Word Count 1,711

SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building Court Address: 2 East 14th Avenue Denver, Colorado 80203	FILED IN THE SUPREME COURT AUG - 3 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ON CERTIORARI TO THE COLORADO COURT OF APPEALS Court of Appeals Case No. 07CA00482	
Petitioner: Savannah Boles v. Respondent: Sun Ergoline, Inc., a Delaware corporation	Δ COURT USE ONLY Δ Case Number: 08 SC 970
James F. Scherer #14291 Miller & Law, P.C. 1900 W. Littleton Boulevard Littleton, Colorado 80120 Tel: (303) 722-6500 ATTORNEYS FOR PETITIONER	
REPLY BRIEF	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

OTHER AUTHORITIES

The petitioner, Savannah Boles, through counsel, Miller & Law, P.C., submits the following Reply Brief.

ARGUMENT

1. Restatement (Third) of Torts: Products Liability provides that exculpatory agreements are not enforceable to bar strict product liability claims.

The question presented in this case is 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. Ms. Boles' position is that exculpatory agreements should not be permitted to shield manufacturers from liability under a strict products liability theory, given the public policy considerations underpinning strict product liability doctrine. Ms. Boles' position is based upon these public policy considerations themselves, as those considerations have been articulated by this Court. Ms. Boles also cites the fact that other jurisdictions have uniformly rejected the validity of exculpatory agreements to shield manufacturers from product liability claims, citing public policy considerations. Ms. Boles further cites the fact that Restatement (Second) of Torts §402A, which has been adopted

by the Colorado courts, provides that exculpatory agreements are not effective to shield manufacturers from strict product liability claims, on public policy grounds.

Sun Ergoline's argument, as set forth in its Answer Brief, cites the provisions of Restatement (Third) of Torts: Products Liability, published by the American Law Institute in 1996. Sun Ergoline contends that in Section 18 of the Restatement (Third), the ALI has abandoned its position, set forth in Restatement (Second) §402A, that exculpatory agreements concerning strict product liability claims are invalid on public policy grounds. Sun Ergoline characterizes the language of Restatement (Third) §18 as replacing the rule of per se invalidity of such agreements with a rebuttable presumption that such agreements are invalid. Sun Ergoline further asserts that Restatement (Third) §2, which sets forth the grounds for a claim of strict products liability, represents a convergence of strict product liability doctrine with negligence theory. Based upon this analysis, Sun Ergoline argues that a finding by the Court that exculpatory agreements releasing strict product liability claims are invalid per se would be inconsistent with Restatement (Third) §18. Sun Ergoline suggests that, as strict product liability is analogous to negligence, the determination of the validity of such agreements be made on a case-by-case basis, applying the criteria set forth in *Jones v. Dressel*, 623 P.2d 370, (Colo. 1981), which applies to releases of negligence claims.

Sun Ergoline's analysis relies upon a distorted interpretation of Restatement (Third) §18. This Section does not in fact propose a rebuttable presumption of invalidity of exculpatory agreements applied to strict product liability claims. The Section itself reads as follows:

> **§18. Disclaimers, Limitations, Waivers, and Other Contractual Exculpations as Defenses to Products Liability Claims for Harm to Persons**
>
> 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.
>
> Restatement (Third) of Torts: Products Liability (1996), §18.

As with Comment m to Restatement (Second) of Torts §402A, Section 18 provides, clearly and categorically, that exculpatory agreements or disclaimers are ineffective to release a manufacturer from liability on an otherwise valid products liability claim. Comment a to Section 18 explains that this rule is based upon public policy considerations, in particular the inherently unequal bargaining positions of a manufacturer and a consumer or user of its products.

Sun Ergoline relies upon Comment d to Section 18 in its urged interpretation of the Section. Comment d, which is quoted in the Answer Brief at pp. 7-8, recognizes that there may be circumstances in which Section 18 might not apply.

Comment d recognizes the possibility that in a hypothetical situation where consumers, represented by informed and economically powerful consumer groups or intermediaries, with full information and sufficient bargaining power, contract with product sellers to accept a curtailment of liability in exchange for reciprocal benefits, the public policy justification for the rule stated in Section 18 might not apply. Comment d recognizes that, were such agreements to include alternative remedies that serve as an adequate quid pro quo for reducing or eliminating a consumer's right to recover in tort, there are arguments that support giving effect to such agreements, and such agreements should be given careful consideration by the courts.

