NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TRESSA BLAS,

Plaintiff and Appellant,

v.

U.S. SPORTS CAMPS, INC. et al.,

Defendants and Respondents.

B287133

Los Angeles County
Super. Ct. No. BC588207

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed in part, reversed in part.

David A. Kay for Plaintiff and Appellant.

O'Connor and Associates, John D. O'Connor, Jeffrey D. Kirk and Jessica C. Shafer for Defendants and Respondents U.S. Sports Camps, Inc. and Nike Golf Schools and Junior Camps.

Horvitz & Levy, H. Thomas Watson, Shane H. McKenzie; Dummit Buchholz & Trapp, Craig S. Dummit and John M. Racanelli for Defendant and Respondent American Golf Corporation.

Plaintiff Tressa Blas appeals a judgment entered after the trial court granted separate summary judgment motions in favor of defendants U.S. Sports Camp, Inc. (USSC) and American Golf Corporation (AGC) in a personal injury action stemming from a golfing accident during a summer camp at the El Dorado Park Golf Course in Long Beach (El Dorado). Plaintiff, who was seven years old at the time, was struck with a golf club by another seven-year-old camper while practicing chip shots under the supervision of volunteer golf instructor, Brian Gonzales. Gonzales had been recruited to work at the camp by the camp's director, Joey Cerulle.

Plaintiff sued USSC and AGC, claiming the defendants had formed a joint venture under a master agreement to operate and profit from golf camps at AGC golf courses, like El Dorado, and the defendants were therefore vicariously liable for Cerulle's and Gonzales's negligence as joint venturers and under the respondeat superior doctrine. However, despite terms in the master agreement obligating AGC to select the camp director and provide and pay for staffing at its "mutually agreed upon facilities," the undisputed evidence showed that it was Cerulle who organized the camp and recruited its staff, and that Cerulle and the staff members (including Gonzales) signed documents pertaining to their employment with USSC—not AGC. The trial court granted summary judgment for both defendants, concluding the undisputed evidence negated plaintiff's claim of joint venture liability. We conclude the court was correct with respect to the joint venture, but find the employment documents were sufficient to raise a triable issue of fact as to whether USSC can be held vicariously liable for Cerulle's and Gonzales's alleged negligence under the respondeat superior doctrine. Accordingly, we reverse

the summary judgment for USSC and remand the matter for further proceedings on the negligence claim. We affirm the summary adjudications for USSC on all other claims, and affirm the summary judgment in favor of AGC.

FACTS AND PROCEDURAL BACKGROUND

Consistent with the applicable standard of review, we state the facts established by the parties' evidence in the light most favorable to plaintiff as the nonmoving party, drawing all reasonable inference and resolving all evidentiary conflicts, doubts, or ambiguities in plaintiff's favor. (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 273 (*Jacks*); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 854.)

1. *AGC and USSC Execute a One-Year Master Agreement to Operate Junior Golf Camps*

AGC operates golf courses throughout California, including the El Dorado Park Golf Course, which it leases from the City of Long Beach. The El Dorado course includes a nonpublic practice area reserved primarily for use by the California State University Long Beach (CSU Long Beach) golf teams.

USSC "organizes, promotes and conducts golf schools and camps for youth and adults throughout the United States." Doing business as Nike Golf Camps, USSC managed 115 golf camps across the United States.

In January 2014, USSC and AGC entered into a one-year master agreement to operate golf camps at certain AGC facilities. The agreement states AGC will "provide for the operation of Golf Camps at its mutually agreed upon facilities," but does not identify El Dorado or any other AGC course as a covered facility.

It also recites that AGC operates "other golf instruction programs which are separate and not a part of this agreement."

Under the master agreement, USSC was responsible for registering campers, collecting and distributing fees, marketing the camps under the "Nike Golf Schools and Junior Camps logo," and providing "amenity packages." AGC was responsible for "providing staffing at each Golf Camp, for running the Golf Camps, for paying the staff, and for paying for all costs of operating the Golf Camps not specifically the obligation of [USSC]." AGC was to have "sole responsibility and authority to select camp directors and staff and [to] conduct the Golf Camps." Neither party was permitted to assign or delegate its obligations under the agreement without the other party's express written consent. Each party agreed to maintain general liability insurance and to indemnify the other party for claims arising out of its respective activities relating to the golf camps.

Consistent with its obligation to collect and distribute fees, USSC agreed to maintain "financial records pertaining to revenue from the Golf Camps" and to submit 75 percent of the "Gross Revenue" from the camps to AGC. From this gross revenue distribution, AGC was "responsible for payment of [1] all staff expenses, including salaries, staff uniforms, payroll taxes, worker's compensation insurance fees and staff meals, and [2] all facility fees." The parties would both own a database of camper names and addresses.

The parties agreed "not [to] initiate other new camps or programs offering competing products in the market areas in which the Golf Camps are located"; however, both were permitted to continue running any "existing camps or programs." The parties expressly disclaimed any "authority to bind the other to

any third party in any way," as well as any intention to create "a partnership, joint venture or agency relationship."

2. ***Joey Cerulle Signs an Agreement with USSC as Camp Director for the El Dorado Golf Camp***

Joey Cerulle is the head coach of the CSU Long Beach women's golf team. His team regularly practiced at the El Dorado course under a memorandum of understanding with the City of Long Beach, which granted the university special permission to use the nonpublic practice area at El Dorado for the university's golf programs. Under the memorandum of understanding, the university's golf teams paid a $5,000 annual fee to AGC for use of the private area, and CSU Long Beach raised additional funds for the creation of a specialized training facility on the grounds.

In the fall of 2013, Cerulle came up with a plan to bring a golf camp to El Dorado as a means of raising funds for the university's training facility. He contacted Nick Brunner, the vice president of USSC, to inquire about organizing a camp at El Dorado during the summer of 2014. After talking with Brunner and learning that USSC had an agreement with AGC regarding golf camps, Cerulle contacted Rick Crowder, El Dorado's general manager, to request permission to use the private practice area for the golf camp.

USSC hired Cerulle as an independent contractor to be the camp director at El Dorado. In that capacity, Cerulle signed a document entitled, "**US SPORTS CAMPS [¶] Staff Conduct Guidelines and Employment Agreement.**" The document reads, in its entirety:

"**Undersigned Director agrees to enforce faithfully the following guidelines:**

- "• Director will educate the staff & campers to think **'Safety First'**.
- "• No campers or counselors are allowed in the dorm of the opposite sex (except in the case of emergency).
- "• There should always be a minimum of two staff members present when supervising campers and conducting dorm bed checks.
- "• Absolutely no casual or physical contact between staff and campers. Campers are forbidden to leave the dorm after lights are out.
- "• No corporal punishment of campers is allowed. No verbal or mental abuse of campers. Notify director of all discipline matter[s].
- "• All suspected camp-related cases or complaints of child abuse; neglect, sexual abuse, sexual harassment or sexual molestation will be reported in writing (dated and signed by the staff member) to the camp director immediately. The director will immediately advise [USSC] and, with USSC collaboration, conduct an investigation and take appropriate action. During the time that an investigation is taking place, if appropriate under the circumstances, the alleged abuser will have no direct contact with any campers.

