IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sarah Scott, an adult individual, Appellant	:	
v.	:	
Altoona Bicycle Club, d/b/a the Tour de-Toona, a Pennsylvania corporation, EADS Group, a Pennsylvania corporation, (dismissed) Lawrence J. Bilotto, an adult individual, USA Cycling, Inc., d/b/a United States Cycling Federation, a Colorado corporation, the Department of Transportation, Commonwealth of Pennsylvania, an executive agency of the Commonwealth of Pennsylvania, Huston Township, a Pennsylvania municipality	:	No. 1426 C.D. 2009 Argued: June 21, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: July 16, 2010

Sarah Scott (Scott) appeals from the June 24, 2009 order of the Court of Common Pleas of Blair County (trial court) granting summary judgment in favor of Altoona Bicycle Club, Inc. d/b/a the Tour de 'Toona,[1] a Pennsylvania corporation (ABC); Lawrence J. Bilotto, an adult individual (Bilotto); USA Cycling, Inc. d/b/a

[1] Although the caption refers to the event as Tour de- Toona, the actual title of the event is Tour de 'Toona.

United States Cycling Federation, a Colorado corporation (USAC); the Commonwealth of Pennsylvania, Department of Transportation, an executive agency of the Commonwealth of Pennsylvania (DOT); and, Huston Township, a Pennsylvania municipality (Huston Township) (collectively, Appellees). The issues in this case are: (1) whether Appellees are entitled to judgment as a matter of law on the basis of the subject releases; (2) whether Appellees are entitled to judgment as a matter of law on the basis of express assumption of risk; and (3) whether the trial court erred in holding that Scott failed to adduce sufficient evidence of recklessness or gross negligence. For the reasons that follow, we affirm the trial court's decision.

On July 29, 2005, after executing two releases, Scott participated in the 19.2 mile Martinsburg Circuit of the seven-day 2005 International Tour de 'Toona bicycle race. The race was organized and promoted by the ABC, which received permits for the event from the USAC, the national governing body for competitive cycling that sanctioned the race, and DOT. Bilotto, DOT engineer and 2005 Tour de 'Toona race director, applied for and evaluated ABC's permit for the race. At some point during the race, the riders were required to descend Sportsman Road and make a 90º left turn where it intersects State Route 866 (SR 866) at a "T." Huston Township owns and maintains Sportsman Road, and maintained State Route 866 through an agreement with DOT. During the race, Scott braked as she descended Sportsman Road and, as she entered the intersection, she rode wide toward the right edge of Sportsman Road, went into the grass off the berm and fell down a 30-inch drop-off on the right side of SR 866. As a result of this accident, she suffered multiple injuries which left her a paraplegic.

On September 12, 2006, Scott filed a complaint against Appellees seeking damages for her accident. She filed an amended complaint on March 15,

2007 asserting claims against ABC, USAC, and Bilotto for negligence, gross negligence and recklessness; against DOT and Huston Township for negligence and gross negligence; and against ABC and USAC for misrepresentation, failure to disclose and fraudulent inducement. Appellees denied liability and asserted in new matter, defenses of release, assumption of risk and immunity. Following extensive discovery, Appellees filed a motion for summary judgment on the basis of Scott's waiver and assumption of risk, and immunity as to DOT and Huston Township The motion for summary judgment was granted by the trial court by order dated June 24, 2009, on the basis that Scott released the parties from liability, and that she voluntarily assumed the risk of her injuries. Scott appealed to this Court.[2]

Whether Appellees Are Entitled to Judgment On The Basis Of The Releases:

Scott argues that the trial court erred in holding that Scott's claims are within the scope of the releases as a matter of law since they are exculpatory and invalid and unenforceable, and Appellees were in a better position to prevent her harm. She avers that immunity for Appellees cannot be granted based upon general language in a release, nor can liability for recklessness and gross negligence be released. Finally, she claims that there are genuine issues of material fact which prevent judgment as a matter of law. We disagree.

