AN EXCULPATORY AGREEMENT IS INVALID WHEN IT VIOLATES PUBLIC POLICY

Fact Pattern:

Plaintiff purchased a season pass at Defendant ski resort. In purchasing the pass, Plaintiff signed a form releasing Defendant from liability. He also signed a photo identification card with the same language. The release stated that Plaintiff acknowledged the inherent risk in skiing and that Defendant was not responsible for personal injury or property damage resulting from negligence, the premises conditions, resort operations, or actions or omissions of resort employees. While skiing, Plaintiff collided with a metal pole used to establish the direction of a ski lift line and was badly injured.

Question:

Can a standard signed liability waiver form be held unenforceable if it violates public policy?

Rule

A liability waiver cannot excuse an injury caused by a defendant's gross negligence, recklessness or intentional wrongful act or if the contract violates public policy.

Discussion

When a person signs a waiver before participating in a dangerous activity, it's called "expressed assumption of the risk." In that case, the person taking part in the activity expressly acknowledges that they are aware of the potential hazard. The individual will usually sign a liability waiver which states that they agree to participate in the activity despite its known risks. The assumption of risk is considered "an affirmative defense," meaning it is something that the Defense must raise in response to the claim against them and it is up to the Defense to prove that the Plaintiff has assumed the risk by signing a waiver.

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However, a standard signed liability waiver form may be held unenforceable if it violates public policy. Even a well-drafted liability release form may be void if enforcement would be contrary to public policy. In determining whether an exculpatory agreement violates public policy, the standard to be used is considering how the “totality of the circumstances of a given case” balances “against the backdrop of current societal expectations.” In this case, thousands of people are purchasing lift tickets at the ski resort each season; therefore, a legitimate public interest is implicated. A business “invitee” has the right to assume that the premises are reasonably safe for the purposes for which they are being used. The ski resort is in the best position to insure against risks by properly maintaining their premises and training their employees. It is not logical to put risks on the skiers when the resort is far better able to control and prevent hazards from occurring. Even though the Plaintiff acknowledged the inherent risks involved in skiing by signing the waiver, this should not allow the ski resort from escaping liability if they have been negligent. When considering cases involving the assumption of risk and the existence of an exculpatory document courts attempt to balance:

1) The existence of duty to the public
2) The nature of the service performed
3) Whether the contract was fairly entered into
4) Whether the intention of the parties is expressed in clear and unambiguous language

Waivers are governed by state law. In California a waiver of liability is enforceable to the extent that it requires someone to assume the risk of **ordinary negligence**. For many years, California courts favored business owners when deciding cases involving seriously injured plaintiffs who had signed liability waivers. If the waiver was deemed legally valid, alleged negligence often couldn’t keep a case alive – even if the plaintiff had died. That earlier interpretation of the law changed with the California Supreme Court’s 2007 ruling in *City of Santa Barbara v. Janeway, et al.*

Katie *Janeway* was a 14-year-old girl who died while swimming at a children’s summer camp run by the City of Santa Barbara. She was one of a group of children there who had developmental disabilities. While the young girl was being monitored by camp employees, she slipped below the surface of the water and was soon found on the bottom of the pool. She died less than 24 hours later. Her death caused her parents to file a lawsuit, claiming that all appropriate safety standards had not been fully honored.
The Janeway case now provides California’s governing legal standard for handling liability waiver cases involving parties who provide recreational opportunities to others. Even when they obtain valid, signed waivers from their customers or clients, venue owners can still be successfully sued – *if* the seriously injured plaintiff’s attorney presents adequate evidence indicating that the defendant venue owner was guilty of **gross negligence** (the defendant’s behavior represented an extreme failure to exercise what the governing law views as the proper or ordinary standard of care).

Courts will evaluate each individual waiver within the context of the commercial industry in which it's being used. Of course, even if a waiver is found to be valid, some plaintiffs' cases may still fail if the defendant's lawyer can convince the court that gross negligence was *not* present and that the plaintiff fully assumed the risk in taking part in the activity in question. Recreational venue owners nearly always allege in personal injury and wrongful death cases that they obtained a fully valid (signed) legal waiver from the customer – and that if the customer was seriously injured (or even died), the person had fully assumed the risk of their injuries when they signed the waiver form.

Assumption of the risk arguments in these cases basically rest on the claim that a defendant should never be held liable for reasonably foreseeable injuries. However, when gross negligence is deemed present, the foreseeability of a person's injuries isn't enough to fully protect a defendant from liability.

Outcome

In 'Fact Pattern', if the metal pole was sufficiently out of the way from skiers that placement of the pole was not grossly negligent injured skier would have no legal basis to obtain monitory damages. If, however, the pole was in the middle of the slope and Ski Resort did not turn off power to the ski lift at sunset and injured skier ran into the pole at dusk when there was little light, injured skier may be successful for obtaining damages for injuries because the ski resort was grossly negligent given the limited visibility at dusk and placement of pole in the middle of the slope.

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