

MONTANA SUPREME COURT

NEGLIGENCE: Redacted horse riding waiver properly admitted ... costs affidavit improperly signed by affiant's partner, award vacated ... defense verdict affirmed ... Tucker affirmed, reversed.

Kieran McDermott and his family were guests at Horse Prairie Ranch in Beaverhead Co. He signed a waiver & release. On 7/23/01, under the supervision of 4 wranglers, he and 10 others were saddling their horses. His stepmother's horse was tethered to a post. While he attempted to untie the rope the horse pulled back and the tightened rope severed the distal part of his right index finger. He sued HPR alleging negligence in determining his ability to safely engage in the equine activity, in selecting a horse that he could safely manage, in inspecting the tack, and in generally failing to prevent injury. HPR asserted the equine liability limitations, §§ 27-1-725 & 727(1). Although it conceded that the waiver is not enforceable, it moved to have it admitted to show that McDermott was aware that equine activities are inherently dangerous, with potentially prejudicial language excised. McDermott moved to exclude the waiver for any purpose, observing that it was an illegal attempt to prospectively release HPR from tort liability. After a hearing at which he and his lawyer inexplicably failed to attend, Judge Tucker permitted HPR to introduce a redacted version, excluding any language that prospectively released HPR from liability. During voir dire a prospective juror indicated that he expected that McDermott had signed a waiver and it would not be right to let him invalidate it. HPR's lawyer then engaged in a colloquy that culminated with a suggestion that one who engages in horse riding assumes the risks. McDermott's lawyer did not object. During closing HPR's lawyer commented to the effect that McDermott's signature on the waiver indicates that he acknowledged the risks in horse riding. McDermott's counsel did not object. The Dillon jury found that HPR was not negligent (8/14/04:3). Tucker ordered McDermott to pay HPR's costs with interest, and denied his motion for new trial or JNOV based on admission of the waiver and HPR's references to it in closing. HPR served a bill of costs with an affidavit by Jared Dahle verifying the costs but signed by Randall Nelson "for Jared S. Dahle." Tucker overruled McDermott's objection to the bill of costs. McDermott appeals.

Tucker did not err in admitting the redacted waiver. Although the waiver is illegal, HPR has not attempted to enforce it or use it as evidence that McDermott waived his right to sue for injuries caused by its tortious conduct. Rather, it removed any exculpatory language and offered it to demonstrate that he had notice of the inherent risks posed by the unpredictable nature of horses. Thus, as affirmatively pled, it endeavored to establish that the equine liability statutes shielded it from liability. McDermott asserts that because the waiver is illegal and unenforceable it may not be used to his disadvantage for any purpose. However, he fails to support this conclusory statement with any authority. By failing to timely object, he waived his right to appeal as to the comments about the waiver by HPR and the prospective juror and by HPR during closing.

Tucker abused his discretion in awarding costs to HPR. § 25-10-501 requires a party seeking costs to serve

a memorandum of the items of his costs and necessary disbursements ... verified by the oath of the party, his attorney or agent, or the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

A notary who takes a verification must

determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the verification is the person whose true signature is on the statement verified. §1-5-603(2).

Nelson was present to subscribe to and swear to the statement before the notary, as indicated by his signature on the verification, and was thus the maker of the statement, yet it gives no indication that he has personal knowledge of the information or swore to its validity. Rather, the verification indicates that it was subscribed and sworn to by Dahle, although Dahle was not present to be sworn by the notary, subscribe to his statement, or sign the verification. Thus the affidavit verifying the bill of costs is improper as a matter of formality. It is also functionally defective since nobody could be prosecuted for false swearing since there is no indication that Nelson made a sworn statement or that Dahle attested to validity of the statement which he purportedly made. The costs award is vacated.

Nelson, Warner, Leaphart, Morris, Rice.

McDermott v. Horse Prairie Ranch, 04-828, 11/22/05. Geoffrey Angel (Angel Law Firm), Bozeman, for McDermott; Jared Dahle (Nelson & Dahle), Billings, for HPR.