

CHALALA GUTIERREZ, Individually	§	THE DISTRICT COURT OF
and as Representative of the Estate of	§	
RICHARD THOMAS VEGA, II, Deceased	§	
and as Next Friend for RICHARD	§	
THOMAS VEGA, III, a Minor Child and	§	
ROSITA HERNANDEZ, Mother of	§	
RICHARD THOMAS VEGA, II, Deceased	§	
	§	
VS.	§	GREGG COUNTY, TEXAS
	§	
PATTERSON MOTORS OF LONGVIEW,	§	
INC. d/b/a PATTERSON NISSAN OF	§	
LONGVIEW	§	124 TH JUDICIAL DISTRICT

**PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff asks the court to deny Defendant's Motion for Summary Judgment.

A. Facts

1. Driven to mental instability in one of Patterson's notorious "Hands on a Hardbody" Contests, Richard Vega killed himself. Vega's family sued, on the grounds that Patterson failed to properly design and monitor the contest or retain professional consultants to assure that the contest would be carried out in a safe manner. The contest subjected contestants to sleep deprivation, stress and provided unlimited "high energy drinks", elevating the need for close supervision. The unscreened contestants were not observed by adequate medical or psychological professionals during the contest. Patterson failed to provide a secure perimeter and a debriefing area for professionals to interview contestants before releasing them as they dropped out and/or disqualified. Now, Patterson seeks a summary judgment dismissing those claims, but it does not deny

the claims factual viability. Rather, Patterson says that Vega waived Patterson's every culpable act or omission by alleging, without proof, that Vega signed a release absolving any negligence that might be perpetrated by Patterson Nissan.

2. In its motion it globally asserts, without supporting affidavit, that an employee of Defendant carefully explained the nature of the contest and obtained a signature on a "Contest Release" preprinted form. No qualifications were presented as to the employee's knowledge or ability to properly instruct Mr. Vega. There is no evidence of what, if anything was actually said to Mr. Vega.

3. Without proof of authenticity, Defendant provides the Court with a document allegedly signed by the deceased that purports to waive deceased's rights and waive even prospective negligence and bad faith on the part of Defendant.

B. Summary of Plaintiff's Position

4. Even if this unsupported assertion is true, the document is a contract of adhesion that attempts to compromise a person of moderate education by asserting the extra-ordinary relief of prospective release from negligence and bad faith on the part of the Defendant. This attempt is not accomplished in a manner proscribed by Texas law.

5. Patterson's argument that it escaped responsibility for its wrongful conduct by alleging waiver could not be more wrong. Waiving future misconduct strikes at the very heart of Texas jurisprudence. Such an extraordinary shifting of responsibility and risk will only be reluctantly recognized by Texas courts under the most stringent of circumstances.

6. A person can only acquire an unfettered license to commit future negligent acts of harm if the contract entered into is one freely negotiated and with a conspicuous waiver specifically referring to “*negligence*”.

C. The Grounds for Denying Summary Judgment

7. A nonmovant in a summary judgment proceeding is not required to produce summary judgment evidence until after the movant establishes it is entitled to summary judgment as a matter of law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). In deciding whether there is a disputed issue of material fact that precludes summary judgment, the Court takes as true all evidence favorable to the nonmovant. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The Court must view the evidence in the light most favorable to the nonmovant and must indulge every reasonable inference and resolve all doubts in favor of the nonmovant. *Limestone Prods.*, 71 S.W.3d at 311; *Nixon*, 690 S.W.2d at 549.

8. The Court should deny Defendant’s Motion for Summary Judgment because Defendant did not prove all elements of its affirmative defense as a matter of law. *See Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995). There is a genuine issue of material fact for at least one element of Defendant’s affirmative defense. The Defendant’s affirmative defense of waiver consists of the following elements: (a) signed contract; (b) legally worded conspicuous express waiver of future negligence; (c) competence of the signer and the representative of the Defendant to

understand the legal and practical implications of the waiver; and (d) voluntary nature of the transaction.

9. The Court should deny Defendant's Motion for Summary Judgment because there are no affidavits attached to Defendant's Motion for Summary Judgment presenting competent summary judgment evidence. Tex. R. Civ. P. 166a(f).

D. The Purported Release is Void

10. "[I]ndemnification of a party for its own negligence in the future is an extraordinary shifting of risk." *Dresser Industries, Inc.*, 853 S.W.2d at 508. As a result, Texas imposes two "fair notice" requirements upon all attempts at such indemnity -- the express-negligence doctrine and a conspicuousness requirement. The release that Patterson relies on meets neither.

Ground 1: The Release Patterson Presents is Invalid Under Texas's Express-Negligence Doctrine.

11. Culminating a "trend toward more strict construction of indemnity contracts," the express-negligence doctrine requires three things before any party can ever be indemnified against or released from the consequences of its own neglect:

- The intent of the parties must be clear.
- The intent to indemnify for the indemnitee's own negligence must be set forth expressly "in specific terms within the four corners of the contract."
- No part of the agreement may be left to implication or inference.

