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Email Legal Alert

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Painting "Fore" Fun

Thomas v. Wheat

(Painter Takes One in the Mouth - Golfer Clearly has an Accuracy Problem - Jury to Decide the "Zone of Risk")
(Oklahoma)

A painter was painting a house that bordered on a golf course. He was struck in the mouth by a golf ball and brought a negligence action against the golfer. The defendant and her fellow golfers yelled “Fore!,” but plaintiff claimed that he did not hear them. Plaintiff admitted that he was aware of the golf course and that he needed to keep a lookout for golf balls flying into the yard, but he testified that he was hit before he had a chance to see if there were golfers on the nearby tee.

The golfer filed a motion for summary judgment asserting (1) there was no evidence of negligence, (2) she had no duty to warn the plaintiff, and (3) the plaintiff assumed the risk of injury in light of his knowledge. The trial court granted the golfer's motion for summary judgment, but the judgment was reversed on appeal. The Court of Appeal held that material issues of fact existed as to whether the painter was within the "zone of risk," and whether the “fore” warning was effective to preclude liability.

The court explained that a "golfer is only required to exercise ordinary care for the safety of persons reasonably within the zone of risk or danger, and the golfer has no duty to those persons who are not in the line of play, *if danger to them cannot be reasonably anticipated."* In describing the "zone of risk," the court stated that it may be shown "by proof that the defendant knew of the plaintiff's presence, and either intentionally hit the ball in the plaintiff's direction or had a propensity to do so." When a party is within the bounds of a

golf course, the presumption exists that he or she assumed the risk of injury from an errant golf ball. However, no such presumption applies if the plaintiff is outside the bounds of the golf course.

The Runner Goes . . . and She is NOT Safe!

Ross v. New York Quarterly Meeting of Religious Society

(Female Youth Softball Player Injured Practicing Slide - Thinks About Sliding Head First Next Time)
(New York)

A seventh-grade school softball team member fractured her leg while performing an indoor exercise to practice sliding. She filed suit against the school and her coaches for negligence relating to the exercise, which involved players running across the hardwood floor of a gymnasium toward an area where the floor was covered by parachute material, where they were directed to slide on the material. The plaintiff's leg was caught in the parachute material, resulting in the injury. The defendants filed for summary judgment arguing assumption of the risk. The trial court denied the motion and the ruling was affirmed on appeal.

The court explained that in terms of an educational institution, "its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or *unreasonably increased* risks." Triable issues of material fact existed as to whether the defendants unreasonably increased the risks in their organization of the practice activity. The expert declarations were in conflict regarding the risks involved and the reasonable nature of the defendants' conduct.

We Recommend Sitting Down During the Ride

Muller v. Jackson Hole Mountain Resort

(Gondolas Gone Wild - Alpine Skier Dragged by the Boots)
(Wyoming)

An injured alpine skier brought a negligence action against the ski resort for leg and knee injuries that she suffered when her boot was caught in the gondola, which dragged her several feet. Following a verdict, judgment was entered in favor of the defendant. The defendant would found to be protected by Wyoming's "Recreational Safety Act." That Act provides protection against liability for injury caused by "'Inherent risk' with regard to any sport or recreational opportunity," which are defined to be "those *dangers or conditions which are characteristic of, intrinsic to, or an integral part of any sport* or recreational opportunity." The Wyoming assumption of the risk statute then provides that "[a]ny person who takes part in any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity, whether those risks are known or unknown, and is legally responsible for any and all damage, injury or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity."

The injured skier appealed the judgment arguing that the Act excluded the operation of a ski lift by a recreational provider from its liability protections. She also argued that the incident could not be considered inherent in the activity of skiing because she was not wearing skis at the time that he boot became stuck. Certified questions were submitted to the Wyoming Supreme Court, which disagreed with the plaintiff on both points. The court concluded that the Recreational Safety Act "does not necessarily exclude a ski lift from its protections. The inherent risks of skiing are not limited only to the act of skiing, and an injury suffered while boarding a ski lift (with skis stowed on the exterior of the lift) may be an inherent risk of skiing."

