

Email Legal Alert

December 28, 2006

Chew On This!

Leibel v. Sandy Springs Historic Community Foundation, Inc.

**(Concert Patron Slipped and Fell on Gum Balls That Had Fallen From
Sweet Gum Tree; Facility Did Not Have a Duty to Remove the Naturally
Occuring Condition)**
(Georgia)

An injured concert patron brought a premises liability action against an operator of a concert house for injuries sustained when she slipped on gum balls that had fallen from sweet gum trees surrounding a parking area. The facility operator filed a motion for summary judgment, which was granted by the trial court, and the patron appealed. On appeal, the court held that the operator owed no duty to the patron to remove the natural accumulation of gum balls that fell from the trees. There was no evidence that the natural accumulation of the gum balls from the sweetgum trees onto the grassy area off the paved surface of the roadway had become a maintenance problem. Additionally, there was not any evidence that the accumulation was such as to have put the operator of the premises on notice of any hazardous or defective condition that would have been discoverable even on reasonable inspection.



**Not Exactly The Type of Water Park
Ride Experience She Was Searching For**

Dickerson v. Guest Services Company of Virginia

(Amusement Park Patron Slipped and Fell on Wet Stairs in a Restaurant; Wet Stairway Was Not a Hazardous Condition)

(Georgia)

A patron filed a negligence action against an amusement park for injuries that she suffered when she slipped and fell on wet stairs at a restaurant at the amusement park. The park filed a motion for summary judgment, claiming that the stairway did not constitute a dangerous condition. The trial court granted the motion and the patron appealed. On appeal, the court held that: (1) the wet step, that was wet as a result of tracked in rain, was not a hazardous condition, and (2) the fact that the wet step was inside a building and was not directly exposed to rain did not preclude a finding that the wet step was not a hazardous condition. The park's merchandising manager submitted an affidavit stating that he knew of no other slip and fall incidents on those steps and no other complaints or concerns about them. He also stated that employees at the restaurant routinely inspected the premises to ensure that they were safe, and that supervisors also inspected the premises at least once per hour during operating hours.

The court explained that in a premises liability case, proof of a fall, without more, did not establish the proprietor's liability. Instead, the proprietor could be liable only if he had superior knowledge of a condition that exposed an invitee to an unreasonable risk of harm. The plaintiff contended that the park's failure to provide floor mats to absorb water tracked into the building was evidence of negligence precluding summary judgment. However, the court explained that a proprietor's failure to place mats on the floor on a rainy day was not negligence because patrons were aware of weather conditions and could plainly see that no mats were present.

Court Gives Defendant the Bird[ie] in Badminton Injury Case

Rosenbaum v. Bayis Ne'emon, Inc.

(Badminton Player Slips Into Hole in the Ground During Game; Risk of the Condition Not Assumed by Player)

(New York)

A badminton player brought a personal injury suit against a property owner for injuries that he sustained when his foot slipped into a hole while playing badminton. The trial court denied the owner's motion for summary judgment based upon assumption of the risk, and the owner appealed. On appeal, the court affirmed the ruling, holding that the property owner failed to establish

that a badminton player assumed the risk of the injury-causing event. The court explained that the doctrine of assumption of risk will not serve as a bar to liability if the risk is "unassumed, concealed, or unreasonably increased." The defendant property owner failed to make a prima facie showing of entitlement to judgment as a matter of law. The record indicated that at least a portion of the subject hole was concealed by an object which had been described by witnesses as being either a cesspool cover or a manhole cover and, as such, was not readily observable. Therefore, it could not be concluded as a matter of law that the plaintiff assumed the risk of the injury-causing event.

Not So Happy Trails

Austin v. Bear Valley Springs Association

(Horse on Trail Spooked by Nearby Dogs; Community Association May Have Failed to Enforce Covenants and Restrictions.)

