

WAIVER FOR DISABLED TEEN DROWNING

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Generally, in a liability waiver (referred to as exculpatory agreements), a participant releases any future liability claims for ordinary negligence against the provider of recreational activities in exchange for the opportunity to participate. Such waivers, however, do not generally extend to claims of gross negligence. Moreover, waivers and releases which might be valid and enforceable in certain private transactions may be found void as against public policy when essential public services are involved.

Should a signed release form agreeing to waive any liability claims for acts of future negligence be valid and enforceable, or void as against public policy, when an injury or death occurs in a public recreation program? This was the issue before the court in the case of *City of Santa Barbara v. Superior Court of Santa Barbara County*, 2d Civil No. B176810 (CA 1/26/2006). In this particular case, Katie Janeway, a disabled 14-year old child, drowned while participating in a recreational activities program for developmentally disabled children operated by City of Santa Barbara (City). In response to a subsequent wrongful death claim, the City maintained that a release agreement signed by Katie's mother barred any liability.

FACTS OF THE CASE

The City provided extensive summer recreational facilities and activities for children, including a summer camp for children with developmental disabilities called "Adventure Camp." Katie Janeway, who suffered from cerebral palsy, epilepsy, and other disabilities, participated in Adventure Camp in 1999, 2000, 2001, and 2002.

Camp activities included swimming, horseback riding, bowling, skating, arts and crafts, group games, sports and field trips. In 2002, as in prior years, swimming activities were held on two of five camp days each week in a City swimming pool.

In 2002, the application form for Adventure Camp included a release of all claims against the City and its employees from liability, including liability based on negligence, arising from camp activities. Katie's mother Maureen Janeway signed the release on behalf of Katie. In relevant part, the release provided:

THE UNDERSIGNED HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE THE CITY OF SANTA BARBARA, ITS EMPLOYEES, OFFICERS AND AGENTS (hereinafter referred to as 'releasees') from all liability to the undersigned, his or her personal representatives, assigns, heirs and next of kin for any loss, damage, or claim therefore on account of injury to the person or property of the undersigned, whether caused by any negligent act or omission of the releasees or otherwise while the undersigned is participating in the City activity or using any City facilities in connection with the activity.

Maureen Janeway disclosed Katie's developmental disabilities and medical problems to the City, specifically informing the City that Katie was prone to epileptic seizures often occurring in water, and that Katie needed supervision while swimming. In addition, the City was aware that Katie had suffered seizures while attending Adventure Camp events in 2001. Katie had had a seizure when sitting on the pool deck and another seizure at the skating rink. Paramedics were called after her seizure on the pool deck. Nevertheless, Maureen Janeway indicated that Katie was a good swimmer, and never sought to prevent or restrict her participation in the swimming portion of Adventure Camp.

Based on the information provided by Maureen Janeway and Katie's history of seizures, the City took special precautions during the Adventure Camp swimming activities in 2002. The City assigned Veronica Malong to act as a "counselor" whose responsibility was to keep Katie under close observation during the Camp's swimming sessions. Previously, Malong, a college student, had worked for a year as a special education aide at the middle school Katie attended. Malong had observed Katie have seizures at the school, and received instruction from the school nurse regarding the handling of her seizures. Malong also received instruction during training sessions conducted by the City on handling seizures and other first aid matters.

Katie participated in the first swimming day at the 2002 Adventure Camp without incident. On the second day she drowned.

About an hour before her drowning, Katie suffered a mild seizure that lasted a few seconds while waiting to enter the pool's locker room. Malong observed the seizure and sent another counselor to report the incident to a supervisor. The supervisor stated that the report was never received. Malong watched Katie for about 45 minutes after the mild seizure. Then, receiving no word from her supervisor, Malong concluded that the seizure had run its course and it was safe for Katie to swim.

Malong sat on the side of the pool near the lifeguard watching the pool's deep end. In addition to the Adventure Camp participants, there were as many as 300 other children in the pool area. Malong watched Katie jump off a diving board and swim back to the edge of the pool. At Malong's insistence, Katie got out of the pool and rested for a few minutes. Malong then asked Katie if she wished to dive again, and Katie said that she did. Katie dove into the water, bobbed up to the surface, and began to swim towards the edge of the pool. As she did so, Malong momentarily turned her attention away from Katie. When she looked back, Katie had disappeared from her sight. Approximately five minutes later, lifeguards pulled Katie from the bottom of the pool. She died the next day.

