



WEEKLY LAW RESUME™

Issue By: Steven D. Werth

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## Negligence - Release And Waiver Of Liability Agreement Does Not Bar A Claim Of "Gross" Negligence

*Jerid Rosencrans v. Dover Images, Ltd.*

Court of Appeal, Fourth Appellate District, Division Two (February 16, 2011)

This case examined the scope of a release and waiver agreement, and whether such an agreement bars a claim for gross negligence.

Jerid Rosencrans sued the defendant Dover Images, Ltd. ("Dover") for negligence. Dover does business as Star West Motocross ("Star West"), and operates a motocross track. Before entering the track facility, patrons were required to stop their cars at a booth that was staffed by a Star West employee. At the booth, while the patron was in his or her car, the patron paid a fee and signed a release and waiver of liability. The document was titled, "Release and Waiver of Liability Assumption of Risk and Indemnity Agreement" (the "Release"), and underneath the title were approximately nine paragraphs. The paragraphs set forth the waiver and release. Under the paragraphs were multiple horizontal lines, separated into four columns, where patrons could print and sign their names. In the section where patrons signed their names, they were required to sign their names over the words "I have read this release."

On the release, Mr. Rosencrans, who was an experienced cyclist and was 38 years old, printed his name, and signed his name over the words "I have read this release." Mr. Rosencrans signed the release within approximately ten seconds of the documents being handed to him.

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Mr. Rosencrans had been riding on the motocross track for approximately thirty minutes when he went up a ramp for a jump and fell, landing on the downslope of the ramp, which placed him outside of the view of the other riders. Mr. Rosencrans was not hurt, and proceeded to stand up and pick up his motorcycle. However, within the next minute or so, Mr. Rosencrans was struck by two other motorcyclists. Mr. Rosencrans' initial fall took place near a platform where a person employed as a "caution flagger" would typically stand. From the platform, a "caution flagger" could see riders who had fallen down, and then alert other riders, who were unable to see fallen motorcyclists, that there was a fallen motorcyclist on the track. There was at least one caution flagger at the track when Mr. Rosencrans fell. However, at the time of his fall, the caution flagger was not on the platform near the location where Mr. Rosencrans had fallen.

Dover successfully moved for summary judgment on the grounds that the release barred Mr. Rosencrans' claim. The Appellate Court disagreed with Mr. Rosencrans' argument that the release was unenforceable. Mr. Rosencrans argued that the release was void due to the legal principal of "fraud in the execution." "Fraud in the execution" means that the promissor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all. Since mutual assent is lacking, the contract is void. However, the Appellate Court noted that a contract will not be "considered void due to the fraud if the plaintiff has a reasonable opportunity to discover the true terms of the contract." Here, there was nothing indicating that Mr. Rosencrans was forced to sign the release or that he was somehow denied an opportunity to read the release before signing it.

However, the Appellate Court did agree with Mr. Rosencrans that there were triable issues of fact related to the allegation of "gross" negligence. As the Court explained, to set forth a claim for "gross negligence," the plaintiff must allege extreme conduct on the part of the defendant. The conduct alleged must rise to the level of either a "want of even scant care" or "an extreme departure from the ordinary standard of conduct."

The Court found that based on the evidence, Mr. Rosencrans created a triable issue of fact as to whether the failure to provide a caution flagger constituted an "extreme departure from the standard of conduct." The Court also noted that while liability for ordinary negligence may be

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released, no published California cases have upheld an agreement purporting to release liability for future "gross" negligence. Thus, while Mr. Rosencrans' claim for ordinary negligence was barred by the release, the claim for gross negligence was not barred by the release due to public policy concerns.

## COMMENT

While an appropriately drafted release and waiver of liability may bar a claim for negligence, public policy concerns preclude a waiver for "gross" negligence. To advance a claim for "gross negligence," the plaintiff must show "extreme departure from the standard of conduct" on the part of the defendant. Confronted with a release and waiver agreement, plaintiffs' counsel may argue that a triable issue of fact exists as to whether the defendant's conduct constituted an "extreme departure" from the ordinary standard of care.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/E049899.PDF](http://www.courtinfo.ca.gov/opinions/documents/E049899.pdf)

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