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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**CECILIA VAHEDY,**

**Plaintiff and Appellant,**

**v.**

**DEBORAH REMIGIO et al.,**

**Defendants and Appellants.**

**A132912**

**(San Francisco City and County  
Super. Ct. No. CGC-09-491193)**

Following a bench trial, a judge pro tem awarded plaintiff Cecilia Vahedy damages of over \$1.47 million for injuries she sustained in a motor vehicle accident while attending an “adventure camp” sponsored by defendant Jews for Jesus. Jews for Jesus and defendant Deborah Remigio, the driver of the van in which plaintiff was riding at the time of the accident, appeal from the judgment. Defendants contend: (1) the judge erred in failing to disqualify himself from the case; (2) the judgment is excessive and reflects the judge’s bias against them for seeking his removal; and (3) the judge erred in concluding plaintiff’s claims are not barred by a release agreement signed by her father before camp began. We reject these contentions and affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

In August 2007, the 16-year-old plaintiff attended a teen “adventure camp,” sponsored by Jews for Jesus. Camp began on August 4, at a residence in Cameron Park, near Sacramento. Campers stayed at a church in the Redding area the next night and then

spent several days houseboating on Lake Shasta. Campers spent the night of Thursday, August 9, at a residence in Live Oak, and left the next day for the Jews for Jesus headquarters in San Francisco for the final night of camp. Plaintiff was riding in a Dodge Caravan that was owned by Jews for Jesus and driven by Remigio, a volunteer. Remigio “momentarily nodded off and when she regained her awareness, she found herself on the shoulder of the road. She quickly corrected to the left, and then overcorrected to the right, causing the van to roll over” several times, injuring the passengers.

In August 2009, after reaching the age of majority, plaintiff filed a form complaint against defendants for motor vehicle negligence, seeking damages for personal injuries she sustained in the accident.

In October 2010, the parties stipulated that Attorney Ronald J. Souza would serve as judge pro tem for the trial of the case. On January 6, 2011, the matter came before Judge Souza for a bench trial. Defendants “admitted liability for ordinary negligence” and that their “negligence was the cause of injury to plaintiff.” Nonetheless, defendants offered a release agreement signed by plaintiff’s father as a complete bar to all claims she asserted against them. Assuming the release agreement did not preclude plaintiff’s claims, the judge was asked to decide the amount of compensatory damages to which plaintiff was entitled for her injuries. The judge heard evidence from January 7 through 12, 2011. On May 26, 2011, after issuing a tentative decision and receiving objections from the parties, the judge filed a statement of decision awarding plaintiff damages of more than \$1.47 million. Judgment against defendants was entered the same day. Defendants filed a timely notice of appeal from the judgment. Plaintiff filed a protective cross-appeal.

## DISCUSSION

### I. *Disqualification of the Judge*

Defendants contend the judgment is void because the judge pro tem failed to disqualify himself from the case.

### A. Background

On January 12, 2011, the fifth day of trial, defendants made an oral motion in chambers for disqualification of the judge under Code of Civil Procedure section 170.1 et seq.<sup>1</sup> Defense counsel indicated that, while doing legal research the previous night, he had come across a case entitled *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262 (*Squaw Valley*). Further research identified the plaintiff in that case, Tatum Souza, as Judge Souza’s daughter, and Judge Souza confirmed he had acted as her guardian ad litem in that litigation. Defense counsel noted purported similarities between *Squaw Valley* and the instant case—specifically, that both involved a minor injured during an outing, allegations of negligence, and an assumption of the risk defense—and expressed concern that the unfavorable outcome in *Squaw Valley* might affect Judge Souza’s ability to remain impartial in the trial of the instant case. (See *Squaw Valley*, at pp. 270, 272 [affirming a grant of summary judgment against plaintiff on all causes of action].)

Judge Souza denied the motion as untimely, noting that *Squaw Valley* “was on the books at the time that you folks selected me . . . .” He stated: “We are going to go ahead and finish the trial,” which was to be concluded that day, but indicated he would allow the parties to brief the disqualification issue before he entered judgment, as “I’m going to need some law . . . to guide my path . . . .” The judge said his decision was “without prejudice to further consideration of whether a consent to disqualification is appropriate following the filing of the declaration [under section 170.3, subd. (c)(1)].”<sup>2</sup>

Defense counsel presented his verified statement of disqualification the following day. On January 24, 2011, Judge Souza issued an order striking defendants’ motion for disqualification pursuant to section 170.4, subdivision (b), “as the motion demonstrates

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<sup>1</sup> All undesignated section references are to the Code of Civil Procedure.

