

2006

James Pearce v. Utah Athletic Foundation, dba Utah Winter Sports Park, Oscar Podar, a foreign individual or company : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Pearce v. Utah Athletic Foundation*, No. 20061030 (Utah Court of Appeals, 2006).

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JAMES PEARCE,

Plaintiff/Appellant,

VS.

UTAH ATHLETIC FOUNDATION,
dba UTAH WINTER SPORTS
PARK, OSCAR PODAR, a foreign
individual or company,

Defendants/Appellee.

Supreme Court No. ~~2001030~~-SC

District Court No. 040500322

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE THIRD DISTRICT COURT, IN AND FOR
SUMMIT COUNTY, STATE OF UTAH,
JUDGE BRUCE C. LUBECK**

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FILED
UTAH APPELLATE COURTS

JUL 06 2007

IN THE SUPREME COURT FOR THE STATE OF UTAH

JAMES PEARCE,	:	
	:	
Plaintiff/Appellant,	:	
	:	Supreme Court No.2001030-SC
vs.	:	
	:	District Court No. 040500322
UTAH ATHLETIC FOUNDATION,	:	
dba UTAH WINTER SPORTS	:	
PARK, OSCAR PODAR, a foreign	:	
individual or company,	:	
	:	
Defendants/Appellee.	:	
	:	
	:	

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ARGUMENT

I. THE TRIAL COURT FAILED TO APPLY A PROPER SUMMARY JUDGMENT STANDARD

The trial court improperly ruled Mr. Pearce was required to produce undisputed evidence of gross negligence to avoid summary judgment. The Sports Park argues the trial court's opinion should not be read literally because the standard for summary judgment is well known. *See* Brief of Appellee at 36-37. Mr. Pearce does not agree the actual language and reasoning of judicial opinions can be disregarded in favor of only a desired outcome.

The trial court set forth this standard: “[t]here must be undisputed facts in evidence relating to each element of the claim before a party may prevail.” (Appx. 10) The court continued, “the court cannot state there are undisputed facts that would show [Mr. Pearce] is entitled to relief under a theory of gross negligence.” *Id.* In the face of the court's plain statements, it is nothing more than wishful thinking to assume the trial court then disregarded its own stated standard and proceeded to properly review the evidence. Rather, the trial court constructed its opinion on a faulty foundation. The result was predictably flawed and must be reversed.

II. THE SPORTS PARK'S EVIDENCE OF THE EXERCISE OF SOME DEGREE OF CARE DOES NOT PRECLUDE A FINDING OF GROSS NEGLIGENCE

Mr. Pearce's claim of Gross Negligence is not precluded by a showing of some care on the part of the Sports Park. The Park argues the trial court properly assessed gross negligence “in light of the undisputed facts regarding UAF's actions.” *See* Brief of Appellee

at 37. In other words, the trial court properly ignored Mr. Pearce's evidence, and the inferences therefrom, and based its ruling solely on the undisputed evidence of some care produced by the Sports Park.

The Sports Park asserts it cannot be grossly negligent because it exercised *some* level of care by designing the track to Olympic standards, having an orientation, and warning passengers about an aggressive ride. *See* Brief of Appellee at 39. Under this construct, no matter how many duties were subsequently breached, and no matter how negligent the conduct, gross negligence would always be precluded by the showing of some amount of care.

However, the Sports Park's undisputed evidence of the care it took in operating the bobsled ride does not preclude Mr. Pearce's evidence of its concurrent gross negligence. For example, a driver may produce undisputed evidence he had a valid drivers license, new tires and brakes, no previous accidents, had both hands on the wheel, and was watching the road in front of him. This would not preclude a jury from finding the same driver grossly negligent for driving 100 mph through a school zone while drunk. While there is certainly evidence the driver exhibited *some* care for others' safety, it does not follow this care precludes a finding of gross negligence.

