

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 SEVEN

ELIJAH LIPSKY, a Minor, etc., et al.,

Plaintiffs and Appellants,

v.

OAK TREE GUN CLUB, LLC et al.,

Defendants and Respondents.

B288182

(Los Angeles County  
Super. Ct. No. BC621036)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Dennis Landin, Judge. Affirmed.

Slattery Law Firm and Thomas W. Slattery for Plaintiffs  
and Appellants.

Schlichter & Shonack, Kurt A. Schlichter, Steven C.  
Shonack and Kim Tabin Mann for Defendants and Respondents.

---

## INTRODUCTION

When Elijah Lipsky was 14 years old, he and his grandfather went to the Oak Tree Gun Club for target practice. While his grandfather was shooting down range at a metal target, a projectile struck Elijah on his right cheek, resulting in a laceration and a broken jawbone. Elijah, by and through his guardian ad litem, sued Oak Tree for negligence. The trial court granted Oak Tree's motion for summary judgment, and Elijah appealed. Because the release Elijah's grandfather signed on Elijah's behalf bars Elijah's sole cause of action for negligence, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Elijah and His Grandfather Go to the Oak Tree Gun Club*

Oak Tree owns and operates a shooting range where members of the public can shoot at targets. The facility includes a pistol range, divided into two sections, where customers can shoot at paper targets or steel targets.

On May 19, 2016 Elijah and his grandfather went to Oak Tree. Elijah's grandfather "had a passion for guns and stuff, and he was getting older," and Elijah, who had shot a rifle before, "wanted to spend some time with him doing what he liked to do." Elijah knew the risk of shooting firearms included injury from bullets or projectiles. According to Elijah, his grandfather brought with him to Oak Tree a "revolver-looking" gun, "some sort of Glock," and ammunition. Elijah's mother said, "Be safe."

Prior to using any of the shooting ranges at Oak Tree, customers have to sign a document titled “Range Agreement & Release of Liability Form.” Oak Tree will not allow anyone into the facility without executing the release. Elijah’s grandfather signed the release without reading it, Elijah printed his name on the form, and his grandfather signed above the line stating, “If minor, signature of parent or guardian.” Elijah’s grandfather believed he had authority to sign the release on behalf of Elijah because Elijah’s mother knew he was taking Elijah to a shooting range.

The release provided that “AS LAWFUL CONSIDERATION for having been permitted by Oak Tree Gun Club . . . to participate in shooting and/or other activities including use of any of the facilities,” patrons agree they and their “heirs, distributees, guardians, legal representatives, and assigns WILL NOT SUE, make claim against, attach property of or prosecute Oak Tree Gun Club . . . and/or any sponsors, owners, partners, employees, or affiliated organizations for injury or damages resulting from negligence or other acts, whosoever caused . . . AS A RESULT OF MY PARTICIPATION IN SHOOTING ACTIVITIES OR ANY OTHER ACTIVITY WHILE on the premises.” The release also stated: “I AM AWARE THAT SHOOTING SPORTS AND RELATED ACTIVITIES ARE INHERENTLY DANGEROUS ACTIVITIES. NEVERTHELESS, WITH KNOWLEDGE OF THE POTENTIAL RISKS INVOLVED, I HEREBY ACKNOWLEDGE AND AGREE THAT BY SHOOTING AT THE OAK TREE GUN CLUB . . . I AM VOLUNTARILY ACCEPTING ANY AND ALL RISKS OF INJURY OR DEATH” and “I AM AWARE THAT SHOOTING AT STEEL TARGETS AND FRAMES COULD POTENTIALLY

RESULT IN RICOCHETS. I WILL NOT INTENTIONALLY SHOOT AT THE GROUND, ROCKS, PLANT & ANIMAL LIFE OR ANY OBJECT OTHER THAN A TARGET LOCATED DOWN RANGE. I AM VOLUNTARILY ACCEPTING ALL RISK OF INJURY OR DAMAGES DUE TO RICOCHETS.” The back of the release listed rules for the safe handling of firearms, as well as rules for the pistol ranges.

Elijah and his grandfather took turns firing pistols at the metal targets, which Elijah’s grandfather called “clankers.” Elijah “was doing really well” shooting at the targets and it “was getting too easy” for him and his grandfather. At some point they switched to Bay No. 4 because its targets were farther away.