(California--UNPUBLISHED*)

The plaintiff was a resident (and dues paying member) of a community managed by the Bear Valley Springs Association ("the Association"). She was riding a horse along an equestrian trail maintained by the Bear Valley Springs Association ("the Association"). The Reimers owned property next to the trail and kept dogs on the property. A fence separated the Reimers' property from the trail. As plaintiff was riding on the trail, the Reimers' dogs ran up to the fence and barked, spooking the plaintiff's horse and causing him to be thrown to the ground. The plaintiff filed suit against the Association and the Reimers. The Association moved for summary judgment, which was granted by the trial court. The trial court found that (1) California *Civil Code* Section 846 immunized the Association from liability, and (2) even if the protections afforded by *Civil Code* Section 846 do not apply, the Association owed no legal duty to plaintiff to take any action to prevent the Reimers' dogs from charging the fence and barking at horses passing by on the equestrian trail maintained by the Association. *Civil Code* Section 846 provides a limitation on liability for private landowners that allow "others" to access their undeveloped lands for recreational purposes "for no consideration."

The plaintiff appealed as to both of the trial court's conclusions. On appeal, the court determined that (2) the Association's motion failed to present undisputed evidence establishing *Civil Code* Section 846 immunity for the Association. There was an issue as to whether the plaintiff would be considered within the definition of "others" under Section 846 since the plaintiff was a dues paying member of the Association. There was also an issue as to whether the statute applied because the plaintiff paid member dues to the Association, which could potentially be considered "consideration." The court also determined that (2) the Association failed to present undisputed evidence

showing that the Association owed no legal duty to plaintiff in terms of the Reimers' dogs. In its motion, the Association failed to directly address the plaintiff's allegations that the Association was negligent in failing to comply with the development's Covenants and Restrictions regarding "noxious or offensive activity" and animal maintenance. As such, a triable issue of material fact existed.

Bringing New Meaning to the Term "Slice"

Bowman v. McNary

(High School Golfer Whacks Teammate in the Head with Golf Club During Match; Blinded Teammate Barred From Proceeding With Claim Against Golfer and School; "Incurred Risk" Survives for Government Entities.)

(Indiana)

The parents of a minor brought an action against a school and their daughter's golf teammate after the daughter was struck in the head by the teammate's club, which left her blind in one eye. The trial court granted summary judgment in favor of the school and the teammate, and the parents appealed. On appeal, the court held that: (1) the student golfer was barred from proceeding with a claim of negligence against the golf teammate based upon primary assumption of the risk (co-participants in a sporting activity); (2) the golf teammate's conduct was not recklessly negligent when she swung her club and accidentally hit teammate in her head; and (3) the student golfer was barred by doctrine of "incurred risk" from proceeding with a negligence action against the school.

Under Indiana law, "incurred risk" was a conscious, deliberate, and intentional embarkation upon a course of conduct with knowledge of attendant circumstances. It required more than the general awareness of a potential for mishap. "Incurred risk contemplate[d] acceptance of a specific risk of which the plaintiff has actual knowledge." A finding of incurred risk demanded a subjective analysis focusing upon the actor's actual knowledge and voluntary acceptance of the risk. Incurred risk, however, did not require that the actor had precise foresight that the particular accident and injury that in fact occurred was going to occur. With the passing of the Indiana Comparative Fault Act, "incurred risk" essentially no longer existed as it was subsumed by the concept of fault in the comparative fault scheme. However, primary assumption of the risk survived the adoption of comparative fault as a complete defense to liability in the context of sports injuries caused by co-participants in sports activities.

The plaintiff argued that she should be able to pursue her claim against the school because, unlike co-participants in a sporting activity, there was "a duty on the part of school personnel to exercise ordinary and reasonable care for the safety of the children under their authority." However, the Bowman court recognized that Indiana's Comparative Fault Act does not apply to a governmental entity, such as the school. Therefore, the earlier determinations that that "incurred risk" could not be a complete defense to a negligence action did not apply to the school. As such, if the plaintiff incurred the risk of injury as a matter of law, it could be (and was) a complete bar to a negligence action against the school.

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* This case is not binding legal authority and should not be cited in legal briefs.

For more information or additional analysis on these and/or others cases, please contact us.

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