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Email Legal Alert

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In this issue...

A Prescription for Injury

Rivkin v. City of Carlsbad

(Doctor Injured Pitching Ball - Should Keep Day Job)
(California--UNPUBLISHED*)

The defendant La Costa Youth Organization sponsored a youth baseball fair at a park owned by defendant City of Carlsbad. The grass on the park's baseball fields was very wet, and many locations had standing water and mud because of rain the previous day. The City posted "Field Closed" signs on each field. Defendant San Diego School of Baseball set up and operated a pitching exhibit at the fair, which measured the speed of a soft, or "squishy" baseball thrown at a radar gun held by a school member. The exhibit was located on a grassy area between the parking lot and a fence along the third base line of one of the park's baseball fields. Pitches were thrown toward the fence, where the radar gun was held, but the exhibit had no line indicating where participants should stand.

The plaintiff and his wife and their then 10-year-old daughter attended the event because the daughter played softball in the La Costa Youth League. Plaintiff paid $5 for raffle tickets to participate in the pitching exhibit. The daughter threw three pitches, and then plaintiff decided to pitch. He chose to stand approximately 30 to 35 feet from the fence, where the property sloped upward, because "that's the pitching distance that the kids use." He wore

tennis shoes, not baseball cleats. His first pitch was a casual "warm-up toss." He threw the second pitch, however, as hard as he could. As plaintiff transferred his weight to his left foot and lowered it to the ground, it slipped downhill on the wet grass. He "suffered a severe knee injury, requiring total knee replacement." Plaintiff the school and the youth organization for negligence and the City for dangerous condition of public property. The wife joined and alleged counts for negligent infliction of emotional distress and loss of consortium.

The court held that pitching a ball to a radar gun for speed measurement is a sport that fell within the primary assumption of risk doctrine, and a resultant knee injury was within the inherent risks of that sport. The court also concluded the defendants did not breach their duty not to increase the inherent risks of the sport. Since the doctrine was a complete defense to the action, the court affirmed the summary judgment for the defendants.

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Easy Rider . . . Big Injury

Wiese v. Hjersman

(Minor Motocross Rider Hits Spectator - Claim Against Parent and Track)
(Nebraska)

Plaintiff was struck by a motocross bike driven by defendant Hjersman while at the Alliance Motocross Association's motocross track. Plaintiff was walking alongside the driveway when Hjersman drove the motocross bike into the pedestrian and street traffic area. Plaintiff filed a personal injury action against (1) the Association, (2) Hjersman (a minor), and (3) Hjersman's father, alleging negligence. Plaintiff specifically alleged the Association was negligent for entrusting use of the track to Hjersman, failing to provide or enforce regulations, and negligent in the supervision of minors. The Association filed a third-party complaint against Grubbs, who took plaintiff to the track on the day of the incident. The Association claims Grubbs permitted plaintiff (a nonmember) to gain unlawful and unauthorized access to the Association's restricted premises, and that Grubbs was negligent in supervising plaintiff at the track.

Hjersman's father filed a motion for summary judgment against plaintiff, asserting that plaintiff's allegations of negligence are improperly founded on the "family purpose doctrine" (i.e. the doctrine which holds the negligence of the driver of the family-purpose vehicle is imputed to the parent owner in actions by third parties to recover for personal injuries or property damage proximately caused by the negligent acts of the family-purpose driver). He stated that the doctrine was inapplicable because Hjersman was neither the head of Hjersman's household, nor was the motocross bike being used for "family purposes." Plaintiff argued that a genuine issue of material fact existed as to the father's liability under the doctrine. Specifically, plaintiff argued that he is entitled to have the trier of fact determine whether the father was the head of Hjersman's family and whether the doctrine encompasses a motocross bike as a "family use" vehicle. After reviewing the facts, the court concluded that a rational jury could find the father to be the head of Hjersman's household at the time of the subject accident, and that the motocross bike was used for "family purposes." Thus, the father's motion for summary judgment was denied.

The Association filed a motion for summary judgment against the father and Grubbs, claiming both the father and Grubbs agreed in unambiguous terms to hold harmless and indemnify the Association from any and all liabilities when they signed an "Application for

Membership and Release of Liability." Grubbs and the father urged the court to deem the agreement ambiguous, claiming it was unenforceable due to vagueness and over breadth. Grubbs also argued the terms of the agreement required indemnification only as to actions at "sanctioned events" at the track. Grubbs contended that he was present to watch the practice and that the practice was not a "sanctioned event," such that it was beyond the scope of the indemnification agreement. Ultimately the court deemed the agreement unambiguous and expressed that there was no need to look beyond the plain language of the document.

The court noted that the term "sanctioned event" was not expressly defined in the agreement. Although the agreement distinguished between "sanctioned events" and other events, it covered both types of events at all times. As such, reasonable minds could not differ, and no rational jury could find, that the agreement indemnified the Association only as to "sanctioned events" at the track, and not as to other events. The court explained that the scope of the indemnification clause in the agreement was consistent with Nebraska law and public policy. Specifically, under Nebraska law, "[a]n indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties." However, the agreement did not contain clear and unequivocal language making each signatory-member liable for any and all damages on the premises caused by or to others, that is each member of the Association would not have been liable to the Association for damages in this case. The court said that granting summary judgment to the Association and holding that any association member could be liable for indemnity would be contrary to public policy. Therefore, to the extent the agreement could be interpreted to hold all association members liable for indemnity, the agreement was deemed void.

