

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GLEND A M. LEWIS AND GLENN E.
LEWIS,

Plaintiffs,

v.

MAMMOTH MOUNTAIN SKI AREA,

Defendants.

1:07-CV-00497-OWW-GSA

ORDER RE DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT (DOC.
33)

I. INTRODUCTION

Plaintiff, Glenda M. Lewis, alleges she sustained injuries while participating in a guided snowmobile tour offered by Defendant, Mammoth Mountain Ski Area ("Defendant" or "Mammoth"). Doc. 25 at ¶ 16 First Amended Complaint ("FAC"). Plaintiffs' FAC alleges (1) Defendant negligently conducted the guided snowmobiling tour in which Plaintiff was allegedly injured; (2) Defendant should be considered a common carrier and breached the heightened duty of care owed by a common carrier to Plaintiff; (3) Defendant negligently maintained its premises resulting in Plaintiff's alleged injuries; (4) Defendant was grossly negligent in conducting the guided snowmobile tour; and (5) Plaintiff, Glenn E. Lewis, suffered loss of consortium as a result of his wife's injuries.

Before the court for decision is Defendant's Motion for Summary Judgment. Doc. 33, Defendant's Motion For Summary

1 Judgment, filed Dec. 1, 2008. Defendant seeks judgment on the
2 entire FAC, arguing that: (1) Plaintiffs assumed the risks of
3 snowmobiling on Defendant's property by (a) signing a written
4 waiver and release; (b) under California's primary assumption of
5 the risk doctrine, barring Plaintiffs' negligence and premises
6 liability claims; (2) Defendant is not a common carrier; (3)
7 Plaintiffs have produced no evidence that Defendant was grossly
8 negligent; and (4) Plaintiff cannot establish Defendant is liable
9 for loss of consortium. Doc. 39, Defendant's Motion For Summary
10 Judgment, filed Dec. 1, 2008.

11 12 II. FACTUAL AND PROCEDURAL BACKGROUND

13 Defendant, Mammoth Mountain Ski Area, is a California
14 corporation with its principal place of business in Mammoth
15 Lakes, California. FAC at ¶ 2. Defendant owns and operates
16 Mammoth Snowmobile Adventures ("MSA") which provides guests with
17 guided snowmobile riding tours for a fee. FAC at ¶ 5.

18 A snowmobile is a gasoline engine powered machine that runs
19 on skis across snow-covered ground at speeds up to 60 miles per
20 hour. A snowmobile rider wears a seatbelt and helmet, but is
21 otherwise exposed to potential physical injury from falling and
22 impacting the terrain and any obstacles that may be encountered.

23 Plaintiffs, Glenda M. Lewis and Glenn E. Lewis, are
24 residents of San Antonio, Texas. FAC at ¶ 1. Based on
25 citizenship and amount in controversy, the diversity jurisdiction
26 of the court is properly invoked.

27 On April 5, 2005, Plaintiffs signed up for a guided
28 snowmobile tour with MSA. FAC ¶ 6. It is undisputed that

1 Plaintiffs paid a fee for the snowmobile tour and signed a
2 "Participant Agreement Release And Acknowledgment of Risk" (the
3 "Participant Agreement"). Doc. 48, Plaintiffs' Response To
4 Separate Statement of Undisputed Material Facts ("PUMF") at ¶ 2,
5 filed Jan. 23, 2009. The text of the Participant Agreement
6 appears in 10-point Times New Roman font, while titles and other
7 language appear in 14-point and 16-point fonts. Doc. 49,
8 Plaintiffs' Statement of Additional Material Facts ("PAMF") at ¶¶
9 13, 15. Certain portions of the text appear in bold and/or are
10 italicized. PAMF at ¶ 15.

11 The first page of the Participant Agreement reads in
12 pertinent part:

13 In Consideration of services of MAMMOTH SNOWMOBILE
14 ADVENTURES,...I hereby agree to release and discharge "MSA"...as follows:

15 (1) I acknowledge that snowmobiling entails known and unanticipated risks
16 which could result in physical or emotional injury, paralysis, death, or damage to
17 myself, to property, or to third parties. I understand that such risks simply
18 cannot be eliminated without jeopardizing the essential qualities of the activity.
19 These risks include, but are not limited to: riding on uneven snow covered
20 terrain, changing snow conditions and variations in elevations...[MSA guides]
21 might be ignorant of a participant's fitness or abilities. They might misjudge the
22 weather, the elements, or the terrain. They may give inadequate warnings or
23 instructions....

24 (2) I expressly agree and promise to accept and assume all of the risks existing in
25 this activity. My participation in this activity is purely voluntary, and I elect to
26 participate in spite of the risks. I accept full responsibility for any damages or
27 injury of any kind arising out of the operation of said snowmobile.

28 (3) I thereby voluntarily release, forever discharge, and agree to indemnify and
hold harmless "MSA" from any and all claims, demands, or causes of action,
which are in any way connected with my participation in this activity or my use
of "MSA"'s equipment or facilities, including any such Claims which allege
negligent acts or omissions of "MSA"....

29 Doc. 38 (original font size and emphasis maintained), Defendant's
30 Separate Statement of Undisputed Material Facts ("DUMF") at ¶ 3,
31 filed Dec. 1, 2008.

32 The second page reads in pertinent part:

33 By signing this document, I acknowledge that if anyone is hurt or property

1 is damaged during my participation in this activity, I may be found by a
2 court of law to have waived my right to maintain a lawsuit against "MSA"
3 on the basis of any claim from which I have released them herein.

4 I have had sufficient opportunity to read this entire document. I have read
5 and understood it and I agree to be bound by its terms.

6 *Id.* (original font size and emphasis maintained).

7 Both plaintiffs read the entire release prior to signing
8 it.¹ Glenn Depo. at 106.

9 The MSA tour was led by MSA guide, Chris Hosking.
10 Mr. Hosking has been a snowmobile tour guide with MSA for seven
11 years. DUMF at ¶ 13. He estimates that during his tenure with
12 MSA he guided over 8,000 guests and rode over 40,000 miles of
13 snow-covered terrain. DUMF at ¶ 20.

14 Each year, MSA trains new and returning guides. DUMF at ¶
15 16. MSA manager, Robert Colbert, conducts a two-day seminar
16 training in which he instructs the guides on tour operation,
17 guest interaction, guest safety, and MSA policies and procedures.
18 DUMF at ¶ 16.