<sup>2</sup> Section 170.3, subdivision (c)(1) states in pertinent part: “If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.”

on its face no legal grounds for disqualification and is untimely.” (See *ibid.* [“if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken”].)<sup>3</sup> Points and authorities attached to the order note that defendants had not sought “to withdraw [their] stipulation to [the judge] acting as Judge Pro Tem.”

Defendants then pursued two avenues of relief in seeking to remove Judge Souza. On February 15, 2011, they moved under California Rules of Court, rule 2.816(e) to withdraw their stipulation to the appointment of Judge Souza.<sup>4</sup> (See rule 2.816(e) [motion to withdraw stipulation for temporary judge’s appointment].) As good cause for the motion, defendants contended “a person aware of the facts might reasonably entertain a doubt that [Judge Souza] would be able to be impartial,” as provided in section 170.1, subdivision (a)(6)(A)(iii). (See *ibid.* [requiring disqualification of a judge if “[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial”]; rule 2.816(e) [motion to withdraw stipulation for temporary judge’s appointment].) Shortly thereafter, defendants filed a petition for writ of mandate in this court, challenging the order striking their motion to disqualify. The petition was denied on February 24, 2011.

On April 5, 2011, Superior Court Judge Marla Miller denied defendants’ motion to withdraw their stipulation, stating she did not find that a person aware of the facts might reasonably entertain a doubt that Judge Souza would be able to be impartial: “This case is barely superficially similar to the *Squaw Valley* case, which arose from an entirely unrelated and dissimilar incident more than 10 years ago. The assumption of risk issues

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<sup>3</sup> “In the event that an appellate court determines that a verified answer should have been filed,” Judge Souza included a verified answer, stating: “I know of no facts or circumstances that would require my disqualification or recusal in this case. I believe that I am impartial in this matter. I cannot identify any grounds for a reasonable person who is aware of the facts to doubt my impartiality. Pursuant to . . . section 170, I believe it is my duty to preside over this matter.” (See § 170 [“A judge has a duty to decide any proceeding in which he or she is not disqualified”].)

<sup>4</sup> All further rule references are to the California Rules of Court.

present in the two cases are fundamentally different.” Defendants also challenged this decision in a petition for a writ of mandate, which we denied on April 22, 2011.

### B. *Analysis*

Defendants do not challenge Judge Miller’s decision finding no good cause to allow them to withdraw their stipulation to Judge Souza under rule 2.816(e), and do not directly challenge Judge Souza’s denial of their section 170.3 motion. Instead, they rely on rule 2.816(e) in contending Judge Souza was immediately disqualified on January 12, 2011, when they first questioned his ability to remain impartial.

When a temporary judge is appointed at the request of the parties, rule 2.831(f) allows a party to move to withdraw its stipulation to the judge’s appointment.<sup>5</sup> The moving party must support the motion with a declaration of facts establishing good cause for permitting withdrawal of the stipulation, and the motion must be heard by the presiding judge or a judge designated by the presiding judge. (*Ibid.*) This rule also states: “If the motion to withdraw the stipulation is based on grounds for the disqualification of the temporary judge first learned or arising after the temporary judge has made one or more rulings, but before the temporary judge has completed judicial action in the proceeding, the provisions of rule 2.816(e)(4) apply.” (Rule 2.831(f).)

Rule 2.816(e)(4) provides, “If the application or motion for withdrawing the stipulation is based on grounds for the disqualification of . . . the temporary judge first learned or arising after the temporary judge has completed judicial action in the proceeding, the temporary judge, unless the disqualification or termination is waived, must disqualify himself . . . . But in the absence of good cause, the rulings the temporary judge has made up to that time must not be set aside by the judicial officer or temporary judge who replaces the temporary judge.”

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<sup>5</sup> “Rules 2.830-2.834 apply to attorneys designated as temporary judges under article VI, section 21 of the California Constitution at the request of the parties rather than by prior appointment of the court . . . .” (Rule 2.830(a).) Judge Souza was selected at the parties’ request to serve as judge in a long cause civil trial. The stipulation form indicates he was appointed at the request of the parties pursuant to California Constitution, article VI, section 21.

Defendants contend rule 2.816(e)(4) required Judge Souza to immediately disqualify himself from the case on January 12, 2011, when “[f]aced with a challenge of disqualification made during the [b]ench trial by defense counsel.” They argue it was error for the judge to continue with the trial without a ruling on the disqualification issue by a superior court judge, and to subsequently strike their disqualification challenge.

