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# Sports and recreation cases: Hope springs eternal

*The 4th District Court of Appeal keeps hope alive for sports and recreational activity cases that are often thought of as DOA due to liability releases and the assumption of risk doctrine*



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California law continues to develop around lawsuits involving accidents in sports and recreational activities. Two cases decided this year – both out of California’s Fourth Appellate District – affirm that suits arising out of injuries in sport and recreational activities are not “dead on arrival.” Plaintiffs’ attorneys have many

important avenues to clear the hurdles these cases present. This article discusses one of the two cases, *Rosencrans v. Dover Images, Ltd.* (2011) \_\_\_ Cal.App.4th \_\_\_ [No. E049899. Fourth Dist., Div. Two., Feb. 16, 2011].<sup>1</sup>

## **Overview of the law**

### *Liability releases*

California cases have long held that liability for ordinary negligence may be re-

leased provided the release complies with contract law and meets three prerequisites: (1) that it is clear and unambiguous; (2) that the injury was sustained in an activity within the object or purpose for which the release was signed; and (3) that the release not contravene public policy.

Perhaps the most important recent development in this area is with respect to the third prerequisite – public policy. In 2007, the California Supreme Court



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rendered a decision in *City of Santa Barbara v. Superior Court* that held that claims for gross negligence cannot be released as a matter of public policy. In that case, the Court examined Civil Code section 1668, which provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the public policy of the law." (Cal. Civil Code § 1668.)

The California Supreme Court, interpreting section 1668, held that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 751.)

#### 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, 1541.) However, to set forth a claim for "gross negligence" the plaintiff must show specifically extreme conduct on the part of the defendant. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186 (Eastburn).) 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.'" (*Santa Barbara, supra*, 41 Cal.4th at p. 754, citations and fn. omitted.)

#### Primary Assumption of Risk

Whether a duty exists is a legal question decided by the court. (*Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 266.) As a general rule, people have a duty to use due care to avoid injuring others. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315.) However, dangerous conduct or conditions are often an integral part of participating in sports; therefore, when a plaintiff is injured while participating in a dangerous sport, the duty analysis becomes intertwined with an exception to the general duty of care rule known as "as-

sumption of the risk." The assumption of the risk doctrine provides an exception to the general duty of care rule when a plaintiff is injured while participating in a dangerous activity. (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 108.)

The California Supreme Court has broken assumption of the risk into two categories: (1) primary assumption of the risk, which affects the duty analysis; and (2) secondary assumption of the risk, which affects the damages analysis. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 489.)

Primary assumption of the risk means that the plaintiff has voluntarily participated in a sport that includes various inherent risks, and therefore, the defendant is relieved of his or her duty to use due care to avoid the plaintiff suffering an injury as a result of those inherent risks of the sport. (*Knight v. Jewett, supra*, 3 Cal.4th at pp. 308-309, fns. 3-4, 315-316.) The question of whether a defendant should be relieved of his or her duty is a question of law and policy. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161.) A court must evaluate (1) the fundamental nature of the sport, and (2) the defendant's relationship to the sport, in order to determine if the defendant should be relieved of his or her duty of care. (Id.) As a matter of policy, a duty should not be imposed where 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, 1004.) If the defendant is relieved of his or her duty of care, then the plaintiff's negligence cause of action is barred. (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.)

Secondary assumption of the risk affects the damages analysis. (*Shin v. Ahn, supra*, 42 Cal.4th at p. 498.) In secondary assumption of the risk, the defendant owes the plaintiff a duty, but the plaintiff shares the fault for his or her injury, and therefore, the damages must be apportioned between the parties. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 480.)

### **Rosencrans v. Dover Images, Ltd.**

*Rosencrans v. Dover Images, Ltd.* (2011) \_\_\_ Cal.App.4th \_\_\_ [No. E049899. Fourth Dist., Div. Two., Feb. 16, 2011]

#### Facts

*Rosencrans* involved a motorcycle accident during a non-race day on a motorcycle race track. Defendant (Dover) operated a .6 mile track at the Lake Perris Fairgrounds in Perris, California. Before entering the track facility, patrons were required to stop their cars at a booth that was staffed by an employee of Dover. 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 to gain entry.

The plaintiff, 38 year old Jerid Rosencrans, had been riding motorcycles since he was 14 years old. Rosencrans arrived at the track driving his truck with his motorcycle in the bed. He stopped his truck at the entrance booth at the defendant's facility, where an employee of defendant gave him a clipboard with the release document and said "Here, just sign in," or "Here, sign this."

