

2000

Jessica Hawkins through Brian and Melinda Hawkins v. Blair Peart dba Navajo Trails : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

JESSICA HAWKINS through her)
guardians. Brian and Melinda Hawkins.)

Appellant.)

vs.)

BLAIR PEART,)
dba NAVAJO TRAILS,)

Appellee.)

Case No: 20000562-SC

Dist. Ct. Case No.: 980600017

**APPELLANT'S REPLY BRIEF AND
RESPONSE TO CROSS APPELLANT'S BRIEF**

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Appellant/Cross Appellee Jessica Hawkins ("Jessica"), through her guardians, Brian and Melinda Hawkins, by her counsel of record, Brian S. King, of King & Isaacson, P.C., hereby reply to Appellee's ("Navajo Trails") brief and also file this brief in opposition to Navajo Trail's Cross Appeal.

A. THE TRIAL COURT ERRED IN UPHOLDING THE INDEMNIFICATION LANGUAGE OF THE RELEASE FORM RATHER THAN DECLARING IT UNENFORCEABLE

The indemnification language as found in the document at issue in this case ("Release Form") is unenforceable because Melinda Hawkins should not be allowed to waive the rights of Jessica, a minor child. Jessica has no quarrel with many of the legal principles concerning indemnification language, as cited in Navajo Trail's Brief. However, many of the cases relied on by Navajo Trails deal with release or indemnification contracts between two adults. They never reach the issue before the Court: whether the release and indemnification provisions found in the Release Form are enforceable against a minor child.

Likewise, Navajo Trail's analysis of Tunkl v. Regents of University of California, 383 P.2d 441 (Cal. 1963) never takes into account Jessica's minority status. Navajo Trails would have this Court analyze the Tunkl factors without any regard whatsoever being given to the fact that the Release Form is being applied to an eleven-year-old. The parties' differences as to the outcome of the Tunkl analysis is, in large part, based on that critical fact. It was also the basis for the Washington Supreme Court's decision in Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992) (*en banc*). When Jessica's minority status is

factored into the Tunkl and Wagenblast v. Odessa School Dist., 758 P.2d 968 (Wash. 1988) analysis, the issue tilts decisively in Jessica's favor.

Navajo Trails' position is untenable. Initially, Navajo Trails argues that the body of Utah case law dealing with indemnification and release provisions (developed, for the most part, in cases involving commercial and real estate rather than consumer contracts) should be applied to this case. Quite simply, Navajo Trails' position is that if the language is unambiguous and conspicuous, it is enforceable. Alternatively, Navajo Trails claims that application of the Tunkl six-factor analysis also dictates a ruling in its favor. Ignored under both arguments is the fact that Jessica was eleven years old at the time the adhesion contract was signed. Navajo Trails' arguments do not take into account the concerns of the courts and legislature of the State of Utah in protecting its children. As noted in Jessica's opening brief, pp. 14-15, these statutes and cases specifically deal with the effects of contracts that directly impact a minor's redress for personal injuries. When Jessica's status as a child is factored into the consideration, the Release Form must be invalidated.

Defendant relies on Cooper v. United States Ski Ass'n, 2000 WL 1159066 (Colo.App. 2000)¹ to support its argument. Although Cooper addresses the indemnification issue, it is factually distinguishable. The child in Cooper was seventeen, and had been ski racing for nine years. In addition, the child and his mother together made an informed decision, long

¹ Counsel for the parties in Cooper verified in a telephone conversation with Jessica's counsel that Cooper is on appeal to the Colorado Supreme Court.

before the date of the accident in that case, to sign a release form, waiving any liability claims in exchange for being able to participate in the ski competition. In contrast, Jessica was only eleven at the time of the accident and was not experienced in horseback riding. Jessica did not make an informed decision with her mother to sign the release. In addition, Jessica did not know at the time that her mother was releasing Jessica's claim and agreeing to indemnify Navajo Trails for any claim Jessica might bring.