These contentions fail for two reasons. First, to the extent defendants’ arguments challenge the order striking their motion for disqualification under section 170.3, this order is not appealable. A petition for writ of mandate is the exclusive means to review this decision. (§ 170.3, subd. (d); *People v. Freeman* (2010) 47 Cal.4th 993, 999-1000.) Second, defendants did not assert on January 12, 2011, that rule 2.816(e)(4) required the judge to disqualify himself immediately, and they have waived this contention. (*Estate of Westerman* (1968) 68 Cal.2d 267, 279 [“issues not raised in the trial court cannot be raised for the first time on appeal”].) On that date, defense counsel said defendants were “formally present[ing] a motion under [section] 170.1 et sequitur for disqualification,” made no mention of rules 2.831 and 2.816(e)(4), and did not object when the judge expressed his intent to “go ahead and finish the trial.”<sup>6</sup> The judge properly proceeded under the statute in his disposition of the motion. (See §§ 170.3, subd. (c)(1), 170.4, subd. (b).)<sup>7</sup> Defendants concede, “[W]hen they first made the request that the [judge pro tem] disqualify himself [on January 12, 2011], . . . it was under . . . section 170.1 . . . .” They contend, however, “that the [judge pro tem], who was aware of the requirements of Rules 2.831 and 2.816 . . . [,] was disqualified automatically at that time.” Defendants provide no authority for the proposition that their failure to argue for automatic

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<sup>6</sup> Defendants filed their motion to withdraw their stipulation under rule 2.816(e)(4) on February 15, 2011, a month after the trial had concluded.

<sup>7</sup> Defendants maintain that the statutory procedure is available only to superior court judges, not temporary judges, whose disqualification is governed by rules 2.831 and 2.816. Assuming this is true, however, defendants invited such error by seeking disqualification under section 170.3. (See 9 Witkin, *Cal. Procedure* (5th ed. 2008) Appeal, § 389, p. 447 [“Where a party by his or her conduct induces the commission of error, the party is estopped from asserting it as a ground for reversal.”].)

disqualification is excused because the judge pro tem was “aware” of rules of court upon which defendants were not relying. Finally, defendants maintain Judge Souza was automatically recused, in any case, on February 15, 2011, when they filed their motion to withdraw their stipulation to his appointment. As defendants did not contend on January 12, 2011, or in their subsequent motion to withdraw their stipulation that Judge Souza was automatically disqualified from the case under rule 2.816(e), they also have waived this argument.<sup>8</sup>

In any event, we reject defendants’ interpretation of rule 2.816(e)(4) as providing for automatic disqualification of a temporary judge by operation of law simply because a party moves to withdraw a stipulation to the judge’s appointment. “We interpret court

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<sup>8</sup> In their motion to withdraw their stipulation to Judge Souza’s appointment, defendants set forth rule 2.816(e) in its entirety, highlighting in boldface and italics the following language: “the temporary judge . . . , unless the disqualification or termination is waived, must disqualify himself or herself.” They did not argue, however, that Judge Souza was automatically disqualified or that he was required to immediately disqualify himself upon the filing of the motion; they sought leave of court to withdraw their stipulation to the temporary judge’s appointment based on the standard set forth in section 170.1, subdivision (a)(6)(A)(iii). In their reply memorandum, they again set forth the above language from rule 2.816(e)(4) in boldface and italics and underscored the word “must.” They argued that disqualification was mandatory under rules 2.816(e)(4) and/or 2.831(f), but continued to rely on the standard for disqualification set forth in section 170.1. In conclusion, they stated: Rule “2.816(e) mandates that in circumstances such as these defendants be granted leave to withdraw their stipulation for appointment of temporary judge. *Indeed, the applicable Rules of Court provide that the temporary judge/judge pro tem must disqualify himself/herself.* Accordingly, defendants respectfully request that this motion be granted.” Defendants’ vague assertions are not sufficient to raise an argument that Judge Souza was required to disqualify himself from the case upon the filing of defendants’ motion to withdraw their stipulation to his appointment. To the extent the italicized language above may suggest such an argument, defendants failed to timely assert and fully develop this argument below. (See Weil & Brown et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 9:106.1, p. 9(I)-83 (rev. #1 2012) [trial court’s discretion to refuse to consider new facts or legal theories presented in a reply memorandum].) Matters that “were not properly presented to the trial court . . . are not properly before this court.” (*Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.* (1995) 31 Cal.App.4th 1323, 1333 [declining to reach new arguments raised either in appellant’s reply papers below or its reply brief on appeal].)

rules in accordance with the cardinal rules of statutory construction . . . .” (*Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1321.) We must harmonize the various parts of a rule, considering them in the context of the rule framework as a whole, and “accord a challenged rule a reasonable and commonsense interpretation consistent with its apparent purpose, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.” (*Ibid.*; see *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724 [“ ‘If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.’ ”].) To construe rule 2.816(e) in the manner urged by defendants would be to disregard rule 2.831(f)—which specifically contemplates a hearing before a superior court judge following such a motion and a showing of good cause for withdrawal—and would lead to an absurd result. Indeed, defendants ask us to conclude Judge Souza was automatically and permanently disqualified from the case upon the filing of their rule 2.816(e) motion even though Judge Miller subsequently found at the hearing required by rule 2.831(f) that the asserted grounds for disqualification lacked merit.<sup>9</sup>

