STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0845

Terry Moore, as father and natural guardian for minor, Thaddeus J. Moore,
Appellant,

vs.

Minnesota Baseball Instructional School,
Respondent.

Filed March 31, 2009
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-07-11022

Wilbur W. Fluegel, Fluegel Law Office, 150 South Fifth Street, Suite 3475, Minneapolis, MN 55402; and

Stuart L. Goldenberg, Goldenberg & Johnson, 33 South Sixth Street, Suite 4540, Minneapolis, MN 55402 (for appellant)

Marianne Settano, Theresa Bofferding, Law Office of Settano & Van Cleave, 3600 American Boulevard West, Suite 425, Bloomington, MN 55431 (for respondent)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant Terry Moore initiated this negligence action in district court on behalf of his minor son, T.J., following an incident in which T.J.'s eye was permanently injured while T.J. was participating in a baseball camp operated by respondent Minnesota Baseball Instructional School. The district court granted summary judgment to respondent. Because appellant had signed a valid agreement releasing respondent from liability for T.J.'s injury prior to enrolling in the camp, we affirm.

FACTS

Respondent operates summer baseball-instructional camps for students of varying ages. T.J. participated in one of respondent's camps during June 2005. The camp was located on the grounds of the University of Minnesota. On the camp's final day, students walked from Siebert baseball stadium to Sanford residence hall to have lunch. When the students were done eating lunch, they were given the option of going to a television lounge in the residence hall or going to the residence hall's courtyard. T.J. and a number of other students went to the courtyard to play. While in the courtyard, students began throwing woodchips at each other. T.J. sustained a permanent eye injury when he was struck by a woodchip thrown by another student.

After T.J.'s father initiated suit, respondent moved the district court for summary judgment, arguing that an exculpatory clause contained in the camp's registration materials insulated it from liability. The district court agreed with respondent and granted summary judgment. Appellant contends that the district court erred because

there are material facts in dispute. Specifically, appellant argues that there are fact issues as to whether T.J.'s mother signed the emergency medical information form in question and whether the form contained the exculpatory clause as it is described by respondent. Appellant also contends that, if it does exist, then the district court erred in interpreting and upholding the exculpatory clause in the release. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I. It is not in dispute that T.J.'s mother signed the assumption-of-risk-and-release agreement.

Respondent was unable to produce the assumption-of-risk agreement and release signed by T.J.'s mother. Appellant contends that, because of this, there is a material factual dispute about whether T.J.'s mother signed the agreement.

Lee Swanson is respondent's director. In his deposition, Swanson was asked about the method through which participants sign up for respondent's camp. He explained that parents have the option of enrolling their children online, and that T.J.'s

mother used this process to enroll her son. In order to enroll her son, T.J.'s mother first went to the camp's website and filled out the enrollment form online. After filling out the form online, T.J.'s mother clicked on a link that submitted the enrollment form. Respondent has been able to produce a document generated from the camp's archives as confirmation that T.J.'s mother filled out the enrollment form. Swanson testified that this document was based on information that is sent to the camp electronically upon the completion of a student's enrollment form. Swanson testified that the camp does not receive the actual completed enrollment form.

Respondent has also produced a spreadsheet containing the roster of students who participated in the June 2005 camp that lists T.J. as a camp participant. Respondents were unable to produce a copy of the online enrollment form that T.J.'s mother filled out; however, they were able to produce a 2007 version of the enrollment form, and Swanson testified it was the same as the 2005 version that T.J.'s mother would have filled out:

> ATTORNEY: I'm showing you what has been purported to in your interrogatory answers to be the summer camp enrollment [form] of '07 which was the same – there's a little note that says same as '05; is that correct?
> SWANSON: That's correct.
> ATTORNEY: That's Exhibit Number 5?[1]
> SWANSON: Correct.
> ATTORNEY: Do you recall anything different about this particular enrollment form from the one that existed in '05?
> SWANSON: That is the same.

Swanson was next questioned about an emergency medical form that a student's parent must sign before that student is allowed to participate in the camp:

[1] Exhibit 5 is a copy of the 2007 summer enrollment form.

ATTORNEY: This is Exhibit Number 7, can you identify what that is for us, please?
SWANSON: This is our emergency medical information form that a parent or guardian has to fill out, it gives specific information about primary contacts, about medical histories, about emergency contacts, it also gives information provided for policy numbers, insurance in case we have to ship the kid to the emergency room for some problem. Also it has a Recognition and Assumption of Risk Agreement that the parent or guardian has to sign along with the camper's signature.
ATTORNEY: Is this something that's on-line or is this sent to the parents to sign?
SWANSON: It is available on-line, but every kid that registers gets an e-mail sent, an attachment with this.
ATTORNEY: Do you have a specific copy of this that the Moores actually signed?
SWANSON: We were not able to retrieve it. Generally I have to destroy these because of valuable information or personal information on these.
ATTORNEY: Okay.
. . . .
ATTORNEY: Do you know for certain that this form was in place as of June of '05?
SWANSON: Yes.
ATTORNEY: *What happens if you don't get a copy of this form?*
SWANSON: *Kid cannot participate in camp.*
ATTORNEY: *So it is fair to say that your testimony is going to be that even though you couldn't find a copy of this if he showed up to camp without his parents signing it he would not be allowed to participant?*
SWANSON: *Correct.*
ATTORNEY: So is it fair to say that you can make that assumption then that they did sign this agreement?
SWANSON: Yes.
ATTORNEY Okay. That's Exhibit Number Seven?
SWANSON: Yes.

