Franklin County Legal Journal

Vol. 24, No. 46, pp. 155-161

Wang v. Whitetail Resort

JEN WANG, Plaintiff, v. WHITETAIL MOUNTAIN RESORT, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 2006–2431

Judgment on the Pleadings and Exculpatory Clauses

1. When ruling on a motion for judgment on the pleadings, the court must determine whether, on the facts averred, the moving party is entitled to judgment as a matter of law.

2. Pennsylvania has long recognized that releases of liability in recreational settings are valid and not against public policy.

Appearances:

Anthony W. DeBernardo Jr., Esq., *Counsel for Plaintiff*

Hugh M. Emory, Esq., and Michael Daley, Esq., *Counsel for Defendant*

OPINION

Walsh, J., March 12, 2007

Defendant has filed a Motion for Judgment on the Pleadings in this lawsuit in which Plaintiff's Complaint, filed August 10, 2006 alleges personal injury arising out of a snow tubing incident at the Defendant's resort. The Defendant promptly filed an Answer and New Matter, the Plaintiff a Reply to Defendant's New Matter and then both parties amended their last two pleadings. The pleadings are now closed.

When ruling on a motion for judgment on the pleadings the court must determine whether, on the facts averred, the moving party is entitled to judgment as a matter of law. Fowkes v. Shoemaker, 661 A.2d 877, 878 (Pa. Super. 1995). The motion is to be granted only in those cases in which, upon the pleadings and documents properly attached, it appears that there are no material issues of fact, but rather a question of law, which is ripe for decision. Id. In conducting its inquiry on motion for judgment on the pleadings, the court should confine itself to the pleadings themselves and any documents or exhibits properly attached to them. Hammerstein v. Lindsay, 655 A.2d 597 (Pa. Super. 1995).

The averments of Plaintiff's Complaint which are material to our resolution of Defen-

dant's Motion are set forth in their entirety as follows:

> 4. On or about February 18, 2006, the plaintiff and her fiancée, Matt Yeazal snow tubed down a hill at defendant's business coming to a stop at the bottom of the hill.
> 5. Upon dismounting the tubes, plaintiff and her fiancée joined hands, preparing to walk away from the slope when an employee, agent and workman of the defendant yelled out to plaintiff and her fiancée instructing them to immediately proceed to the employee's right (plaintiff's left).

6. At the time the employee, agent and workman of the defendant instructed the plaintiff and her fiancée as to the direction to proceed, there was general confusion at the bottom of the hill and the plaintiff and her fiancée believed that the best way to leave the bottom of the hill was to follow the directions of the defendant's agent.
7. Plaintiff and her fiancée followed the instructions and proceeded immediately to their left, causing them to walk into the path of other snow tubes coming down the hill, resulting in the plaintiff being struck by a snow tube and violently thrown to the ground face first, suffering the injuries and damages hereinafter outlined.

Complaint, Paragraphs 4 through 7.

In its Answer, the Defendant denied each of these allegations and deemed them to be at issue pursuant to Pa. R.C.P. 1029. In its New Matter, the Defendant alleges that the Plaintiff signed a document titled "Whitetail Adventure Tubing Release and Assumption of Risk Agreement" ("Agreement") and claims that by virtue of that Agreement, the Defendant has been released from any liability for the claims asserted in this litigation. Defendant attached to its Answer and New Matter a clear copy of the Agreement and we have reproduced it in this Opinion.

The parties briefed the Defendant's Motion and we held argument on March 1, 2007. The matter is now ripe for disposition.

The Defendant has properly and accurately characterized the question before the Court: Is Plaintiff's claim barred based upon the Release she executed that releases Whitetail from any and all liability for injuries sustained at the snow tubing facility, regardless of any negligence on the part of Whitetail? The law in Pennsylvania is that such "exculpatory releases are to be construed strictly against the person or party sought to be released thereby, but that such exculpatory releases are not automatically void as against public policy." Forbes v. Ski Roundtop Operating Corp., No. 2001-SU-0043-01 (York Co. 2001), aff'd, No. 1386 MDA 2001 (Pa. Super. 2002). The Pennsylvania Supreme Court set forth a test to determine whether an exculpatory clause is valid: (1) the release must not contravene any policy of law; (2) it must be a contract between individuals relating to their private affairs; (3) each party must be a free bargaining agent; and (4) the release agreement must express the intent of the parties with the utmost particularity. Zimmer v. Mitchell & Ness, 385 A.2d 437 (Pa. Super. 1978), aff'd 416 A.2d 1010 (Pa. 1980).