[2] "The scope of this Court's review of a grant or denial of summary judgment is limited to determining whether the trial court committed an error of law or an abuse of discretion." *Kaplan v. Southeastern Pennsylvania Transp. Auth.*, 688 A.2d 736, 738 n.2 (Pa. Cmwlth. 1997). "Summary judgment is appropriate only when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Guy M. Cooper, Inc. v. E. Penn Sch. Dist*., 903 A.2d 608, 613 (Pa. Cmwlth. 2006). The appellate standard of review is de novo when a reviewing court considers questions of law. *Weaver v. Lancaster Newspapers, Inc.*, 592 Pa. 458, 926 A.2d 899 (2007). In reviewing questions of law, the scope of review is plenary, as the reviewing court may examine the entire contents of the record. *Id.*

It is undisputed that, on March 3, 2005, in order to obtain a license from USAC to participate in USAC-sanctioned events in 2005, Scott completed an online application. As part of the application process, Scott was required to read and agree to an "Acknowledgement of Risk, Release of Liability, Indemnification Agreement and Covenant Not To Sue" (Membership Release). The Membership Release provided, in pertinent part:

> I ACKNOWLEDGE THAT BY SIGNING THIS DOCUMENT, I AM ASSUMING RISKS, AND AGREEING TO INDEMNIFY, NOT TO SUE AND RELEASE FROM LIABILITY USA CYCLING, INC. (USAC), ITS ASSOCIATIONS . . . AND THEIR RESPECTIVE AGENTS, EMPLOYEES, VOLUNTEERS, MEMBERS, SPONSORS, PROMOTERS AND AFFILIATES (COLLECTIVELY "RELEASES"), AND THAT I AM GIVING UP SUBSTANTIAL LEGAL RIGHTS. THIS DOCUMENT IS A CONTRACT WITH LEGAL AND BINDING CONSEQUENCES. I HAVE READ IT CAREFULLY BEFORE SIGNING, AND I UNDERSTAND WHAT IT MEANS AND WHAT I AM AGREEING TO BY SIGNING.
>
> In consideration of the issuance of a license to me by one or more of Releasees and being allowed to participate in a cycling event permitted or sanctioned by USA Cycling, . . . I hereby freely agree to and make the following contractual representations and agreements. I acknowledge that cycling is an inherently dangerous sport and fully realized the dangers of participating in a bicycle race, whether as a rider, coach, mechanic or otherwise, and FULLY ASSUME THE RISKS ASSOCIATED WITH SUCH PARTICIPATION INCLUDING, by way of example, and not limitation, the dangers of collision with . . . fixed or moving objects; the dangers arising from surface hazards, including pot holes . . . THE RELEASEES' OWN NEGLIGENCE, the negligence of others . . . ; and the possibility of serious physical and/or mental trauma or injury, or death associated with cycling competition. . . . I HEREBY WAIVE, RELEASE, DISCHARGE, HOLD HARMLESS, AND

> PROMISE TO INDEMNIFY AND NOT TO SUE the Releasees and all sponsors, organizers, promoting organizations, property owners, law enforcement agencies, public entities, special districts and properties that are in any manner connected with a USA Cycling event, and their respective agents, officials, and employees through or by which the event will be held, (the foregoing are also collectively deemed to be Releasees), FROM ANY AND ALL RIGHTS AND CLAIMS INCLUDING CLAIMS ARISING FROM THE RELEASEES' OWN NEGLIGENCE, which I have or may hereafter accrue to me, and from any and all damages which may be sustained by me directly or indirectly in connection with, or arising out of, my participation in or association with a USA Cycling event, in which I may participate as a rider . . . . I agree it is my sole responsibility to be familiar with the course of a USA Cycling event, the Releasees' rules, and any special regulations for a USA Cycling event and agree to comply with all such rules and regulations . . . . I understand and agree that situations may arise during a USA Cycling event which may be beyond the control of Releasees, and I must continually ride and otherwise participate so as to neither endanger myself nor others. I accept responsibility for . . . my conduct in connection with a USA Cycling event. . . .
>
> I agree, for myself and my successors, that the above representations are contractually binding, and are not mere recitals, and that should I or my Successors assert a claim contrary to what I have agree to in this contract, the claiming party shall be liable for all expenses (including legal fees) incurred by Releasees in defending the claims . . . .