(Emphasis added.)

Exhibit seven contains the assumption-of-risk agreement that is at the heart of this appeal. It, under the headline "**RECOGNITION & ASSUMPTION OF RISK AGREEMENT**," reads:

> I, the undersigned parent/legal guardian of _____, authorize said child's participation in the Minnesota Baseball Instructional School (MBIS) camp. It is my understanding that participation in the activities that make up MBIS is not without some inherent risk of injury. As such, in consideration of my child's participation in the MBIS camp, I hereby release, waive, discharge, and covenant not to sue the MBIS and any and all Directors, Officers, and Instructors and the Regents of the University of Minnesota and its Directors, Officers, or Employee from any and all liability, claims, demands, action, and causes of action whatsoever arising out of or related to any loss, damage, or injury including death, that may be sustained by my child, whether caused by the negligence of the releases, or otherwise while participating in such activity, or while in, or upon the premises where the activity is being conducted.

The following colloquy occurred when respondent's attorney questioned T.J.'s mother about the assumption-of-risk agreement:

> QUESTION: Okay. I'm showing you what's been marked Deposition Exhibit No. 2. Do you recognize that document?
> ANSWER: I don't recall it specifically.
> QUESTION: Do you recall that that is an emergency medical information – or should I say – let me rephrase that. Do you recall filling out a health information form and emergency medical form for T.J. to attend the Minnesota Baseball Instructional School in either 2004 or 2005?
> ANSWER: I don't recall.
> QUESTION: Okay. *Do you deny having filled out an emergency form for T.J.?*
> ANSWER: *I must have.*
> QUESTION: Okay. I'm going to ask you to look at both pages of that form and see if you recognize that form.
> ANSWER: I don't recall the form.

> QUESTION: Okay. I'd like you specifically to read the second page of the form, recognition and assumption of risk agreement, and I'd like you to read that to yourself and tell me if you recognize that.
> ANSWER: I don't recall the form.
> QUESTION: *Do you deny having filled it out?*
> ANSWER: *I do not deny it, I just don't recall.*

(Emphasis added.)

Based on the above deposition testimony, there is no material fact in dispute that T.J.'s mother signed the emergency medical form containing the assumption of risk agreement. Swanson testified that the 2007 enrollment form he produced was the same as the 2005 version that T.J.'s mother would have used. He was able to produce a document generated from archived enrollment data that indicates T.J. enrolled in the camp. He was also able to produce a roster, containing T.J.'s name, of children who participated in the 2005 camp. Finally, he produced a copy of an emergency medical form that is e-mailed to parents upon completion of the enrollment form. He testified that this was the same version of the emergency medical form that was in place in 2005. He testified that a student would not be allowed to participate in the camp unless the emergency medical form was signed and returned to respondent. The emergency medical form contained the assumption-of-risk agreement with the release language.

T.J.'s mother does not deny filling out the emergency medical form containing the assumption-of-risk agreement. She only states that she does not recall filling it out but admits that she must have filled it out. Because she does not claim that she did not fill out the emergency medical form, and because Swanson testified that she did fill out the form, it is simply not in dispute that T.J.'s mother filled out the form. Appellant argues,

in essence, that the district court made a credibility determination in giving greater weight to Swanson's testimony than to T.J.'s mother. This is not the case because Swanson's testimony and T.J.'s mother's testimony are not in conflict. Swanson testified that T.J.'s mother filled out the emergency medical form. T.J.'s mother's testimony does not contradict Swanson's testimony; she only states that she does not remember filling it out, but that she must have filled it out, and that she does not deny doing so.

Finally, the text of the assumption-of-risk agreement is not in dispute. Swanson produced the 2007 version of the agreement and testified that the 2007 version is the same as the 2005 version. Appellant disputes this in his brief, but points to no evidence that contradicts this testimony. T.J.'s father did not present any evidence that the emergency medical form produced by respondent was different from the 2005 agreement that she "must have" filled out. In sum, there are no material facts in dispute. The district court did not make any credibility determinations and did not weigh the evidence. It simply applied the law to undisputed facts.