19 On April 5, 2005, Mr. Hosking instructed Plaintiffs, and
20 other participants, on how to operate the snowmobile during a
21 brief orientation prior to the tour. Glenn Depo. at 25.
22 Plaintiffs did not ask Mr. Hosking any questions during or after
23 the orientation. Glenn Depo. at 28. Plaintiffs recall that Mr.
24 Hosking did not provide instruction on how to handle becoming
25 airborne and that he failed to provide additional instruction on
26 off-trail snowmobile riding. PAMF at ¶ 5.

27 ¹ Glenn recalls spending three minutes reading the release.
28 Glenn Depo. at 106. Glenn recalls Glenda taking ten minutes to
read the release. Glenn Depo. at 106.

1 After the orientation session, Plaintiffs, along with the
2 rest of the tour group, departed on their guided tour.
3 Plaintiffs rode together on one snowmobile: Mr. Lewis drove the
4 snowmobile while Mrs. Lewis rode as a passenger behind Mr. Lewis.
5 DUMF at ¶ 5. It is undisputed that each rider participating in
6 the snowmobile tour controlled his or her snowmobile at all
7 times: specifically, through the snowmobile's throttle, brake,
8 and handlebars. DUMF at ¶¶ 8-11. Defendant states that each
9 rider was at liberty to choose his or her own path. DUMF at ¶
10 12. However, Plaintiffs believe that riders participating in the
11 tour were not free to go in any direction at any time. PAMF at ¶
12 12. Rather, Plaintiffs state that Mr. Hosking led the tour group,
13 decided both the on-trail and off-trail routes, and that Mr.
14 Hosking set the pace for travel. PAMF at ¶¶ 9-12.

15 Initially, Mr. Hosking led the group along established
16 trails. Glenn Depo. at 28. Later in the tour, Mr. Hosking asked
17 the group if they would like to go "off trail". Glenn Depo. at
18 37-38. Several members of the group answered affirmatively;
19 however, Plaintiffs remained silent and followed the group off
20 trail. Glenn Depo. at 38.

21 It is undisputed that while off trail, Plaintiffs
22 encountered a windridge, which is caused by "wind blowing snow
23 and building a hump and an eddy." DUMF at ¶ 7. Defendant states
24 that the windridge in question here was a two to three foot
25 variation in terrain. DUMF at ¶ 6. However, Plaintiffs'
26 witnesses recall the drop being closer to three to six feet.
27 PUMF at ¶ 6. Plaintiffs went over this windridge, which in turn
28 caused them to become airborne. DUMF at ¶ 6. Upon landing, Mrs.

1 Lewis sustained injury. DUMF at ¶ 6.

2 Mr. Lewis heard Mrs. Lewis yell out and immediately pulled
3 the snowmobile over and checked on Mrs. Lewis. Mr. Lewis
4 discovered that she was in a lot of pain and subsequently
5 summoned Mr. Hosking. Glenn Depo. at 52. Mr. Hosking
6 recommended calling ski patrol so that Mrs. Lewis could be
7 evacuated by toboggan. Glenn Depo. at 52. However, Mrs. Lewis
8 refused treatment and rode the snowmobile, as a passenger, back
9 to the MSA base where she then sought medical attention. Glenn
10 Depo. at 52.

11 Mrs. Lewis filed suit in this court on March 29, 2007
12 seeking damages for injuries sustained while snowmobiling on the
13 MSA tour. Mr. Lewis joined her suit alleging loss of consortium
14 resulting from Glenda's injuries purportedly caused by Defendant.

16 III. DECISIONAL STANDARDS

17 Summary judgment is warranted only "if the pleadings,
18 depositions, answers to interrogatories, and admissions on file,
19 together with the affidavits, if any, show that there is no
20 genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c);
21 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998).
22 Therefore, to defeat a motion for summary judgment, the non-
23 moving party must show (1) that a genuine factual issue exists
24 and (2) that this factual issue is material. *Id.* A genuine
25 issue of fact exists when the non-moving party produces evidence
26 on which a reasonable trier of fact could find in its favor
27 viewing the record as a whole in light of the evidentiary burden
28 the law places on that party. See *Triton Energy Corp. v. Square*

1 *D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); see also *Anderson v.*
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). The evidence
3 must be viewed in a light most favorable to the nonmoving party.
4 *Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood Products,*
5 *Inc.*, 268 F.3d 639, 644 (9th Cir. 2001), amended by 2001 WL
6 1490998 (9th Cir. 2001). Facts are "material" if they "might
7 affect the outcome of the suit under the governing law."
8 *Campbell*, 138 F.3d at 782 (quoting *Liberty Lobby, Inc.*, 477 U.S.
9 at 248).

10 The moving party bears the initial burden of demonstrating
11 the absence of a genuine issue of fact. *Devereaux v. Abbey*, 263
12 F.3d 1070, 1076 (9th Cir. 2001). If the moving party fails to
13 meet this burden, "the nonmoving party has no obligation to
14 produce anything, even if the nonmoving party would have the
15 ultimate burden of persuasion at trial." *Nissan Fire & Marine*
16 *Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th
17 Cir. 2000). However, if the nonmoving party has the burden of
18 proof at trial, the moving party must only show "that there is an
19 absence of evidence to support the nonmoving party's case."
20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the
21 moving party has met its burden of proof, the non-moving party
22 must produce evidence on which a reasonable trier of fact could
23 find in its favor viewing the record as a whole in light of the
24 evidentiary burden the law places on that party. *Triton Energy*
25 *Corp.*, 68 F.3d at 1221. The nonmoving party cannot simply rest
26 on its allegations without any significant probative evidence
27 tending to support the complaint. *Devereaux*, 263 F.3d at 1076.

28 [T]he plain language of Rule 56(c) mandates the

1 entry of summary judgment, after adequate time
2 for discovery and upon motion, against a party
3 who fails to make a showing sufficient to
4 establish the existence of an element essential
5 to the party's case, and on which that party
6 will bear the burden of proof at trial. In such
7 a situation, there can be "no genuine issue as
8 to any material fact," since a complete failure
9 of proof concerning an essential element of the
10 nonmoving party's case necessarily renders all
11 other facts immaterial

12 *Celotex Corp.*, 477 U.S. at 322-23.

13 "In order to show that a genuine issue of material fact
14 exists, the nonmoving party must introduce some 'significant
15 probative evidence tending to support the complaint.'" *Rivera v.*
16 *AMTRAK*, 331 F.3d 1074, 1078 (9th Cir. 2003) (quoting *Liberty*
17 *Lobby, Inc.*, 477 U.S. at 249). If the moving party can meet his
18 burden of production, the non-moving party "must produce evidence
19 in response....[H]e cannot defeat summary judgment with
20 allegations in the complaint, or with unsupported conjecture or
21 conclusory statements." *Hernandez v. Spacelabs Med., Inc.*, 343
22 F.3d 1107, 1112 (9th Cir. 2003). "Conclusory allegations
23 unsupported by factual data cannot defeat summary judgment."
24 *Rivera*, 331 F.3d at 1078 (citing *Arpin v. Santa Clara Valley*
25 *Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001)).