"• For staff and campers US Sports Camps has a 'zero tolerance' policy relative to drugs and alcohol and tobacco consumption.

"• No staff members are allowed to consume alcoholic beverages, drugs or smoke while at camp.

"• No staff member will engage in sexual activity or use profanity while at camp.

"• Staff member agrees to the Sexual Harassment Policy. Violation of these rules is grounds for immediate termination of employment.

"• Employment at this camp is temporary, and employee acknowledges he is an at-will and probationary employee, and may be terminated without notice for any reason, or no reason, at the sole discretion of employer.

"• Employment automatically ends with the last camper checkout.

"• Staff members are not allowed to contact campers with any form of social media such as text, email, etc. while working [at] camp.

"• Should any dispute arise concerning this employment, or any matter related thereto, including any claim of discrimination, harassment, accident or injury, the matter shall be submitted to binding arbitration before the American Arbitration Association ('AAA') in San Francisco, California or such other venue as the arbitrator may decide,

before a single arbitrator, under the AAA rules applicable to employment disputes.

"I, the Director, have read and reviewed these Guidelines with each member of my staff[.]"

Cerulle signed the document in the space provided for the "Director Signature."

Cerulle received all the documentation for the golf camp from USSC. In addition to the Staff Conduct Guidelines and Employment Agreement, Cerulle received USSC's Sexual Harassment Policy, and a document entitled Rules of the Game for Nike-Sponsored Programs and Events. Like the staff conduct guidelines, the Rules of the Game document emphasized the director's and staff's responsibility to "support the participant's safety and well-being." Apart from these guidelines and directives, Brunner confirmed that USSC did not have safety protocols or safety training for camp staff and that USSC considered Cerulle to be solely responsible for "mak[ing] sure safety's first."[1]

USSC generated the marketing materials for the El Dorado camp. Those materials announced the camp would be led by "Camp Director: Joey Cerulle, Head Coach, Long Beach State." Other marketing materials advertised "Round-the-Clock

---

[1] Brunner also noted that USSC provided its camp directors with a workbook to be distributed to junior golfers with "safety tips." Among other things, the workbook instructed campers to "[a]lways listen to your coaches and only swing when directed"; "[n]ever swing in proximity to other players and always be alert of your surroundings"; and "[n]ever walk ahead of or stand in front of another golfer while they are hitting." Brunner did not know whether anyone at El Dorado instructed the camp participants to read the workbook.

Supervision," stating "Campers are supervised 24 hours a day." The marketing brochures directed prospective campers to enroll through USSC's website or by phone. USSC also provided Nike t-shirts, golf balls, and hats for the campers. It provided shirts and hats for the staff members as well, although neither Cerulle nor his staff were required to wear them.

Cerulle obtained permission from Crowder to use the El Dorado practice area for the golf camp, but he did not have a written agreement with AGC, and he did not receive documentation, guidelines, or directions about running the camp from AGC. Crowder authorized Patrick Blas, El Dorado's assistant general manager, to act as Cerulle's "point person" for the camp's needs. Blas, who is also plaintiff's father, was charged with helping Cerulle set up tee times, transport lunches, and shuttle campers to the private practice area.

In addition to marketing, USSC provided registration services and generated accounting reports for the El Dorado camp, listing the attendees and their respective payments. The reports noted that AGC was to receive 75 percent of the camp's gross revenue, and USSC customarily sent the reports to Crowder with a check payable to El Dorado Park Golf Course for AGC's revenue share.

3. *Cerulle Hires Brian Gonzales as a Camp Instructor and Permits Plaintiff to Attend the Camp Without Registering through USSC*

As the camp director, Cerulle recruited and scheduled the camp staff. Although he was to be solely responsible for supervising the staff and ensuring camp safety, USSC nonetheless required all of Cerulle's staff members to sign its Staff Conduct Guidelines and Employment Agreement, its

Sexual Harassment Policy, and the Rules of the Game document. USSC also required staff members to submit to mandatory background checks.

Cerulle recruited his friend Brian Gonzales to work as a volunteer instructor at the El Dorado golf camp. He had known Gonzales for 17 years, ever since they played together on their high school golf team. For the past 11 years, Gonzales had been working for the City of Los Angeles as a paid part-time junior golf instructor. AGC also employed Gonzales to manage the pro shop at the El Dorado course. And, Gonzales worked as an independent golf instructor on his own time. He did not have an independent contractor agreement as a golf coach or instructor with AGC.

While working for the City of Los Angeles, Gonzales received detailed safety training, including instruction on safely grouping junior golfers. He had instructed as many as 25 children at a time. Cerulle knew that Gonzales worked as a junior golf instructor and that he had received this training. Neither Cerulle nor USSC provided Gonzales with supplemental safety training, and Gonzales did not think he needed additional training before joining the El Dorado camp. Consistent with USSC's policy, Cerulle had Gonzales sign the same Staff Conduct Guidelines and Employment Agreement that Cerulle had signed as camp director, the Sexual Harassment Policy, and the Rules of the Game document.

Although USSC controlled the camp's official registration process, Cerulle allowed the children of certain El Dorado managers to participate in the camp without registering through USSC. According to Cerulle, during a "table conversation" at a pre-setup meeting for the camp, Marc Lilleberg, El Dorado's

superintendent, Rick Crowder, El Dorado's general manager, and Patrick Blas, plaintiff's father and El Dorado's assistant general manager, asked Cerulle if their children could also participate in the camp. Cerulle agreed to allow the children to participate, even though they did not officially register, pay the camp fees, or sign the enrollment forms that USSC required.

4. ***Plaintiff Is Injured by Another Camper; Cerulle Files an Injury Report with USSC***

On August 7, 2014, plaintiff, the seven-year-old daughter of Patrick Blas, was injured at the El Dorado golf camp. Alexa Bryson, another seven-year-old camper, struck plaintiff above the eye with a golf club, apparently when plaintiff crossed into the path of Bryson's swing.

