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Alaska State Legislature

DURING SESSION
STATE CAPITOL
JUNEAU, AK 99801-1182
(907) 465-4843 (800) 892-4843
FAX: (907) 465-3871

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www.akrepublicans.org/Bunde

DURING INTERIM
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ANCHORAGE, AK 99501-2133
(907) 269-0181
FAX: (907) 269-0184

E-MAIL
Senator.Con.Bunde@legis.state.ak.us

SENATOR CON BUNDE

District P

VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

MEMORANDUM

DATE: April 10, 2003

TO: Senator Ralph Seekins
Chair, Senate Judiciary Committee

FROM: Senator Con Bunde

RE: Hearing Request

I respectfully request that you schedule a hearing for CSSB 98 (TRA), "An Act relating to civil liability for boat owners and to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date" at your earliest convenience.

I have attached the following materials:

- CSSB 98 (TRA)
- Sponsor Statement for the CS
- Sectional Analysis for the CS
- Zero Fiscal Note (Dept. of Law)
- SB 98
- Letters of Support

If you require any additional backup, please contact my aide, Karen McCarthy, at 3881.

Thank you.

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VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

SPONSOR STATEMENT

CSSB 98

“An Act relating to civil liability for boat owners and to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date.”

Thousands of Alaskans own private aircraft and/or watercraft and routinely share the enjoyment of these activities with friends, relatives, and neighbors. In doing so, those owners expose themselves to being sued if an accident occurs. SB 98 is the “Good Neighbor Bill.” It will clarify the responsibilities of airplane and boat owners and their guests when injuries are caused by the inherent risk of the activity, not by owner negligence.

Common law recognizes that certain activities carry inherent risks, and that participants take some responsibility for injuries they may sustain while participating in those activities. However, America is a litigious society, and people will sue -- often without consideration for the guest's responsibility for his or her own injury. SB 98 seeks to clarify in statute that people who accept an invitation to participate in a non-commercial recreational activity in a watercraft or aircraft also accept the inherent risks of such activity.

SB 98 does not absolve the owners of the aircraft or watercraft from maintaining and operating their equipment in a safe and prudent manner.

Due to inherent risks associated with these activities, rising insurance rates have forced many owners to forgo insurance on their expensive equipment. By discouraging frivolous lawsuits, SB 98 will also help keep a lid on the rising costs of insurance for airplane and boat owners.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 10, 2003

SUBJECT: Civil liability for plane/boat passengers - CSSB 98(TRA)

TO: Senator Con Bunde
Attn: Karen

FROM: Michael F. Ford 
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Provides that immunity under SB 98 is an exception to the liability imposed under AS 05.25.040.

Section 2. Creates immunity from civil liability for negligence when an owner or operator of an aircraft or watercraft transports a passenger and the aircraft or watercraft is not being used for commercial purposes. Provides that accidents resulting from gross negligence or reckless or intentional misconduct, involving a common carrier, or occurring during a sales demonstration are not immune. Also when the owner or operator has certain insurance coverage or fails to tell passengers that no insurance exists, immunity does not apply.

Section 3. Amends a sunset provision of law to provide that immunity under SB 98 is an exception to the liability imposed under AS 05.25.040. This section is necessary to avoid a conflict of law if AS 05.25.040 is repealed and reenacted as provided in the Boating Safety Act (Ch. 28, SLA 2000).

Section 4. Provides that the Act applies to accidents that occur after the effective date of the Act.

Section 5. Provides that sec. 3 of SB 98 only takes effect if the sunset provisions of Sec. 9, Chapter 28, SLA 2000, take effect.

Section 6. Effective date for all sections of SB 98, except for sec. 3.

MFF:lmb
03-148.lmb

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 98
 (S) Publish Date: 4/9/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to civil liability for guest BRU Civil Division
passengers on an aircraft or watercraft; . . ." Component Special Litigation
 Sponsor Senator Bunde
 Requester Senate Transportation Committee Component No. 2213

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Under this bill, owners or operators of an aircraft or watercraft would not be liable for civil damages of a guest passenger if the owner or operator is not being compensated for the transportation, except under certain specified circumstances.

This bill concerns civil actions between private parties, and will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 4/7/03 2:24 PM
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 4/7/2003
 Agency Department of Law

ALASKA BOATING ASSOCIATION



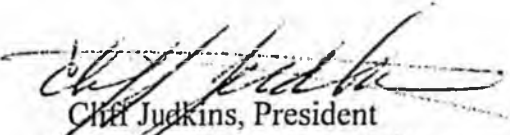
Senator Con Bunde
State Capital
Juneau Alaska 99801-1182