In *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917 (Tex. 1998), the heirs of Mr. Ellender recovered against Mobil for its gross negligence in exposing Mr. Ellender to benzene for thirty years without any warning or protection. Mobil sought to overturn a jury's finding of

gross negligence stating it complied with the industrial standards for benzene and took some steps to protect workers from exposure. The Court ruled, “the fact that a defendant exercises some care does not insulate the defendant from gross negligence liability.” *Id.* at 923-24.¹

Here, it is undisputed the Park inherited a bobsled track designed and tested to Olympic standards. Yet, it is also undisputed the Park opened the track to the general public without any testing, research or analysis of the effects and dangers of such a ride, or its modified sled, on members of the general public as opposed to Olympic athletes. (TR 95, 97) A jury could find this conduct indicates recklessness or even a conscious disregard of the dangers posed by the rigors of the bobsled run on the general public.

It is undisputed the Sports Park had an orientation. Yet, it is also undisputed the Park did not inform patrons the fourth seat was significantly more dangerous than the second and third positions. (TR 132) It is undisputed patrons were improperly seated in the fourth seat which further increased their risk of serious injury. (TR 131) It is undisputed patrons were not told of the substantial risk of spinal injury from riding the bobsled. (TR 133) Jay Gordon opined the Park’s injury statistics demonstrated “an extreme disregard for their patron’s health and safety.” (Appx. 31) A jury could find the Park grossly negligent in not using this orientation to inform the public in general, and fourth seat riders in particular, of the statistically overwhelming risk of spinal injury.

¹ Though not binding on this Court, it should be noted Judge Stewart of the Utah federal district court recently ruled the showing of even slight care on the part of the defendant precluded a finding of gross negligence. *Milne v. USA Cycling, Inc.*, ---- F.Supp.2d ----; 2007 WL 1698277. For the reasons set forth herein, Mr. Pearce disagrees with Judge Stewart’s ruling.

It is undisputed the Sports Park warned riders of an aggressive ride. Yet, the Park could still be grossly negligent because it had no idea how the ride's "aggressiveness" affected patrons, what health risks were involved, or how the Park's own self-imposed ignorance increased these risks.² For example, the Park still maintains it tried to "screen" passengers with "bad backs." *See* Brief of Appellee at 29, 39. The injury here, however, is not a muscle strain or a bulged disk, but rather the crushing of the vertebral bone. Unless the Sports Park had a bone scan at the starting line checking bone density and composition, they were not "screening" anybody for such an injury. A jury could determine the Park's continued ignorance of the dangers of the ride, the causes of the risk, and the inadequacy of its procedures in the face of recurring injury is grossly negligent.

In *Currid v. DeKalb State Court Probation Dept.*, 618 S.E.2d 621 (Ga.App. 2005), the court of appeals reversed summary judgment by finding sufficient evidence of gross negligence. There, defendant had Currid performing community service on the back of a garbage truck when he slipped and fell to his death. There was evidence defendant had given Currid a pair of gloves to use and had provided him the same training received by regular employees. This was evidence of *some* care on the part of the defendant, but did not preclude a finding of gross negligence. Plaintiff's estate produced evidence Currid was not given

² The Sports Park argued Mr. Pearce's listing of the Park's duties towards him was merely an attempt to "hedge [his] bets." *See* Brief of Appellee at 39. Whatever the connotation, Mr. Pearce was required to set forth the Park's duties: "Any analysis of a tort claim, then, begins with an inquiry into the existence and scope of the duty owed the plaintiff by the defendant." *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶11; 143 P.3d 283.

safety shoes which would have provided better traction, and he should not have been on the truck while it exceeded 10 mph on a busy roadway. The court ruled a jury must decide whether this evidence constituted negligence or gross negligence. “When facts alleged as constituting gross negligence are such that there is room for difference of opinion between reasonable people as to whether or not negligence can be inferred, and if so whether in what degree the negligence amounts to gross negligence, the right to draw the inference is within the exclusive province of the jury.” *Id.* at 626.

In contrast to *Currid*, the Sports Park argues the court could only look at “the facts as admitted by defendant” to determine gross negligence. *See* Brief of Appellee at 43. Again, the Park argues all evidence produced by Mr. Pearce is irrelevant in the face of the Park’s evidence it exercised some care. This is not the law in Utah. Rather, the Sports Park’s gross negligence must be submitted to a jury.