Notably, California courts have not construed section 170.3, subdivision (b)(4), which is virtually identical to rule 2.816(e)(4), in the fashion urged by defendants. (See, e.g., *Calvert v. State Bar* (1991) 54 Cal.3d 765, 776 (*Calvert*); *Roscco Holdings, Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353, 1363 (*Roscco*).)<sup>10</sup> Instead, the cases have concluded section 170.3, subdivision (b)(4) simply provides the standard for determining

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<sup>9</sup> Thus, even if we were to construe rule 2.816(e) to preclude Judge Souza from entering further orders in the case upon the filing of defendants’ motion to withdraw until the resolution of that motion, no harm occurred here. Judge Souza did not enter his decision in the case until after Judge Miller found no grounds for disqualification.

<sup>10</sup> Section 170.3, subdivision (b)(4) states: “If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge.”

whether to vacate the previous rulings of a trial judge who has become disqualified. (See, e.g., *Calvert*, at p. 776 [§ 170.3, subd. (b)(4) “merely addresses the continuing effect of rulings made by a referee before the referee was disqualified”]; *Roscco*, at p. 1363 [§ 170.3, subd. (b)(4) provides that, “under certain circumstances, prior rulings of a disqualified judge are not to be set aside without good cause”].)

Defendants provide no authority to support their contention that rule 2.816(e)(4) provides for the automatic disqualification of a temporary judge simply because grounds for withdrawal are *alleged*. They rely instead on a policy argument, contending that, because a temporary judge is an attorney, not a judicial officer, “it is not predictable that the Judge Pro Tem will be able to act as a professional jurist . . . by not holding a ‘grudge’ against an attorney and his client who makes the challenge [to] impartiality against the ‘Judge.’ ” Defendants do not support this assertion with legislative history or other authority, and we reject it, noting that the presumption of regularity applies with equal force to the decisions of temporary judges. (*In re Estate of Kent* (1936) 6 Cal.2d 154, 163 [“ ‘While a judge pro tempore is selected under the stipulation of the parties litigant by the approval and order of a “regular” judge, still, when acting, the judge pro tempore is acting for the superior court. The judgments and orders of the superior court, a judge pro tempore presiding, are entitled to the same presumption of regularity as a court with a regular judge presiding’ ” (italics omitted)].)

Defendants therefore have failed to demonstrate that Judge Souza was required to remove himself from the case upon the filing of their initial motion to disqualify or their subsequent motion to withdraw their stipulation.

## II. *Bias of the Judge*

In their next assertion of error, defendants appear to conflate principles of prejudicial error, excessive damages, and actual bias. They contend Judge Souza’s “violation of law resulted in extreme prejudice to [them],” suggesting they are discussing the prejudicial impact of Judge Souza’s alleged failure to disqualify himself from the case. Relying on authority addressing claims of excessive damages, they also argue Judge Souza “turned his ire on [them] and blasted them by rendering a \$1.47 million

verdict against them” after denying their motion to disqualify. Still other argument indicates they assert their claim of excessive damages as evidence of the judge’s bias against them.

None of these contentions has merit. As we find no error in the disposition of defendants’ attempts to remove Judge Souza, we need not address whether the alleged error was prejudicial. To the extent defendants claim excessive damages, this assertion of error is not properly before us, as defendants did not raise it in a motion for new trial. (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719–720 [“[I]f ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for . . . excessiveness for the first time on appeal”]; accord, *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759 [“trial courts are in a better position than appellate courts to resolve disputes over the proper amount of damages”].)<sup>11</sup>

In any event, defendants have not shown that Judge Souza was biased against them. There is no indication that he was “inflamed” by their attempts to remove him, or that the disqualification proceedings influenced his decision. Indeed, when defendants first raised the issue on January 12, 2011, Judge Souza stated: “It’s not going to prejudice [defense counsel] that he’s made this motion. He’s doing what he has to do to protect his clients’ rights, and in that spirit, he’s bringing this motion, and I accepted that that’s the spirit he’s bringing it in.” We also observe that the judge awarded plaintiff significantly less in damages than she sought.

