

**RECREATIONAL RELEASES MUST SPECIFICALLY
RELEASE THE OWNER'S PREMISES LIABILITY TO
BAR SLIP AND FALL CLAIM**

Recently, in *Zipusch v. L.A. Workout*, the California Second District Court of Appeal reversed a trial court's dismissal of a recreational sports case and sent the case back down to be tried because the gym used a poorly drafted assumption of risk and release agreement. The case gives some insight into the type of release language that will be most effective to bar the widest variety of claims.

In *Zipusch* plaintiff got her foot caught on an unknown sticky substance on a treadmill, causing her to lose her balance and fall. She had previously signed a release / assumption of risk agreement that provided:

"The use of the facility at L.A. Workout naturally involves the risk of injury to yourself or your guest, whether you or someone else causes it. As such you understand and voluntarily accept this risk and agree that L.A. Workout will not be liable for injury, including ... personal injury ... resulting from the negligence or other acts of anyone else using L.A. Workout ... The member or guest will defend and indemnify L.A. Workout for any negligence except the sole negligence of the club."

The court first reiterated that "[i]n the recreational sports context, parties are free to contractually redistribute the risk" unless there is some public policy issue at issue. Any ambiguities, however, must be construed against the drafter; the same rule that applies to insurance policy interpretation. "While a release need not achieve perfection, it must nonetheless be clear, explicit and comprehensible to an ordinary person untrained in the law." Here, the court found that the release:

" ... does not release LA Workout from its own negligence. After an introductory sentence which alludes to the inherent risks of exercising ... the exculpatory clause

only contemplates injuries arising 'from the negligence or other acts of anyone else using L.A. Workout.' By itself, this clause does not clearly, explicitly and comprehensively contemplate exculpating L.A. Workout from its own negligence." The court noted that while the sticky substance probably did come from a third party there was no certainty of that and there was evidence that the club had not inspected the treadmill for 85 minutes. Thus, a triable issue of fact remained for the jury as to whether the failure to inspect constituted negligence. In other words, the release did not adequately exonerate the club from its own negligence.

The court reviewed several other cases where recreational releases were scrutinized. One of the main points that arose in these cases was that if a recreational release does not specifically mention *premises liability*, or have language broad enough to include premises liability, it will not be enforced if the participant is injured by something outside the sport that is related to the premises. For instance, in *Benedek v. PLC Santa Monica*, someone on a treadmill at a gym was injured when a poorly attached

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overhead television set fell on her while she was trying to position it. The release in that case was broad enough to cover what amounted to premises liability. "Though repositioning a television is arguably unrelated to the inherent risks of exercising, ... the plaintiff had signed an unambiguous release exculpating the health club from all injuries sustained while on the premises irrespective of whether the injury related to exercise." On the other hand, in *Leon v. Family Fitness Center*, when plaintiff was injured by a sauna bench that collapsed under him, the release was not sufficient to bar his premises liability lawsuit. The release contained general release language, but without reference to premises liability. The general release language would be taken by most people to refer to injuries that arise from the risks of the recreational activity, not those that arise from ordinary premises safety considerations.

The take-away from this case includes:

1) Recreational release waivers cannot rely on general language releasing "all claims" to bar premises liability claims or other claims that don't relate directly to the recreational activity, unless there is specific language that puts the ordinary person on notice that premises claims are included.

2) Language such as "all injuries sustained or caused while on the premises [or during the activity, including preparation such as during payment or changing clothes], whether arising from participation in the activity or not," and "including premises liability claims, assault, defamation, invasion of privacy, and any other claim arising from, during, or in connection with Participant's presence or participation" might be helpful.

3) The courts will enforce releases if there is good plain language in them that relates specifically to the types of accidents covered.

States vary as to how they interpret and enforce language in releases so the development of case law tends to be state specific. Wesierski & Zurek LLP can assist in drafting releases to increase their likelihood of being enforced with 20 years of experience litigating these releases. California adheres to many picayune rules of interpretation that often cannot be anticipated by national or out of state counsel.