Reproduced Record (R.R.) at 342a-343a (emphasis in original).

Thereafter, on July 28, 2005, specifically in order to participate in the Tour de 'Toona, Scott skimmed then executed a "2005 USA Cycling, Inc. Standard Athlete's Entry Blank and Release Form" (Event Release). R.R. 346a, 1369a. The Event Release provided, in pertinent part:

I ACKNOWLEDGE THAT BY SIGNING THIS DOCUMENT, I AM ASSUMING RISKS, AND AGREEING TO INDEMNIFY, NOT TO SUE AND RELEASE FROM LIABILITY USA CYCLING, INC. (USAC), ITS ASSOCIATIONS . . . AND THEIR RESPECTIVE AGENTS, EMPLOYEES, VOLUNTEERS, MEMBERS, SPONSORS, PROMOTERS AND AFFILIATES (COLLECTIVELY "RELEASEES"), AND THAT I AM GIVING UP SUBSTANTIAL LEGAL RIGHTS. THIS ENTRY BLANK AND RELEASE IS A CONTRACT WITH LEGAL AND BINDING CONSEQUENCES. I HAVE READ IT CAREFULLY BEFORE SIGNING, AND I UNDERSTAND WHAT IT MEANS AND WHAT I AM AGREEING TO BY SIGNING.

In consideration of the issuance of a license to me by one or more of Releasees or the acceptance of my application for entry in the above event, I hereby freely agree to and make the following contractual representations and agreements. I ACKNOWLEDGE THAT CYCLING IS AN INHERENTLY DANGEROUS SPORT AND FULLY REALIZE THE DANGERS OF PARTICIPATING IN A BICYCLE RACE, whether as a rider, coach, mechanic or otherwise, and FULLY ASSUME THE RISKS ASSOCIATED WITH SUCH PARTICIPATION INCLUDING, by way of example, and not limitation, the dangers of collision with . . . fixed or moving objects; the dangers arising from surface hazards, including pot holes . . . THE RELEASEES' OWN NEGLIGENCE, the negligence of others . . . ; and the possibility of serious physical and/or mental trauma or injury, or death associated with cycling competition. . . . I HEREBY WAIVE, RELEASE, DISCHARGE, HOLD HARMLESS, AND PROMISE TO INDEMNIFY AND NOT TO SUE the Releasees and all sponsors, organizers and promoting organizations, property owners, law enforcement agencies, public entities, special districts and properties that are in any manner connected with this event, and their respective agents, officials, and employees through or by which the events will be held, (the foregoing are also collectively deemed to be Releasees), FROM ANY AND ALL RIGHTS AND CLAIMS INCLUDING CLAIMS ARISING FROM

> THE RELEASEES' OWN NEGLIGENCE, which I have or may hereafter accrue to me, and from any and all damages which may be sustained by me directly or indirectly in connection with, or arising out of, my participation in or association with the event . . . I agree it is my sole responsibility to be familiar with the race course, the Releasees' rules, and any special regulations for the event and agree to comply with all such rules and regulations. I understand and agree that situations may arise during the event which may be beyond the control of the Releasees, and I must continually ride and otherwise participate so as to neither endanger myself nor others. I accept responsibility for . . . my conduct in connection with a USA Cycling event. . . .
>
> I agree, for myself and my successors, that the above representations are contractually binding, and are not mere recitals, and that should I or my successors assert a claim contrary to what I have agreed to in this contract, the claiming party shall be liable for the expenses (including legal fees) incurred by the releasees in defending the claims. . . .