The document was titled "Release and Waiver of Liability Assumption of Risk and Indemnity Agreement," and contained approximately nine paragraphs setting forth a waiver and release. One of the paragraphs read:

"[participant] [h]ereby releases, waives, discharges and covenants not to sue the owner of the Premises, any individual engaging in the Activities, rescue personnel, and the Premises inspectors, surveyors, underwriters, consultants and others who give recommendations, directions or instructions or engage in risk evaluation or loss control activities regarding the Premises, and each of them, their directors, officers, agents and employees[,] from all liability to the Undersigned for any and all loss or damage and any claim or demands therefore on account of injury to the person or property or resulting in death of the Undersigned arising out of or related to the use of the Premises for the Activities, whether caused by the negligence of the Releasees or otherwise."



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Underneath the paragraphs were multiple horizontal lines, separated into four columns, for patrons to print and sign their names. In the section where patrons signed their names, they were required to sign their name over the words "I have read this release." Rosencrans printed his name and signed over the words "I HAVE READ THIS RELEASE." Rosencrans signed the release within approximately 10 seconds of the document being handed to him, and was not given a copy of the release that he signed. The total exchange at the entrance booth lasted approximately 30 seconds.

Approximately 20 other motocross riders were practicing on the track when Rosencrans arrived. Rosencrans had been riding for approximately 30 minutes when he went up a ramp for a jump, fell, and landed on the downslope of the ramp outside of the view of the other riders. Approximately 30 seconds after he fell, Rosencrans was struck by another motorcyclist. Approximately 20 seconds after that collision, a second motorcyclist struck him. Rosencrans suffered unspecified "serious and severe" injuries.

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" can see riders who have fallen down, and then alert other riders, who are unable to see fallen motorcyclists, that there is a fallen motorcyclist on the track. There was at least one caution flagger at the track when he fell; however, at the time of the fall, the caution flagger was not on the platform at the location near his fall. Rosencrans saw a caution flagger on the far side of the track from where he fell, and he saw the caution flagger run towards him prior to being struck by the second motorcyclist.

Rosencrans alleged causes of action against Dover for negligence and premises liability. Dover moved successfully for summary judgment, arguing that plaintiff's claim was barred by plaintiff's execution of the release.

### Summary judgment - and a reversal

The trial court granted Dover's motion for summary judgment. First, the trial court concluded the release was enforceable. Second, the trial court held the undisputed facts showed that Dover's conduct did not rise to the level of gross negligence. Third, the trial court concluded Plaintiff assumed the risk of being injured when he participated in the sport of motocross.<sup>2</sup>

The Court of Appeal reversed.

#### "Fraud in the execution" and "free and knowing" waiver

Rosencrans argued the release could be found to be unenforceable for a number of reasons giving rise to a "fraud in the execution" argument, which he contended created a triable issue that the release was void because he did not knowingly and freely enter into the release.

The court disagreed. "Fraud in the execution," the court held, "means that the promisor 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." (*Duffens v. Valenti* (2008) 161 Cal.App.4th 434, 449.)

However, a contract "[will not be] considered void due to the fraud if the plaintiff had a reasonable opportunity to discover the true terms of the contract. 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 plaintiff's part. 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. 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, 958-959.)

The court held that Rosencrans was given an opportunity to read the terms of the agreement because he testified that he can read English, that he attended college, and because he was handed the agreement before signing. Even though the Dover employee gave Plaintiff the release as a condition of entering the facility, and said "Here, just sign in," or "Here, sign this" while plaintiff was in his truck with approximately 10 cars in line behind him, and plaintiff only had the release for 10 seconds before signing it, the court held that Rosencrans was not defrauded.

Because Rosencrans could have read the Release while in line, or could have moved his truck to the side and read the release, he had a sufficient opportunity to know what he was signing. The court similarly rejected plaintiff's lack of "freely and knowingly" signing the release argument based on the Dover employee's misrepresentation of the document as a sign-in sheet, the clipboard clip obscuring the document title, small font, and failure to give him a copy of the release.

#### Gross negligence

Second, Rosencrans argued that even if the release was enforceable, it could not bar a claim for gross negligence. Rosencrans argued the following evidence created a triable issue of fact for gross negligence on the part of Dover: (1) Dover had "a duty to have caution flaggers at a permanent station"; (2) Dover failed to place a caution flagger at the platform near the site of plaintiff's fall; and (3) a caution flagger did not warn other motorcyclists that Plaintiff had fallen on the track for approximately 30 seconds. Additionally, plaintiff argued Dover was grossly negligent in its hiring and supervising of employees, and submitted an expert declaration stating that Plaintiff's "injuries were caused by caution flaggers who were not properly trained or supervised."

#### Release sufficient to bar ordinary negligence claims

The court held that the language of the release, which gave up plaintiff's right to sue defendant for any injury occurring on the track "whether caused by the



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negligence of [defendant] or otherwise,” was sufficient to release defendant from claims for ordinary negligence as well as negligent hiring and supervision.

