The Limits of Limited Liability or

When the Knot Slips

By Mauricio R. Hernandez, Esq.

Her after-school riding lesson complete and the stable horse groomed, 10-year-old Lisa[1] asked permission to take the horse out of the corral to a nearby pasture to eat. The instructor gave her permission. Off she went alone to halter and lead the stable horse out of his corral. But when Lisa got there, she also found another, younger, not fully trained horse in the corral.

After catching and haltering her horse, Lisa decided to open the gate from the outside. As Lisa climbed through the corral fence, her horse started walking away. To stop him, she wrapped the lead around her left hand and as she wrapped, the other horse in the corral came near. The young horse hit the rope and spooked. It ran through the rope, tightening it around Lisa's hand, seriously injuring her.

Finding liability

Was there liability for the girl's injuries? Hadn't the horse stable and its training program supervisor required the girl's father to sign a preprinted liability release contract before enrolling her in classes? As a matter of law, was the stable and its supervisor freed from liability by this release? More importantly, weren't they shielded by Arizona's Statute limiting the liability of horse owners for injuries suffered by others riding or handling the owner's animals?

False comfort

The short answer was *no*, contrary to the false comfort often drawn from that Arizona Law's supposed limitation on horse owner liability. The Arizona Court of Appeals in the real life case[2] from which the above facts were taken, found that, as *a matter of law*, the father's signed release did not automatically stop the stable's liability. This decision was based on two things: the court ruled that the Arizona Revised Statute known as A.R.S. Section 12-553 did not apply because the minor had not "taken control" of the running horse and because the minor was engaged in a non-riding activity. Furthermore, the court said the release her father signed for

1 The 10 year-old's name has been changed for this story.

2 Bothell v. Two Point Acres, Inc., 965 P.2d 192 (Ariz. App 1998)

12-553. Limited liability of equine owners and owners of equine facilities; exception; definitions

A. An equine owner or an agent of an equine owner who regardless of consideration allows another person to take control of an equine is not liable for an injury to or the death of the person if:

1. The person has taken control of the equine from the owner or agent when the injury or death occurs.

2. The person or the parent or legal guardian of the person if the person is under eighteen years of age has signed a release before taking control of the equine.

3. The owner or agent has properly installed suitable tack or equipment or the person has personally tacked the equine with tack the person owned, leased or borrowed. If the person has personally tacked the equine, the person assumes full responsibility for the suitability, installation and condition of the tack.

4. The owner or agent assigns the person to a suitable equine based on a reasonable interpretation of the person's representation of his skills, health and experience with and knowledge of equines.

B. Subsection A does not apply to an equine owner or agent of the equine owner who is grossly negligent or commits wilful, wanton or intentional acts or omissions.

C. An owner, lessor or agent of any riding stable, rodeo ground, training or boarding stable or other private property that is used by a rider or handler of an equine with or without the owner's permission is not liable for injury to or death of the equine or the rider or handler.

D. Subsection C does not apply to an owner, lessor or agent of any riding stable, rodeo ground, training or boarding stable or other private property that is used by a rider or handler of an equine if either of the following applies:

1. The owner, lessor or agent knows or should know that a hazardous condition exists and the owner, lessor or agent fails to disclose the hazardous condition to a rider or handler of an equine.

2. The owner, lessor or agent is grossly negligent or commits wilful, wanton or intentional acts or omissions.

E. As used in this section:

1. "Equine" means a horse, pony, mule, donkey or ass.

2. "Release" means a document that a person signs before taking control of an equine from the owner or owner's agent and that acknowledges that the person is aware of the inherent risks associated with equine activities, is willing and able to accept full responsibility for his own safety and welfare and releases the equine owner or agent from liability unless the equine owner or agent is grossly negligent or commits wilful, wanton or intentional

her did not necessarily cover such non-horse riding activity.

A.R.S. Section 12-553, "Limited liability of equine owners and owners of equine facilities; exception; definitions," was passed to provide *some limited* protection to equine owners or their agents as well as to stable, equine private property possessors and rodeo ground owners. (The section expressly defines an equine as "a horse, pony, mule, donkey or ass.")

Why didn't the law provide its limited protection? The answer is that, regardless of the statute, equine and equine property owners must start and end with a general assumption, Arizona Courts do not like releases and liability waivers. The courts look closely at such agreements, which prevent an injured person from a legal remedy because of a contract holding the party attempting to enforce that contract blameless. As in most states, Arizona Courts say such contracts must be strictly interpreted against the enforcing party. If the party trying to enforce the release leaves out a word or does not adequately disclose risks or does not meaningfully explain, the release will be disregarded. Generally, the enforcing party must do what a skeptical court believes should have been done.

Does this mean that an adequate

defense to liability cannot be yet presented? No. It means that the shield of "but she signed a release" will not prevent a case from going to trial as a *matter of law* under the procedural device known as *summary judgment*. Summary judgment is available to speed up the settlement of a dispute without trial only when there is no quarrel over the material facts or the inferences taken from undisputed facts or as a matter of law. Based largely on the Arizona Statute, the defendant stable had asked for summary judgment. The trial court had granted summary judgment and dismissed the case. The appeals court expressed its disagreement and reversed the trial court.

