

1 is “more pampering with the beginners.” Regardless of the skill level of his students, his standard
2 practice since he began teaching water-skiing in March 1990, has been to use full throttle for
3 every take-off. Prior to reconfiguring his boat’s engine, the full-throttle approach provided the
4 “gentle pull” that is customary practice in the industry when instructing beginners. Christian
5 claims that he adopted this approach because his boat lacked sufficient power otherwise and he
6 perceived that the skiers fatigue quickly and cannot maintain their balance unless the take-off is at
7 full-throttle.

8 December is a slow month at Lake Alcala. In December 2005, Christian took Joe and
9 Doug, two semi-pro skiers, out for some water-skiing on the empty lake. At the end of the day,
10 Joe and Doug commented to Christian that the water was like glass, but a quicker take-off would
11 greatly improve the skiing experience. This gave Christian an idea for a project to complete
12 during the remainder of the slow season: rebuild the engine on his boat to add more horsepower
13 and enable him to take off faster. Christian spent every day from December 5, 2005 to December
14 22, 2005, working on adding power to his boat. He added a supercharger, a performance ignition
15 system, and performance heads. He also replaced the standard carburetor with an electronic fuel
16 injection system. After completing the work, he first “tested” the boat in the garage by turning on
17 the engine and pushing it to full-throttle, just as he typically does when he pulls a water-skier.
18 Christian testified that the “modified engine sounded crisper and felt more powerful.” Based on
19 the modifications he made, Christian estimated that the boat’s horsepower increased from the
20 standard 250 to around 400. On December 23, 2005, Christian took the boat out for a test on
21 Lake Alcala and he testified that “its new power exceeded his expectations” and he was “excited
22 to get a skier behind the boat because it would be such a smooth, non-stressful experience.”

23 At a synchronized swimming practice near the end of December 2005, Frances started
24 talking to Christian about water-skiing. Frances told Christian that he had “never been water
25 skiing,” but had always wanted to try it. Frances testified that, during this conversation, Christian
26 “bragged about the power of his new boat.” Christian agreed to take Frances out and teach him
27 how to ski for a reduced fee. Since they had a big “sync” tournament coming up, Frances warned
28 Christian that he was somewhat fearful of getting injured, but Christian reassured Frances that he

1 was an instructor with a lot of experience. Christian agreed to pick Frances up the following day
2 and take him to the lake. Christian promised that he would bring him back home by dark.

3 As agreed, Christian picked Frances up on December 27, 2005, at 12:00 p.m. During the
4 forty-five minute drive to the boat launch, Christian gave Frances instructions on the art of
5 waterskiing. Of note, he told him how to hold his legs, when to stand up, and how much force to
6 expect. Laughing, Christian said, "You're not the biggest wimp on the sync team, so you won't
7 get hurt too bad. Besides, we don't really need you for the tourney anyway." Christian then
8 added, "In my fifteen (15) years of towing skiers, I have never seen anybody get more than sore
9 muscles from all the strain." As they were approaching Lake Alcala, Frances noticed a bus stop
10 approximately one quarter (1/4) mile from the boat ramp and commented about its peculiarity in
11 such a remote location. Christian agreed and added that the bus ran every fifteen (15) minutes.

12 Christian and Frances arrived at the lake at approximately 12:45 p.m. and immediately
13 launched the newly modified boat and headed to open water. After finding a smooth and quiet
14 part of the lake, Christian stopped the boat and demonstrated the ski technique he described
15 earlier. He then had Frances demonstrate it. After a few corrections to Frances' technique,
16 Christian sent him into the water with a life vest, wetsuit, and skis. Christian idled the boat
17 forward until the rope was taut. When Frances gave Christian the signal that he was ready (a
18 vocal "hit it") Christian pushed the throttle forward and inadvertently slammed it all the way
19 down, using all of the boat's horsepower. Instead of gently pulling Frances up from the water, as
20 is the customary practice with beginners, the boat accelerated two times faster than an average ski
21 boat. Frances testified that the rope "jerked violently and he was yanked out of the water almost
22 as if he were being shot out of cannon." Frances testified that he "hung onto the rope for only a
23 second or two because he felt searing pain in his shoulder." When he let go of the rope, he
24 skidded on the water, bouncing on the shoulder that was burning in pain.