At the time of the injury, Gonzales was giving chipping instructions to plaintiff, Bryson, and four to five other campers in the private practice area. He instructed the campers on safety issues for 10 to 15 minutes before allowing them to swing their clubs. According to Gonzales, in his experience supervising junior golfers, six to eight students was a reasonable number of students for one instructor to supervise.

Gonzales placed the campers eight to ten feet apart so each student could practice chip shots without endangering other students. He instructed the students to stay at their stations until he told them they could leave. Gonzales then began working with two or three campers practicing "bunker shots," and he placed the remaining students about 10 to 15 yards away in the "fringe area adjacent to the chipping green" where he allowed them to practice "chipping." Plaintiff and Bryson were with the larger group of campers in the fringe area.

At some point, Gonzales noticed Bryson swinging "too big" for a proper chip shot, and he stopped the group to demonstrate the proper swing. He was not concerned that Bryson would hit another student with her club, since the students were still spaced an appropriate distance apart. But he was concerned she would hit the ball too hard and possibly hit a student in another practice group with the ball. Gonzales stayed with Bryson for "several swings" to ensure she was following the "proper technique," then he returned to the bunker to work with the smaller group.

From his position in the bunker, Gonzales was able to keep a "perfect view of all the other girls that were on the chipping green." He permitted the campers in the chipping green to "hit the balls they had in front of them at the same time at their own discretion." At some point, however, he took his eyes off the larger group for approximately 10 to 15 seconds, when he "heard a loud scream and crying" coming from the chipping green. He immediately ran to help plaintiff who was "bleeding profusely right above her eye." Although he did not see what happened, Gonzales believed Bryson hit plaintiff with her club. He reasoned that Bryson was "taking too big of swings, [and] her club came around to[o] far and hit" plaintiff, who was positioned behind Bryson during the exercise. Gonzales testified that the only way the accident could have occurred is if plaintiff or Bryson moved out of their designated areas or Bryson intentionally struck plaintiff.

In an affidavit regarding the accident, Gonzales declared: "Looking back the only thing that I would have done differently would be to have another instructor to help with monitoring the kids. Having more instructors would have helped with

preventing the situation. My only recommendation would be to have more instructors." He testified that, if he had been the camp director, he "would have recommended two instructors," but he "felt that for the amount of kids, one instructor was sufficient." He added that, in his "previous experience in camps with younger kids, more instructors . . . on kids five and under would definitely be a recommendation, if not . . . a requirement." But for the older kids at the El Dorado camp and the number of students in the group, he felt one instructor was "sufficient." He acknowledged that "another supervising adult" for the chipping group "would have helped."

USSC requires a contemporaneous report for all injury incidents that occur at its camps. The top of its injury report form reads: "Report to be completed immediately following injury. Copy must be forwarded to U.S. Sports Camps within five days following injury. [¶] CAMP MUST IMMEDIATELY TELEPHONE THE U.S. SPORTS CAMPS OFFICE TO REPORT INJURY."

On September 3, 2014, Cerulle prepared and submitted the required injury report to USSC. He reported plaintiff was struck with the head of a golf club above the eye when she walked into the bunker behind Bryson, who was completing the "follow through" of her swing. Cerulle noted Gonzales was "outside of the bunker" when the injury occurred, and plaintiff was "not instructed to enter the bunker as it was not her turn and unsafe to be near swinging clubs." Cerulle did not file the injury report within the mandated period because he believed Crowder and Gonzales would "handle it." When he later learned that nothing had been done, Cerulle contacted Brunner, and prepared the injury report from the notes he had on the incident.

5. *Plaintiff Sues Cerulle, Bryson, USSC, AGC, and the City of Long Beach*

Plaintiff, through her mother as guardian ad litem, sued Cerulle, Bryson, USSC, AGC, and the City of Long Beach for negligence, gross negligence, fraud, and negligent misrepresentation. Her operative second amended complaint added claims for joint venture liability against USSC and AGC, and vicarious liability against AGC. Plaintiff alleged Cerulle was "an employee, or agent, or authorized agent" of USSC and AGC with respect to the golf camp, Cerulle "delegated authority to supervise operations of the camp" to Gonzales, and Cerulle, AGC, and USSC were "vicariously liable for failing to adequately supervise the students during the golf camp on El Dorado."

6. *USSC and AGC Move for Summary Judgment*

USSC and AGC filed separate motions for summary judgment. Both motions argued there was insufficient evidence of the respective defendant's control over the operation of the golf camp at El Dorado to impose vicarious liability for Cerulle's and Gonzales's alleged negligence. They also argued there was no evidence of willful misconduct or recklessness to support the gross negligence claim. USSC maintained there was no evidence of reliance to support the fraud and negligent misrepresentation claims, because it was undisputed that plaintiff had not registered for the camp through USSC's website as the brochure directed. AGC argued it could not be held liable on the misrepresentation claims because it was undisputed that it had no part in preparing or approving the marketing materials.

Plaintiff opposed the motions, citing evidence that USSC required Cerulle and Gonzales to sign its Staff Conduct Guidelines and Employment Agreement, while AGC had

responsibility to supervise the operations of the golf camp under its agreement with USSC. Plaintiff also cited the USSC and AGC agreement, the revenue sharing documentation, and Cerulle's interactions with USSC and AGC personnel as evidence that the companies operated the El Dorado golf camp as a joint venture. She argued Gonzales's testimony, coupled with USSC's admission that it did not provide safety training or protocols to camp directors and staff, were sufficient to raise a triable issue on her negligence and gross negligence claims. With respect to her fraud and negligent misrepresentation claims, plaintiff argued it was irrelevant that she did not officially register for the camps, because Cerulle, at the urging of AGC's managers, gave her permission to participate.

7. *The Trial Court Grants Summary Judgment for USSC and AGC*

The trial court granted both motions for summary judgment. With respect to USSC's motion, the court determined the undisputed evidence established USSC did not have sufficient control of the camp's operations to be held liable for negligence directly or indirectly on a theory of vicarious liability. The court also concluded USSC did not owe a legal duty to plaintiff, and plaintiff could not establish her claims for fraud or negligent misrepresentation, because there was no evidence that she reasonably relied upon the alleged misrepresentations.

As for AGC, the court likewise determined there was insufficient evidence of control to impose vicarious liability. The undisputed evidence also established that AGC did not market the camp or make the alleged misrepresentations. Finally, the court concluded none of the instructors were working as AGC employees when they volunteered for the golf camp.

DISCUSSION

1. *Standard of Review*

Summary judgment is properly granted if all the papers submitted show no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*); *Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 152.) A defendant meets its 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. (Code Civ. Proc., § 437c, subd. (o); *Aguilar,* at p. 849; *Saelzler, supra,* 25 Cal.4th at p. 768; *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741.) If the defendant makes this showing, the burden shifts to the plaintiff to demonstrate a triable issue of fact exists. (*Aguilar,* at p. 849.)