R.R. at 346a (emphasis in original). Scott argues that these exculpatory releases are invalid and unenforceable as against public policy and, therefore, her claims should be allowed to proceed.[3]

In order for an exculpatory clause in a release to be valid, "(1) the clause must not contravene public policy, (2) the contract must be between persons relating entirely to their own private affairs and (3) each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion." *Vinikoor v. Pedal Pennsylvania, Inc.*, 974 A.2d 1233, 1238 (Pa. Cmwlth. 2009). Scott does not dispute the trial court's conclusion that the subject releases meet the third requirement, i.e., they are not contracts of adhesion. Thus this Court need only determine whether the

[3] According to *Black's Law Dictionary* 648 (9th ed. 2009), an exculpatory clause is a "provision relieving a party from liability resulting from a negligent or wrongful act."

subject releases are contracts between persons relating to their private affairs and/or whether they contravene public policy.

The Pennsylvania Superior Court has held, "[c]ontracts against liability, although not favored by courts, violate public policy only when they involve a matter of interest to the public or the state. Such matters of interest to the public or the state include the employer-employee relationship, public service, public utilities, common carriers, and hospitals." *Seaton v. E. Windsor Speedway, Inc.*, 582 A.2d 1380, 1382 (Pa. Super. 1990). Scott argues that the releases involved matters of interest to the public, since: ABC touted the Tour de 'Toona as a "community-owned" event, in "partnership" with state and municipal governments; the race altered traffic patterns on public roads regulated by DOT and Huston Township, thereby affecting motorists; it invited members of the public to participate, to watch, and to volunteer; and, it was overseen by police and fire departments. Scott also argues that DOT's permit "embodies" the state's public policy to ensure that the roads were safe for the event, thus, the public had an interest in the event being conducted safely. However, there is no case law found by the trial court or this Court to support Scott's contention that merely because the Tour de 'Toona may have provided an ancillary benefit to the local community and used public resources, the exculpatory clauses in the releases were void as against public policy. Instead, courts in the Commonwealth have upheld releases similar to the one executed by Scott as not against public policy. *See Vinikoor*; *Seaton*; *Valeo v. Pocono Int'l Raceway, Inc.*, 500 A.2d 492 (Pa. Super. 1985). Specifically, in *Vinikoor*, this Court held that, "[t]here is a valid public policy to preclude recovery against self-inflicted injuries through known risks." *Vinikoor*, 974 A.2d at 1240. Thus, the trial court did not err in finding that the subject releases do not contravene public policy.

In addition, the trial court properly held that the subject releases "are private agreements between an individual . . . and various entities," and do not involve agreements between persons and their employers required as a condition of employment, or a public service, a public utility, a common carrier or a hospital or healthcare provider. *Scott v. Altoona Bicycle Club, et al.* (No. 2006 GN 4730, filed June 25, 2009), slip op. at 17. Scott was under no obligation to either apply for a license from the USAC or to register to compete in the Tour de 'Toona. No case law was cited by Scott addressing whether releases like those at issue here are considered anything other than private agreements between private parties. Thus, the trial court did not err in finding that the subject releases involved private parties and their private affairs. Accordingly, because the subject releases do not contravene public policy, are between persons relating to their private affairs, and are not contracts of adhesion, they are valid.

Notwithstanding the above, "[e]ven if an exculpatory clause is determined to be valid, however, it will still be unenforceable unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence." *Vinikoor*, 974 A.2d at 1238. In order to determine whether an exculpatory release is enforceable:

> 1) the contract language must be construed strictly, since exculpatory language is not favored by the law; 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; 3) the language of the contract must be construed, in case of ambiguity, against the party seeking immunity from liability; and 4) the burden of establishing the immunity is upon the party invoking protection under the clause.

Id. (citing *Topp Copy Prods., Inc. v. Singletary*, 533 Pa. 468, 471, 626 A.2d 98, 99 (1993)). "Under Pennsylvania law, written releases are interpreted in accordance with the rules of contract construction. . . . In determining the parties' intent, a court must first look to the language of the release." *A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, 1167 (Pa. Cmwlth. 2006) (citations omitted).

