

WASHINGTON CASE UPDATE

Those who Sign Pre-injury Releases Risk Running into a Huge Problem

case in point...

From the desk of Kyle Riley: Contracts that include release and waiver provisions can effectively insulate a party from claims of negligence. These contracts are particularly useful to a proprietor of recreational activities, as there are numerous ways patrons can injure themselves while engaged in such activities. Two issues that can arise are (1) whether the terms of the release are enforceable and (2) whether the release violates public policy. A recent case is instructive on how Washington courts approach releases involving a recreational activity in which adults participate.

Claims Pointer: A release from liability for personal injury is likely enforceable when it is easy to read and set apart from other language, when it deals with a recreational activity in which adults participate, and when it does not release the proprietor of the activity from gross negligence. As such, those who participate in recreational activities, such as running relays, can literally run into a problem when signing pre-injury waivers.

Johnson v. Spokane to Sandpoint, LLC, 176 Wash. App. 453 (2013).

Spokane to Sandpoint promotes a long-distance relay race from Spokane to Sandpoint, Idaho, involving teams running a 185 mile course over two days. The course is not closed to public traffic. When registering online, the runners must electronically acknowledge a release of liability and waiver, which states:

I understand that by registering I have accepted and agreed to the waiver and release agreement(s) presented to me during registration and that these documents include a release of liability and waiver of legal rights and deprive me of the right to sue certain parties [...] I have acknowledged that I have both read and understood any waiver and release agreement(s) [...] as part of the registration process and accept the inherent dangers and risks which may or may not be readily foreseeable, including without limitation personal injury [...] arise from participation in the event.

Robin Johnson ("Johnson"), an attorney, registered online for the 2010 Spokane to Sandpoint race and acknowledged the above release, in addition to agreeing to "waive and release Spokane to Sandpoint ... from any and all claims or liability of any kind arising out of my participation in this event, even though that liability may arise out negligence or carelessness on the part of persons on this waiver." Johnson read the agreement carefully and understood the terms.

Spokane to Sandpoint provided a race handbook to Johnson, explaining all aspects of the race, including crossing public highways and train tracks.

The fourth leg of the race crossed a highway and a sign was posted on the intersection road which read "caution crossing highway." Signs were posted along the race route informing drivers that runners were running along the race route roads.

Madilyn Young ("Young") saw Johnson continue across the highway without looking for cars. Young was unable to stop in time to avoid hitting Johnson, who, as a result, suffered severe injuries. Johnson and her husband ("the Johnsons") sued Spokane to Sandpoint, Young, and her parents. The Johnsons dismissed their claims against Young and her parents after a settlement. Spokane to Sandpoint sought summary judgment, arguing the pre-injury waiver and release agreed to by Johnson was conspicuous, not against public policy and that the Johnsons lacked evidence of gross negligence which was necessary to defeat the release. The trial court granted the motion and the Johnsons appealed.

On appeal, the Johnsons argued that the the release and waiver signed by Johnson was unenforceable because it was ambiguous, against public policy, and because Spokane to Sandpoint was grossly negligent. The Washington Court of Appeals held that the release and waiver were clear and unambiguous, that its enforcement was not against public policy and that the Johnsons did not show that Spokane to Sandpoint was grossly negligent.

The court explained that the waiver was unambiguous because the release language was either italicized, in all capital letters or both, the document was conspicuous with a header that read, "WAIVER AND RELEASE OF LIABILITY,



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ASSUMPTION OF RISK AND INDEMNITY AGREEMENT,” and the release repeatedly warned Johnson that she was giving up her legal rights by signing it. Johnson also noted in her deposition that from a “legal perspective,” she understood that the release would insulate Spokane to Sandpoint from liability for any injuries she suffered during the race.

The court evaluated the six factors in determining if the pre-injury release violated public policy: (1) whether the release concerned an activity that should be publicly regulated, (2) whether the party enforcing the release is performing an important public service, (3) whether all members of the public participated in the activity, (4) whether the service provided was so essential that the enforcing party had an unfair bargaining advantage, (5) whether the release left the party signing it with a choice as to whether or not to enter into the agreement and (6) whether the party seeking to enforce the release controlled the manner in which the public obtained its services. As applied to the facts of the case, the court explained that 185-mile relay races are not regulated, Spokane to Sandpoint was not performing an important public service, not all members of the public participated in relay races, Spokane to Sandpoint had no control over how Johnson ran the race, there was no inequality of bargaining power since Johnson could have chosen not to participate and could have selected a different event, and while Spokane to Sandpoint set up the course, it did not control the manner in which Johnson ran the race.

The court further explained that the Johnsons offered no evidence that Spokane to Sandpoint was grossly negligent, as it marked the roadways to warn both drivers and runners of danger and provided a handbook to each runner about crossing busy highways.



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