

Cohen v Five Brooks Stable

2/14/08

Ambiguity in Release; Assumption of the Risk

Plaintiff and her friend were riding on horses rented from the defendant in the Golden Gate National Recreation Area. An employee of defendant was acting as a guide. The plaintiff's complaint alleged the employee, knowing the horses behind him would follow and adjust their gait, suddenly caused his horse to gallop without warning to the others. Plaintiff fell from the saddle and with one foot caught in the stirrup, was dragged across the ground, sustaining injury.

Defendant filed a motion for summary judgment based on **express** assumption of the risk (AOR) stemming from a release, as well as **implied** AOR. Plaintiff acknowledged the operator of a sports facility does not have a duty to protect against risks inherent in the sport, but claimed an operator does have **a duty to use due care not to increase the risks to a participant over and above those inherent in the sport**. Since plaintiff and her friend's testimony conflicted with that of the defendant employee as to his conformance with the standard of care, she contended summary judgment should be denied.

The trial court did not address the conflict in evidence, finding instead that the Release was clear, unambiguous, and explicit, expressing an agreement not to hold the defendant liable for negligence. The trial court found that even if the defendant employee was negligent, the plaintiff assumed the risk inherent in horseback riding. Summary judgment was granted.

The First Appellate District focused on the questions of **(1)** the scope of the release, and **(2)** whether the conduct of defendant's employee was an inherent risk of recreational trail riding, or the if the employee did anything to increase that risk.

The release states that a specifically identified risk of horseback riding is that a horse may and will run without warning and without apparent cause. The release also states it applies to other unknown or

unanticipated risks not specifically identified.

The determination of whether a release contains ambiguities is a matter of contractual construction. An ambiguity exists when a party can identify an alternative, semantically reasonable, meaning of a writing. An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence. If an ambiguity as to the scope of the release exists, it should normally be construed against the drafter. (*Benedek v PLC Santa Monica* (2002) 104 Cal. App. 4th 1007)

The scope of a release is determined by its express language. The issue is not whether the particular risk of injury is inherent in the recreational activity to which the release applies, but rather the scope of the release. Here the release described several specific inherent risks of horseback riding, including the fact a horse may buck, run, kick, bite, bolt uncontrollably without apparent cause. The release goes on to state the list includes ... some, but not all, of these risks.

The release also applies to other unknown or unanticipated risks that are not specifically identified therein.

Whether the risks not specifically identified are also limited to risks inherent in horseback riding is, unclear. The Justices state the problematic language consists of the following:

I understand that the previous description of these inherent risks is not complete and the other unknown or unanticipated risks may result in **injury or death, I agree to assume responsibility for the risks identified herein and those risks not specifically identified.**

Because an interpretation of the reference in the release to those risks not specifically identified as pertaining only to unspecified risks inherent in horseback riding is semantically reasonable, **the release is ambiguous and the ambiguity must be resolved against the defendant, the drafter of the instrument.** The trial court not only improperly resolved the ambiguity in favor of the drafter, but ignored the principle that **a release relieves a defendant of the consequences of its own negligence only if it does so in clear, unambiguous, and explicit language.**

The Restatement Second of Torts states: [In order for the agreement to assume the risk to be effective, it must also appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm.](#)

The release must clearly, explicitly and comprehensibly set forth to an ordinary person untrained in the law that the *intent and effect of the document* is to release his claims for his own personal injuries and to indemnify the defendants from and against liability to others which might occur in the future as a proximate result of the negligence of the defendants.

Here, the release did not inform the releasor (rider) that it applies to misconduct on the part of the releasee (stable). Nothing in the release clearly, unambiguously, and explicitly indicates that it applies to risks and dangers attributable to the stable's negligence or that of an employee that may not be inherent in supervised recreational trail riding.

A fair reading of the release does not make clear to an ordinary person untrained in the law that its [purpose and effect](#) is to release claims for one's own personal injuries resulting from respondent's negligent acts, including misconduct that increases a risk inherent in horseback riding.

Turning to the second issue, the Appellate Court noted that although [persons involved in a sporting activity do not have a duty to reduce the risk of harm inherent in the sport itself, such persons do have a duty not to increase such inherent risks.](#) (*Knight v Jewett* (1992) 3 Cal. 4th 296).

Distinguishing *Harrold v Rolling J Ranch* (1993) 19 Cal. App. 4th 578, the Justices then found that imposition on trail guides of a duty not to endanger a rider by, without warning, inciting her horse to bolt and gallop would be appropriate. Further, the stable employee was not acting as a coach or riding instructor, but as a trail guide.

Referring to the recent California Supreme Court golfing case, *Shin v Ahn* (2007) 42 Cal. 4th 482, the Court referenced disputed issues of material fact as to whether the trail guide was [so reckless as to be totally outside the range of the ordinary activity involved in the sport of horseback riding.](#) A determination of whether the employee did or did not act recklessly within the meaning of *Knight* is necessary.

The judgment is reversed. A lengthy dissenting opinion is attached to this published case.