

LOCAL

Could attorney's tragic death at 5K result in legal action? Lawyers weigh in

BY STEVEN MAYER
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Some run because they want to stay in shape. Others compete because they have something to prove.

But many people participate in 5Ks, 10Ks and half-marathons because of one simple fact: They love to run.

When Bakersfield attorney Benjamin Greene collapsed and died last week after participating in a 5K event at Hart Park in evening temperatures hovering around 107 degrees, the tragedy immediately raised questions about why the race was run during what may turn out to be the worst heat wave of 2017.

Many Facebook posters and online story commenters agreed that civil liability — an ever-present concern in this litigious age — was a question worth asking about in this instance, although few actually advocated for it.

The Bakersfield Track Club's "Summer Series" — a string of six 5K events stretching over the season — has been held for more than three decades, in heat, in dust, in dry and in muggy conditions.

But the club appeared to recognize that last Tuesday's oppressive heat merited extra attention for the walkers, runners and joggers.

"Normally, only three aid stations are set up during the summer races," the club said last week in a statement.

"Because of the heat, five aid stations were set up ... to provide the 180 runners with extra water, ice and Gatorade. Misting stations were also set up at the beginning and end of the course to assist the



Greene

runners."

Matt Clark, an attorney with the law offices of Chain Cohn Stiles, said he did not know Greene well, although as attorneys, the two had crossed paths on occasion.

It's too early, Clark said, to come to any hard and fast conclusions about the circumstances behind the tragedy.

And uppermost in his mind, he said, is the heart-breaking loss to Greene's family.

Legally speaking, Clark said, he would start exploring two major areas in investigating the question of civil liability: the waiver ostensibly signed by each 5K participant, and a legal doctrine known as "assumption of risk."

"Was there a waiver?" Clark asked. "Was it signed for that event, that date? Did it have all the right language?"

According to the track club's website, the waiver reads as follows:

In consideration of this entry acceptance, I hereby for myself, my heirs, executors, and administrators, waive all of my

SERVICES

A public service for Bakersfield attorney Benjamin R. Greene, who died after collapsing during a 5K run last week, has been scheduled for July 7 at a south-west Bakersfield church, his wife said.

The service will be held at 2 p.m. at New Life Church at 4201 Stine Road, Michelle Greene said.

rights for damages I may have against the County of Kern, the Bakersfield Track Club, the race sponsors, or any individual associated with the above and for all injuries sustained by me in this event. I attest and verify that I am physically fit and have sufficiently trained for this race."

Daniel Rodriguez, another Bakersfield attorney who specializes in civil cases, said if gross negligence can be proved, even a well-written waiver can become ineffective.

"Legally speaking," Rodriguez said, "a claim for gross negligence cannot be waived. So, the question would be whether there is enough evidence to prove gross negligence to a jury."

Still not easy.

"It's very, very rare you find a circumstance of gross negligence," Clark said.

Rodriguez agreed, describing it as "a pretty tough row to hoe, legally speaking."

The "assumption of risk" doctrine was established from the foundational case, Knight vs. Jewett. It involved a woman who

joined to play in a co-ed flag football game.

As one point she fell, someone stepped on her hand and seriously injured it, and she sued.

The court found that the game of football is one in which players can fall down and be stepped on. These are risks inherent to the sport, the court found. In such cases, the participants are making an assumption of risk.

"The question is, can you get over this assumption of risk?" Clark said.

There are risks inherent to running long distances. Turned ankles, blown knees, torn hamstrings — and worse.

And everyone who ran the race knew it was going to be brutally hot. The weather could not have been a surprise to any participant.

However, on the other side of the ledger, Rodriguez said, there apparently was no portable defibrillator, no ambulance on scene on one of the hottest days of the year at a time of day when summertime air quality is often less than pristine.

Neither attorney was making a judgment. They were merely raising questions — on both sides of the ledger — that would be asked should they need to be.

"Did the BTC make the sport more dangerous than those risks naturally associated with it?" Clark asked.

It's a question he didn't try to answer. "This will sound very lawyerly," he said. "But I can see both sides."

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TEHACHAPI

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options.

The district's special education enrollment has remained relatively stagnant in the last decade, seeing just a 2 percent increase since 2012, according to CDE records. Meanwhile, districts in Bakersfield have seen spikes of between 9 and 18 percent as more and more students are diagnosed with autism.

"We have quite a few who are unhappy with the program, especially for the kids who are a little more severe in their disabilities," Torres said. "They have no desire to go through the district because of the struggles and because their kids are not given the education that they need to be successful."

Parents have described the quality of education for special needs students at TUSD as more akin to a daycare setting than an

academic environment, Torres said.

Jeff Kermod, vice president of the TUSD board of trustees, said he was unaware of any significant number of special education students exiting the district, and that "the district has worked hard in the past two or three years to really improve their special education services."

Andreas-Bervel also said she was unaware of any parents fleeing the district.

The standard response from the district to the possibility of increased support services for special needs students has been a resounding "no," Markham said.

The report reinforced that. Five of the 36 IEPs reviewed show that the district made no modifications allowing students to advance toward "attaining educational goals, be involved and make progress in the general education curriculum, and/or be educated and participate with other

students with disabilities and nondisabled students," the report states.

Markham's perspective is underscored by her three-year struggle to get more speech support for her daughter, who until a few years ago couldn't utter a full sentence. She used hand gestures to communicate, but understood more than she could verbalize, much to her frustration.

The district offered her 40 minutes a week, the standard amount for special ed students, according to the findings in an Office of Administrative Hearings decision made this year that found TUSD violated that students' rights.

"She has a right to an education, just like all these other children," Markham said, arguing that 40 minutes wasn't enough time. She drove her daughter to a special program in Santa Clarita for six weeks, where she achieved the equivalent of 10 months of growth. It cost more than \$18,000

with mileage — something the OAH administrative law judge said the district needs to reimburse because it denied Markham's daughter a free and public education.

Instead, TUSD appealed the decision, alleging the judge misapplied the law, according to OAH documents.

Andreas-Bervel wouldn't comment on any due process matter specifically, but said that increasing services for a student is a team decision that parents sometimes disagree with.

Markham said her experience was just one of the 348 instances of noncompliance outlined in the CDE review.

The TUSD board is set to discuss the review at 6 p.m. today at 300 S. Robinson St. in Tehachapi.

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