26 IV. DISCUSSION

27 A. Negligence Claim - Assumption of Risk

28 Defendant moves for summary judgment on Plaintiffs'
negligence claim, arguing that (1) Plaintiffs waived their right
to sue on a negligence theory by signing the Participant
Agreement; and, alternatively, (2) that California's primary

1 assumption of the risk doctrine precludes negligence liability as
2 a matter of law in this case.

3 The issue of assumption of the risk is a question of law,
4 which may properly be decided on a motion for summary judgment.
5 See *Knight v. Jewett*, 3 Cal. 4th 296, 313 (1992); *Muchhala v.*
6 *United States*, 532 F. Supp. 2d 1215, 1228 (E.D. Cal. 2007)
7 (citing *Knight* and deciding issue of primary assumption of risk
8 on summary judgment); *Randall v. Mammoth Mountain Ski Area*, 63 F.
9 Supp. 2d 1251, 1253 (E.D. Cal. 1999) (same). Both express
10 assumption of the risk and primary assumption of the risk are
11 amenable to summary adjudication. In the context of express
12 assumption of risk, *Knight* stated that "as a result of an express
13 agreement, the defendant owes no duty to protect the plaintiff
14 from injury-causing risk." *Id.* at 308 n.4. Comparably, when
15 primary assumption of the risk applies, the defendant owes no
16 duty to protect the plaintiff from harm. *Id.* Where no duty
17 exists, the plaintiff "is not entitled to recover from the
18 defendant." *Id.*

19 1. Express Assumption of Risk

20 "Express assumption of risk is a contractual matter and
21 comes into play where the plaintiff, in advance, expressly
22 'agrees not to expect the potential defendant to act
23 carefully....'" *Saenz v. Whitewater Voyages, Inc.*, 226 Cal. App.
24 3d 758, 762-63 (1991). It also applies "when a person implies
25 consent to certain risks by voluntarily encountering a known
26 danger." *Id.* at 762. The doctrine arises when an express
27 agreement "operates to relieve the defendant of a legal duty to
28 the plaintiff with respect to the risks encompassed by the

1 agreement." *Knight*, 3 Cal. 4th at 308 n.4.² It acts as a
2 complete bar to recovery in a negligence action. *Von Beltz v.*
3 *Stuntman, Inc.*, 207 Cal. App. 3d 1467, 1477 n.3 (1989).

4 It is undisputed that both Plaintiffs read and signed the
5 Participant Agreement. However, Plaintiffs challenge the
6 enforceability of the Participant Agreement by asserting (a) that
7 the Participant Agreement failed to specify the risk of becoming
8 airborne and therefore does not cover the injury sustained by
9 Mrs. Lewis; (b) the font size of the Participant Agreement
10 rendered it unreadable; (c) language in the Participant Agreement
11 unrelated to release of liability was emphasized in capitalized
12 and/or italicized fonts which detracted from the release
13 language; and (d) that Plaintiffs only agreed to assume the risks
14 of a beginners tour. Doc. 47, Plaintiffs' Opposition To Motion
15 For Summary Judgment at 10, filed Jan. 23, 2009.

16 a. Specificity of MSA's Participant Agreement

17 To be effective, a release from liability must "be clear,
18 unambiguous, and explicit" and "express an agreement not to hold
19 the released party liable for negligence." *Nat'l & Int'l Bhd. of*
20 *("Street Racers") v. Superior Court*, 215 Cal. App. 3d 934, 938
21 (1989). The release "need not achieve perfection." *Id.* It
22

23 ² California courts have consistently upheld release
24 agreements in the recreational setting and have determined that
25 such release agreements are not contrary to public policy. *Allan*
26 *v. Snow Summit, Inc.*, 51 Cal. App. 4th 1358 (1996) (upholding
27 written release in the context of a snow sport over
28 unconscionability objection); see also *City of Santa Barbara v.*
Superior Court, 41 Cal. 4th 747, 759 (2007) ("Our lower courts
have upheld releases of liability concerning ordinary negligence
related to ...[numerous] recreational activities.")

1 "must be clear, explicit and comprehensible in each of its
2 essential details" and "read as a whole, must clearly notify the
3 prospective releasor ... of the effect of signing the agreement."
4 *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th 748, 755
5 (1993) (citing *Madison v. Superior Court*, 203 Cal. App. 3d 589,
6 597-98) (internal quotations omitted). Plaintiffs argue that the
7 Participant Agreement failed to specify the risk of becoming
8 airborne.³

9 In *Buchan v. U.S. Cycling Federation*, 227 Cal. App. 3d 134,
10 136-37 (1991), plaintiff sustained head injuries when she
11 collided with other cyclists during a bicycle racing series and
12 fell. Although she signed an "Agreement and Release of
13 Liability," the release did not specify what risks were in
14 involved in cycling. *Id.* at 145. Instead, the release merely
15 stated that "cycling is an inherently dangerous sport." *Id.* The
16 court determined that "[f]alls and crashes [were] acknowledged
17 risks of injury inherent in the sport of bicycle racing." *Id.* at
18 148. Since the injury arose from risks inherent in cycling, of
19 which the plaintiff was aware when she signed the release, the
20 court found the release enforceable. *Id.* at 154.

21 In *Bennett v. U.S. Cycling Federation*, 193 Cal. App. 3d
22 1485, 1487-88 (1987), plaintiff was injured while participating
23

24 ³ At oral argument, Plaintiffs' counsel also argued that
25 Mr. and Mrs. Lewis only assumed the risks associated with a
26 "beginner's ride" or a "baby ride." However, Plaintiffs offered
27 no evidentiary or legal support for this assertion. Case law
28 suggests that the key legal inquiry is whether the risks
encountered by Plaintiffs were within the scope of the release
and related to the activity of snowmobiling.