Caution: Horses May Move

Anderson v. Four Seasons Equestrian Center

(Rider Tries to Mount Horse. . . Horse Moves . . . Rider Falls to the Ground. This was Obviously the Fault of the Equestrian Center.)
(Indiana)

The plaintiff rider had purchased a horse from the defendant equestrian center following many years of riding instruction at the center. The center boarded her horse, and the plaintiff continued to receive riding instruction. Several years prior, the rider signed a waiver and release form that released the center from tort and civil liability. The waiver and releases specifically applied to the "inherent risks" of equestrian activities, but did not specifically mention the center's own potentially negligent conduct.

The plaintiff rider was thereafter injured when she fell attempting to mount her horse. She filed a lawsuit against the center, alleging that it was negligent in caring for, conditioning, and training her horse. The center filed a motion for

summary judgment based upon the waiver and release form, and based upon Indiana's Equine Activity Statute, which provides liability protections against injury from "an inherent risk of equine activities." The trial court granted the motion, and the ruling was affirmed on appeal.

Plaintiff argued that a triable issue of material fact existed as to whether the statutory requirements of the Equine Activity Statute had been met (i.e. whether the facility had posted a warning sign in a clearly visible location in proximity to the equine activity, and whether her injury resulted from an inherent risk of equine activity). She also argued that waiver and release did not explicitly release the center from its own negligence. Addressing the waiver and release issue, the court explained that although the agreement "did not specifically and explicitly refer to the [center's] own negligence . . . , that fact does not render the Waiver useless." Rather, an exculpatory clause's lack of a specific reference to the "negligence" of a defendant will not always preclude the defendant from being released from liability, such as when a plaintiff has incurred damages that are inherent in the nature of the activity. The subject waiver and release mentioned the inherent risks of equine activities, and the plaintiff admitted that she was engaged in an equine activity at the time of the injury.

In that the court ruled that the waiver and release precluded liability for the injury arising out of the inherent risks of equine activities, it did not reach the issue regarding the applicability of the Equine Activity Statute.

Big Horses and Little Children - Let the Fireworks Begin

Lavenda v. Rodowick

(Fourth of July Horse Rides Gone Bad - Minor Child Injured When Horse Reared Up.)
(California--UNPUBLISHED*)

The defendant offered free horse rides in his front yard to the neighborhood children on the Fourth of July. The children would sit on a horse's saddle, and the defendant would lead the horse around the perimeter of his yard two or three times. The minor plaintiff accepted a ride and the defendant took her around the yard. Since it was the last ride of the day he began to walk along side the horse as it walked down the driveway, giving the plaintiff the reins. The defendant began to jog and the horse followed. The defendant stopped jogging, but the horse continued to pick up speed. Eventually the horse stopped and turned back toward the defendant. At some point, the defendant called the horse's name, and it reared up and "bolted" toward defendant, causing plaintiff to fall and suffer injury.

Plaintiff filed suit alleging negligence and premises liability. The defendant filed a motion for summary judgment, contending that plaintiff had assumed the risk of harm by engaging in the sport of horseback riding. The court granted the motion, which was affirmed on appeal. Plaintiff argued that the assumption of risk doctrine did not apply because the defendant increased the risk of harm by improperly caring for the horse, by providing a faulty saddle and other equipment, and by calling to the horse. Plaintiff contended that the defendant's conduct was “so reckless as to be totally outside the range of the ordinary activity involved in the sport.” She offered expert testimony in support of her contentions.

The defendant argued that the doctrine of primary assumption of risk applied because a horse's sudden movements are inherent in the sport of horseback riding. The court agreed with the defendant, noting the defendant "knew [plaintiff] had at least some experience riding horses, she had skillfully controlled [the horse], and she had acknowledged [the horse] wanted to run." Given those facts, the court concluded that the defendant's "action in calling the horse was not reckless as a matter of law."

* This case is not binding legal authority and should not be cited in legal briefs.

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

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