March 26,2003

Re: Senate Bill 98

Dear Senator Bunde,

The Alaska Boating Association supports the passage of SB 98, "An act relating to civil liability for guest passengers on an aircraft or watercraft." The Alaska Boating Association is a statewide organization with a membership of more than 1200. The association is an organization dedicated to the enhancement and preservation of the boating experience in Alaskan waters. Our organization represents the boating public on all issues concerning boating activities. As a past member of the Governors Boating Safety Advisory Council I personally reviewed statistics depicting boating accidents and related personal injury. Alaskans are involved in a high rate of boating accidents with personal injury and death to both operators and passengers- one of the results is high insurance rates. Insurance rates for the group of boaters that I fall into has more than doubled in the past three years. My insurance has gone from \$825.00 three years ago to over \$1,600.00 for the coming season. Other boaters have experienced similar rate increases. Some folks have actually made the decision not to purchase a boat, or to sell the one they have due to high insurance rates. Passage of SB98 would surely help to buffer future rate increases. Again the Alaska Boating Association is a strong supporter of SB98 and we commend you for the time that you have spent drafting and introducing this legislation.


Cliff Judkins, President
Alaska Boating Association

Cliff Judkins - President • P.O. Box 874124 • Wasilla, Alaska 99687
(907) 373-3591 • Fax 373-3592 • E-Mail: cjudkins@customcpu.com

THE
FOLLOWING
DOCUMENT(S)
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March 24, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182



Re: SB 98, "An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

Dear Senator Bunde,

On behalf of the Personal Watercraft Club of Alaska (PWCA), I would like to express our support for SB 98.

This legislation provides a much needed limit of civil liability for boaters. Currently, Alaskan boat owners have two jobs when they take the helm, not only to navigate safely through waters, but also to avoid the treacherous crags of a litigious society.

The cost of not passing SB 98 can be measured in terms of lost opportunities for recreation and enjoyment. Key to this is a boat owner's legitimate fear of potentially losing ones life savings in a world rife with frivolous lawsuits and unspecified civil damages. This legislation will relieve an unnecessary and unfair burden on recreational boaters while protecting passengers from negligent acts.

It seems obvious that boat owners should be able to take their friends fishing or sightseeing without the fear of an expensive lawsuit should their trip end in misfortune. Similarly, non-commercial passengers should not have their choice to ride in a boat made by a legal system more concerned with contingency awards than with personal freedoms.

Our club promotes the sport of watercraft riding, education, and boating safety. Several of our members belong to the Coast Guard Auxiliary. Annually, we contribute our time and equipment to help Alaskans with disabilities at the Challenge Alaska Summer Splash. We are staunch supporters of boating rights and are a member club of the Alaska Outdoor Council, the Alaska State Boaters Association, and ABATE. Because of our interest in recreational boating, the PWCA is particularly interested in the success of your legislation.

Almost all of our club members ride 2-4 seat watercraft and take passengers. We have traveled from Whittier to Valdez and from Anchorage to Kenai on PWC. Modern PWC are quiet transportation, leave little wake, and burn a fraction of the fuel of many boats. These clean burning machines meet the rigid 2006 EPA standards. Light, durable, and stable, they very well may prove to be the snow

PWCA

SENATOR CON BUNDE
SENATE BILL 98

machine of the water for many communities. They are a fun and exciting way to experience the Alaskan outdoors.

I am available to discuss this legislation with you or your staff and may be reached directly at 258-2420 (wk) or at davealaska@aol.com. Please let me know how we can assist you in reaching your vision for Alaska.

Sincerely,



David Ausman
PWCA President

Personal Watercraft Club of Alaska (PWCA)

P.O. Box 112984

Anchorage, AK 99511-2984


website: www.pwcalaska.org

email: akpwrdr@aol.com

phn: 907-345-6723

cc:

Cliff Judkins, Alaska State Boater Association



Ed & Inge Crane

*5260 Lupin Place
Anchorage, AK 99507*

Senator Con Bunde
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

March 18, 2003

Dear Senator Bunde,

Thank you for introducing SB 98. While I am not sufficiently knowledgeable to address the commercial aspects of the legislation, I would like to express wholehearted support for the potential effects on private aircraft owners and operators.

I am an instrument-rated private (i.e., non-commercial) pilot who owns a modest small airplane. I fly that airplane strictly for pleasure, under favorable conditions only, and I operate only from improved airports. I have some 1,400+ hours of flying experience, with no record of accidents, incidents, emergencies, regulatory violations, or insurance claims.

Despite the foregoing, it has for several years been increasingly difficult (as I believe it has been for most Alaska pilots) to obtain and/or afford adequate liability insurance. Because of my history, my carrier has "grandfathered" my personal injury liability coverage at a level which it no longer makes available in Alaska generally. Nevertheless, I no longer carry passengers other than my spouse. Within the context of today's society and the influence of personal injury lawyers, the risks of exposure for myself, my family, and my estate are more than I can rationally tolerate. On the other hand, I would have no problem assuming the totally controllable risks of "gross negligence or reckless or intentional misconduct" which would result in liability under SB 98.