Pennsylvania has long recognized that releases of liability in recreational settings are valid and not against public policy. Id. Releases have been upheld in winter recreational cases and other recreational settings on numerous occasions. See Mazza v. Ski Shawnee, Inc., 74 Pa.D.&C.4th (Monroe Co. 2005), Seaton v. East Windsor Speedway, Inc., 582 A.2d 1380 (Pa. Super. 1990), Kotovsky v. Ski Liberty Operating Corp., 603 A.2d 663 (Pa. Super. 1992), allocatur denied, 812 A.2d 1230 (Pa. 2002). We do not believe that prongs (2) and (3) are at issue in this case.

Prong (4) of the test requires us to review the Release in order to determine whether the agreement expressed the intent of the parties with the utmost particularity. Defendant attached the Release & Assumption of Risk Agreement that Plaintiff signed to their Answer as Defendant's Exhibit C. The Release & Assumption of Risk Agreement is attached as an exhibit at the end of this Opinion.

The Release signed by Plaintiff clearly, unambiguously, and conspicuously released Defendant from any liability for Plaintiff's accident. The Release is noticeably titled "RELEASE & ASSUMPTION OF RISK AGREEMENT." The release explicitly states that snow tubing contains inherent and other risks that can cause serious and even fatal injuries. The Release plainly enumerates a long list of the risks involved with snow tubing. Included in this list are collisions with other tubes and tubers. The Release also states that if the patron does not agree to the risks and agreement not to sue, she will not use the tubing facility at Whitetail Mountain Resort. The Release states in capital letters that the releasor agrees not to sue and will release Whitetail from "any and all liability" for injuries "related to my use of the tubing facility" even if the contention is that such injuries are the result of "negligence on the part of Whitetail." We believe that the risk (of a collision with another tube or tuber), which resulted in Plaintiff's injury, was expressed with the utmost particularity in the document that Plaintiff signed before using the tubing facility at Whitetail Mountain Resort.

Plaintiff, on the other hand, asserts that there are three (3) independent reasons why Defendant's Motion for Judgment on the Pleadings should be denied. First, the above quoted allegations concerning conduct of the Defendant were not within the contemplation of the parties when the Release was signed by the Plaintiff as required by the Pennsylvania Supreme Court case of Wanger v. Zeigler, 424 Pa. 268, 226 A.2d 653 (1967). Second, pursuant to Restatement (Second) of Torts, §323, Defendant's agent undertook an independent duty to direct the Plaintiff during confusion at the base of the slope after the tubing event was at an end. Third, the recent case of Chepkevich v. Hidden Valley Resort, LLP, 2006 WL 3258583

(Pa.Super.) demonstrates that factual issues remain. See Plaintiff's Brief at Page 3.

We will now discuss each of the Plaintiff's specific contentions.

A. The allegations concerning conduct of the Defendant were not within the contemplation of the parties when the Release was signed by the Plaintiff.

Plaintiff's counsel argues that the timing of the incident in the instant case distinguishes the facts from those of the cases cited above. Specifically, Plaintiff's Complaint attempts to characterize the timing of the incident as occurring after the Plaintiff had stopped snow tubing thus taking it out of the contemplation of the parties. Plaintiff argues that her injuries occurred after the downhill tubing event had been completed, when she dismounted the tube, and joined hands with her fiancée in preparation of walking away from the tubing slope in the direction Defendant's employee instructed her to proceed. We find Plaintiff's argument to be unpersuasive.

The Supreme Court of Pennsylvania addressed a very similar issue in Hughes v. Seven Springs Farm, Inc., 762 A.2d 339 (Pa. 2000). In Hughes, the plaintiff was in the process of propelling herself towards the ski lift at the base of the mountain following a downhill run when she suffered injuries after colliding with another skier. Id. The plaintiff in Hughes made the argument that "she was not in the process of skiing downhill" at the time of the incident. Id. In reaction to this argument the Supreme Court stated:

> In order to accept this argument, this Court would have to interpret … the sport of downhill skiing in an extremely narrow, hyper-technical manner. This we decline to do.
> …
> Obviously, the sport of downhill skiing encompasses more than merely skiing down a hill. It includes those other activities directly and necessarily incident to the act of downhill skiing. Such activities include boarding the ski lift, riding the lift up the mountain, alighting from the ski lift, skiing from the lift to the trail and, after a run is completed, skiing towards the ski lift to start another run or skiing toward the base lodge or other facility at the end of the day.

