hubert, the first page of the motion stated that Hubert was "also sued as 'The Barge, LLC.' " The last page of the motion,[3] however, requested summary judgment or summary adjudication in favor of "Defendant David Hubert." Hubert asserted that the motion should be granted because (1) Bradford and Forbes released Hubert from liability for negligence; (2) Hubert cannot be liable for ordinary negligence due to the Release; (3) Hubert was not grossly negligent; and (4) the negligent misrepresentation claim fails for lack of evidence. Plaintiffs countered that (1) the releases did not bar their claims against Hubert because Hubert was not a party to the releases; (2) there was no valid signature from Forbes; (3) the Release signed by Bradford was invalid; (4) there was evidence of gross negligence; (5) under maritime law, assumption of risk is not a complete bar to recovery; and (6) triable issues of fact existed regarding whether there was negligent misrepresentation.

On February 17, 2015, the trial court granted summary adjudication on the negligence/recklessness, negligent infliction

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[3] There is no evidence in the record that The Barge, LLC intended to join in Hubert's motion through a notice of joinder. Regardless, in the summary judgment context, a notice of joinder to another party's motion is procedurally improper. (*Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 30 [individual attorney was not entitled to summary judgment, since his notices of joinder were not motions seeking judgment in his favor as required by Code Civ. Proc., § 437c].) Although The Barge, LLC is a separately named defendant, and did not move for summary judgment or summary adjudication, the trial court entered judgment for *both* defendants based on Hubert's motion.

of emotional distress, and loss of consortium causes of action. The court reasoned that the Release signed by Bradford was valid and barred plaintiffs' claims for ordinary negligence. The court also found that because "Hubert is the owner of The Barge, LLC," and "The Barge, LLC is a fictional business name under which [] Hubert conducts his PWC rental operation," the Release was effective as to Hubert as well. The loss of consortium claim failed because it flowed from the negligence claim. There was no evidence of gross negligence, because the evidence showed Hubert's employees instructed plaintiffs on use of the jet skis and went over the jet ski's controls with Forbes individually. The court denied the motion as to the negligent misrepresentation claim.

Thereafter, plaintiffs voluntarily dismissed the negligent misrepresentation cause of action without prejudice, and appealed the trial court's ruling. On April 4, 2016, the court entered judgment.

DISCUSSION

1. The appeal is timely.

We first address Hubert's contention that the appeal must be dismissed because the notice of appeal was untimely.

1.1. Additional Facts

As noted, the trial court granted Hubert's motion for summary adjudication on February 17, 2015. On April 1, 2015, plaintiffs filed a request for dismissal without prejudice of their sole remaining cause of action for negligent misrepresentation. The superior court clerk entered the dismissal of that cause of action the same day. On April 20, 2015, plaintiffs served notice of entry of dismissal of the negligent misrepresentation cause of

action. On July 14, 2015, plaintiffs filed a notice of appeal. On November 23, 2015, this court issued an order requiring plaintiffs to show cause why their appeal should not be dismissed because they purported to appeal from a nonappealable order. After receiving and considering the parties' briefing, on March 9, 2016 this court concluded the April 1, 2015 voluntary dismissal of the negligent misrepresentation cause of action did not create a final judgment, and ordered plaintiffs to file a copy of a "Judgment after Order Granting Summary Judgment/Summary Adjudication and Dismissal of the Final Cause of Action" within 30 days. On April 4, 2016 plaintiffs filed and served the judgment in the action as ordered.

1.2. Discussion

Plaintiffs' notice of appeal was not late. Prior to entry of the April 2016 judgment, there was no appealable judgment or order in the case. An order granting summary adjudication is not appealable. (*Tucker Ellis LLP v. Superior Court (Nelson)* (2017) 12 Cal.App.5th 1233, 1240; *Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 503–504 [generally, orders granting summary adjudication are interlocutory and not appealable].) Nor was the dismissal of the remaining cause of action an appealable judgment. To be sure, Code of Civil Procedure section 581d provides that a written order of dismissal signed by the court constitutes a judgment and is effective for all purposes when entered. But the April 1, 2015 request for dismissal was not signed by the court and therefore did not constitute a judgment under section 581d. (*Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 768 ["for a 'dismissal' to 'constitute [a] judgment[] and be effective for all purposes'—including the

right to appeal—it 'shall be in the form of a written order *signed by the court* and filed in the action' "].)

Because no appealable judgment existed prior to April 4, 2016 (the date judgment was eventually filed), plaintiffs' notice of appeal was premature rather than untimely. The California Rules of Court "allow us to '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.' (Cal. Rules of Court, rule 8.104, subd. (d)(2).)" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1189.) Because an appealable judgment was later entered, the notice of appeal was merely premature and we liberally construe the appeal as having been taken from the judgment. (*Id.* at pp. 1189-1190; Cal. Rules of Court, rule 8.104(d) [notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment]; *Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1090, fn. 4.)

