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REDEFINING GROSS NEGLIGENCE: CAN RECREATIONAL SPORT OPERATORS INSULATE THEMSELVES FROM LIABILITY WITH PRE-INJURY WAIVERS?

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KEY POINTS

- Pre-injury liability waivers are unenforceable against gross negligence claims.
- Gross negligence is now more akin to negligence on the liability continuum resulting in the erosion of pre-injury liability waiver enforceability.
- Failure to supply the most up-to-date manufacturers' warnings to consumers and to train employees on the most up-to-date safety protocols can be evidence of gross negligence.

Plaintiffs' attorneys are baiting the hook with arguments conflating gross negligence with

negligence, and the judicial system is biting. If recreational sport entity operators wish to remain insulated from negligence claims with pre-injury waivers, an examination of gross negligence's modified definition must be considered.

In *Steinberg v. Sahara Sam's Oasis, LLC*, 142 A.3d 742, 744-745 (N.J. 2016), the plaintiff, a patron of the defendant's indoor water park, suffered a spinal cord injury on FlowRider, a simulated surfing ride created by pumping water over a stationary surface. Prior to participating, the plaintiff signed a pre-injury waiver acknowledging the risks associated with FlowRider and waiving liability for any injury caused by the defendant's negligence. In a prior opinion, *Stelluti v. Casapenn Enters.,*

LLC, 1 A.3d 678-681-682 (N.J. 2010), the New Jersey Supreme Court held that pre-injury waivers executed for participation in recreational activities are enforceable for injuries sustained during such activity.

The plaintiff brought suit alleging his injuries were caused by the defendant's negligence and gross negligence, among other things. The defendant filed a motion for summary judgment, which the trial court granted, determining the liability waiver "[e]xtinguished [plaintiff's] right to file a negligence action" and that the facts did not support the plaintiff's claim for gross negligence. The Appellate Division affirmed in a split decision, adding that the trial court "[d]id not err in characterizing gross negligence as the

equivalent of willful conduct." The dissenting appellate judge disagreed, stating the evidence "provided sufficient support for a gross negligence action" and proof of gross negligence did not require a showing of "willful conduct."

In the plaintiff's appeal to the New Jersey Supreme Court, he argued that the record contained sufficient evidence to support a gross negligence claim. Specifically, the defendant's employees failed to inform the plaintiff, as a first-time rider, to lay flat rather than stand on the surfboard and, if standing, to hold onto the balance rope with one hand rather than two. Additionally, the plaintiff contended that the defendant failed to post the most up-to-date manufacturer warning signs.

On the accident date, the defendant displayed the manufacturer's older warning for the ride, which stated, "PARTICIPATION ON THIS RIDE AND CONSENT OF WAIVER INDICATES YOU UNDERSTAND THE POTENTIAL TO GET INJURED SHOULD YOU FALL WHILE PARTICIPATING," instead of the most up-to-date signage, which included the statement "YOU WILL FALL." The newer un-posted signage also instructed riders to watch a safety video before riding and contained drawings illustrating the ride's dangers, including an image of a participant striking his head on the ride's surface. The video referenced on the sign was not available to riders.

Before the ride opened to the public, its manufacturer sent an instructor to educate the defendant's employees on the ride's safe operation. He instructed that first-time riders should participate in a prone position and should not hold onto the balance rope with both hands.

In its opinion, the New Jersey Supreme Court agreed with the Appellate Division's dissenting judge, holding that "gross negligence is a higher degree of negligence" and "does not require willful or wanton misconduct or recklessness." It also determined that "[n]egligence, gross negligence, recklessness, and willful conduct fall on a spectrum, and the difference between

negligence and gross negligence is a matter of degree." The Supreme Court endorsed the New Jersey Civil Model Jury Charge's gross negligence definition, which states that gross negligence is:

An act or omission, which is more than ordinary negligence, but less than willful or intentional misconduct. Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence.

[Model Jury Charge (Civil) § 5.12 "Gross Negligence" (2009).]

With gross negligence definitively defined, the Supreme Court then concluded that the trial court and Appellate Division majority erred in granting summary judgment and reversed, stating, "[t]he relevant evidence, presented in the light most favorable to plaintiff, demonstrates that a rational fact finder could conclude that [defendant's] conduct constituted gross negligence."

In forming its opinion, the court determined that the defendant's failure to post the updated signage, provide patrons with the safety video, and properly instruct the plaintiff on how to ride could have demonstrated to a rational fact finder that it "failed to exercise slight care or diligence." The court further held that, "[a] liability waiver ... in a consumer agreement that exculpates a business owner from liability for tortious conduct resulting from the violation of a duty imposed by statute or from gross negligence is contrary to public policy and unenforceable."

Steinberg confirmed that pre-injury liability waivers are unenforceable against gross negligence claims. This opinion also expanded the range of conduct considered grossly negligent by sliding gross negligence closer to negligence and further from recklessness on the liability scale. The court demonstrated this slide by concluding the defendant's failure to provide up-to-date warnings could be evidence of gross negligence despite facts showing that the plaintiff signed a liability waiver explaining the ride's

hazards and that the defendant provided signage describing the FlowRider's dangers. As a result of *Steinberg*, pre-injury liability waivers signed before participation at recreational sporting facilities no longer carry the same protections as they did upon *Stelluti's* release.

Nevertheless, recreational sport entity operators and insurers can still insulate themselves from liability. They must train their employees on the most up-to-date safety protocols, post the most up-to-date manufacturer recommended signage, and familiarize themselves with the most up-to-date manufacturer operating manuals.

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