AMWT&C
AGAJANIAN, MCFALL, WEISS TETREAULT AND CRIST LLP

THE SPORTS, RECREATION AND LEISURE LIABILITY LITIGATORS. READY TO SERVE YOUR NEEDS.

346 N. Larchmont Blvd.
Los Angeles, CA 90004
(323)993-0198
www.agajanianlaw.com

Email Legal Alert

April 19, 2007

In this issue...

Inherent Risks

Nebraska Legislators Look to Protect Government Entities Providing Recreational Activities

(Pending Bill Would Protect Government Entities from Liability Arising From the Inherent Risks of a Recreational Activity)
(Nebraska)

Nebraska legislators have initially approved a bill that would offer some liability protection to cities and counties against claims by those injured on government-owned property, including at skate parks on government property. The focus of the legislation is to provide protection against claims arising from the inherent risks of a particular activity. Liability could still be established if the entity acted negligently and was aware of a dangerous condition but failed to take remedial action in a reasonable time frame. The bill came in reaction to developing case law establishing government entity liability for injuries occurring as the result of recreational activities. Proponents of the bill claimed that the legal developments prompted some public entities to close recreational facilities, with the threat of further closures unless liability protections were implemented. From a practical standpoint, although this type of statutory protection provides an additional affirmative defense to government entities providing recreational services, it may not have an appreciable impact on the number of lawsuits filed. Lawsuits resulting from recreational pursuits are generally based upon allegations of negligent conduct. The ensuing litigation will then revolve around determining whether the injury occurred as a result of the inherent risks in the activity or as the result of negligence.

^ Top

Not Up Lifting

Chepkevich v. Hidden Valley Resort

(Woman Falls From Ski Lift; Argues Oral Contract to Defeat Release; Adhesion Contract)
(Pennsylvania)

A snow skier was injured when she and her son fell from a ski lift at the defendant's ski resort. Prior to the incident, the plaintiff was concerned that her son would have a difficult time safely boarding the lift due to his small size and skiing inexperience. Therefore, prior to boarding, plaintiff asked the chair lift operator to slow the lift down while they boarded. The operator agreed to stop the chair lift, but failed to slow or stop it when it arrived. The operator tried to place the son on the chair, but he began to slip. The plaintiff tried to lift him up, but they both fell, and plaintiff was injured. She thereafter filed a lawsuit against the operator, alleging negligence.

The defendant operator filed a motion for summary judgment based upon a release of liability signed by the skier prior to her participation, and based upon the doctrine of assumption of the risk. The trial court granted the motion, and the plaintiff appealed. Plaintiff testified that she did not recall signing the release, although she admitted that she understood the release language She explained that had she read and understood the release, she would have signed it despite disagreeing with it. Plaintiff also argued that the incident did not result in an injury contemplated by the release. Moreover, plaintiff argued that the release had been superceded by a second agreement (verbal) between the ski lift operator and the plaintiff, when the operator promised to stop the lift prior to her boarding.

The court reviewed the assumption of the risk doctrine in connection with Pennsylvania's Skiers' Responsibility Act, and it concluded that plaintiff was engaged in the act of downhill skiing at the time of her injury. However, the court further concluded that because the negligent operation of a ski lift was not a risk inherent in the sport of downhill skiing, a question of fact existed as to whether the operator's acts were negligent, and the proximate cause of plaintiff's injuries.

As to the release, the court criticized the size and location of the text. It also noted that the release did not clearly define the term "negligence" or illustrate its application in any way, such as with an example of conduct that could be considered negligent. As a result, the court concluded that that the release arguably amounted to an adhesion contract that provided no recourse to one who disagreed with it other than to reject the entire transaction. Furthermore, the court explained that the release could not be enforced as a matter of law in that the plaintiff had raised a triable issue as to the existence of a subsequent superceding oral agreement between the parties. The court reversed the trial court's ruling and remanded the matter for trial.

^ Top

Pucker Up

Hurst v. East Coast Hockey League, Inc.

(Hockey Spectator Struck in the Face with Puck; Claim Barred By Assumption of Risk)
(South Carolina)

During pregame warm-ups at a hockey game, the plaintiff entered the spectator area through a curtained concourse entrance behind one of the goals. He was then struck in the face by a puck while standing behind the goal. Thereafter, he brought a negligence action against the hockey league, the hockey team, the city-county civic center commission, the city, and the county. The defendants filed a motion based upon the doctrine of primary implied assumption of the risk, which was granted, and the plaintiff appealed.

