Certification of Word Count: 2,590

SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT JUL 16 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Certiorari to the Court of Appeals, 2007CA482	
Petitioner: Savannah Boles v. Respondent: Sun Ergoline, Inc., a Delaware corporation.	▲ COURT USE ONLY ▲
Peter J. Moyson #16573 HALL & EVANS, L.L.C. 1125 17th Street, Suite 600 Denver, CO 80202 Phone: 303-628-3339 Fax: 303-293-3239 moysonp@hallevans.com	Supreme Court Case No: 2008SC970

ANSWER BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the public policy of Colorado allows enforcement of an exculpatory agreement purporting to release a manufacturer from liability for possible future injuries caused by the manufacturer's defective products.

II. STATEMENT OF THE CASE

Defendant accepts the Statement of the Case set forth in the Opening Brief.

III. SUMMARY OF THE ARGUMENT

Section 402A of the Restatement (Second) of Torts takes the position that exculpatory agreements concerning strict products liability are per se invalid. A number of foreign jurisdictions have followed this position and held that public policy prohibits enforcement of exculpatory agreements in strict liability cases. The American Law Institute, however, has moved away from the per se rule of § 402A. In the Restatement (Third) of Torts: Products Liability, the per se rule is replaced by a presumption of invalidity that can be rebutted upon a showing that a consumer has sufficient information and market choices to protect the consumer's interests and enable the consumer to make a fair decision whether to enter into an exculpatory agreement. The Restatement (Third) of Torts adequately balances the public policy of freedom of contract and the public policy of allocating responsibility for damages caused by defective products. This Court should

therefore reject the per se rule of the Restatement (Second) of Torts and instead adopt the position set forth in the Restatement (Third) of Torts.

IV. ARGUMENT

[Standard of Review: Defendant accepts the standard of review set forth in the Opening Brief.]

In general, Colorado tort law concerning exculpatory agreements closely tracks the position taken by the American Law Institute in the Restatement (Second) of Torts. Regarding a plaintiff's assumption of risk, the Restatement (Second) recognizes a distinction between express an implied assumption of risk. An implied assumption of risk can involve a situation where a plaintiff has entered voluntarily and reasonably into a relation with a defendant which the plaintiff knows to involve the risk. An implied assumption of risk can also involve a situation where a plaintiff knows of a danger presented by a defendant's conduct and proceeds to voluntarily and unreasonably encounter it. See Restatement (Second) of Torts § 496A, comment c.

Restatement (Second) of Torts § 496B provides the following definition of an express assumption of risk: "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy." Comment b to § 496B states that where an express agreement to

assume a risk "is freely and fairly made, between parties who are in an equal bargaining position, and there is no social interest with which they interfere, it will generally be upheld." The rationale for disallowing recovery in this situation is that "the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his own protection, and agrees to take his chances as to injury from a known or possible risk." See Restatement (Second) of Torts § 496A, comment c.

Colorado law is in accord with the Restatement (Second) concerning express agreements to assume a risk. As this Court has observed, exculpatory agreements "stand at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts." Heil Valley Ranch v. Simkin, 784 P.2d 781 (Colo. 1989). An individual's right to contractually assume the risk of injury from a known or possible risk is determined according to four factors: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981). The first three factors are interrelated. An exculpatory agreement will not be enforced if it is contrary to a recognized public policy, and an exculpatory agreement may be deemed contrary

to public policy if the nature of the defendant's services indicate that the agreement "was entered into in an unfair manner." See Chadwick v. Colt Ross Outfitters, Inc., 100 P.3d 465, 467 (Colo. 2004).

Notably, the Restatement (Second) of Torts takes a much more restrictive position concerning the validity of agreements to relieve defendants of strict products liability. The doctrine of strict liability in tort is set forth in Restatement (Second) of Torts § 402A, which doctrine this Court expressly adopted in Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975). Comment m to § 402A sets forth a per se rule invalidating disclaimers of strict products liability:

> The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

Although § 402A of the Restatement (Second) does not allow for an express disclaimer of strict liability, Comment n to § 402A states that an implied assumption of risk is a defense against strict liability:

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in

> voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

In similar fashion, Colorado law recognizes that assumption of the risk is an affirmative defense to strict liability. For purposes of strict liability, assumption of risk is defined as voluntarily and unreasonably proceeding "to encounter a known danger the specific hazards of which the plaintiff had actual subjective knowledge." See Camacho v. Honda Motor Co., 741 P.2d 1240, 1245, footnote 6 (Colo. 1987).

A significant shift occurred in 1998 when the American Law Institute promulgated the Restatement (Third) of Torts: Products Liability. Whereas Restatement (Second) of Torts § 402A provides that a commercial seller is liable for injuries caused by defective products even if "the seller has exercised all possible care in the preparation and sale of his product," the Restatement (Third) of Torts has adopted the equivalent of a negligence standard regarding liability on failure-to-warn and design defect claims. Specifically, Restatement (Third) of Torts: Products Liability § 2 provides as follows:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

The shift in subsections (b) and (c) brings the treatment of failure-to-warn and design defect claims into conformity with negligence law generally. A similar shift is reflected in the rule regarding exculpatory agreements. In contrast to the per se rule of invalidity set forth in the Restatement (Second) of Torts, the Restatement (Third) of Torts takes the position that exculpatory agreements in strict liability cases are only presumptively invalid. The distinction is described in the Comments to § 18 of the Restatement (Third) of Torts: Products Liability.