III. WHERE A PROVIDER OF A RECREATIONAL ACTIVITY KNOWS, OR SHOULD KNOW, OF A SUBSTANTIAL RISK OF SERIOUS INJURY WHICH IS NOT AN OBVIOUS OR INHERENT RISK OF THE ACTIVITY, THE PROVIDER CANNOT CONTRACT AROUND THE RISK UNLESS MEANINGFULLY DISCLOSED AND ASSUMED

A pre-accident exculpatory agreement is unconscionable where the provider knows of the substantial risk of serious injury from a danger unknown to the participants and makes no effort to meaningfully disclose the danger. Here, bobsled participants placed in the fourth seat were at a greatly increased risk of serious spinal injury. This risk was further increased

by the Sports Park's instruction to fourth seat riders to sit away from the third rider and arch their back forward to grasp the handles on the sled.

Mr. Pearce provided evidence that 1 out of every 266 riders suffered spinal injury. Even if we ignore the evidence these injuries took place in the fourth position, the Sports Park knew, or should have known by analyzing its own incident rates, that patrons were exposed to a substantial risk of serious danger.

The Park argues this was an obvious, inherent risk. The Park states Mr. Pearce "knew he would be rocketing down a [sic] icy, curvy track at 80 miles an hour and experiencing gravitational pressures of up to 5 times his own body weight." *See* Brief of Appellee at 26. From this information, the Park concludes it is "difficult to comprehend" that a patron should not expect his vertebrae to be crushed by G forces on even routine rides. *Id.*

The Sports Park offered no evidence to support its conclusion riders should have expected to have their backs broken even on a routine run. The evidence, in fact, is to the contrary. Mr. Pearce testified he never understood his back could be broken on a routine ride. (TR 131). Dr. Paul France similarly opined the dangers of the fourth seat "are not inherently obvious to a normal rider." (Appx. 42) Here, Mr. Pearce could anticipate injury from a collision, tip over or other incident, but there was no reason for Mr. Pearce to expect injury simply from riding the bobsled on a routine run.

Furthermore, the Sports Park used a modified sled and improperly instructed patrons in such a way as to increase their exposure to spinal injury in the fourth seat. (TR 132) The

risk of the fourth seat could have been alleviated by proper instruction and positioning, or even eliminated altogether by riding without a fourth passenger or using a professional brakeman. (TR 133) Therefore, serious spinal injury from even routine rides was not an obvious or inherent risk.

As for the third prong, the Sports Park did not meaningfully disclose the risk. The Park argues it warned Mr. Pearce he could suffer severe personal injury or even death. *See* Brief of Appellee at 22. Anything more specific would require “a pages-long laundry list of hypothetical scenarios.” *Id.* at 27, fn. 7. The problem with this argument is spinal injury in the fourth seat was not hypothetical, but rather statistically probable. Hypothetical injuries do not need to be disclosed. But once the provider knows or should know of the substantial risk of serious injury, he must disclose it.

Professor David Horton, in his article *Extreme Sports and Assumption of Risk: a Blueprint*, 38 U.S.F.L.Rev. 599 (2004), made disclosure the key to offering a sport such as bobsledding to the public. Professor Horton opined disclosure of injury rates is the “bare minimum.” *Id.* at 648. Only through disclosure can a patron be deemed to willingly accept the risks of the ride. “A fully-informed plaintiff’s decision to engage in an extreme sport indicates that, for him, the benefits of the activity outweigh its risks. Warnings would thus allow businesses to cater only to those people who find such activities to be reasonable. By limiting the availability of a risky activity only to those who truly prefer to face its dangers, defendant businesses would ensure that they too are operating [reasonably].” *Id.* at 607.

Here, Mr. Pearce may have chosen not to ride; he may have chosen to ride in only the second or third seats; or he may have chosen to ride in fourth seat despite the increased dangers and risk. The point is he would have made the decision. Yet, in this case, he could not make the decision because he was never given the relevant information. Accordingly, the Park's release should be deemed unconscionable.

The Sports Park argues Mr. Pearce's construct does not allow a provider to release his own negligence. *See* Brief of Appellee at 29. This is true in the case of substantial risks of serious injury caused by non-obvious, non-inherent risks. Where the patron does not know of the risk, he or she cannot make any meaningful decision regarding engaging in the activity. Likewise, where no meaningful decision is possible, it cannot be said there was a meeting of the minds on an exculpatory agreement in favor of the provider.

