Jim's Perspective…

Assumption of Risk in Civil Tort Claims

The state high school rodeo competition was held at the Adams County Fairground at Hastings, Nebraska, starting June 10, 2022. Being the insurance attorney guy that I am, when I read about this rodeo competition, I immediately thought about, not horses, but, instead, the legal doctrine of assumption of risk.

Assumption of risk prohibits a plaintiff from seeking damages on the basis that the plaintiff knew of a hazardous condition and willingly exposed him or herself to it. Essentially, the defendant is claiming that the plaintiff knew the risk involved but took the chance of being injured anyway. In order to use the assumption of risk defense successfully, the defendant must demonstrate:

- ★ The plaintiff had actual knowledge of the risk involved; and
- ★ The plaintiff voluntarily accepted the risk, either expressly through agreement or implied by their words or conduct.

The idea is that if a plaintiff has assumed the risk, the defendant does not owe any legal duty to the plaintiff. The Hastings rodeo reminds me of an old Nebraska Supreme Court case involving a rodeo. The case is Burke v. McKay, 268 Neb. 14, 679 N.W.2d 418 (2004). Burke, age 18, participated in a rodeo at Madison, Nebraska in May, 2000. He was injured when the horse he was riding, in a bareback horse riding event, bucked over backward trapping Burke between the body of the horse and the ground. Since Burke was still a minor, his mother brought a tort negligence lawsuit against McKay Rodeo Company and the Nebraska High School Rodeo Association (NHSRA). At the district court level, the court determined that Burke had assumed the risk of injury as a matter of law, and entered summary judgment in favor of all defendants. Burke appealed, and the case ended up before the Nebraska Supreme Court.

On the day of the Madison rodeo, the draw for the bareback event was posted about 2 hours before the competition began. Upon checking the posting, Burke discovered that he had drawn a horse designated as "No. 18." The evidence submitted at trial showed that Burke remembered this horse from a May, 1999 rodeo in O'Neill. At the O'Neill rodeo, Burke had witnessed horse No. 18 go over backward or "flip" onto himself. Burke also testified at trial that he was concerned about riding horse No. 18 because of the O'Neill incident. Burke talked to another contestant about horse No. 18 who said he had seen this horse "buck out" but that the horse did not go over backward. Burke's father also saw horse No. 18 flip over at the O'Neill rodeo, but he did not realize horse No. 18 in the Madison rodeo was the same horse that flipped at O'Neill. However, he finally realized this was the same horse as it was coming into the chute for Burke's ride. At that point, the father did nothing to stop the bareback ride. Horse No. 18 was a horse provided at the O'Neill rodeo by the McKay Rodeo Company, and McKay knew of the bucking incident at O'Neill.

The Nebraska Supreme Court, in reviewing the evidence submitted at trial, summarized application of the assumption of risk defense as follows:

The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. On this basis, the court then said:

> Our primary inquiry in this regard is whether Burke knew of and understood the specific danger involved in riding horse No. 18 in the Madison rodeo. The undisputed evidence is that horse No. 18 fell backward onto its rider on only one previous occasion, at the O'Neill rodeo. Burke and his father were present and witnessed the incident and were aware of the resulting injury to the rider. . . . Thus, there is uncontroverted evidence that Burke and his father knew of and understood the specific risk posed by horse No. 18.

The Court then said that the next inquiry is whether, as a matter of law, Burke voluntarily exposed himself to the danger. The evidence admitted at the trial court level shows that the draw for the bareback event was posted two hours before the competition started. Both Burke and his father admitted that Burke could have elected not to ride horse No. 18. After discussing the horse with several other participants in the rodeo, Burke concluded that the behavior of horse No. 18 at O'Neill was a "one-time deal" and assumed that he could ride the animal without any trouble, a decision which he subsequently characterized as "a mistake." The trial court record thus established that Burke considered the specific, special, risk posed by riding horse No. 18 and made a conscious decision to expose himself to the potential danger by riding the horse in the competition, and Burke assumed the risk of riding on horse No. 18, and thus the summary judgment entered against Burke at the district court level was affirmed by the Supreme Court.

And Now, the Rest of the Story

The trial court entered a summary judgment in favor of the defendants. This means that there was no factual issue that needed to be submitted to a jury. The facts were straightforward, and there was nothing for a jury to resolve. Burke knew the horse had bucked backward onto its back, but chose to ride it anyway.

The Northeast Nebraska High School Rodeo Club sponsored the Madison rodeo. It had a contract with the McKay Rodeo Company to provide the horses for this event. In part, the contract provided that animals used in the a rodeo contest shall be closely inspected and objectionable ones eliminated. The director of the NHSRA testified that the stock contractor (McKay) for a high school rodeo is expected to provide adequate stock which is safe for the participants in the sense that the animal would "not intentionally bring harm to an individual." Nevertheless, McKay used horse No. 18 in the Madison rodeo.

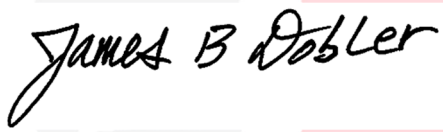
I visited with my wife, Janie, about the Burke case. I did so because this case reminded me of her parents, both of whom rode horses. Her father, Lee, rode a quarter horse and participated in quarter horse competition. Her mother, Anne, rode a show horse and was involved in western pleasure competition. In fact, Anne lived on a farm near Friend, Nebraska, and, as a child, rode a horse to the Catholic grade school in Friend. Both won various horse riding trophies, many of which we have in our house.

Janie was appalled at the outcome in Burke. McKay should have never included horse No. 18 in this event. McKay knew the horse had problems! In addition, would anyone really expect an 18 year-old boy to completely, and rationally, weigh every possible risk associated with riding a horse. An 18 year-old boy will always feel he can handle the situation!

It should be noted too, that three justices on the Supreme Court dissented from the majority opinion. The dissent notes that Burke talked to other participants about horse No. 18, and these individuals did not say anything to confirm the risky behavior of horse No. 18.

The assumption of risk doctrine is one that is applied on a subjective basis. There is no "bright line" as to when it will be applied. In theory, it could be said that we assume the risk by riding a bicycle or riding in a car, but of course there must be specific facts known by the person on the bike or in the car that make the risk exposure unique and present an extra unusual risk of injury. Overall, the assumption of risk doctrine is never easy to apply.

And so, at the end of the week, I leave it to you to kick this case around, and reach your own conclusion as to whether Burke's case should have been decided by the court which entered summary judgment in favor of McKay and NHSRA, or whether the trial court should have submitted the matter to a jury. Janie is adamant that a jury would have returned a verdict in favor of Burke!



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