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

Email Legal Alert

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In this issue...

Parens Patriae ("Father of the People")

Fields v. Kirton

(Fatal ATV Accident; Court of Appeal Makes a Clear Statement Against Parents'/Guardians' Rights to Waive/Release Negligence Liability on Behalf of Minor Participants in Recreation Activities; Conflict Created in the Law)
(Florida)

A fourteen (14) year old boy died in an all terrain vehicle ("ATV") accident. His father had taken the boy to the defendant motorsports park without the knowledge of the boy's mother. In order to gain entry into the park, the father signed a release and waiver of liability, assumption of risk, and indemnity agreement on behalf of his son, which (by its terms) protected the park from negligence-based liability. Thereafter, the boy attempted to complete a jump, but was ejected from the ATV. The ATV landed on top of him. He tried to get up, but collapsed and died. The boy had unsuccessfully attempted the same jump one month earlier, resulting in a fractured rib and mild concussion.

The boy's parents filed a lawsuit against the park and its owners/operators, alleging negligence in the operation of the facility. The defendants filed a motion for summary judgment based upon the release agreement signed by the boy's father. The trial court granted the defendants' motion and the plaintiffs appealed. On appeal, the court reversed the trial court's decision.

The court reviewed the recent Florida Supreme Court decision of *Global Travel Marketing, Inc. v. Shea*, which concerned a parent's ability to bind a minor to the arbitration of personal injury tort claims. In

that decision, the court ruled that a minor can be bound by an arbitration provision. However, the Supreme Court distinguished the arbitration provision from waiver and release agreements in the context of recreational activities, and the Supreme Court expressly abstained from ruling on the enforceability of waiver and release agreements generally.

The court explained that "[g]enerally, parents may make decisions affecting their children without governmental interference unless significant harm to the child is threatened by or resulting from these decisions." The court was concerned about the effect of the agreement of "insulating the provider of the activity from liability for negligence inflicted upon the minor." As a result, the agreement caused "a forfeiture of the minor's property right to seek legal redress either through his parent or the appointment of a guardian ad litem." The court noted that while a parent may elect to have his or her minor child participate in an activity, thereby assuming the inherent risks and dangers associated with that activity, allowing the activity provider to protect itself from negligence liability impacted the property rights of the minor which "cannot be waived by the parent absent a basis in common law or statute." According to the court, there was "no basis in common law for a parent to enter into a compromise or settlement of a child's claim, or to waive substantive rights of the child without court approval."

In making the ruling, the court acknowledged and specifically addressed the fact that the decision is in direct conflict with another published Florida decision (*Lantz v. Iron Horse Saloon, Inc.* - a pre-injury release signed by a mother so that her minor son could ride a pocket bike was enforced to preclude negligence liability). In light of the clear conflict in the law, the court certified the conflict and submitted the question to the Florida Supreme Court as one of great public importance. As such, we have not likely heard the end of this issue in Florida. We would suspect that the Florida Supreme Court will eventually settle the issue.

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Shin v. Ahn

(Golfer Learns Lesson About Standing in Front of Another golfer Teeing Off; Court Allows Case to Proceed to Trial on Issue of Reckless Conduct)
(California)

The plaintiff was golfing in a threesome. He took a shortcut from one hole to the other, which placed him in front of the defendant and to the defendant's left. Plaintiff stopped at that point to get a bottle of water out of his golf bag and to check his cell phone for messages. He did so even though he knew (1) that he was in front of the tee box, (2) that defendant was preparing to tee off, and (3) that he should stand behind a player who was teeing off. The defendant golfer inadvertently "pulled" his tee shot to the left, hitting plaintiff in the temple. The plaintiff brought a negligence action against other golfer. The parties disputed whether the defendant golfer knew where plaintiff was standing when he teed off. The plaintiff alleged that he and defendant made eye contact before defendant hit his shot, but his accounts of just when that eye contact occurred appeared to be inconsistent and in dispute.

The defendant golfer filed a motion for summary judgment based upon primary assumption of the risk, alleging that he did not owe the plaintiff a duty to protect him

the the risks inherent in golfing, including the risk of being struck by a golf ball. The trial court initially granted the motion, but later reversed itself, concluding that triable issues remained. The defendant then appealed. On appeal, the affirmed the denial of the motion and remanded the case, finding that primary assumption of risk did not apply to co-participants in golf. The California Supreme Court then granted review. The Supreme Court noted that the Court of Appeal decision was contrary to decision in *Dilger v. Moyles*, a 1997 case in which the court held that being struck by a ball was a risk inherent in golf and that the primary assumption of risk doctrine applied to the case of a defendant whose errant shot struck another golfer playing a different hole.

The Supreme Court noted that this case represented the next generation of its jurisprudence regarding *Knight v. Jewett*, the seminal California case concerning primary assumption of the risk. In *Knight*, the Supreme Court had expressly left open the question whether the primary assumption of risk doctrine should apply to non-contact sports, such as golf. The *Shin* court concluded that it should. As such, the Supreme Court ruled that golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is "so reckless as to be totally outside the range of the ordinary activity involved in the sport."

In *Shin*, the determination of whether a defendant breached the limited duty of care he owed other golfers by engaging in such "reckless" conduct depended on the resolution of disputed material facts. Therefore, the defendant's summary judgment motion was properly denied. Ultimately, the trier of fact would have to consider both the nature of the game and the totality of circumstances surrounding the shot. Many factors would bear on whether a golfer's conduct was reasonable, negligent, or reckless. According to the Supreme Court, the relevant circumstances may include the golfer's skill level; whether topographical undulations, trees, or other impediments obscure his view; what steps he took to determine whether anyone was within range; and the distance and angle between a plaintiff and defendant.

Although the justices of the California Supreme Court agreed on the end result of the ruling, there was some disagreement about how the doctrine of assumption of the risk should generally be applied. This disagreement was expressed in the concurring opinion, which advocated a change in how the law is applied, alleviating a court's need to determine as a matter of law (and at an early stage in the litigation) the risks inherent in an activity. Rather, the concurring justices would have the court focus on whether the plaintiff "truly appreciated and voluntarily consented to the risk" posed by defendant's negligent conduct."

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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