For example, in *Turnbough v. Ladner*, 754 So.2d 467 (Miss. 1999), the Mississippi Supreme Court rejected an exculpatory agreement where there was no meeting of the minds. As here, the agreement stated the patron assumed the risks of scuba diving and, at the end of the release, stated he released the defendant for all claims "... as a result of the negligence of any party . . ." The Court found the plaintiff assumed the inherent risks of scuba diving, but "it does not necessarily follow that he, a student, intended to waive his right to recover from Ladner for failing to follow even the most basic industry safety standards." *Id.* at 469. The Court further found, "[s]urely it cannot be said from the language of the agreement that

Turnbough intended to accept any heightened exposure to injury caused by the malfeasance of an expert instructor.” *Id.* at 470.

In *Harsh v. Lorain Co. Speedway, Inc.*, 675 N.E.2d 885 (Ohio App. 1996), a meeting of the minds was also critical. There, defendant’s release, waiver of liability, assumption of the risk, and indemnity and hold-harmless agreement was left for the jury because “factual questions exist as to whether appellant could knowingly assume the risk of injury where the inadequacy of the guardrail in front of the embankment may have been known to appellees but not communicated to appellant.” Likewise, in *Larsen v. Vic Tanney Int’l*, 474 N.E.2d 729 (Ill.App. 1984), the Illinois court ruled, “[a] plaintiff’s decision to assume the risk of injury resulting from a defendant’s conduct attains efficacy only in a context in which the plaintiff may foresee the range of possible dangers to which he subjects himself, thus enabling the plaintiff to minimize the risk by altering his conduct in order to employ a proportionately higher degree of caution.” *Id.* at 732.

Here, Mr. Pearce assumed the inherent risks of bobsledding. In deciding to ride the bobsled he considered the risks of collision, tipping over, or falling out of the bobsled and determined the ride was worth that risk. He did not, and could not, decide the ride was worth a significant chance of spinal injury on even routine runs because that was not disclosed. He did not, and could not, decide he would ride in the fourth seat despite its greatly increased risk of injury because it was not disclosed. He did not, and could not, decide to position

himself in a manner that substantially increased his risk of injury because it was not disclosed.

Mr. Pearce and the Sports Park could have no meeting of the minds where the substantial risk of serious injury from a non-inherent risk was never meaningfully disclosed. Enforcement of such an agreement in the absence of meaningful disclosure is unconscionable.

IV. MEANINGFUL DISCLOSURE OF KNOWN RISKS IS CONSISTENT WITH UTAH LAW

The meaningful disclosure of known risks is not new to Utah law. As set forth in Mr. Pearce's initial brief, Utah places the duty on landowners and service providers to discover and eliminate or warn of the dangers on their land or products. Utah similarly requires service providers to protect patrons from risk and not increase the danger of activity. Here, the Sports Park desires, by contract, to abdicate its common-law duties and shift the burden of all risks to patrons. Utah contract law could only allow such a shift where the risks are meaningfully disclosed allowing the patron to assess the risks and the terms of the contract. *Resource Mgmt. Co. v. Weston Ranch & Livestock Co., Inc.*, 706 P.2d 1028, 1043 (Utah 1985)(finding disclosure and assessment of risks intrinsic in process of contracting). Mr. Pearce's proposed construct brings nothing of the new or novel to Utah law, but rather incorporates it.³

³ The Sports Park argues only the legislature could require meaningful disclosure in exculpatory agreements. *See* Brief of Appellee at 30. This Court recently rejected this end-around. "Typically, courts cede authority over matters of policy to the political branches of

Mr. Pearce's proposed construct also does not offend the policies set forth in *Tunkl v. Regents of Univ. of California*, 383 P.2d 441, 445 (1963). Under *Tunkl*, exculpatory agreements in the arena of essential public services are unenforceable. However, it does not follow that agreements for recreational services are automatically enforceable.

