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## Email Legal Alert

November 7, 2007

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## *Deadly Collision*

### *Long Truong v. Cu Van Nguyen*

**(Woman Died in Watercraft Collision on Lack; Court Ruled Primary Assumption of the Risk Barred Negligent Operation Claim and There was No Evidence of Negligent Entrustment) (California)**

The plaintiff was a passenger on a personal watercraft being operated on a lake. She was killed in a collision with another personal watercraft. Decedent's parents filed a lawsuit alleging that the other rider was negligent in the operation of the personal watercraft and that the owner of the watercraft had negligently entrusted the watercraft to the other rider. The defendants filed a motion for summary judgment arguing that the primary assumption of the risk doctrine precluded negligence liability because they had no duty to protect the decedent from the risks inherent in the activity of riding on a personal watercraft. Defendants also argued that there was no evidence of negligent entrustment. The trial court granted defendants' motion, and the plaintiffs appealed.

On appeal, plaintiffs argued that the primary assumption of risk doctrine did not apply because the decedent was a passenger (rather than the operator), and she was not engaged in an active sporting activity at the time of the accident. Plaintiffs also urged the court to distinguish between "ordinary" or "casual" use of the personal watercraft and "extreme" use such as competitions or racing, claiming that

the doctrine should not apply to casual use. In support of this argument, the plaintiffs contended that there were no skills required to be a passenger on a sit-down personal watercraft. Referring to an Indiana statute, plaintiffs argued that primary assumption of risk should not apply to the "casual" or "ordinary" operation of personal watercraft that occurred in this case as distinguished from the "extreme" operation of personal watercraft that occurs in tournaments, exhibitions, competitions, races, or parades.

In support of the appeal, plaintiffs cited the case of *Shannon v. Rhodes* (2001), which held that the primary assumption of the risk doctrine did not apply "where a driver of a boat takes passengers out on [the] boat for a simple ride around a lake." Plaintiffs argued like the boat driver in *Shannon*, the decedent was simply a passenger who was taken out for a ride around the lake. Plaintiffs highlighted the fact that the personal watercraft was not being used for sport, and they distinguished other personal watercraft cases that applied the primary assumption of the risk doctrine by asserting that the other cases (unlike this case) involved the operation of the watercraft at relatively high speeds and engaging in maneuvers.

Citing studies, articles, and reports, the Plaintiffs challenged the previous courts' "common knowledge" assumption that personal watercraft operation poses a "significant risk of injury." The plaintiffs asked the court to take judicial notice of the evidence, but the court refused because (1) the documents had not been presented to the trial court, (2) one of the reports was published after the trial court's ruling, (3) the court was not convinced the materials were judicially noticeable under the *Evidence Code*, and (4) even if the materials were judicially noticed, they did not compel a contrary conclusion since they concerned different types and styles of personal watercraft.

On appeal, defendants argued that the activity at issue was identical to that in previous personal watercraft cases. They contended that the question of whether the decedent was the operator or a passenger of the vessel was not pertinent to the analysis, and that operation of a personal watercraft is not a benign activity like riding in a boat.

The court recounted the history of the application of the primary assumption of the risk doctrine in California, noting that the state Supreme Court and appellate courts had examined its applicability in a wide variety of cases involving sports and recreational activities, including water sports and boating. Ultimately the court concluded, as a matter of law, that operation of the watercraft did include inherent risks and dangers. The court confirmed that the primary assumption of the risk doctrine applied to both competitive and noncompetitive, but active sports and activities. Moreover, the court explained that if it adopted plaintiffs' argument regarding the distinction between "casual" and "competitive" uses, the application of the primary assumption of risk doctrine would be based on a characterization of the use of equipment or action occurring at the very moment of injury, rather than upon the general nature of the activity and the relationship of the plaintiff and the defendant to the activity.

Plaintiff did not argue that the other rider's conduct was reckless, intentional, or outside of the range of ordinary activity involved in using personal watercraft. Finally, the court noted that since the other rider was not negligent because he had no duty to decedent, then the owner of the watercraft could not be negligent in entrusting the vessel to the other rider. The court affirmed the summary judgment in favor of the defendants.

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## Hitting the Slopes

### *Berry v. Greater Park City Company*

**(Experienced Skier in Competition Breaks Neck and Suffers Paralysis; Release Enforceable to Preclude Liability for Ordinary Negligence; Triable Issues of Fact Existed Regarding "Gross Negligence"; Dismissal of Strict Liability Claim was Proper)**  
(Utah)

The plaintiff was a twenty-six year old expert skier who entered a "skiercross" race which took place on a course constructed on the defendant's ski runs. In the "skiercross" race format, four racers simultaneously descended a course that featured difficult turns and tabletop jumps. The racers competed against each other as they skied down the mountain to complete the course first. On plaintiff's fourth trip down the course, he attempted to negotiate a tabletop jump. Upon landing from the jump, he fell and fractured his neck, resulting in permanent paralysis. Before being allowed to participate in the contest, plaintiff was required to sign a "Release of Liability and Indemnity Agreement," which purported to release defendant from negligence liability. Although plaintiff did not read the agreement, he signed it twelve days before the race.

Plaintiff filed a lawsuit against the defendant facility, alleging ordinary negligence, "gross negligence," and common law strict liability. The trial court granted defendant's motions to summarily dismiss each of plaintiff's claims, concluding that plaintiff was bound by the "clear and unequivocal" language of the agreement, and he could not therefore pursue a negligence claim against defendant. The trial court also held that plaintiff's strict liability claim was invalid because the race was not (as a matter of law) an abnormally dangerous activity. Finally, the trial court concluded that (as a matter of law) plaintiff failed to present evidence create a triable issue of material fact regarding "gross negligence." An appeal to the Utah Supreme Court followed.