We review a trial court's ruling granting summary adjudication de novo, liberally construing the nonmoving party's evidence while strictly scrutinizing the moving party's showing. (*Jacks, supra,* 3 Cal.5th at p. 273; *Saelzler, supra,* 25 Cal.4th at p. 768.) We consider all the evidence set forth in the papers, except that to which objections have been properly sustained, and all inferences reasonably deducible from the uncontradicted evidence. (Code Civ. Proc., § 437c, subd. (c); *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542.) " 'We apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a

summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' " (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 931-932.) Any doubts concerning the propriety of the motion must be resolved in favor of the party opposing the motion. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 415.)

2. *The Evidence Raises a Triable Issue as to Whether Cerulle and Gonzales Were USSC's Employees and, thus, Whether USSC Is Vicariously Liable for Their Alleged Negligence*

Under the doctrine of respondeat superior, an "employer may be [vicariously] liable for the torts its employee commits while acting within the scope of his employment. This liability is based . . . on public policies concerning who should bear the risk of harm created by the employer's enterprise," because "losses caused by employees' torts are viewed as a required cost of doing business, the risk of which an employer may spread through insurance." (*Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 481 (*Yamaguchi*).)

In moving for summary judgment on plaintiff's negligence claim, USSC focused principally on whether it could be held vicariously liable as a joint venturer under its agreement with AGC to operate junior golf camps at unspecified AGC courses. USSC argued it could not be held liable on a joint venture theory because AGC was solely responsible for providing staffing and running the camps under the terms of the master agreement. However, USSC's motion did not challenge plaintiff's allegation that Cerulle and Gonzales were USSC's employees. Nor did USSC address plaintiff's contention that the Staff Conduct

Guidelines and Employment Agreement, as well as other documents that USSC required Cerulle and Gonzales to sign, raised a triable issue of fact concerning their employment status. On appeal, USSC argues these documents are irrelevant because all parties understood the director and camp staff were "independent contractors." We conclude there was sufficient evidence for a jury reasonably to find they were USSC's employees.

" 'Employee[s]' include most persons 'in the service of an employer under any . . . contract of hire' . . . , but do not include independent contractors." (*Borello & Sons v. Dept. of Indus. Rel.* (1989) 48 Cal.3d 341, 349 (*Borello*).) "The determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences." (*Ibid.*) The question is one of law if the evidence is undisputed. (*Ibid.*) "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*Ibid.*; *Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4th 419, 425 (*Arzate*).)

"The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 946 (*Tieberg*); *Borello, supra,* 48 Cal.3d at p. 350.) However, no rigid test governs whether someone is an employee, and "courts 'have long recognized that the "control" test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements.' " (*Arzate, supra,* 192 Cal.App.4th at p. 426, quoting *Borello,* at p. 350.)

Thus, "while the right to control work details 'is the "most important" or "most significant" consideration, the authorities also endorse several "secondary" indicia of the nature of a service relationship.' " (*Arzate, supra,* 192 Cal.App.4th at p. 426, quoting *Borello, supra,* 48 Cal.3d at p. 350.) Critically, our Supreme Court has said " 'the right to discharge at will, without cause,' " is " '[s]trong evidence in support of an employment relationship.' " (*Borello*, at p. 350.) Additional factors include "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Id.* at p. 351.)

The individual factors " 'cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*Borello, supra,* 48 Cal.3d at p. 351; *Arzate, supra,* 192 Cal.App.4th at p. 426.) "[T]he process of distinguishing employees from independent contractors is fact specific and qualitative rather than quantitative." (*State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 202.) Thus, "[t]he label placed by the parties on their relationship is not dispositive." (*Borello*, at p. 349.) Indeed, courts regularly disregard such labels "whenever the acts and

declarations of the parties are inconsistent" with independent contractor status. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 877.)

Since articulating these principles in *Borello*, our Supreme Court has clarified the "control" test for determining an employer/employee relationship. In *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 528 (*Ayala*), the high court reversed an order denying class certification to newspaper carriers who alleged the defendant improperly classified them as independent contractors. The court explained that what matters "is not how much control a hirer exercises, but how much control the hirer retains the right to exercise." (*Id.* at p. 533, italics omitted; see also *Industrial Indemnity Exch. v. Industrial Acc. Com'n* (1945) 26 Cal.2d 130, 135 ["The right to control and direct the activities of the alleged employee . . . , whether exercised or not, gives rise to the employment relationship."]; *S. A. Gerrard Co. v. Industrial Acc. Commission* (1941) 17 Cal.2d 411, 414 ["the right to control, rather than the amount of control which was exercised, is the determinative factor"]; *Borello, supra,* 48 Cal.3d at p. 350.)

The *Ayala* court explained that when the parties have a written agreement, "[s]elf-evidently, '[s]uch agreements are a significant factor for consideration' in assessing a hirer's right to control a hiree's work." (*Ayala, supra,* 59 Cal.4th at p. 534, quoting *Tieberg, supra,* 2 Cal.3d at p. 952.) The court emphasized that the parties' contract defines the legal parameters of their relationship, and "what matters is whether a hirer has the 'legal right to control the [hiree's] activities.' " (*Ayala,* at p. 535, italics omitted.) Conversely, evidence "[t]hat a hirer chooses not to wield power does not prove it lacks power."

(*Ibid.*, citing *Malloy v. Fong* (1951) 37 Cal.2d 356, 370; see also *Robinson v. George* (1940) 16 Cal.2d 238, 244 [absence of evidence a hirer "exercised any particular control over the details" of the work does not show the hirer lacked the right to do so].)

Plaintiff's operative complaint alleged Cerulle was "an employee" of USSC, and that Cerulle "delegated authority to supervise operations of the camp" to Gonzales when plaintiff's injury occurred. Based on this alleged employment relationship, the complaint asserted USSC was "vicariously liable" for Cerulle's and Gonzales's alleged "fail[ure] to adequately supervise the students during the golf camp on El Dorado." In opposing summary judgment, plaintiff sought to substantiate the alleged employment relationship by presenting, among other things, the Staff Conduct Guidelines and Employment Agreement that USSC required Cerulle and Gonzales to sign. We agree with plaintiff that the terms of the employment agreement could support a finding that USSC "retain[ed] the right to exercise" substantive control over the camp's operation. (*Ayala, supra,* 59 Cal.4th at p. 533, italics omitted.) Thus, the agreement is sufficient to raise a triable issue as to whether Cerulle and Gonzales were USSC's employees.