Here, the circumstances surrounding the Park's suspect exculpatory agreement contain the earmarks of unenforceability mentioned in *Tunkl*. The Park offered the bobsled ride to the general public, with a decisive bargaining advantage allowing it to require a take-it-or-leave-it adhesion contract, and maintaining all control over the ride and patrons. Even if not deemed a public service, the Park's exculpatory agreement is still unenforceable because there was no meaningful disclosure of the risks of the ride to Mr. Pearce.

Yet, it cannot be conceded the Sports Park was not engaged in a public service. Though the bobsled ride is not a matter of practical necessity for members of the public, there are important distinctions between the Park's operations and the homebuilder the Sports Park relies upon from *Russ v. Woodside Homes, Inc.*, 905 P.2d 901 (Ut.App. 1995). The bobsled track was designed, built and maintained for several years by public funds. See Brief of Appellee at 3. It is open to the public in response to that funding, as an Olympic "legacy" venue. *Id.* at 4. Unlike a construction site, the Sports Park held itself out as a fun, entertaining, exhilarating "ride of a lifetime" for anyone over 16 years of age. (Appx. 47)

government. When policy considerations bear on a subject lodged firmly within the court's sphere, like the common law, it is entirely appropriate for the court to make the policy judgments necessary to get the law right." *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶20; 143 P.3d 283.

As stated in *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 799 (Vt. 1995), “when a substantial number of such sales take place as a result of the seller’s general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises.” The Sports Park’s role in providing public recreational activities highlights its need to meaningfully disclose the risks of such activities.

V. THE SPORTS PARK’S USER AGREEMENT IS UNENFORCEABLE AS WRITTEN

The Sports Park’s User Agreement is ambiguous and, thus, unenforceable as written. The Sports Park argues Part I’s definition of inherent risks included negligence such as the failure to follow safety procedures or defects in the facilities. Indeed, Part I included the risk of “failure to follow safety procedures, or to stay within ability or control.” But this simply lends itself to the reasonable interpretation it referred to Mr. Pearce’s conduct, not the Park’s, and thus had no bearing on the Park’s negligence.

Part I continued with the risk of “limits or defects in the Sports Facilities.” The Park argues this clause contractually altered Utah’s accepted definition of inherent risks by including therein defects in the facilities which could be alleviated or eliminated. *See e.g. Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1046-47 (Utah 1991)(defining inherent risks as hazards that cannot be eliminated by the exercise of ordinary care); *White v. Deseelhorst*, 879 P.2d 1371, 1375 (Utah 1994)(same). Instead of bringing clarity to Part I, the Park’s definition adds to the patron’s confusion by stating they assume only inherent risks and then changing the definition of that term, mid-clause, to include negligence. Yet, Utah law will

not imply the Sports Park meant to include its own negligence in Part I. *Bishop v. Gentec, Inc.*, 2002 UT 36, ¶ 19. Therefore, Mr. Pearce did not assume the risk of the Park's negligence under Part I.

Not to worry, the Park argues, any confusion in Part I was rectified in Part III where Mr. Pearce purportedly released "any and all liability, claims, demands, and causes of action whatsoever . . . whether caused by the negligence of releasees or otherwise." *See* Brief of Appellee at 22. This quote from the Park uses ellipses to skip over a total of thirty-five (35) words in Part III's run-on sentence. Indeed the Park, in an effort to make sense of Part III, cannot quote it without resorting to ellipses. *Id.* at 21, 22.

Strictly construed, even were Part III comprehensible, it ambiguously releases claims for a risk, i.e. the Park's negligence, which was not assumed in Part I. Due to this ambiguity, a jury could determine the Park's exculpatory contract is not enforceable against Mr. Pearce.

DATED this 6th day of July, 2007.

SILVESTER & CONROY, L.C.

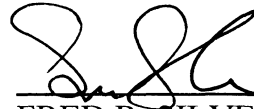


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CERTIFICATE OF SERVICE

I herewith certify that on the 6th day of July, 2007, I caused to be served, a true and correct copy of **REPLY BRIEF OF APPELLANT** placing the same via first-class U.S. Mail, postage prepaid thereon to the following:

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A handwritten signature in black ink, appearing to read "Fred R. Silvester", written over a horizontal line.

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