2015 IL App (5th) 140124-U

NO. 5-14-0124

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

APRIL DODGE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Respondent,	)	Madison County.
	)	
v.	)	No. 13-L-238
	)	
GRAFTON ZIPLINE ADVENTURES, LLC,	)	
and MICHAEL QUINN,	)	Honorable
	)	Barbara L. Crowder,
Defendants-Petitioners.	)	Judge, Presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Appellate court declines to answer the certified question and remands to the trial court to hear evidence to determine whether exculpatory agreement is between the public and one charged with a duty of public service, *i.e.*, a common carrier, and therefore unenforceable.

¶ 2 The plaintiff, April Dodge, filed the instant suit seeking recovery for injuries she sustained while riding on an aerial zip line course designed and operated by defendant Grafton Zipline Adventures, LLC (Grafton Zipline), by which defendant Michael Quinn is employed. The circuit court certified a question after denying the defendants' motion to dismiss.

¶ 3 BACKGROUND

¶ 4 In her first amended complaint filed on May 3, 2013, the plaintiff alleged that Grafton Zipline operated an aerial zip line course in which paying guests, riding from one elevated platform to another, were guided over a series of suspended wire cable runs. The plaintiff alleged that "guests [we]re outfitted with a harness and pulley system which attache[d] to the suspended cables and which in theory allow[ed] them to control their speed by braking on descents." The plaintiff alleged that on the eighth run of the zip line course, the plaintiff's braking system failed to slow her descent, she approached the landing platform at a high rate of speed, and she violently struck the trunk of the tree on which the landing platform was mounted, fracturing her right heel bone.

¶ 5 In count I, the plaintiff alleged that Grafton Zipline was a common carrier that breached its duty of care by negligently designing and operating its course, intentionally or recklessly violated the safety regulations promulgated by the Illinois Department of Labor (56 Ill. Adm. Code 6000.350 (2013)), and thereby engaged in willful and wanton misconduct. In count II, the plaintiff claimed that Quinn, a tour guide for Grafton Zipline, was negligent in instructing the plaintiff, in inspecting and maintaining the braking system, and in failing to prevent the plaintiff from colliding with the tree. The plaintiff also alleged willful and wanton misconduct against Quinn.

¶ 6 On June 7, 2013, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)), the defendants filed a motion to dismiss the plaintiff's first amended complaint on the basis that the plaintiff's claims were barred by an exculpatory agreement signed by the plaintiff prior to her participation in the zip line activity. In the

agreement, the plaintiff agreed to release the defendants from liability for injury, disability, death, or loss or damage to persons or property, whether caused by negligence or otherwise.

¶ 7 In the plaintiff's memorandum of law in opposition to the defendants' motion to dismiss, the plaintiff asserted that the defendants' exculpatory agreement was unenforceable. The plaintiff asserted that zip line courses are common carriers under Illinois law, and as such, they cannot exempt themselves from liability for their own negligence.

¶ 8 On November 1, 2013, the circuit court held that exculpatory clauses were unenforceable against plaintiffs injured by the ordinary negligence of a common carrier. The circuit court noted that when parties disagree as to whether a defendant is a common carrier, the question becomes a controverted question of fact to be determined after considering evidence. However, the circuit court found that the pleadings before it alleged sufficient facts to establish that the defendants were common carriers, in that zip lines fell within the definition of amusement rides pursuant to the Illinois Carnival and Amusement Rides Safety Act (430 ILCS 85/2-2 (West 2012)) and were akin to merry-go-rounds or other amusement rides that had been held to be common carriers. The circuit court thereby denied the defendants' section 2-619 motion to dismiss based on the exculpatory clause but also stated that "questions of fact remain as to whether [d]efendants *** are within the definition of common carriers."

¶ 9 On March 6, 2014, the circuit court, pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010), entered its order certifying the following question for appeal:

"Is an exculpatory agreement signed by a participant on a zip[ ]line course, that released the zip[ ]line operator and its employees from their own negligence, enforceable to bar the participant's suit for negligence, or is the zip[ ]line course a common carrier such that the exculpatory agreement is unenforceable?"

¶ 10 On March 20, 2014, the defendants filed an application for permissive interlocutory appeal, which we denied on April 21, 2014. On September 24, 2014, however, the Illinois Supreme Court directed this court to vacate its judgment denying the defendants' application for leave to appeal and directed us to grant such application. *Dodge v. Grafton Zipline Adventures, LLC*, No. 117701 (Ill. Sept. 24, 2014). On November 5, 2014, per the supreme court's supervisory order and pursuant to Illinois Supreme Court Rule 308, we thereafter allowed the defendants' permissive interlocutory appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, the defendants argue that the exculpatory agreement signed by the plaintiff bars her negligence claims and that the exculpatory agreement is enforceable because Grafton Zipline is not a common carrier. The plaintiff counters that the circuit court's certified question is not ripe for determination because there are unresolved questions of fact regarding whether Grafton Zipline is a common carrier. We agree with the plaintiff.

