Filed: 12/21/21

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ESTATE OF LAMERLE JOHNSON, SR., et al., Plaintiffs and Appellants, v. MAYACAMAS HOLDINGS LLC, Defendants and Respondents.	A161183 (Alameda County Super. Ct. No. RG17853267)

The Estate of Lamerle Johnson, Sr., Danielle Martin Johnson, LaMerle Johnson, Jr., and Deja Thomas (appellants) sued respondents after Lamerle Johnson, Sr. (Johnson) tragically drowned while canoeing on a lake at respondents' resort. The trial court entered judgment in respondents' favor after granting their motion for summary adjudication, based largely on the fact that Johnson had signed a release of liability. Appellants now contend the court erred because (1) respondents were not identified by name as parties to the release and were not third-party beneficiaries; (2) the release could be construed to pertain only to claims arising from swimming at the pool, not canoeing on the lake; (3) there was a material factual dispute as to whether respondents were grossly negligent; and (4) the court erred in

sustaining an objection to the declaration of appellants' expert witness. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

A. Mayacamas Ranch

Mayacamas Ranch was a resort in Calistoga. The property included a "Building Parcel," with guest cottages, a man-made pool, and other structures, and a "Lake Parcel," with a pond called Hidden Lake. On the shore of Hidden Lake were at least two 12-foot fiberglass canoes. An unmarked white bin, containing life vests, was nearby.

At the time relevant to this case, the Building Parcel of Mayacamas Ranch was owned by respondent Mayacamas Holdings LLC (Mayacamas Holdings), and the Lake Parcel was owned by respondent Profit Recovery Center. Both parcels were operated and managed by respondent Paradise With Purpose, a hospitality management company.[1]

B. Release and Waiver of Liability

In December 2016, Johnson attended a retreat at Mayacamas Ranch hosted by Rockwood Leadership Institute. Upon his arrival, he received a "Release & Waiver of Liability," which the resort required guests to review and sign before they were assigned rooms and given keys. Johnson signed the release on December 5, 2016.

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[1] In October 2017, Mayacamas Ranch was destroyed by fire. Paradise With Purpose is purportedly suspended by the California Secretary of State and barred from defending against appellants' lawsuit. (See *Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306.) Philadelphia Indemnity Insurance Company filed a motion to intervene in this appeal to protect its interests as the insurer of Paradise With Purpose and the interests of its insured. We granted the motion, and Philadelphia Indemnity Insurance Company filed its joinder to respondents' brief.

The release stated: "I am aware that the grounds and facilities of Mayacamas Ranch are rural and rustic. I do not have any medical or physical conditions, which would impair or affect my ability to engage in any activities or which would cause any risk of harm to myself or to the participants or otherwise endanger my health while attending and utilizing Mayacamas Ranch. . . . I am further aware that certain activities available at the Ranch may be dangerous, for example, swimming, consuming alcohol, or hiking the trails. I understand that the Ranch does not provide lifeguards or any other forms of supervision for the use of the facilities nor for monitoring consumption of alcoholic beverages. I understand that the Ranch does not have on staff anyone trained in CPR nor first aid. Pool [c]loses promptly at 10 p.m. to adhere to strict property noise ordinance. . . . *I assume full responsibility for all risks of bodily injury, death or property damage and hold harmless Mayacamas Ranch, its officers, agents, principals and employees and the owners of the real property. . . . I waive, release, and discharge any and all claims, rights and/or causes of action which I now have or which may arise out of or in connection with my presence at Mayacamas Ranch.* I acknowledge that I have read and agree to all Mayacamas Ranch policies listed in this release & waiver of liability." (Italics added.)

C. Johnson Drowns While Canoeing

On December 6, 2016, Johnson and another guest, Troy Williams, went hiking and "stumbled upon" Hidden Lake. Johnson took one of the canoes onto the water, apparently without incident.

On December 7, 2016, Johnson, Williams, and two other guests (Heracio Ray Harts and Eddy Zheng) went hiking before the day's scheduled activities. They arrived at Hidden Lake and took turns taking the two canoes

onto the water. They did not locate any life vests; although they found the white bin, they could not open it.

While Johnson and Williams were in their respective canoes on Hidden Lake, Johnson began "horsing around" and rocking Williams's canoe. Williams started to return to shore. When he looked back, he saw that Johnson's canoe had flipped over and Johnson was in the water. Williams saw "panic in [Johnson's] face."