Section 18 of the Restatement (Third) of Torts: Products Liability provides as follows:

> Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

Comment a to § 18 describes how the general rule is based on a presumption that an exculpatory agreement is unfair because of a consumer's lack of sufficient information and bargaining power:

> a. Effects of contract defenses on products liability tort claims for harm to persons.
>
> A commercial seller or other distributor of a new product is not permitted to avoid liability for harm to persons through limiting terms in a contract governing the sale of a product. It is presumed that the ordinary product user or consumer lacks sufficient information and bargaining power to execute a fair contractual limitation of rights to recover. For a limited exception to this general rule, see Comment d.

In turn, Comment d to § 18 addresses the situation where the presumption underlying the general rule is absent:

> d. Waiver of rights in contractual settings in which product purchasers possess both adequate knowledge and sufficient economic power.
>
> The rule in this Section applies to cases in which commercial product sellers attempt unfairly to disclaim or otherwise limit their liability to the majority of users and consumers who are presumed to lack information and bargaining power adequate to protect their interests. This Section does not address whether consumers, especially when represented by informed and economically powerful consumer groups or intermediaries, with full information and sufficient bargaining power, may contract with product sellers to accept curtailment of liability in exchange for concomitant benefits, or whether such

> consumers might be allowed to agree to substitute alternative dispute resolution mechanisms in place of traditional adjudication. When such contracts are accompanied by alternative nontort remedies that serve as an adequate quid pro quo for reducing or eliminating rights to recover in tort, arguments may support giving effect to such agreements. Such contractual arrangements raise policy questions different from those raised by this Section and require careful consideration by the courts.

Comment d goes on to state that the general rule of § 18 "speaks only to traditional disclaimers that function unfairly to deny or limit liability to persons who lack either information or bargaining power to protect their interests."

The rebuttal presumption described in § 18 of the Restatement (Third) of Torts: Products Liability dovetails with the standards of the four-part test set forth in Jones v. Dressel, supra. Under the Jones test, the determination of the validity of an exculpatory agreement requires consideration of the public policy implications of the subject matter involved, as well as consideration of the circumstances of the formation of the contract (i.e., whether the contract was fairly entered into and whether the parties' intentions were expressed in clear and unambiguous language). Jones v. Dressel, supra, 623 P.2d at 376; Stanley v. Creighton Co., 911 P.2d 705, 706 (Colo. App. 1996). The test under § 18 of the Restatement (Third) of Torts: Products Liability likewise requires consideration of the circumstances of the formation of the contract, particularly the issue of whether the contract was fairly entered into.

The fairness issue under the Restatement (Third) of Torts focuses on whether a consumer entering into an exculpatory agreement has a level of information and bargaining power sufficient to protect the consumer's interest. If a consumer has sufficient information and bargaining power, § 18 of the Restatement (Third) of Torts: Products Liability allows for enforcement of an exculpatory agreement. This Court should adopt the same rule and hold that an exculpatory agreement is not per se invalid as contrary to public policy simply because it concerns a defendant's strict products liability. Instead, the validity of an exculpatory agreement in which a plaintiff assumes the risk of injury from a defective product should be evaluated under the four-part test set forth in Jones v. Dressel, supra, with a particular emphasis given to consideration of the plaintiff's awareness of the risk of injury and the plaintiff's realistic ability to look elsewhere for a more favorable bargain.

Such a test would have been particularly appropriate in this case. Plaintiff's third amended complaint alleged that the tanning booth was "defective and unreasonably dangerous" because the ceiling exhaust fan was not located beyond a consumer's reach and the fan's protective grill did not make it impossible for a consumer to insert a fingertip far enough to come into contact with the fan blade. The exculpatory agreement signed by the Plaintiff, however, stated, "I have read

the instructions for proper use of the tanning facilities and do so at my own risk, and hereby release the owners, operators, franchisor or manufacturers, from any damage or harm that I might incur due to use of the facilities." If in fact the "instructions for proper use of the tanning facilities" gave Plaintiff adequate notice about the risk of injury from inserting fingertips into the protective grill of the exhaust fan, the presumption of lack of information that underlies the general rule of § 18 of the Restatement (Third) of Torts: Products Liability would be rebutted. Likewise, the general rule's presumption of a lack of bargaining power could be rebutted by a showing that Plaintiff had a host of choices for obtaining the tanning services. Upon a showing that Plaintiff had sufficient information and bargaining power, together with a showing that the contract was otherwise fairly entered into and the parties' intentions were expressed in clear and unambiguous language, the exculpatory agreement signed by the Plaintiff would be enforceable under the standards set forth in the Restatement (Third) of Torts: Products Liability. This Court should adopt those same standards as the law in Colorado.

V. CONCLUSION

A number of jurisdictions have adopted a per se rule prohibiting the enforcement of an exculpatory agreement where a consumer expressly assumes the risk of injury from a defective product. The result reached in these jurisdictions

has been based on the position taken by the American Law Institute in § 402A of the Restatement (Second) of Torts. The American Law Institute, however, has moved away from the absolute rule set for in § 402A and replaced it with a presumption of invalidity that can be rebutted upon a showing that a consumer had sufficient information and market choices to meaningfully and fairly make an express assumption of risk. This rebuttable presumption, taken together with the four-part test set forth in Jones v. Dressel, supra, adequately accounts for the competing public policy interests of ensuring freedom of contract and allocating responsibility for damages caused by defective products. This Court should therefore reject the per se rule of § 402A and instead adopt the rule set forth in § 18 of the Restatement (Third) of Torts: Products Liability.

Respectfully submitted this 16th day of July 2009.

Peter Moyson, #16573
Hall & Evans, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202
303-628-3300
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that on the 16th day of July, 2009, I served the foregoing **ANSWER BRIEF** upon counsel for the Petitioner by U.S. Mail, postage prepaid, properly addressed as follows:

James F. Scherer, Esq.
Miller & Law, P.C.
1900 W. Littleton Blvd.
Littleton, CO 80120
Attorneys for Petitioner

Sheila Kelly