Defendants rely on the size of the judgment and the timing of the judge’s decision to establish bias, but fail to overcome the presumption that Judge Souza acted impartially. (*Caminetti v. Edward Brown & Sons* (1943) 23 Cal.2d 511, 521 [“Every presumption is in favor of the fairness, impartiality, and regularity of the proceedings in the trial court

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<sup>11</sup> In their objections to Judge Souza’s tentative decision, defendants contended the award of past and future general damages and future medical expenses was excessive. The procedure set forth in section 632 and rule 3.1590 permits the parties to raise objections to the sufficiency of the trial court’s findings; it is not intended as a substitute for a motion for new trial.

leading to judgment.”].) We reject defendants’ contention that the judgment “can only be understood in light of Judge [Souza’s] prejudice against [them].” The statement of decision sets out the evidence on which the judge relied, and defendants do not argue there is a lack of substantial evidence to support the award; they simply ask us to reweigh the evidence at trial and second guess Judge Souza’s motivation for making certain credibility findings. “Credibility is an issue for the fact finder. . . . [W]e do not reweigh evidence or reassess the credibility of witnesses. [Citation.]” (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622.)

Defendants also note that Judge Souza’s tentative decision was filed the same day Judge Miller denied their motion to withdraw the stipulation to his appointment, arguing bias may be inferred from the fact that Judge Souza was drafting his tentative decision while actively opposing their efforts to have him disqualified. There is no indication in the record, however, that the timing of the judge’s tentative decision reflects anything more than his desire to withhold his ruling on the merits of the case until the resolution of defendants’ motion to withdraw their stipulation to his appointment.

Defendants have failed to demonstrate that Judge Souza was biased against them.

### III. *The Release Agreement*

Defendants contend a form entitled “Medical Authorization and Liability Release” (release agreement) that was signed by plaintiff’s father, Benjamin Vahedy (Father), on July 25, 2007, constitutes a legal bar to plaintiff’s claim. Judge Souza rejected this contention, concluding the release agreement “is too vague, ambiguous, and overbroad to be enforceable.”

#### A. *Terms of the Release Agreement*

At trial, there was evidence that the release agreement was a standard form that Jews for Jesus mailed to campers’ parents in July 2007, along with a confirmation letter setting out the schedule for the adventure camp; and that parents were required to sign and return it before their child would be allowed to attend camp. The release agreement provides:

“The health history in the attached ‘Medical Information and Parental Authorization’ is correct so far as I know. I certify that my child, Cece Vahedy,<sup>[12]</sup> is in good physical condition, and is able to participate in the entire adventure trip except for the activities listed above as ‘restricted.’ In case of medical emergency, I hereby give by [*sic*] permission to Jews for Jesus staff member in charge to: hospitalize, and/or secure the services of a licensed physician, surgeon or anesthetist and order any treatment deemed necessary, including anesthesia, injections, or surgery in providing the necessary care for my child as named on this registration form.

“By signing this form, I, the parent/guardian acknowledge that an element of risk exists in participating in this adventure trip. I am voluntarily placing my child in these camp activities. I hereby agree to assume and accept full responsibility for any and all risks of injury or damage inherent in camp activities. Furthermore, I agree to indemnify, defend and hold harmless for myself and my successors Jews for Jesus from any and all costs, expenses, and liabilities of every kind directly and indirectly arising from any claims or causes of action by whomever or wherever made or presented for personal injury, property damage, or wrongful death arising out of or relating in any way to my child’s participation in this adventure trip.

“Furthermore, in consideration of the permission granted Jews for Jesus for my child to participate in this adventure trip[,] I voluntary [*sic*] agree for myself and my representatives[,] successors and assigns (collectively ‘successors’) to release, discharge and waive any and all claims or causes of action against Jews for Jesus and their respective successors and assigns from and for any and all liability including without limitation any personal injury, property damage or wrongful death, arising out of or relating to my child’s participation in this adventure trip.

“I understand that my signature is for both medical and liability release and I agree that the foregoing language is intended to be as broad and inclusive as is allowed under

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<sup>12</sup> Plaintiff’s name is written in Father’s handwriting in the space provided on the form after the phrase “my child.”

California Law and that if any portion of this agreement is held invalid, the balance shall, notwithstanding, continue in full legal force and effect.

“I have carefully read this agreement and fully understand its contents. I am aware that I am signing a medical release and waiver of liability and indemnity contract between myself and Jews for Jesus. No oral representations, statements or inducements apart from this written agreement have been made and I sign this agreement of my own free will. I understand that my signature is for both a medical and liability release. . . .”

Father signed his name on the line provided for “Parent or Guardian Signature” directly beneath this paragraph.

Judge Souza concluded the release does not satisfy the standards for enforcement because: (1) it does not expressly relieve Remigio of liability, nor state it is intended to apply to volunteers and agents of Jews for Jesus, like Remigio, who is not an employee or staff member; (2) it could be understood as a waiver of liability for medical treatment for the child’s injuries during the trip; (3) it could be read to apply only to Father’s claims arising out of the child’s participation; and (4) its application to “camp activities” does not unambiguously refer to the car ride in which she was injured.

