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Email Legal Alert

October 24, 2007

In this issue...

Sticking To It

Zipusch v. LA Workout, Inc.

(Woman Falls Due to Sticky Substance on Treadmill; Poorly Worded Waiver and Release Fails to Protect the Health Club from Negligence Liability)
(California)

In October of 2004, the plaintiff signed a "Membership Agreement" and, thereafter, became a member of the defendant health club's facility. On December 10, 2004, plaintiff allegedly sustained injuries when her foot became stuck to a sticky substance on a treadmill at the facility, causing her to lose her balance. Plaintiff filed a complaint against the facility for general negligence and premises liability, alleging its failure to inspect and maintain the exercise equipment resulted in the sticky substance remaining on the treadmill. The defendant filed a motion for summary judgment based upon the waiver and release and express assumption of the risk provisions in the agreement, and it alternatively argued that it did not have actual or constructive notice of the allegedly dangerous condition. The trial court granted the defendant's motion, and the plaintiff appealed.

On appeal, the court analyzed the "readily identifiable" release and assumption of the risk language, which was located at the bottom of the front page on the double-sided membership agreement. The defendant argued that the provision exculpated the facility from all claims arising during a member's

use of the athletic facilities. However, the plaintiff argued that the release only barred claims against the facility caused by negligent third party conduct. Plaintiff also argued that the language of the agreement was ambiguous and that ambiguities should be read against the facility since they drafted it. In either event, plaintiff argued the agreement did not bar her claim against the facility for its own negligence.

Quoting the provision, the court noted that the pertinent provision provided that the plaintiff released the facility "from the negligence or other acts of anyone else using [the facility]." However, it did not explicitly protect the facility from its own negligent conduct. In fact, to the contrary, the provision stated that the plaintiff was required to "defend and indemnify LA Workout for any negligence EXCEPT the sole negligence of the club." Therefore, the court concluded that the most reasonable interpretation of the release and assumption of risk provision was the parties' intention to exculpate the facility from injuries, whether self-inflicted or caused by other members, sustained from the *inherent* risks of exercising at a the club. It did not contemplate exculpating the facility from its own negligence. The court further agreed with plaintiff that any ambiguity should be read against the drafter of the document. Accordingly, the court held that it was improper for the trial court to rule that the membership agreement barred plaintiff's negligence and premises liability action.

Secondarily, the court also held that the plaintiff had raised a triable issue regarding whether the defendant had actual or constructive notice of the allegedly dangerous condition. Plaintiff, via declaration, stated that, based on her own observations, 85 minutes had elapsed between the time of the accident and the last time a gym employee had inspected and cleaned the equipment. Additionally, at his deposition, an assistant manager of the facility testified that the undersides of treadmill belts were not inspected in the normal course by gym employees monitoring the exercise area throughout the day. Plaintiff argued, and the court agreed, that a reasonable trier of fact could find that the facility should have known of the condition and that it negligently inspected and maintained its exercise equipment.

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Caution: Supervision Required

Patterson v. Sacramento City Unified School District

(Truck Driver Student Injured Unloading Bleachers During a Community Service Project; School Owed a Duty to Supervise; Activity Not Inherently Dangerous and Primary Assumption of Risk Doctrine Did Not Apply)
(California)

The plaintiff was an adult truck driver training course student. He brought a negligent supervision action against a school district after he was injured while loading bleachers onto a flat-bed trailer as part of an off-campus community service project. The defendant school district filed a motion for summary judgment, which was eventually granted by the trial court. The court ruled, in part, that the plaintiff's claims were barred by the primary assumption of the risk doctrine in that he voluntarily assumed the risks inherent in the activity and the defendant did nothing to increase those risks. The plaintiff appealed.

On appeal the court held that the community service project was a "school sponsored activity" for purposes of determination of whether the district had a duty of care, and that the plaintiff student should have been under the immediate and direct supervision of a school district employee. The court also ultimately ruled that the primary assumption of the risk doctrine, which could bar liability altogether under California law, did not apply under the circumstances.

