



Pleading and proving gross negligence in light of *City of Santa Barbara*



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California Supreme Court affirms that liability waivers for future gross negligence are unenforceable as a matter of public policy.

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The California Supreme Court, in keeping with the law in the majority of states, has determined that liability waivers for future gross negligence are unenforceable as a matter of public policy. Their decision upholds the decision of the Court of Appeal which denied a petition for writ of mandate by the defendant, after losing its summary judgment motion on this issue.

In *City of Santa Barbara v. Superior Court (Janeway)* (2007) DJDAR 10807, a 14 year-old developmentally disabled girl drowned while in a swimming pool of a camp for disabled children, despite the camp having provided the special precaution of having a college age one-on-one attendant who was familiar with the girl's disabilities (she had been her attendant at the girl's middle school). According to the facts presented, the decedent dived into the pool and when the attendant's attention was distracted for about 15 seconds, the decedent was not seen again until two to five minutes went by, when she was found unconscious in the pool. This injury eventually led to her death.

The camp application, signed by decedent's mother, contained a release of all claims based upon negligence. Defendant's motion for summary judgment arguing the release as a defense was denied. The trial court held that while the release was effective as against a claim of ordinary negligence, it was unenforceable as to a claim for gross negligence. The Court of Appeal affirmed and the Supreme Court granted review on the limited question of whether the

release was an effective defense against a claim for gross negligence.

The Supreme Court held: "We conclude, consistent with dicta in California cases and with the vast majority of out-of-state cases and other authority, that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, is unenforceable as a matter of public policy." (*City of Santa Barbara, supra*).

Under the guidance of this case, claimants seeking damages in the context of sports or recreational programs or services, have the ability to defeat a general negligence release by pleading and proving gross negligence. Now the question remains: How to plead and prove gross negligence?

"Gross negligence" has been defined in California law and legal texts as "an extreme departure from the ordinary standard of conduct" or "want of even scant care." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186, *Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1240, *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052-1053, 236). The "extreme departure" standard or the "want of even scant care" standard are alternatives; both need not be present. (*Kearl, supra*, 189 Cal.App.3d 1053; *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 196-197). The "distinction" between ordinary and gross negligence "amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations." (*Colich & Sons, supra*).



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Under California law, the concept of “gross negligence” is contrasted with intentional acts which the actor knows or should know will result in harm. Such conduct has been designated “wanton” or “reckless” misconduct. (*Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, 871). “Gross negligence falls short of a reckless disregard of consequences and differs from ordinary negligence only in degree and not in kind.” (*Colich & Sons, supra*).

In general, the determination of whether there was evidence of “gross negligence” is a triable issue of fact. (See, e.g., *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 138; *Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 359; *Colich & Sons, supra*, 198 Cal.App.3d at 1241.) This means that a properly pleaded claim for gross negligence which is supported by evidence should defeat a summary judgment motion. “The aim of the summary judgment proceedings is to discover whether the parties possess evidence requiring the fact-weighting procedures of a trial.” (*Decker, supra*, 209 Cal.App.3d 353.)

Before the case even gets to the summary judgment stage, the court may determine on demurrer, however, whether the facts as pleaded are sufficient to constitute a claim for violation of gross negligence. (*Colich & Sons, supra*; *DeVito v. State of California* (1988) 202 Cal.App.3d 264, 272.)

Since *City of Santa Barbara* specifically references “sports or recreational programs or services,” government entity liability may very well be the basis of the case. Cases involving a government tort claim must specify the factual basis of the case in the claim itself. Failure to identify the factual basis of each legal theory set forth in the claim could result in a successful attack by motion for judgment on the pleadings or demurrer once the complaint is filed. (See, *Stockett v. Association of California Water Agencies Joint Powers Ins. Auth.* (2004) 34 Cal.4th 441; *Fall River Joint Unified School District v. Superior Court* (1988) 206 Cal.App.3d 431). Moreover, a “variance” defense, where “facts underlying each cause of action in the complaint” are not fairly reflected in the claim, may be successful if the plaintiff attaches the claim to the complaint and the complaint alleges theories which are not fully stated in the claim. (*Fall River, supra*, 206 Cal.App.3d 434). The careful practitioner would be well advised to allege “gross negligence” and its supporting facts in the claim itself.

While the Supreme Court in *City of Santa Barbara* purports to take no position on the issue of whether there is a separate cause of action for “gross negligence,” it also concluded that under the circumstances of an exculpatory release, the *only* claim the plaintiff *may* have is a theory of “gross negligence.” On cases not based upon government liability, “gross

negligence” (as well as negligence) should be pleaded in the complaint and facts supporting the theory also alleged in the complaint. This is because on demurrer, the court must accept properly pleaded facts as true and consider all reasonable inferences that can be drawn from them. (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 828). Early and aggressive discovery should be undertaken to discern additional facts since it may be necessary to make an offer of proof as to how a complaint may be amended, should a demurrer be sustained.

Finally, while the Supreme Court in *City of Santa Barbara* states in footnote 58 that the plaintiff is not required to anticipate the defense of a release, it would be imprudent for plaintiff’s counsel not to thoroughly investigate the release and plan for the defense at the time of drafting the complaint (or government tort claim).

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