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Email Legal Alert

March 26, 2007

In this issue...

Regulating Fun

Arizona Legislators Consider Safety Legislation for Amusement and Carnival Rides

(Arizona is One of More Than 10 States Without Regulations for Carnival Rides; Could Change)
(Arizona)

In an attempt to establish some regulations for amusement rides, an Arizona Republican representative recently introduced House Bill 2200, which would allow Arizona cities and towns to require proof of insurance and annual inspections before issuing event permits for mechanical

rides. However, there a a significant limitation to the Bill, which would allow ride companies to keep their injury records secret from the public unless ordered by a court. The Bill would allow them to dispose of accident, inspection and insurance records after two years. The measure is backed by the League of Arizona Cities and Towns.

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Impenetrable Defense

Willis v. Willoughby

(Self-Defense Instructor Takes Down Student; Court Finishes Her Off with Release)
(Texas)

The plaintiff voluntarily participated in a self-defense class in connection with her employment as a jailer for the local Sheriff's department. Plaintiff and the instructor were engaged in a training exercise when plaintiff was injured. The instructor charged at plaintiff who attempted to thwart the charge. When the two came into physical contact, they fell to the ground, and plaintiff broke her ankle. She thereafter filed a negligence lawsuit against the instructor. The plaintiff's workers compensation insurer intervened, asserting a claim for subrogation after paying out workers' compensation benefits to plaintiff. The instructor filed a motion for summary judgment based upon the waiver and release and express assumption of risk agreement signed by the plaintiff prior to participation. The trial court granted the motion, and the plaintiff appealed.

On appeal, the court affirmed the ruling, holding that: (1) the release signed by student prior to receiving instruction relieved the instructor of a duty to protect student from foreseeable injury, and (2) the risk of an injury like that incurred by student was foreseeable. The court stated that by signing the waiver and release, plaintiff "both expressly acknowledged the inherent danger involved in self-defense training and 'knowingly and willingly assume[d] *all* risk of injury or other damage associated with such training.'" As such, the court could only "conclude that the contractual doctrine of assumed risk applied" and plaintiff assumed "all risk of injury . . . associated with such training," thereby relieving the instructor of the duty to protect plaintiff from foreseeable injury while instructing her in self-defense. Plaintiff argued (1) that suffering physical injury was not an inherent risk of undergoing training in self-defense (i.e., that the risk of injury was not foreseeable) and (2) that the waiver and release was contrary to public policy. The court disagreed on both points.

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Shore Stopper

In re Complaint of Royal Caribbean Cruises

(Dad and Son Crash Wave Runner Into an Island; Dad's Claim Barred by Release, Son's Claim Continues)
(S.D. Florida-Federal)

A father and son were injured while riding a personal watercraft while on a vacation. The Wave Runner was provided by a cruise line operator during an island tour as part of a day trip. Prior to riding the Wave Runner, the father signed a "Personal Watercraft Express Assumption of Risk, Waiver, & Release of Liability" agreement on behalf of himself and his minor son. After the incident, the father and son filed a civil action in Federal Court. The cruise line operator filed a motion for summary judgment based largely upon the agreement signed by the father. The Florida District Court held that: (1) the agreement signed by the father was enforceable as to the father; (2) the agreement was not enforceable as to his son; (3) the doctrine of unseaworthiness did not extend to passengers and could not be the basis of liability; (4) riding the personal watercraft was not an ultrahazardous activity and, thus, a strict liability standard would not apply, and (5) the plaintiffs' negligence claims could not be founded upon violation of Florida statutes because Federal Maritime law applied.

The plaintiff did not dispute the authenticity of the waiver and release agreement, but they challenged its enforceability. The court determined that the agreement was clear and unambiguous, validly releasing the cruise operator from liability stemming from the father's use of the Wave Runner. Plaintiffs argued that the agreement was unenforceable due to the operator's failure to comply with the safety rules as outlined in the agreement. Specifically, plaintiffs contended that the agreement should have been found invalid because the personal watercraft tour leader allegedly led the plaintiffs' tour group within 100 yards of the shore, a violation of the safety rules outlined in the agreement. However, the court disagreed.

