

When Have I Assumed the Risk?

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

[Wagener v. Kretz, 3rd Dist. Allen No. 1-17-24, 2017-Ohio-8517.](#)

This was an appeal of a trial court's decision to grant summary judgment in a negligence action. The plaintiff had been riding on a parade float when it hit a defect in the road, resulting in the plaintiff suffering serious injuries. The plaintiff sued the company who had driven the float and the city of Lima for his injuries.

Eventually, the defendants moved for summary judgment on the doctrine of primary assumption of the risk, and the trial court agreed. Plaintiff appealed and on appeal the Third Appellate District affirmed. In so ruling, the court found that a successful primary assumption of risk defense is a matter of law for the court to decide and that the trial court did not err in finding that riding a parade float constituted an inherently dangerous activity.

The Bullet Point: "In order to succeed on a primary assumption of the risk defense, it must be shown that (1) the danger is ordinary to the activity; (2) there is common knowledge that the danger exists; and (3) that the injury occurs as result of the danger during the course of the activity." Courts have adopted this doctrine on the basis of "the notice that certain risks are so inherent in some activities that they cannot be eliminated."

[Karapanos v. Ford Motor Co., 8th Dist. Cuyahoga No. 105422, 2017-Ohio-8487.](#)

Plaintiff leased a Ford vehicle from defendant dealership. About two years later, he brought the car back to the dealership to get a number of issues fixed and to get mold removed from the interior of the vehicle. The repairs were covered by warranty and plaintiff was not charged. However, after the repairs and cleaning, the vehicle continued to smell of mold. Eventually, plaintiff requested that Ford replace the vehicle, which it refused to do. Plaintiff then filed suit alleging claims for violation of Ohio's Products Liability Act, among other claims.

Eventually, the defendants moved for summary judgment and the trial court granted the motion. Plaintiff appealed. On appeal the Eighth Appellate District affirmed. Regarding plaintiff's Products Liability Act claim, the court found that plaintiff had only alleged purely economic damages and was therefore barred from recovery

under the act.

The Bullet Point: To sustain a products liability claim, R.C. 2307.71(M) requires a plaintiff to set forth “a claim seeking compensatory damages for ‘death, physical injury to person, emotional distress, or physical damage to property other than the product in question.’” Thus, a plaintiff cannot sustain a claim under the Products Liability Act for economic damages alone. Economic damages include “direct, incidental, or consequential pecuniary loss, including, but not limited to, damage to the product in question[.]”

[In Re JW, 8th Dist. Cuyahoga No. 105337, 2017-Ohio-8486.](#)

This was an appeal of a trial court’s decision incorporating a custody agreement between the parties. The father appealed, claiming that he thought he had agreed to a shared parenting order and that the order should be voided due to his unilateral mistake of fact. The Eighth Appellate District refused to vacate the order, finding that the father failed to provide clear and convincing evidence of a unilateral mistake or that he did not understand the terms of the agreement he eventually agreed to.

The Bullet Point: Under Ohio law, settlement agreements are highly favored. Like all other agreements, a court’s role in interpreting a settlement agreement is to give effect to the intent of the parties. A settlement agreement can be vacated or rescinded, however, for a unilateral mistake. Under Ohio law, a unilateral mistake occurs when one party recognizes the true effect of an agreement while the other does not. A unilateral mistake can be grounds for rescission of a contract if the other party had reason to know of the mistake or was at fault in causing the mistake such that enforcing the contract would be unconscionable.

[Winkle v. Kroger Grocery Store, # 519, 10th Dist. Franklin No. 17AP-50, 2017-Ohio-8461.](#)

This was an appeal of a trial court’s decision to dismiss a lawsuit for want or prosecution. The plaintiff had filed a slip and fall case and, after not prosecuting it, dismissed it without prejudice. The plaintiff then re-filed the case and failed to actively prosecute the case or comply with discovery requests made by the defendant. Eventually, the defendant moved to dismiss the action as a discovery sanction and for failure to prosecute. The trial court granted the motion and the plaintiff appealed.

On appeal the Tenth Appellate District affirmed the trial court’s decision, finding that it had broad discretion to handle discovery sanctions and that the trial court did not abuse that discretion in dismissing the lawsuit in this case.

The Bullet Point: A court can dismiss an action for a party’s failure to comply with a discovery order. Before doing so, however, there must be a showing of bad faith or fault of the party. Failure to comply with a discovery request coupled with a subsequent lack of explanation for that noncompliance indicates willfulness and bad faith sufficient to warrant dismissal of an action for failure to comply with a discovery order.

[City of Springdale v. Tri-County Commons Assoc., LLC, 1st Dist. Hamilton No. C-160922, 2017-Ohio-8380.](#)

Defendant owns commercial real estate in the City of Springdale. To stop vandals from entering the roof on one of the properties, the defendant put a razor wire fence on it. The City of Springdale's zoning department notified the defendant that this violated the city's zoning code. The defendant refused to remove the fence and the city sued for violating its zoning codes.

Eventually, the trial court granted the city's motion for summary judgment and the defendant appealed. On appeal the First Appellate District reversed, finding that the razor wire on top of the roof was not prohibited by the city ordinances.

The Bullet Point: Zoning regulations are in derogation of the common law and deprive a landowner of certain uses of his land to which he would otherwise be entitled. Because of this, zoning ordinances are strictly construed in favor of a property owner, and courts will not expand or enlarge the scope of an ordinance.