

**ASSUMPTION OF THE RISK DEFENSE IS NOT AVAILABLE
TO A DEFENDANT WHO VIOLATES A SAFETY
REGULATION DESIGNED TO PREVENT ACCIDENTS**

Assumption of the Risk (AOR) used to mean that if a plaintiff walked into a situation knowing the risks and took them anyway, he couldn't sue. AOR was a complete defense. Now, it is usually only a partial defense. For example, if a plaintiff knows that walking down an unlit walkway at night carries a risk of tripping, and she trips over a log the landlord negligently left there, she will share blame with the landlord under the doctrine of comparative fault. Indeed, AOR survives as a complete defense almost only in the sports context, where courts have held that injuries are part of the game and that only intentional misconduct will allow for recovery. For the defendant to win on AOR in the sports context, he has to show that his behavior did not increase the risk normally inherent in the sport itself. This is often a fine line. Tackles, even negligently executed ones, are "part of the game" and are not recoverable. But if a defendant does something that is not normally part of the sport, there can be liability. In *Huff v. Wilkins*, the Court of Appeal recently held that when the defendant All Terrain Vehicle driver violated a Vehicle Code section and a Bureau of Land Management regulation designed to prevent accidents, he broke safety laws and exceeded the boundaries of the sport. Consequently, plaintiff did not assume a risk of injury.

In *Huff*, the defendant was a 14 year old ATV rider who collided with another rider at the Glamis Sand Dunes in Imperial County. It was found that he had violated Section 38503 of the *Vehicle Code* (minor on ATV needs a safety course and adult supervision) and a Bureau of Land Management safety rule. The court held that violations of safety regulations are by definition behaviors that fall outside the scope of risks that participants assume when they participate. The law presumes that people know the law and will follow it. It is not against the law to negligently tackle someone in a football game in a way that they should know might hurt someone. Accordingly, such negligence is an assumed risk. If there are actual laws governing behavior, however, all contestants can assume that other participants will not break the law.

Other examples of non-assumed risks include (1) that another participant has consumed alcohol, or (2) that a snowboarder has not strapped down the board. Flying skis and snowboards are generally part of the risk of skiing and snowboarding. If it happens that because someone breaks the law in not wearing the required bindings, then plaintiff will not be found to have assumed a particular risk. The defendant will instead be found to have increased the risks inherent in the normal sport as it is played within the confines of the law.

Proximate cause is another defense that can be raised when safety violations occur but do not directly cause the accident. For example, in the context of snowboarding; if there were no law requiring specific kinds of bindings and a snowboard went flying and hurt the plaintiff. If, however, the defendant was found to have violated an unrelated safety regulation prohibiting sharp tips on snowboards, but the plaintiff was hit with the side of the board and not the tip, the defendant might well be able to prevail based on assumption of the risk. Ordinarily, the risk of flying snowboards is simply part of the sport. Had the defendant

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NEW AT WESIERSKI & ZUREK

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violated a safety law that was the cause of the injury, he could not assert AOR. But if the law violated by defendant did not cause the injury, the plaintiff would not be able to use it to avoid the AOR defense.

In *Huff*, the defendant filed an MSJ based on assumption of risk in the context of recreational ATV riding. On MSJ, the burden is on defendant. The defendant in *Huff* could not prove absolutely that his violation of the statutes did not increase the risk, or was not a proximate cause of the accident. At trial, it will be plaintiff's burden to prove that the violation caused the accident. On MSJ, however, the defendant will have to prove that either the violation did not increase the risk beyond normal, or that the violation was independent of the accident.

- Joseph Miller

**PREVENTING PLAINTIFFS FROM HAVING THEIR CAKE AND
EATING IT TOO: HOW JUDICIAL ESTOPPEL MAY PREVENT A
BANKRUPT PLAINTIFF FROM RECOVERING IN A
SUBSEQUENT PERSONAL INJURY LAWSUIT**

A plaintiff's civil action may be subject to dismissal if that plaintiff successfully asserted a contrary position in the same or an earlier proceeding. This is known as the doctrine of judicial estoppel, the purpose of which is to protect the integrity of the judicial process. It is an extraordinary doctrine aimed at preventing fraud on the courts by preventing a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.