Why releases and waivers fail

What are the most common ways releases and waiver contracts fail? First, recognize that these releases are contracts. Contracts by definition are agreements between parties who have bargained for an exchange of promises giving each a benefit and a burden. For such a bargain to exist, each side of the exchange must know and understand the benefit and the burden. Imagine buying a car sight unseen, without ever having been told a thing about it. Or imagine signing a sales contract where the seller covers everything on the page but the signature line? Would you agree to such deals? Of course not.

When a person participates in equine activities, the same "of course not" should apply. Too often, it does not. Unlike buying a car or some other necessary item, people believe fun activities are not meant for contracts or for fine print. "Tell me where to sign so I can go" becomes the rule not the exception, whether it's signing a release to visit a racetrack pit area; to ride a hot air balloon; or to take riding lessons.

The horns of the dilemma: the risk/fun balance

And just as troublesome, facility owners are too often equally disinterested in dampening fun or enthusiasm with scary legalese. Who is going to pay for admission to a pit area if the racetrack owner describes the dangers of cars crashing into it? Or who would pay to climb into a hot air balloon basket to sip champagne from 500 feet if told about such life-threatening hazards as accidental falls or crashes? Should a trainer scare the daylights out of a beginner by adequately describing unpredictable equines and the inherent risks of serious injury or death in equine activities?

The answer is yes. In truth, business owners, even those in the business of *fun* activities, must adequately disclose. A buyer must understand and know what she is buying. Participants in equine activities must appreciate the inborn risks of those activities when bargaining for the liability limitation in exchange for the *benefit* of participating and the *burden* of paying. This is the only way the would-be participant can ever make a knowing and voluntary decision. This is also why equine and facility owners must make the time to consistently and satisfactorily explain their release agreements to prospective equine activity participants. Explanation procedures must be methodical and deliberate not slap-dash and haphazard.

Next, remember the disfavor courts have for such agreements. While the Arizona Legislature enacted the law to provide

some protection, keep in mind that even without the skepticism and strict construction employed by Arizona Courts, the legislature's protections are limited and conditional. For example, the statute has exceptions for gross negligence, which simply means extreme, outrageous and reckless disregard of the duty of care reasonably owed to another. The statute also excepts willful, wanton and intentional acts or omissions.

Finally, it is not enough to adequately explain what is in the release. A court may still find a release was not properly drafted. No amount of adequate explanation, for example, pardons non-disclosure if the words were left out of the release to begin with. In the case described above, because the acknowledgements in the release referred only to "horse-riding or horse-drawn vehicle activity" wherein risks of injury "arising from approaching [and] handling a horse" may occur, the court found that reasonable minds could differ as to whether the release applied to the specific activity in the corral where the girl was injured. In other words, it was unclear from the facts whether or not the parties to the release intended for it to cover risks of injury from any and all kinds of activity involving a horse. Because of this uncertainty, the appeals court ruled that the lower court should have let the dispute go to a jury trial. Relying on another Arizona case[3], the court of appeals said, "If defendants wanted to insulate themselves from every claim relating to any aspect of their stable and horse operations, they 'should have clearly and explicitly stated so in the … agreement."[4]

The subparts of "control"

The word "control" also created problems. While the Arizona Statute mentions the word, "control" at least four times in its subparts, it does not exactly define when a person is considered to have taken control. The court said the statute was ambiguous on that point. For example, the first part (A) states, "An equine owner or an agent of an equine owner who regardless of consideration allows another person to take *control* [emphasis added] of an equine is not liable for an injury to or the death of a person if:

The person has taken *control* [emphasis added] of the equine from the owner or agent when the injury or death occurs."

But what does the statute mean by "take control of an equine"? And in stating and restating the importance of "control," what if a release does not expressly state the hazards of, and seek liability release from, equine activities **where the participant is not in control**?

In the case involving the injured ten-year-old, the court looked at these questions in making its crucial interpretations. First, the training stable's release referred to the specific risks of property damage and personal injury arising from "approaching, handling, mounting, riding and dismounting the horse or horse-drawn vehicle, and from observing or participating" in this horse riding or horse-drawn activity. The release also stated

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3 Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291 (Ariz. App. 1990)

4 Sirek, 800 P.2d at 1295

the participant's intentional agreement to assume these risks "upon mounting, and taking up the reins." The release language went on to say that "I, the rider, am in primary control of the horse I am riding" and that the stables were not responsible for "my action or inaction." But, here the court interpreted the Arizona Statute as inapplicable. The statute relieves equine owners of liability for injury to a person who, with the owner's permission, takes control of a horse and executes a release. The difference in these facts, the court said, was that the girl injured by the startled horse was not in control of the running horse. And so the statute did not apply.

Equine and facility owners may wrongly continue to think the signing of a liability release ties up all loose ends. But judicial disfavor and strict interpretation of such contracts, especially those not adequately drafted and not properly administered, means the knot on those loose ends can still come undone.

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