

1995

# Jeannie Harrison v. Free Spirit Recreation : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ronald E. Dalby; Goicoechea Law Offices; Attorneys for Appellant.

Stephen G. Morgan; Mitchel T. Rice; Morgan & Hansen; Attorneys for Appellee.

---

## Recommended Citation

Brief of Appellant, *Jeannie Harrison v. Free Spirit Recreation*, No. 950706 (Utah Court of Appeals, 1995).

[https://digitalcommons.law.byu.edu/byu\\_ca1/6927](https://digitalcommons.law.byu.edu/byu_ca1/6927)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

JEANNIE HARRISON,  
Plaintiff/Appellant,  
  
FREE SPIRIT RECREATION, INC.  
Defendant/Respondent.

[illegible]

Case No. ~~950349~~  
950706

**APPEAL FROM DISTRICT COURT ORDER  
DISMISSING PLAINTIFF'S CLAIMS AGAINST  
FREE SPIRIT RECREATION, INC. FILED JULY 10, 1995**

Stephen G. Morgan  
MORGAN & HANSEN  
Kearns Building, Eighth Floor  
136 South Main Street  
Salt Lake City, Utah 84101

**Attorneys for Defendant/  
Respondent**

**FILED**

DEC 22 1995

**COURT OF APPEALS**

Ronald E. Dalby  
GOICOECHEA LAW OFFICES  
4516 South 700 East, Suite 280  
Salt Lake City, Utah 84107

Attorney for Plaintiff/  
Appellant



## TABLE OF CONTENTS

Table of Contents . . . . .	i
Table of Authorities . . . . .	ii
Court Rules, Statutes and Other Authorities . . . . .	iii
Statement of Jurisdiction . . . . .	1
Statement of Issues Presented on Appeal . . . . .	2
Statement of the Case . . . . .	2
Summary of Arguments . . . . .	3
Argument . . . . .	4
A. Defendant's Motion is Premature . . . . .	4
B. This Incident Did Not Fall Within the Bounds of the Release . . . . .	5
C. Defendants Are Not Entitled to Unconscionable Provisions . . . . .	6
Conclusion . . . . .	9

## TABLE OF AUTHORITIES

### Cases:

<u>Biesinger v. Behunin,</u> 584 P.2d 801, 803 (Utah) . . . . .	6
<u>Bowen v. Riverton,</u> 656 P.2d 434 (1982) . . . . .	4
<u>Boyce v. West,</u> 862 P.2d 592 (Wash. Ct. App. 1993) . . . . .	4, 7
<u>Cain v. Cleveland Parachute Training Center,</u> 457 N.E.2d 11185 . . . . .	8
<u>Carlson v. Hamilton,</u> 332 P.2d 989, 991 . . . . .	7
<u>DeBoer v. Florida Offroaders Driver's Ass'n., Inc.,</u> . . . . 622 So.2d 1134	9
<u>Haines v. St. Charles Speedway, Inc.,</u> 874 F.2d 572 . . . . .	8
<u>Hewitt v. Miller,</u> 521 P.2d 244 . . . . .	4, 8
<u>LaFrenz v. Lake County Fair Board,</u> 360 N.E.2d 605 . . . . .	8
<u>Lee v. Allied Sports Associates, Inc.,</u> 209 N.E.2d 329 . . . . .	8
<u>Milligan v. Big Valley Corp.,</u> 754 P.2d 1063 . . . . .	8
<u>Moss v. Fortune,</u> 340 S.W.2d 902 . . . . .	8
<u>Owen v. Vic Tanny's Enterprises,</u> 199 N.E.2d 280 . . . . .	8
<u>Russell v. Park City Utah Corp.,</u> 548 P.2d 889, 891 (Utah) . . . . .	6
<u>Schutkowski v. Carey,</u> 725 P.2d 1057 . . . . .	8

Table of Authorities Continued. . .

COURT RULES, STATUTES AND OTHER AUTHORITIES

Utah Rules of Appellate Procedure

Rule 3(a) . . . . .	1
---------------------	---

Utah Rules of Civil Procedure

§78-2-2(3)(j) . . . . .	1
-------------------------	---

Other Authorities

<u>5 Corbin on Contracts</u> , 1057, 1068, 1075 . . . . .	7
-----------------------------------------------------------	---



#### STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was the Court's Order premature? A Motion to Dismiss is a matter granted with great caution in negligence cases. The appellate court has the right to review this action to determine whether the caution was taken or whether the facts presented should have been allowed to be considered by the trier of fact.

