CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Rosencrans v Dover Images, LTD. (2/16/11)

Release of Liability; Gross Negligence Exception

Defendant operated a motocross track in Perris. Before entering the track facility, patrons were required to sign a release and waiver of liability which was given to them as they stopped at a booth at the entrance. Plaintiff, age 38, had twenty-four years of experience riding motocross. As he arrived with his motorcycle in the back of his pickup, he was given a clipboard holding the release and told, "Here, just sign in" or words to that effect.

The document was titled "Release and Waiver of Liability Assumption of Risk and Indemnity Agreement." It contained nine paragraphs containing waiver and release language. Underneath the paragraphs were multiple horizontal lines for patrons to print and sign their names. In the signature line, the typed words "I HAVE READ THIS RELEASE" appeared, and the signature had to be written over these words. Plaintiff testified he signed the document within 10 seconds of his arrival. He was not given a copy, and the whole exchange took about 30 seconds.

Approximately 20 other motocross riders were practicing on the track when plaintiff arrived. He donned his helmet, gloves, and chest protector and proceeded to ride on the track for about 30 minutes. At that point he went up a ramp for a jump and fell on the opposite side, so that he was out of view of other riders. About 20 seconds later he suffered severe injuries when he was hit by two other riders. The incident took place where a "caution flagger" would normally stand. The one flagger at the track was not in the area of the fall, and plaintiff saw him running over just before he was struck.

Plaintiff sued the track owner for negligent ownership, operation, maintenance and control of the track as well as negligent supervision and training of its employees. Defendant moved for summary judgment based on the release. Plaintiff asserted he was told the release was a "sign-in" sheet, was not

told it was a release, and did not know he was signing a release. He claimed he was not given a copy of the document and had insufficient time to sign it as he pulled in to the facility. Since he did not freely enter into the release, a triable issue of fact was raised whether the release was void. Plaintiff also argued that even if the release was enforceable, it could not bar a claim for gross negligence. He alleged a triable issue of fact was present for gross negligence as to the failure to assign a flagger to the point of the accident and claimed defendant was grossly negligent in hiring and supervising employees.

Defendant replied that plaintiff had failed to demonstrate he would not have signed the release if he had known what it was. Thus there was no reliance on the alleged misrepresentation. Defendant also argued plaintiff failed to produce evidence of gross negligence. Plaintiff's claim was barred by assumption of the risk, as well. The trial court then granted defendant's motion for summary judgment. It found the release was enforceable, defendant's conduct did not rise to gross negligence, and plaintiff assumed the risk of injury by participating in motocross. Plaintiff appealed.

Division Two of the Fourth Appellate District addressed the release issue first. Characterizing plaintiff's claim as sounding in "fraud in the execution," the Court noted the contract is only considered void when the plaintiff's failure to discover the true nature of the document executed was without negligence on the part of the plaintiff. This issue usually arises when the plaintiff failed to read the terms of the contract, relying instead on the defendant's representation as to the effect of the contract. (See, *Duffens v Valenti* (2008) 161 Cal.App.4th 434) Generally, it is not reasonable to fail to read a contract; this is true even if the plaintiff relied on the defendant's assertion that it was not necessary to read the contract. Reasonable diligence requires a party to read a contract before signing it. (*Brown v Wells Fargo Bank, N.A.*(2008) 168 Cal.App.4th 938)

Here, the evidence reflected the fact plaintiff was given an opportunity to read the contract. He could have read it while in line or he could have pulled over and read the release. He was not forced to sign the release, nor denied an opportunity to sign it before signing. His failure to read the release was due to his own negligence, because the evidence indicated there was nothing preventing him from reading the release. Despite plaintiff's argument that he did not freely and knowingly enter into the release, there is no reason, in the evidence, why plaintiff could not read the document. Because the document contained a waiver of the right to sue for damages suffered on account of injury

related to using the track, plaintiff waived his rights to sue defendant for ordinary negligence and negligent hiring and supervision.

