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Public Policy Prohibits Parent from Signing Away Child's Negligence Claim

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Corporate Officers Liable for Damages

Finally, the Brokers argued that the district court erred in granting judgment against the individual corporate officers. The appellate court rejected this argument. Instead, the court used the well settled principle that corporate officers who actively participate in a tortious act are personally liable for resulting injuries to affirm the district court's decision. The court stated that since the Brokers had established their businesses specifically to interfere with contractual relations and to misappropriate airline services, and that because each defendant had actively participated in the business' activities, the individual defendants were personally responsible. The court of appeals also affirmed the district court's decision to enforce the no-sale rules, finding the Brokers liable for contract interference, and upheld the permanent injunction prohibiting the Brokers from dealing in AAdvantage awards. ❖

— Michael J. Lubeck

Public Policy Prohibits Parent from Signing Away Child's Negligence Claim

In *Scott v. Pacific Mountain Resort*, 834 P.2d 6 (Wash. 1992), the Supreme Court of Washington held that, as a matter of public policy, a parent could not waive its child's future claims against a negligent third party. The court further held that a plaintiff's assumption of the risks inherent in participation in a sports activity did not bar the plaintiff's claims against an operator who failed to maintain reasonably safe conditions. Instead, the skier who assumed the risks innate in the sport could be contributorily negligent, and thus receive a lower damage award.

Ski School Argued Parent Released Child's Claim

Twelve-year-old Justin Scott ("Justin") was a student in the Grayson Connor Ski School ("Ski School"), which conducted lessons at a commercial Ski Resort owned by Pacific West Mountain Resort ("Ski Resort"). Justin's mother completed and signed his Ski School application, which included personal information as well as an agreement to refrain from holding the Ski School liable for any injuries sustained during Justin's lessons. While practicing on a race course designed and arranged by the Ski School, Justin lost control and veered away from the course into an abandoned tow-rope shack. Justin collided with one of the shack's exposed support poles and sustained serious head injuries as a result of the accident.

Justin and his parents sued the Ski Resort and Ski School, alleging that the course was carelessly planned and positioned too close to the hazardous tow-rope shack. Not disputing the facts, the Ski School and the Ski Resort both moved for judgments as a matter of law. The Ski School claimed that the exculpatory clause in the Ski School application released the school from responsibility for its negligence. The Ski Resort asserted that Justin could not recover because he had assumed the risks inherent in the sport when he skied the course. The trial court granted both motions and dismissed the Scotts' claims. The Washington Supreme Court then granted Justin's petitions for direct review.

Parents Could Not Sign Away Child's Claims

Reviewing the language of the exculpatory clause signed by Justin's mother, the Washington Supreme Court found that the language of the clause was clear and therefore satisfactorily showed the parties' intent to shift the risk of loss away from the Ski School. The court held that the language of the release need not include the word negligence to be effective.

After finding the language of the clause effective, the court considered the validity of Mrs. Scott's release under the general Washington state rule that a clear exculpatory clause is enforceable unless it violates public policy. The court discussed whether a parent-signed exculpatory clause precluding a child's prospective cause of action violated public policy. In analyzing the issue, the court focused on cases from Washington and other jurisdictions which held that parents could not legally discharge a child's claim after an injury without a court's permission. The court reasoned that allowing parents to release their child's claims before injury would be illogical and contrary to those earlier cases. Therefore, although Mrs. Scott's signature on the contract prevented her and her husband from suing the Ski School, her signature did not preclude Justin's claim.

Ski Resort Liable for Dangerous Conditions

Since Justin himself had never signed a contract which expressly prevented him from bringing suit, the court examined whether he impliedly assumed the risk of injury inherent in the sport of skiing. The court maintained that the doctrine of implied primary assumption of the risk prohibits any recovery where the injury sustained ensues from known and appreciated risks that are common to the sport.

The court distinguished these assumed risks from those which are caused by a third party. To determine the extent of fault attributable to Justin and to the Ski Resort, the court examined Washington case law and the state's ski statute. The court referred to *Kirk v. WSU*, 746 P.2d 287 (Wash. 1987), in which the Washington Supreme Court distinguished between those risks inherent to the sport of cheerleading, and those risks caused by the negligent provision of practice facilities or improper supervision. The court in *Kirk* stressed that to the extent a cheerleader knowingly continued to practice under

dangerous conditions, she may have contributed to her injury. Under Washington's comparative negligence law, this type of risk assumption could reduce recovery but could not bar it completely. The court also considered Washington's ski statute, WASH. REV. CODE § 70.117, which imposed duties both on skiers and on ski operators, but which did not relieve operators from liability for their negligence.

