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Case Notes

Amusement, Recreation and Leisure

Young v. Warwick Roller Magic Skating Center (Superior Court of Rhode Island, 6/30/09), 2009 WL 1872329.

A former employee filed a discrimination claim against her employer, claiming that she was terminated on the basis of a physical handicap resulting from a work related shoulder injury. Plaintiff, the general manager of the skating center, was injured when she was struck by a car in the rink's parking lot. Thereafter, she filed a worker's compensation claim. While that claim was pending, her employment was terminated. She then filed a charge of discrimination with the Rhode Island Commission for Human Rights, claiming that she was terminated because of her physical handicap that resulted from the motor vehicle accident. Next, she settled her worker's compensation claim, and as a part of that settlement, she signed a broadly worded release and a resignation from employment. That release covered "any and all incidents or injuries occurred during my employment…"

When she tried to pursue her discrimination claim, her former employer filed a Motion for Summary Judgment seeking dismissal of that claim on the basis of the release signed in connection with plaintiff's workers compensation claim. The trial court granted the defendant's motion and dismissed the claim. On appeal, plaintiff argued that the release did not apply to her employment discrimination claim because her worker's compensation claim was a separate and distinct matter. The appellate court affirmed, because it could "perceive no reason for invaliding the instant release or its all-encompassing scope." "Were it otherwise, signed contracts would be little more than scraps of paper, subject to the selective recollection of the parties in interest."

Meisels v. Lucille Roberts Health Clubs (N.Y.A.D. 2 Dept.), 2009 WL1796866.

Plaintiff was injured when she slipped and fell while using an exercise step. She claimed that the step was slippery because certain "fuzz" from newly installed carpet had become caught in the grooves of the step. She testified that she first saw the fuzz on the step about 30 minutes prior to the accident, but continued her step class without complaint. The trial court denied defendant's Motion for Summary Judgment. The appellate court reversed, finding that defendants were entitled to judgment as a matter of law by submitting evidence sufficient to demonstrate that the condition of the carpet fuzz was open and obvious, not inherently dangerous and was known to the plaintiff.

Kaplan v. Lucille Roberts Health Clubs, 880 NYS 2nd 284, June 9, 2009.

Club member brought an action seeking damages for a personal injury she allegedly sustained while using a step-aerobic board that was supplied by the club for participation in a club-sponsored class. The trial court granted summary judgment dismissing the complaint. The appellate court reversed, find that there were disputed issues of fact, including whether the plaintiff was limited to choosing among defective step aerobic boards supplied by the club for participation in a club sponsored class, whether the defendants had noticed that a fair number of those boards lacked stabilizing bottom grips, whether the absence of those grips unreasonably increased the risk of use of the boards, whether that risk was apparent to the plaintiff and whether it proximately caused her injury.

Hall v. Perry (Superior Court Wyoming, June 30, 2009), 2009 WL 1858258.

Plaintiff Hall was injured when he was thrown from a horse while participating in a deer hunt guided by the defendants. The district court dismissed plaintiff's complaint based on a "release of liability and user indemnity agreement" signed by the plaintiff. On appeal, plaintiff argued that the release was unenforceable because it was not supported by separate consideration, i.e. consideration in addition to that consideration provided in connection with the parties' "letter contract of agreement" by which plaintiff contracted defendants' services. In other words, if the release was a contract separate and apart from the contract for services, then Wyoming law would require consideration separate from the money plaintiff paid for defendants' services. On the other hand, if the release was a part of the parties' original agreement then no additional consideration would be required. On appeal, the court held that the release was referenced in the letter agreement, and was an addendum to the letter agreement; therefore, no additional consideration was required for that release to be effective.

Beninati v. Black rock City (CAL. App. 1 Dist.), 2009 WL 1857303.

