



West News

## Court Rules Liability Waiver Invalid When There is Gross Negligence

July 19, 2007

The California Supreme Court has ruled that a signed liability waiver is useless in protecting a government entity from gross negligence and only good in protecting against ordinary negligence, which could have implications for recreational programs throughout the state.

In *City of Santa Barbara et al. v. Superior Court*, a disabled 14-year-old girl drowned in a city-owned swimming pool in Santa Barbara, Calif., while participating in a recreational activities program for developmentally disabled children. Prior to the girl's participation in the program, her parents signed a waiver and release and express assumption of the risk agreement. By signing the agreement, the parents waived and released all liability related to the program, including potential negligence of the facility and its workers.

Nevertheless, after the girl drowned, the parents filed a lawsuit, alleging that the city of Santa Barbara and its counselor acted negligently. Relying on the signed waiver release, the defendants moved unsuccessfully for summary judgment and summary adjudication. The defendants then petitioned the Court of Appeal, filing a writ of mandate.

The appellate court denied the petition, holding that the signed waiver agreement was effective and enforceable insofar as it concerned defendants' liability for future ordinary negligence. However, the appellate court concluded that a release of liability for future gross negligence is generally unenforceable, and the agreement in this case did not validly release such liability.

The California Supreme Court agreed to address the second part of the appellate court's decision, and found in prior cases a "rough outline" of the "type of transaction in which exculpatory provisions will be held invalid."

The high court said that in previous court cases, "'Gross negligence' has long been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" "'Traditionally the law has looked carefully and with some skepticism at those who attempt to contract away their legal liability for the commission of torts.' Courts and commentators have observed that such releases pose a conflict between contract and tort law." Previous court decisions, the high court said, "held that [an agreement's] exculpatory provision may stand only if it does not 'involve [and impair] 'the public interest.'"

Furthermore, the court said it found in prior cases a "rough outline" where liability waivers were held invalid. In its decision, the Supreme Court wrote: "[T]he attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

According to legal firm Agajanian, McFall, Weiss, Tetreault & Crist LLP, the court's ruling could mark a new era in the sports and recreation industries in California, with growing liability exposures, increased litigation and rising insurance costs. The firm filed briefs on behalf of the California Speedway in Fontana and NASCAR, which rely on waiver and release agreements signed by race participants and spectators entering the pit areas.

While the Supreme Court said it is "sensitive to the policy arguments advanced by defendants and their amici curiae," it cautioned "against rules triggering wholesale elimination of beneficial recreational programs and services." The court said it found no support for predictions that recreational programs would disappear, noting that other states have made similar decisions that liability waivers do not apply to gross negligence and recreational programs still exist in those states.

Ultimately, the Supreme Court ruled that "the absence of a duty to protect against ordinary negligence does not absolve a defendant from liability based upon reckless conduct. Similarly, in the present situation, it cannot be said that a legal distinction between ordinary negligence and gross negligence is 'unnecessary' • indeed, a theory of gross negligence, if supported by evidence showing the existence of a triable issue, is the only negligence-based theory that is potentially open to plaintiffs and real parties in interest."

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