Referring to prior case law directly on point, the Court explained that pre-injury waiver and release agreements were not favored in the law. However, they were enforceable if they were properly drafted and not contrary to public policy. According to the Court, Utah's public policy did not foreclose the opportunity of parties to bargain for the waiver of tort claims based on ordinary negligence. Applying a six factor test, the Court concluded that the agreement in this case did not violate public policy.

The defendant did not contend that the release signed by the plaintiff insulated it from liability for "gross negligence." Instead, defendant argued that the precautions that the race sponsors took, which were designed to minimize the risk of injury to participants without unduly compromising the competitive challenges (without which the contest would have little allure), were sufficient to overcome plaintiff's "gross negligence" claim as a matter of law. However, the Court stated that there was no evidence in the record as to the appropriate standard of care. As such, it could not determine the issue as a matter of law. The defendant contended that its production of evidence indicating that it used "even slight care" or displayed something more than "complete and absolute indifference" to the consequences that might have resulted from an improper design or construction of the course was sufficient to remove plaintiff's "gross negligence" claim from the jury. However, the Court disagreed, noting that the determination of the appropriate standard regarding course design and construction was a factual issue to be resolved by the finder of fact.

On appeal, plaintiff also continued to argue that the defendant should be strictly liable to him for his injuries because the activity of "skiercross racing" was an abnormally dangerous activity as described by the factors set forth in the *Restatement of Torts*. However, the Court explained that even if the activity was abnormally dangerous, liability under such a theory was precluded because plaintiff was a participant in the activity. The abnormally dangerous theory of liability concerned liability of participants to others that are injured or harmed as a result of the activity.

Therefore, the lower court's decision was affirmed in part and reversed in part. The case was remanded for trial on the issue of "gross negligence."

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# "Ring of Fear" Results in Death

## *Davis v. 3 Bar F Rodeo*

**(Man Killed by Aggravated Bull at Rodeo; Release Signed by Decedent Precluded Negligence Liability Despite Failure to Post Proper Warnings Under Kentucky's Farm Animals Activities Act; Triable Issues Existed as to Release and as to Whether Aggravating the Bull Amounted to "Gross Negligence")**  
(Kentucky)

The decedent attended a rodeo, and he volunteered to participate in a game called the "Ring of Fear." The game called for audience members to enter the rodeo ring and stand in marked circles on the ground. A bull was released into the ring, and the winner of the game was the last person standing inside his or her circle in the ring. The winner of the game won \$50. The decedent entered the ring to try his luck at the game. It was alleged that before it was released, the bull was angered by someone jabbing him with a wooden object and beating sticks against his cage. After the bull was released, he charged and drove his head into the decedent's abdomen, lifting him off the ground. After the game, the decedent made his way back into the stands, not knowing that his liver had burst as a result of the incident and that he was bleeding internally. The decedent faded into temporary unconsciousness and died the next morning.

Decedent's wife brought a wrongful death action against the rodeo operators, alleging negligence. The defendants moved for summary judgment based upon a release the decedent had signed prior to participating. The decedent's wife filed a cross-motion for summary judgment, asserting that the defendants failed to properly warn her husband of the dangers of the "Ring of Fear" as required by Kentucky statutes as part of the Farm Animals Activities Act ("FAAA"). The trial court granted defendants' summary judgment, finding that the release was sufficient to exempt them from liability, and the trial court denied plaintiff's cross-motion for summary judgment. Plaintiff thereafter appealed.

On appeal, plaintiff argued that defendants owed a duty to post warnings pursuant to the FAAA (*Kentucky Revised Statutes* Sections 247.401 through 247.4029), a statutory plan designed to outline the duties and responsibilities of both participants and sponsors conducting animal activities. The court agreed that the FAAA was applicable to the case, but the court noted that the statutory scheme allowed for a waiver of liability if the participant signs a release waiving his right to bring an action against the farm animal event sponsor. Of course, the release needed to satisfy the requirements of a legal binding agreement under Kentucky law.

The trial court had deemed the release enforceable and valid, but the Court of Appeal disagreed. The release used the word "negligence," and it specifically and explicitly released the defendants from liability for "any and all claims and liability arising out of strict liability or ordinary negligence of Releases [defendants] ... which causes the undersigned injury ... [or] death...." It also specifically warned that rodeo events contained danger and risks of injury or death; that the conditions of the rodeo arena change and may become more hazardous; that rodeo animals are dangerous and unpredictable; and finally that anyone choosing to participate voluntarily assumes the inherent danger that exists in rodeo events. However, the releases did not include language that released defendants from conduct that would constitute "gross negligence."

Plaintiff contended that the defendants provoked the bull by prodding him and beating on his cage prior to his release into the ring. Plaintiff argued, and the court agreed, that this alleged intentional provocation of the bull to attack the participants was not contemplated by the release. Defendants

disputed the allegations of intentionally mistreating the bull, but the court stated that if the allegations were true, they would at the very least constitute "gross negligence." The release contemplated getting into the ring with a bull and even mentioned that rodeo animals are unpredictable. However, it did not contemplate a bull that has been infuriated by the defendants prior to its release into the ring. According to the court, such conduct could be construed as "willful or wanton" for which a party may not contract away any liability through a release.

The court ultimately concluded that if the jury determined that the defendants' conduct was "grossly negligent," the release would be unenforceable as to this conduct. Citing to testimony of another participant that said he did not read the release, the plaintiff had also argued that the decedent did not have an opportunity to read the release prior to signing it. The court further concluded that a triable issue of material fact existed in that regard as well. Judgment in favor of the defendants was reversed, and the case was remanded for trial.

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