As Williams tried to help Johnson, Williams fell into the water, which was so cold that he had to swim to shore. Zheng entered the water to look for Johnson, and Harts ran to get help. Darlene Nipper, the chief executive officer of Rockwood Leadership Institute, arrived at the scene and unsuccessfully tried to find Johnson. First responders later found Johnson's deceased body.

On the day of the incident, the canoes were unsecured; previously, they had been secured with a chain and a lock. The water temperature in Hidden Lake was about 40 degrees, and the air temperature was roughly 38 degrees. Respondents had no policies, procedures, or practices to warn guests about specific safety hazards associated with cold water shock and swimming or canoeing at Hidden Lake.

D. Johnson's Estate and Survivors Sue

In March 2017, appellants sued Mayacamas Ranch LLC, Rockwood Leadership Institute, and others. They asserted causes of action for general negligence, premises liability, and wrongful death, alleging that Mayacamas Ranch LLC negligently owned, possessed, leased, maintained, operated, designed, inspected, supervised, managed, and controlled the resort premises.

In April 2018, appellants filed an amended complaint in which they acknowledged that Mayacamas Ranch LLC was a dissolved entity that was

no longer operating. In its place, appellants named three new defendants—respondents Mayacamas Holdings, Profit Recovery Center, and Paradise With Purpose (Mayacamas Defendants).

E. Mayacamas Defendants' Summary Judgment Motion

In December 2019, the Mayacamas Defendants moved for summary judgment or, in the alternative, summary adjudication. They argued that the release provided a complete defense to each cause of action, the primary assumption of the risk doctrine also barred liability, and Thomas lacked standing to bring a wrongful death action.

Appellants opposed the motion, arguing inter alia that the release did not identify the Mayacamas Defendants, did not cover canoeing on Hidden Lake, and did not absolve the defendants from liability for gross negligence. They also argued that primary assumption of the risk was inapplicable and that Thomas had standing to file suit.

On the issue of gross negligence, appellants submitted a declaration from Dr. John R. Fletemeyer, a purported expert in "aquatics safety," who stated that the defendants' failure to take certain safety precautions—such as failing to provide warnings, limit access to the canoes, or make life vests accessible—fell "far below the generally accepted customs and practices in the aquatic safety industry, such that it rises to a level of gross neglect, recklessness and a deliberate and willful disregard for the safety of the public and their guests, including Mr. Johnson."

In July 2020, the trial court granted summary adjudication for the Mayacamas Defendants on each cause of action, concluding that the release was "unambiguous as a matter of law." The court found "no triable issue of material fact as to the existence of gross negligence, which could negate the legal effect of the Release," observing that Dr. Fletemeyer's opinion "fail[ed]

to establish what the accepted customs and practices in the aquatic safety industry [were], or how they appl[ied] to properties like Mayacamas Ranch." The court sustained the Mayacamas Defendants' objection to paragraph 16 of Dr. Fletemeyer's declaration, which had set forth his opinion on gross negligence, as conclusory and lacking in foundation. The court added that "Mr. Johnson's assumption of risk in signing the Release functions as a defense to the Plaintiffs' claims based on negligence."

Judgment was entered in favor of the Mayacamas Defendants as to all causes of action. This appeal followed.

II. DISCUSSION

In reviewing a grant of summary judgment, we conduct an independent review to determine whether there are triable issues of material fact 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, 843.) A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (o)(1) & (2).) The burden then shifts to the plaintiff to show there is a triable issue of material fact as to that issue. (Code Civ. Proc., § 437c, subd. (p)(2); See *Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72.) We construe the moving party's evidence strictly, and the nonmoving party's evidence liberally, in determining whether there is a triable issue. (*Thomas*, at p. 72.)

A. The Release Unambiguously Bars Appellants' Claims

A written release of future liability reflects an express assumption of the risk by the plaintiff, thereby negating the defendant's duty of care. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 719 (*Eriksson*).) If the

plaintiff signed a release of all liability, the release applies to any ordinary negligence of the defendant, so long as the act of negligence that resulted in the plaintiff's injury is reasonably related to the purpose for which the release was given. (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1357–1358.) The release must be " ' " 'clear, unambiguous, and explicit in expressing the intent of the subscribing parties.' " ' " (*Eriksson, supra*, 233 Cal.App.4th at p. 722, italics omitted.)