Accordingly, the court noted that under Washington law, the Ski Resort had a duty to warn skiers of any dangerous condition unless that condition was so obvious as to be inescapably noticeable. At trial there was some dispute between the parties regarding the tow-shack's position in relation to the race course. The Ski Resort claimed that the shack was an obvious danger, and that therefore, the Ski Resort had no duty to warn Justin. The Scotts, on the other hand, asserted that the shack was not an obvious hazard and that it posed an unanticipated danger and an unknown risk to Justin. Noting that primary implied assumption of risk in a sports context does not release the operator from the duty to provide reasonably safe facilities, the court held that a jury must decide the extent of the Ski Resort's responsibility for the accident.

The court also found that Justin's awareness of the risks inherent in the sport of skiing did not automatically make him liable for any failure by the Ski Resort to provide safe facilities. Rather, Justin may have been contributorily negligent by knowingly participating in a race on such a hazardous course. Such contributory negligence, the court noted, would not preclude his recovery in a negligence action against the Ski Resort, but instead would reduce any damages he might recover.

Accordingly, the Washington Supreme Court reversed the grant of summary judgment for the Ski Resort, and returned the case to the trial court in order to allow a jury to decide Justin's claims against the Ski Resort. ❖

— Laura M. Zubor

Residential Re-Roofing Contract is a Consumer Product Covered by the Magnuson-Moss Warranty Act

In ***Muchisky v. Frederic Roofing, Co.,*** 1992 WL 182300 (Mo. App., Aug. 4, 1992), the Missouri Court of Appeals held that the re-roofing of a home under a written contract, which provided a warranty for the workmanship and materials, is a consumer product within the meaning of the Magnuson-Moss Act ("Act"), 15 U.S.C. § 2301. Furthermore, the court distinguished between fixtures added to an existing structure and fixtures incorporated in the creation of the structure, characterizing only the former as consumer products within the statutory definition.

Continuous Problems with the Roof

Thomas P. Muchisky ("Muchisky") contracted with Frederic Roofing Co., Inc. ("Frederic") to re-roof his home. The contract contained a twelve year, defect-free warranty on the completed roof, which guaranteed workmanship as well as materials. Frederic re-roofed the house on March 21, 1988. Subsequently, Muchisky called the contractor twice to make remedial repairs to the new roof. On August 16, 1988, Muchisky notified Frederic of his continued dissatisfaction with the roof and terminated Frederic's services, after he paid only $4,000 of the $8,272 contract price.

Muchisky then filed suit against Frederic, alleging breach of contract, breach of warranty, and violation of the Magnuson-Moss Warranty Act for breach of written warranty. Frederic counterclaimed, alleging breach of contract for the homeowner's failure to pay the contract price. The jury found in favor of Muchisky and awarded him damages of $10,000 and $11,200 in attorney's fees. Frederic then appealed to the Missouri Court of Appeals.

On appeal, Frederic asserted that the trial court erred in denying his motion for a judgment as a matter of law for the Magnuson-Moss Warranty Act count. Frederic further contended that the Act did not apply to service contracts, such as the re-roofing contract with Muchisky, but applied only to sales contracts.

Statutory Language and Federal Trade Commission Regulations Not Dispositive

The appellate court found that the Magnuson-Moss Warranty Act defined consumer product as "any tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." The appellate court also noted that House Reports indicated congressional intent to apply the statute to such real estate fixtures as hot water heaters and air conditioners, irrespective of their common law classification as realty.

The court also found that the Federal Trade Commission ("FTC"), the agency charged with administration of the Act, looked to the nature of the transaction when defining a fixture as a consumer product.

Additionally, the court relied upon 16 C.F.R. § 700.1(f), which interpreted the Act. This section states that when a consumer contracts for the construction of a home or substantial addition to an existing home, the parties are deemed to contract for construction of the integrated structure even though the materials are separately identifiable upon formation of the contract. This sec-