So no longer can I share with friends, neighbors, or visitors the awesomeness and beauty of SouthCentral Alaska which can be reasonably and safely accessed by a simple and inexpensive flight. No longer can I experience the pleasure of implementing a youngster's "first flight", or of using my aircraft to pique a teenager's interest in an aviation career. If passed, SB 98 would make these things once again possible - not only for me, but for countless thousands of Alaskans and visitors!

Very truly yours,



From: Dr. Frost
To: senator.con.bunde.@legis.state.ak.us
Cc: (left blank for privacy purposes)
Sent: Monday, March 17, 2003 6:19 PM
Subject: Senate Bill 98

Dear Senator Bunde,

I have reviewed Senate Bill 98 and would like to express my strong support for it. As you know I own and fly my own piper cub here in Alaska. I have never flown commercially. I have always been concerned with my family's potential liability if I were to be involved in a serious aircraft accident and to have any passengers injured.

Clearly since I do all of my own flying I never place a passenger in a situation which I am personally not comfortable for myself. However as you know there are times when weather changes unexpectedly or other circumstances may create a hazardous situation. Since the passengers are enjoying the benefits of the flight for no cost they should be expected to shoulder some of the responsibility as well.

I will be out of town for the next week. I can not personally speak for the Alaska Bowhunters Association and Alaska Chapter of SCI but I would suspect that they would support the bill as well. By sending them a copy of this I will solicit their opinions.

Sincerely,
John D. Frost MD

Subject: Re: SB 98, Recreational Liability Bill
Date: Mon, 03 Feb 2003 18:45:10 -0900
From: "William G. Nelson"
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

I strongly support SB 98. As an owner of a small private aircraft, I do on occasion take visitors to our state for a "flight seeing" ride. They always indicate that it was the highlight of their trip. I would do so more often, but do not feel the need to shoulder the liability.

Certainly, visitors that see the real Alaska are less likely to be swayed by special interest groups supporting causes detrimental to the development of Alaska.

Thank you for your sponsorship of this bill.

William G. Nelson

March 26, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182

Dear Senator Bunde,

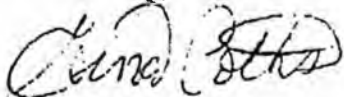
I am writing in support of Senate Bill 98, "an act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date".

As a responsible watercraft and boat owner I feel this is important legislation to provide a limit on civil liability for boaters (and aircraft owners). We live in a litigious society and it seems everyone wants to lay fault or blame on the other person and make them pay. This legislation will allow boat owners and aircraft owners a little more peace of mind when taking passengers on board for pleasure rides.

Thank you for writing a bill that promotes safety in recreational activities. I am a member of the Personal Watercraft Club of Alaska (PWCA) as well as Alaska Boating Association. I know the PWCA has given their support to this bill and I'm sure they have contacted the Boating Association and asked them to contact you with their support as well.

If there is anything else I can do to help promote and support this bill please do not hesitate to contact me. I can be reached at 345-6723 or email at akpwcrdr@acsalaska.net.

Sincerely,



Gina Poths
11600 Trails End Rd.
Anchorage, AK 99507

March 26, 2003

Senator Bunde

REF: SB98 Recreational Liability

Senator Bunde, although I am writing this letter on my behalf to express support for SB 98 "Good Neighbor Bill" I am also President of the Alaskan Bowhunters Association one of the largest outdoor organizations in the state and I have asked that the entire executive board and general membership across the state show their support.

I moved to Alaska 29 years ago so that I may be involved in the out of doors in the most beautiful state in the union. I have always owned boats for recreation since moving to Alaska and have been fortunate to travel around the state with friends of mine that own small fixed wing planes.

I have discovered as has many of my friends that one of the greatest joys of living in Alaska is the ability to share the experience of the outdoors with friends in Alaska that may not have the ability or friends and business acquaintances from lower forty-eight. A concern that I have always had is the possibility of leaving my family liable for something that may have not been in my control to prevent. There is always a risk of potential life threatening accidents with any journey in to the outdoors in Alaska that is part of the mystique of Alaska. If I am operating my boat or plane in a safe manor and an accident does occur I do not believe that my family should be liable for something that they had no part in.

This bill is long over due and I encourage the Senate to fully support this bill. There is no disadvantage to this bill other than leaving the door open for frivolous lawsuits. Thank you for your time and consideration into this matter.

Sincerely
Phil Pringle
10086 Explorer Cr.
Anchorage AK. 99515
907-344-8812

Phillip H. Mabry, D.D.S.

