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Email Legal Alert

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Whoa Nellie!

Courbat v. Dahana Ranch

(There's Nothing Like a Kick in the Shin - Horse Gets Spooked and Plaintiff's Counsel Gets Creative)
(Hawaii)

During a horse trail ride as part of a vacation tour package, the plaintiff's horse approached another rider. The second horse became spooked and kicked the plaintiff in the shin. Prior to the ride (but after the vacation had already been booked and paid), the plaintiff signed a waiver and release agreement. The plaintiff did not dispute that she signed the agreement, nor did she dispute that the agreement was generally an accepted method by which businesses could limit their liability. Instead, plaintiff challenged the agreement and the practice of booking ride reservations through an activity company (receiving payment prior to the arrival of the guest, and then, upon the guest's arrival at the Ranch, requiring the guest to sign a waiver and release as a precondition to horseback riding) as being "an unfair and deceptive business practice" in violation of state statutes. Plaintiff maintained that the practice of withholding the waiver and release agreement had "the capacity or tendency to mislead" customers, thereby satisfying the legal test for a deceptive trade practice.

The court ultimately held that the presence or absence of an unfair or deceptive trade practice was an issue of fact for the jury to decide. The court explained that if the jury found the nondisclosure of the waiver and release at the time of booking was a deceptive trade practice (rendering the agreement void), then plaintiff's negligence claims would proceed to trial. However, if the jury found that there was no such violation, then plaintiff validly waived and released her negligence claims, which would be barred. However, under such

a circumstances, the court was clear to point out that even if the agreement was enforceable, it could not protect the defendant from allegations of "gross negligence" and/or "willful misconduct," both of which were alleged.

Finally, the court concluded that Hawaii's equine liability statute did not protect the defendant from negligence liability. The statute, which provides for certain liability immunity to equine facilities, includes an exception which applies to a facility's failure to supervise the activities. Plaintiff here had alleged such negligent supervision, such that the statute did not apply to provide immunity.

Snow Tuber v. Barrier Wall . . . Wall Wins!

Beck-Hummel v. Ski Shawnee

(Effect of Snow Tubing Ticket Language Frozen by Triable Issues Regarding Consent and "Conspicuous" Test)
(Pennsylvania)

The plaintiff attended the defendant ski facility with her family to go snow tubing. The tubing ticket purchased by the plaintiff included waiver and release and express assumption of the risk language printed on the back. The plaintiff had not been snow tubing before and did not read the language on the ticket. The plaintiff did not personally purchase the ticket, and no one from the ski facility pointed out the language or explained it to her. The plaintiff did not (and was not required to) sign the ticket to acknowledge having read the terms.

The plaintiff filed the lawsuit and the facility filed a motion for summary judgment based upon the language on the ticket. The trial court granted the motion and the plaintiff appealed. On appeal, the court reversed the ruling, finding that it was "best left to the trier of fact to determine whether the language of the lift ticket reasonably communicated the existence of a contractual agreement to the purchaser, and whether the mere presence of exculpatory language on the lift ticket acts as a bar to recovery." There court also noted that was no evidence to "suggest that the terms of the disclaimer were 'brought home' to [plaintiff] or understood by her," such that it could not enforce an express assumption of risk defense as a matter of law.

The court further pointed out some deficiencies with regard to whether or not the pertinent provisions were "conspicuous." As explained by the court, the "disclaimer language on the ticket was in a font size such that the photocopy of the ticket attached to the [plaintiff's] brief was just barely readable." This issue was also to be decided by the jury.

Timing is Everything

Pollock v. Highlands Ranch Community Association

(Minor Rock Climber Successfully Attacks Retroactive Application of Minor Waiver and Release Statute)
(Colorado)

The plaintiff suffered personal injuries in a fall from a rock climbing wall at the defendant's recreational facility. The fall occurred on January 10, 2002, when plaintiff was nine years old. The plaintiff filed suit, and the defendant filed a motion for summary judgment based upon the waiver and release and express assumption of risk and indemnity agreement signed by the plaintiff's mother on behalf of the plaintiff prior to his participation. The trial court granted the motion, and the plaintiff appealed.

In 2003, the Colorado legislature passed a statute permitting parents/legal guardians to prospectively waive and release the negligence liability claims of their minor children participating in hazardous recreational activities. The statute overruled existing case law, which prohibited the enforcement of such agreements. The statute was effective on May 14, 2003. Since the plaintiff's cause of action accrued on the date of injury (January 10, 2002), the Court of Appeal determined that the trial court had improperly retrospectively applied the provisions of the new statute. The statute was deemed to be "substantive," rather than "procedural" or "remedial," such that retroactive application was not permissible.

On Court Battle for Gender Supremacy

Schnarrs v. Girard Board of Education

(Cooties Alert! Big Meany Breaks Girl's Arm During Inter-Gender Practice.)
(Ohio)

A high school basketball coach testified that he made the discretionary coaching decision to utilize recent male graduates to practice with the girls' basketball team. The coach explained that he believed using boys with sound basketball skills would improve the girls, and better prepare them for stronger future opponents. During the practice, one of the boy players (6'5" and 260 lbs) blocked the attempted outlet pass of the plaintiff, breaking her arm. The boy player blocked only the ball and no foul would have been called on the

play.

Thereafter, the plaintiff filed her complaint alleging both negligent and "reckless" conduct. The defendant school argued that the claims were barred by assumption of the risk and by the state statute providing for a political subdivision's immunity from liability for discretionary decisions. The court ultimately ruled that the school district could be held liable because the coach (by virtue of his position) had the discretion to plan and conduct practices. Such discretion in his capacity with a government entity, afforded the entity immunity. The court did not address the assumption of the risk argument.

Lake Was Open and Obvious

Brazier v. Phoenix Group Management

(Property Developer Not Liable for Death of Mother Who Saved 13-year old From Drowning)
(Georgia)

The plaintiff drowned after she rescued her 13-year-old son from a lake near their home. A wrongful death lawsuit was filed thereafter, alleging that the developer of a subdivision was negligent per se because it violated a county ordinance when it failed to erect and maintain a fence around the lake. Cross-motions for summary judgment were filed, and the issue was whether or not any code provision or ordinance did, in fact, require that a fence be installed around the lake. The defendant also argued that the decedent and her son were trespassers (or, at most, licensees), to whom it could only be liable for willful or wanton conduct, and that the lake was an open and obvious condition of which both the decedent and her son had actual knowledge. Ultimately, the trial court granted summary judgment in favor of the defendant.

On appeal, the court affirmed the ruling and explained that a showing of negligence per se does not establish liability per se. "Breach of duty alone does not make a defendant liable in negligence. The rule remains that the true ground of liability is the *superior* knowledge of the [property owner or occupier] of the existence of a condition that may subject the invitee to an unreasonable risk of harm." Therefore, even if the plaintiff could show that the ordinance applied to the lake and that the defendant was negligent per se for failing to erect a fence around the lake, he would still be unable to recover if the undisputed evidence showed that the lake was an open and obvious hazard of which the decedent and her 13-year-old son had equal knowledge.

Referring to the case law, the court concluded that that lakes, ponds, and similar bodies of water, either natural or manmade, had routinely been determined to be open and obvious hazards, even to small children. As such, the lake was not a "mantrap" or an "attractive nuisance," and it did not expose

either a licensee or a trespasser to an unreasonable risk of harm. Finally, the court noted that there was no evidence to support a finding that the defendant acted in a wilful or wanton manner toward either the decedent or her son in order to allow for the imposition of liability.

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

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