As for Melinda Hawkins, her indemnification was not provided after due consideration and in light of a meaningful opportunity to explore other options or negotiate different contractual terms. She signed this form contract when it was presented to her, moments before she and her group were saddling up and after they had driven many miles to reach the location for the horseback ride. Like her daughter, Melinda Hawkins had little experience with horseback riding. Taking into account these factual differences, Cooper has minimal persuasive effect in this case.

Navajo Trails also argues that the Court should treat release and indemnification provisions as separate clauses and uphold the indemnification clause as valid. Jessica recognizes that an indemnification clause may transfer responsibility, while an exculpation clause waives liability. However, in the context of this case, those two clauses compliment each other in effecting a transfer of the risk of loss for Navajo Trails' negligent acts to Jessica and her parents. They work, hand in glove, to create the same outcome. Separating the two provisions in this case, as the lower court did, elevates form over substance and drives a

wedge between Jessica's interests and those of her mother. Public policy dictates that if the release language is stricken, the Court must do the same with the indemnification provision.

B. UTAH'S PUBLIC POLICY SUPPORTS INVALIDATING BOTH THE INDEMNITY AND RELEASE PROVISIONS OF DEFENDANT'S RELEASE FORM

Navajo Trails claims that Utah's extensive judicial procedures for protecting minor children in a post-injury setting, such as court review and approval of minor's tort settlement and continuing court jurisdiction over personal injury settlement trusts for minors, are simply of no relevance when dealing with a pre-injury release. Relying on Zivich v. Mentor Soccer Club, 696 N.E.2d 201 (Ohio 1998), Navajo Trails claims that parents are more susceptible to exercise poor judgment in a post-injury setting. However, the facts the Zivich court identified to justify its conclusions do not exist in this case. Contrary to the hypothetical pre-injury circumstances Navajo Trails presents, Melinda Hawkins did not have a meaningful chance to "consider the release, its terms, and to explore possible alternatives . . ." (Navajo Trail's brief, p. 21) when she was told to fill in and sign the Navajo Trails form documents before the ride was to begin. Zivich is distinguishable in other ways. Important to that court's analysis was the fact that the defendant was a non-profit soccer club that utilized mostly volunteers to carry out its activities. Zivich, 696 N.E.2d at 204-5. Conversely, Navajo Trails is a business with paid employees operating to make a profit.

Certainly in the context of the facts of this case, if it is necessary for a guardian to be appointed and a court to approve the settlement and release of a tortfeasor after injury to a

minor, no basis exists to afford less protection to a minor before the injury occurs. A parent signing a pre-injury release form does not know all the possible outcomes that could occur from the child's participation. Many injuries and risks that arise from participating in an activity are unforeseen. It should be against public policy to limit a child's right to a cause of action, before the parent and child are even aware of the cost and damage of a future injury.

C. THE COURT'S INVALIDATION OF THE RELEASE PROVISION OF THE CONTRACT SHOULD BE UPHELD

In its Cross Appeal, Navajo Trails argues that invalidating the release provisions of the contract impermissibly infringes on a parent's constitutional rights to make decisions about his or her child's care and upbringing. This constitutional argument by Navajo Trails is not only beyond this Court's reach, it is a red herring. The issue about whether invalidating the release provision impermissibly infringes on a parent's constitutional rights was never raised by Navajo Trails to the court below. It should not be considered in that context by this Court. However, to the extent this Court is willing to consider Navajo Trails' arguments for purposes of public policy considerations, it simply does not apply to the situation before this Court.

Jessica is not attempting, *per se*, to question her parents' ability to make decisions about how she is raised. She is simply striking down the attempt by Navajo Trails to exculpate themselves from liability. The case before this Court is not about Brian and

Melinda Hawkins' choices in how Jessica should be educated. It is simply about whether Navajo Trails has the ability to enforce a contract provision that violates important public policies in the State of Utah dealing with the rights of children.