Here, the release was clear, unambiguous, and explicit in expressing the parties' intent that Johnson assume all risks of injury or damage at Mayacamas Ranch and waive and release all claims related to his stay. The release was entitled "Release & Waiver of Liability," communicating to Johnson that he was releasing claims and waiving liability. It explicitly stated that he would "assume full responsibility for *all* risks of bodily injury, death or property damage," and that he would "hold harmless Mayacamas Ranch, its officers, agents, principals and employees and the owners of the real property." (Italics added.) It further stated that Johnson would "waive, release, and discharge *any and all* claims, rights and/or causes of action which [he] now ha[s] or which may *arise out of or in connection with* [his] *presence* at Mayacamas Ranch." (Italics added.) In short, the release applied to any ordinary negligence liability arising out of Johnson's stay at the ranch, which would include his use of the canoe on Hidden Lake at the resort.

B. Appellants' Arguments

Appellants contend the release was insufficient in three respects: it did not apply to the Mayacamas Defendants; it did not apply to canoeing; and it did not apply to gross negligence. Their contentions lack merit.

1. Application of the Release to the Mayacamas Defendants

The release stated that Johnson would hold harmless "Mayacamas Ranch, its officers, agents, principals and employees and the owners of the real property." It did not explicitly name Paradise With Purpose, Profit Recovery Center, or Mayacamas Holdings. Therefore, appellants contend, the Mayacamas Defendants "were not parties to the Release" and could not invoke its protections unless they were intended third-party beneficiaries. Appellants further contend there was no evidence that the release was intended to benefit the Mayacamas Defendants and appellants presented evidence to the contrary.

Although the release did not identify the Mayacamas Defendants by name, a reasonable person in Johnson's position—signing a release and waiver of liability for all claims arising from his presence at Mayacamas Ranch—would necessarily expect the phrase "Mayacamas Ranch, its officers, agents, principals and employees" to include the entity that was operating, and doing business as, "Mayacamas Ranch." That entity was the defendant, Paradise With Purpose, which—as alleged in the amended complaint—operated and managed both parcels. (At the time the release was signed, the legal entity previously known as "Mayacamas Ranch, LLC" had already been dissolved.) Further, a reasonable person in Johnson's position would understand that "owners of the real property" meant those who owned the property on which Mayacamas Ranch was located: that is, Mayacamas Holdings, which owned the Building Parcel, and Profit Recovery Center, which owned the Lake Parcel, as alleged in the amended complaint.

The cases on which appellants rely do not suggest otherwise. In *Vahle v. Barwick* (2001) 93 Cal.App.4th 1323, an attorney had represented clients in a personal injury matter that was resolved by a settlement agreement.

When the clients later sued the attorney for malpractice, the attorney argued that a provision in the settlement agreement, by which the clients had released the opposing party in the personal injury case and "their agents, servants, assigns . . . and *all other persons* . . ." from all claims related to the personal injury litigation, released the attorney as to the subsequent malpractice claim. (Italics added.) The court rejected the argument, noting that the release was plainly intended only to release the opposing party and those in privity with the opposing party, and not the clients' own attorney. (*Id.* at pp. 1326–1333.)

In *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, a passenger in a vehicle involved in an accident sued the driver of the other car. The defendant driver contended the claim was barred by a release the plaintiff had signed with the insurer of the vehicle in which the plaintiff had been riding. That release had exonerated certain individuals "and *any other person*, firm or corporation charged or chargeable with responsibility or liability." (Italics added.) The court of appeal concluded there was a triable issue of material fact as to whether the plaintiff had intended to release the driver with the words "any other person." (*Id.* at pp. 342–345.) The question, the court explained, is whether "a reasonable person in the releasing party's shoes would have believed the other party understood the scope of the release." (*Id.* at p. 351.)

Here, we do not have a situation where we must divine whether the parties intended the Mayacamas Defendants to fall within a phrase such as "all other persons" or "any other person." The release expressly identified the ranch, its agents, its officers, its principals, its employees, and the owners of the real property as the ones who would be held harmless. The only reasonable interpretation is that, by this language, the release was intended

to protect the entities that were subject to liability as operators of the resort and owners of the real property—the Mayacamas Defendants.