Id.

The Hughes Court went on to say that:

> To accept appellee's argument that one who is not at the precise moment skiing "down" a hill is not engaged in the sport of downhill skiing would require an entirely artificial and unrealistic view of the activity. Under appellee's theory, a skier who has temporarily stopped in the middle of a slope would no longer be engaged in the sport of downhill skiing. Such a tortured and artificial interpretation of the … sport would defy common sense and lead to absurd results.

Id.

While we understand that snow tubing and skiing are different activities, we believe that the two recreational activities are nearly indistinguishable for purposes of this case. Therefore, when Plaintiff dismounted her snow tube in preparation of leaving the slope for the day, she was still participating in the sport of snow tubing. Defendant's employee was at the base of the slope doing his job by directing patrons to exit the base in a certain direction. We believe the actions of Plaintiff and the Defendant's employee are very common during this type of winter activity and were clearly in the contemplation of the parties when Plaintiff signed the Release and Assumption of Risk Agreement.

B. Pursuant to Restatement (Second) of Torts, §323, Defendant's agent undertook an independent duty to direct the Plaintiff during confusion at the base of the slope after the tubing event was at an end.

Plaintiff's counsel would have the Court apply Section 323 of the Restatement (Second) of Torts which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to

> exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increased the risk of harm or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts §323 (1965).

Section 323 of the Restatement (Second) of Torts has long been recognized as part of the law of Pennsylvania. Jones v. Montefiore Hospital, 431 A.2d 920, 923 (Pa. 1981). See also Hamil v. Bashline, 392 A.2d 1280, 1286 (Pa. 1978). Based upon that section of the Restatement (Second) of Torts, Plaintiff argues that in light of the Release form, Defendant undertook the obligation of rendering service to Plaintiff after she had finished snow tubing by directing her to exit the bottom of the hill in a particular direction, and that Defendant performed this obligation in a negligent manner in that its employee directed her into the path of an oncoming snow tuber and that Plaintiff suffered injuries as a result of that directive.

The language of Section 323 of the Restatement (Second) of Torts clearly creates a duty and the Plaintiff alleges that Defendant breached the duty. By relying on this section of the Restatement, Plaintiff's cause of action still squarely sounds in negligence. We have already analyzed the Release which states in capital letters that the releasor agrees not to sue and will release Whitetail from "any and all liability" for injuries "related to my use of the tubing facility" even if the contention is that such injuries are the result of "negligence on the part of Whitetail." Consistent with our earlier analysis, we find that negligence on the part of the Defendant had been specifically released when Plaintiff signed the Release and Assumption of Risk Agreement.

C. The recent case of Chepkevich v. Hidden Valley Resort, LLP, 2006 WL 3258583 (Pa.Super. 2006) demonstrates that factual issues remain.

Plaintiff believes that notwithstanding the above, the Chepkevich case serves as an independent basis to permit this case to go forward. We disagree. In Chepkevich a minor was attempting to board a chairlift and because of his small size, his aunt asked the operator to slow the lift down so that she and her nephew could board safely. The lift operator allegedly entered into a verbal agreement with the aunt that he would stop the lift to allow the child to load. According to the aunt, the operator did not stop the lift, and his failure to stop the lift caused the accident. The lower court granted summary judgment on behalf of the defendant based on a release from liability form signed by the plaintiff. The Superior Court reversed and remanded the case, finding factual issues remained. See Chepkevich, *supra*.

The Chepkevich court specifically pointed out that the facts of that case establish a second contract had been entered into when the lift operator agreed to stop the lift. Id. Plaintiff argues that the independent communication from Defendant's employee to Plaintiff forms a second contract that supersedes the Release and Assumption of Risk Agreement. Again, we disagree. In the instant case, we simply have Defendant's employee at the bottom of the hill directing tubers to the exit at the base of the slope. We do not find Chepkevich to be applicable in this case because there is no evidence of a subsequent agreement that would have revoked or altered the terms of the Release and Assumption of the Risk Agreement.

Having fully considered the pleadings, with attachments, as well as the arguments and briefs of the parties and the law, we will grant Defendant's Motion for Judgment on the Pleadings.

ORDER OF COURT

Now this 12th day of March 2007, the Court having reviewed Defendant Whitetail Mountain Resort's Motion for Judgment on the Pleadings and Brief, Plaintiff's Response and Brief, the pleadings, and the applicable law, it is hereby ordered that Whitetail Mountain Resort's Motion for Judgment on the Pleadings is granted.