1 in a bicycle race conducted and sponsored by the defendant. In
2 contrast to *Buchan*, the plaintiff in *Bennett* collided with a
3 vehicle that was driven onto the race's closed-course with
4 defendant's permission. *Id.* at 1488. Prior to beginning the
5 race, the plaintiff filled out and signed defendant's "Entry
6 Blank and Release," which waived plaintiffs' right to sue for
7 defendant's negligent conduct or for injuries arising from
8 participating in bicycle racing. *Id.* at 1488. The plaintiff
9 challenged the validity of the release because it did not include
10 the unexpected risk that caused plaintiff's injury. Plaintiff
11 argued that he did not expect vehicles on the closed-course, nor
12 did the release contain any language purporting to warn the
13 plaintiff of the hazard of encountering vehicles on the course.
14 *Id.*

15 The court concluded that the injury sustained by the
16 plaintiff due to the vehicle colliding with him during the race
17 was outside the scope of the release. *Id.* at 1491: "There is
18 little doubt that a subscriber of the bicycle release at issue
19 here must be held to have waived any hazards relating to bicycle
20 racing that are obvious or that might reasonably have been
21 foreseen." *Id.* at 1490. Such hazards include "collisions with
22 other riders, negligently maintained equipment, bicycles which
23 were unfit for racing but nevertheless passed by organizers,
24 [and] bad road surfaces." *Id.* (internal quotes omitted).
25 Because the race was conducted on a closed-course, presence of
26 and collision with a vehicle on the course was unrelated to
27 bicycle racing and was not obvious or reasonably foreseeable to
28 participants. *Id.* at 1490-91.

1 In this case, the Participant Agreement is extremely broad
2 as to time and place for any activities arising out of
3 participating in snowmobiling. It provides that "snowmobiling
4 entails known and unanticipated risks which could result in
5 physical or emotional injury, paralysis, death, or damage to
6 myself, property, or to third parties." The agreement provides
7 specific examples of risks inherent in snowmobiling: "riding on
8 uneven snow covered terrain, changing snow conditions and
9 variations in elevations; lost participants; tree, rocks and
10 other man-made or natural obstacles; exposure to the elements,
11 extreme temperatures, inclement weather and encounters with
12 animals and wildlife; mechanical and/or equipment problems, and
13 unavailability of immediate medical attention in case of injury."
14 (emphasis added) Plaintiffs correctly point out that the
15 agreement does not specify the risk of becoming airborne.

16 Although the risk of becoming airborne is not specified in
17 the release, the risk of variations in terrain is explicitly
18 identified. A variation in elevation involves a change in the
19 height of ground level. Common sense informs that when a
20 snowmobile, running on the surface of the ground, encounters an
21 abrupt change in elevation that the vehicle is likely to leave
22 the ground surface as it travels from higher to lower ground
23 levels. A windridge two to six feet higher than the adjacent
24 ground level, is a variation in terrain, which caused Plaintiffs'
25 snowmobile to leave the higher elevation and become airborne.
26 The specific consequences of becoming airborne were not
27 articulated among the inherent risks; however, the risk of injury
28 caused by a variation in terrain, was disclosed. Coming into

1 contact with a variation in elevation is a risk inherent in
2 snowmobiling, just as colliding with other cyclists is inherent
3 in bicycle racing. See *Buchan*, 227 Cal. App. 3d at 148. The
4 release here, like in *Buchan*, describes and makes the participant
5 aware that the activity in which they are about to engage has
6 inherent risks; i.e., of injury riding an open vehicle on snow
7 and uneven terrain. Where a participant in an activity has
8 expressly released the defendant from responsibility for the
9 consequences of any act of negligence, "the law imposes no
10 requirement that [the participant] have had a specific knowlege
11 of the particular risk which resulted in [the injury]." *Madison*
12 *v. Superior Court*, 203 Cal. App. 3d 589, 601 (1988).

13 The Participant Agreement in this case is even more specific
14 than the release upheld in *Buchan*. Here, the Participant
15 Agreement articulates specific risks inherent in snowmobiling, in
16 contrast to the *Buchan* release which only stated that "cycling is
17 an inherently dangerous sport." Each Plaintiff in this case read
18 and signed the agreement by which each "expressly agreed[d] and
19 promise[d] to accept and assume all of the risks existing in
20 [snowmobiling]." Plaintiffs further released Defendant from "any
21 such Claims which allege negligent acts or omissions of MSA."
22 The Participant Agreement adequately informs and puts Plaintiffs
23 on notice of the risks involved in snowmobiling, as the
24 Participant Agreement's language expressly describes the risk of
25 the snowmobile encountering variations in elevation which caused
26 it to leave the ground surface and impact lower terrain with
27 force, which led to the injury sustained.

28 This conclusion is supported by *Saenz v. Whitewater Voyages*,

1 *Inc.*, 226 Cal. App. 3d 758, 763 n.7 (1990), where a release was
2 upheld that stated in general terms that the risks inherent in
3 whitewater rafting include "hazards of and injury to person and
4 property while traveling on rafts on the river, accident or
5 illness in remote places without medical facilities, the forces
6 of nature...." The release was validated despite the fact that
7 it did not explicitly refer to defendant's negligence, nor did it
8 specify the risk of death or drowning. *Id.* at 765. These
9 omissions from the release were described as "drafting
10 imperfections," which did not render the release ambiguous. *Id.*
11 at 765 (internal quotes omitted).

12 Here, the absence of reference to the specific risk of
13 becoming airborne does not render the agreement ambiguous,
14 because the release explicitly describes the risks and dangers of
15 injury from snowmobiling caused by elevation changes as here
16 occurred. The Participant Agreement includes plain language
17 absolving Defendant from "negligent acts or omissions."

18 This case is unlike *Cohen v. Five Brooks Stable*, 159 Cal.
19 App. 4th 1476 (2008), where plaintiff was injured participating
20 in a horseback riding tour, when a guide, unexpectedly and
21 without warning caused his horse to gallop, which, in turn,
22 caused all the other horses on the tour to gallop, resulting in
23 plaintiff's injury. *Cohen* held the risk of injury suffered by
24 the plaintiff was not within the scope of the release because
25 "[n]othing in the Release clearly, unambiguously, and explicitly
26 indicates that it applies to risks and dangers attributable to
27 respondent's negligence or that of an employee that may not be
28 inherent in supervised recreational trail riding." *Id.* at 1489

1 (emphasis in original). Here, in contrast, the release clearly
2 and unambiguously covers errors and/or misjudgements "of a
3 participant's fitness or abilities, ...the weather, the elements,
4 or the terrain," and instances in which the guide gives
5 "inadequate warnings or instructions...." The Participant
6 Agreement, unlike the agreement in *Cohen*, expressly covers
7 negligence on the part of MSA's guides.