Hubert argues that an appealable judgment was created when, after the grant of summary adjudication, plaintiffs filed a request for dismissal without prejudice of their remaining cause of action. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105 [a dismissal without prejudice, "unaccompanied by any agreement for future litigation," creates "sufficient finality as to that cause of action so as to allow appeal from a judgment disposing of the other counts"].) He observes that plaintiffs asserted, in response to the order to show cause, that the voluntary dismissal was an appealable judgment, a proposition with which he agrees.

Even if the trial court's grant of summary adjudication, coupled with plaintiffs' request for dismissal of the single

remaining cause of action, gave rise to an appealable judgment in the instant matter, the notice of appeal was nonetheless timely. California Rules of Court, rule 8.104, provides that a notice of appeal must be filed no later than 60 days after service of a document entitled " 'Notice of Entry' of judgment" or a filed-endorsed copy of the judgment, *or* 180 days after entry of judgment, whichever is earlier. (Rule 8.104(a)(1).) Here, the record does not show that a "Notice of Entry of Judgment" or a filed-endorsed copy of such a judgment was served or filed by either the court clerk or a party before the notice of appeal was filed. The document served by plaintiffs on April 20, 2015 is captioned "Notice of entry of *dismissal* and proof of service," (italics added), *not* notice of entry of *judgment*. (Cf. *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 259–260 [where minute order granting anti-SLAPP motion was not entitled " 'notice of entry,' " it did not trigger 60-day time period to file notice of appeal].) The April 20, 2015 document gave notice that the negligent misrepresentation cause of action had been dismissed, not that judgment had been entered in the action. Therefore, even if an appealable judgment existed as of April 1, 2015, the applicable filing deadline was 180 days later, as set forth in rule 8.104(a)(1)(C). Plaintiffs' notice of appeal was filed on July 14, 2015, well within the 180-day limit.

2. Summary adjudication was improperly granted.

Having found the appeal timely, we turn to plaintiffs' contention that the court erred in finding that the Release in favor of The Barge, LLC shielded Hubert from liability.

2.1 Standard of Review

Summary judgment or summary adjudication is properly granted if there is no triable issue of material fact and the issues raised by the pleadings may be decided as a matter of law. (§ 437c, subd. (c); *Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 641; *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1290 [motions for summary adjudication are procedurally identical to motions for summary judgment].) A defendant meets his burden by showing that one or more essential elements of the plaintiff's cause of action cannot be established, or that there is a complete defense. (§ 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) "The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. [Citation.] If the defendant does not meet this burden, the motion must be denied." (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289–290.)

" 'The purpose of a summary judgment proceeding is to permit a party to show that material factual claims *arising from the pleadings* need not be tried because they are not in dispute.' [Citation.] Materiality depends on the issues in the case, and what matters are at issue is determined by the pleadings, the rules of pleadings, and the substantive law. [Citation.] *'The complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action.'* [Citation.]" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 172, (*Teselle*), italics added.) If the showing by the defendant does not support judgment in his favor, "the burden does not shift to the plaintiff and the motion must be denied without regard to

the plaintiff's showing." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534 (*Crouse*).)

"Summary judgment, although a very useful tool in litigation, is also a drastic remedy. Because of this, it is important that all of the procedural requirements for the granting of such a motion be satisfied before the trial court grants the remedy." (*Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, 1256; *Magana Cathcart McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106, 117.) One of the procedural requirements that must be satisfied is the filing of a separate statement of facts. " 'Facts not contained in the separate statements do not exist.' [Citation.]" *(Teselle*, *supra*, 173 Cal.App.4th at p. 175.) "The due process aspect of the separate statement requirement is self-evident—to inform the opposing party of the evidence to be disputed to defeat the motion." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337; *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 946.) The trial court cannot consider evidence that "not only was omitted from the separate statement, [but] also was not filed until after [plaintiff] had responded to the issues raised in the separate statement." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

On appeal following the grant of summary judgment or summary adjudication, we review the record de novo. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) We liberally construe the evidence in support of the party opposing the motion and resolve doubts concerning the evidence in favor of that party. (*Ibid.*)

2.2 Discussion

"A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release 'must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.' [Citation.]" (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356; *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1485 (*Cohen*).) Waiver and release forms are strictly construed against the defendant. (*Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738.) " 'If a release of all liability is given, the release applies to any negligence of the defendant,' " as long as the act of negligence is reasonably related to the object or purpose for which the release is given. (*Cohen, supra,* at p. 1485; *Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 722.) Whether a release is clear and unambiguous is a question of law. (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598; *Cohen,* at p. 1483.)

In this case, plaintiffs alleged in their complaint that defendant The Barge, LLC is a "California company." And it is undisputed that the Release signed by Bradford on his own and Forbes's behalf released The Barge, LLC "from any and all liability of any nature for any and all injury or damage" to Bradford and his minor children. Further, the Release states that by signing, the releasor "waiv[ed] valuable legal rights, including any and all rights that I might have against the owners, the operator named above, or their employees, agents, servants, or assigns." Because such language may be read as extending the Release to, for example, The Barge, LLC's agents, other tortfeasors could be shielded under the terms of that agreement.