In executing the agreement as camp director, Cerulle agreed to "enforce faithfully" USSC's staff conduct guidelines. Chief among these "guidelines" was the explicit directive to "educate the staff and campers to think **'Safety First'**." The agreement imposed other directives and prohibitions on the camp director and staff members (who USSC also required to execute the agreement) principally aimed at controlling aspects of the camp's operations relating to the staff's interactions with and supervision of junior campers. The agreement directed that

"[t]here should always be a minimum of two staff members present when supervising campers and conducting dorm bed checks." It stated "US Sports Camps has a 'zero tolerance' policy relative to drugs and alcohol and tobacco consumption," and directed that "[n]o staff members are allowed to consume alcoholic beverages, drugs or smoke while at camp." It prohibited the "use [of] profanity" and "verbal or mental abuse of campers," directing staff to "[n]otify [the] director of all discipline matter[s]." The agreement prohibited sexual harassment, required the director and staff to agree to USSC's separate sexual harassment policy, and it established a procedure requiring the director to immediately report suspected cases of abuse or neglect to USSC and to conduct an investigation "with USSC collaboration." And, critically, the agreement required the director and each staff member to acknowledge "he is an at-will and probationary employee, and may be terminated without notice for *any reason, or no reason, at the sole discretion of employer*." (Italics added.)

USSC admits it required Cerulle and Gonzales to sign its Staff Conduct Guidelines and Employment Agreement (as well as its Sexual Harassment Policy and the Rules of the Game document), but it contends these were " 'employment' agreements . . . in name only." It insists "[n]either party to the agreement believed that they were entering into an employment relationship," Cerulle and Gonzales "testified that the relationship [with USSC] was that of an independent contractor," and USSC "exercised no control over the employees with respect to the provision of junior golf instruction." In view of the agreement's express terms, none of these points conclusively negates the existence of an employment relationship as a matter

of law. As our Supreme Court has instructed, "[t]he label placed by the parties on their relationship *is not dispositive*, and subterfuges are not countenanced." (*Borello, supra,* 48 Cal.3d at p. 349, italics added.) And, as the high court clarified, what matters "is not how much control a hirer exercises, but how much control the hirer *retains the right to exercise*" under an employment agreement; evidence "[t]hat a hirer chooses not to wield power *does not prove* it lacks power." (*Ayala, supra,* 59 Cal.4th at pp. 533, 535, italics omitted and added.)

USSC also emphasizes that Gonzales "was not actually paid" and that instructors "chose which days they were available to volunteer," arguing these points lend "credence" to the staff members' independent contractor status. The defendant in *Arzate* advanced similar evidence, but the reviewing court found it was insufficient, in view of other "competing" factors, to support summary judgment. (*Arzate, supra,* 192 Cal.App.4th at p. 427.)

The defendant in *Arzate* was in the business of arranging for the transportation of its customers' cargo between shipping ports and the customers' facilities. (*Arzate, supra,* 192 Cal.App.4th at p. 422.) Although it held itself out as a " 'common carrier by motor vehicle,' " the defendant did not own any trucks, and instead hired truck drivers, who did own trucks, to transport the cargo. (*Ibid.*) Like USSC, the defendant in *Arzate* argued the truck drivers were not employees because the defendant did not control the " 'manner and means' " of their work (hauling loads). (*Id.* at p. 427.) It relied on evidence showing the truck drivers drove their own trucks, paid the related expenses, could have hired other drivers and leased more than one truck to the defendant, could decline a dispatch, and decided when and where

to take meal and rest breaks. (*Ibid.*) The trial court granted summary judgment, but the appellate court reversed. (*Id.* at p. 421.)

The *Arzate* court explained: "At its heart, this case involves competing, if not necessarily conflicting, evidence that must be weighed by a trier of fact." (*Arzate, supra,* 192 Cal.App.4th at p. 427.) The court acknowledged there was considerable evidence suggesting the drivers were independent contractors, but emphasized there was other evidence, apart from control over the " 'manner and means' " of hauling loads, that suggested they were employees. (*Ibid.*) Among other things, the reviewing court found the claim that the drivers " 'did not perform work that was part of [defendant's] regular business,' " was "belied by defendant's own documentation, which states, correctly, that defendant is a 'common carrier by motor vehicle, engaged in the business of transportation of property . . . .' " (*Ibid.*) And, most importantly, the court emphasized the defendant could terminate the drivers with nothing more than 24 hours' notice. (*Ibid.*, citing *Borello, supra,* 48 Cal.3d at p. 350 [" ' "the right to discharge at will, without cause," ' " is " ' "[s]trong evidence in support of an employment relationship" ' "]; cf. *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1182 [affirming summary judgment based on physician's independent contractor status, distinguishing *Arzate* on ground that defendant "could not discharge Dr. Murray without cause"].) Considering the "totality of the evidence," the *Arzate* court concluded the trial court erred when it ruled, as a matter of law, the drivers were independent contractors. (*Arzate,* at p. 427.)

Like the defendant in *Arzate*, USSC retained the right under its Staff Conduct Guidelines and Employment Agreement

to terminate Cerulle's and Gonzales's employment "without notice for any reason, or no reason," at its "sole discretion." And, although USSC may not have directly controlled the manner and means by which Gonzales provided golf instruction to junior campers, it retained significant control under the agreement over important aspects of the instructors' and staff members' supervision of and interactions with the young camp participants. Indeed, one can easily imagine a scenario in which USSC might exercise this authority to discharge a golf instructor for failing adequately to supervise campers during an instruction session.

As Brunner confirmed, and USSC's injury report form directs, the camp director must immediately notify USSC by telephone of all injuries that occur, and must forward a completed injury report to USSC within five days. While there are numerous conceivable reasons that USSC might require these reports, one likely reason is to allow USSC to determine whether a staff member's negligence contributed to the injury and to assess whether the staff member should be terminated for failing to follow the directive to put " 'Safety First.' " (Boldface omitted.) Indeed, that sort of intervention would be consistent with provisions in the Staff Conduct Guidelines and Employment Agreement requiring the director immediately to notify USSC of any suspected case of abuse or neglect, and authorizing USSC to suspend the alleged abuser while the case is under investigation. In plaintiff's case, it is reasonable to infer that, had USSC received an injury report within the mandated reporting period, it might have immediately terminated Gonzales's employment upon learning he was "outside of the bunker" and not supervising plaintiff and Bryson when the injury occurred. This sort of oversight authority, coupled with the

" 'right to discharge at will,' " is " '[s]trong evidence in support of an employment relationship' " and sufficient to raise a triable issue of fact on the question of vicarious liability. (*Borello, supra,* 48 Cal.3d at p. 350; see *Arzate, supra,* 192 Cal.App.4th at p. 427.)