Comment d does not establish an exception to Section 18; it essentially states a hypothetical caveat to the rule stated in the Section. Comment d does not purport to advocate a modification of Section 18's bar of enforcement of exculpatory agreements, outside the circumstances described in the Comment. The circumstances addressed by Comment d are a far cry from the typical consumer transaction, such as is presented in this case. Insofar as Comment d posits a situation which might justify a departure from a rule of per se invalidity of exculpatory agreements to bar product liability claims, that situation is not before the Court in this case.

Sun Ergoline's argument also inaccurately conflates strict products liability doctrine with negligence. Sun Ergoline suggests that Restatement (Third) of Torts: Products Liability §2 adopts the equivalent of a negligence standard with respect to design defect and failure-to-warn product liability claims. This interpretation is not borne out by the language of the Section itself. Nothing in the language Section 2 defining design defect or failure-to-warn claims may reasonably be read to suggest that Restatement (Third) has adopted a negligence standard with respect to such claims, or that it has incorporated negligence concepts into strict product liability doctrine. The Colorado courts have recognized and applied the bases set forth in Section 2 for liability under strict products liability doctrine. See, e.g., *White v. Caterpillar, Inc.* 867 P.2d 100 (Colo. App. 1993). However, this Court has clearly and consistently held that strict products liability doctrine is distinct from negligence, and arises out of independent public policy considerations. See, e.g. *Jackson v. Harsco Corp.*, 673 P.2d 363, 365 (Colo. 1983); *Camacho v. Honda Motor Co. Ltd.*, 740 P.2d 1240, 1244 (Colo. 1987); *Forma Scientific, Inc. v. Bio Sera, Inc.*, 960 P.2d 108, 115 (Colo. 1998).

As discussed in the Opening Brief, the doctrine of strict products liability is separate and distinct from negligence. The public policy reasons for the imposition of strict liability on manufacturers for injuries resulting from defective products are

sufficiently compelling, in and of themselves, to preclude the enforcement of disclaimers or agreements purporting to prospectively abrogate a manufacturer's legal responsibility for such injuries.

As strict products liability is distinct from negligence, and rests upon independent public policy considerations, the four-part *Jones* test is not applicable to releases of liability for claims of strict products liability. However, the rationale relied upon by the Court in promulgating the *Jones* test is instructive. The *Jones* test incorporates the principle that an exculpatory agreement will not be enforced if it is contrary to a recognized public policy. *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004). See also *Cooper v. Aspen Skiing Company*, 48 P.3d 1229, 1232-35 (Colo. 2002) (finding prospective releases of minors' negligence claims to be invalid, on public policy grounds). As discussed in the Opening Brief, release agreements which purport to prospectively shield manufacturers from liability for their defective products substantially impact the fundamental public policy interests sought to be furthered by strict products liability doctrine. Such agreements should accordingly be found to be void as against public policy, applying the principles and rationale previously established by this Court.

2. **The Court may properly determine the issue presented in this case.**

In its Amicus Brief, the Colorado Defense Lawyers Association argues that the question of the validity of exculpatory agreements to bar product liability claims is properly a subject for determination by the legislature, and suggests that the Court should defer to the legislature on this issue. The Amicus Brief provides no coherent rationale as to why the Court should do so. The General Assembly has not enacted any legislation addressing the issue, and there accordingly exists no statutory provision for this Court to defer to. The General Assembly has left this issue for determination by the courts, and this Court has not been reticent in the past in establishing and delineating the law in this area. The determination of the issue presented in this case lies squarely within the province of the Court.

CONCLUSION

This Court in its past decisions has cited and applied public policy considerations to carefully circumscribe the circumstances under which exculpatory agreements may be enforced. The Court has restricted the enforceability of such agreements to non-essential recreational activities, and has established a rule of per se invalidity of such agreements to release claims of willful and wanton negligence or intentional conduct. A finding by the Court that

exculpatory agreements are not enforceable to release claims brought under strict products liability theory would be fully consistent with the Court's historic approach to the issue. Such a holding is necessary to protect the public policy sought to be furthered by Colorado's adoption of strict product liability doctrine.

For the reasons stated herein, the Petitioner respectfully requests that the Court grant her the relief sought in her Opening Brief.

Respectfully submitted this 3rd day of August, 2009.

MILLER & LAW, P.C.

By: _____
James F. Scherer
Attorneys For Petitioner
Savannah Boles

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served the above and foregoing: **REPLY BRIEF** upon counsel for the Respondent by U.S. Mail, postage prepaid, properly addressed as follows:

Peter Moyson
Hall & Evans
1125 17th Street, Suite 600
Denver, CO 80202

Jeffrey Clay Ruebel
Casey A. Quillen
Jeanine Lynn Yaxley
Campbell Latiolias and Ruebel, P.C.
825 Logan Street
Denver, CO 80203

this 3rd day of August, 2009.

Denise Dyakon