Rountree v. Boise Baseball, LLC — The End of Assumption of the Risk as a Defense in Idaho

Joshua Evett

Premises liability and sports cases often make it difficult for a defense attorney to accept the demise of assumption of the risk as a defense. This is particularly so in cases involving inherently dangerous activities, such as boxing or football (as a participant), or watching sports, such as baseball, that are inherently dangerous to spectators.

The Idaho Supreme Court recently revisited the assumption of the risk doctrine in *Rountree v. Boise Baseball, LLC*, a case in which the plaintiff was hit in the eye by a foul ball some 270 feet down the left field line.[1] The decision in *Rountree* illustrates the Idaho Supreme Court's continued adherence to the rule that only express contractual assumption of the risk can waive a tort claim in Idaho.[2]

It also raises some interesting practice points for litigating cases where a defendant is not protected by an express assumption of risk.

The history of assumption of the risk in Idaho

"In its most basic sense, assumption of the risk means that the plaintiff, in advance, has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone."[3] In *Salinas v. Vierstra*, the Idaho Supreme Court abolished assumption of the risk as a defense in Idaho.[4] The sole exception to the *Salinas* holding is where a plaintiff, "either in writing or orally, expressly assumes the risk involved."[5] Because express assumption of risk sounds in contract and not tort, the *Salinas* Court noted that the "correct terminology" to use should be that of "consent" or something of a similar nature.[6]

Primary assumption of the risk has been used in many states to bar those who participate in, or watch, inherently dangerous sports from recovering when they are injured, regardless of whether there is an express oral or written consent.[12]

The Idaho Supreme Court next addressed assumption of the risk in *Winn v. Frasher*.[7] There the Court commented that *Salinas* only abolished *secondary* implied assumption of the risk and not *primary* implied assumption of the risk.[8] Secondary implied assumption of the risk "is an affirmative defense to an established breach of duty and as such is a phase of contributory negligence."[9] Primary implied assumption of the risk arises when "the plaintiff impliedly assumes those risks that are *inherent* in a particular activity."[10] To avoid conflict with comparative negligence principles, some courts have held that primary implied assumption of the risk is "treat[ed] as part of the initial duty analysis, rather than as an affirmative defense."[11]

Primary assumption of the risk has been used in many states to bar those who participate in, or watch, inherently dangerous sports from recovering when they are injured, regardless of whether there is an express oral or written consent.[12] Considering the *Winn* Court's conclusion that *Salinas* left primary implied assumption of risk undisturbed, there is appeal to the argument that participation in a sport with obvious inherent risks, such as football or boxing, should be enough to establish the consent required by *Salinas*.

And, for the right type of spectator sport — such as baseball — it also seemed plausible to argue that the common knowledge of the dangers posed by thrown or batted balls should be enough to support a primary implied assumption of the risk defense.

The decision in *Rountree*

Then came the decision in *Rountree*, the facts of which seemed to support a primary implied assumption defense. The plaintiff had been a Boise Hawks season ticket holder for 20 some years, he had handled thousands of tickets with printed waiver language on the back of each ticket (which he denied ever reading), had seen foul balls repeatedly enter the stands, and also had coaching and playing experience.[13] Additionally, the club read the waiver language over the public address system before every game.

Nevertheless, on appeal the Idaho Supreme Court held that neither secondary implied assumption of the risk or primary implied assumption of the risk are viable defenses in Idaho with respect to spectator sport injuries, holding that "[a]llowing assumption of risk as an absolute bar is inconsistent with our comparative negligence system, whether the risks are inherent in an activity, or not."[14] The Court reiterated that liability under comparative fault is apportioned "based on the actions of the parties . . ." and that "[w]hether a party participated in something inherently dangerous will simply inform the comparison, rather than wholly preclude it."[15]

Litigating assumption of the risk after *Rountree*

Despite *Rountree's* rejection of a primary implied assumption of risk defense, on remand the case demonstrated some of the challenges plaintiffs face in these types of cases. While the primary implied assumption of risk defense cannot appear on a special verdict form, the reality is the defense is alive and well in spirit. For example, because the plaintiff had not signed an express waiver, he attempted to exclude any mention of the language on the back of his tickets, which stated "THE HOLDER ASSUMES ALL RISK AND DANGERS INCIDENTAL TO THE GAME OF BASEBALL . . . ."[16] His argument was, if Idaho has rejected the assumption of the risk doctrine, the assumption of risk language was not effective, and the jury should not be allowed to consider it.

The district court disagreed, finding that the language was in effect a "super warning" that should have made the plaintiff more vigilant than he normally would have been, as he was told that any injuries would be his responsibility.[17] And, despite the plaintiff's testimony that he never read the disclaimer language on the tickets, the court concluded that whether the plaintiff actually read the tickets was a credibility determination for the jury to decide.

The district court's ruling makes sense in light of what *Rountree* ultimately instructs, which is that the inherently dangerous nature of an activity will "simply inform the comparison" of fault, rather than "wholly preclude it."[18] Arguably, any evidence that has any bearing on the plaintiff's knowledge of the inherently dangerous nature of a sport is relevant to a comparative fault analysis. This would seem to include any type of warning or assumption of risk language communicated to a plaintiff, even in the absence of a signed waiver.

Get a signed waiver if you can

A "best practice" is to get a signed waiver. This is probably the only way to achieve the potential for a summary judgment in these types of cases. While this may present challenges in the sporting event context (for example, having general admission patrons sign waivers may be logistically impossible or too time consuming), electronic signatures or check boxes during electronic payment might suffice. And, certainly, season ticket holders could be requested to sign a waiver upon purchase of their tickets.

However, even in the absence of an express written waiver, it is probably fair to say that assumption of the risk, though no longer an accepted defense in Idaho, still exerts a strong influence on how courts and juries consider cases involving inherently dangerous activities.

Endnotes

1. 154 Idaho 167, 296 P.3d 373 (2013)
2. Cases in which, effectively, assumption of risk is asserted as a defense continue to make their way to the Idaho Supreme Court. *See, e.g., Ball v. City of Blackfoot*, 152 Idaho 673, 273 P.3d 1266 (2012) (application of "natural accumulation rule" by district court overruled on appeal). In that case the Court held that the Legislature's enactment of comparative fault in 1971 effectively abolished the "open and obvious danger doctrine," and similar defenses, such as the natural accumulation rule, which barred suit where a plaintiff injured herself due to natural accumulations of ice or snow. *Id.* at 676, 273 P.3d at 1269.
3. BLACK'S LAW DICTIONARY 134 (8th ed. 2004) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, at 480-81 (5th ed. 1984)).
4. 107 Idaho 984, 695 P.2d 369 (1985).
5. *Id.*, 107 Idaho at 990.
6. *Id.*
7. 116 Idaho 500, 777 P.2d 722 (1989).
8. *Id. at* 503, 777 P.2d at 725.
9. *Rountree*, 154 Idaho at 174 (citation omitted)
10. *Id.* (citation omitted).
11. *Id.* (citations omitted).
12. *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508 S.E.2d 565, 569-71 (1998).
13. 154 Idaho at 169, 296 P.3d at 375.
14. *Id.* at 175, 296 P.3d at 381.
15. *Id.*
16. *Id.* at 169, 296 P.3d at 375.
17. The author was defense counsel in *Rountree* and argued the motions in limine.
18. *Rountree*, 154 Idaho at 175, 296 P.3d at 381.

About the Author

Joshua Evett *is an attorney at Elam & Burke, where he specializes in defense litigation involving personal injury, professional malpractice, and banking. He is a graduate of Hastings College of the Law and is the firm's managing director.*