

Whitehead v. City of Oakland
2024 DJDAR 1290

Plaintiff's execution of a release to participate in a bicycle fundraiser which included a provision releasing liability arising out of roadway maintenance and ownership was valid and enforceable because the fundraiser was a nonessential sports activity that did not affect the public interest.

FACTS

In March 2017, Ty Whitehead participated in a fundraising bicycle event for AIDS LifeCycle. The event included preparatory group training rides leading up to a seven-day long-distance group ride from San Francisco to Los Angeles. The training rides included certified training ride leaders and a support car for longer rides. Whitehead went on a 50-mile group training ride. He was an experienced cyclist and was a certified ride leader, although he was not acting as the leader of this particular ride.

Prior to but on the same day as the training ride, Whitehead signed a release. The release included provisions for assumption of the risk, waiver and release, and relinquishment of any rights under Civil Code section 1542 for unknown claims. The release explicitly included training rides. The release expressly covered negligent maintenance of roads owned by governmental entities, such as broken pavement. During the ride, Whitehead hit a pothole on Skyline Boulevard near Grass Valley Road in the City of Oakland. The pothole was approximately one to two inches deep, 18 inches across and 14 inches long. He flipped over his handlebars and hit his head on the pavement.

Whitehead sued the City of Oakland. He alleged causes of action for dangerous condition of public property (Gov. Code, § 853 et seq.), and public employee or contractor liability for a dangerous condition. The City filed a motion for summary judgment and in the alternative, for summary adjudication. After filing, the City apparently learned of the release. The trial court granted summary adjudication for the public employee cause of action because Plaintiff didn't sue any City employees. It denied summary judgment, *without prejudice*, as the City hadn't negated the duty element under the primary assumption of the risk doctrine based on the release as a matter of law.

Subsequently, Plaintiff filed a motion for summary adjudication on the City's affirmative defenses of waiver and assumption of the risk. He argued that the waiver release was void under *Tunkl v. Regents of University of Cal.* (1963) 60 Cal.2d 92, because it affected a matter of public interest – the maintenance of safe public roads. He also argued that the City could not rely on assumption of the risk because the alleged dangerous condition affected all road users, not just recreational cyclists. The City filed a cross-motion for summary judgment contending that the release barred his claim as he expressly assumed the risk.

The trial court denied Plaintiff's motion and granted the City's motion, dismissing the case with prejudice. The court found that his execution of the release barred his claim (the court did not address the primary assumption of the risk doctrine arguments). Plaintiff appealed and the City cross-appealed.

FIRST APPELLATE DISTRICT'S RULING

The Appellate Court found the release was enforceable and affirmed. The standard of review to decide if a release is invalid is *de novo*. In *Tunkl*, the California Supreme Court held that under Civil Code section 1668, a release between a hospital and an entering patient was invalid because it affected the public interest. The analysis of whether a release is void because it affects the public interest focuses on the overall transaction giving rise to the release, not the allegedly negligent conduct. *Tunkl* set forth

factors to assess whether a transaction type affects public policy.¹ In a later case, the Supreme Court observed that subsequent appellate cases had categorically concluded that private release agreements made in the recreational sports context for future ordinary negligence do not implicate the public interest and are not void as against public policy. Specifically, *Okura v. United States Cycling Fed'n* (1986) 186 Cal.App.3d 1462, established that under the *Tunkl* factors, bicycle racing does not present a transaction affecting the public interest. Therefore, Plaintiff's argument that the focus under *Tunkl* should be on the public interest in maintaining public streets and highways was incorrect. Because the cycling event was a nonessential sports activity that did not affect the public interest within section 1668, the trial court properly found the release was valid and enforceable. Accordingly, like the trial court, the appellate court did not address whether the doctrine of primary assumption of the risk foreclosed the claim.

Plaintiff also argued that even if the release is enforceable, it could not absolve the City of liability for gross negligence. A release agreement cannot bar an action for gross negligence. Conduct that substantially or unreasonably increased the inherent risk of an activity or active concealment of a known risk can amount to gross negligence. Conduct demonstrating a failure to guard against or warn of a dangerous condition typically does not rise to gross negligence. However, Plaintiff did not clearly raise this argument in the trial court and the evidence he pointed to fell far short of establishing a triable issue of fact.

¹ The transaction exhibits some or all of the following characteristics:

[1] It concerns a business of a type generally thought suitable for public regulation.

[2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

[3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

[4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.[5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

[6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.