In moving for summary judgment, USSC did not dispute that there was sufficient evidence to hold Cerulle and/or Gonzales liable in negligence for plaintiff's injury. Because a jury, considering the totality of the evidence, might reasonably conclude that Cerulle and Gonzales were USSC's employees, and thus USSC was vicarious liable for their negligence, the trial court erred in summarily adjudicating the claim for USSC.

3. *There Is No Evidence of Gross Negligence*

" 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754 (*Santa Barbara*), quoting *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185–1186; *Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 (*Decker*) [gross negligence is " ' "a failure to exercise even that care which a careless person would use" ' "].) It is this extreme departure from the standard of care that distinguishes gross negligence from " '[o]rdinary negligence'—an unintentional tort—consist[ing] 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." (*Santa Barbara,* at pp. 753–754.)

The distinction between ordinary and gross negligence is salient only in limited circumstances. For instance, in the context of sports or recreational programs or services,

our Supreme Court has held that a general release of liability for ordinary negligence may be enforceable, but a release of liability for future gross negligence generally is unenforceable.[2] (*Santa Barbara, supra,* 41 Cal.4th at pp. 750–751.)

Here, because it is undisputed that plaintiff did not execute a release absolving any defendant of liability for negligence, the question of whether she can establish conduct rising to the level of gross negligence is largely academic. (See *Santa Barbara, supra,* 41 Cal.4th at p. 780, fn. 58 [the distinction between ordinary and gross negligence "imposes a limitation on *the defense* that is provided by *a release*," the effect of which "means that, in any subsequent jury trial, defendants would not be entitled to instructions absolving them of liability

---

[2] USSC maintains "California recognizes no cause of action for 'gross negligence' independent of a statutory basis." This is technically correct, but it fails to acknowledge those circumstances in which the distinction between ordinary and gross negligence is relevant. For example, our Supreme Court noted in *Santa Barbara* that "*despite* the absence of any statutory authorization for the distinction—we long have adhered to the common law rule that a contract may be reformed due to mutual mistake based upon 'ordinary negligence,' but not when the mistake is based upon 'gross negligence.' " (*Santa Barbara, supra,* 41 Cal.4th at p. 778; see also *id.* at p. 779 [discussing primary assumption of risk doctrine, which permits liability for conduct " 'so reckless as to be totally outside the range of the ordinary activity' " (italics omitted)].) As for releases of liability in the context of sports and recreational activities, the *Santa Barbara* court explained the distinction between gross and ordinary negligence is relevant to the *defense* that a release may provide, even if California law does not technically recognize "a separate cause of action for gross negligence." (*Id.* at p. 780, fn. 58.)

for damages resulting from gross negligence" (italics added)].) In any event, we agree with the trial court that there is no evidence of conduct representing such " ' " 'an extreme departure from the ordinary standard of conduct' " ' " that it would constitute gross negligence. (*Id.* at p. 754.)

Drawing all inference from the evidence in favor of plaintiff, a reasonable jury at most could find Cerulle and Gonzales acted negligently in failing to implement adequate safety measures for the supervision of plaintiff and the other junior golfers who were practicing chip shots in the "fringe area."[3]

---

[3] In its respondent's brief, USSC maintains Cerulle's and Gonzales's conduct constitutes, at most, "simple negligence," but it argues for the first time on appeal that anything short of gross negligence is "not enough to impose liability in the context of sporting events." Because USSC did not make this argument in the trial court, it forfeited the contention as a basis for affirming the summary adjudication of plaintiff's negligence claim. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 14, fn. 6 ["New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal."].) The rule USSC relies upon is inapplicable in any event.

In *Knight v. Jewett* (1992) 3 Cal.4th 296, our Supreme Court considered the proper duty of care that should govern the liability of a sports participant for an injury to a coparticipant. In recognition of the circumstance that some risk of injury is inherent in most sports, and in order to avoid the detriment to a sport that would arise from discouraging vigorous engagement in the activity, the *Knight* court held that a participant breaches a duty of care to a coparticipant only if he or she "intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Id.* at p. 320; see *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 995–996 [extending *Knight*

When Cerulle recruited Gonzales for the El Dorado golf camp, he knew Gonzales had worked as a junior golf instructor for the City of Los Angeles, and that Gonzales had received significant safety training in connection with that work. This undisputed evidence negates any charge that USSC or Cerulle were reckless in permitting Gonzales to instruct junior golfers without undertaking additional safety training.

As for Gonzales, he consistently declared that he spaced the campers eight to ten feet apart so each student could practice chip shots without endangering other students. When he noticed Bryson swinging "too big" for a proper chip shot, he stopped the group to demonstrate the proper swing, and remained with Bryson for "several swings" to ensure she was following the "proper technique." To be sure, Gonzales admitted he took his eyes off plaintiff's group for 10 to 15 seconds after allowing them to "hit the balls they had in front of them at the same time at their own discretion." He also acknowledged that, if he had been the camp director, he "would have recommended two instructors" so an adult would have been there to provide constant supervision of the group in the fringe area. But, while a jury could reasonably conclude these lapses constituted a breach of

---

standard to "cases in which an instructor's alleged liability rests primarily on a claim that he or she challenged the player to perform beyond his or her capacity"].) Unlike the touch football game at issue in *Knight*, golf is not a contact sport, and being struck by another golfer's club is not a risk inherent to the ordinary activity involved in the sport. Because plaintiff's injury in this case did not stem from a risk inherent in the sport itself, but rather was the result of an alleged failure properly to supervise young children swinging golf clubs in a group, the *Knight* standard is inapplicable to the facts of this case.

the ordinary standard of care, they do not, as a matter of law, constitute recklessness or such an extreme deviation from the standard of care as to establish gross negligence. (See *Decker, supra,* 209 Cal.App.3d at pp. 360–362 [affirming summary judgment for city, concluding sheriff's dive team's use of rescue method that would not be used by an experienced, trained surf rescuer was insufficient to establish gross negligence as would destroy governmental immunity under Gov. Code, § 831.7]; *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 639 [finding no evidence of gross negligence where defendant took steps to mitigate risks].)

4. *There Is No Evidence that Plaintiff or Her Parents Relied Upon Any Defendant's Representations Regarding the Golf Camp*

Whether it be a cause of action for intentional or negligent misrepresentation, a plaintiff must demonstrate that he or she *actually* and reasonably relied upon a representation made by the defendant. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088 (*Mirkin*).) "[W]hether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843.)