In this case, the Membership Release, which Scott reviewed and agreed to online, in its very title, indicates the clear intention that she must release from liability, indemnify and agree not to sue the parties designated therein. In the bodies of both releases Scott acknowledged she was "giving up substantial legal rights," and she expressly agreed to "release from liability" "from any and all rights and claims," and "not to sue" for "damages which may be sustained by me directly or indirectly in connection with, or arising out of, my participation in or association with a USA Cycling event," or the Tour de 'Toona. R.R. at 342a, 346a, 1369a. It is also clear that Appellees are specifically covered by the releases – USAC by name; ABC as sponsor, organizer and/or promoting organization; Bilotto as agent, official or employee of ABC; and, DOT and Huston Township, as property owners, law enforcement agencies, public entities, or special districts and properties that are in any manner connected with the event.

The language in these releases clearly and unambiguously reflects Appellees' intention to be released by Scott from all liability, even for Appellees' negligence, for injuries she may suffer during a USAC event generally, and the Tour de 'Toona specifically. "Where . . . the language of the contract is clear and unambiguous, a court is required to give effect to that language." *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 503 Pa. 300, 305, 469 A.2d 563, 566 (1983). In addition, in the absence of fraud or a confidential relationship, the fact that Scott may

have "skimmed" or "somewhat" read the subject releases, does not make them any less enforceable. *Seaton*; *Standard Venetian Blind Co.* Finally, in *Vinikoor*, this Court upheld as enforceable a substantially similar exculpatory release in favor of Pedal Pennsylvania, Inc. where Vinikoor read, understood and signed the agreement.[4]

Scott argues that the Supreme Court, in *Employers Liability Assurance Corporation v. Greenville Business Men's Association*, 423 Pa. 288, 224 A.2d 620 (1966), prohibits the grant of immunity based upon general language in a release, and the trial court herein violated that rule by holding that the general language, "from any and all rights and claims including claims arising from the releases' own negligence," included a waiver of gross negligence and recklessness despite the fact that neither word appears anywhere in the form. Scott Br. at 57. Scott argues that such language can "reasonably be interpreted to release only claims that arise from negligence and no more," since "[t]here is no comma after 'claims' nor is there any 'without limitation' language as appears earlier." Scott Br. at 57. Scott attempts to go beyond the plain meaning of the subject releases to support her position.

As properly noted by Appellees, the Pennsylvania courts have upheld as enforceable agreements containing the "any and all" language. *See Rep. Ins. Co. v. Paul Davis Sys. of Pittsburgh S., Inc.*, 543 Pa. 186, 670 A.2d 614 (1995) (general release applicable to "all other persons" from "any and all other actions" of "whatsoever kind or nature" barred subsequent action by an insurer against a contractor); *Buttermore v. Aliquippa Hosp.*, 522 Pa. 325, 561 A.2d 733 (1989) ("any and all other persons, associations and/or corporations, whether known or unknown" language in a general settlement release barred a subsequent claim against the

[4] While the release in *Vinikoor* specifically stated that it was a "complete waiver," the fact that that phrase does not appear in the releases executed by Scott does not render this Court's reasoning in *Vinikoor* inapplicable here.

hospital, despite the fact that it was not named in the release, nor contributed consideration toward settlement). In *Vinikoor*, where the release stated that Pedal Pennsylvania, Inc. was released "from all liability as a result of my participation in Pedal Pennsylvania, whether caused by negligence or otherwise," was sufficient for this Court to find that Vinikoor, without qualification, waived his right to sue Pedal Pennsylvania, Inc. for injuries suffered as a result of his participation in a bicycle tour. *Vinikoor*, 974 A.2d at 1237.

In order to glean the parties' intent, "[t]he language [of a release] must be viewed in the context of the entire document. Each part of a release must be given effect. . . . [T]erms in one section should not be interpreted to nullify or conflict with other terms." *A.G. Cullen Constr., Inc.*, 898 A.2d at 1167-68 (citations omitted). The subject releases read in their entirety cannot, as Scott argues, "reasonably be interpreted to release only claims that arise from negligence and no more." Scott Br. at 57. In *Zimmer v. Mitchell & Ness*, 385 A.2d 437 (Pa. Super. 1978), the Superior Court held that, "[a]lthough we must construe the contract strictly, we must also use common sense in interpreting this agreement. The mere fact that the word 'negligence' does not appear in the agreement is not fatal to appellee's position." *Id.*, 385 A.2d at 439.