Plaintiff attended the annual Black Rock City, Nevada Burning Man Festival, a week-long event held a remote desert location. A number of large structures are erected and then burned, the culmination of which is the burning of a 60ft. tall wood sculpture in the figure of a man. Once ignited, the sculpture burns until it topples and then continues to burn in a gigantic bond fire. The flames from the fire were about 40ft. high when plaintiff arrived. He walked around the perimeter of the fire, each time moving a little closer to it. While doing so, he tripped and fell into the fire badly burning both of his hands. Of course, plaintiff filed suit against the defendants. The trial court granted summary judgment based on the doctrine of primary assumption of risk "where, by virtue of the nature of the activity and the parties' relation to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury…" On appeal, both parties cited *Knight v. Jewett*, Cal. 4th 296 (1992), the seminal case concerning assumption of risk. The court discussed several previous cases analyzing the application of the assumption of risk doctrine to various sporting and non-sport activities. After doing so the court concluded that the doctrine of primary assumption of risk applies to plaintiff's activity and, therefore, Black Rock owed plaintiff no duty of care to prevent the injuries he incurred as a result of his participation in that event.

Beattie v. Mickalich (Michigan Court of Appeals, June 25, 2009), 2009 WL 1835074.

The issue in this case is whether section 5(d) of the Equine activity liability act (EALA), MCL 691.1661 *et seq.,* prescribes a general claim of ordinary negligence. Plaintiff and defendant were neighbors in Michigan. During 2003-2004, defendant invited plaintiff over to his property to exercise a few horses. In May 2004, plaintiff went to defendant's property to ride a "green broke" horse named Whiskey. A green broke horse is one that does not respond to cues from the rider and requires more experienced riders to handle it.

Plaintiff was holding the horse's halter while the defendant was attempting to saddle the horse. The horse reared up onto his hind legs, and plaintiff, whose hand was caught in the horse's halter, was pulled into the air. She fell to the ground and sustained injuries to her shoulder and arm. She brought an action in negligence claiming that the defendant failed to properly secure the horse's head before saddling the horse, failed to avoid alarming the horse, and failed to lift the saddle up to the horse's back rather than throwing the saddle in a high arching throw onto the horse's back.

Defendant moved for summary dismissal urging that §3 of the EALA barred plaintiff's claim. The trial court and the Michigan Court of Appeals agreed and held that "the statute recognizes that an equine may behave in a way that will result in injury and that equines may have unpredictable reactions to diverse circumstances, precisely one of the guiding motivations of the limited liability for equine professionals. Because there was no evidence indicating that the [horse's] behavior represented anything other than unpredictable action to a person or unfamiliar object pursuant to the statute, plaintiff's argument is without merit."

The Michigan Court of Appeals noted that the purpose of the EALA is to curb litigation against the equine industry and the correlative rising costs of liability insurance, and to stem the exodus of public stable operators from the equine industry. The EALA further proscribes liability for injuries resulting from "an inherent risk of equine activity" which is defined as a danger or condition that is an integral part of an equine activity. Specifically, it is activity that includes, but is not limited to, riding a horse that belongs to another, boarding a horse and its normal daily care, as well as teaching or training activities.

There are five exceptions of the EALA which do not create blanket immunity in §5 of the EALA: (a) providing equipment or tack and the knowledge of any faulty equipment or tack which is the proximate cause of injuries; (b) providing an equine and failing to ascertain the rider's ability to safely manage the equine; (c) ownership, control and knowledge of land in which a participant sustained injury from a latent defect in the condition of the land or facilities of which there are no warning signs conspicuously posted; and (d) committing a negligent act or omission that constitutes a proximate cause of injury, death, or damage. The Michigan Court of Appeals held that subdivisions a, b, and c in §5 of the EALA describe conduct that falls outside of the definition of "inherent risk of equine activity." Further, liability will attach under §5(d) only if that act or omission involves something other than inherently risky equine activity.

Bass v. Gopal, Inc. (South Carolina Court of Appeals, July 1, 2009), 2009 WL 1917283.

In the summer of 1999, plaintiff was staying at a Super Eight Motel in Orangeburg. One night at about 10:00 p.m., a stranger came to plaintiff's motel room door, demanded money and shot plaintiff in the leg. Plaintiff filed suit against the motel owner and franchisor for failure to provide adequate security. In opposition to defendants' Motion for Summary Judgment, the plaintiff submitted the affidavit of his expert witness, Harold Gillens. Mr. Gillens concluded that the motel was in a high crime area and that the motel security was inadequate. In connection with his affidavit, Mr. Gillens submitted a Crimecast site report, which measures the risk of criminal activity at a particular site and rates the site in comparison to national, state and county averages. This report showed the motel had a predicted crime risk of 3.69 times higher than the national average.

