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Happy Halloween: A Litigation Nightmare?

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Halloween has produced a surplus of complicated and, at times, amusing litigation over the years – from flammable cotton ball costumes to unneighborly yard decor.[2] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn2) Haunted house attractions generate personal injury, assault, and negligence claims each year.[3] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn3) Most of these cases involve some procedural mud-slinging followed by a motion to dismiss or a motion for summary judgment by the defendant haunted house attraction based on the primary assumption of the risk doctrine.

Primary assumption of the risk is defined as, “a legal conclusion that the average or ordinary participant in an activity would reasonably assume the risks that are inherent in the activity, thereby relieving the defendant of any duty of care with respect to those risks.”[4] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn4) Traditionally and still in many states, primary assumption of the risk implies that there is no breach of the duty of care and acts as a complete bar to a negligence claim.[5] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn5) Even in jurisdictions that recognize primary assumption of the risk,

issues still arise in determining if primary assumption of the risk is a question of fact for a jury to decide or a question of law for a judge to decide.[6] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn6) Some states consider primary assumption of the risk as a question of law “even where the determinative issue is factual, such as whether particular risks are ‘inherent’ in an activity.”[7] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn7) Other states automatically send assumption of the risk questions to a jury.[8] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn8)

In Griffin v. Haunted Hotel, Inc., the plaintiff filed a claim against the operator of “The Haunted Trail” for negligence and assault after he fell and was injured while running from a “chainsaw-wielding actor.”[9] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn9) The plaintiff thought he had exited the attraction when an actor carrying a chainsaw with the chain removed appeared and frightened the plaintiff.[10] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn10) This was a specific part of the haunted house attraction that the defendant referred to as the “Carrie” effect because it issues one final scare before the visitors actually exit the attraction.[11] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn11) The defendant raised primary assumption of the risk as a bar to plaintiff’s claims.[12] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn12) The trial court granted the defendant’s summary judgment motion based on the primary assumption of the risk doctrine.[13] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn13) On appeal, the plaintiff argued that primary assumption of the risk is a question of fact for a jury.[14] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn14) The Court affirmed the trial court’s summary judgment decision and considered the plaintiff’s argument meritless, noting that the determination of duty and inherent risk is a question of law.[15] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn15)

The Ohio Court of Appeals took a different stance in Blum v. Dungeons of Delhi.[16] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn16) Here, the plaintiff claimed negligence and assault after she was injured while running from an employee dressed as a ghoul in a graveyard area outside a haunted house.[17] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn17) After an abundance of procedural motions, the trial court granted the defendant’s motion for summary judgment based on the theory of primary assumption of the risk.[18]

(applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn18) The Court of Appeals reversed and indicated that questions of fact still remained, including a determination about whether the plaintiff was within the confines of the attraction or not when she was injured and if she could reasonably foresee injury at that point.[19] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_edn19)

While these are just two examples of haunted house personal injury and negligence cases, the case law is replete with procedural issues surrounding primary assumption of the risk. Be careful out there, friends, the jurisdictional differences in primary assumption of the risk is just one of the many ways Halloween can become a litigation freight fest.

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[2] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref2) See Daniel B. Moar, *Case Law from the Crypt: The Law of Halloween*, N.Y. St. B.A. J., Oct. 2011, at 15-17.

[3] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref3) *Id.* at 12.

[4] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref4) *Assumption of the Risk*, Black's Law Dictionary (11th ed. 2019).

[5] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref5) Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *Dobbs' Law of Torts* § 238 (2d ed.)

[6] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref6) *Id.*

[7] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref7) *Id.* (quoting *Griffin v. Haunted Hotel, Inc.*, 242 Cal. App. 4th 490, 499 (Cal. Ct. App. 2015).

[8] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref8) Dobbs, Hayden & Bublick, *supra* note 5.

[9] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref9) *Griffin v. Haunted Hotel, Inc.*, 242 Cal. App. 4th 490, 493 (Cal. Ct. App. 2015).

[10] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref10) *Id.*

[11] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref11) *Id.*

[12] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref12) *Id.* at 497.

[13] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref13) *Id.*

[14] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref14) *Id.* at 500.

[15] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref15) *Id.* at 501.


[16] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref16) *Blum v. Dungeons of Delhi*, No. C-180242, 2019 WL 1757550, at *1, *6 (Ohio Ct. App. Apr. 19, 2019).

[17] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref17) *Id.* at *1, *6.

[18] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref18) *Id.* at *1 – *5.

[19] (applewebdata://0245C88C-31D7-44BD-AE9D-07FD5A3030FE#_ednref19) *Id.* at *6.

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