With regard to the minor plaintiff, the court explained that "[g]enerally, parental pre-injury releases are upheld when they involve activities related to school, volunteer, or community events but are invalidated when they involve activities related to private for-profit activities." In 2005, the Florida Supreme Court addressed the issue of the enforceability of an agreement by a parent on behalf of a minor child (*Global Travel Marketing, Inc. v. Shea*). In *Shea*, the Florida Supreme Court concluded that an arbitration agreement incorporated into a commercial travel contract, which was executed by a parent on behalf of a minor child, was enforceable against the minor and/or minor's estate in a tort action arising from the contract. However, in reaching this conclusion the Court repeatedly cautioned that its holding was not be construed broadly to encompass the issue of the validity of a parental pre-injury release. The court went on to highlight the distinction between parental releases involving activities related to a school, community, or volunteer-run event where the courts uphold the releases and those involving private, for profit activities where the courts invalidate the releases.

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That'll Be A Deduction on the Landing

Yedid v. Gymnastic Center

(Minor Injured During Failed Gymnastic Front Flip; Court Says Falling is an Inherent Risk)
(New York)

The minor plaintiff was injured while performing a front flip on a trampoline at the defendant gymnastic center. Plaintiff was unable to complete his rotation and fell. He had completed the same maneuver unassisted on a number of occasions, including immediately before the incident. The plaintiff filed his lawsuit, alleging negligence, and the defendant filed a motion for summary judgment based upon implied assumption of the risk. The trial court granted the motion, and plaintiff appealed. On appeal, the court held that the minor gymnast had assumed the apparent risk of falling when he voluntarily engaged in act of performing an unassisted front flip on a

trampoline in his gymnastics class.

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High School Football Practice Casualty

Stowers v. Clinton Central School

(High School Football Player Collapses and Dies During Practice; Jury Verdict for School Reversed and Case Remanded; Release Did Not Cover Negligence)
(Indiana)

The parents of a high school football player, who collapsed due to heat related problems following summer football practice and subsequently died, brought a wrongful death claim against school. Prior to the beginning of football season, the player's mother signed the school's release form, which gave permission for the player to participate in organized athletics and acknowledged that in such activities the potential for injuries is inherent and may be a possibility. However, the agreement never mentioned the potential negligence of the school.

The plaintiffs filed a motion for summary judgment arguing that the school was negligent as a matter of law and a motion challenging the school's affirmative defense of incurred risk. The school filed its own motion for summary judgment, arguing the affirmative defenses of incurred risk and contributory negligence. All of the motions were denied and the case proceeded to trial. Following a jury trial, a verdict was entered in favor the school. The plaintiffs filed a motion to correct errors and for judgment on the evidence, which was denied by the trial court, and the plaintiffs then appealed.

On appeal, the court explained that Indiana's Comparative Fault Act did not apply under the circumstances because it did not apply to governmental entities, such as public schools and their employees. Rather, tort claims against such defendants are subject to the common law principles of negligence, and both contributory negligence and incurred risk operate to bar a plaintiff's recovery against governmental actors.

First, the plaintiffs argued that the court erred in failing to grant their motion for summary judgment. Plaintiffs claimed that the undisputed evidence supported the conclusion that the school breached its duty to the decedent. They specifically argued that the school was obligated to comply with certain Indiana High School Athletic Association (IHSAA) rules, which it failed to do. Additionally, plaintiffs asserted that the defendant failed to recognize heat stroke, despite possessing materials regarding heat-related injuries from the IHSAA. The court disagreed noting that triable issues existed on those points and they were properly presented to the jury.

Plaintiffs also contended that its motion regarding contributory negligence should have been granted, precluding such an affirmative defense by the school. However, the court stated that although evidence presented by plaintiffs demonstrated that the decedent was reasonable in his conduct during the practice, those factual findings did not establish that every action he took on that date was reasonable.