2601 BONIFACE PARKWAY ANCHORAGE, ALASKA 99504

(907) 337-9448 FAX (907) 337-4123

March 20, 2003

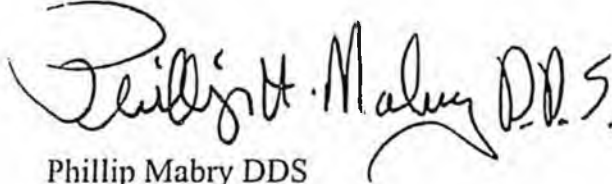
Senator Con Bunde
716 W. Fourth Avenue
Anchorage, Alaska 99501-2133

Dear Mr. Bunde,

I've just read your proposed S.B. 98. It's about time the legislature addressed this issue. You've done a remarkable job of covering all the bases. It protects the individual who is entertaining someone but doesn't eliminate the use of proper conduct and safety. Hopefully your fellow Senator's will agree and move this bill onward.

Thank you again for your good sense.

Sincerely,

A handwritten signature in cursive script that reads "Phillip H. Mabry D.D.S." with a decorative flourish at the end.

Phillip Mabry DDS

Greg Remaklus, D.M.D.

Practice Limited to Periodontics

Suite 102

4200 Lake Otis Parkway

Anchorage, Alaska 99508

Office Phone (907) 561-1884

March 26, 2003

Senator Con Bunde

State Capital

Juneau, Alaska 99801-1182

Dear Senator Bunde:

Please accept my support and encouragement for Senate Bill 98. Existing liability concerns have for a long time discouraged me from transporting others and insurance is increasingly more difficult to afford. I hope your efforts can help change all that. Thank you.

Kindest personal regards,



Greg Remaklus, D.M.D.

March 20, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182



Re: SB 98, "An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

Dear Senator Bunde,

On behalf of the Personal Watercraft Club of Alaska (PWCA), I would like to express our support for SB 98.

This legislation provides a much needed limit of civil liability for boaters. Currently, Alaskan boat owners have two jobs when they take the helm, not only to navigate safely through waters but also to avoid the treacherous crags of a litigious society.

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Almost all of our club members ride 2-4 seat watercraft and take passengers. We have traveled from Whittier to Valdez and from Anchorage to Kenai on PWC. Modern PWC are quiet transportation, leave little wake, and burn a fraction of the fuel of many boats. These clean burning machines meet the rigid 2006 EPA standards. Light, durable, and stable, they very well may prove to be the snow

machine of the water for many communities. They are a fun and exciting way to experience the Alaskan outdoors.

I am available to discuss this legislation with you or your staff. Please let me know how our club can assist you in reaching your vision for Alaska.



I know this is basically a copy of a letter you have received from our club president, but I share the same views.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Thomas Byers'.

Thomas Byers
Club member

cc:

Cliff Judkins, Alaska State Boater Association

Subject: SB98

Date: Mon, 7 Apr 2003 09:43:19 -0800

From: "Robert Dreeszen" [REDACTED]

To: <Senator_Con_Bunde@Legis.state.ak.us>

We support SB98.

Robert & Carol Dreeszen
Outlet Lower Ugashik Lake AK

Subject: Re: [Fwd: SB 98 Scheduled for a Hearing]
Date: Sun, 06 Apr 2003 21:34:37 -0800
From: (deleted for privacy)
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Karen.

At our meeting last week, the KCK (Knik Canoers and Kayakers) Board of Directors voted unanimously to endorse this bill. I will be out of town for the rest of the week.

Thank you,
-Fran Hall

Subject: Re: SB 98

Date: Sun, 06 Apr 2003 14:35:35 -0800

From: Marilyn Warren [REDACTED]

To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Mr. Bunde:

As an aircraft and water craft owner I encourage you to support the passage of SB 98. As an aircraft owner I can not afford to purchase insurance and so am denied the pleasure of taking friends or acquaintances flying with me because of the substantial liability involved. This bill needs to be passed. Thank you, Charles Warren

Subject: SB 98

Date: Sun, 06 Apr 2003 16:33:19 -0800

From: Don & Nita Meierhoff <[REDACTED]>

To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Dear Senator Bunde:

Just a short note to let you know I support your bill SB 98 wholly. I am an owner of an aircraft and the liability prospect has stopped me from transporting friends out fishing and hunting with me a number of times.

Good luck and thanks for the hard work!

Don Meierhoff

3637 North Point Dr.

Anchorage, AK. 99502

907-243-1046

**Constituent Support for SB 98, "Recreational Liability"
Expressed as Replies to Legislative Update**

Thank you for sponsoring both pieces of legislation Con. We support them. As an aircraft owner, I particularly appreciate the liability legislation.

These sound like good Bills. Thanks for all your work.

Dear Con, I am a boat owner and applaud your new bill. Thanks

Con: I support your efforts on both bills.

Senate Bill 98 sounds like a great idea. As a private pilot this is something that I think of often. I support your endeavors with this bill.

Good Luck with SB 98!

I like the objective of SB98 and wish to compliment you on common sense legislation.

Thank you for both pieces. Especially logical and sensible is the Good Neighbor Bill. I hope for its passage.

As an owner of a small aircraft, we appreciate and support the intent of SB98.