Navajo Trails' arguments, and the analysis of the courts in Zivich and Cooper on this point miss the mark. Rather than presenting issues about parental rights, this case deals most directly with the enforceability of contracts that arise out of those parental choices, the consequences of which rest almost entirely on Jessica, the minor child. The focus of the case is, and should be, on Jessica, rather than her parents. Navajo Trails has little standing to press the constitutional rights of Brian and Melinda Hawkins. They are not the ones arguing that their constitutional rights have been infringed.

In any event, there is little question that even if Navajo Trails' constitutional argument is considered to its full extent, the right of parents to make choices about how their children will be raised is not unlimited. There are many other scenarios where parents enter into contracts that purport to bind their children but would nevertheless be unenforceable if presented to a court. For example, parents of an eleven-year-old girl contract with other parents of an eleven-year-old boy that the two will marry when they turn sixteen. Five years later, both children are sixteen and the parents of the boy decide to back out of the contract. No one believes that a court would enforce the arrangement if suit were brought by the parents of the daughter for breach of contract. This is true despite the fact that the parents' judgment of who would be a good mate may be better than the childrens', and there may

have been consideration exchanged for that contract. In that situation, the court rightly will have little patience for the parents' argument that the contract should be enforced. It is the child's rights on which the court would rightly focus.

The court in Scott recognized that while the freedom to contract and the parents' rights to make basic decisions about the care and maintenance of their children are important, there were countervailing public policy reasons to strike down the release. Scott, 834 P.2d at 11. In fact, Melinda's decision to sign the Release Form when it was provided, moments before the horseback ride was to begin, should not be given the same dignity or gravity as a parent's choices concerning schooling, medical treatment, and religious training. To sweep these decisions together and acknowledge all as valid and binding is to cut with a sword rather than a scalpel. The facts of this particular case, taken as a whole, dictate that the release contract be invalidated.

Lost in Navajo Trails' argument is another important public policy: parties who act negligently should be accountable for their actions. Navajo Trails wants Court approval to use its form contract to shift risk of loss from its business activities to eleven-year-olds and their parents. The effect of accepting Navajo Trails' argument is to encourage economic and social irresponsibility. There is a better way to resolve these important issues, mixed as they are with important economic and social overtones. Refusing to enforce the Release Form tells all business interests in Utah that they should accept responsibility for their employees'

negligent behavior. In fact, the socially responsible way of dealing with that inherent risk is well known and understood. It is to purchase liability insurance.

Indeed, in this case Navajo Trails is being defended and its exposure is being covered by its liability insurer, Agora Insurance. Navajo Trails' claims of economic devastation for its business activities if the release provision is not enforced ring especially hollow in light of this fact². Accepting Navajo Trails' argument in the context of these facts also leads to the perverse result that the party who escapes with no loss, Agora, is the party who is paid to accept the risk. Navajo Trails loses because it has already incurred the financial expense to cover this risk. It paid the premium to Agora Insurance before the accident ever occurred. Jessica loses because the release and/or indemnification clauses are upheld and she will have not financial recourse for her injuries.

The public policy of the State of Utah is not served by accepting Navajo Trails' argument on this point. This Court should look with disdain upon attempts by relatively sophisticated business operations to shift to individual consumers, especially minor children, the risk of their negligence when the most obvious and cost-efficient alternative is simply to procure an insurance policy to deal with the financial risk of loss due to the actions of negligent employees.

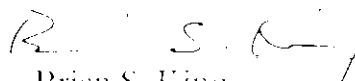
² "To find that the release form is against public policy would basically put the Defendant out of business, contrary to the desire of thousands of satisfied customers." Navajo Trails Addendum, p. 000015.

CONCLUSION

The State of Utah should be concerned in protecting its children from indemnification and release contracts. Utah's public policy supports invalidating both the indemnity and release provisions of the Release Form in order to afford minors the proper recourse in a negligence action. Navajo Trails should not be able to walk away from all liability to a minor simply because a parent had to sign the contract in order to participate. Navajo Trails should be held accountable for their negligence towards Jessica, as a minor.

RESPECTFULLY SUBMITTED this 6 day of November, 2000.

KING & ISAACSON, P.C.

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2000, I mailed a copy of the foregoing document, first class mail, postage prepaid to the following:

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