8 *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th 748, 756
9 (1993), holds that it is not necessary that a release include
10 every imaginable risk or every specific act of potentially
11 negligent conduct because "the law imposes no requirement that
12 [the participant] have had a specific knowledge of the particular
13 risk which resulted in his [injury]." (citing *Madison v.*
14 *Superior Court*, 203 Cal. App. 3d 589, 601 (1988) (internal quotes
15 omitted)). The Participant Agreement unambiguously expresses
16 that serious inherent risks exist in snowmobiling and specifies
17 several examples of such risks. Plaintiffs read and signed the
18 Participant Agreement, expressly assuming the risks involved in
19 this hazardous recreational activity. Neither Plaintiff claims
20 to have any learning disability or perceptual deficits that
21 prevented each from reading and understanding the release's
22 language.

23 b. Font Size of the Participant Agreement

24 Plaintiffs challenge the Participant Agreement on the
25 additional ground that its 10-point font size makes it unclear
26 and ambiguous. Plaintiffs' argument finds no support in the law.

27 *Link v. Nat'l Ass'n For Stock Car Auto Racing, Inc.*, 158
28 Cal. App. 3d 138, 141 (1984), articulated the general rule: "[a]n

1 express release is not enforceable if it is not easily readable.”
2 *Link* invalidated a release printed in 5½- point font and held
3 that “the typeface size of ... crucial language in a release
4 should be no smaller” than 8- to 10-point font. *Id.* at 141-142;
5 but see *Bennett v. U.S. Cycling Fed’n*, 193 Cal. App. 3d at 1489-
6 90 (holding that 5½-point font does not render the release per se
7 invalid).⁴

8 Here, it is undisputed that the Participant Agreement is
9 written in 10-point font, a type size not so small as to render
10 the release legally unenforceable.

11 c. Relative Emphasis of Text

12 Plaintiffs argue that the Participant Agreement is
13 unenforceable because capitalized and/or italicized text in the
14 agreement distracts a reader from focusing on the operative
15 release language. Plaintiffs cite *Leon v. Family Fitness Center*
16 *(#107), Inc.*, 61 Cal. App. 4th 1227 (1998) which held that “[a]n
17 exculpatory clause is unenforceable if not distinguished from
18 other sections, if printed in the same typeface as the remainder
19 of the document, and if not likely to attract attention because
20 it is placed in the middle of a document.” *Id.* at 1232.

21
22 ⁴ Plaintiffs cite *Celli v. Sports Car Club of Am., Inc.*, 29
23 Cal. App. 3d 511, 521 (1972), which invalidated a release written
24 in 6-point type. Although the *Celli* court was critical of the
25 type size used in the release, it did not decide the issue of
26 whether public policy would permit enforcement of a release
27 written in such small font. *Id.* at 522. Instead, the court
28 invalidated the release because the language did not specifically
release defendants from liability for “negligence.” *Id.*
Critically, here, the font is 10-point, larger than the type
criticized in *Celli*. *Celli* does not help Plaintiffs’ case.
Here, the font is a size validated by *Link*.

1 However, *Leon* concerned a health club membership agreement that
2 contained a release clause embedded within a longer agreement.
3 *Id.* at 1232-33. In contrast, MSA's Participant Agreement is a
4 stand-alone release, distinguishable from the agreement in *Leon*.

5 An effective release from liability must "be clear,
6 unambiguous, and explicit." Further, "[s]ignificant release
7 language must be readable, and should not be so encumbered with
8 other provisions as to be difficult to find." *Bennett*, 193 Cal.
9 App. 3d at 1489. Although *Bennett* did not find the release
10 enforceable against the plaintiff, the court nevertheless
11 determined that the release was "sufficiently conspicuous and
12 legible," based on its finding the release language was
13 "practically the only language on the document." *Id.* The
14 release language did "not have to compete with other, less
15 important information for the subscriber's attention." *Id.* at
16 1489-90.

17 Here, Plaintiffs suggest that capitalized and italicized
18 language on the second page in the Participant Agreement competes
19 with the release language, distracting the subscriber.
20 Plaintiff's editing expert, Meg Brookman, examined the
21 Participant Agreement and testified that the "majority of the
22 text of the [Participant Agreement] is in 10 point Times New
23 Roman...font." Doc. 52 at ¶ 5 Declaration of Meg Brookman In
24 Opposition to Motion for Summary Judgment, filed Jan. 23, 2009.
25 Brookman further testified that in a document written in 10-point
26 font, "[i]t is difficult...to determine what, if anything, was
27 bolded in the original or whether the copy procedure or something
28 else might have lightened or darkened some of the print." *Id.*

1 No party has produced an original copy of the Participant
2 Agreement, but submit a photo-copy of the Participant Agreement
3 signed by Plaintiffs.

4 Although Brookman testified that "[n]o part of the document
5 is unequivocally in bold" it is evident that the language on the
6 top of the second page is in bold 10-point Times New Roman font:

7 By signing this document, I acknowledge that if anyone is hurt or property is damaged
8 during my participation in this activity, I may be found by a court of law to have waived my
9 right to maintain a lawsuit against "MSA" on the basis of any claim from which I have
released them herein.

10 I have had sufficient opportunity to read this entire document. I have read and understood
it and I agree to be bound by its terms.

11 Immediately following this statement is a date and signature
12 block, which has "5 Apr 05" written into the spaces provided
13 beside the signatures of Glenn E. Lewis and Glenda Lewis,
14 respectively. Next, two headings in capitalized bold-faced type
15 appear on the second page: (1) "PARENT'S OR GUARDIAN'S ADDITIONAL
16 INDEMNIFICATION" and (2) "PROPERTY DAMAGE INSURANCE POLICY."
17 Finally, the capitalized, bold-faced, and italicized language
18 referred to by Plaintiffs appears one-third of the way down on
19 the second page of the Participant Agreement and reads:

20 ***"I, THE UNDERSIGNED, HAVE READ AND UNDERSTAND THE
21 INSURANCE AGREEMENT ABOVE. I ACCEPT RESPONSIBILITY FOR
22 AND AGREE TO PAY ALL DAMAGE I CAUSE TO ANY MACHINE
INCLUDING PARTS AND LABOR NOT COVERED BY ADDITIONAL
INSURANCE."***

23 Other language pertaining to insurance policies is found below
24 this statement.

25 Plaintiffs' argument that the relative emphasis of the
26 aforementioned clauses unduly distract a subscriber lacks merit.
27 The bold-faced language at the top of the second page, located
28 directly above the signature block, does not distract the reader.