However, the court agreed with plaintiff’s contention that triable issues of fact existed related to plaintiff’s allegation of gross negligence. Defendant argued that plaintiff’s complaint was “devoid of any allegation of gross negligence.” The court disagreed, and held that plaintiff’s complaint sufficiently alleged extreme conduct on the part of the defendant.

Specifically, plaintiff’s complaint alleged that only one “flagger” was present on the track at the time of plaintiff’s fall, but the flagger was not paying attention to the track and failed to raise his flag which would have alerted other oncoming riders of an incident and to ride with caution. Having found that an owner/operator of a motocross track has a duty to provide a warning system, such as caution flaggers, to alert other riders of a fallen participant on the track, the court held that “[i]t is possible a jury could find that providing only one caution flagger was an extreme departure from the ordinary standard of care.”

Therefore, the court found that plaintiffs, although not separately pleading a cause of action for gross negligence, had sufficiently alleged facts to constitute a claim of gross negligence, and that a triable issue existed with respect to whether the failure to provide a competent caution flagger constituted gross negligence.

### Primary Assumption of Risk - Duty

The *Rosencrans* court also analyzed whether Dover had a duty to Rosencrans, and framed the issue as “whether being crashed into twice by coparticipants is a risk inherent in the sport of motocross.” Interestingly, the court rejected plaintiff’s expert declarations, stating “It is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide. Accordingly, the legal question of duty, and specifically the question of

whether a particular risk is an inherent part of a sport, is necessarily reached from the common knowledge of judges, and not the opinions of experts.” (citations omitted). This is curious and a departure from the California Supreme Court’s analysis in *Kahn*, which expressly held that expert declarations were admissible to analyze whether a risk is inherent in a sporting activity.

Apparently relying exclusively on prior court opinions as evidence of the inherent risks of motocross (where would that leave the court when analyzing a case involving the increasingly creative X-Games competitions?), the court found that motocross is a sport in which people ride motorcycles and perform jumps off of ramps, while in a setting filled with dust and other people on motorcycles. The court noted that “given the racetrack setting, speed involved, and jumping maneuvers, it follows that coparticipants will fall down, and while down, be struck by other riders whose views are obscured by the blind corners, blind ramps, dust, and/or other riders.” (citing *Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 193 [jumps and falls are inherent risks in BMX (bicycle) competitions]; *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264 (Distefano) [collisions with coparticipants are an inherent risk in the sport of off-roading (dune buggies and motorcycles)].)

However, although these risks are inherent in motocross racing, the court examined Dover’s relationship to the sport and concluded that “[a]n owner/operator of a sports facility has a duty to provide a reasonably safe course or track.” (citing *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 134.) The court held that this requires an owner or operator to “to minimize the risks without altering the nature of the sport.”

In analyzing this duty, the *Rosencrans* court held that within the sport of motocross, an owner/operator of a track has a duty to minimize the risk of a coparticipant crashing into a second coparticipant

who has fallen on the track, and that providing a competent warning system, such as caution flaggers to alert riders of a fallen participant, would assist in minimizing the risk of riders colliding with one another.

Finally, the court concluded that plaintiff’s evidence, consisting of Rosencrans’ statements, a safety manual for caution flaggers (which provided that “Flaggers must remain at the flag station at all times when competitors are on the course”), and a declaration of plaintiff’s motocross safety expert, who declared that the common practice for motocross tracks is to have caution flaggers at their assigned posts at all times, whether the track is being used for racing or practicing, and that the lack of a caution flagger at the platform near Rosencrans’ collisions, was “inexcusable, a blatant disregard for riders’ safety, and criminal,” plaintiff presented triable issues on whether Dover’s conduct was an “extreme departure from the ordinary standard of conduct” constituting a breach of Dover’s duty.

### Conclusion - Yes, there is a duty

Don’t listen to naysayers who call the primary assumption of risk doctrine the “no duty for sports” rule. That is a misnomer. Creative thinking and disciplined discovery investigations can develop the information necessary to prevail in accidents arising in the sports and recreational activity context.



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<sup>1</sup> The other case, *Eriksson v. Nunnink*, \_\_\_ Cal.App.4th \_\_\_, [No. E049392., Court of Appeals of California, Fourth Dist., Div. Two, January 10, 2011] is definitely worth a read. In that case, 17 year old Mia Eriksson was killed when a horse she was riding during an equestrian competition pulled up lame and fell on top of her. The Court of Appeal held that a

horse trainer could be subject to liability for increasing the inherent risks of equestrian competitions by encouraging Mia to ride a horse that the trainer knew was unfit. The horse had suffered a concussion and a leg injury in a prior competition and was not fully healed. This conduct was both conduct totally outside the range of activity involved in the sport, and consti-

tuted sufficient allegations of gross negligence to defeat the release.

<sup>2</sup> The court also barred plaintiff's wife's loss of consortium claim, as it was derivative of his negligence claims. The loss of consortium claim is not relevant to this article.