Dresser Industries, Inc., 853 S.W.2d at 508; *Maxus Exploration Co. v. Moran Bros.*, 817 S.W.2d 50 (Tex. 1991); *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). Implied obligations to indemnify one's own negligence thus are invalid. Indeed,

this is the essential difference between the express-negligence doctrine and the “clear and unequivocal” test that it replaces.

12. Contracts purporting to globally release/indemnify any and all claims categorically fail the strict express-negligence doctrine, to wit:

A. In *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.* a global attempt to indemnify “any and all loss” to the indemnitee’s “property or operations”¹ failed the express-negligence doctrine and thus indemnified nothing. 739 S.W.2d 239 (Tex.1987).

B. In *Trinity Industries v. Ashland*², a contract that purported to release “all claims . . . and liabilities . . . of any nature whatsoever” nonetheless was ineffective to release claims of negligent misrepresentation and fraud where the global release “mention[ed] neither negligent misrepresentation nor fraud.” 53 S.W.3d at 868.

C. In *Singleton v. Crown Central Petroleum Corp.* the Texas Supreme Court likewise struck down an indemnity provision that did not specifically state (but distinctly implied) that there was indemnity for concurrent negligence. 729 S.W.2d 690 (Tex.1987).

¹The indemnity agreement, as quoted by the supreme court, stated:
Contractor agrees to indemnify and save owner harmless from any and all loss sustained by owner by reason of damage to owner's property or operations, and from any liability or expense on account of property damage or personal injury sustained by any person or persons, including but not limited to employees of owner, contractor and subcontractors, arising out of or in any way connected with or attributable to the performance or nonperformance of work here under (sic) by contractor, its subcontractors and their respective employees and agents, or by any act or omission of contractor, its subcontractors, and agents while on owner's premises, or by defects in material or equipment furnished hereunder ...

² 53 S.W.3d 852, 868 (Tex. App.–Austin 2001, pet. denied).

13. This case is no different. Patterson inveigled Mr. Vega to sign a similarly global agreement. Patterson's "Contest Release" set out to absolve it of any liability for Vega's "health and safety" and further purported to broadly indemnify against "any demands, claims, or liability related to" Vega's health and safety. See Release. But the contract never so much as mentioned Patterson's conduct -- negligent or otherwise. Patterson's attempt to thus cloak indemnity for its own negligence behind such language is invalid for the same reasons that similar efforts were invalid in *Gulf Coast Masonry, Trinity Industries*, and *Singleton*. Indeed, to find Patterson indemnified for its negligence by generic reference to "any demands, claims, or liability" would render the express-negligence test meaningless. Otherwise, no scrivener worth his salt would dare mention negligence by name thereby highlighting the breathtaking shift of risks that indemnity for one's own negligence represents.

Ground 2: Even if the document contained express wording of negligence, there is no conspicuous attempt to create prospective immunity

14. Any attempted waiver of future negligent acts is an extra-ordinary shifting of risk that can be accomplished only under the most stringent rules of notice. The language must be conspicuous. *Storage & Processors, Inc. v. Reyes*, 134 S.W. 3d 190, 193 (Tex 2004).

See Tex. Bus. & Comm. Code Ann. Sec 1.201(b)(10) defining conspicuous:

"Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

15. Even if the document presented by Defendant was signed by the deceased, there is no reasonable argument that it provides the “fair notice” requirement described in *Dresser Industries v. Page Petroleum v. Houston Fishing*, 853 S.W. 505 (Tex 1993).

Ground 3: The extra-ordinary relief waiving future negligence is inappropriate in a contract of adhesion.

16. Even if Vega signed the contract presented to the Court, it was signed after the lottery and hype allowing Vega to be in the contest. There was no opportunity for this unrepresented contestant to bargain with the Patterson Corporation for better terms or to avoid the most Draconian terms of indemnity for future wrongful acts and omissions. The contract that Patterson alleges Vega signed was not a negotiated contract with parties of equal competence. In fact the contestants were overwhelmed by advertisement and the chance to win a truck most could never hope to own. The contract was merely a formality that had to take place for each contestant to be able to receive their lottery prize of being a contestant in “Hands on a Hardbody”.

17. In recognizing suicide as a foreseeable, recoverable consequence of negligence, the Supreme Court in *Exxon Corporation v. Brecheen*, 526 S.W. 2d 519 (Tex. 1975) rejected Exxon Corporation's release defense citing "disparity of bargaining power". Also see: *Allright, Inc. v. Elledge*, 515 S.W.2d 226, 267 (Tex. 1974).

D. Conclusion

18. There is no evidence that the deceased signed any contract or that the terms of the contract were explained to him. More importantly, the contract attached to the Defendant's Motion for Summary Judgment cannot, as a matter of law, prospectively waive Defendant's negligence or bad faith because it is offensive to Texas policy and in violation of the "Fair Notice" requirement.

E. Prayer

19. For these reasons, Plaintiffs ask the Court to deny Defendant's Motion for Summary Judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded via facsimile and regular mail to all counsel of record listed below, on this the 18th day of April, 2007.



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