2. Did this incident fall within the bounds of the release signed by Plaintiff?

3. Does the case law cited by Defendant and relied upon by the Court exclude gross negligence and/or willful and wanton conduct?

4. Are the terms of the release clear enough to qualify as an exculpatory clause under the circumstances of this injury? Ambiguous clauses in a release are matters of fact and must be reviewed in favor of those facts being considered by the jury.

#### STATEMENT OF THE CASE

This action arises out of a "bungee" jumping incident which occurred on July 21, 1994. Plaintiff, a novice at bungee jumping, advised all parties that this was her first time. She advised the worker at the ticket booth who required that she sign a release and advised the worker on the platform. On the platform prior to jumping, she asked the attendant if she could hold on to the supporting cord. The attendant told her that she could and

specifically instructed her where to place her hands. Upon jumping, a sliding sleeve over the cord struck her hands and caused substantial and permanent damage to her fingers.

#### SUMMARY OF ARGUMENTS

1. Was the Court's Order premature? The Plaintiff had no opportunity to engage in discovery to determine standards of care in the industry, to determine if there were any governmental standards applicable to the equipment or to determine the training or state of mind of the applicable attendants.

2. Did this incident fall within the bounds of the release signed by Plaintiff? There is a substantial question as to whether this particular set of circumstances fell within the "four corners" of the release. This is a factual question for the trier of fact and not a question of law.

3. Does the case law cited by Defendant and relied upon by the Court exclude gross negligence and/or willful and wanton conduct? Plaintiff believes that the case law does exclude this type of conduct and that Plaintiff is entitled to have a trier of fact determine the level of negligence or conduct prior to a ruling on the merits.

4. Are the terms of the release clear enough to qualify as an exculpatory clause under the circumstances of this injury?

Cases believed to be determinative of the stated issues are as follows:

Boyce v. West, 862 P.2d 592 (Wash. Ct. App. 1993)

Hewitt v. Miller, 521 P.2d 244.

#### ARGUMENT

##### A. Defendant's Motion is Premature

Plaintiff had just filed its Complaint and a Motion to Dismiss at that time was premature. Plaintiff believes that discovery would have provided testimony that the actions of the employees of Defendant fall outside the normal purview of a general release. Plaintiff was entitled to obtain that discovery before a Motion to Dismiss could be entertained.

A Motion to Dismiss should be granted with great caution in negligence cases. See Bowen v. Riverton, 656 P.2d 434 (1982).

The question of the sliding sleeve on the cord which caused Plaintiff's injury, safety factors, training of employees, action of employees or agents, or whether they meet governmental standards are questions that further require discovery.

Plaintiff did not allege violation of appropriate governmental standards at this point due to that information not being in Plaintiff's hands at the time. Plaintiff is certainly entitled to enter into discovery to determine whether the equipment referred to in the Complaint was defective.

B. This Incident Did Not Fall Within the  
Bounds of the Release

Plaintiff points to the portion of the release which reads as follows:

I am hereby aware that shock cord jumping. . .is a hazardous activity. . .and I am voluntarily participating in this activity with full knowledge of the danger involved. . . .

Plaintiff will testify that following the explicit instructions of the Defendant with the resultant permanent injury to her hands was not within the purview of the "full knowledge" referred to in the release.

The question of whether the "full knowledge" referred to in the release should have included the knowledge of possible loss of use of the hands due to a sleeve on the cord is a jury question and not the basis for a Motion to Dismiss.

The same argument applies to the portion of the release which states:

. . .I shall not make a claim against. . .Free Spirit Recreation. . .for injury. . .caused. . .as a result of my participation in shock cord jumping.

Again, there is a question as to whether this type of injury was foreseeable as participation in shock cord jumping, especially given the peculiar facts of this incident. There is a question of whether this was participation by the employee which is outside of the purview of the release.

Plaintiff contends that the paragraph of the release which states:

I am in good physical health or have notified Free Spirit Recreation of any physical impairments, or limitations (i.e.; history of any heart or back or neck problems, SI joint, pelvis, eye surgery, etc.) that may affect my physical and mental well being during or after shock cord jumping activities. . . .

would give a reasonable person the basis to believe, together with a lay person's understanding of the forces involved in shock cord jumping, that these are the areas of the body at risk. There is no reason to believe that a participant would lose a finger. Interpretation is certainly an issue for the jury, especially where there was an express instruction from an employee.