Thus, to be to be entitled to summary adjudication on the ground that he was also exculpated by the Release in favor of The Barge, LLC, it was incumbent on Hubert to set forth in his separate statement of undisputed facts statements explaining his relationship with the released party and other defendant, The Barge, LLC, and why that relationship would have extended the terms of the Release to him. This could have been done, for example, by statements explaining that The Barge, LLC was not a separate legal entity, it was actually a sole proprietorship owned by Hubert in July 2012, or that Hubert did business as The Barge, LLC in July 2012 when the accident occurred.

Instead, in his separate statement of undisputed facts, Hubert averred the following:

"1. The Barge is a sole proprietorship owned by Defendant David Hubert, engaged in the business of renting PWCs to customers in Avalon, California;"

"2. Hubert acquired The Barge in April 2006 as a partnership, and he acquired sole ownership of the company in 2010;" and

"3. The Barge is open for business during the summer season, between April and September each year."

These undisputed facts do not address or mention the released entity (The Barge LLC), do not state that Hubert owned The Barge, LLC when the Release was signed in July 2012, do not state that Hubert did business under this entity's name, or that he acquired the entity or was assigned its rights under the Release before or after the accident. Even as to The Barge, the separate statement does not state that it is the same entity mentioned in the Release and Use Agreement. Because Hubert failed to address his relationship with the sued and released entity, The Barge, LLC, the burden of production never shifted to

plaintiffs and, therefore, Hubert's motion should have been denied. (See *Crouse*, *supra*, 67 Cal.App.4th at p. 1534 ["if the showing by the defendant does not support judgment in his favor, the burden does not shift to the plaintiff and the motion must be denied without regard to the plaintiff's showing."].)

Hubert argues that the fact the released entity is The Barge, LLC is inconsequential because plaintiffs agreed to release The Barge, and that entity is a sole proprietorship owned by Hubert. Hubert's argument misses the mark. First, as just discussed, the undisputed facts do not address or mention the released entity (The Barge, LLC), or explain Hubert's relationship with that entity, a separately named defendant. (See *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395 ["But technical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers."].)

Second, words have meaning; what is stated or not stated has significance, especially in the context of granting a summary adjudication motion. Contrary to Hubert's view that his separate statement of material facts was close enough to afford plaintiffs due process, the law clearly provides that all documents are to be strictly construed against the moving party and summary adjudication should not be granted unless, under no hypothesis, is there a triable issue of material fact. Nor has Hubert argued that he failed to include "LLC" in his separate statement due to a mistake or typographical error. This omission is significant because when he acquired the business in 2006 it was a partnership, and Hubert renamed it The Barge Watercraft Rentals, not The Barge, LLC. Put another way, Hubert's

omission supports an inference that The Barge, LLC is a separate legal entity as alleged in the complaint.

Third, while a sole proprietorship is not a legal entity separate from its individual owner (*Providence Washington Ins. Co. v. Valley Forge Ins. Co.* (1996) 42 Cal.App.4th 1194, 1199; *Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th 694, 701 (*Ball*)), an LLC, or limited liability company, *is* a distinct legal entity and its members have limited liability for the entity's debts and obligations.[4] (*Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 852.) And a limited liability company may sue *and be sued*. (Corp. Code, § 17701.05.) Here, plaintiffs sued The Barge, LLC—a California company—and Bradford and Forbes released The Barge, LLC. Plaintiffs did not sue or release The Barge, LLC doing business as David Hubert, or David Hubert doing business as The Barge, LLC. And Hubert has not shown that he is legally indistinguishable from The Barge, LLC.[5]

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[4] *Ball* is also inapt since it was decided in the context of a demurrer. There, the issue was whether a plaintiff who contracts under a name different from that listed in his license was barred from pursuing an action to collect for work performed under that contract. (*Ball*, *supra*, 196 Cal.App.4th at p. 697.) In this case, by contrast, the issue is whether a defendant was entitled to summary adjudication because plaintiffs' claims are barred under a release agreement naming an entity other than the defendant, and that entity is not referenced by the defendant in his separate statement. (Cf. *Montgomery Sansome LP v. Rezai* (2012) 204 Cal.App.4th 786, 795 [although defendants submitted evidence showing that the contracting entity was a separate entity from the licensed entity, the trial court erred by granting summary judgment].)

[5] Even if The Barge, LLC did not exist as of July 2012, there is no legal analysis in Hubert's brief as to why he was entitled to summary adjudication under a liability release agreement with a non-existent or

For these reasons, Hubert's motion for summary adjudication should have been denied in its entirety. In light of our conclusion, we do not reach plaintiffs' other arguments.

DISPOSITION

The judgment is reversed. The trial court is directed to enter a new order denying Hubert's motion for summary adjudication in its entirety and to conduct further proceedings consistent with this opinion. Plaintiffs shall recover their costs on appeal.

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LAVIN, J.

I CONCUR:

EDMON, P. J.

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defunct entity. In any event, an agreement insulating one from liability for his own negligence must "specifically so provide and is strictly construed against the party asserting the exemption." (*Viotti v. Giomi* (1964) 230 Cal.App.2d 730, 739.)