On appeal, the court referred to the baseball spectator case law, finding that the risk of being injured by a foul ball at a baseball game and the risk of being injured by a flying puck at a hockey game were similar risks. Citing hockey spectator injury cases from numerous other jurisdictions, the court affirmed the lower court decision, concluding that the risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey.

^ Top

Not Exactly According to the Curriculum

Brown v. Soh

(Racing School Driving Instructor Struck By Car Driven by Student; Release Violated Public Policy and Not Enforced)
(Connecticut)

A driving instructor employed by a racing school, who was struck by a car driven by a student during a driving class, brought a negligence action against the student, the other driving instructor, the owner of the car, and the racing school. The trial court granted the defendants' motion for summary judgment, and plaintiff appealed. On appeal, the court held that: (1) the exculpatory agreement purporting to release the racing school and other specified groups from liability for injury to the driving instructor caused by their negligence violated public policy and was invalid, and (2) exculpatory agreements in the employment context violate public policy. This was the first case in which Connecticut had looked at waiver and release agreements in the employment context. Looking at case law from other jurisdictions, the court noted that releases are almost universally rejected in the employment context, where exculpatory agreements exempting an employer from all liability for negligence toward his employees are void as against public policy.

^ Top

The Agony of Victory

Moening v. University of Toledo

(Football Game Spectator Injured by Goal Post During Postgame Celebration; Court Says Assumption of Risk and No Duty Owed by University)
(Ohio--UNPUBLSHED*)

The plaintiff was a spectator at a college football game. He was injured during a melee that occurred immediately following the conclusion of the game. A group of fans formed on the field and gathered under the goal posts. Plaintiff voluntarily left his seat, climbed over a railing, and proceeded to slide several feet down a concrete wall to gain access to the playing field. The crowd tore down the north goal posts and plaintiff witnessed the crowd carry them out of the stadium. A crowd also surrounded the south set of goal posts and began the process of bringing them down as well. Several people were sitting on or hanging from the crossbar while others were on the ground pulling and twisting at the structure in order to bring it down to ground level. The crossbar eventually broke free sending parts of the structure along and persons hurtling to the ground. Plaintiff was trapping underneath the pile. He was knocked unconscious and suffered injury to his lower back.

Plaintiff claimed that he wasn't an "invitee" at the time of the incident. He contended that he never heard announcements warning fans to stay off the field and that the defendant failed to warn him of the danger he encountered. Plaintiff further asserted that defendant was liable for failing to eliminate the risk of harm from the dismantling of the goal posts, either by installing collapsible goal posts or by providing enhanced police presence to control the crowd around the goal posts.

The defendant school argued that it owed no duty to plaintiff and that plaintiff's claim should be barred based on the doctrine of primary assumption of the risk. Defendant argued that that plaintiff assumed the risk of harm when he joined others on the field and and placed himself in the area near the goal posts. In addition, defendant asserted that plaintiff was a "trespasser" on the field at the time of the incident because he exceeded the scope of his invitation when he left the stands and went onto the field. Finally, the defendant maintained that the danger to plaintiff was open and obvious.

The court concluded that plaintiff ignored obvious barriers and risked serious harm during each stage of his journey to the field. The then court found that plaintiff was clearly not an invited guest by the time he arrived on the playing field and joined the crowd. Plaintiff knowingly and consciously placed himself in close proximity to the goal posts with utter disregard for the obvious risk of harm he was exposed to from the actions of an unruly crowd. The court sated that the defendant was entitled to assert the defense of primary assumption of the risk and that defendant owed no duty to plaintiff. Therefore, the court granted the defendant's motion for summary judgment.

^ Top

No Horseplay Around the Office

Deak v. Bach Farms, LLC

(Licensed Horse Trainer Was Thrown From Horse He Was Instructed to Ride; Issue of Fact Regarding Prior Knowledge of Vicious Propensities Left for the Jury)
(New York)

An employee brought an action against a corporate employer regarding personal injuries he sustained when he was thrown from a horse while in the course of his employment. The employer filed a motion for summary judgment alleging that liability was precluded by the doctrine of primary assumption of the risk. The employer also contended that they could not be liable for negligent or intentional infliction of emotional distress because its conduct (and the conduct of the manager as its agent) was not outrageous. The court denied the employer's motion, and the employer appealed. On appeal, the court held that the employer's order to the employee to exercise a horse that a manager knew had previously thrown others was not sufficiently outrageous to support the employee's claims for intentional and negligent infliction of emotional distress. However, the court also held that fact issues remained as to whether the employer itself had knowledge of the horse's vicious propensities and proclivities, and whether the employee assumed risk of his injuries.