Supporting the aforementioned argument as to gross negligence is the Pennsylvania Supreme Court's declaration that "there are no degrees of negligence in Pennsylvania" common law, only differing standards of care in certain circumstances. *Ferrick Excavating & Grading Co. v. Senger Trucking Co.*, 506 Pa. 181, 191, 484 A.2d 744, 749 (1984) (describing differing standards of care applicable in bailment cases). Thus, since the releases specifically mention "negligence," gross negligence is, by implication, included. This position is supported by the Pennsylvania Superior

Court's decision in *Valeo*, in which it affirmed the trial court's grant of summary judgment in favor of a race car track where a race car driver executed a release "from all liability . . . whether caused by negligence of Releasees or otherwise," on the basis that:

> where the intention of the parties is spelled out with particularity and their agreement shows an unequivocally expressed purpose to release from liability, the law will give effect to that agreement. . . . The effect of the release was not avoided by an averred conclusion in the complaint that the negligent maintenance of the track amounted to gross negligence. **The language of the exculpatory clause was broad enough to exclude liability for all degrees of negligence.**

Valeo, 500 A.2d at 493 (emphasis added). We recognize that, in *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695 (Pa. Super. 2000), the Pennsylvania Superior Court held:

> Since gross negligence is clearly more egregious than ordinary negligence, the rule of strict construction is even more appropriate in the case of indemnity for accidents caused by one's gross negligence. In other words, this Court will not read the term 'gross negligence' into an indemnity provision in which it is not specifically manifested. If it had been the intention of the parties to cover liability for gross negligence, it requires no extraordinary skill in draftsmanship to so bind a contractor in words and phrases of absolute certainty as to require him to indemnify the owner for its gross negligence.

Id., 758 A.2d at 705. However, *Ratti* is distinguishable from this case in that *Ratti* concerned an indemnification agreement rather than an exculpatory release. Thus, based upon *Zimmer* and *Valeo*, this Court holds that gross negligence need not have been specifically mentioned in the subject releases in order for Appellees to be

protected from Scott's claims.[5] To support her claim that the subject releases do not waive Scott's claims for recklessness against ABC, Bilotto and USAC,[6] Scott cites the Pennsylvania Superior Court's decision in *Tayar v. Camelback Ski Corp., Inc.*, 957 A.2d 281 (Pa. Super. 2008), for the proposition that recklessness cannot be waived in an exculpatory contract by words of general import such as "any and all liability." In *Tayar*, a snowtubing patron brought an action against Camelback Ski Corporation (Camelback) for injuries sustained in a collision when a Camelback employee permitted the patron to descend the slope before her path was clear. The trial court granted summary judgment in favor of Camelback and its employee on the basis of a release of liability executed by the patron. The Superior Court reversed. Scott claims that, in doing so, the Superior Court expressly rejected the notion that recklessness is waived in an exculpatory contract by words of general import. However, that case is clearly distinguishable from the present case. In *Tayar*, the focus was on the fact that Camelback "consciously marketed a service that purported to eliminate a known and typical risk of a recreational activity," and the issue of whether Camelback's employee's actions were waived by the release. *Id.*, 957 A.2d at 293. Ultimately, the Superior Court remanded the case, since there was insufficient evidence of record to determine if the defendants' conduct was reckless or intentional and whether that was the cause of the patron's injuries. Thus, *Tayar* has no bearing on the outcome of this case.

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[5] Scott's amended complaint asserts claims against DOT and Huston Twp. for negligence and gross negligence since they own, operate, maintain and control the intersection at which Scott was injured. The issue of sovereign or governmental immunity afforded DOT and Huston Twp. was raised in Appellees' motion for summary judgment, but was not addressed in the trial court's opinion. Since it is clear that the subject releases relieve all Appellees, including DOT and Huston Twp., of liability for negligence and gross negligence, we do not address the issue of any sovereign or governmental immunity to which they may be entitled.