DHANIDINA, J., concurring and dissenting:

I concur that plaintiffs' appeal is timely, for the reasons stated in the majority opinion. However, I respectfully disagree with the majority's conclusion that the trial court improperly granted defendant David Hubert's motion for summary adjudication. In my view, the releases signed by Bradford David Jones (Bradford) and Forbes Bradford Jones (Forbes), bar plaintiffs' ordinary negligence claims, and Hubert demonstrated the absence of a triable issue of material fact as to gross negligence. Accordingly, I would affirm the trial court's order granting summary adjudication.

1. *The Releases signed by Bradford bar plaintiffs' ordinary negligence claims*

The majority's analysis is anchored by its reasoning that "plaintiffs sued The Barge, LLC–a California company–and Bradford and Forbes released The Barge, LLC. . . . And Hubert has not shown that he is legally indistinguishable from The Barge, LLC." The majority faults Hubert for failing to adequately address, in his moving papers, the relationship between himself and "The Barge, LLC," omissions which it finds fatal to the summary adjudication motion. In my view, this analysis misses the boat.

These are the undisputed facts: Bradford and Forbes rented jet skis ("PWCs") on July 2, 2012, from a rental company operating out of Catalina, owned by defendant Hubert, as a sole proprietorship. That the company was owned by Hubert at the time of the rental and execution of the Releases is confirmed by plaintiffs' complaint, which was brought against Hubert, as well as "The Barge, LLC." The complaint alleged that "at all relevant times," Hubert "was the owner of the personal water crafts being

operated by" plaintiffs; Bradford "had rented the two [jet skis] from Defendants, and each of them;" and "Defendants, and each of them, were in the business of renting jet skis to the general public." A defendant moving for summary adjudication may rely on the allegations of plaintiff's complaint, " ' "which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues." [Citations.]' " (*Mark Tanner Construction, Inc. v. HUB Internat. Ins. Services, Inc.* (2014) 224 Cal.App.4th 574, 586-587; *Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324.) Indeed, if Hubert were *not* the rental company's owner, plaintiffs' complaint against him would have been curious. And, plaintiffs did not dispute Hubert's factual assertions, in his separate statement, that "The Barge is a sole proprietorship owned by Defendant David Hubert," and that "Hubert acquired The Barge in April 2006 as a partnership, and he acquired sole ownership of the company in 2010."

Hubert's failure to explain his relationship with "The Barge, LLC" in his moving papers is unsurprising, because the undisputed facts showed the jet ski rental company was never a limited liability company and there was never a disputed issue of material fact about who owned it at the time the accident occurred. In a summary judgment motion, the issues are framed by the pleadings. " '[A] summary judgment motion is directed to the issues framed by the pleadings. [Citations.] *Those are the only issues a motion for summary judgment must address*.' " (*Van v. Target Corp.* (2007) 155 Cal.App.4th 1375, 1387, italics added; *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444 [the pleadings play a key role in a summary judgment motion and set the boundaries of the issues

to be resolved].) Given that the complaint acknowledged Hubert was the owner of the jet skis and had rented them to plaintiffs, there was no reason for the summary adjudication motion to elaborate upon the relationship between Hubert and the non-existent limited liability company. Even more important, in support of his separate statement Hubert cited to his own deposition, wherein he testified that he purchased the jet ski rental company in 2006 and named it "The Barge Watercraft Rentals." When asked, "*At any time*, has the Barge Watercraft Rentals been anything other than a . . . sole proprietorship?" Hubert replied that the company was originally a partnership and he became sole proprietor in 2010. (Italics added.) In other words, the company was never a limited liability company. Hubert also confirmed during his deposition that at the time of the accident, the company was a sole proprietorship, and he was doing business as "The Barge." *None of this evidence was disputed by plaintiffs.* Indeed, plaintiffs asserted below, in their opposition to the summary adjudication motion, that "Since 2010, Defendant David Hubert has owned and operated a personal watercraft . . . rental facility in Avalon, California;" that Bradford and Forbes "decided to rent [jet skis] from Defendant while they vacationed in Catalina;" and that " 'The Barge, LLC,' . . . does not exist." Likewise, in their briefing before this court, plaintiffs aver that " 'The Barge, LLC,' " is "an entity that simply does not exist" and "[t]here is no legal entity known as 'The Barge LLC.' " Thus, the majority's concern that Hubert failed to explain that he owned "The Barge, LLC" or elaborate on his relationship with that entity, is misplaced.

Given the foregoing, the majority's suggestion that Hubert could have cured the purported flaws in his summary judgment

motion by explaining that The Barge, LLC was not a separate legal entity, is unwarranted. Such an addition would have told us nothing we do not already know from the complaint, the undisputed facts, and the evidence offered in support of the summary judgment motion: the rental company was a sole proprietorship owned by Hubert, not a limited liability company, when Bradford signed the Releases and the accident occurred. At the end of the day, the pertinent legal question remains the same: did Hubert's use of an inaccurate corporate designation – "LLC" – after his company's name on the Releases render them inapplicable to him?

