Grossly Underestimated

Exploring Gross Negligence and Liability Waivers in Pennsylvania Premises Liability Law

By James Cullen, Esq.

In Pennsylvania, gross negligence is seldom considered in premises liability cases because ordinary negligence is far easier for a plaintiff to prove against a premises owner. Pennsylvania courts hold that there is a substantive difference between gross negligence and negligence. Kibler v. Blue Knob Recreation, Inc., 184 A.3d 974, 985 (Pa. Super. 2018). This substantive difference typically results in only ordinary negligence being pleaded by a plaintiff against a property owner.

However, claims of gross negligence can arise when, prior to an alleged accident, the injured individual signs a liability waiver. Such waivers are often used by fitness and recreational businesses such as gyms, exercise classes, or recreational sports companies. A liability waiver will typically contain an exculpatory clause excluding the premises owner for liability for negligent conduct. Yet, "gross negligence" cannot be excluded—even by a valid liability waiver—under Pennsylvania law as a matter of public policy.

When a liability waiver is at issue, a plaintiff's lawyer will typically plead both negligence and gross negligence. Such allegations could negate the effect of the liability waiver and require a judge or jury to determine whether the premises owner's conduct amounted to not only negligence, but also gross negligence.

In determining what type of conduct constitutes gross negligence, the general consensus is that the alleged conduct must be more egregious than negligence, but it does not rise to intentional acts or conduct. Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 704 (Pa. Super. 2000). In practice, application of this broad definition in a wide variety of factual scenarios can prove difficult.

In the premises liability context, in 2018, the Superior Court of Pennsylvania reviewed a case involving claims of gross negligence involving an injured skier and a ski resort. In Kibler v. Blue Knob Recreation, Inc., 184 A.3d 974 (Pa. Super. 2018), the plaintiff was injured when he skied over "trenches" in the snow that were caused by an all-terrain vehicle operated by a resort employee. While the plaintiff had signed a valid liability waiver relating to the negligence of the ski resort, the plaintiff argued that the ski resort's conduct amounted to gross negligence. The Superior Court reviewed and held that the

evidence did not demonstrate the ski resort's conduct amounted to grossly negligent conduct. The Superior Court reasoned, while this conduct was arguably negligent, it did not amount to gross negligence because the resort's employees were, at most, careless in their actions. The Superior Court further found that evidence of "mere inadvertence, incompetence, unskillfulness, or a failure to take precautions" do not support a claim of gross negligence.

While case law involving the application of the concept of gross negligence with regard to premises liability are few, this concept has also been applied by Pennsylvania courts to mental health facilities covered under the Mental Health Procedures Act (Act). This Act provides an exception to a blanket protection for treating mental health facilities when said facilities render grossly negligent treatment.

For example, in Albright v. Abington Memorial Hospital, 696 A.2d 268 (Pa. 1997), the Supreme Court of Pennsylvania held that the defendant-hospital's conduct, after a patient failed to appear for a scheduled appointment, did not amount to gross negligence as a matter of law, even in light of the fact that the defendant-hospital was aware of the patient's deteriorating mental condition and it failed to have the patient committed. In Downey v. Crozer-Chester Medical Center, 817 A.2d 517 (Pa. Super. 2003), a similar decision was upheld when the defendant-hospital's failure to supervise the plaintiff-decedent, despite her mental health issues, constituted nothing more than ordinary "carelessness, inadvertence, laxity, or indifference," and not gross negligence.

The broad gross negligence definition will undoubtedly be put to the test in Pennsylvania courts. In a recent premises liability case involving a gym member and premises/gym owner, the Superior Court held that the gym member's claims for negligence were excluded under a valid liability waiver and that the member failed to raise the claim of gross negligence in a timely manner, having raised the issue of gross negligence for the first time at the summary judgment stage. Toro v. Fitness Int'l LLC, 150 A.3d 968 (Pa. Super. 2016). Given that the claims of negligence and gross negligence were substantively different, the Superior Court upheld the lower court's granting of summary judgment in the premises/gym owner's favor.

Based upon the ruling of Toro, an informed plaintiff's attorney will likely plead both negligence and gross negligence in any premises liability case involving a liability waiver in an effort to defeat it. The vague definition of gross negligence will, therefore, likely be the key topic in cases involving liability waivers at the summary judgment and trial stages.

As more and more recreational and fitness entities are requiring customers to sign liability waivers before using their facilities, the issue of what kind of conduct constitutes gross negligence will likely become more prevalent in premises liability lawsuits.

So how can premises owners, and their attorneys/insurers, fight back? The first step is to ensure that the liability waiver signed by the plaintiff is valid and enforceable. However, the fight does not end there. The premises owner must also ensure they can prove the plaintiff actually "signed" the waiver themselves and what the terms of the waiver were at the time of the plaintiff's agreement.

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Continued on page 10

Continued from page 9

Electronic liability waivers are common these days, and customers of recreational entities sign them electronically through "click-through" transactions. Such transactions often do not require the customer to physically (or electronically) sign the waiver but, instead, simply "click" that they agree to the terms of the waiver. In Pennsylvania's Electronic Transactions Act (PETA), the Pennsylvania legislature approved the use of such electronic signatures. See 73 P.S. §§ 2260.101. Such signatures can include "[a]n electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Id. at § 2260.103 (emphasis added). The official comments of Section 2260.305 of the PETA recognize the validity of "click-through" transactions.

What premises owners should be mindful of is that these electronic liability waivers are often provided and maintained by a third-party software company. Customers are frequently required to download an app, create an account, and execute the liability waiver before attending their first exercise class or patronizing the recreational company's business. These businesses should make sure a copy of the executed liability waiver can be produced on the same date the customer agreed to the waiver. Securing a copy of the liability waiver from the third-party software company early on will help prevent the loss or routine deletion of such documents by the software company. Moreover, the business will be able to rebut any claims from a customer who later disputes they "signed" the waiver or otherwise questions the validity or application of the waiver.

As to the validity of such waivers, there is a plethora of Pennsylvania case law on what language is sufficient to preclude claims of negligence against the recreational business. While such language need not specifically mention the terms "negligence," the language must be conspicuous in relation to the surrounding text. The extent of Pennsylvania's case law on the validity and enforceability of such waivers is not the primary topic of this article. However, the main takeaway is that public policy prevents such waivers from precluding claims of gross negligence.

That leads us to our second step. Premises owners and their attorneys should be on the lookout for any claims of gross negligence in a plaintiff's complaint and challenge such claims early and often. Educating the judge assigned to the case on the substantive differences between ordinary negligence and gross negligence is essential to the defense. You do not want the judge reading about these substantive differences for the first time at the dispositive motion stage. Instead, raising the issue at the pleadings stage, through preliminary objections or a motion to dismiss, will give you a chance to educate the judge and lay the foundation for a dispositive motion later.

Additionally, plaintiffs' attorneys know that, even if there is a valid and enforceable liability waiver, such waivers cannot preclude gross negligence. Therefore, a primary topic for discovery in defense of such claims should be what evidence the plaintiff has to support their claim of gross negligence. Whether the premises owner deviated from the industry standard of care is often a primary target for plaintiffs' attorneys. Premises owners and their attorneys should be prepared to challenge and rebut such evidence, again, early and often. If properly challenged, the chances of success at the dispositive motions stage and trial increase greatly.

Having an experienced defense attorney involved early on in cases involving gross negligence and liability waivers will help premises owners stay one step ahead of the plaintiffs' attorneys, who may be looking to sidestep a valid and enforceable liability waiver with evidence that does not support a gross negligence claim under Pennsylvania law.

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