1 Rather, this language, and its typeface, emphasize the important
2 terms that by signing the agreement, the subscriber waives his or
3 her right to bring a lawsuit against Defendant for injury or
4 property damages based on negligence. Moreover, the capitalized
5 and italicized language on the second page of the agreement does
6 not de-emphasize the release language and the risks involved
7 described on the first page of the document. Like the agreement
8 in *Bennett*, the release language embodies the entire agreement.
9 The Participant Agreement is sufficiently conspicuous and
10 legible.

11 d. *Assumed Risks of the Snowmobile Tour*

12 At oral argument, Plaintiffs' counsel suggested that both
13 the express and implied assumption of the risk analysis should be
14 informed by the fact that Mr. and Mrs. Lewis intended only to
15 participate in a "beginners" or "baby" snowmobile tour. Mrs.
16 Lewis was 59 years old. Neither had snow-mobiled before.
17 Plaintiffs essentially argue that they only expressly assumed the
18 risk associated with a beginners tour.

19 Whether a release bars negligence liability is a question of
20 contractual agreement. See *Appleton v. Waessil*, 27 Cal. App. 4th
21 551, 554 (1994). Assuming, *arguendo*, that Plaintiffs and
22 Defendants shared a mutual understanding that Plaintiffs were
23 only participating in a beginners ride, the Participant Agreement
24 does not reduce any such agreement to writing. Even if
25 Plaintiffs were able to present parol evidence of a separate oral
26 or implied agreement to limit the liability release to only
27 "beginner" activities, such evidence would only be admissible to
28 explain ambiguous terms in the Participant Agreement, not to

1 contradict express terms or to "explain what the agreement was."
2 *See Wagner v. Columbia Pictures Indus., Inc.*, 146 Cal. App. 4th
3 586, 592 (9th Cir. 2007) (quoting Justice Holmes' explanation
4 that parol evidence is inadmissible to show that when the parties
5 "said five hundred feet they agreed it should mean one hundred
6 inches, or that Bunker Hill Monument should signify the Old South
7 Church").

8 Here, the Participant Agreement required Plaintiffs to
9 acknowledge that

10 snowmobiling entails known and unanticipated risks
11 which could result in physical or emotional injury,
12 paralysis, death, or damage to myself, to property, or
13 to third parties. I understand that such risks simply
14 cannot be eliminated without jeopardizing the essential
15 qualities of the activity. These risks include, but
16 are not limited to: riding on uneven snow covered
17 terrain, changing snow conditions and variations in
18 elevations...[MSA guides] might be ignorant of a
19 participant's fitness or abilities. They might
20 misjudge the weather, the elements, or the terrain.
21 They may give inadequate warnings or instructions...

22 In addition, Plaintiffs agreed to "voluntarily release, forever
23 discharge, and agree to indemnify and hold harmless 'MSA' from
24 any and all claims, demands, or causes of action, which are in
25 any way connected with my participation in this activity ...
26 including any such claims which allege negligent acts or
27 omissions of 'MSA'..." (Emphasis added).

28 Plaintiffs assertion that there was an agreement to limit
the liability release to only "beginner" or "baby" activities
directly conflicts with the broadly worded language of the
release, which enumerates specific risks and consequences,
including the risks and consequences of negligence in taking
beginners off-trail, that caused Mrs. Lewis' injury.

1 e. Conclusion - Express Assumption of the Risk

2 The Participant Agreement is clear, unambiguous, and easily
3 readable. It explicitly waives Plaintiffs' right to pursue a
4 negligence action against Defendant. Defendant's motion for
5 summary judgment as to the negligence claim on the ground of
6 express assumption of the risk is GRANTED.

7
8 2. Primary Assumption of Risk

9 In addition to the defense of express assumption of the
10 risk, Defendant also argues that Plaintiffs' negligence claim is
11 barred by the doctrine of primary assumption of the risk, which
12 applies when a defendant has a duty to protect plaintiff from the
13 risks inherent in an activity. However, because Plaintiffs
14 expressly assumed the risks involved in snowmobiling, it is not
15 necessary to reach a decision as to the primary assumption of the
16 risk doctrine. See *Paralift, Inc. v. Superior Court*, 23 Cal.
17 App. 4th 748, 750 (1993) (declining to decide issue of primary
18 assumption of risk where express assumption of the risk applied).

19
20 B. Premises Liability Claim

21 Premises liability is based upon traditional negligence
22 principles of duty, breach, and harm. Courts have found that a
23 "special relationship" exists between business proprietors and
24 their patrons or invitees. See *Rotolo v. San Jose Sports and*
25 *Entertain.*, 151 Cal. App. 4th 307, 326 (2007). This duty may
26 include "a duty to take affirmative measures, either to prevent
27 foreseeable harm from occurring to those using the premises, or
28 to come to the aid of a patron or invitee in the face of ongoing

1 or imminent harm or danger." *Id.* However, California courts
2 have upheld releases purporting to waive premises liability
3 actions.

4 In *Benedek v. PLC Santa Monica, LLC*, 104 Cal. App. 4th 1351,
5 1355 (2002), the plaintiff, a member of the defendant's health
6 club, was injured while attempting to turn a television set to
7 face his direction. The plaintiff could not bear the weight of
8 the television as it began sliding off of its mount, injuring his
9 knee. *Id.* The plaintiff filed a premises liability claim
10 against the health club.

11 The defendant argued that the release of liability form
12 signed by the plaintiff, as part of his membership agreement,
13 barred plaintiff's action. *Id.* The release purported to waive
14 "any responsibility for personal injuries ... by any MEMBER ...
15 while on the ... premises, whether using exercise equipment or
16 not." *Id.* at 1354. The court upheld the release, finding that
17 the release "unambiguously, clearly, and explicitly released [the
18 defendant] from liability for any injury [the plaintiff] suffered
19 on hotel or spa premises, whether using exercise equipment or
20 not," *Id.* at 1361; further: "A release of all premises liability
21 in consideration for permission to enter recreational and social
22 facilities for any purpose does not violate public policy." *Id.*
23 at 1359 (citing *YMCA of Metro. Los Angeles v. Superior Court*, 55
24 Cal. App. 4th 22, 27 (1997)).

25 Here, the Participant Agreement releases Defendants from
26 "any and all claims, demands, or causes of action, which are in
27 any way connected with my participation in [snowmobiling] or my
28 use use of [Defendant's] equipment or facilities." The

1 Participant Agreement releases Defendant's from claims arising
2 from use of Defendant's facilities, which include the equipment
3 used and the grounds on which the tour operated. The Participant
4 Agreement is enforceable against Plaintiffs, the release serves
5 as a complete bar to Plaintiffs premises liability claim.
6 Defendant's motion for summary judgment on the premises liability
7 claim is GRANTED.