II. The exculpatory clause releases respondent from liability for any damage resulting from T.J.'s injury.

"The interpretation of a contract is a question of law if no ambiguity exists, but if ambiguous, it is a question of fact . . . ." *City of Va. v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991).

It is settled Minnesota law that, under certain circumstances, "parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 922-23

(Minn. 1982). The "public interest in freedom of contract is preserved by recognizing [release and exculpatory] clauses as valid." *Id.* at 923. (citing *N. Pac. Ry. v. Thornton Bros.*, 206 Minn. 193, 196, 288 N.W. 226, 227 (1939)). But releases of liability are not favored by the law and are strictly construed against the benefited party. *Id.* "If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." *Id.*

Appellant contends the district court erred in interpreting the exculpatory clause contained in the assumption-of-risk-and-release agreement because the events leading to T.J.'s injury were not covered by the exculpatory clause, and because T.J.'s injuries occurred on premises not covered by the exculpatory clause.

Regarding appellant's first contention, the district court did not err in concluding that the events that resulted in T.J.'s injuries were covered by the exculpatory clause. Appellant's argument on this point is that woodchip throwing is not an inherent risk of playing baseball. While this may be true, it is not dispositive in this case. As respondent noted, the "inherent risk" language found in the assumption-of-risk-and-release agreement is extraneous to the exculpatory clause because the sentence containing the "inherent risk" language precedes the exculpatory language. However, more important to the resolution of this appeal is determining what actions are covered by the term "activities" as it is used in the exculpatory clause. Appellant attempts to define the term "activities" narrowly, to mean only activities directly related to the game of baseball. This is contrary to a plain reading of the assumption-of-risk-and-release agreement. The first time "activities" occurs in the agreement, it is used to describe "the activities that

make up the MBIS." It is not limited to the activity of playing baseball; instead, it covers all of the activities encompassed by the respondent's camp. Lunch-break activities were part of respondent's camp. T.J. was injured during the lunch break. As such, the exculpatory clause, under a plain reading, does cover T.J.'s injury.

Regarding appellant's second contention, the district court did not err in concluding that T.J.'s injuries occurred on premises covered by the exculpatory clause. Appellant argues that the residence hall courtyard, in which the injury occurred, is not part of the "premises" used for specific baseball instructional activities. As explained above, appellant's definition is too narrow. As used in the assumption-of-risk-and-release agreement, "activities" refers to all of the activities that are part of the camp, rather than just activities directly related to baseball. Because lunch-break activities are part of the camp, those activities are covered by the assumption-of-risk-and-release agreement. As a result, the premises where lunch-break activities occurred are covered by the exculpatory clause.

III. The exculpatory clause does not violate public policy.

Finally, the district court was correct in concluding that the exculpatory clause did not violate public policy. [2]

Even if a release clause is unambiguous in scope and is limited only to negligence, courts must still ascertain whether its enforcement will contravene public policy. On this issue, a two-prong test is applied:

[2] Appellant does not contend that T.J. was injured as a result of respondent's intentional conduct.

> Before enforcing an exculpatory clause, both prongs of the test are examined, to-wit: (1) whether there was a disparity of bargaining power between the parties (in terms of a compulsion to sign a contract containing an unacceptable provision and the lack of ability to negotiate elimination of the unacceptable provision) . . . *and* (2) the types of services being offered or provided (taking into consideration whether it is a public or essential service).

Id. (citations omitted).

The two-prong test describes what is generally known as a "contract of adhesion." *Anderson v. McOskar Enter.*, 712 N.W.3d 796, 800 (Minn. App. 2006). As explained in *Schlobohm*, a contract of adhesion is

> a contract generally not bargained for, but which is imposed on the public for necessary service on a 'take it or leave it' basis. Even though a contract is on a printed form and offered on a 'take it or leave it' basis, those facts alone do not cause it to be an adhesion contract. There must be a showing that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation and that the services could not be obtained elsewhere.

326 N.W.2d at 924-25.

Here, it is not in dispute that the exculpatory clause was part of a take-it-or-leave-it agreement. Neither appellant nor respondent argues that T.J.'s mother had the ability to negotiate the agreement. What the parties do dispute is the nature of the services being offered by respondent. Appellant argues that instructional baseball training is an educational activity and, thus, an essential public service. We disagree. Instructional baseball training is not a service that is either of great importance to the public, or a practical necessity for some members of the public. Furthermore, the services provided by respondent are not essential because there are other avenues to obtain instructional

baseball training for children. *See id.* at 926 ("[I]n the determination of whether the enforcement of an exculpatory clause would be against public policy, the courts consider whether the party seeking exoneration offered services of great importance to the public, which were a practical necessity for some members of the public.").

Because the district court did not err (1) in concluding that there was no material fact in dispute; (2) in interpreting the exculpatory clause; and (3) determining that the exculpatory clause did not violate public policy, we affirm.

Affirmed.