The cases cited by Defendant involve injuries within the reasonable expectations of a person participating in those activities.

C. Defendants Are Not Entitled to Unconscionable Provisions

The law is well settled that the general principle of allowing persons to contract for themselves has its limits. An established exception is that if a contract is unconscionable, in whole or in part, the court may, on equitable grounds, refuse to enforce the unconscionable provisions, or it may construe the contract to avoid an unconscionable result. Biesinger v. Behunin, 584 P.2d 801, 803 (Utah); Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah);

Carlson v. Hamilton, 332 P.2d 989, 991; See also 5 Corbin on Contracts, 1057, 1068, 1075.

Allowing unfettered freedom from liability certainly falls in the unconscionable area. This would allow employees of a facility similar to Defendant to rough-house on the platform or use significantly inferior cords causing death or serious injury without fear of any responsibility.

Plaintiff reiterates and incorporates herein by reference her initial response to Defendant's Motion to Dismiss.

This is apparently a case of first impression in Utah, since the bulk of Defendant's references are from outside jurisdiction. The two Utah cases cited refer to indemnity agreements which are totally different from the present case. Review of Defendant's cites indicate other factors which the Court must consider.

In Boyce v. West, 862 P.2d 592 (Wash. Ct. App. 1993), the Court states:

Exculpatory clauses are strictly construed and must be clear if the release from liability is to be enforced.

Boyce at p. 595

The same case provides an out for gross negligence:

[Boyce] further contends there are issues of material fact whether the defendants were grossly negligent. If [defendant's] acts fell greatly below the standard established by law for the protection of others against unreasonable risk of harm, the releases are unenforceable.

Boyce, at 597

Plaintiff has continually contended that Defendant's agent, by specifically instructing Plaintiff where to put her hands, and reassuring her that no injury would result, acted at least in a grossly negligent manner, if not wanton and/or malicious. Again, this is a question for the finder of fact to determine.

The court in Hewitt v. Miller, 521 P.2d 244 stated:

The court also recognized that the release in question is not a valid defense to factually supported causes of action based upon. . . wilful and wanton misconduct. . .

Hewitt, at 245.

Plaintiff again reiterates that the evidence, through discovery, will show that Defendant's agents acted in a wilful and wanton manner, or at least were grossly negligent. Hewitt also referred to the injury as being "an inherent danger" to the sport involved. Here, the injury to the fingers could not be considered to be "an inherent danger" and therefore the release is invalid.

In Schutkowski v. Carey, 725 P.2d 1057, also conditioned the imposition of the release "subject to willful misconduct limitations" (Schutkowski, at 1059). The same holds true for Cain v. Cleveland Parachute Training Center, 457 N.E.2d 11185, Milligan v. Big Valley Corp., 754 P.2d 1063, Lee v. Allied Sports Associates, Inc., 209 N.E.2d 329, Moss v. Fortune, 340 S.W.2d 902, LaFrenz v. Lake County Fair Board, 360 N.E.2d 605, Owen v. Vic Tanny's Enterprises, 199 N.E.2d 280, Haines v. St. Charles

Speedway, Inc., 874 F.2d 572, and DeBoer v. Florida Offroaders Driver's Ass'n., Inc., 622 So.2d 1134.


Defendant cannot contend that the release excuses Defendant from gross or wilful or wanton misconduct which would fall into the category of being against public policy and be therefore an exclusion to all the cases cited by the Defendant.

#### CONCLUSION

Therefore, Plaintiff requests that the Court reverse the Trial Court's granting of Defendant's Motion on the grounds that there are material issues of fact which need to be resolved by a jury at trial, or, in the alternative, that Defendant's Motion be denied with leave re-submit their motion after discovery has been obtained.

Respectfully submitted this 21st day of December, 1995

GOICOECHEA LAW OFFICES

  
RONALD E. DALBY  
Attorneys for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I caused two (2) copies of the foregoing Brief of Plaintiff/Appellant Jeannie Harrison to be mailed, postage prepaid, on the 21st day of December, 1995, to Defendant's counsel at the following address:

Stephen G. Morgan  
MORGAN & HANSEN  
Attorneys for Defendant  
Kearns Building, Eighth Floor  
136 South Main Street  
Salt Lake City, Utah 84101

Joni Singletary