8
9 C. Common Carrier Negligence Claim

10 California Civil Code Section 2168 defines a common carrier
11 as "[e]veryone who offers to the public to carry persons,
12 property, or messages... is a common carrier of whatever he thus
13 offers to carry." Common carriers are subject to a higher
14 standard of care and "must use the utmost care and diligence"
15 when acting as such. Cal. Civ. Code § 2100. Plaintiffs contend
16 that Defendant is a common carrier subject to a heightened duty
17 of care.

18 An agreement purporting to release a common carrier from
19 liability for negligence is against public policy. *Walter v.*
20 *Southern Pacific G.*, 159 Cal. 769, 772 (1911). That policy does
21 not apply to a "private carrier." *Saenz, supra*, at 764. "Unlike
22 common carriers, private carriers are not bound to carry any
23 person unless they enter into an agreement to do so." *Id.* at 764
24 n.8; *Samuelson v. Public Utilities Comp.*, 36 Cal. 2d 722, 730
25 (1951).

26 Certain types of recreational rides are considered common
27 carriers. For example, in *McIntyre v. Smoke Tree Ranch Stables*,
28 205 Cal. App. 2d 489, 490 (1962), the defendant conducted guided

1 mule tours, which took passengers in a mule train along scenic
2 trails. *Id.* at 492. The defendant in *McIntyre* argued that it
3 was not a common carrier because the mules were not tied
4 together, and plaintiff had control over the mule and held the
5 reins. *Id.* at 492. The court rejected this argument, focusing
6 instead on the relationship between the plaintiff and defendant.

7 *Id.* The court noted:

8 [D]efendant operated a mule train for the purpose of
9 taking passengers over a designated route between fixed
10 termini...; for a roundtrip fare...; chose the animals
11 to be used for this purpose; furnished whatever
12 equipment was necessary; selected the trail over which
13 they were to travel; trained [the mules] to follow one
14 another along this trail; and employed a guide to act
15 as conductor. The only reasonable conclusion to be
16 drawn from these facts is that a person who paid a
17 roundtrip fare for the purpose of being conducted by
18 mule over the designated route between fixed termini,
19 purchased a ride; that the defendant offered to carry
20 such a person by mule along that route between these
21 termini; and that the transaction between them
22 constituted an agreement of carriage.

23 *Id.* See also *Squaw Valley Ski Corp. v. Superior Court*, 2 Cal.
24 App. 4th 1499 (1992) (ski resort chair lift facility is a common
25 carrier); *Gomez v. Superior Court*, 35 Cal. 4th 1125
26 (2005) (operator of a roller coaster or similar amusement park
27 ride is a common carrier).⁵

28 Defendant attempts to distinguish *McIntyre* on the ground
that, in that case, "[e]ach passenger was essentially at the

⁵ Plaintiffs, citing *Gomez*, contend that the "critical factor" in classifying an entity as a common carrier is "whether the carrier acts gratuitously or is paid." Doc. 47 at 11. But, nothing in *Gomez* suggests that this factor is more important than any other. *Gomez* merely involved a case in which the central disputed issue was whether defendant was a "carrier of persons for reward." 35 Cal. 4th 1125.

1 mercy of whatever the mule chose to do...." Doc. 84 at 12.
2 Here, by contrast, guests on defendant's snowmobile tour had
3 complete control over their vehicle: "they could stop the
4 snowmobile when they chose; they could hit the brakes at any
5 time; they could go faster and slower at various parts of the
6 ride." *Id.* Mammoth further argues:

7 Holding Mammoth's snowmobile operation [to be] a common
8 carrier would be no different than finding a ski area
9 who provides lessons to guests to be a common carrier.
10 In such a situation, the ski area would provide the
11 guide. The ski area provides equipment (skis, boots,
12 and poles). The guide takes the skier on the mountain.
13 The guide selects the route for the skier who has
14 control over his speed, his direction, and his ultimate
15 path of travel. The described situation is no
16 different than what Mammoth provides as a snowmobile
17 operator. It is simply not a common carrier.

18 *Id.* Mammoth's reasoning is compelling. *McIntyre*, a case decided
19 more than forty years ago, represents the outside edge of
20 California's common carrier jurisprudence. It does not compel a
21 finding that Defendant is a common carrier under the
22 circumstances presented here.

23 Some cases draw a distinction between "common carriers"
24 (sometimes referred to as "public carriers") and "private
25 carriers," placing into the latter category operators who are
26 "not bound to carry any person for any reason unless they enter
27 into an agreement to do so." *Saenz, supra*, at 764 n.8; see
28 *Webster v. Ebright*, 3 Cal. App. 4th 784, 787 (1992) (holding
defendant, an owner and operator of recreational horseback rides,
to be a private carrier and reasoning that "being a carrier for
reward does not itself impose the 'utmost care' standard of
common carriers"). Defendant falls under this definition of

1 "private carrier," because MSA is not bound to guide anyone on a
2 snowmobile tour unless they enter into a mutual agreement to do
3 so. Additionally, the tour did not operate between previously
4 selected fixed termini and there is no evidence that guides
5 always took the same fixed route, as the mule train in *McIntyre*
6 did. Each snowmobile was operated by an individual rider without
7 any indication that the tour was to travel a pre-established
8 fixed route. This was a specific agreement for private carriage
9 with a comprehensive release of MSA from negligence.⁶

10 Moreover, even if Defendant were a common carrier, the
11 Participant Agreement bars any negligence claim based on a
12 heightened common carrier duty of care. *Booth v. Santa Barbara*
13 *Biplanes, LLC*, 158 Cal. App. 4th 1173, 1177 (2008), held that a
14 common carrier may limit its liability by special contract or
15 release, but not for gross negligence. See Cal. Civ. Code § 2174
16 ("obligations of a common carrier ... may be limited by special
17 contract"); Cal. Civ. Code § 2175 ("a common carrier cannot be
18 exonerated, by any agreement...from liability for the gross
19 negligence, fraud, or willful wrong of himself or his servants").

21 ⁶ There is some authority that suggests the higher
22 standard of care set forth in § 2100 applies only to
23 common/public carriers, not private carriers. See *Webster v.*
24 *Ebright*, 3 Cal. App. 4th 784, 787 (1992). However, the law is
25 far from clear on this question. See *Lopez v. So. Cal. Rapid*
26 *Transit Dist.*, 40 Cal. 3d 780, 785 (1985) (stating "[t]he duty
27 imposed by Section 2100 applies to public carriers as well as
28 private carriers"). Recently, the California Supreme Court
declined to resolve this conflict in *Gomez*, 35 Cal. 4th at 1130
n.3. It is not appropriate or necessary to decide the issue the
California Supreme Court declined to reach, as this case is
resolved on other grounds.