There were shooters in most of the shooting bays at the steel target range. The patron shooting in Bay No. 6, who was approximately 15 to 20 feet from Elijah, began experiencing difficulties with his firearm. An Oak Tree employee, Christopher Torp, went to Bay No. 6 to assist the customer with the jammed gun, which was on the table, pointing downrange. To fix the malfunction, Torp inserted a screwdriver into the firearm and placed the firearm back down on the table. Torp placed the gun facing downrange on the table and began to insert a cleaning rod into the gun.

Elijah, who was standing behind and a little to the left of his grandfather, felt something hit his right cheek near his jawbone. Torp heard someone to his left say “‘ouch’ or something to that effect,” and Torp turned to see Elijah bleeding and holding his cheek. Elijah was screaming he had been shot in his jaw and needed help. A customer came over and said “it was just a scratch from a shell that came and hit [him] in the jaw, it was nothing, [and] nothing [was] in there.” Neither Elijah nor his

grandfather saw where the object that struck Elijah came from, although his grandfather believed from watching a surveillance video of the incident “it was a ricochet off the ground from the guy down the road that had a jammed gun.”<sup>1</sup>

Torp escorted Elijah off the range. After the incident, Torp’s supervisor, Robert Martin, checked each bay and confirmed none of the customers had been using prohibited ammunition. Elijah later saw the bullet that hit him in pictures taken in the pathology lab and in X-rays.

B. *Elijah Sues the Gun Club, and the Trial Court Grants Oak Tree’s Motion for Summary Judgment*

Elijah filed this action against Oak Tree for premises liability negligence. Elijah alleged that, “[w]hile his grandfather was shooting at the targets” from Bay No. 4, Elijah “was standing directly behind” him, “four feet back in the so-called ‘safe’ zone for observing participants.” Elijah alleged that a man in Bay No. 6 summoned an Oak Tree “Range Master/Safety Lineman” to help him with his gun and that the employee negligently manipulated the gun while it was not, as required by posted range rules, “pointed down range toward the target(s).” According to Elijah, the gun “was pointed in the direction of [Bay No.] 4” when it discharged and fired a bullet that struck him “in the right

---

<sup>1</sup> The range supervisor on duty at the time, when asked at his deposition whether Torp’s manipulation of the jammed gun could have caused the gunshot that struck Elijah, stated: “No, absolutely not even in the realm of anything I would think. By definition, if [Torp] was unjamming a firearm, if the firearm was jammed, it is physically incapable of firing. That’s the definition of a jam.”

jaw/neck area causing severe injury, while he was standing in the ‘safe’ zone directly behind” his grandfather.

Elijah alleged “[d]efendants . . . failed to exercise reasonable care by negligently, carelessly, and or/ [sic] recklessly creating a risk of injury by failing to follow subject property and shooting range rules concerning the handling of guns at the shooting range, namely failing to point any and all guns down at the target(s) at all times, and by actually pointing, and knowingly allowing others to point a loaded gun.” Elijah also alleged that, “[t]o the extent that there are any inherent risks in the operation of and the use of a shooting range, defendants . . . negligently, carelessly, and recklessly increased that risk” and that “[t]he injuries suffered by [Elijah] were directly and proximately caused by Defendants’ conduct, acts, failure to act, omissions, negligence, and failure to exercise the duty of care owed to [Elijah].”

Oak Tree moved for summary judgment, or in the alternative summary adjudication, arguing the release barred Elijah’s cause of action for negligence. Oak Tree also argued that, under the primary assumption of risk doctrine, Oak Tree did not owe Elijah a duty of care and that Elijah assumed the risk a bullet or other projectile might hit him.

Elijah opposed the motion, arguing that his grandfather did not have the authority to sign the release on behalf of Elijah and that the primary assumption of risk doctrine did not bar Elijah’s complaint. In particular, Elijah asserted there was a disputed issue of material fact regarding whether Torp accidentally shot Elijah.

The trial court granted the motion. The court ruled both the express assumption of risk doctrine and the primary assumption of risk doctrine barred Elijah’s cause of action. The

court entered judgment in favor of Oak Tree, and Elijah timely appealed.

## DISCUSSION

### A. *Standard of Review*

“A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff’s causes of action, or shows that one or more elements of each cause of action cannot be established. [Citation.] A moving party defendant bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to the responding party plaintiff to demonstrate the existence of a triable issue of material fact. [Citation.] From commencement to conclusion, the moving party defendant bears the burden of persuasion that there is no triable issue of material fact and that the defendant is entitled to judgment as a matter of law.”