In support of their summary judgment motions, the defendants submitted testimony from the motel owner that he was not aware of any prior criminal activity at the motel prior to plaintiff's incident, nor was he aware of any criminal complaint filed by anyone in the general area. Further, the plaintiff, who had been staying at the motel for a few months, admitted that he had not noticed any criminal activity at the motel during that period of time.

The trial court granted the motions for summary judgment and plaintiff appealed. The appellate court affirmed that trial court's judgment on the basis that plaintiff failed to present any evidence of prior criminal activity at the motel or the surrounding area. With respect to plaintiff's expert, the court found that "although Gillens stated that a security survey and a crime analysis

should have been conducted to determine the vulnerability of the premises, there is no South Carolina law that imposes such a duty on business owners."

Retail and Restaurant Industries

Leo v. Waffle House, Inc. (GA. App. July 9, 2009), 2009 WL 1958957.

Leo was a homeless man who was drinking coffee at the Waffle House. At about 4 a.m. a Waffle House employee, Wilson, concocted a mixture of juice, hot water, lemons, sugar, ivory soap and Score dishwashing detergent. He then approached Leo, told him the concoction was a mile shake and challenged Leo to drink it. After Leo drank the mixture, he collapsed on the floor and began foaming at the mouth. He was taken to the hospital for internal injuries from the corrosive dishwasher detergent. Leo filed suit against Waffle House, alleging vicarious liability, negligent supervision and a claim of failure to intervene based on failure of Wilson's co-employee to stop Leo from consuming the concoction. The trial court granted the defendant's Motion for Summary Judgment and plaintiff appealed. The appellate court reversed in part and affirmed in part. First, the Court held that plaintiff's claim that a co-employee's failure to intervene constituted negligence on the part of Waffle House was a question for the jury and therefore reversed summary judgment on that issue; next, the Court affirmed dismissal of plaintiff's negligent supervision claim because plaintiff did not present any evidence that Waffle House knew or should have known of Wilson's reckless conduct; finally, the Court affirmed dismissal of the claim against Waffle House (vicarious liability), finding that Wilson's act was not within the scope of his employment.

Stuart v. Daiquiri Affair, Inc. (LA. 1st Cir., 5/13/09), 2009 WL 1322602.

Plaintiff was an 18 year old employee at Daiquiri Affair, Inc. After her shift ended, she remained at the bar for several hours and consumed two daiquiris. On her way home, her vehicle left the roadway and flipped several times. Testing revealed that her blood alcohol level was above the legal limit. She filed suit against Daiquiri Affair, Inc. contending that it breached its duty not to allow underage persons to consume alcohol on its premises. Daiquiris asserted immunity under Louisiana Revised Statute 9:2798.4, which provides that a motor vehicle operator found to be in excess of 25% negligent due to intoxication cannot recover damages against any other person. The trial court ruled that the statute did not apply to plaintiff's dram shop action against the bar owner. On appeal, the Court reversed the trial court's judgment, and held that 9:2798.4 does serve to preclude plaintiff's claim against the bar owner. The Court noted, however, that that statute does not protect vendors from liability for damages caused to third persons injured as result of the vehicle operator's negligence or for other injuries resulting to an underage patron that arise outside of the operation of a motor vehicle.

Wurzel v. LTR, LLC d/b/a Black Rock and Blue Café (Superior Court of Connecticut, 5/21/09), 2009 WL 1607723.

This case stems from a motor vehicle accident in which the defendant's vehicle collided with a vehicle that carried the plaintiff and his three minor children. The defendant, Derek Fatsy, was the owner/operator of Black Rock and Blue Café. Plaintiffs contend that Fatsy spent several hours at Black Rock prior to the accident and consumed "copious" quantities of gin and tonic. He had a BAC of .24% at the time of the crash. At the time suit was filed, Connecticut's Dram Shop Act required plaintiffs to give written notice to the alcohol seller within 60 days of the injury, specifying the date and time of the sale of the alcohol, the person to whom the sale was made, the identity of the person injured and the time, date and place of the injury. Here, plaintiffs did not provide timely notice, and explained that they did not because they did not know of Fatsy's alleged alcohol consumption. The Court rejected the plaintiffs' plea, and held that plaintiffs' cause of action for violation of the Dram Shop Act would be dismissed.

For a copy of any of the cases cited above, please contact Joe Hassinger at jhassinger@gjtbs.com or 504-648-6294.