- Paul J. Lipman

ENTERTAINMENT NEWS

Barry Bonds Indicted on Perjury and Obstruction of Justice

November 15, 2007 - A San Francisco federal grand jury indicted home-run powerhouse Barry Bonds. According to the five count indictment, Bonds lied to a federal grand jury in December of 2003 about his use of steroids. At that hearing, Bonds repeatedly denied that his trainer, Greg Anderson, provided Bonds with "performance-enhancing" drugs such as human growth hormones and similar products manufactured by Bay Area Laboratory Co-Operative (BALCO).

W&Z has obtained the court document. In it, portions of Bonds' testimony are cited including a portion where Bonds responds to the question of whether he took steroids that Anderson gave him: "Not that I know of." If convicted, Bonds faces up to five years on each of the four perjury counts and 10 years on the obstruction charge. Bonds is due in court on December 7, 2007. Story developing....

Red Hot Chili Peppers Sues Showtime Over "Californication"

November 19, 2007 - Rock band Red Hot Chili Peppers has filed suit in Los Angeles Superior Court, alleging Showtime and others violated federal trademark law by producing a new show called "Californication." In the court documents, the band says the song "Californication" and the album achieved "extraordinary critical and commercial recognition," and according to a statement by lead singer Anthony Kiedis, "'Californication' is the signature CD, video and song of the band's career. For some TV show to come along and steal our identity is not right." Band members want the show to stop using the name and to turn over any profits it made.

Writers Strike Affects Los Angeles Local Economy

November 21, 2007 - According to FilmL.A. Inc., a non-profit organization that handles film permits and promotes the industry, the Los Angeles local economy will lose \$20 million a day in direct production spending if the writers strike extends into December. The strike is in its third week now. The issue is between TV and film writers and major studios over pay for work that is distributed via the Internet, video clips for iPods, cellphones, DVD sales residuals and other new media in today's technology driven market. Since November 1, at 12:01 a.m., when the Writers Guild of America contract expired, there have been virtually no talks between the guild and the production companies in an effort to revive the twenty-year old deal that gave only 20% to writers for the wholesale revenues of home videos.

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LANDLORDS MUST TAKE REASONABLE MEASURES TO PREVENT TENANTS FROM COMMITTING CRIMES ON THE PREMISES

In determining a landowner's duty to alleviate the risk of a third party criminal assault on tenants and invitees, it is necessary to understand the underlying principles of negligence. Negligence embodies the concept of all persons using ordinary care to prevent others from being injured as a result of their conduct.

The court in the precedent-setting case, *Ann M.*, applied negligence law in the context of landlord-tenant law. That 1993 case held that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. This duty includes keeping common areas secure against *foreseeable criminal acts* of third parties that are likely to occur in the absence of such precautionary measures. The remaining question, however, was how a landlord was supposed to know when to secure against such risks. The court went on to explain that the duty to take affirmative action to control the wrongful acts of a third party would be imposed *only* where such conduct can be reasonably anticipated.

The line of cases following this decision created a "sliding scale balancing formula" for determining the duty of landlords in this particular type of situation. The formula calls for heightened foreseeability before imposing burdensome protective measures on landowners; in the alternative however, a minimal burden may be imposed upon a showing of a lesser degree of foreseeability.

The California Court of Appeal recently held in *Barber v. Chang* (2007) DJDAR 8751, that knowledge of even just *one* violent act is sufficiently foreseeable for a landlord to undertake one or more *minimally burdensome* protective measures. The court explained that the burden, as a matter of law, is not beyond the scope of a landlord's duty of maintenance.

In *Barber v. Chang*, the mother of the plaintiff's girlfriend, Jean King, lived in the apartment complex owned and managed by the defendant. King had an

incident with Daniel Gray, a tenant in the complex, where Gray brandished a gun at King and her daughter, who was the plaintiff's girlfriend. This incident followed a verbal confrontation that the plaintiff had with Daniel Gray previously over trivial issues such as pet droppings. The defendant received a letter from King regarding the brandishing of the weapon incident. The defendant, upon receipt of this letter, called King and advised her that he could not do anything about it, unless and until she filed a police report. The plaintiff visited the complex three weeks later and at this time Gray shot the plaintiff in the leg, kicked his tooth out, stomped the wounded leg and then placed the gun in the plaintiff's rectal area causing him to jump and then get shot at again.