The court recounted the history of primary assumption of the risk, noting its typical application in the

sports and recreation context. However, the court acknowledged that the doctrine has been expanded to encompass dangerous activities in other contexts (including employment contexts) where the activity is inherently dangerous. In the end, the court determined that loading a flat bed trailer is not an inherently dangerous activity. As such, the plaintiff's claim was not barred as a matter of law. The court also touched upon the fact that even if the doctrine had applied, there was evidence to potentially establish that the instructors had acted recklessly in failing to supervise the activity, thereby increasing the risk of injury. As such, there would have been the possibility of liability notwithstanding the doctrine's application.

As a matter of policy, the court did "not want truck driver training instructors to send inexperienced students out to load flat bed trailers without instruction and supervision." Imposing a duty of care upon the instructors to properly supervise the activity would not "chill vigorous participation." The lower court's ruling was reversed and the case was remanded for trial.

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O-U-C-H . . . . What's That Spell?

Krathen v. School Board of Monroe County

(High School Cheerleader Injured During Practice; Waiver and Release Signed by Parent Enforced, Negligence Claims Barred)
(Florida)

A high school student injured during a cheerleading practice brought a negligence action against the school board. She alleged that the school board was negligent in the following respects: (1) by failing to adequately supervise the cheerleading practice; (2) by conducting the practice without adequate preparation; (3) by using inexperienced or untrained personnel to supervise the practice; (4) by failing to place protective mats on the floor so as to cushion the impact; (5) by conducting the practice without the coach being present; and (6) by failing to abide by or follow appropriate school board policies and/or procedures relating to extracurricular activities. The defendant school board filed a motion for summary judgment based upon the "Consent and Release of Liability Certificate" signed by the cheerleader and her parents prior to her participation. The trial court granted the motion, and the cheerleader appealed.

On appeal, the court first concluded that the signed certificate clearly and unambiguously indicated the intent to release the school board from liability for "any injury or claim resulting from . . . athletic participation." The court explained that under Florida law, the language was sufficient to insulate the school board from liability for the negligence claims. The court found that any claim resulting from athletic participation includes the claim for negligence such as was alleged by the cheerleader.

After addressing the sufficiency of the document itself, the court then turned to the issue of a parent's right to sign a waiver and release and express assumption of the risk agreement on behalf of his or her minor child in the context of a hazardous recreational activity. Just a few weeks earlier, the Florida Court of Appeals (in the case of *Fields v. Kirton* [addressed in a previous AMWT&C Email Legal Alert]) held that these types of agreements, signed by parents on behalf of minors, were not enforceable as contrary to public policy. The *Krathen* court specifically acknowledged the *Fields* decisions, and recognized that the *Fields* court had certified the question to the Florida Supreme court for a resolution of a conflict in the law. Nonetheless, the court found its previous 2004 decision in *Gonzalez v. City of Coral Gables* (enforcing a waiver and release agreement signed by a parent on behalf of a minor participating in a fire rescue personnel training course for school credit to bar negligence liability) to be controlling.

The court noted that the cheerleader's parents clearly thought that participation in cheerleading was beneficial for their daughter, and they were, thus, willing to "release and hold harmless" the school board from "any claim or injury" their daughter suffered as a result of her participation. The court stated that because it was within a parent's authority to make this type of decision on behalf of his or her child, the cheerleader and her parent were bound by the signed certificate. Plaintiff's negligence-based claims were barred, and the court noted that she was unable to present any evidence demonstrating either "gross negligence" or an intentional tort.

Therefore, the ruling in favor of the school district was affirmed. In light of the continuing conflict in Florida law regarding the enforcement of waiver and release agreements signed by parents on behalf of their minor children participating in hazardous recreational activities, the issue seems ripe for resolution by the Florida Supreme Court.

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