The majority emphasizes the importance of the separate statement of facts in a summary judgment motion, and observes that "technical compliance" with the procedural requisites for such motions is required. But the case cited for the latter proposition, *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389 (*Bahl*), did not hold that a hypertechnical reading of the undisputed facts is mandated in the fashion the majority suggests. Instead, *Bahl* concluded the trial court's denial of a continuance, requested because discovery was ongoing and the defendant produced voluminous discovery after plaintiff's opposition was filed, infringed plaintiff's right to a jury trial – circumstances entirely distinct from those here. (*Id.* at p. 391.) Nothing in *Bahl* suggests a party's failure to address an issue not framed by the pleadings, on an essentially undisputed point, constitutes noncompliance with the requirements of Code of Civil Procedure section 437c. To the extent the majority suggests that a constricted reading of the separate statement is required simply because summary judgment is a drastic remedy, I disagree. Our Supreme Court has explained that summary

judgment "is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542.) The purpose of summary judgment is to " 'provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.' [Citations.]" (*Ibid.*; see *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69-70 [summary judgment provides the court and parties with a vehicle to weed the judicial system of an unmeritorious case; it "is in the public interest, including the court's interest in the efficient and economical administration of justice and the parties' interest in the prompt and affordable resolution of unmeritorious cases, to expeditiously rid the judicial system of a case in which a party is entitled to judgment as a matter of law, without requiring protracted litigation and a trial on the matter"].)

Here, based on the undisputed facts as set forth in Hubert's separate statement and the supporting evidence, the Releases covered Hubert. It is well settled that a sole proprietorship " 'is *not* a legal entity itself. Rather, the term refers to a natural person who *directly* owns the business . . . .' [Citation.]" (*Providence Washington Ins. Co. v. Valley Forge Ins. Co.* (1996) 42 Cal.App.4th 1194, 1199; *Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th 694, 701 ["a sole proprietorship is not a legal entity separate from its individual owner"].) Thus, any release of liability applicable to the jet ski company also covered Hubert. (See *Providence Washington Ins. Co.*, at pp. 1199-1200 [automobile registered in a sole proprietor's trade name was owned by the sole proprietor].) It is also settled that the use of a fictitious business name does not create a separate legal entity.

(*Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348; *Montgomery Sansome LP v. Rezai* (2012) 204 Cal.App.4th 786, 798 ["the use of a fictitious business name or the filing of an FBN statement does not itself *create* a separate entity"]; *Ball v. Steadfast-BLK*, *supra*, 196 Cal.App.4th at p. 701 [the business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner].) It is undisputed that Hubert was doing business as "The Barge." Thus, absent the "LLC," there is no question the Releases covered Hubert.

Plaintiffs point to no authority persuasively demonstrating that the inclusion of the initials "LLC" after The Barge's name on the Releases – either as a trade name or a typographical error – invalidate them as to Hubert, and I am not persuaded that, on the facts of this case, this technical error has such an effect. *Ball v. Steadfast-BLK*, *supra*, 196 Cal.App.4th 694, is instructive. There, a contractor, Ball, sued the defendant, alleging nonpayment for construction services rendered. Ball had been issued a contractor's license as a sole owner, under the fictitious business name "Clark Heating and Air Conditioning." (*Id.* at pp. 697, 701.) Ball contracted with the defendant under the transposed name " 'Clark Air Conditioning & Heating.' " (*Id.* at p. 697.) The defendant successfully demurred on the ground "Clark Air Conditioning & Heating" was unlicensed, and therefore Ball was statutorily barred from recovery because he was an unlicensed contractor.[1] (*Id.* at pp. 698-699.) The appellate court reversed, explaining: "The trial court has confused the individual owner to whom the contractor's license

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[1] Business and Professions Code section 7031, subdivision (a) bars actions seeking compensation for illegal unlicensed contract work. (*Ball v. Steadfast-BLK*, *supra*, 196 Cal.App.4th at p. 697.)

was issued with the name under which the individual conducted his contracting business. Ball was licensed as a 'Sole Owner,' and not as a partnership or corporate entity, pursuant to the classification system of [Business and Professions Code] section 7065." (*Id.* at p. 697, fn. omitted.) Because Ball was licensed and entitled to perform work under the name Clark Heating and Air Conditioning, his "failure to contract in the exact same name set forth in his license is, at most, grounds for disciplinary action" and did "not bar him from recovering for work performed under the contracts." (*Id.* at pp. 697-698.) "[L]ike Clark Heating and Air Conditioning, Clark Air Conditioning & Heating is legally indistinguishable from *Ball*." (*Id.* at p. 701.) The " 'name discrepancy' " was at most a technical violation and did not defeat Ball's claim. (*Id.* at pp. 700, 701.)