Plaintiff's operative complaint alleged the El Dorado golf camp's brochure "falsely represented" that all students would be " 'supervised 24 hours a day' under 'Round-the-clock supervision' by 'some of the finest professionals and college coaches this country has to offer.' " The complaint alleged that "plaintiff's mother read [the brochure] and relied upon the representations made in" it in "deciding to enroll plaintiff in the camp."

In moving for summary judgment, USSC presented evidence showing the brochure specifically directed prospective attendees to register for the camp through USSC's website or its toll free telephone number, but plaintiff did not register for the camp as the brochure directed. The evidence also showed that plaintiff's attendance came about by way of a "table conversation" between Cerulle and plaintiff's father, who urged Cerulle to allow his daughter to participate. This evidence was sufficient to shift the burden to plaintiff to substantiate her allegations with evidence that she or her parents relied upon the allegedly false statements in the brochure. (*Aguilar, supra,* 25 Cal.4th at p. 849; *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 548 [plaintiff's complaint limits the issues to be addressed in defendant's motion for summary judgment]; see also *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1275 [" ' " ' "[t]he [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings" ' " ' "].)

Plaintiff's opposition presented no evidence of reliance to substantiate her complaint's allegation. Plaintiff admitted she did not register for the camp as the brochure directed, and she offered no evidence to show that anyone in her family relied on the brochure. Instead, she confirmed Cerulle's account of the table conversation with her father that led to her participation in the camp. There is no evidence in the record that plaintiff's mother even read the brochure. (*Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 988–989 [party opposing summary judgment must present evidence and cannot rely on allegations in a complaint].)

Because there is no evidence that plaintiff (or her parents) relied on the alleged misrepresentations in deciding whether to participate in the El Dorado golf camp, the trial court properly adjudicated the fraud and negligent misrepresentation claims in defendants' favor. (See *Mirkin, supra*, 5 Cal.4th at pp. 1088-1089, 1107-1108 [plaintiffs could not plead cause of action for deceit where they could not allege they actually read or heard the alleged misrepresentation].)

5. *The Undisputed Evidence Establishes AGC Is Not Liable under Any Theory*

The complaint alleges AGC is vicariously liable as a joint venturer in the El Dorado golf camp, vicariously liable under the respondeat superior doctrine because Gonzales was an AGC employee, and directly liable for failing to ensure the safety of junior golfers at its golf course. Because the undisputed evidence negates each theory of liability, the trial court properly granted summary judgment in AGC's favor.[4]

a. *Joint venture: AGC did not have joint control over the operation of the golf camp*

Plaintiff principally claims AGC is vicariously liable as part of a joint venture with USSC to operate and profit from the golf camp at El Dorado. "There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise." (*Orosco v. Sun-Diamond Corp.* (1997)

---

[4] Because we have already concluded there was no evidence to establish gross negligence or the claims for fraud and negligent misrepresentation against any defendant, our discussion focuses on plaintiff's negligence claim against AGC.

51 Cal.App.4th 1659, 1666 (*Orosco*).) The cases emphasize that " ' "the right of joint participation in the management and control of the business" ' " is " ' "[a]n essential element of a partnership or joint venture." ' " (*Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1056 (*Simmons*).) " ' "Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer." ' " (*Ibid.*, quoting *Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 586; *Orosco,* at p. 1666.)

In moving for summary judgment, AGC sought to negate the requisite element of control. Crowder, AGC's general manager at El Dorado, declared AGC "did not setup, manage, supervise, arrange, direct, or conduct junior golf camps at the golf course during the summer of 2014," when plaintiff was injured. Consistent with that declaration, Cerulle testified the golf camp at El Dorado was his "brain child" and he reached out to Brunner, USSC's vice president, to inquire about organizing the camp. Brunner likewise testified that USSC hired Cerulle to be the camp director at El Dorado, and that Cerulle—not anyone from AGC—was USSC's "single point of contact" regarding the camp. Brunner also confirmed that, as camp director, Cerulle was responsible for negotiating golf course arrangements, arranging for lunches, and recruiting and scheduling the camp staff, subject to USSC's directive that all staff members execute its documentation and submit to a background check. This showing was sufficient to shift the burden to plaintiff to present evidence that AGC actually exercised control over the El Dorado camp's operations.

On appeal, plaintiff relies on the master agreement between AGC and USSC, which she contends "established joint

control of the Nike Junior Golf Camps." She emphasizes the terms requiring AGC to provide facilities, marketing services, liability insurance, and staffing for the camps, but she fails to cite any *evidence* showing AGC and USSC actually operated the El Dorado camp in accordance with these terms. On the contrary, consistent with Brunner's deposition testimony, plaintiff asserted in her supporting separate statement in opposition to summary judgment that "*Cerulle* [was] in charge of hiring, training, and scheduling the instructors" for the camp, as well as "put[ting] together and execut[ing] a curriculum, negoiat[ing] golf course space arrangements, [arranging for] lunches, and creating a safety protocol." (Italics added.) Absent evidence that AGC actually exercised the sort of control contemplated by the master agreement, the terms of the agreement, by themselves, are insufficient to raise a triable issue of fact. (See *Orosco, supra,* 51 Cal.App.4th at pp. 1665–1666 [affirming summary judgment against claim of joint venture liability, observing language of written agreement making defendant "agent for 'all operating functions' " was "extremely broad" and, "[i]n the absence of any further information," would cause one "plausibly [to] infer that the joint venture . . . actually ran" operations, but concluding agreement was insufficient to create triable issue because there was "not a shred of evidence that any entity other than [co-defendant] had any control" over facility where injury occurred].)

Plaintiff nevertheless argues AGC "specifically approved of this camp through its managing director Rick Crowder[ ]," thereby delegating its control over the operations to Cerulle and USSC. (See *Buck v. Standard Oil Company of California* (1958) 157 Cal.App.2d 230, 240 ["Joint venturers may delegate

responsibility between them for certain portions of the job without destroying the joint venture aspect thereof."].) However, the evidence plaintiff relies upon does not support her contention. At his deposition, Cerulle testified that he needed Crowder's "permission to use the [El Dorado] practice area for the camp," because Crowder had the ultimate "say in who comes and goes as far as use of that practice area." This testimony does not demonstrate AGC controlled the golf camp or delegated authority to Cerulle; it merely shows AGC controlled who could use the practice area at its El Dorado golf course. Indeed, while the testimony is consistent with evidence showing Cerulle was responsible for "negoiat[ing] golf course space arrangements," the fact that he needed to ask for Crowder's permission to use the practice area is patently inconsistent with the contention that AGC was part of a joint venture to put on the golf camp at its El Dorado course. Evidence that AGC controlled the practice area and granted Cerulle permission to use it does not support an inference that AGC maintained joint control over the camp itself. (See *Simmons, supra,* 213 Cal.App.4th at p. 1056 [boat owner's control over boat, being "responsible for maintenance and repair, insurance, fueling, serv[ing] as ship's engineer, and provid[ing] three of the ship's crew members" did not establish joint control over marine education charter trips].)