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Working Out of Liability

Shaw v. Premier Health and Fitness Center

(Injured Health Club Member - Barred from Making Claim)
(Florida)

The plaintiff was a member of a health club and suffered an injury while using the facility. She and her husband filed a claim against the health club for negligence. The defendant filed a motion for summary judgment based on the waiver and release language found in the membership application completed by the plaintiff. The trial court entered summary judgment for health club, and the members appealed. On appeal, the court ruled that the waiver provision contained in the health club's membership agreement clearly and unequivocally released the health club from liability for its own negligent acts. Details of the incident and injury were not provided in the published opinion.

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Unattractive Pond

Butler v. Newark Country Club

(Minor Drowns in Pond at Country Club - No Liability)
(Delaware)

A mother, individually and as administratrix of her son's estate, filed a wrongful death action against a country club after her son drowned in an irrigation pond on the club's property. The trial court granted the country club's summary judgment, and the mother appealed. The Delaware Supreme Court held that the irrigation pond on the country club's property did not constitute an attractive nuisance. The parties did not dispute that the child was a trespasser when he walked onto the ice-covered irrigation pond on the club's property. A landowners' only duty to trespassers is not to intentionally, willfully or wantonly injure them. Landowners, however, can be liable to child trespassers for injuries caused by dangerous, artificial conditions on land when the possessor knows or has reason to know that the artificial condition will attract children who will not recognize the risk because of their age. However, reasoning that the attractive nuisance doctrine should not apply as a matter of law, the court stated that the pond was natural in appearance and had never been used for recreational activity.

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Snow Place Like Court

Adams v. White Water Mountain Resorts

(Snow Tuber Crashes - Waivers Severely Damaged)
(Connecticut)

The plaintiff was snow tubing at the Powder Ridge Ski Area and paid an admission fee for the use of the facilities. In order to participate, all patrons were required to sign a "Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability," which plaintiff signed on behalf of herself. Thereafter, plaintiff was being pulled up the mountain incline by a lift device while seated in a snow tube. The plaintiff alleged that while seated in the snow tube, she reached the crest of the hill when the defendant's employee negligently and prematurely released the snow tube, causing the tube to slide down the slope backwards at an excessive rate of speed. The tube went out of control and collided with frozen hay bales. The plaintiff was ejected from the tube and flew approximately ten feet into the air. She then struck the ground and tumbled down the slope for another 20 feet, causing her to incur severe injuries.

The complaint alleged that the defendants were negligent in numerous ways. The defendants thereafter filed its initial answer and special defenses, including the defenses of comparative fault and contractual assumption of risk. The defendants also filed a counterclaim, alleging that the plaintiff, by signing the contract agreement described herein, agreed to indemnify and hold harmless the defendants from claims by anyone arising from the plaintiff's use of the defendants' snow tubing facilities and equipment. The defendants further alleged that if the plaintiff sustained injuries, as a result of risks inherent in the sport of snow tubing, (emphasis added), the plaintiff has an obligation under the contract agreement, to defend, indemnify and hold harmless the defendants for claims arising out of her use of the facilities and equipment. The plaintiff filed her motion to strike the special defense regarding contractual assumption of the risk, as well as the defendant's counterclaim.

The defendant argues that the operator of a recreational facility can use pre-accident contracts to insulate itself from claims arising out of risks that are "inherent" or "innate to the activity." However, the plaintiff argued that the agreement was invalid as contrary to public policy. Recent case law from the Connecticut Supreme Court (*Hanks v. Powder Ridge Restaurant Corporation* [2005]) held that a snow tubing waiver and release was altogether contrary to public policy because it sought to exculpate the facility for its own negligent conduct as opposed to simply liability for the risks inherent in the activity. The *Adams* release also included a release of negligence liability, but the defendant argued that it was only seeking to enforce the indemnity portion of the agreement, not the release of negligence liability. However, the court stated that it could not selectively enforce provisions in the agreement, finding the complete agreement to be contrary to public policy and sustaining plaintiff's motion to strike the affirmative defense.

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"Danger! You May Need to Turn!"

Curtis v. Town of Inlet

(Snowmobile Rider Takes a Wrong Turn - Blames Signs)
(New York)

A snomobile rider brought a lawsuit against a town seeking damages for injuries he sustained while riding his snowmobile on the town's trail. The trial court granted summary judgment in favor of town based upon assumption of the risk, and the rider appealed. On appeal, the court held that genuine issues of material fact existed as to the rider's training and experience and whether, under the circumstances, the signage of snowmobile trails was sufficient to satisfy town's duty to make the conditions "as safe as they appeared to be," precluding judgment in favor of town as a matter of law. The court explained that the defendant failed to submit any evidence setting forth the risks inherent in the sport of riding a snowmobile or any evidence establishing that the trail at issue was free from defects not inherent in the sport, such as inadequate trail signage.

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* This case is not binding legal authority and should not be cited in legal briefs.

For more information or additional analysis on these and/or others cases, please contact us.

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