Appellants argue that they submitted evidence showing that the Mayacamas Defendants were not third-party beneficiaries. They cite to a discovery response in which Profit Recovery Center stated it owned the Lake Parcel but did not own or control the Building Parcel (the land where the " 'resort and retreat center' " was located). Whether Profit Recovery Center owned the Building Parcel is irrelevant, however, because it owned the Lake Parcel and was therefore one of the "owners of the real property" under the release. Similarly, appellants point us to a discovery response in which Mayacamas Holdings stated it owned the Building Parcel and not the Lake Parcel, but that still makes Mayacamas Holdings an "owner[] of the real property" under the release. Appellants also refer to discovery responses indicating that the Mayacamas Defendants had no "relationship" except that they shared a chief executive officer or manager, but they fail to demonstrate why that matters.

Whether the release should be construed such that Mayacamas Holdings, Profit Recovery Center, and Paradise With Purpose were parties to the release, or were intended third-party beneficiaries, they are entitled to the benefits and protections of the release.

2. Application to the Canoe Incident

Appellants next contend the scope of the release was ambiguous and could reasonably be construed to apply only to Johnson's use of the resort's swimming pool, and not to canoeing; because of this ambiguity, they argue, there was a material factual dispute that precluded summary judgment.

Appellants' argument is meritless. An ambiguity exists only " ' "when a party can identify an alternative, semantically reasonable, candidate of

meaning of a writing." ' " (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1485 (*Cohen*).) It is not semantically reasonable to conclude that the release covered only Johnson's swimming in the pool.

As mentioned, the release was exceedingly broad. It stated that Johnson assumed "full responsibility for *all risks of bodily injury, death or property damage*" and "waive, release, and discharge *any and all* claims, rights and/or causes of action which I now have or which may arise out of or in connection with my *presence* at Mayacamas Ranch." (Italics added.)

Given this language, no reasonable person would think that the release pertained only to swimming in the swimming pool. Appellants point to a sentence in the release that states: "I am further aware that certain activities available at the Ranch may be dangerous, *for example, swimming*, consuming alcohol, or hiking the trails." (Italics added.) But in that sentence, "swimming" was just an "example" of dangerous activities, and there was no attempt to provide an exhaustive list of the risks. While the release mentioned the pool's closing time, that was plainly to solicit adherence to a "noise ordinance" and in no way limited the release's scope. To the contrary, the first sentence of the release recited Johnson's awareness that the "*grounds and facilities* of Mayacamas Ranch are rural and rustic," suggesting a far broader scope to the release than just the pool. (Italics added.) And finally, the fact that the release did not specifically mention canoeing is immaterial. (See *Cohen, supra,* 159 Cal.App.4th at p. 1485 [the express terms of the release must *apply* to the defendant's negligence, but the release need not *mention* the defendant's specific negligent act].) Canoeing would be performed in the canoes provided at Hidden Lake, which was part of the "grounds and facilities of Mayacamas Ranch," and involved Johnson's "presence" at the resort.

The cases on which appellants rely are inapposite. In those cases, the harm that caused the plaintiff's injuries was outside the purpose of the release. (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1466–1469 [release given in connection with the rental of scuba diving equipment was expressly limited to "boat dives or multiple day rentals" and therefore did not apply where the decedent had not rented the equipment for those purposes]; *Sweat v. Big Time Auto Racing, Inc.* (2004) 117 Cal.App.4th 1301, 1303–1308 [release signed as a condition of watching an automobile race from the "pit area" did not cover injuries incurred when bleachers in the pit area collapsed, because the purpose was to require attendees to assume the risk of injury as a result of being in close proximity to the race, not defectively constructed or maintained bleachers].) Here, the purpose of the release was for guests to waive all future claims arising out of their presence at the ranch and their use of its property and facilities, which necessarily included canoeing on Hidden Lake.

3. No Triable Issue as to Gross Negligence

A release of liability bars claims for ordinary negligence, but not gross negligence. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750 (*Santa Barbara*).) Appellants contend they established triable issues of material fact as to whether the Mayacamas Defendants acted with gross negligence. We disagree.