Plaintiff also contends AGC shared control over enrollment with USSC, claiming "[AGC] approved the participation of children of [its] employees without registration or signing waivers." But, here again, the evidence plaintiff relies upon does not support her assertion. To the contrary, Cerulle testified that members of AGC's management "*asked* if their children could also participate" in the camp. (Italics added.) As AGC argues, it

stands to reason that, if AGC controlled the camps, its executives would not need to ask Cerulle for permission to have their children attend.

Finally, plaintiff contends "the agreement to split the profits is prima facie evidence of a joint venture." (See *Nelson v. Abraham* (1947) 29 Cal.2d 745, 750.) However, as we have discussed, the sharing of profits is only one of the three essential elements of a joint venture. Without the requisite element of control, " ' "the mere fact that one party is to receive benefits in consideration of services rendered . . . does not, as a matter of law, make him a partner or joint venturer." ' " (*Simmons, supra,* 213 Cal.App.4th at p. 1056; *Orosco, supra,* 51 Cal.App.4th at p. 1666 [essential element of joint venture is "members must have joint control over the venture"]; cf *Nelson,* at pp. 750–751 [observing a party's receipt of a share of profits is "prima facie evidence that he is a partner," but concluding it was "unnecessary" to determine whether joint venture existed because parties' agreement imposed fiduciary duty "without the necessity for designating their relationship by a particular label"].) Because there is no evidence that AGC had joint control with Cerulle or USSC over the golf camp, we need not decide whether its receipt of 75 percent of the camp's gross revenue was sufficient to raise a triable issue. The undisputed evidence that AGC maintained no control over the camp's operations is alone sufficient to negate its alleged joint venture liability. (See *Orosco,* at pp. 1665–1666.)

b. *Respondeat superior: Gonzales was not acting within the course and scope of his employment*

As discussed, under the doctrine of respondeat superior, an "employer may be [vicariously] liable for the torts its employee

commits while acting within the scope of his employment." (*Yamaguchi, supra,* 106 Cal.App.4th at p. 481.) To establish a tortious act was committed within the course and scope of employment, a plaintiff must show the conduct "either (1) is required by or incidental to the employee's duties, or (2) it is reasonably foreseeable in light of the employer's business." (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1521 (*Montague*); see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209 [plaintiff bears the burden of proving alleged tortious act was committed within the course and scope of employment].)

The complaint alleges AGC is vicariously liable because it employed Gonzales. In moving for summary judgment, AGC presented evidence that Gonzales was employed as the pro shop manager at El Dorado—not as a golf instructor—and his duties were limited to overseeing operations of the shop, checking in and greeting customers, processing their transactions at the shop, assisting with merchandising, and scheduling employees in the shop. AGC showed Gonzales was not scheduled to work and he was not managing the pro shop at the time plaintiff was injured. Gonzales testified that he volunteered to work at the camp on his day off as a favor to his friend, Cerulle, who asked for his help. And, it was undisputed that the Staff Conduct Guidelines and Employment Agreement and other documents Gonzales signed were required by USSC, not AGC. This evidence was sufficient to satisfy AGC's initial burden. (See *Montague, supra,* 223 Cal.App.4th at p. 1522 [" 'If an employee substantially deviates from his duties for personal purposes, the employer is not vicariously liable for the employee's actions.' "].)

On appeal, although plaintiff still emphasizes Gonzales's employment with AGC, she fails to cite evidence showing he was acting within the course and scope of his employment as the El Dorado pro shop manager when she was injured. Instead, plaintiff appears to contend AGC compelled Gonzales to volunteer for the camp because it required professional instructors who worked at El Dorado to "donate a certain amount of hours to junior golf." But the only evidence plaintiff cites for this contention is Crowder's deposition testimony regarding an agreement AGC had with Tim Johnson, a different golf professional who worked at the El Dorado course. With respect to Gonzales, Crowder testified he was unaware that Gonzales had volunteered to work for Cerulle's golf camp. And, for his part, Gonzales affirmed that his work as a part-time instructor "was a completely private enterprise with no relation to [AGC]." Indeed, notwithstanding the insinuation about Gonzales volunteering, plaintiff concedes in a different part of her opening brief that Gonzales "was not required to donate any hours to junior golf, since he had no independent contract with [AGC] as a professional." There is no basis to hold AGC liable under the respondeat superior doctrine.

c. ***Direct liability: AGC had no duty to supervise because it had no reason to know of reckless conduct or a dangerous condition***

The complaint alleges AGC "had a duty at all times to supervise the conduct of students on the grounds of El Dorado Park Golf Course and to enforce those rules and regulations necessary for the protection of the students." "Owners and operators of recreational resorts and facilities . . . have a duty to warn their patrons of dangerous conditions the owner is aware of,

but are not apparent to the patron." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1202 (*Lackner*).) However, the operator of such a facility "is not an insurer of its patron's safety," and it has no duty to "personally supervise" other participants who may cause harm, absent evidence the operator "knew or should have known" these participants "were reckless." (*Id.* at pp. 1193–1194, 1203 [ski resort owner had no duty to supervise patrons, notwithstanding hosting a competition bringing 400 teenage skiers and snowboarders to its resort].)

In moving for summary judgment, AGC presented evidence that its general manager, Crowder, gave Cerulle permission to use the private practice area for the golf camp, but neither Crowder nor any employee of AGC had any part in setting up or supervising the camp. On appeal, plaintiff relies exclusively upon the master agreement between AGC and USSC to argue AGC had authority to staff and supervise the camp under the agreement's terms. But, as we have discussed, the agreement's terms do not establish AGC had actual control of the golf camp or knowledge of an unsafe condition regarding supervision of the camp's participants. Absent evidence that AGC knew or should have known of reckless conduct or hazardous conditions, it cannot be charged with a duty to instruct, supervise, or control the junior golfers at the El Dorado camp. (*Lackner, supra,* 135 Cal.App.4th at pp. 1202–1203.)

DISPOSITION

The summary judgment in favor of USSC is reversed and the matter is remanded for further proceedings on the negligence claim. The summary adjudications of all other claims in favor of USSC are affirmed, and the summary judgment in favor of AGC

is affirmed. AGC is awarded its costs. Plaintiff and USSC shall bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.