Plaintiffs also asserted that the school should not have been allowed to assert the affirmative defense of "incurred risk" due to a lack of evidence. "Incurred risk" requires evidence of a plaintiff's actual knowledge and appreciation of the specific risk involved and voluntary acceptance of that risk. A plaintiff must have more than just a general awareness of a potential for injury. It also involves a mental state of "venturousness" and has been described as negating a duty, and

therefore precluding negligence. The court concluded that a question of fact existed as to whether decedent had actual knowledge of the specific risk, such that he incurred the risk. As such, the trial court had not erred in denying plaintiffs' summary judgment on the issue. The court also stated that the trial court had not abused its discretion in denying plaintiffs' motion for judgment on the evidence because there were issues of fact and evidence presented to the jury which supported the jury's verdict.

Plaintiffs further claimed that the trial court erred by allowing the waiver and release forms signed by decedent's mother into evidence because they did not contain the word "negligence," and were therefore not relevant evidence. However, the court explained that the forms were properly admitted on a limited basis as relevant to a determination of the decedent's knowledge and the "incurred risk" defense.

Nonetheless, the court agreed with the plaintiffs that the trial court had improperly instructed the jury with regard to the waiver and release forms. The plaintiffs had requested an instruction clarifying that the forms did not expressly protect the school from its own negligent conduct, but the court rejected the instruction. Since the waiver and release forms did not contain any specific or explicit reference to the school's "negligence," the plaintiffs' proposed instruction was supported by the evidence. Therefore, the court reversed the verdict and remanded the case for a new trial, ordering the trial court to give an instruction stating the correct law regarding the waiver and release forms. The court also ordered the trial court to change its jury instruction to provide the jury with the fullest explanation of the law on "incurred risk."

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Left Wanton More

Wagner v. SFX Motor Sports, Inc.

(Motorcycle Racer Crashes and Burns; Release Signed, but Triable Issue Found Regarding "Wanton" Conduct)
(Kansas-Federal)

The plaintiff crashed his motorcycle while competing in an endurance motorcycle race at Heartland Park Topeka racetrack in Topeka, Kansas. Prior to his participation the rider had signed a release and waiver of liability. During the race, plaintiff's motorcycle entered a corner at a speed of 100 to 130 miles per hour. He hit a speed bump, and plaintiff and the motorcycle slid across the grass and dirt on the outside of the corner and into an unprotected concrete barrier approximately 25 to 50 feet away. The collision ignited a fire which engulfed both plaintiff and the motorcycle, and plaintiff suffered severe injuries. He filed a lawsuit against several parties, including the event organizers and track owners and operators, alleging ordinary negligence, wanton conduct and loss of consortium. The defendants' thereafter filed a motion for summary judgment arguing that negligence liability was barred by the waiver and release, and that there was no evidence to support a claim for wanton conduct.

Event organizers had inspected the track prior to the race to look at track conditions and identify primary target zones of impact. A day earlier, at least three motorcycles had run off the racetrack at the same location at slower speeds during practice. Prior to the race, track operators placed tires in front of a certain section of the concrete barrier around the subject corner. However, track operators did not place any tires or other safety devices in front of the remainder of the concrete barrier surrounding the corner (about 70 feet of the barrier lacked additional protection). Plaintiff struck an unprotected portion of the barrier.

The evidence also showed that although there were certain requirements and rules applying to the placement and assignment of corner workers, the corner workers used on the day of the incident had no prior experience in those positions and were not fully trained on procedures in the event of an incident. One of the workers in the subject corner was disabled with a back condition and asthma. Both corner workers were stationed on the inside of the corner, with none on the outside of the corner. As a result, oncoming racers delayed the workers from reaching plaintiff. Additionally, although the corner workers tried to stop the race with a red flag, authorization from the control tower was delayed. Moreover, although there were fire extinguishers positioned in the corner, the corner workers had not received any instruction or training on proper use of fire extinguishers in case a rider caught on fire.

The evidence showed that no corner worker ever attempted to help plaintiff. The fire that engulfed plaintiff and his motorcycle burned until it ran out of fuel. The first ambulance arrived approximately five minutes after the accident, but the emergency personnel in that ambulance did not attempt to help plaintiff. It was not until the second ambulance arrived, approximately 12 minutes after the accident, that any emergency personnel began to render aid. There was no wrecker, flatbed truck or fire truck that responded to the crash site.