¶ 13 "The scope of review in an interlocutory appeal brought under [Illinois Supreme Court] Rule 308 is limited to the certified question." *Spears v. Association of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15. "A reviewing court should only

answer a certified question if it asks a question of law and [should] decline to answer where the ultimate disposition 'will depend on the resolution of a host of factual predicates.' [Citations.]" *Id.* "A certified question pursuant to Rule 308 is reviewed *de novo*." *Id.*

¶ 14 An exculpatory clause is a contractual provision that excuses the defaulting party's liability. See Black's Law Dictionary 648 (9th ed. 2009) (defining an exculpatory clause as "a contractual provision relieving a party from liability resulting from a negligent or wrongful act"); *McKinney v. Castleman*, 2012 IL App (4th) 110098, ¶ 14 (exculpatory agreement involves express assumption of risk wherein one party consents to relieve another of a particular obligation). "Courts disfavor such agreements and construe them strictly against the benefitting party, particularly one who drafted the release." *McKinney*, 2012 IL App (4th) 110098, ¶ 14. "Nevertheless, contracting parties are free to 'allocate the risk of negligence as they see fit, and exculpatory agreements do not violate public policy as a matter of law.' " *Id.* (quoting *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 412 (2007)).

¶ 15 Accordingly, if a valid exculpatory clause clearly applies, and in the absence of fraud or willful and wanton negligence, courts will enforce it unless " ' (1) it would be against a settled public policy of the State to do so, or (2) there is something in the social relationship of the parties militating against upholding the agreement.' " *McKinney*, 2012 IL App (4th) 110098, ¶ 14 (quoting *Harris v. Walker*, 119 Ill. 2d 542, 548 (1988)). Exculpatory agreements between the public and those charged with a duty of public service, such as those involving a common carrier, an innkeeper, a public warehouseman,

or a public utility, have been held to be unenforceable as contrary to public policy. *McKinney*, 2012 IL App (4th) 110098, ¶ 14; *Johnson v. Salvation Army*, 2011 IL App (1st) 103323, ¶ 19; *White v. Village of Homewood*, 256 Ill. App. 3d 354, 358-59 (1993). Courts have alternatively recognized that exculpatory agreements between common carriers and passengers are unenforceable because of the special social relationship of a semipublic nature that permeates the transaction between the parties. See *McClure Engineering Associates, Inc. v. Reuben Donnelley Corp.*, 101 Ill. App. 3d 1109, 1111 (1981); *First Financial Insurance Co. v. Purolator Security, Inc.*, 69 Ill. App. 3d 413, 419 (1979) ("when an exculpatory provision is found invalid because of a special relationship between the parties, it is the semipublic nature of the party seeking to exculpate itself from liability that allows the court to invalidate the provision").

¶ 16 Thus, any contract by which a common carrier of goods or passengers undertakes to relieve itself from liability for loss or damage arising from its negligence or the negligence of its servants is void. *Checkley v. Illinois Central R.R. Co.*, 257 Ill. 491, 494 (1913); *Simmons v. Columbus Venetian Stevens Buildings, Inc.*, 20 Ill. App. 2d 1, 17 (1958); Restatement (Second) of Torts § 496B cmt. G (1965) ("Where the defendant is a common carrier ***, or is otherwise charged with a duty of public service, and the agreement to assume the risk relates to the defendant's performance of any part of that duty, it is well settled that it will not be given effect."). "Having undertaken the duty to the public, which includes the obligation of reasonable care, [common carriers] are not free to rid themselves of their public obligation by contract, or by any other agreement." Restatement (Second) of Torts § 496B cmt. G (1965).

¶ 17 An exculpatory contract, wherein a common carrier of goods or passengers undertakes to exempt itself from liability for negligence "if sustained, would relieve the carrier from its essential and important duties to the public growing out of the character of its employment, and tend to defeat the foundation principle on which the law of common carriers is based; that is, the securing of the highest care and diligence in the performance of the important duties due to the public." *Checkley*, 257 Ill. at 494; see also *Simmons*, 20 Ill. App. 2d at 17. "The heightened status afforded to common carrier[ ] *** relationships is based on the protection of the public ***." *Zerjal v. Daech & Bauer Construction, Inc.*, 405 Ill. App. 3d 907, 912 (2010); see also *Simmons*, 20 Ill. App. 2d at 17 ("It has been said if there is any general reason for the rule to be deduced from the passenger cases, it is that the public service consideration alone prevents contractual limitation of liability for negligence.").