[6] Scott has not asserted a claim for recklessness against either DOT or Huston Twp.

Based upon the foregoing, we hold that claims for gross negligence and recklessness need not have been specifically mentioned in the subject releases in order for Appellees to have been protected in this case. Since, in strictly construing the subject releases as against Appellees, this Court finds that the intention of the parties is stated with particularity therein, Appellees have met their burden of establishing that they are released from Scott's claims. Moreover, since the exculpatory clauses in the releases have met the necessary requirements, they are valid and enforceable.[7]

Finally, examining the record in the light most favorable to Scott, there are no genuine issues as to the material facts upon which this Court relies to hold that Appellees are entitled to judgment in their favor as a matter of law on the basis of the subject releases. The facts cited herein for the Court's holding are undisputed.

Whether Appellees Are Entitled To Judgment On The Basis Of Scott's Assumption of Risk:

Next, Scott argues that her claims are not barred by her assumption of risk because the assumption of risk doctrine is disfavored in the law, because she did not knowingly proceed in the face of an obvious danger or an inherent risk of competitive cycling, and because the trial court ignored evidence that Scott did not assume the risk that ABC would not correct a course that was inherently dangerous.

[7] Our holding on this issue is in accordance with the Pennsylvania Supreme Court's decision in *Chepkevich v. Hidden Valley Resort, L.P.*, ___ Pa. ___, ___ A.2d ___ (No. 22 WAP 2007, filed June 21, 2010), which was decided after the instant case was briefed, and on the same day that it was argued before this Court. The Supreme Court declared, *inter alia*, that exculpatory releases for voluntary participation in non-essential recreational activities are not contracts of adhesion and, that the fact that such releases may not specifically define or illustrate the specific actions from which the released parties are immune does not render them invalid or unenforceable.

Moreover, Scott argues that there are genuine issues of material fact with respect to her alleged assumption of risk.

Scott avers that the assumption of risk doctrine is "disfavored in the law," since it has been "supplanted by comparative negligence." Scott Br. at 40. However, in *Wallis v. Southeastern Pennsylvania Transportation Authority*, 723 A.2d 267 (Pa. Cmwlth. 1999), this Court addressed the place of assumption of risk as a defense in Pennsylvania law as follows:

> In *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993) (plurality opinion), the Pennsylvania Supreme Court abolished assumption of the risk as an affirmative defense to be decided by a jury; rather, to the extent that an assumption of the risk analysis applies in a given case, the court must apply it as part of its duty analysis. The doctrine is to be applied only in cases involving an express assumption of risk, in cases brought under a strict liability theory, and in cases in which the doctrine is preserved by statute. *Id.* In *Duquesne Light v. Woodland Hills School District*, 700 A.2d 1038 (Pa. Cmwlth. 1997) . . . this Court adopted the rationale of *Howell* as controlling precedent.

Id., 723 A.2d at 269-70 (footnote omitted). This Court, in *Vinikoor*, restated its position that assumption of risk is still viable for courts to consider in the three limited circumstances noted in *Wallis*.

"Under the doctrine of assumption of the risk, a defendant is relieved of its duty to protect a plaintiff from harm if the plaintiff voluntarily faces a known and obvious risk and is therefore considered to have assumed liability for his own injuries." *Kevan v. Manesiotis*, 728 A.2d 1006, 1009 (Pa. Cmwlth. 1999). This case does not involve a claim of strict liability or a statutory exception, but does involve what is presented as an express assumption of risk.

> An express assumption of the risk is where the plaintiff has given his express consent to relieve the defendant of an

> obligation to exercise care for the plaintiff's protection. Ordinarily such an agreement takes the form of a contract, which provides that the defendant is under no obligation to protect the plaintiff, and shall not be liable to him for the consequences of conduct which would otherwise be tortious.

Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d 1038, 1054 (Pa. Cmwlth. 1997) (citations and quotation marks omitted).