The court explained that a cause of action for either intentional or negligent infliction of emotional distress must be supported by proof of conduct by a defendant that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." The employer had met its burden by demonstrating that its conduct, by or through its agents, was not outrageous, extreme, or calculated to cause the employee emotional distress.

As to the assumption of risk, the court stated that whether the plaintiff employee had assumed the risks of riding the horse depended on whether the risk was inherent in the activity, "the openness and obviousness of the risk, plaintiff's background, skill, and experience, plaintiff's own conduct under the circumstances, and the nature of [the employer's] conduct." Since the employer knew about the dangerous proclivities of the horse, and since that knowledge was not made known to plaintiff until after his injury occurred, there was a question of fact as to whether the plaintiff had voluntarily assumed the risk that he encountered.

^ Top

Brew Run Gone Wrong

Durham v. Patel

(Apparently Intoxicated Mini-Mart Patron Slipped and Fell While Trying to Buy Beer; Employee was Mopping; Triable Issue Existed as to Mini-Mart's Superior Knowledge of Danger)
(Georgia)

A mini-mart patron brought a slip and fall action against the store. The mini-mart filed a motion for summary judgment, which was granted by the trial court and the patron appealed. On appeal, the court reversed the trial court's ruling and held that issues of fact existed as to the store's superior knowledge of the hazard posed by the wet floor, whether the area where patron fell was actually wet, and whether it was wet from mopping by an employee.

The patron submitted an affidavit which stated that on "August 29, 2001, I went up to the BP store to get a Dr. Pepper while going towards the back of the store to the coolers I slipped on a wet spot on the floor where it looked as if they had been mopping." His shorts were very wet after he landed on the floor. He claimed that the store was open at the time of his fall and that there were no warning signs in the store. A mini-mart employee submitted an affidavit claiming that the patron entered the store 45 minutes after it closed. According to the employee, the patron ignored his statement that the store was closed, pushed past him, "and went to the beer cooler area." The employee followed the patron and found him "sitting on the floor holding a 22 ounce bottle of Bud Lite in each hand." The employee did not see any substance on the floor and the patron made no complaint about falling. According to the employee, the patron appeared to be "highly intoxicated." The employee acknowledged that he had been mopping the floors when the patron entered. He asserted that he had placed a "Caution-Wet Floor" sign in one of the aisles near the main entrance, and that the bucket which he used to mop the floor also had a warning about wet floors.

The court noted that in order to recover for injuries sustained in a slip and fall under Georgia law, a plaintiff must prove (1) that the defendant had actual or constructive knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard, despite exercising ordinary care, due to actions or conditions within the defendant's control. The court explained that "issues of premises liability are generally not susceptible to summary judgment, which may be granted only when the evidence is plain, palpable, and undisputed." Since the record did not show that the patron knew that the floor was wet before his fall, and since the employee acknowledged mopping before the patron's fall, the court concluded that an issue of material fact exists at to the store's superior knowledge of the hazard posed by the wet floor.

^ Top

Blades of Glory

Ziegelmeyer v. United States Olympic Committee

(Olympic Speedskater Suffers Injury During Fall in Practice, Blames Padding on Boards; Court Says Assumed Risk)
(New York)

An Olympic speedskater was injured when she fell on the ice during practice and hit the boards surrounding the rink. Although safety pads had been placed on the boards, plaintiff fell in such a way that her feet lifted the pads, causing her hip to strike the boards directly. She filed a lawsuit alleging negligence in placement of pads on boards surrounding the rink. The trial court granted the defendant's motion for summary judgment based upon the doctrine of assumption of the risk, and the skater appealed. On appeal, the court affirmed the trial court ruling. The court explained that since the skater was aware of the exact manner in which the safety pads had been set up on the day of her accident, she had assumed the risk of her injuries.

^ Top

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

346 North Larchmont Boulevard Los Angeles, CA 90004
Phone: (323)993-0198 Fax: (323)993-9509

E-mail: news@agajanianlaw.com Web: www.agajanianlaw.com