

## KENTUCKY WAIVER IN CAVE TOUR FATALITY INEFFECTIVE

**COUGHLIN v. T.M.H. INTERNATIONAL ATTRACTIONS, INC.**

**895 F.Supp. 159 (W.D. Ky. 1995)**

**United States District Court, Western District Kentucky, Bowling Green Division.**

**August 16, 1995.**

In this case, plaintiffs Margaret and John Coughlin, administrators of the estate of William Coughlin (Coughlin), sued the defendant T.M.H. International Attractions, Inc. following a fatal accident during defendant's cave tour. The facts of the case were as follows:

On Friday, May 28, 1993, William J. Coughlin and two of his friends, James Jakala and Kevin Feeley traveled from Illinois to Cave City, Kentucky. While in Cave City, the **young men read T.M.H.'s brochure** that advertised two tours available to the public at Buzzards Roost Cave. The **brochure described a "Historic Tour" and a "Wild Cave Tour."** The Historic Tour provided guided viewing of easily accessible areas of the cave. In contrast, the **Wild Cave Tour, which the brochure described as appropriate for "the more daring visitor," provided guided exploration of unimproved areas and "required crawling, twisting and squeezing through the lower passages of the cave."**

On Sunday, May 30, 1993, Coughlin, Jakala, and Feeley went to Buzzards Roost Cave to participate in the cave tours. **None of the young men were experienced cavers.** They first chose to participate in the Historic Tour. Before embarking on the tour, **all three signed a release form** that consisted of the following text:

We the undersigned hereby accept the following special conditions and **in recognition that speleology is an inherently dangerous recreational activity, we voluntarily assume all risks** and shall indemnify and hold the owners, operators, and employees of Buzzards Roost Historic Cave harmless from all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the privileges granted by this permit including damages caused by or resulting from the sole or joint negligence of the owners, operators, or employees of Buzzards Roost Historic Cave. Additionally, I accept and understand the aforementioned conditions apply to any minor we escort.

**Each caver did not have his own form to sign, but rather signed one document passed amongst the group.**

Coughlin and Jakala **completed the Historic Tour**, which Co-Defendant David Hardin guided, and **then elected to participate in the Wild Cave Tour** offered that afternoon. Coughlin, Jakala, and four other persons paid Hardin to conduct the Wild Cave Tour. Hardin **asked each to sign a release form with language identical to that above.**

Before the tour began, Hardin **gave the group two hand-held flashlights. He also instructed the group members that he would lead the exploration and that each person should navigate the cave in the same fashion as the person in front of him or her.** After crawling through part of the cave for a while, the group reached a thirty-foot hanging cable ladder with wooden rungs ("the first ladder"). The group descended this ladder, crawled a short distance, and then reached the second ladder, a fifteen-to-twenty-foot hanging cable ladder. The **second ladder, although shorter, was more difficult to navigate because it hung over a rock protrusion, which made it difficult to grip the rungs adequately.** Shortly after the group descended the second ladder, **Hardin announced that the official tour had ended, but that the group was free to explore nearby passages.**

Sometime around 7:00 P.M., Hardin gathered the group together and **informed them that they were behind schedule. He told the group that he was going to leave to make a phone call.** He then **left the group at the bottom of the second ladder** between 7:00 and 7:15 P.M.. When **Hardin did not return after thirty to forty-five minutes had elapsed, the group attempted to exit the cave.** Coughlin unsuccessfully tried twice to climb the second ladder. Jakala then asked two persons in the group to exit the cave in order to find Hardin. After waiting a while for Hardin to return, **Coughlin attempted to climb the ladder again, but he slipped and fell. He hit his head on the rock protrusion, fell several feet and landed on his head, which began to bleed profusely.**

At Jakala's request, several members of the group exited to summon **Hardin, who returned without a medical kit and without having requested the assistance of medical or rescue personnel. Hardin strove to help Coughlin leave the cave, but Coughlin became wedged in a rock formation as he was attempting to crawl to safety.** Having been trapped in the passageway for seven hours, Coughlin died of his injuries the next day.