1 In *Booth*, participants signed a release which provided in
2 pertinent part

3 I UNDERSTAND THAT PARTICIPATION IN BIPLANE OR OTHER
4 AIRCRAFT TOURS IS A HIGH RISK ACTIVITY AND THAT SERIOUS
5 INJURY OR DEATH MAY OCCUR. [¶] 8. I VOLUNTARILY ASSUME
6 ALL RISK, KNOWN AND UNKNOWN, OF INJURIES, HOWEVER
7 CAUSED, EVEN IF CAUSED IN WHOLE OR IN PART BY THE
8 ACTION, INACTION, OR NEGLIGENCE OF THE RELEASED PARTIES
9 TO THE FULLEST EXTENT ALLOWED BY LAW.

10 *Id.* at 662-63 (emphasis from *Booth*). The release was found to be
11 a "special contract" within the meaning of section 2174. Here,
12 the release similarly transferred the risk of engaging in the
13 dangerous activity of snowmobiling to Plaintiffs, the same
14 conclusion is appropriate. See also *Saenz*, 226 Cal. App. at 764
15 (holding "[t]here is no public policy in California opposing
16 private, voluntary transactions in which one party, for a
17 consideration, agrees to shoulder a risk which the law would
18 otherwise have placed upon the party.")

19 Defendant's motion for summary judgment as to common carrier
20 liability is GRANTED on the ground that any carrier liability was
21 validly released, except as to gross negligence.

22 D. Gross Negligence Claim

23 Defendant moves for summary judgment on Plaintiffs' gross
24 negligence claim, arguing that the record contains absolutely no
25 evidence to support a finding of gross negligence.

26 Plaintiffs correctly point out, and Defendant concedes, that
27 the Participant Agreement cannot waive grossly negligent conduct.
28 In *City of Santa Barbara v. Superior Court of Santa Barbara*
County, 41 Cal. 4th 747, 751 (2007), the court considered the
issue of whether an operator of recreational facilities may

1 release liability for its grossly negligent conduct. *Id.* at 750.
2 The court held that as a matter of public policy, release
3 agreements waiving liability for future gross negligence are
4 unenforceable. *Id.* at 777. In light of *City of Santa Barbara*,
5 the Participant Agreement does not bar Plaintiffs' gross
6 negligence claim.⁷

7 A defendant's conduct rises to the level of gross negligence
8 when his or her conduct embodies "either a 'want of even scant
9 care' or 'an extreme departure from the ordinary standard of
10 conduct.'" *Id.* at 754. In order to survive Defendant's motion
11 for summary judgment, Plaintiffs must provide some evidence
12 indicating that Hosking demonstrated a "want of even scant care"
13 or exercised "an extreme departure from the ordinary standard of
14 conduct."

15 MSA has a policy of not taking their snowmobilers to areas
16 where they may become airborne. Hosking testified that he was
17 not airborne when he went over the windridge that injured Mrs.
18 Lewis. Hosking Depo. at 82. However, at least one witness
19 testified that Hosking became airborne on at least one occasion:

20 Q: Do you remember going off the jump or the
21 incline or whatever you call it, the
windridge, where she was injured? Do you
remember what it was like to go over that?

22 A: Yes, because we had all gone over the same
23 one unless she went over a different one, but
I think we went over the same ones.

24 Q: Okay.

25 A: I saw the guide go over...
26

27 ⁷ The Participant Agreement does not purport to release
28 grossly negligent conduct and only refers to ordinary negligence.

1 Q: Did you, on all three of these jumps, two
2 or three, did your snowmobile come off the
ground completely on all of them?

3 A: Uh-huh.

4 Q: Is that a "Yes"?

5 A: Yes.

6 Q: Were you trying to keep your snowmobile
7 off the ground, is that something you wanted
to do?

8 A: I might have. This is really - Let's see
9 if I can do this. ... I tried to follow the
10 guide and he got more air than I did. He
obviously has done this before.

11 Singleton Depo. at 15, 16, 35 (emphasis added).

12 The witness further testified that "we went off trail and
13 went over either two or three jumps before we stopped and he
14 [Hosking] looked back." Singleton Depo. at 25. Viewing the
15 facts in a light most favorable to Plaintiffs, there is evidence
16 that could support a finding that Hosking deliberately and
17 without warning led the group over at least one terrain variation
18 that caused Hosking and other members of the group to go airborne
19 in violation of MSA policy. There is no evidence to suggest that
20 Hosking stopped and warned the group about becoming airborne or
21 the attendant risk, after he allegedly became airborne. Going
22 airborne is sufficiently riskful that MSA has a policy against
23 the activity. Deliberately ignoring and violating its own rule
24 could support a finding of reckless disregard of known risks
25 amounting to gross negligence. Plaintiffs have sufficiently
26 raised a genuine issue of material fact as to whether Hosking
27 exercised "an extreme departure from the ordinary standard of
28 conduct" by taking the group over windridges that caused him and

1 multiple snowmobilers to become airborne.

2 Defendant's motion for summary judgment as to this claim is
3 DENIED.

4
5 E. Loss of Consortium Claim

6 "A cause of action for loss of consortium is ... dependent
7 on the existence of a cause of action for tortious injury to a
8 spouse." *Hahn v. Mirda*, 147 Cal. App. 4th 740, 746 (2007).

9 "[I]t stands or falls based on whether the spouse of the party
10 alleging loss of consortium has suffered an actionable tortious
11 injury." *Id.* Here, Mr. Lewis bases his loss of consortium claim
12 based on the injuries sustained by Mrs. Lewis. Since, Mrs.
13 Lewis' gross negligence claim survives summary judgment, Mr.
14 Lewis' claim for loss of consortium also survives, only as to
15 this claim.

16 Defendant's motion for summary judgment on the loss of
17 consortium claim is DENIED.

18
19 V. CONCLUSION

20 For the reasons set forth above, Defendant's motion for
21 summary judgment is GRANTED as to the negligence, common carrier,
22 and premises liability claims and DENIED as to the gross
23 negligence and loss of consortium.

24 Defendant shall submit an order consistent with this
25 decision within five (5) days following date of service by the
26 clerk.

1 IT IS SO ORDERED.

2 **Dated: February 19, 2009**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28