I believe SB98 is a step in the right direction. Thanks

As for SB 98, I surely wish you well. As a pilot/owner that truly enjoys showing Alaska to others, it is very sobering to know what liable risk we take in so doing.

Dear Con, This is excellent and thank you for all your fine work.

Public Opinion Message
4/9/2003

Mr. Donald M Quarberg
HC 60 Box 3070
Delta Junction, AK 99737

Bill #98: SB 98 LIABILITY: PLANE AND BOAT PASSENGERS

MESSAGE: Support this Bill. It is a practical approach to an ever increasing problem – frivolous lawsuits! Thank you!

DISTRIBUTION: 60

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 18, 2003

SUBJECT: Civil liability of boat/airplane owners to passengers
(CSSB 98(TRA))

TO: Senator Con Bunde
Attn: Karen

FROM: Michael F. Ford 
Legislative Counsel

You have asked several questions regarding CSSB 98(TRA).

First, does the term "watercraft" that appears in Sec. 2 need to be defined. This is a judgment call, but I don't think that it does. There are several definitions in existing law, but they all apply to particular situations. See AS 28.35.030(r)(3). There is no general statutory definition of "watercraft." A definition is often helpful to clarify a meaning or to exclude some unintended meaning. But since "watercraft" has a generally accepted meaning defining the term seems unnecessary. Also, there is some risk in creating a definition, in that you may inadvertently exclude or include some category.

Second, you have asked about the validity of liability waivers. This issue was recently before the Alaska Supreme Court in Moore v. Hartley Motors, Inc., 36 P.3d 628 (Alaska 2001). In that case, a liability waiver for injuries resulting from a ATV class was held valid and did protect the defendant from claims of negligence. However, the court noted that not all liability waivers were valid. In some cases, public policy considerations preclude a waiver from being effective against civil claims. I have attached a copy of that decision for your information.

Please contact me if you have further questions.

MFF:med
03-416.med

Enclosure

Made available by Touch N' Go Systems, Inc.
e-mail: touchngo@touchngo.com, and
Law Offices of James B. Gottstein.
406 G Street, Suite 210, Anchorage, AK 99501
(907) 274-7686 fax 274-9493
e-mail: jimgotts@touchngo.com

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You can do a full-text search of the Alaska Supreme Court opinions or go to the recent opinions, or the chronological or subject indices. Moore v Hartley Motors, Inc. et al (09/14/2001) sp-5469

Moore v Hartley Motors, Inc. et al (09/14/2001) sp-5469

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

GAYLE W. MOORE,)	
)	Supreme Court No. S-9336
Appellant,)	
)	Superior Court No.
v.)	3PA-95-505 CI
)	
HARTLEY MOTORS, INC.; ATV)	O P I N I O N
SAFETY INSTITUTE; SPECIALTY)	
VEHICLE INSTITUTE OF AMERICA,)	[No. 5469 - September 14, 2001]
a corporation incorporated in)	
the District of Columbia; and)	
JIM CROAK,)	
)	
Appellees.)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Beverly W. Cutler, Judge.

Appearances: Thomas R. Wickwire, Fairbanks, for Appellant. John B. Thorsness and Kimberlee A. Colbo, Hughes Thorsness Powell Huddleston & Bauman, LLC, Anchorage, for Appellee Hartley Motors, Inc. L. G. Berry, Robertson, Monagle & Eastaugh,

Anchorage, for Appellees ATV Safety Institute, Specialty Vehicle Institute of America, and Jim Croak.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Bryner, Justices. [Carpeneti, Justice, not participating.]

FABE, Chief Justice.

I. INTRODUCTION

Gayle Moore was injured during an all-terrain vehicle (ATV) safety class when she drove her ATV over a rock and the vehicle rolled over. Before participating in the class, Moore signed a release of liability. After her injury, however, she sued for damages the safety class instructor, the organizations that developed and offered the class, and the owner of the property on which the class took place. She alleged that the release was not valid because she received no consideration, the release was against public policy, and the course was inherently unsafe. The superior court granted summary judgment to the defendants. Because there is a factual dispute regarding whether the layout of the course was unnecessarily dangerous, we reverse and remand for trial on that issue.

II. FACTS AND PROCEEDINGS

Gayle Moore and her husband bought a Suzuki four-wheel ATV in May 1993 from Suzuki, Arctic Cat Motor Sports. At the time of the sale, the salesperson offered the Moores a \$50 rebate upon completion of an ATV rider safety class. On October 23, 1993, the Moores attended an ATV rider safety class held on the property of Hartley Motors, Inc. James Croak instructed the class using the curriculum of the ATV Safety Institute. Before starting instruction, Croak requested that all participants sign a consent form and release. Moore signed the consent form and release.

The driving portion of the class took place on a course marked with cones on unpaved ground. During the class, Moore drove her ATV through high grass beyond a cone marking the course. Her vehicle rolled up on a rock protruding from the ground in the high grass. Moore was thrown from her vehicle, suffering injuries as a result.