## B. *Analysis*

### 1. Relevant Legal Principles

“California courts require a high degree of clarity and specificity in a [r]elease in order to find that it relieves a party from liability for its own negligence.” (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1488 (*Cohen*)). “[T]o be effective, an agreement which purports to release, indemnify or exculpate the party who prepared it from liability for that party’s own negligence or tortious conduct must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor . . . of the effect of signing the agreement.” (*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1983) 147 Cal.App.3d 309, 318 (*Ferrell*); accord, *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 (*Madison*)); see *Cohen*, p. 1485 [release “ “must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties” ’ ” (italics omitted)]; *Salton Bay Marina, Inc. v.*

*Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 932 [language must be “ ‘free of ambiguity or obscurity’ ”].) “[A] release need not achieve perfection . . . .” (*National & Internat. Brotherhood of Street Racers, Inc. v. Superior Court* (1989) 215 Cal.App.3d 934, 938.) It is not enforceable, however, unless it “ ‘clearly, explicitly and comprehensibly set[s] forth to an ordinary person untrained in the law that the intent and effect of the document is to release his claims for his own personal injuries.’” (*Cohen*, at p. 1488 (italics omitted), quoting *Ferrell*, at p. 319.)

“Whether a contract provision is clear and unambiguous is a question of law” (*Madison, supra*, 203 Cal.App.3d at p. 598) that we review de novo. “An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.]” (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360 (*Solis*).) “An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence. [Citations.]” (*Ibid.*; accord, *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1357 [“The circumstances under which a release is executed can give rise to an ambiguity that is not apparent on the face of the release. [Citation.]”]; *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40, fn. 8 [“the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning”].)<sup>13</sup>

Plaintiff maintains the trial court’s finding of ambiguity is entitled to deference because it is a factual determination that turns on extrinsic evidence. We disagree. The trial court did not resolve conflicts in the extrinsic evidence introduced by the parties, and considered this evidence only in determining whether the release agreement was fatally

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<sup>13</sup> This ambiguity analysis appears analogous to that involved in the *first* step of determining whether to admit parol evidence, in which the court “ ‘provisionally receives . . . all credible evidence concerning the parties’ intentions to determine “ambiguity” . . . . If in light of the extrinsic evidence the court decides the language is “reasonably susceptible” to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract.’ [Citation.]” (*General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 441.) The trial court’s threshold determination of ambiguity is a question of law. (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555.)

ambiguous. As plaintiff points out, for example, the trial judge’s decision specifically refers to Father’s testimony that he understood the release to mean “[he] would not hold [Jews for Jesus] liable for bad decisions in regard to medical issues.” The trial judge did not note this testimony in interpreting the release agreement to preclude only those claims relating to medical treatment decisions; he did so in finding an ambiguity, namely, that “[t]he Release could be understood (or misunderstood) to authorize medical treatment which the parent’s child may require as a result of injuries occurring on the trip [and] that liability for any such medical treatment is waived and released by this document.”

Thus, bearing in mind that we are not called upon to *interpret* the release agreement, but, rather, to determine independently whether its language is clear and unambiguous, we turn to defendants’ contentions.

## 2. The Waiver of Liability Provision

Defendants contend plaintiff’s claims are barred by a waiver of liability provision in the third paragraph of the release agreement. This provision states: “[I]n consideration of the permission granted [by] Jews for Jesus for my child to participate in this adventure trip[,] I voluntary [*sic*] agree *for myself and my representatives[,] successors and assigns* . . . to release, discharge and waive any and all claims or causes of action against Jews for Jesus and their respective successors and assigns from and for any and all liability including without limitation any personal injury, property damage or wrongful death, arising out of or relating to my child’s participation in this adventure trip.” We conclude that the release contains an essential ambiguity, as it does not clearly and explicitly identify whose claims Father is waiving—his own or plaintiff’s.

This provision does not indicate whether Father is agreeing to release certain claims on his own behalf or on behalf of his child,<sup>14</sup> and the italicized language suggests he is releasing his own claims against Jews for Jesus as a result of his child’s

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<sup>14</sup> Plaintiff does not dispute that a parent may execute a release on behalf of his or her child. (See *Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1565 (*Hohe*); accord, *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 819-820; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1120.)

participation in the adventure trip.<sup>15</sup> Indeed, the last paragraph of the release indicates that the waiver of liability he is signing is “between myself and Jews for Jesus.” In an earlier paragraph, Father identifies himself as “the parent/guardian,” and he signed the release on the line provided for “Parent or Guardian Signature.” (See Civ. Code, § 1641 [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”].) Still, since an injury to the child would also give rise to Father’s claims in his capacity as a parent, the release agreement’s reference to him as “Parent/ Guardian” does not definitively establish whether he is releasing his own claims, his child’s, or both.<sup>16</sup> We conclude, accordingly, that the release agreement does not clearly and explicitly notify a person untrained in the law that its intent and effect is to release *the child’s* potential claims against Jews for Jesus.