Also instructive is *Montgomery Sansome LP v. Rezai*, *supra*, 204 Cal.App.4th 786. There, a contractor's license was issued to " 'Montgomery Sansome LTD,' " a limited partnership. (*Id.* at p. 789.) The company later filed a fictitious business name statement for " 'Montgomery Sansome Ltd. L.P.,' " a general partnership, and performed work for the defendants under that name. (*Id.* at p. 789.) When the defendants failed to pay, the company sued under the name "Montgomery Sansome LP." Defendants successfully moved for summary judgment on the ground Montgomery Sansome LP was not the real party in interest or a party to the contract; instead, Montgomery Sansome Ltd. LP – a general partnership and a separate legal entity – was, and it did not have a contractor's license. (*Id.* at pp. 790-791, 795.) The appellate court concluded summary judgment was improper. (*Id.* at p. 795.) The critical issue was whether the Montgomery Sansome entity that contracted with the defendants

was a separate legal entity from the licensed limited partnership. If so, then any claim for compensation would be barred by Business and Professions Code section 7031, and because the limited partnership was not the contracting party. (*Id.* at p. 797.) "On the other hand, if the entity that contracted with defendants is the same entity that held a license, then, under *Ball,* the use of slightly different names for that entity on different documents (Montgomery Sansome LP, Montgomery Sansome LTD, Montgomery Sansome Ltd. LP) would not bar its recovery under section 7031." (*Ibid.*) While some evidence suggested there were two separate entities, other evidence suggested the name "Montgomery Sansome Ltd. LP" was "not a reference to a separate entity but, instead, is a reference to the licensed entity." (*Id.* at p. 799.) "It . . . appears that [the general partner] . . . [was] just inconsistent regarding the exact name . . . used to refer to this limited partnership. This evidence supports an inference that the use of another slightly different name on the FBN statement . . . was also a reference to that same licensed entity, and that the designation of that entity as a general partnership, rather than a limited partnership, was a mistake." (*Id.* at p. 800.)

Here, the erroneous "LLC" designation after The Barge's name on the release does not provide safe harbor for the plaintiffs. *Ball* and *Montgomery Sansome* stand for the proposition that an inaccurate description of the nature of an entity, or a slight inconsistency in the entity's name on a legal document, may be insignificant when there is no genuine issue regarding which entity was being referenced. Here, "The Barge, LLC" could only have referred to the entity that rented the jet skis to the Joneses, that is, the entity owned as a sole

proprietorship by Hubert. There is no material question of fact regarding which entity was responsible for the jet ski rental, or which entity the parties intended the Releases to cover. Hubert's use of a fictitious business name – including his erroneous use of the "LLC" designation – did not create a separate legal entity. And, neither the majority nor plaintiffs explain how the corporate structure of the rental company, on the facts here, has any legal significance; whatever consequences an "LLC" designation might or might not have in other situations,[2] it is legally irrelevant here.

The majority also points out in a footnote that an agreement insulating one from liability for his own negligence must be strictly construed against the party asserting the exemption. I agree that this is a pertinent consideration. (See *Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738.) To be effective, "a release 'must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.' [Citation.]" (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356; *Lund*, at p. 738; *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1485.) However, the "release

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[2] An LLC, or limited liability company, "is a hybrid entity that offers certain advantages over corporations and partnerships by combining aspects of each. Like a corporation, an LLC is a distinct legal entity and its members (owners) have limited liability for the entity's debts and obligations; LLC's thereby provide an advantage over certain partnerships and sole proprietorships." (*Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 852.) Formation as an LLC may also have favorable tax consequences. (*Ibid.*) An LLC is formed in California by the filing of articles of incorporation with the Secretary of State. (*Id.* at p. 853.)

need not achieve perfection. [Citation.]" (*Benedek*, at p. 1356; *Cohen*, at p. 1485.) Here, the Releases clearly and unambiguously expressed plaintiffs' intent to release from liability the company from which they were renting the jet skis, *and* the company's owner. The language of the Releases is clear, comprehensive, and specific. They unambiguously and unequivocally shield The Barge "from any and all liability of any nature for any and all injury or damage" to Bradford and his minor children, that is, Forbes. (Full capitalization omitted.) In bold, capitalized typeface the Releases state that by signing, the releaser "waiv[ed] valuable legal rights, including any and all rights that I might have *against the owners*, the operator named above, or their employees, agents, servants or assigns." (Italics added.) It is undisputed Hubert was the owner of the company at the time of the rental and collision. There is no evidence plaintiffs thought they were releasing a different entity than Hubert's enterprise, and no hint they were misled or that the "LLC" designation in any way influenced either their decision to rent jet skis or sign the Releases. The Releases therefore clearly, unambiguously, and explicitly expressed the intent of the subscribing parties to release the rental company – whether denominated "LLC" or not – and its owner, Hubert, from liability. Accordingly, the Releases shielded Hubert from liability for the collision. (See, e.g., *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638; *Benedek v. PLC Santa Monica*, *supra*, 104 Cal.App.4th at pp. 1358, 1361; *Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 757.)

Plaintiffs' other arguments regarding the Releases' validity do not, in my view, hold water. Plaintiffs argue that there was "no valid signature" for Forbes, because Bradford did not sign Forbes's Release and Use Agreement. Because Forbes was a minor, plaintiffs contend, he was "unable to contractually waive any of his rights." (See Civ. Code, §1556; *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 818.) But Bradford admittedly signed Forbes's Use Agreement. He also signed Forbes's Release, albeit using Forbes's name rather than his own. Bradford testified at his deposition that the signature was his, "[s]igning for Forbes." In California, a parent may execute a release on behalf of his or her child. (*Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1120; *Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1565; *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 770 & fn. 30 (*City of Santa Barbara*).) Even if Bradford's signature on Forbes's Release was invalid because Bradford did not sign his own name, this is of no moment: the release Bradford signed for himself stated that he released the company from any and all liability of any nature, for any and all injury or damage "to me or my minor children." (Full capitalization omitted.)