¶ 18 In holding that a common carrier has a duty to exercise the highest degree of care consistent with the practical operation of its conveyances to protect its passengers (*Rotheli v. Chicago Transit Authority*, 7 Ill. 2d 172, 177-78 (1955); *Browne v. Chicago Transit Authority*, 19 Ill. App. 3d 914, 917 (1974)), courts have considered the " 'unique control [a common carrier] possesses over its passengers' safety.' " *Krywin v. Chicago Transit Authority*, 391 Ill. App. 3d 663, 666 (2009) (quoting *Sheffer v. Springfield Airport Authority*, 261 Ill. App. 3d 151, 154 (1994)); see also *O'Callaghan v. Dellwood Park Co.*, 242 Ill. 336, 345 (1909) ("If the injury of a passenger is caused by apparatus wholly under the control of a carrier and furnished and managed by it, and the accident is of such a character that it would not ordinarily occur if due care is used, the law raises a

presumption of negligence."). "Common carriers are charged with the highest duty of care when transporting passengers because passengers must wholly rely upon a common carrier's proper maintenance and safe operation of its equipment during passage." *Sheffer*, 261 Ill. App. 3d at 156. "[C]ommon carriers are responsible for their patrons' physical safety for which there is no second chance if a mistake should occur." *Zerjal*, 405 Ill. App. 3d at 912.

¶ 19 In determining whether a defendant is a common carrier that owes the highest degree of care in transporting its passengers, the courts have characterized the following as common carriers: owners of buildings with elevators (*Rotheli*, 7 Ill. 2d at 177); a scenic railway at an amusement resort, where "steep inclines, sharp curves, and great speed necessarily are sources of peril" (*O'Callaghan*, 242 Ill. at 344); a merry-go-round (*Arndt v. Riverview Park Co.*, 259 Ill. App. 210, 216-17 (1930)); a taxicab (*Metz v. Yellow Cab Co.*, 248 Ill. App. 609, 612 (1928)); and a Ferris wheel (*Pajak v. Mamsch*, 338 Ill. App. 337, 341 (1949)).

¶ 20 In finding that an escalator was not a common carrier, the Illinois Supreme Court in *Tolman* found it significant that a person on an escalator may actively participate in the transportation in a manner similar to the use of a stairway and may contribute to his own safety. *Tolman v. Wieboldt Stores, Inc.*, 38 Ill. 2d 519, 526 (1967). The court noted that the role of a passenger on a train, bus, or elevator is a passive one, and ordinarily such a passenger cannot exercise any control over his own safety. *Id.* at 525. The court further held that the rule as to the higher duty one owning and operating an elevator owes to a passenger riding in same, who is injured through some defect in its operating mechanism,

is predicated upon the fact that a person riding in an elevator cannot possibly know or show, if such elevator gets out of control, what caused it to do so. *Id.* at 524-25. The court noted that because the elevator owner was in sole control of the elevator and the machinery used in its operation, an inference of negligence on the part of said owner arose out of the circumstances. *Id.*; see also *Lombardo v. v. Reliance Elevator Co.*, 315 Ill. App. 3d 111, 125 (2000) (because bank had full control of premises, it had the duties of common carrier owed to the plaintiff who suffered injuries when the lift he was riding suddenly fell); *Carson v. Weston Hotel Corp.*, 351 Ill. App. 523, 532 (1953) (lessee in full control of the premises had the duties of a common carrier of elevator passengers).

¶ 21 While proper solicitude for human safety requires a carrier of passengers not to diminish its liability to them, the relative bargaining power of the parties is also a factor. *Simmons*, 20 Ill. App. 2d at 17. In *Hamer v. City Segway Tours of Chicago, LLC*, 402 Ill. App. 3d 42, 43-44 (2010), the plaintiff sought to recover for injuries she suffered on a tour run where she rode a segway onto a small grassy hill, and it threw her off. The plaintiff signed a release before participating in the tour. *Id.* The plaintiff argued, however, that her social relationship with the defendant and its tour guide rendered the release unenforceable. *Id.* at 46. The court concluded, without analysis, that the defendant was not a common carrier. *Id.* Finding also that that there was no disparity of bargaining power because the plaintiff simply could have refused to join the tour if she had disagreed with the exculpatory clause, the court held that the exculpatory language of the release was enforceable. *Id.*

¶ 22 Further, courts have distinguished between a common and a private carrier. "A common carrier, generally, is a carrier hired to carry any person who applies for passage as long as there is room available and there is no legal excuse for refusing." *Long v. Illinois Power Co.*, 187 Ill. App. 3d 614, 628 (1989). "Ordinarily, a common carrier must accept as a passenger any person offering himself or herself for passage at the proper time and in the proper manner and who is able and willing to pay the fare." *Id.* "[A] common carrier may be liable for an unexcused refusal to carry all who apply." *Doe v. Rockdale School District No. 84*, 287 Ill. App. 3d 791, 794 (1997). A common carrier is "obligated by law to undertake the charge of transportation, which none but a common carrier, without a special agreement, is." *Rathbun v. Ocean Accident & Guarantee Corp.*, 299 Ill. 562, 566 (1921).