" 'Gross negligence' " is a " ' " 'want of even scant care' " ' " or " ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*Santa Barbara, supra*, 41 Cal.4th at p. 754; *Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640 [" ' "such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results" ' "].) By contrast, ordinary negligence is "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, supra*, 41 Cal.4th at pp. 753–754; *Anderson, supra*, 4 Cal.App.5th at p. 881 [" ' "[M]ere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty," ' amounts to ordinary negligence."].) Thus, while "[e]vidence of conduct that evinces an extreme departure from safety directions or an industry standard could demonstrate gross negligence," "conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence." (*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 365 (*Willhide-Michiulis*).)

Here, appellants claim that the Mayacamas Defendants were grossly negligent because they did not lock up the canoes, post signs, provide a flotation device and life vests, or warn guests about "cold water shock" and canoeing at the lake, including admonishing them that canoes can capsize and life vests should be worn. This alleged wrongdoing, however, does not constitute gross negligence, but "[m]ere nonfeasance"—the failure to guard against, or warn of, dangerous conditions. (See *Willhide-Michiulis, supra*, 25 Cal.App.5th at pp. 358–365 [where snowboarder collided with snow grooming equipment, allegations that the equipment was used on an open run without spotters or adequate warning of the danger did not demonstrate gross negligence]; *Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 878–883 [customer who slipped and fell in health club's shower room failed to plead gross negligence by alleging that the shower room floor was routinely covered with oily and soapy residue, because there was no extreme departure from expected conditions or safety standards, and the defendant did not actively increase the risk or conceal it].)

Dr. Fletemeyer's opinion that the failure to take the stated precautions fell "far below the generally accepted customs and practices in the aquatic safety industry, such that it rises to a level of gross neglect" did not create a triable issue of fact. As discussed *post*, the trial court did not err in sustaining defendants' objection to Dr. Fletemeyer's statement as conclusory and lacking in foundation. (*Willhide-Michiulis, supra*, 25 Cal.App.5th at pp. 355–356.) In any event, Dr. Fletemeyer's opinion missed the mark, because he did not explain the customs and practices of aquatic safety in the context of places such as Mayacamas Ranch and Hidden Lake. There was no showing, therefore, of an *extreme* departure from the ordinary standard of conduct.

Nor did the alleged actions of the Mayacamas Defendants increase the inherent risks of canoeing. A reasonable person in Johnson's position understands that canoeing on a lake (in 38-degree weather) poses risks such as the canoe capsizing or the canoer otherwise falling into the water and having to swim to safety. Not only is this conclusion readily drawn from general experience, it is confirmed by the deposition testimony of Johnson's own companions, who knew enough about the dangers of canoeing to inquire of Johnson's ability to swim and to search for life vests; despite not finding any, they ventured onto the water. (See *Anderson v. Fitness Internat., LLC, supra,* 4 Cal.App.5th at pp. 878–883 [no gross negligence where the defendant did not actively increase the risk or conceal it]; cf. *Eriksson, supra*, 191 Cal.App.4th at p. 856–857 [triable issue as to gross negligence where defendant unreasonably increased the inherent risk of injury in horse jumping by allowing the victim to ride an unfit horse and concealing the horse's unfitness].)

Appellants' reliance on *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072 (*Rosencrans*) is misplaced. In *Rosencrans*, a motorcycle rider fell on a motorcross track during a practice run, at a location where he was not visible to other riders; after he stood and picked up his motorcycle, two other motorcyclists struck him. (*Id.* at p. 1077.) The court determined that, as a matter of law, the operator owed the plaintiff a duty to minimize the risks of motorcross by providing a system, such as a "caution flagger," to alert riders of a fallen participant. (*Id.* at pp. 1084–1085.) Based on admissible evidence in the form of an instructional manual, which directed that flaggers should remain at the flag station at all times when competitors are on the course, and a declaration of a motocross safety expert, who averred that the common practice was to always place caution flaggers at their posts and the failure to do so greatly fell below the standard of care in the motocross industry, the court concluded there was a triable issue of fact as to whether the operator's failure to provide the caution flagger constituted an extreme departure from the ordinary standard of conduct—that is, gross negligence. (*Id.* at pp. 1086–1087.)

Here, even assuming that the Mayacamas Defendants' alleged wrongdoing constituted a breach of their duty of care, there is no evidence comparable to that in *Rosencrans* suggesting the conduct was so extreme as to constitute *gross* negligence. There was no evidence, for example, of an applicable instructional manual. Nor was there admissible testimony from an expert that such conduct would greatly fall below the standard of care applicable specifically to operators of resorts akin to Mayacamas Ranch.