Defendants analogize the language of the release to “a corporate officer or agent . . . sign[ing] an agreement which specifically identifies his/her capacity or position as an officer or representative of the corporation,” and argue that the references to parent/guardian in the release establish that the release was entered on plaintiff’s behalf. This argument begs the question, as it is premised on the unsupported assumption that a release would be enforceable against a corporation in similar circumstances—where the corporate representative is identified as the corporation’s agent or officer, but the agreement does not refer to the corporation’s claims or state that the representative is acting on the corporation’s behalf, and the representative also has individual claims against the releasee.

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<sup>15</sup> Defendants admitted in their responses to plaintiff’s request for admissions that plaintiff was not Father’s representative, successor, or assign.

<sup>16</sup> We observe that a parent may maintain an action for injury to the child caused by the wrongful act or neglect of another. (§ 376.) Judge Souza’s decision also notes that Father may have claims for medical expenses arising out of his daughter’s participation in the adventure trip, as well as claims for his own emotional distress damages and claims for reimbursement related to property damage sustained by his daughter while on the trip. Defendants do not dispute this.

Defendants also rely on *Solis*, noting “striking similarities with the release agreement at issue in this case,” specifically, the absence of any provision in the body of the *Solis* waiver indicating that parents were signing on behalf of minors, and the presence of a separate and distinct signature line for a parent/guardian. Defendants’ reliance on *Solis* is misplaced. The plaintiff in that case was not a minor at the time of his injury, and the court did not consider whether the release agreement was sufficiently clear as to whose claims it precluded. Significantly, defendants also fail to note the following language, which appears directly above the line for “Parent/ Guardian’s signature” on the *Solis* release: “Parent/Guardian: If passholder is a minor, I verify that I am the parent or guardian of the minor, and I have authority to enter into this agreement *on behalf of the passholder*.” (*Solis, supra*, 94 Cal.App.4th at p. 368 (italics added).)

As the release agreement does not clearly and unambiguously waive liability against Jews for Jesus on plaintiff’s behalf, it does not bar her claims in this action.

### 3. The Assumption of the Risk Provision

Defendants also contend plaintiff’s claims are barred by an express assumption of the risk provision in the second paragraph of the release agreement, which states: “By signing this form, I, the parent/guardian acknowledge that an element of risk exists in participating in this adventure trip. I am voluntarily placing my child in these camp activities. I hereby agree to assume and accept full responsibility for any and all risks of injury or damage inherent in camp activities.”<sup>17</sup> “ ‘In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. . . . The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he

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<sup>17</sup> In *Coole v. Haskins* (1943) 57 Cal.App.2d 737 (*Coole*), the court held “the assumption of risk by parents should not be held to preclude a recovery by a minor child on his own behalf.” (*Id.* at p. 742.) *Coole* did not involve an express assumption of the risks, however, and, as discussed above, other authority holds that “[a] parent may contract on behalf of his or her children.” (*Hohe, supra*, 224 Cal.App.3d at p. 1565.) Plaintiff does not dispute that a parent may assume particular risks on behalf of a child.

cannot be charged with negligence.’ [Citation.]” (*Coates v. Newhall Land & Farming, Inc.* (1987) 191 Cal.App.3d 1, 8, fn. & italics omitted.) We conclude this provision fails to clearly and unambiguously identify the risks the releasor is assuming and on whose behalf he is assuming them.

The language of the second paragraph reflects an ambiguity as to the risks Father is agreeing to assume. Although he generally acknowledges the risks involved “in participating in this adventure trip” and notes that he is voluntarily placing his child in “these camp activities,” the risks he expressly assumes are “any and all risks of injury or damage inherent in camp activities.” It is not clear from this language alone whether the motor vehicle accident in which plaintiff was injured falls within the class of risks “inherent in camp activities.” The phrase itself suggests it applies only to risks that are inherently present in camp recreational activities, even in the absence of negligence. (See, e.g., *Solis, supra*, 94 Cal.App.4th at p. 361 [inherent risks in the sports of skiing, snowboarding, and other recreational activities]; *Cohen, supra*, 159 Cal.App.4th at pp. 1485-1486 [risks that cannot be eliminated from horseback riding without destroying the unique character of this activity].) In context, however, the phrase may also be read to simply restate the risks Father is acknowledging in the prior sentences and, therefore, to apply to all risks involved “in participating in this adventure trip.” This uncertainty is compounded by the last sentence in that paragraph—a provision agreeing to indemnify, defend, and hold Jews for Jesus harmless from a broad range of claims “arising out of or relating in any way to my child’s participation in this adventure trip,” with no mention of “camp activities.”