Plaintiff also asserts that there are triable issues of material fact related to his allegation of gross negligence. Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation and damages. (*Jones v Wells Fargo Bank* (2003) 112 Cal.App.4th 1527) To set forth a claim for gross negligence, the plaintiff must allege extreme conduct on the part of the defendant. (*Eastburn v Regional Fire Protection Authority* (2003) 31 Cal.4th 1175) The conduct must rise to the level of "either a want of even scant care, or an extreme departure from the ordinary standard of conduct."(*City of Santa Barbara v Superior Court* (2007) 41 Cal.4th 747)

Duty is a legal question, to be decided by the court. Generally, people have a duty of care to avoid injuring others. When a plaintiff is injured in a dangerous sport, the duty analysis becomes intertwined with an exception to the general rule, known as assumption of the risk. Where plaintiff voluntarily participates in a sport with inherent risks, defendant is relieved of the duty to use due care to avoid plaintiff suffering an injury as a result of those risky aspects of the sport. (*Knight v Jewett* (1992) 3 Cal.4th 296) A duty should not be imposed when doing so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events. (*Kahn v East Side Union High School Dist.* (2003) 31 Cal.4th 990)

In motocross, given the racetrack setting, the speeds involved, and the jumping maneuvers, it follows that participants will fall and while down, will be struck by other riders whose views are obscured by corners, ramps or other riders. Defendant is the track owner. It has a duty to provide a reasonably safe track. (*Morgan v Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127) In motocross, the track owner has a duty to minimize the risk of a co-participant crashing into a rider who has fallen on the track. Providing a warning system, such as caution flaggers to alert other riders would assist in minimizing the risk of riders colliding with one another. As such, defendant owed a duty to plaintiff. There is no duty to eliminate the risk of motocross riders colliding with one another, however, there is a duty to minimize the risk by providing an adequate warning system. (See, *Saffro v Elite Racing, Inc.* (2002) 98 Cal.App.4th 173)

On the question of breach of this duty, the Justices observed that plaintiff submitted evidence of a "Safety Foundation Instructional Manual for Caution Flaggers." Testimony from the track manager confirmed the manual was used to

train its caution flaggers, and all had received a copy. In addition, a safety expert declared that it was common practice for caution flaggers to be assigned to their posts at all times. He stated that lack of a flagger at the site of the incident was "inexcusable, a blatant disregard for riders' safety, and criminal." He opined that the failure to have a flagger posted at the time *greatly* fell below the standard of care in the industry. Based on this evidence, the plaintiff created a triable issue of fact as to whether the failure to provide a caution flagger constituted an extreme departure from the ordinary standard of conduct.

In proving causation, the foreseeability required is of the risk of harm, not of the particular intervening act. (*Anaya v Superior Court* (2000) 78 Cal.App.4th 971) Here, a jury could find that if a caution flagger had been posted, then the other riders may have seen plaintiff and altered their course so as to avoid plaintiff. As such, a trier of fact could reasonably find that defendant's negligence was a substantial factor in causing plaintiff's injuries. The jury could also find the incident was foreseeable, and there is thus a triable issue of fact on the element of causation.

The Fourth DCA concluded that defendant owed plaintiff a duty of care. Whether the conduct constituted an extreme departure from the ordinary standard of conduct, and whether defendant's conduct was a cause of plaintiff's injuries is a question of fact to be resolved by trial, not summary judgment. Defendant then argued that the facts alleged by plaintiff do not amount to extreme conduct. When reviewing a motion for summary judgment, though, the Justices noted that they are obligated to resolve every reasonable doubt in favor of the plaintiff when looking at the complaint. (*B.L.M. v Sabo & Deitsch* (1997) 55 Cal.App.4th 823) Here, it is possible a jury could find that providing only one caution flagger was an extreme departure from the ordinary standard of care. As such, plaintiff did allege facts sufficient to constitute a claim of gross negligence. This is not a judgment on the merits of plaintiff's case, but a view of the allegations in the light most favorable to plaintiff as required by law.

The trial court correctly found the claim for ordinary negligence and negligent hiring and supervision is barred by the release. The error occurred when it found defendant did not owe a duty of care to plaintiff, and that a triable issue of fact did not exist as to the claim for gross negligence. The judgment is reversed as to gross negligence, but is otherwise affirmed. The parties are to bear their own costs on appeal.