Katie's parents, Terral and Maureen Janeway, filed a wrongful death action alleging that the accident was caused by the negligence of the City and Malong. The City and Malong moved for summary judgment based on the signed release.

TRIAL COURT

As noted by the trial court, "any release that involved the public interest" would be invalid and unenforceable. The City and Malong contended that the release did not involve the public interest because "Adventure Camp provides nonessential recreational activities, and the

Janeways were not compelled to sign the City's release in order to obtain recreation for their daughter." As a result, the City and Malong claimed the release was valid and enforceable.

The trial court denied the City's motion for summary judgment. In the opinion of the trial court, further proceedings were necessary to determine "whether the release was valid" and "whether the City and Malong acted with gross negligence." The City and Malong appealed.

ON APPEAL

As a general rule, the appeals court found that private parties in voluntary transactions may agree to waive or release future claims of ordinary negligence, unless "such contracts exculpating a contracting party from liability for negligence... affects the public interest." In determining whether "enforcement of a release would contravene that public interest," the court would consider the following "six nonexclusive factors":

- 1) the transaction concerns a business of a type generally thought suitable for public regulation";
- (2) the party seeking exculpation performs a service of great importance to the public, which is often a matter of practical necessity for some members of the public";
- (3) the service is offered to the public at large;
- (4) in the economic setting of the transaction, the party seeking exculpation has a "decisive" bargaining advantage because the service is "essential";
- (5) the person obtaining the service is required to sign a "standardized adhesion contract of exculpation" [i.e. take it or leave it]; and
- (6) the person obtaining the service bears the risk of the other party's carelessness.

Although "beneficial," the appeals court noted that courts have upheld "releases of ordinary negligence for injuries arising from sports and recreational activity" because "sports and recreational activities are not services essential to the public and do not involve the public interest."

[T]o require a party to sign an exculpatory release as a condition of participation lacks the compulsion typically found in a contract of adhesion and would not impair the public interest or violate public policy. Releases have been enforced not only for high risk sports activities, but for less risky recreation and, importantly, where the recreational activity was directed at or included participation by children.

The appeals court further noted that "the enforcement of releases in the youth recreational setting has been analyzed as a method of serving the public interest by preserving the availability of such activities."

The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports

activities. Those options are steadily decreasing-victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. [Plaintiff] agreed to shoulder the risk. No public policy forbids the shifting of that burden.

In this particular instance, the appeals court similarly found that “the reasoning and result of the numerous cases upholding releases required for participation in sports and recreational activities apply to Adventure Camp and compel the conclusion that the release signed by Maureen Janeway is valid and enforceable.”

On appeal, Janeway had argued that “Adventure Camp implicates different public policies and interests than a program providing summer recreation for all children.” Specifically, Janeway contended “Adventure Camp is not merely a recreational program but also provides opportunities for developmentally disabled children to participate in mainstream life.” According to Janeway, state and federal law required the integration of individuals with developmental disabilities into mainstream life, including “ensuring that such individuals are accorded the same rights as others” to participate in recreational programs.

While recognizing the importance of the federal Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) and analogous state law policies in addressing “discrimination and integrating the disabled into mainstream society,” the appeals court noted that the Janeways did “not claim that their daughter was denied the benefit of these statutes in the operation of Adventure Camp.” Moreover, in the opinion of the appeals court, the Janeways had failed to “identify how the public policy goal of providing equal opportunity to the disabled is undermined by permitting the shifting of the risk of injury resulting from ordinary negligence to the participants.”

According to the appeals court, the ADA and state law “guarantee equal opportunity, not separate or preferential treatment.” In this particular instance, the appeals court found the “release furthers the public interest because it permits municipalities and private business to provide recreational services to children with developmental disabilities under the same terms as they provide services to other children.”

