# Tubing Uphill: How An Appellate Battle in a Snow Tubing Injury Case Helped Create a Path for Overcoming Pre-Injury Exculpatory Releases

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Pursuing personal injury claims arising from accidents occurring during "high risk" activities, such as skiing, skydiving, or paintballing has been an uphill battle for plaintiffs due to the exculpatory waivers and releases that these facilities require their patrons sign prior to participation. Pennsylvania courts have consistently upheld the enforceability of pre-injury exculpatory waivers and releases, not only for attractions that have a known inherent risk of injury, such as ski resorts[1] and trampoline parks, but also for more innocuous services such as gyms and fitness centers.[2] These releases, when properly drafted and signed by the injured participant, effectively immunize a business from personal injury claims arising from their negligent conduct, no matter how obvious. Challenges to the validity of these releases, whether for public policy grounds, lack of conspicuousness, or a plaintiff's failure to read them before signing have largely been rejected by Pennsylvania's appellate courts.[3]

While such releases may close the door for pursuing a personal injury claim arising from a defendant's ordinary negligence, they do not extinguish an injured individual's rights in their entirety. In its decisions in *Tayar v. Camelback*[4] and *Feleccia v. Lackawanna College*,[5] the Pennsylvania Supreme Court has clearly stated that a pre-injury exculpatory waiver cannot release claims for recklessness or gross negligence, respectively.

Despite the fact that claims of recklessness or gross negligence will survive an exculpatory release, these claims have a much higher burden of proof than one of ordinary negligence and are routinely challenged at both the pleadings and summary judgment stages. Trial courts have often struggled when deciding whether to dismiss claims of reckless conduct or gross negligence as a matter of law; rather than decide whether the plaintiff has established the prima facie elements of these causes of action, courts will often look to other standards to determine if the plaintiff's burden of proof has been met. Since pre-injury releases are most commonly used by commercial entities who are seeking protection from foreseeable injuries their patron might suffer during the activity they are hosting, Courts will often look to "industry standards" as a polestar for determining whether the conduct in question rises to the level of recklessness or gross negligence.[6]

The appellate journey of *Bourgeois v. Snow Time Inc.*,[7] a case handled by this author, is an example of how Pennsylvania courts have often grappled with determining whether an actor's conduct rose to the level of recklessness or gross negligence and illustrates the courts' tendency to look to industry standards for guidance rather than applying the fundamental elements of a tort cause of action.

The *Bourgeois* matter arises from a snow tubing injury that occurred at the Roundtop Mountain Resort in York County. Mr. Bourgeois suffered catastrophic spinal cord injuries when the snow tube he was traveling on struck a folded rubber mat that had been placed into his path by the Resort's employees, bringing his tube to a sudden stop but causing his body to be propelled headfirst into the snow. The Resort claimed that the use of what they called "deceleration mats" was an industry accepted practice, and that there had been no similar injuries in the six years since they were implemented. The Bourgeoises alleged that deliberately folding and placing a mat designed, marketed, and sold for use on the floor of a commercial kitchen into the path of speeding snow tube riders created a foreseeable risk of serious injury or death that violated acceptable snow tubing industry standards.

In their Complaint, the Bourgeoises brought claims for negligence, recklessness, and gross negligence. The Defendant Resort immediately filed Preliminary Objections to the Bourgeoises' recklessness and gross negligence claims, which were overruled.

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However, after the conclusion of discovery and production of the Bourgeoises' expert reports, the Defendant Resort filed a Motion for Summary Judgment, which was granted by the Trial Court dismissing the Bourgeoises' claims in their entirety. In support of its opinion striking the Bourgeoises' recklessness claims, the Trial Court held that ***"Plaintiffs have not produced sufficient evidence to show that an industry standard exists for placing the mats at the bottom of hills for snow tubers."*** Similarly, in dismissing the Bourgeoises' gross negligence claim, the Trial Court found ***"the Plaintiffs in the present case have not presented any evidence of directives which would permit the Court to find that Defendants were flagrant and grossly deviated from the standard of care when they folded the deceleration mats and placed them at the bottom of the hill."***

After an appeal to the Superior Court, a 2-1 majority panel affirmed the Trial Court's grant of summary judgment, also citing an absence of evidence of industry standards as a basis for dismissing the Bourgeoises' recklessness and gross negligence claims. Specifically, the Superior Court majority held that providing evidence of an industry accepted standard of care was an actual element of a recklessness and gross negligence cause of action:

> ***Therefore, we are constrained to agree with the trial court that [the Bourgeoises and their experts] failed to articulate the appropriate standard of care for the use of deceleration mats. Without such a standard of care, [the Bourgeoises], as a matter of law, cannot establish [the Resort's] duty to [the Bourgeoises] and that [the Resort] knew or should have known about the standard of care. Since [the Bourgeoises] failed to meet this element of recklessness and gross negligence, the trial court properly granted [the Resort's] Motion for Summary Judgment on this issue.***

The Pennsylvania Supreme Court granted the Bourgeoises' Petition for Allowance to Appeal on four issues, among which was: *Did the majority panel opinion conflict with existing law by requiring that a violation of industry standards be demonstrated for Petitioners to sustain a recklessness or gross negligence cause of action against Respondents?*

In a 7-0 Opinion reversing and remanding the two lower court opinions, the Supreme Court clarified that proving a violation of established industry standards was not required to sustain claims of recklessness or gross negligence. In reaching its Opinion, the Supreme Court noted that identifying or defining an industry standard that was violated was not necessary to establish the duty that the defendant Resort owed its patrons:

> ***Instead of viewing the expert reports in the light most favorable to the Bourgeoises, the Superior Court disregarded the expert reports because they failed to define an industry standard for the placement of deceleration mats, which in the Superior Court's view was necessary to establish the standard of care. However, "[c]ompliance with the statute or regulation is admissible as evidence of the actor's exercise of due care, but such compliance 'does not prevent a finding of negligence where a reasonable [person] would take additional precautions.'"***[8]

The Court would go on to hold that proof that an articulated standard of care existed that could be violated was not necessary for a duty to be established in the context of a recklessness or gross negligence case.

> ***[The Resort's] duty was not to comply with industry standards; its duty was to exercise reasonable care to protect its patrons against unreasonable risks that its conduct of using rubber mats to decelerate snow tubers created.***[9]

It is this author's opinion that the Supreme Court's decision in Bourgeois sends a clear reminder to Pennsylvania Courts that a plaintiff does not need to establish the violation of a pre-defined standard of care to sustain a recklessness and gross negligence cause of action. As noted in the passage above, ultimately a recklessness or gross negligence claim comes down to the question of whether a defendant breached its duty to exercise reasonable care to protect its patrons against unreasonable

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risks that its conduct created. In a sign that the Supreme Court's message in *Bourgeois* has been received, the Superior Court en banc recently reversed a grant of summary judgment to a plaintiff's recklessness claims in a case involving a zip lining accident, focusing not on "industry standards" but on the more fundamental question of whether the defendant:

> ***... engaged in intentional acts, knowing or having reason to know facts which would lead a reasonable person to realize that it thereby created an unreasonable risk of physical harm that was substantially greater than incompetence or unskillfulness.***[10]

Thus, the *Bourgeois* opinion comes at an opportune time, as more and more businesses are requiring patrons to sign exculpatory releases before providing their services. With this clear guidance, the uphill battle to overcome an exculpatory release has now become a little less steep. ◆

[1] Claims for skiing and snowboarding related accidents are also limited by the "Skiers Responsibility Act." 42 Pa.C.S. § 7102(c). However, snow tubing accidents such as the one described in this article are not subject to this statute.

[2] *Toro v. Fitness Int'l, LLC*, 150 A.3d 968 (Pa. Super. 2016).

[3] *See e.g. Chepkevich v. Hidden Valley Resort, LP*, 2 A.3d 1174 (Pa. 2010); *In re Estate of Boardman*, 80 A.3d 820 (Pa. Super. 2013); *Vinkoor v. Pedal Pennsylvania, Inc.*, 974 A.2d 1233 (Pa. Commw. 2009).

[4] 47 A.3d 1190 (Pa. 2012).

[5] 215 A.3d 3 (Pa. 2019).

[6] Unlike reckless conduct, which is defined by Restatement (Second) of Torts § 500 and its comments, gross negligence has generally lacked a concise definition, and has been most frequently used in cases involving medical malpractice, which by definition requires an analysis of the applicable standard of care. See e.g. *Bloom v. Dubois Regional Medical Center*, 597 A.2d 671 (Pa. Super 1991).

[7] 242 A.3d 637 (Pa. 2020).

[8] 242 A.3d at 658 (*citing Berkebile v. Brantley Helicopter Corp.*, 281 A.2d 707, 710 (*quoting* Restatement (Second) of Torts § 288C)).

[9] *Id.*

[10] *Monroe v. CBH 20*, LP, 2022 PA Super 197, *16 (*citing Bourgeois*, 242 A.3d at 657-58).

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