Also without merit is plaintiffs' contention that the Releases are inapplicable because they do not cover Hubert's failure to properly train Forbes. The Releases expressly listed collision with other watercrafts, the ability to operate equipment, and operator error as risks involved in the sport. Injury related to a collision with another jet ski, whether due to operator error, inexperience, or inadequate training, was a risk reasonably related to the use of the jet ski and was therefore encompassed in the Releases. (See *Grebing v. 24 Hour Fitness USA, Inc.*, *supra*,

234 Cal.App.4th at p. 638.) Moreover, when a release expressly releases the defendant from any liability, as the Releases do here, it is not necessary that the plaintiffs have had specific knowledge of the particular risk that ultimately caused the injury. (*Ibid.*; *Benedek v. PLC Santa Monica*, *supra*, 104 Cal.App.4th at p. 1357; *Paralift, Inc. v. Superior Court*, *supra*, 23 Cal.App.4th at p. 757 [not every possible specific act of negligence by the defendant must be spelled out in the agreement or discussed by the parties].)

And, contrary to plaintiffs' argument, the Releases were sufficiently conspicuous and readable. To be enforceable, a release must be easily readable, with the operative language placed in a position that compels notice. "In other words, a release must not be buried in a lengthy document, hidden among other verbiage, or so encumbered with other provisions as to be difficult to find." (*Leon v. Family Fitness Center (#107), Inc.* (1998) 61 Cal.App.4th 1227, 1232.) These requirements were met here. The Releases are titled, in capital letters, "ASSUMPTION AND ACKNOWLEDGEMENT OF RISKS AND RELEASES OF LIABILITY AGREEMENT." (Bold & underlining omitted.) The "unmistakable focus of the document" is the release of liability arising from use of the jet skis. (See *Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 722.) The documents do not contain excessive information, but are straightforward and relatively uncomplicated. The Release and assumption of risk portions are highlighted by headings in all capital letters.

2. *Gross negligence*

An agreement to release a party from ordinary negligence is enforceable, but "an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy." (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 751; *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1081.) If Hubert were grossly negligent, therefore, the Releases would not preclude plaintiffs' claims. In my view, the trial court properly found there was no evidence of gross negligence and no triable issue of material fact on the question.

Ordinary negligence "consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm." (*City of Santa Barbara*, *supra*, 41 Cal.4th at pp. 753-754.) Gross negligence is defined as a want of even scant care or an extreme departure from the ordinary standard of conduct. (*Id.* at p. 754; *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186.) Whether gross negligence exists is often, but not always, a triable issue of fact. (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358.) "Where the evidence on summary judgment fails to demonstrate a triable issue of material fact, the existence of gross negligence can be resolved as a matter of law." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 882; *Grebing v. 24 Hour Fitness USA, Inc.*, *supra*, 234 Cal.App.4th at p. 638; *City of Santa Barbara*, at p. 767.)

As the trial court found, there was no gross negligence because The Barge employees did provide some training. It is undisputed The Barge employed Stephen Hubert (Stephen) to provide instruction on how to operate the jet skis. It is undisputed that Stephen did, in fact, conduct a training which covered a variety of key safety and operational points, such as the jet skis' lack of brakes, turning abilities, basic operation, and distance that should be maintained from other watercraft. Either Stephen or Fekete briefly showed Forbes how to steer and how to accelerate. Although the evidence may conflict on whether this training was effective, or whether a fuller training was advisable, any such conflict does not preclude summary judgment on the question of gross negligence. (See *Grebing v. 24 Hour Fitness USA, Inc.*, *supra*, 234 Cal.App.4th at p. 639.)

Plaintiffs attempted to raise a triable issue through the declaration of Bradley Cuthbertson, an expert on PWC safety, offered in opposition to the summary judgment motion below. In a 22-page declaration, Cuthbertson opined that "conditions at The Barge" were below industry standards, and The Barge's purported failure to provide adequate training, supervision, and equipment increased the risks inherent in the sport and constituted "an extreme departure from what a reasonably careful PWC rental facility would do in the same situation." But his declaration failed to raise a triable issue for at least two reasons: there was no showing he was qualified to opine on the "industry standards" applicable to a jet ski rental operation; and, there was no showing the purported deficiencies in the Barge's operation caused the accident.

Stripped of its repetitive and conclusory rhetoric, Cuthbertson's criticism of The Barge's training efforts amounted to the following. Stephen should have engaged in a multi-step training procedure in which he would operate the jet ski with Forbes riding as a passenger; he and Forbes would then switch places; and finally, he would remain in the water and observe as Forbes operated the jet ski by himself. The failure to follow this procedure, Cuthbertson opined, fell below "industry standards." The Barge's employees also failed to adequately explain the procedure for obstacle avoidance. Prior to allowing renters on the water, The Barge should have shown them videos available from the manufacturer or through the "Personal Watercraft Industry Association," (PWIA), and had them read PWIA or other literature, as well as the jet ski's owner's manual.