The court review the waiver and release signed by the plaintiff and noted that it was clear and unequivocal in limiting the defendants' liability for ordinary negligence. Thus, the court granted the defendants' motion as to the negligence claims. However, the court "wanton conduct" fell outside the scope of the waiver and release. Although Kansas does not recognize degrees of negligence, it does draw a distinction between ordinary negligence and wanton conduct. Wanton conduct is a product of defendants' mental attitude, not of particular negligent acts. To establish wanton conduct under Kansas law, plaintiff must show defendants' realization of the imminence of danger and reckless disregard, complete indifference or lack of concern for the probable consequences of the wrongful act. Plaintiff may establish defendants' realization of an imminent danger with circumstantial evidence that (1) defendants had reason to believe that such a danger existed or (2) defendants disregarded a known or obvious risk from which harm was highly likely to occur. The determination that conduct is wanton is normally a question of fact for the jury.

Plaintiff argued that defendants acted with wanton disregard of the known and obvious risk of harm at the subject corner. The court stated that the track rental agreement, the waiver and release, and the placement of ambulances, a fire truck, fire extinguishers, radios and emergency personnel suggested that the defendants knew of these risks before plaintiff's accident. According to the court, the defendants' general knowledge was sufficient to support a finding that defendants had reason to know about the existence of imminent danger. The court also highlighted the fact that motorcycles had run off the track in that same corner on several occasions during pre-race practice.

The defendants argued that it could not be found liable for wanton conduct because it had materially lessened plaintiff's risk of harm by (1) stationing two corner workers at the subject corner, (2) holding training meetings with corner workers the morning and afternoon of each race day, (3) equipping the corner with two fire extinguishers and a radio, (4) providing two staffed ambulances and a fire truck, (5) calling for a helicopter and (6) protecting the "impact zone" of the concrete barrier around the corner with additional safety measures. However, the court disagreed, noting that a "token effort" at preventing injury will not overcome a mental attitude of reckless disregard.

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Extreme Tubing

Berdecia v. Orange

(Spinning Snow Tuber Breaks Ankle; Court Says Inherent Risk and No Liability)
(New York--UNPUBLISHED*)

Plaintiff was injured while riding a snow tube at the defendant's facility. Plaintiff alleged that when she went down the hill for the second time on the day in question, she was pushed by an attendant and the tube immediately began "spinning like a top." Her left foot hit the ice wall and she fractured her left ankle. Plaintiff sued the facility owner and operator, alleging the the attendant unreasonably created a dangerous condition resulting in her personal injury. The defendant filed a motion for summary judgment, contending the plaintiff assumed the risk of injury that she incurred. The court granted the defendant's motion.

Under New york law, a person who engages in a sport or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." However, he or she does not assume risks that result in a "dangerous condition over and above the usual dangers inherent in the activity." The "voluntary participant is deemed to have consented to apparent or reasonably foreseeable consequences of engaging in the sport; the landowner need protect the plaintiff only from unassumed, concealed, or unreasonably increased risks, thus to make conditions as safe as they appear to be." It is not necessary that plaintiff foresee the exact manner in which his or her injury would occur.

A manager from the defendant testified that the attendants were instructed not to push or spin a rider's tube, unless requested to do so by the rider. Plaintiff testified that no one asked her if she wanted to be pushed or spun. She further testified that she did not ask to be spun, and that she did not have any communication with the attendant on either of her "runs" that day. However, she also testified that she was unsure whether the attendant "spun the tube itself" on the run in question or whether he had simply pushed her. The defendant asserted that plaintiff's sole theory of negligence that she was "improperly spun" by the attendant" was "speculative" as she was assuming she was spun. Testimony from attendants indicated that on occasion the tubes would spin on their own or if they were simply pushed.

Plaintiff had been to the facility on one prior occasion and had completed one run on the day in question without issue. In fact, plaintiff testified that during her prior visit to the facility she had been pushed down the hill on two occasions. Based on these evidence presented, the court concluded that the plaintiff was aware of and appreciated the risks of the snow tube run, given her skill, background and experience. She failed to demonstrate the existence of a dangerous condition above and beyond those inherent in the activity, and the defendant was entitled to summary judgment.