In response to Coughlin's negligence claims, defendants T.M.H. and Gordon Hall asserted that "Bill Coughlin released Defendants from liability for all claims arising from their negligence when he executed a waiver before embarking on the Wild Cave Tour."

In considering the enforceability of the liability waiver, the federal district court reviewed the following two state statutes to determine "the intentions of the Kentucky legislature as well as common law justifications" for providing immunity in recreation.

The Recreational Use Statute, Ky.Rev.Stat. sec. 411.190, states that a property owner is not liable for any negligence towards those who enter the property for recreational purposes unless the property owner charges the entrants.

The **Cave Protection Statute**, Ky.Rev.Stat. sec. 433.883, mirrors this language in relation to cave owners. **By negative implication, the legislature has suggested that owners who charge for cave exploration do not receive special treatment and that if one charges for such activity, one might be expected to shoulder responsibility for any consequences.**

In the opinion of the federal district court, these two state statutes demonstrated that "**the legislature did not intend to encourage the commercial exploitation of caves.**" Accordingly, the federal district court stated it would "be very careful before it endorses a common law rule which encourages contrary conduct," i.e., enforcing liability releases for cave exploration. Further, the federal district court found that "[t]he Kentucky common law [i.e., "judge-made" law defined by court decisions] suggests that the Court use similar caution."

Well-settled roots of Kentucky law supports a **public policy that disfavors and, indeed, bars exculpatory agreements from enforcement.** In analyzing exculpatory agreements as to one party's negligence, courts must **look to whether the public interest requires performance of the duties in the agreement and whether the parties stand on an equal footing with one another... [T]he release is against public policy if the parties possess unequal bargaining power...**

[W]ell-settled law in Kentucky [suggests] **releases must be interpreted narrowly, and against the protected party...** [C]ourts have cautiously analyzed each situation in light of public policy... **[In determining whether a particular release is void as against public policy, court have] considered the following factors:**

- 1. The voluntary signing of the release;**
- 2. The equal bargaining power of the parties;**
- 3. The public interest in the activity;**
- 4. The recreational nature of the activity;**
- 5. The knowledge and familiarity of Plaintiff with activity...**

[A]lthough one may be released of liability for ordinary or gross negligence, **one may not be released of liability for willful and wanton negligence.**

**Applying these principles** to the facts of the case, the federal district found that Coughlin had not "released Defendants of liability by signing the release form."

Mr. Coughlin was an **inexperienced caver who knew little about the activity of spelunking.** He may have **voluntarily signed the release;** however, he was **not on an equal footing** with the Defendants. Mr. Coughlin **did not know of the dangers** inside the cave--the **release read more as an enticement than as a warning of specific risks that the tour members would confront.** Thus, Mr. Coughlin relied entirely on his tour guide and the cave operators for his own safety, instead of on his own expertise or familiarity with spelunking.

In addition, the court found **"no public interests in encouraging commercial caving by validating releases under these circumstances."**

**In an activity such as competitive racing, the public's interests are a factor, and invalidating a release may lead to a decrease in such events because track owners fear liability.** However, the public's interests are considerably different in this instance. Cave exploration is not a competitive sport which involves the public; here, it was a supervised and structured activity. **Even if it is true that some cave owners will now discontinue commercial tours for fear of liability without valid releases, this does not overcome the evident public interest in the physical safety and legal protection of our citizens.**

Moreover, a tour of a cave does not qualify as a recreational activity as... in the presence of the public and involved trained individuals in car or bicycle racing events. The case at bar stands in stark contrast. The Court cannot construe this cave tour as a recreational activity on the same par with auto racing or bicycle racing.

Therefore, absent expansion of the narrow exception, the general rule against waiver of liability must stand. The Court finds insufficient justification for believing that Kentucky courts would carve a further exception for all activities that are recreational in nature and involve releases.

The federal district court, therefore, denied defendants' motion for summary judgment based upon the release signed by Coughlin before participating in defendants' cave exploration.