Plaintiffs failed to establish Cuthbertson was qualified as an expert on these topics. " 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' (Evid. Code, § 720, subd. (a).)" (*People v. Nelson* (2016) 1 Cal.5th 513, 536.) An expert's testimony in the form of an opinion must be "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing . . . ." (Evid. Code, § 801, subd. (b); *Nelson,* at p. 536.) Cuthbertson's declaration and curriculum vitae – which detail his experience as a jet ski stunt rider, show promoter, and safety consultant, among other things – sufficiently establish his expertise regarding jet ski operation and safety. They do not, however, establish that he has any personal experience or knowledge of the current "industry

standards" or customs pertaining to training and supervision for jet ski facilities renting equipment to consumers on a short term basis, such as The Barge. Other than Cuthbertson's assertion that in the mid-1980's he consulted with manufacturers regarding their development of training materials for rental facilities, he appears to have no experience with jet ski rental facilities. And, although Cuthbertson purports to compare The Barge's conduct with "industry standards," he never identifies from where these industry standards come or upon what they are based. Cuthbertson's opinion regarding applicable industry standards thus lacks foundation.

In any event, there is a dearth of evidence that the user's manual or the suggested videos and publications contained any information materially different than that already provided by Stephen, or that any additional, unspecified information might have enabled Forbes to avoid the collision. Other documents referenced by Cuthbertson do not purport to require certain training procedures or to describe the training regimen he suggests. Most of the practical and safety information in the referenced publications was either relayed to renters by Stephen, or is irrelevant to the collision at issue. Nor did Cuthbertson's declaration establish a triable issue based on Stephen's alleged failure to describe the correct procedure for collision avoidance. Even if Stephen's explanation of the jet ski's operation were not as detailed as Cuthbertson would have liked, this at most shows negligence, not gross negligence. Thus, Cuthbertson's opinion that The Barge's training efforts fell below an unspecified industry standard, to which he had insufficient foundation to testify, does not demonstrate that the training admittedly provided showed either the absence of scant care or the extreme

departure from the ordinary standard of conduct which are required to prove gross negligence.

Furthermore, Cuthbertson's declaration fails to establish that the purported deficiencies in The Barge's training efforts or operations were a substantial factor in the accident. Summary judgment is properly granted when a plaintiff fails to establish the defendant's negligence "was an actual, legal cause" of the injuries. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 766, 775; see *Jacobs v. Coldwell Banker Residential Brokerage Co.*, *supra*, 14 Cal.App.5th at p. 446 [to establish negligence, plaintiff must prove causation].) Cuthbertson's statement that the accident would have been avoided had an instructor been operating the jet ski with Forbes or in the water with him is too speculative and conclusory to raise a triable issue. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123 [expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value]; *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 530 [to defeat summary adjudication, plaintiffs cannot rely on assertions that are conclusionary or speculative].) The same is true of Cuthbertson's opinion that The Barge departed from industry standards by failing to provide additional equipment, including a helmet, gloves, a wet suit, footwear, a whistle, protective eyewear, and a " 'learning key.' " The documents Cuthbertson cites do not require such equipment, and there is no evidence the collision could have been avoided or Bradford's injuries lessened had such additional equipment been provided. A mere possibility of causation is not enough. (*Saelzler*, at pp. 775-776.) The remainder of Cuthbertson's declaration consists of criticisms of Hubert's and The Barge's operations and equipment that are

either irrelevant because they cannot have been a substantial factor in the accident, or lack foundation because Cuthbertson is not qualified as an expert on the topics covered.

Nor was a triable issue created by Cuthbertson's opinion that The Barge's decision to allow 16-year-old Forbes to operate a jet ski increased the risk of an accident. Harbors and Navigation Code section 658.5 prohibits persons *under* 16 years of age from operating vessels powered by motors over 15 horsepower; thus, persons *16 and over* may legally operate a jet ski. Plaintiffs cite no authority for the proposition that compliance with a legally mandated age limit is grossly negligent.

Finally, Cuthbertson's opinion that the Barge's jet skis should have been equipped with an "off-power assisted steering" system, or "OPAS," did not raise a triable issue on the question of gross negligence. Plaintiffs' complaint did not advance this theory, and therefore it was not before the court on summary judgment. " '[T]he scope of the issues to be properly addressed in [a] summary judgment motion' is generally 'limited to the claims framed by the pleadings. [Citation.] A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion. [Citations.]' [Citations.]" (*Jacobs v. Coldwell Banker Residential Brokerage Co.*, *supra*, 14 Cal.App.5th at p. 444.) Thus, a "party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings." (*California Bank & Trust v. Lawlor* (2013) 222

Cal.App.4th 625, 637, fn. 3.) Plaintiffs' second amended complaint focused on The Barge's failure to train and supervise Forbes, not on the absence of OPAS or on any purported flaw in the equipment. This unpled theory of liability was not properly before the court, and Cuthbertson's opinion regarding it was irrelevant. (See *Jacobs*, *supra*, 14 Cal.App.5th at pp. 444-445; *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499.)

DHANIDINA, J.*

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