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Uncalled Fore

Hemady v. Long Beach Unified School District

(One Student Golfer Accidentally Whacks Another in the Face with Golf Club; Court Says Conduct Outside the Scope of Sport)
(California)

The 12-year-old plaintiff was struck in the face with a golf club by another student during a seventh grade physical education golf class. She sued the school and her instructor for the personal injuries that she suffered. The school filed a motion for summary judgment based upon primary implied assumption of the risk. The motion was granted and the plaintiff appealed. The

key issue on appeal was the duty of care owed to the plaintiff by the student who swung the club. The court had to decide whether the applicable standard was the general duty of care or whether it was the limited duty of care used in the context of co-participants in a sport.

Under the general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their failure to use due care injures another person. Under the general duty of care, a plaintiff can establish liability by presenting evidence that the defendant acted unreasonably under the circumstances. However, in the context of voluntary sporting activities, the California Supreme court developed a limited/modified duty of care, creating an exception to the prudent person standard of care. Since dangerous conditions and conduct are often an integral part of a sport, the courts have held that a coach or co-participant in a sport will only owe the plaintiff a limited duty of care not to intentionally injure a player or engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport. The purpose of this limited duty of care is to prevent a fundamental alteration of certain sports and to guard against chilling a coach's role or discouraging vigorous participation in sports activities. Under the limited duty of care, a plaintiff must present evidence of intentional or reckless conduct in order to establish liability.

On appeal, the court held that the general duty of care applied. As such, liability was to be determined by the jury's factual analysis of whether the school and the instructor acted reasonably under the circumstances. The court stated that being hit in the head by a golf club swung by another golfer is not an inherent risk in the game of golf, especially in physical education golf taught to a group of seventh graders. This conclusion was supported by the instructor's own testimony, which provided that being hit by a golf club was not an inherent risk in golf if the students followed the rules. Therefore, the court reversed the trial court ruling and remanded the case for trial.

The court explained that a prudent person standard of care to determine the defendants' potential liability under these circumstances would not result in a fundamental alteration of the game of golf or the loss of an integral part of the sport. The court also expressed that applying a prudent person standard of care in this case would not chill a coach's role in challenging students to improve their golf game, and would not discourage vigorous participation by student athletes.

In reversing the trial court ruling, the court also acknowledged that historically under California law, the prudent person standard of care has determined the liability of school districts and their employees for injuries to students during regular school hours. The defendants challenged this position by arguing that the plaintiff's participation in the golf class was a voluntary choice and not required by the school. However, the court responded by noting that seventh grade students were required to take physical education. Providing the students with some choice in the matter as to what activities to take did not negate the fact that physical education and attending grade school are mandatory and compulsory.

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Dodging Liability

Dyrcz v. Longview Enterprise

(Dodge Baller Takes One in The Knee and Another One in Court; Release Enforced)
(E.D. Texas--Federal)

Plaintiff alleged that he was seriously injured when an employee of the defendant Longview Enterprises struck him in the knee as a game of dodge ball began. Prior to participating in the

game, plaintiff signed a "Release and Assumption of Risk" agreement. Plaintiff sued alleging negligence, and the defendant filed a motion for summary judgment based upon the agreement. The court agreed that the agreement was generally valid and enforceable, and that the injury related to the purpose for which the agreement was signed. However, the remaining issue was whether or not the agreement specifically protected the named defendant.

The name of the facility listed in the agreement (Graham Central Station) was different from the legal corporate name of the defendant facility operator (Longview Enterprise). As such, plaintiff argued that the agreement was not intended to apply to Longview Enterprise. However, the court noted that the agreement applied not only to Graham Central Station, but also to its "partners, agents and employees." As such, the court concluded that by releasing Graham Central Station, plaintiff also intended to release any claim against all individuals and entities involved in the operations and activities of Graham Central Station, including Longview Enterprises. The defendant's motion for summary judgment was, therefore, granted.

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

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