Moore brought suit in July 1995 against Hartley Motors, the dealer that sold the Moores their ATV, ATV Safety Institute, and Jim Croak. [Fn. 1] She alleged that the defendants negligently failed to provide a safe ATV rider training course and location, and negligently concealed the fact that the course was unsafe.

In 1996 the defendants [Fn. 2] sought summary judgment based on the release signed by Moore before the class. In opposition to summary judgment, Moore presented a transcript of a telephone conversation between an investigator hired by her attorney and Michael Swan, a former ATV Safety Institute instructor. In this telephone conversation, Swan indicated that he had chosen not to teach an ATV rider course at the Hartley Motors location because he found the location inappropriate.

Superior Court Judge Beverly W. Cutler initially denied the motion for summary judgment. She concluded that while the release was valid as a matter of law, genuine issues of material fact existed regarding the defendants' knowledge of the suitability of the course site and whether they informed Moore of its suitability before she signed the release. In denying summary judgment, the superior court relied upon a theory of material nondisclosure by the defendants. The court found that the allegations presented in the telephone conversation with Swan could be supported by admissible evidence at trial.

In 1999 ATV Safety Institute, Specialty Vehicle Institute of America, and Croak (collectively ATVSI) sought reconsideration of the 1997 summary judgment denial because Michael Swan had died and therefore could not testify at trial. The superior court denied the motion for reconsideration but granted Hartley Motors's motion in limine to exclude hearsay statements by or attributed to Swan.

ATVSI then filed a motion for summary judgment and Hartley Motors filed a renewed motion for summary judgment based on the release Moore had signed. The superior court granted summary judgment to the defendants. The superior court entered final judgment for \$32,817.56 fees and costs to Hartley Motors, and \$21,049.12 fees and costs to ATVSI. Moore appeals.

III. DISCUSSION

A. Standard of Review

This court reviews grants of summary judgment de novo. [Fn. 3] We will affirm a summary judgment if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. [Fn. 4] When making this determination, we draw all reasonable inferences in favor of the non-moving party. [Fn. 5] "We make no attempt to weigh the evidence or evaluate the credibility of witnesses, and we assume that all facts set forth in the nonmoving party's affidavits are true and capable of proof." [Fn. 6]

B. The Superior Court Did Not Err in Finding that the Release Was Valid.

The superior court determined in 1997 that "the release itself is valid as a matter of law against negligence claims brought by [Moore]." Moore asserts that the trial court erred in treating the release as valid because (1) there was no consideration for the release and (2) the release should have been declared void as against public policy.

1. There was consideration for the release.

Moore argues that she did not receive any consideration in return for her release. She contends that the \$50 rebate promised by the salesperson upon completion of the course [Fn. 7] was to have been the consideration for her release of liability. Because Moore did not complete the course, she did not receive the \$50 rebate. [Fn. 8] She asserts that since she did not receive any consideration for the release, it was not effective to protect the defendants from liability.

Moore misconstrues the role of consideration by equating inducement with consideration. Here ATVSI provided consideration for the release, not by offering a \$50 rebate, but by offering participation in the class. Thus, even if the \$50 rebate induced Moore to take the class, the only reasonable inference from the facts presented is that Moore exchanged the release of liability for participation in the program. Whether Moore considered the \$50 rebate her inducement is immaterial to the sufficiency of consideration. [Fn. 9] The trial court did not err in rejecting Moore's claim that the release was invalid for failure of consideration.

2. The release did not violate public policy.

Moore argues that the release should "be set aside as unconscionable and contrary to public policy." An otherwise valid release is ineffective when releasing a defendant from liability would violate public policy. [Fn. 10] Moore argues that public policy considerations should invalidate the release she signed.

In *Municipality of Anchorage v. Locker*, we evaluated whether an exculpatory release should be invalidated as against public policy. [Fn. 11] In *Locker*, we concluded that a limited liability clause in a contract for an advertisement in the yellow pages was unconscionable and void as against public policy. [Fn. 12] We relied upon *Tunkl v. Regents of the University of*

California [Fn. 13] in identifying the factors for review in invalidating an exculpatory provision on public policy grounds, noting that such a provision is likely invalid when

[i]t concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. [Fn. 14]]

Of particular relevance to this case is the type of service performed and whether the party seeking exculpation has a decisive advantage in bargaining strength because of the essential nature of the service. [Fn. 15] Here, the ATV safety course, although perhaps providing a desirable opportunity for an ATV driver, is not an essential service, and therefore the class providers did not have a "decisive advantage of bargaining strength" in requiring the release for participation in the class. [Fn. 16] Moore had a choice whether to take the class or not, and chose to sign the release in order to participate. The release in this circumstance does not present a violation of public policy.