Appellants fail to establish that the court erred in granting summary adjudication and entering judgment based on the release.

C. Primary Assumption of the Risk

In addition to contending that the release negated the element of duty under an *express* assumption of risk theory, the Mayacamas Defendants contended in the trial court that they had no liability based on the *primary* assumption of risk theory. Under that theory, "operators, instructors and participants in the activity owe other participants only the duty not to act so as to *increase* the risk of injury over that inherent in the activity." (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154.) Whether a given risk is inherent in the sport is a question of law to be answered by the court. (*Id.* at pp. 1158–1159.) Respondents argue that falling out of a canoe and drowning is an inherent risk of canoeing, and there was no evidence that the Mayacamas Defendants increased that risk.

It is unclear whether the trial court addressed the primary assumption of risk argument. The court stated in its order that "Mr. Johnson's assumption of risk in *signing the Release* function[ed] as a defense to the Plaintiffs' claims based on negligence." (Italics added.) Because the court discussed assumption of the risk "in signing the Release" and referred to the *Eriksson* case, the Mayacamas Defendants contend the court was referring to express assumption of the risk and never ruled on the primary assumption of the risk theory. On the other hand, the court made its statement under the heading of "Issue 4," which pertained to assumption of the risk (based in part on the language of the release), separate from "Issues 1[–]3," which pertained to the theory of waiver based on the release. Appellants argue that the court did invoke the "primary assumption of the risk" doctrine as an alternative basis for its ruling, and erred in doing so.

Even if the trial court relied on the primary assumption of the risk doctrine, we need not and do not address this alternative ground for the

court's decision, because we affirm the ruling based on the express assumption of the risk doctrine as discussed *ante*.

D. Exclusion of Evidence

In concluding there were no triable issues of material fact as to gross negligence, the trial court sustained respondents' objection to paragraph 16 of Dr. Fletemeyer's declaration. Paragraph 16 read as follows: "Based on my background, education, training, experience, skill, and specialized knowledge in aquatics safety, there are many reasonable, inexpensive, simple, and effective safety precautions, outlined above and referenced below, that the Property-Defendants should have taken under the circumstances. Their failures, whether taken individually or in any combination, more likely than not caused or contributed to the Drowning and death of Mr. Johnson. These failures fall far below the generally accepted customs and practices in the aquatic safety industry, such that it rises to a level of gross neglect, recklessness, and a deliberate and willful disregard for the safety of the public and their guests, including Mr. Johnson." Subparagraphs set forth the safety precautions that, according to Dr. Fletemeyer, should have been taken and would have saved Johnson's life.

The court sustained the objection to paragraph 16 on the ground it was conclusory and lacking in foundation, because Dr. Fletemeyer failed to establish industry standard or custom, particularly as it applied to Mayacamas Ranch. Appellants contend this was error. The traditional rule is that evidentiary rulings in summary judgment proceedings are reviewed for an abuse of discretion. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.) It is now an open question whether that remains the standard or whether the standard is de novo. (*Reid v. Google, Inc.* (2010) 50

Cal.4th 512, 535.) Under either standard, we would uphold the trial court's ruling."

Dr. Fletemeyer professed to be an expert in "aquatics safety" and opined about customs and practices in the "aquatic safety industry," but nothing in his declaration defined the standard and custom specifically for a resort like Mayacamas Ranch or the body of water known as Hidden Lake. Although appellants insist that Dr. Fletemeyer identified the reasonable industry practices relating to safety precautions in paragraph 16(a) and preceding paragraphs, those passages amount to a legal conclusion that certain things the Mayacamas Defendants did not do constituted reasonable industry standard practices, without particularizing the "industry" to which he referred, identifying the "industry standard," or explaining how it applies to resorts like the ranch. (*Willhide-Michiulis, supra*, 25 Cal.App.5th at p. 344, 366 [trial court did not abuse its discretion by excluding expert declarations that "did nothing more than to provide conclusions that the [defendants]conduct violated industry standards and constituted gross negligence"].) Appellants fail to establish error.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BURNS, J.

Estate of Johnson v. Mayacamas Holdings / A161183