

YOU AND THE LAW

Assuming the Risk of Open and Obvious Dangers of Climbing Gyms

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McGarry v. Philly Rock Corp.
134 A.3d 97 (2015)

Facts of the Case

On March 16, 2011, Rebecca McGarry and her husband, Peter, went to the Philly Rock Corp. (PRC) indoor climbing gym where they had twice climbed previously. When the McGarrys first visited they were asked to sign a waiver, which outlined the risks and dangers associated with indoor rock climbing. This legal document released PRC from liability regarding any injuries the couple may sustain while climbing at the facility. The couple's signatures implied the McGarrys understood the risks and were willing to assume those risks to engage in the activity. During their first visit, March 5, 2011, the couple received instruction on the proper operation of the safety equipment the facility used for top-rope climbing. Top-rope refers to the manner in which the rope is situated in this particular climbing setup. Both ends of the rope come down on either side of the anchor positioned at the top of the climb with the belayer attached to one end and the climber on the other. On March 16, the couple decided to try bouldering, a style of climbing lower to the ground in which the climber uses bouldering pads instead of ropes, harnesses, and belay devices. Bouldering started as a way for rock climbers to practice

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techniques and improve strength using less gear. Consequently, this style of climbing quickly rose in popularity because of increased accessibility and fewer concerns for participants who have a fear of heights.

After watching her husband climb the bouldering wall, Rebecca McGarry took a turn. After climbing about 4 feet up the wall, McGarry let go of the wall and jumped to the ground. When she hit the ground, she rolled her ankle and heard a cracking, crunching noise. Peter had moved a bouldering pad under her next to another pad; however, her foot landed between the two pads. As a result of the fall, McGarry broke her ankle, which required several surgeries and more than a year of physical therapy to recover fully.

The Complaint

McGarry claimed that PRC was grossly negligent in their duty to instruct her in the proper way to use the bouldering wall and failed to warn of the dangers of using the bouldering wall. Because McGarry had signed a release of liability for ordinary negligence, she was required to prove gross negligence in this case. McGarry supported her allegation by claiming that neither she nor her husband had received any instruction on how to use the bouldering wall. While PRC did not require bouldering instruction, they did have signs suggesting that users inquire with staff for any questions associated with use of the bouldering area. McGarry claimed that it was not reasonable to expect patrons to approach staff to instruct them how to use the bouldering wall and instead should require instruction and training before a climber uses that area of the facility.

Findings of the Case

At the trial court level, the jury agreed with McGarry, finding PRC grossly negligent in contributing to McGarry's injuries and 50% at fault. The jury also ruled that McGarry contributed to her own injury by deliberately jumping off the wall and was found 50% at fault. Based on this ruling, McGarry was awarded \$150,000 in damages.

PRC filed an appeal in the form of a post-trial motion of judgment notwithstanding the verdict (JNOV) on a number of procedural issues and legal claims. According to *Black's Law Dictionary* (Garner, 2014), JNOV is a "judgment entered for one party even

though a jury verdict has been rendered for the opposing party” (p. 972). The primary issue PRC claimed in their request to the court was that the jury had ruled in error because McGarry had not proven PRC was grossly negligent. In review, the judge agreed plaintiff’s evidence did not rise to the level of proving gross negligence, that she assumed the risk of injury from the inherent risks of bouldering, and entered a JNOV in PRC’s favor. As a result, McGarry appealed on two main legal issues: gross negligence and against assumption of risk. McGarry persisted in her argument that PRC was grossly negligent supported by the facts that (1) there was no instruction on how to use the bouldering pads or how best to descend the wall and (2) there was no signage cautioning users to be careful when using the facility nor instruction for them on how to use the facility safely. Further, McGarry’s argument to the appeals court was that because she was claiming gross negligence, the assumption of risk doctrine should not apply. McGarry claimed that because of PRC’s failures, she was unable to appreciate the risks of bouldering and therefore was unable to assume its inherent risks.