Other courts have upheld exculpatory releases for activities similar to ATV riding where the activities themselves were not regulated by statute. These releases precluded liability for injuries sustained while parachute jumping, [Fn. 17] riding a dirt bike motorcycle in a motorcycle-park facility, [Fn. 18] and scuba diving as a part of a scuba diving course. [Fn. 19] The Alaska legislature does not regulate ATV riding. By contrast, the legislature has acted to regulate the ski industry, and as part of this regulation has precluded ski facility operators from obtaining waivers of liability for negligence. [Fn. 20] Importantly, the Alaska Ski Safety Act of 1994 [Fn. 21] defines the duties of a ski operator [Fn. 22] and prevents actions against ski operators for injuries resulting from the inherent danger and risk of skiing. [Fn. 23] The legislature has not chosen to regulate ATV course operators in a similar way.

Moore also contends that because a consent decree issued in a consumer products safety lawsuit requires ATV manufacturers to carry liability insurance covering participants in training courses, [Fn. 24] it is therefore against public policy for an ATV safety program to require participants to waive and release any injury claims. Moore cites no authority to support this interpretation of the consent decree, and we have discovered no reported decisions that have addressed this issue. We decline to invalidate an otherwise valid release between participants and providers of ATV safety courses on this basis.

C. A Genuine Issue of Material Fact Exists as to Whether the Course Layout Was Inherently Dangerous.

The trial court's summary judgment analysis focused on alleged misrepresentations that could have invalidated the release. As with any contract, a release of liability is only valid to the extent that it reflects a "conspicuous and unequivocally expressed" intent to release from liability. [Fn. 25] The trial court granted

summary judgment after determining that no genuine issue of material fact existed as to whether ATVSI or Hartley Motors knew that the course was allegedly unsafe.

Even if there was no genuine issue of material fact regarding a misrepresentation, the trial court erred in failing to consider the scope of the release signed by Moore. [Fn. 26] Moore agreed to release the ATV Safety Institute and all other organizations and individuals affiliated with the ATV safety class from liability, loss, and damages "including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse." But the release does not discuss or even mention liability for general negligence. Its opening sentences refer only to unavoidable and inherent risks of ATV riding, and nothing in its ensuing language suggests an intent to release ATVSI or Hartley Motors from liability for acts of negligence unrelated to those inherent risks. Based on this language, we conclude that Moore released ATVSI and Hartley Motors only from liability arising from the inherent risks of ATV riding and ordinary negligence associated with those inherent risks. [Fn. 27] As we noted in *Kissick v. Schmierer*, an exculpatory release can be enforced if "the intent to release a party from liability for future negligence" is "conspicuously and unequivocally expressed." [Fn. 28] However, underlying the ATV course release signed by Moore was an implied and reasonable presumption that the course is not unreasonably dangerous.

Moore claims that she was injured when she fell off her ATV after riding over a rock obscured by tall grass. We assume the truth of this assertion for purposes of reviewing the superior court's summary judgment order. Moore asserts that the course on which the class operated was set up in such a way that she had to ride into the grass and that this posed an unnecessary danger.

The allegedly improper course layout may be actionable if the course posed a risk beyond ordinary negligence related to the inherent risks of off-road ATV riding assumed by the release. [Fn. 29] As we have explained in the context of skiing, "[i]f a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger" and is therefore not an inherent risk of the sport. [Fn. 30] We have described an "unreasonable risk" as one for which "the likelihood and gravity of the harm threatened outweighed the utility of the . . . conduct and the burden on the [defendant] for removing the danger." [Fn. 31] If the course was designed or maintained in such a manner that it increased the likelihood of a rider encountering a hidden rock, then the course layout may have presented an unnecessary danger; holding an ATV safety class on an unnecessarily dangerous course is beyond the ordinary negligence released by the waiver. Holding a safety class on an unreasonably risky course may give rise to liability even if encountering rocks is generally an inherent risk of ATV riding. Moreover, the fact that the course was geared towards novice ATV riders may also affect the level of care required of ATVSI and Hartley Motors to reduce unnecessary dangers and unreasonable risk. [Fn. 32]

Whether the injury resulted from an unnecessarily dangerous course or a course placed perilously close to an obscured obstacle are questions of fact. Here, Moore presented facts that could support a finding that the ATV safety course was laid out in an unnecessarily dangerous manner that was not obvious to novice ATV riders and therefore not within the scope of the release. Thus, it was error to grant summary judgment.

IV. CONCLUSION

Moore agreed to release the defendants from liability for injuries sustained as a result of participation in the ATV riding and safety class. The trial court erred in granting summary judgment because genuine issues of material fact existed regarding whether the injury resulted from unreasonable dangers not within

the scope of the release. Therefore, we REVERSE the grant of summary judgment in favor of the defendants and REMAND the case to the trial court for further proceedings consistent with this opinion.

FOOTNOTES

Footnote 1:

Specialty Vehicle Institute of America was added as a defendant in the Second Amended Complaint in October 1995.

Footnote 2:

The ATV dealer was dismissed as a defendant in 1997.