Five elements must be present and proved for judicial estoppel to apply: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (*i.e.*, the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

If a defendant can prove these five elements, judicial estoppel can be an effective tool to prevent plaintiffs, including personal injury plaintiffs, from 'having their cake and eating it too.' The law will not allow a plaintiff to successfully assert one position, whether in a bankruptcy, administrative or judicial proceeding, and then proceed to assert a contrary position later on. Imagine someone injured in an auto accident declares bankruptcy. He fails to list his potential cause of action against the other driver as an "asset." He then files a personal injury lawsuit against defendant based on the same auto accident for which he denied having a claim.

This is potentially fertile grounds for judicial estoppel. In fact, in a recent case, *Gottlieb v. Kest* (2006) 141 Cal. App. 4th 110, the defendant attempted to assert judicial estoppel in a similar situation. Plaintiff has incorporated himself and secured almost \$1 million in loans from various investors, including Kest. Plaintiff was pursuing a venture to purchase 146 acres of property near Las Vegas. When the venture failed due to a possible breach of contract by Kest, plaintiff filed for bankruptcy. In bankruptcy proceedings, the debtor must disclose all assets, including potential claims against any creditors. Sometimes debtors forget to list such claims, often out of a desire to prevent their causes of action from

passing to the bankruptcy trustee, as required by law. Similarly, in this case, plaintiff failed to disclose his potential claim against Kest for breach of contract.

Plaintiff later chose to dismiss the bankruptcy proceedings, having never filed a plan for reorganization. He then brought a lawsuit against Kest, alleging, among other things, breach of contract. Kest filed a motion for summary judgment, citing the rarely-used doctrine of judicial estoppel. Kest argued that plaintiff's failure to disclose his potential claim as an asset in the bankruptcy proceeding precluded him from asserting his claim in the subsequent lawsuit. The trial court agreed, and plaintiff's lawsuit was dismissed. However, the Court of Appeals reversed, citing the fact that the bankruptcy court never adopted plaintiff's failure to cite the civil action as an asset. The bankruptcy was dismissed without the court confirming a reorganization plan, and the automatic stay that accompanies a bankruptcy filing was not enough because it was automatic under the law and the court had not chosen to grant it. In other words, plaintiff had not met one of the required elements for judicial estoppel: the court did not adopt the first position or accept it as true.

However, plaintiff only narrowly escaped disaster in this case. Had he not dismissed his bankruptcy proceeding and had the court approved his plan for reorganization, or adopted any stipulations ignoring the potential cause of actions, it appears that defendant's summary judgment based on judicial estoppel would have been proper. Because in that event, the court would have adopted plaintiff's prior, inconsistent position. Perhaps the defendant could have helped his MSJ by obtaining a stipulated order in the bankruptcy case that forces the court to adopt plaintiff's failure to the potential cause of action as an asset. A wary plaintiff might recognize the plan and refuse to stipulate. However, some will not, and the benefit can be huge for the defendant.

The law does not permit a plaintiff to 'play fast and loose' with it or pull the wool over its eyes. And neither should a defendant. Although recent cases have undermined the applicability of judicial estoppel, it is still a potent defense if used in the right situation and with the right strategy.

- Matthew R. Silver

COURT OF APPEAL HOLDS SCHOOL DISTRICTS AND THEIR EMPLOYEES TO HIGHER DUTY OF CARE TO PROTECT STUDENTS IN CURRICULAR ACTIVITIES

In *Jane Hemady v. Long Beach Unified School District*, the California Court of Appeal held that in certain sports settings, the prudent person standard of care applies to school districts and their employees rather than the limited duty of care.