To address the claims, the appellate court examined the obligations and expectations between business owners and invitees on their property. PRC argued the precedent set by *Zeidman vs. Fisher* (2009) regarding business invitees and service providers’ duties to protect them. In *Zeidman*, the plaintiff hit a tee shot on a golf course and then drove out on a golf cart to make sure that the previous group was clear of the area before the rest of the party also teed off. When he had concluded the previous group was far enough away, he then motioned for the other players to tee off as he made his way back to the tee area. As he was making his way back, the defendant hit an errant tee shot that struck the plaintiff and caused serious and permanent injuries. According to this case the court ruled,

When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them, the doctrine of assumption of risk operates merely as a counterpart to the possessor’s lack of duty to protect the invitee from those risks. (*Zeidman vs. Fisher*, 2009, p. 642)

In *Zeidman*, the plaintiff understood the dangers of going out onto the golf course when others from the group may be teeing off.

By being on the course, the plaintiff had assumed the risks associated with the activity. Similarly in the case at hand, the plaintiff understood the dangers inherent to rock climbing and by participating assumed those risks. While the defendant had a duty to protect patrons and provide reasonable mitigation of risks inherent to indoor climbing, when a patron realizes or observes a danger that is open and obvious, yet decides to participate anyway, it is implied the individual assumed the risk, which alleviates the premises owner of liability.

The Verdict

The appellate court ruled that the assumption of risk doctrine barred the plaintiff's recovery and superseded her claim of whether the defendant was grossly negligent. As a result, the defendant was found not liable for the plaintiff's injuries.

Implications

This case provides several examples of risk management implications relevant to climbing facility managers and owners for patrons at their bouldering walls. While the facility in this case was not found liable for the plaintiff's injuries, careful adherence to the following suggestions offers increased protection of facility patrons and provides further protection for facility operators in the event of future claims. Grady (2017) suggests six legal obligations required of property owners and operators. First, owners and operators must regularly inspect the premises to determine both open and obvious dangers, as well as hidden dangers. Prior to opening a climbing gym, trained staff should perform daily inspections of bouldering pads, holds, surfaces, and equipment, while certified professionals should inspect anchor systems and the structural integrity of the wall surface and supporting frame. Most climbing wall manufacturers will do these inspections as part of the construction contract and suggest that facilities have the manufacturer conduct major maintenance on the structure and safety systems. Second, owners have an obligation to maintain and repair the premises. In *McGarry*, this might have meant more bouldering pads sufficiently large enough for the landing area or, better yet, installation of a new pad surface with no seams, a standard design practice in many modern bouldering gyms. Third, operators have an obligation to warn of concealed dangers. In this case, specifically informing patrons about the dangers

of having space between the bouldering pads and how one might protect a climber if there is a space. Fourth, as the PRC did in the case at hand, owners must advise of inherent risks to participating in the activity, such as the possibility of falling from heights, other climbers falling, and injuries, such as sprains, strains, fractures, cuts, scrapes, or dislocations. Fifth, managers and operators should hire competent and qualified staff who are able to recognize and assist new participants to the facility. In the case at hand, had the plaintiffs received an orientation to the bouldering area, they would have had even less standing in a legal case. Sixth, it is the owners' responsibility to design facilities that meet or exceed safety requirements. Climbing gyms are now constructing their facilities so situations like the one in this case are less likely to occur. One of the contributing factors to this incident was that the spotter (plaintiff's husband) was not experienced in using proper spotting techniques or bouldering pad placement. Climbing facilities have developed new designs to help mitigate this risk; most new gyms install a thick padded floor that completely surrounds the bouldering wall and is level without spaces between the padding. This minimizes the opportunity for moving the pads and for an awkward fall like the one plaintiff suffered in this case.

One of the main complaints in this case was that McGarry did not receive any instruction on how to use the bouldering area properly, which should have included topics such as how to properly move bouldering pads, how to spot and protect climbers, and how to descend the wall. The key lesson learned from this case is the need for climbing facilities to provide instruction or an orientation for every part of the facility that patrons may use. Often climbing gyms focus on the roped climbing areas, due to severity of the consequence if a mistake is made, and tend to rush through the bouldering area orientation. Yet a significant number of climbing facility accidents and injuries can occur in the bouldering area (Schöffl, Hoffmann, & Küpper, 2013). Clear, thorough instructions on how to use these areas may assist in lowering injury rates or at the least increase protection of the facility if participants take legal action.

References

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