Both of the subject releases read and signed by Scott expressly state, "I AM ASSUMING RISKS," and Scott expressly acknowledged:

> I acknowledge that cycling is an inherently dangerous sport and fully realize the dangers of participating in a bicycle race . . . as a rider . . . and FULLY ASSUME THE RISKS ASSOCIATED WITH SUCH PARTICIPATION INCLUDING, by way of example, and not limitation, the dangers of collision with . . . fixed or moving objects; the dangers arising from surface hazards . . . . THE RELEASEES' OWN NEGLIGENCE, the negligence of others . . . and the possibility of serious physical . . . injury . . . associated with cycling competition.

R.R. at 342a, 346a. There is no doubt that, by signing the releases, Scott intended to assume any risks inherent in bicycle racing.

It is clear that Scott had experience with bicycle racing before the day of her accident. She testified that she had previously seen cyclists leave the road course. Prior to the Tour de 'Toona, she understood that there are potential hazards on and off the racecourse. She has seen conditions off the road course that were not flat or even. She also acknowledged that it is easier to control a road bike on the paved road surface than off the paved road surface. She inspected the race course, including the intersection in question, before the day of the race. Finally, during the race, Scott deliberately steered her bicycle off the paved road and into the grass area where her accident occurred.

> When a trial judge applies assumption of the risk as part of the duty analysis, the 'court may determine that no duty exists only if reasonable minds could not disagree that the plaintiff deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced his injury.'

Wallis, 723 A.2d at 270. In this case, as in *Vinikoor*, it is clear that Scott knew of the general risk of riding bicycles, she was aware of specific risks like the one she encountered in the Tour de 'Toona (i.e., uneven surface off the road course), and she voluntarily signed the releases acknowledging her awareness that riding could result in serious physical injury and she, nevertheless, chose to participate in the event.

Scott argues that she could not assume the risk that ABC knew that the intersection was dangerous and did nothing about it, and/or misled her by promoting the Tour de 'Toona as the best race in the country, and the "safest possible." Scott Br. at 45. Whether that is true, in *Vinikoor*, this Court held that even if the race coordinator took specific action to make the course safe and provided warnings of hazards, such "activities do not preclude application of the voluntary assumption of the risk/no duty rule with respect to the risk of falling from a bicycle or encountering an irregular surface." *Id.*, 974 A.2d at 1241. We hold, therefore, that reasonable minds could not disagree that Scott deliberately and with awareness assumed the risk of injuries for which she now seeks damages from Appellees.

Finally, examining the record in the light most favorable to Scott, there are no genuine issues as to the material facts upon which this Court relies to hold that Appellees are entitled to judgment in their favor as a matter of law on the basis of express assumption of risk. The facts cited herein for the Court's holding are undisputed.

Because Appellees are entitled to judgment in their favor on the basis of the exculpatory releases and Scott's express assumption of risk, the decision of the trial court is affirmed.[8]

JOHNNY J. BUTLER, Judge

[8] Since this Court held that by executing the subject releases and/or assuming the risk of her injuries, Scott waived all claims against Appellees, including those for recklessness and gross negligence, there is no reason for this Court to address the final issue of whether Scott presented sufficient evidence of recklessness or gross negligence.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sarah Scott, an adult individual, Appellant	:	
v.	:	
	:	
Altoona Bicycle Club, d/b/a the Tour de-Toona, a Pennsylvania corporation, EADS Group, a Pennsylvania corporation, (dismissed) Lawrence J. Bilotto, an adult individual, USA Cycling, Inc., d/b/a United States Cycling Federation, a Colorado corporation, the Department of Transportation, Commonwealth of Pennsylvania, an executive agency of the Commonwealth of Pennsylvania, Huston Township, a Pennsylvania municipality	:	No. 1426 C.D. 2009

O R D E R

AND NOW, this 16th day of July, 2010, the June 24, 2009 order of the Court of Common Pleas of Blair County is affirmed.

JOHNNY J. BUTLER, Judge