Defendants rely on extrinsic evidence to clarify the meaning of “camp activities”: the confirmation letter from the Camp Director, Dave Garrett, which accompanied the release agreement when it was sent to parents for signature.<sup>18</sup> In this letter, Garrett notes that the child “will be joining us for our upcoming Camp Gilgal adventure camp” and states, “This will be our adventure:”; he then sets forth the details of the schedule for the

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<sup>18</sup> Plaintiff does not dispute that the meaning of particular terms in a release agreement may be clarified by resort to extrinsic evidence.

week. The letter indicates that “[c]amp begins” in Cameron Park on Saturday, August 4, 2007, and ends at the Jews for Jesus headquarters in San Francisco on the morning of Saturday, August 11, when the group would “break camp” after a “closing Shabat service” the night before. This letter also reasonably notified parents that automobile transportation from location to location was part of “camp.” It states, “[W]e’ll drive to the Redding area [on August 5], and spend the night at a church,” and indicates that the group would then travel from the Redding area to Lake Shasta for several days, and “then drive to . . . Live Oak” for the night, before “head[ing] to San Francisco” on August 10. Indeed, Father agreed at trial that he understood “this particular camp would involve automobile travel from location to location.”

This letter supports defendants’ contention that the phrase “camp activities” may reasonably be read to refer to all activities from August 4, 2007, when camp began, through August 11, when the group was to break camp, including automobile travel from location to location. At most, however, it provides evidence of an alternative candidate of meaning, and does not definitively establish the meaning of “inherent camp activities” or the risks to which the second paragraph refers. We note that the letter also identifies the recreational activities in which campers would participate during camp, including basketball and dodgeball games, houseboating and skiing, and a “BBQ pool party,” all of which present inherent risks in the absence of negligence.<sup>19</sup>

In addition, the assumption of the risks provision suffers from the same ambiguity that makes the waiver of liability unenforceable as to plaintiff: On whose behalf did Father assume the risks in question?

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<sup>19</sup> Citing *Paralift, Inc. v. Superior Court* (1994) 23 Cal.App.4th 748, 755 (*Paralift*), defendants contend “the critical issue is whether enforcement of the Release would defeat the reasonable expectations of the parties to the contract.” *Paralift* is inapposite. In setting out this test, the court in that case was not considering whether the language of the release was clear and unambiguous, but rather, whether the activity giving rise to the litigation was within the scope of the release. (*Paralift*, p. 756 [in noting the applicable test “in this factual context,” the court cited *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 344, which discussed the enforceability of a contract of adhesion releasing a parachute center from liability for risks inherent in skydiving].)

Defendants argue plaintiff's claim that her father assumed the risks for himself alone, and not on her behalf, presents "an after-the-fact 'moving target' [that] decimates their reliance on the representations and agreements made by plaintiff when the Release was signed, and cannot be countenanced in either law or equity. [¶] Plaintiff cannot have her cake and eat it too: on the one hand, present defendants with an executed Release, a prerequisite to attendance at and participation in Camp Gilgal . . . and then thereafter assert that the Release . . . does not bind or obligate her in any way." This contention also fails. Properly characterized, plaintiff's contention is that the release agreement does not clearly indicate whether Father made the representations at issue on behalf of plaintiff or himself, and equity provides no relief to defendants here, as they, not plaintiff, drafted those representations. Having failed to set forth clearly the bargain to be struck, they cannot now complain that they did not obtain the intended benefit of that bargain.

We conclude, accordingly, that neither the waiver of liability nor the assumption of the risk provision in the release agreement is enforceable.<sup>20</sup> *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253 (*Platzer*) does not call for a different result. In that case, the court was not asked to consider whether the language in the release agreement was sufficiently clear and explicit to be enforceable. (See *Aero-Crete, Inc. v. Superior Court* (1993) 21 Cal.App.4th 203, 212 ["[A] case is not authority for a proposition not considered and decided."].) Additionally, in that case, the release agreement specifically indicates in two places that the parent is assuming the risks "[i]ndividually and as the parent or guardian of the Child," and notes that the liability release is "legally binding on me [and] the Child." (*Platzer*, p. 1256.)

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<sup>20</sup> In light of our conclusion in this regard, we do not consider plaintiff's remaining arguments or her protective cross-appeal, filed in the event we reversed the trial judge's finding the release agreement was unenforceable.

DISPOSITION

The judgment is affirmed, with costs to plaintiff.

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BRUINIERS, J.