The plaintiff filed a negligence action against the defendant for breaching his duties of taking reasonable action and care to protect plaintiff from harm. The defendant moved for summary judgment ("MSJ") on the grounds that he owed the plaintiff no duty of care and that he had no duty to hire security guards to prevent Gray from hurting visitors to the complex. The defendant argued that there was no reasonable security measure that should have been in place and it was an unreasonable expectation for a landlord to hire a security guard to protect a non-resident who decides to visit the premises at an unknown date and time.

The court, in denying the MSJ, used the sliding scale balancing formula in deciding that Gray's initial incident of brandishing the gun would have alerted a reasonably prudent landlord of a risk of serious injury to other tenants and visitors. The case turned on the fact that the defendant never addressed whether there were any less burdensome measures, other than hiring security guards, which he could and should have undertaken. Could he have called 911? Was there

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some less burdensome alternative? The court did not know because defendant failed to address any measures less burdensome, other than hiring security guards. Therefore, he was unable to refute the plaintiff's broadly pleaded theory of recovery.

The importance of this holding is two-fold. On a more specific level, it holds landowners to a very high duty of care, wherein they are liable for acts that arguably might not seem to be foreseeable. With the sliding scale formula, their duty is not extinguished just because something is not highly foreseeable, rather the duty changes into less burdensome methods of alleviating risks. Landowners must be aware that if they know of any hazards - human, animal, structural or natural - on their property, they will be responsible for placing into effect various methods to alleviate these hazards.

On a broader level, this case proves to be an effective refresher in summary judgment law. The MSJ is a very powerful tool for extinguishing a case very early on. As such, a defendant's burden of proof in bringing this motion must be evaluated very carefully and met at every level. As the case demonstrates, it is tactically advantageous for plaintiffs to plead theories of recovery very broadly. Defendants in turn must refute plaintiffs' arguments on as specific a level as possible. Refuting one theory, albeit successfully, without addressing other *possible* theories is a sure way to have an MSJ denied; Indeed, the whole purpose of filing such a motion is to convince the court that there are no triable issues of material fact. If even one possible theory of recovery is left uncovered, there remains at least one triable issue that the court must address. This forces defendants to carefully scrutinize all theories of recovery early on in preparing the case. At best, the case is dismissed via MSJ; At worst, defendant has analyzed the issues early on and will be prepared if and when the case goes to trial.

- Arpineh Babakhanian

New at Wesierski & Zurek

Mary H. Kim: Mary H. Kim graduated from the University of California, Riverside, with a B.A. in Liberal Studies. After graduation, Ms. Kim worked as a paralegal for a Newport Beach law firm before deciding to attend law school. She then attended the University of San Diego, School of Law, where she received the Diversity Scholarship each year, and graduated in 1998. Ms. Kim was admitted to the State Bar of California in 1998, and was subsequently admitted to the United States District Court for the Central, Southern, and Northern districts.

Ms. Kim handles civil litigation with an emphasis on insurance, employment, and business law, and is experienced in litigation, trials and appeals. Ms. Kim has also represented clients in employment matters before state agencies such as the Department of Labor Enforcement Standards. Prior to working for Wesierski & Zurek, Ms. Kim worked for defense firms in Long Beach and Santa Ana, where she practiced insurance, business, employment and products liability law.

Ms. Kim is fluent in Korean and is a member of the Orange County Korean American Bar Association.

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Already, at least two dozen shows have stopped production, including dramas such as "24," "Cold Case" and "Desperate Housewives," late-night shows and several sitcoms including "Till Death," "The Office" and "My Name Is Earl." Most TV shows are filmed in L.A., so the effect is especially acute here. According to officials, if the strike continues into next month, most of the 44 one-hour dramas and 21 sitcoms that are shot in Los Angeles will stop production entirely as the shows run out of new scripts to keep crews filming.

- Steven Ibarra

Editor

Paul J. Lipman