¶ 23 A common carrier holds himself out as such by advertising or by actually engaging in the business and pursuing the occupation as an employment. *Id.* at 567. The test to distinguish a common carrier from a private carrier is whether the carrier serves all of the public alike. *Green v. Carlinville Community Unit School District No. 1*, 381 Ill. App. 3d 207, 211 (2008); *Illinois Highway Transportation Co. v. Hantel*, 323 Ill. App. 364, 375 (1944). Again, common carriers necessarily have control and regulation of the passengers' conduct and of the operation of the carriage before they can be held to the extraordinary liability of common carriers to such passengers. *Rathbun*, 299 Ill. at 567 (evidence that deceased contracted car by private contract and had control of car and driver revealed defendant was not common carrier but was liable only as private carrier for ordinary negligence).

¶ 24 "Private carriers as ordinarily defined are those who, without being engaged in such business as a public employment, undertake to deliver goods or passengers in a particular case for hire or reward." *Rathbun*, 299 Ill. at 566. A private carrier makes no public profession to carry all who apply for transport, transports only by special agreement, and is not bound to serve every person who may apply. *Green*, 381 Ill. App. 3d at 211; *Rockdale School District No. 84*, 287 Ill. App. 3d at 795.

¶ 25 "Whether a particular transportation service is undertaken in the capacity of a private or of a common carrier must be determined by reference to the character of the business actually carried on by the carrier, and also by the nature of the service to be performed in the particular instance." (Internal quotation marks omitted.) *Long*, 187 Ill. App. 3d at 630. When a plaintiff affirms and the defendant denies that the defendant is operating as a common carrier, the question becomes a controverted question of fact to be determined by a consideration of the evidence by the trial court. *Rathbun*, 299 Ill. at 566; *Bare v. American Forwarding Co.*, 242 Ill. 298, 299 (1909); *Hantel*, 323 Ill. App. at 374; *Beatrice Creamery Co. v. Fisher*, 291 Ill. App. 495, 497 (1937).

¶ 26 Accordingly, we find that whether Grafton Zipline is a common carrier is a question of fact, "dependent upon the nature of the business in which [it is] engaged, and [is] to be determined from a consideration of all of the evidence." *Beatrice Creamery Co.*, 291 Ill. App. at 497. In its order, the circuit court noted that questions of fact remained regarding whether Grafton Zipline is a common carrier. We agree and find this so with regard to the certified question. To determine whether the exculpatory clause is unenforceable on the basis that Grafton Zipline is a common carrier "charged with a duty

of public service" the court must necessarily determine disputed factual issues. The court must determine whether Grafton Zipline had control and regulation of the passengers' conduct and of the operation of the carriage (see *Rathbun*, 299 Ill. at 567 (evidence that deceased contracted car by private contract and had control of car and driver revealed defendant was not common carrier but was liable only as private carrier for ordinary negligence)); whether the plaintiff actively participated in the transportation and contributed to her own safety (*Tolman*, 38 Ill. 2d at 525-26 (because escalator allowed the plaintiff to actively participate in the transportation and allowed control over safety, escalator not common carrier); whether there was a disparity of bargaining power between the parties (see *Hamer*, 402 Ill. App. 3d at 43-44 (exculpatory clause enforceable where plaintiff could simply have refused to join the segway tour)); and whether Grafton Zipline made a profession to carry all who applied for carriage (see *Browne v. SCR Medical Transportation Services, Inc.*, 356 Ill. App. 3d 642, 647 (2005) (because medical transport van served only those individuals who met its eligibility requirements, could decline to serve anyone based on numerous factors such as location and availability of medical transport vans, made no profession to carry all who apply for carriage, and was not bound to serve every person who may apply, medical transport van was not a common carrier)). To answer the certified question before the circuit court has heard evidence on these matters would be premature. Thus, we decline to answer the certified question, and we remand the cause for further proceedings consistent with this order. See *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 477 (1998).

¶ 27 CONCLUSION

¶ 28 For the reasons stated, we decline to answer the certified question as its ultimate disposition depends on the resolution of multiple factual predicates. We remand the cause to the Madison County circuit court for further proceedings.

¶ 29 Certified question not answered; cause remanded.