25 Christian saw Frances fall and circled around to pick him up. It took about five (5)
26 minutes to get Frances into the boat because Frances could not use his injured right shoulder.
27 Christian drove quickly to the dock. Both Frances and Christian have estimated that they arrived
28 at the dock about twenty (20) minutes from the time Frances fell. Once at the dock, Christian

1 took Frances to the clubhouse and gave him some ice for his shoulder. Both Christian and
2 Frances agreed that the shoulder appeared to be dislocated. Christian testified that, after looking
3 at Frances' shoulder, he knew that Frances needed treatment and told Frances that he would take
4 him to San Diego County General. According to Christian, Frances refused to go to San Diego
5 County General "for no apparent reason and insisted that he be taken to San Diego Memorial."
6 Christian then explained that "three of my buddies received negligent care at San Diego
7 Memorial and are currently involved in litigation as a result." He told Frances, "I could not
8 subject you to that kind of medical care so you can either let me take you to San Diego County
9 General or call the paramedics to take you to San Diego Memorial."

10 Frances testified that that he thought about asking to take Christian's truck to San Diego
11 Memorial, but the truck was a stick-shift and he could not use his right arm to shift the gears due
12 to the injury and pain. Christian again offered to drive Frances to San Diego County General, but
13 Frances refused and instead called 911, requesting the paramedics. Fifty-five (55) minutes after
14 calling 911, the paramedics arrived. Frances arrived at San Diego Memorial at 3:45 p.m. where
15 he then waited two (2) hours for treatment because he did not sustain a life threatening injury.
16 Frances was diagnosed with a dislocated shoulder and a torn rotator cuff. His shoulder
17 dislocation was treated in the emergency room, but the rotator cuff required a more extensive
18 procedure.

19 On January 9, 2006, Frances underwent surgery to repair the torn rotator cuff. He then
20 spent eight (8) weeks in physical therapy. He began light swimming workouts in early March
21 2006 and returned to the "sync" team on May 31, 2006.

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1 **PROCEDURAL HISTORY**

2 The Operative Complaint and Summary Judgment Motion

3 On May 24, 2006, Frances filed suit against Christian, alleging two causes of action: 1)
4 negligence; and 2) false imprisonment. On the claim of negligence, Frances alleged that
5 Christian, an experienced instructor, negligently operated the boat and, as a result, Frances'
6 suffered a debilitating injury to his shoulder. On the claim of false imprisonment, Frances alleged
7 that Christian's refusal to take him to the hospital of his choice deprived him of his freedom to
8 leave the lake. On November 14, 2006, Christian moved for summary judgment on both causes
9 of action, claiming that the primary assumption of risk doctrine protected him from the
10 negligence action and that Frances was not falsely imprisoned because he was not actually
11 confined to the lake.

12 The Trial Court's Memorandum of Decision

13 On January 26, 2007, the trial court granted Christian's summary judgment motion on the
14 claim of negligence, finding that Christian's conduct was not so reckless as to be totally outside
15 the range of ordinary activity involved in water-skiing. The trial court relied on the reasoning in
16 *Kahn v. East Side Union High Sch. Dist.*, 75 P.3d 30, 39-44 (Cal. 2003), to reach its conclusion
17 that Christian was shielded from liability by the primary assumption of the risk doctrine.

18 The trial court also granted Christian's summary judgment motion on the claim of false
19 imprisonment, finding that, as a matter of law, Frances was not confined. *Fermino v. Fedco*, 872
20 P.2d 559, 567 (Cal. 1994).

21 The Appeal

22 Frances timely appealed to the (fictional) Seventh District of the California Court of
23 Appeal on February 23, 2007. [Note: Published judicial opinions from all districts of the
24 California Court of Appeal are equally persuasive in the Seventh District, California Court of
25 Appeal.]

26 Frances appealed on two narrowly tailored grounds:

27 1) Did the trial court err in finding, as a matter of law, that the primary assumption of the
28 risk doctrine shielded Christian from liability under the negligence cause of action?

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2) Did the trial court err in finding, as a matter of law, that Frances failed to satisfy the confinement element of the claim of false imprisonment?