Examining the other above cited factors used to determine the existence of a public interest, the appeals found this particular release would not necessarily contravene public interest because “Adventure Camp is not an enterprise suitable for public regulation” and “does not provide essential services that are a matter of practical necessity to developmentally disabled children.” Moreover, the court found the release “did not give the City a decisive bargaining advantage because of the absence of alternative means of obtaining recreation.”

The evidence shows that Katie voluntarily participated in a commendable, but optional, recreational program. No public policy mandating the availability of recreational equality for the disabled requires recreational facilities or programs to take any particular form or to include any specific type of activity. The Janeways were not faced with the choice of signing the City's release or leaving their daughter with no recreation during the summer months. Undisputedly, there were

other parks, other pools, other providers of various sports and recreational facilities.

Adventure Camp may have been the best program for developmentally disabled children in the Santa Barbara area, but there were countless alternatives that would have given Katie an opportunity for recreation. In fact, the relevant Adventure Camp activity concerned swimming in a public pool. Katie could have gone there without enrolling in Adventure Camp.

As a result, the appeals court found “the release is enforceable as to ordinary negligence” because the City had a “legitimate interest in conducting its Adventure Camp program without an inordinate risk of liability.”

GROSS NEGLIGENCE

On appeal, the City and Malong had contended that the term “all liability” in the release encompassed “not only ordinary negligence, but also exculpates them from liability for acts of gross negligence.” The appeals court rejected this argument. According to the appeals court, public policy consideration and the legitimate objective of the release necessarily limited the scope of the release to ordinary negligence. Accordingly, under the circumstances of this case, the appeals court found “the release does not exculpate the City or Malong from liability for acts or omissions constituting gross negligence.”

As defined by the court, “gross negligence is “an act or omission that shows a failure to exercise even slight care or that constitutes an extreme departure from the ordinary standard of conduct.”

[Gross negligence] requires negligent conduct which is aggravated, reckless or flagrant so as to connote such a lack of care as may be presumed to indicate a passive and indifferent attitude towards the consequences of one's acts to the safety and welfare of others. Conduct that qualifies as gross negligence will vary according to the nature of the act, and the surrounding circumstances as shown by the evidence.

In deciding that this particular release did not extend to gross negligence, the appeals court cited the following “policy interests”:

Here, a gravely disabled child was given the opportunity to participate in recreational activities that might otherwise be limited to children who are not disabled. The City has a legitimate interest in protecting itself from the risk of unlimited liability in offering the program. But, exculpating the City from liability for acts of gross negligence exceeds the protection reasonably necessary to protect the City in the operation of Adventure Camp, and would remove its obligation to adhere to even a minimal standard of care.

Clearly, there is a heightened public interest in protecting against negligent conduct as the level of negligence becomes more aggravated and extreme. Essentially, the greater the disregard for the safety of others, the greater is the

public interest in restricting contractual exculpation. As a result, courts are skeptical of a release of liability for harm that is caused recklessly or through gross negligence...

We are not dealing with a high-risk sporting activity where the inherent danger of the activity forms a principal motivation for participation. We are concerned with the supervision of vulnerable children engaged in an activity where simple enjoyment motivates participation.

In light of these policy interests, the appeals court found sufficient evidence to support a claim of gross negligence. Specifically, in the opinion of the appeals court, a jury could reasonably conclude that “the City and Malong were grossly negligent in their decision to allow Katie to participate in the swimming activities of Adventure Camp on the day of her death, and to use the diving board during those activities.”

Undisputedly, the City and Malong were informed of Katie's propensity to suffer seizures while in the water, and took substantial precautions to provide close supervision for Katie in light of this propensity and her disabilities in general. Nevertheless, it is also undisputed that Katie suffered a seizure shortly after she came to the pool area on the day of her drowning, and there is disputed evidence that Malong failed to notify senior City staff of the seizure, and that the City failed to consider the significance of this seizure on Katie's swimming activity that commenced minutes later.

In addition, although mere inattentiveness in watching Katie in the swimming pool would constitute only ordinary negligence, the record shows that Katie was allowed to dive into the deep end of a crowded pool at a time when her counselor was not at her side and could not provide immediate assistance.

As a result, the appeals court ordered the trial court to provide Janeways with an opportunity to proceed to trial to prove their claims against the City and Malong based on a gross negligence theory of liability.