(*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 847-848.)

“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.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; accord, *Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 643.)

We review an order granting a motion for summary judgment ““de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.”” (*Hampton v. County of San Diego* (2015) 62

Cal.4th 340, 347; see *Santos v. Los Angeles Unified School Dist.* (2017) 17 Cal.App.5th 1065, 1074.)

B. *The Express Assumption of Risk Doctrine Bars  
Elijah's Cause of Action*

“An exculpatory contract releasing a party from liability for future ordinary negligence is valid unless it is prohibited by statute or impairs the public interest. [Citation.] Releases in the context of recreational sports or exercise facilities generally do not impair the public interest. [Citation.] A valid release precludes liability for risks of injury within the scope of the release. [Citation.] [¶] A release of liability for future gross negligence, in contrast, generally is unenforceable as a matter of public policy.” (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 637; see *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 357 [“[w]hile often referred to as a defense, a release of future liability is more appropriately characterized as an express assumption of the risk that negates the defendant’s duty of care, an element of the plaintiff’s case”].) Conduct that substantially or unreasonably increases the inherent risk of an activity or actively conceals a known risk may amount to gross negligence. (*Eriksson v. Nunnink, supra*, 191 Cal.App.4th at p. 856.) “Evidence of conduct that evinces an extreme departure from manufacturer’s safety directions or an industry standard also could demonstrate gross negligence. [Citation.] Conversely, conduct demonstrating failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence.” (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881; see *DeVito v. State of California* (1988) 202 Cal.App.3d 264, 272.)



Elijah does not argue the scope of the release does not include his claim. Instead, he argues the release is unenforceable as a matter of public policy because Torp was grossly negligent in manipulating the firearm of the customer in Bay No. 6, which ultimately caused Elijah's injuries. Elijah, however, did not argue in the trial court the release was unenforceable because of gross negligence or otherwise as a matter of public policy; Elijah argued only his grandfather did not have authority to sign the release on his behalf, an argument Elijah has abandoned on appeal. Therefore, Elijah forfeited the argument the release is unenforceable because it violated public policy. (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920, fn. 3; see *Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 155 ["arguments not raised in summary judgment proceedings" are forfeited on appeal]; *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185-1187 [plaintiff forfeited an argument she raised for the first time on appeal and did not make in opposition to the defendant's motion for summary judgment].)

Moreover, Oak Tree submitted evidence the conduct of its employees was not negligent, let alone grossly negligent. In his declaration in support of the motion for summary judgment, Torp stated he was working as a Range Safety Officer at Oak Tree the day Elijah was injured. Torp stated the gun he worked on in Bay No. 6 was unloaded with the slide "pulled back and locked in an open position" so that it could not fire. He said he confirmed there was no projectile in the barrel of the gun, dislodged "the empty shell casing from the firearm," and "placed the firearm back down on the table pointing down-range and not in the direction of any other shooting bays." Torp stated he was holding a bottle of gun oil and inserting a cleaning rod into the gun when

he heard Elijah say he was hurt. The general manager of the club stated in her declaration Torp did not “act[ ] unsafely while clearing the jam” in the gun of the customer in Bay No. 6. In response to Oak Tree’s showing, Elijah submitted no evidence Torp or anyone else at Oak Tree was grossly negligent. Elijah’s only basis for asserting on appeal Torp was grossly negligent was the video of the incident, which Elijah admits is “unclear.” The video’s lack of clarity, without more, did not create a triable issue of fact regarding whether Torp’s conduct was grossly negligent.<sup>2</sup>

---

<sup>2</sup> Elijah also argues that “it is a material question of fact whether the patron whose gun jammed in the bay adjacent to Elijah was a law enforcement or government agency officer undergoing training” and that, “[b]y failing to account for patrons that engage in the use of firearms on its premises, Oak Tree . . . is precluding any action under the [Government] Claims Act against law enforcement or government agency members that shoot minors in the face at their facility.” The Government Claims Act has nothing to do with this case; it is an act that governs the filing of claims against government entities or agents. (Gov. Code, § 945.) There is no evidence Oak Tree is a government agency, Torp was a government employee, or there were any government agents at the shooting range. In any event, Elijah forfeited any argument based on the Government Claims Act by again not making it in the trial court.

## DISPOSITION

The judgment is affirmed. Oak Tree Gun Club is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

STONE, J.\*

---

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