Footnote 3:

See Ganz v. Alaska Airlines, Inc., 963 P.2d 1015, 1017 (Alaska 1998).

Footnote 4:

See Parson v. Marathon Oil Co., 960 P.2d 615, 618 (Alaska 1998).

Footnote 5:

See id.

Footnote 6:

Samaniego v. City of Kodiak, 2 P.3d 78, 83 (Alaska 2000).

Footnote 7:

Moore has not presented evidence that the parties to this case promised to provide the \$50 rebate.

Footnote 8:

Moore also asserts that the release was not valid because the instructor returned the signed release to her after the injury. She claims that by returning the slip of paper to her, Croak rejected the release, and therefore the release does not bind Moore. The physical location of the signed consent form -- in ATVSI's possession or Moore's -- has no effect on the bargained-for exchange that occurred before Moore began participation in the class.

Footnote 9:

A comment to the Restatement (Second) of Contracts states:

Even in the typical commercial bargain, the

promisor may have more than one motive, and the person furnishing the consideration need not inquire into the promisor's motives. Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so.

Restatement (Second) of Contracts sec. 81 cmt. b (1979).

Footnote 10:

See Municipality of Anchorage v. Locker, 723 P.2d 1261, 1264-67 (Alaska 1986).

Footnote 11:

Id.

Footnote 12:

Id. at 1264-65.

Footnote 13:

383 P.2d 441 (Cal. 1963).

Footnote 14:

Locker, 723 P.2d at 1265 (quoting Tunkl, 383 P.2d at 445-46).

Footnote 15:

See id.

Footnote 16:

Id. at 1265.

Footnote 17:

See Boucher v. Riner, 514 A.2d 485 (Md. App. 1986).

Footnote 18:

See Kurashige v. Indian Dunes, Inc., 200 Cal. App. 3d 606 (Cal. App. 1988).

Footnote 19:

See Mann v. Wetter, 785 P.2d 1064, 1066 (Or. App. 1990).

Footnote 20:

See AS 05.45.120.

Footnote 21:

See AS 05.45.010-.210.

Footnote 22:

See AS 05.45.040-.070.

Footnote 23:

See AS 05.45.010.

Footnote 24:

The United States government brought suit under the Consumer Product Safety Act, 15 U.S.C. sec. 2061 (1981), against the manufacturers of ATVs for "relief as may be necessary to protect the public from the risk of an imminently hazardous consumer product." The case settled and the court issued a consent decree requiring manufacturers to market ATVs within specified guidelines, "offer to all interested persons a nationwide hands-on training program," and offer incentives to consumers to take the classes.

Footnote 25:

Kissick v. Schmierer, 816 P.2d 188, 191 (Alaska 1991).

Footnote 26:

The release signed by Moore reads as follows:

IMPORTANT INFORMATION. YOU MUST READ AND SIGN THIS CONSENT FORM AND RELEASE: The Consumer Product Safety Commission ("CPSC") reports that over 1,186 people, including many children, have died in accidents associated with ATVs since March, 1986. You should also be aware that 70cc to 90cc ATVs should be used only by persons aged 16 and older. Having been advised of the above, the undersigned agrees to release the ATV Safety Institute, the Specialty Vehicle Institute of America, its members, Trustees, employees, agents, representatives and all other organizations affiliated with the ATV RiderCourse, from any and all liability, loss, damage claim or cause of action, known or unknown, including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse.

Footnote 27:

The inherent risks of an activity such as ATV riding are those risks that are obvious and necessary to the sport. These inherent risks, by the very nature of being "inherent," are beyond the control of instructors teaching the activity, the landowner on whose land the activity is conducted, or an organization conducting a program involving the activity.

Footnote 28:

816 P.2d at 191.

Footnote 29:

See Scott v. Pacific West Mountain Resort, 834 P.2d 6, 10 (Wash. 1992) (noting that an exculpatory clause should not be upheld where "the negligent act falls greatly below the standard established by law for protection of others").

Footnote 30:

Hiibschman ex rel. Welch v. City of Valdez, 821 P.2d 1354, 1360 n.12 (Alaska 1991) (quoting Assumption of Risk After Sunday v. Stratton Corp.: The Vermont Sports Liability Statute and Injured Skiers, 3 V. L. Rev. 129, 141-42 (1978)).

Footnote 31:

State v. Abbott, 498 P.2d 712, 725 (Alaska 1972).

Footnote 32:

See, e.g., Hiibschman, 821 P.2d at 1360 (citing as evidence of ski operator negligence evidence that a ski jump that caused injury was on a beginner's slope, and that an expert witness stated that there should not have been any jumps on a beginner's slope, especially if it was not clearly marked as only being for expert skiers); Scott, 834 P.2d at 15 (reversing summary judgment where "some of the evidence would support a conclusion that the race course was laid out in an unnecessarily dangerous manner that was not obvious to a young novice ski-racing student").