This case involved a 12-year-old student, Jane Hemady. She took a golf class to satisfy the school's physical education requirement. The only training the golf instructor, defendant Feely, had received was an hour-and-a-half seminar. During one of the classes, Feely was teaching the students the mechanics of the full golf swing. According to plaintiff, the class was "unorganized and uncontrolled, and Feely's instructions were confusing." At some point, the student in front of plaintiff appeared to be finished. Plaintiff stepped forward to place a ball on the grass. Without warning, the student in front of plaintiff swung her club back and hit plaintiff in the mouth. Feely had not given the whistle command for the person to swing, and at the time of the incident, Feely was in fact at one end of the field talking to other students.

Plaintiff sued the instructor of the golf class as well as the school district for negligence. The plaintiff argued that the prudent person standard of care was applicable. On the other hand, the defendants argued the limited duty of care applied, essentially claiming that plaintiff assumed the risk of being hit with a golf club.

As a general rule, individuals have a duty to exercise due care to avoid injury to others (*i.e.*, the "prudent person" standard of care), and may be held liable if their failure to use due care injures another person. However, there is a limited exception to this standard where dangerous conditions or conduct are integral to the sport or activity. In these settings, individuals merely owe a "limited duty" of care not to intentionally or recklessly injure a player. Under this test, a participant in an activity or sport will only be liable to other participants if he or she "intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport."

The limited liability exception to the prudent person standard of care was set forth in *Knight v. Jewett* and *Kahn v. East Side Union High School District*. There are three policy considerations for this exception. When dangerous conditions or conduct are an integral part of the sport or activity itself, the limited duty applies for the following reasons: 1) to prevent a fundamental alteration of certain sports or activities; 2) to guard against chilling a coach's role; and 3) to prevent discouraging vigorous participation in sports activities under the assumption of the risk doctrine.

To determine the applicable duty of care, it "depends on the nature of the sport at issue and the parties' general relationship to the sport." The first question the court asked was whether the injury was an inherent risk in the activity that caused the injury. If not, then the prudent person standard of care would apply because it would not require a fundamental alteration of the activity. In terms of a seventh grade physical education course in golf, the court found that being hit in the head by a golf club is not an inherent risk. "Imposing upon golfers a prudent person duty of

care to ascertain the area around them prior to swinging the golf club will not fundamentally alter or eliminate an integral part of the sport."

The second step in the court's analysis was to determine whether applying the prudent person standard would chill the coach's role in challenging the participants. The court found that applying the prudent person standard "may require school districts and coaches to evaluate the size, staffing, and organization of physical education golf classes." This however will not prevent or deter a teacher from teaching the basic mechanics of the golf swing and challenging students to improve their golf game.

Moreover, the court found that the prudent person standard of care applied because it would not discourage vigorous activity. "Requiring school officials to ensure student safety by providing additional personnel or decreasing the size of the class will not affect a student's vigorous participation." Additionally, there was no evidence that the golf class was competitive in nature.

"Historically, the California Supreme Court has applied the prudent person standard of care to determine liability of school districts and their employees for injuries to students which occurred during school hours." There is no indication in *Knight* or *Kahn* that the Supreme Court intended to overrule the long line of precedent cases by implementing the limited duty of care in certain situations. Cases such as this, in which the activity does not involve an inherent risk, do not satisfy the policy rationales for applying *Knight* or *Kahn*.

Therefore, school districts and their employees will continue to be liable for injuries to students which result from failure to use ordinary care to supervise the conduct of students. The analysis required to determine which standard of care is applied is a fact-intensive one. With this in mind, it is best to use common sense and always err on the side of caution. If dangerous conduct is not an integral part of an activity but can still be a consequence, do not presume the individual involved is assuming that risk.

Of equal importance is the issue of Jane's recovery. Her injury included a fracture to her mandible which left a two-inch scar requiring costly reconstructive surgery and loss of her lower front teeth necessitating dental implants and bone grafts. Over six years have elapsed since her injury, and she is yet to have any reconstructive surgery, bone graft, or dental implants. This raises the issue of the good faith of the insurance companies for the school district. Under California law, insurance companies have a duty to act in good faith in processing claims such as Jane's.

- Lindsie N. McBratney

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