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News and Updates for Sports, Fitness & Recreational Businesses

Waivers and Persons-with-Disabilities: Do the Same Rules Apply?

One positive development in the world of sports in the last two decades has been the substantial increase in opportunities available for persons with disabilities to engage in active recreational activities and competitions. But during that time there have been few cases addressing the enforceability of waiver-of-liability agreements, when activity or competition involved persons with disabilities. This has raised the question of whether in such cases courts will apply the same rules regarding waivers, or impose a heightened set of rules.

Recently, the federal Tenth Circuit Court of Appeals (which is responsible for appeals from the states of Colorado, Utah, Wyoming, Oklahoma, Kansas, and New Mexico), issued a decision in a case involving a waiver and organization that provides recreational opportunities to persons with disabilities. The holding in the case is favorable for providers of recreational opportunities, because the court enforces the waiver at issue, and applies the same standards it would apply in any other waiver case. Because the Tenth Circuit Court of Appeals is a federal court that is well-respected, and there are few cases in this area of waiver law, it is likely the decision will be helpful to providers of recreational opportunities in future cases, even if the event giving rise to the case occurs outside of the Tenth Circuit.

Bad Day on the Ski Slope

Breckenridge Outdoor Education Center is a non-profit that works to provide adventure opportunities to anyone who is interested, regardless of disability or physical condition. In 2008, Kimberly Squires, a minor who had significant disabilities (legally blind with cerebral palsy and cognitive delays), was participating in a ski trip at Breckenridge. While being towed in a bi-ski by an employee of Breckenridge, a third skier intercepted the tethers connecting Kimberly to the employee. Due to the impact, the employee lost control of and contact with Kimberly, and she then went down the ski-hill uncontrolled, crashed into a tree, and sustained severe injuries.

At the Trial Court Level

In 2013, Kimberly filed an action against Breckenridge Outdoor Education Center alleging negligence and gross negligence, and that Breckenridge's release was void. Breckenridge moved for summary judgment, arguing its release barred Kimberly's negligence claim, and arguing that there was insufficient evidence of gross negligence. The magistrate judge granted Breckenridge's motion as to the negligence claim (holding the release barred the claim), and denied Breckenridge's motion as to the gross negligence claim (finding issues of fact precluded summary judgment). At trial, the jury ruled in favor of Breckenridge on the gross negligence claim. Kimberly then appealed to the Tenth Circuit court.

On Appeal: Knowing Waiver, No Fraud

Before the Tenth Circuit, Kimberly's counsel argued the waiver Kimberly's mother signed was void for two reasons. First, the counsel argued the waiver was unenforceable due to the ambiguity of its language. Under Colorado law (as in most states), for a waiver to be enforceable, the language must be clear to the intentions of the parties. Citing this, Kimberly's counsel maintained that the waiver did not express in bold enough terms the specific dangers of bi-skiing that Kimberly might encounter, such that Kimberly's mother when she signed the waiver fully understood the implications of the activity. Breckenridge, however, argued that the waiver indicated "it is impossible for [Breckenridge] to guarantee absolute safety," and indicated that the potential risks/implications of the activity included "loss or damage to personal property, injury, permanent disability, [and] fatality." As to the scope of the waiver, Breckenridge pointed to language in the waiver that indicated: "I hereby release [Breckenridge]…from any and all claims…whether resulting from negligence or otherwise, of every nature and in

conjunction with a [Breckenridge-organized] activity." The court also found it significant that the letter with which the waiver arrived indicated that, if a parent had any concerns regarding specific activities, the parent should contact Breckenridge, and that Mrs. Squires did not do that. When she signed the waiver, Mrs. Squires knew Kimberly would be skiing, and that the Breckenridge used bi-skis. Based on these facts, the court concluded that Mrs. Squires knew the risks associated with the program, and that the waiver was clear in its assertion of such risks. Therefore, the court held the waiver was enforceable.

Kimberly's counsel also asserted that the waiver was unenforceable because Breckenridge obtained the waiver through fraud. Counsel pointed to a sentence in the letter accompanying the waiver, indicating that "All of [Breckenridge]'s activities are conducted in a manner consistent with the highest standards, as defined by the Association for Experiential Education (AEE)." Counsel for Kimberly argued that statement was false (on the grounds that the AEE did not have a specific standard for bi-skiing), and argued from this that Mrs. Squires was deceived in agreeing to the waiver agreement. The court rejected this argument, holding that for the waiver to be voided due to fraud, Mrs. Squires would have needed to prove she relied upon that information when she signed the waiver, and that at the summary judgment stage she had failed to present sufficient evidence to show reliance. Therefore, the judge supported Breckenridge in both the enforceability of the waiver and the legitimacy of the procurement of the signature on the waiver.

Conclusion

The decision in *Squires* is a good one for recreational providers. It is also a good decision generally for persons with disabilities because if providers cannot shield themselves from liability associated with providing recreational opportunities to persons with disabilities, it is likely that there will be fewer organizations that are willing to sponsor and provide such opportunities, or, in the alternative, that the cost of such opportunities will become prohibitively high. The decision in *Squires* also indicates that there are multiple factors that courts take into consideration when considering whether to enforce a waiver. Providers ignore these factors at their peril.

As always, if we can be of assistance to your organization as it designs its legal liability risk management program, or with any of its legal liability agreements (waivers, indemnification agreement, etc.), do not hesitate to give us a call.

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(The information and views discussed in this article are for general information purposes only. An organization that has specific questions as to the effect the above development may have for it should discuss such with its attorney, or with an attorney who is familiar with this area of the law and the organization's specific operations or concerns.)

About Pendleton: Alexander "Sandie" Pendleton is the owner of the Milwaukee law firm of Pendleton Legal, S.C. Sandie has over twenty years of experience counseling clients involved in sports and recreational activities, including power sports activities, and is a frequent speaker and writer on recreational liability issues.

About Pendleton Legal, S.C.: At Pendleton Legal, S.C., we continue to believe the right to the "Pursuit of Happiness" is a right worth preserving. Our S/F/R Team (Sports, Fitness & Recreation Team) guides and fights for businesses and organizations that provide recreational opportunities and products, so that our clients are not overwhelmed by liability that might otherwise threaten their continued success (or even existence). Preserving the right is often not an easy or simple task, but we know this mission is an important one to our clients, and to the future of a free society. In addition to our S/F/R services, we provide legal expertise across the numerous areas of law encountered by businesses and organizations in the normal course of their day-to-day operations and growth. If you would like to explore whether we can help your organization achieve its mission, contact us**.**