

**CASE NO. A05-1546  
STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Tammey J. Anderson f/k/a  
Tammy J. Blazjak and  
Michael Anderson,

Appellants,

vs.

McOskar Enterprises, Inc. d/b/a  
Curves for Women,

Respondent.

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**APPELLANTS' REPLY BRIEF**

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**BORKON, RAMSTEAD,  
MARIANI, FISHMAN & CARP**

Amy L. Baumgarten (337857)  
5401 Gamble Drive  
Suite 100  
Minneapolis, MN 55416  
952-546-6000  
Attorneys for Appellant

**RIDER BENNETT**

Kathleen M. Daly (314390)  
33 South Sixth Street  
Suite 4900  
Minneapolis, MN 55402  
612-340-8900  
Attorneys for Respondent

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## INTRODUCTION

Respondent's brief is without merit as Curve's exculpatory clause is invalid and therefore unenforceable; a genuine issue of material fact exists as to whether or not Respondent was negligent; and Appellant did not assume the risk of injury.

### **I. THE RELEASE AND WAIVER OF LIABILITY IS UNENFORCEABLE**

An exculpatory clause may be unenforceable if: (1) it is ambiguous in scope or purports to release a party from liability for intentional, willful, or wanton acts; (2) there was a disparity of bargaining power between the parties to the agreement; or (3) the type of service being offered or provided by the exculpated party is either a public or an essential service. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

#### **a. The Release is Ambiguous.**

Respondent argues that the Release is clear and unambiguous due to its virtual identicalness to the release upheld in *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn.1982). However, although the wording is close, it is not completely identical, and it is this slight variation that creates ambiguity in scope thereby invalidating the exculpatory clause.

An exculpatory clause is ambiguous when it is susceptible to more than one reasonable interpretation. *Collins Truck Lines, Inc. v. Metro Waste Control Comm'n*, 274 N.W.2d 123, 126 (Minn. 1979). With the exception of *Schlobohm*,

the cases that Respondent cites to as examples of unambiguous wording are neither controlling nor find authoritative support under Minnesota law.

In *Schlobohm*, the exculpatory clause reflected an absence of ambiguity because the clause specifically exonerated Spa Petite employees from liability for acts of negligence and negligence only. In other words, it was obvious from the wording of contract that Spa Petite employees were not to be released from liability for intentional, willful or wanton acts. In this case, however, the wording reads that clients are prevented from recovering for any injury or damages for, "*any act or omission, including negligence by Curves' representatives.*" Thus, it is plausible that a Curve's client would think themselves unable to recover for any injuries or damages caused by any act or omission of a Curve's employee whether they are the result of negligence or not. As such, it is not an implausible interpretation that this clause provides liability protection to Curve's employee for intentional, willful or wanton acts.

Minnesota courts have refused to enforce exculpatory clauses that purport to release a party from intentional, willful and wanton acts. *Schlobohm*, 326 N.W.2d 920, 923 (Minn. 1982). Here, unlike the release in *Schlobohm* where it was obvious that employee liability was limited to acts other than negligence, the exculpatory clause in the Curve's contract does not adequately depict what Curve's employees are and are not to be held liable for. The fact that employees cannot be held responsible for "*any act or omission, including negligence*" quite possibly purports to release the party from intentional, willful and wanton acts as

well as negligence. As such, unlike the release in *Sclobohm*, the Curve's exculpatory clause is ambiguous and therefore invalid.

**b. Respondent's Release Constituted an Adhesion Contract.**

In Minnesota, an exculpatory clause will not be enforced if there is evidence of unequal bargaining power such that one party was under compulsion to sign a contract with an unacceptable provision and was unable to negotiate the elimination of the provision. *Schlobohm*, 326 N.W.2d at 924. Such contracts will be considered contracts of adhesion, which are not bargained for but are instead imposed on the public on a "take it or leave it" basis. *Id.*

Respondent argues that because the Appellant was not forced to sign the release, it was not a contract of adhesion. However, Appellant had never been to a health club before. During her initial meeting at Curves, Appellant was presented with a pre-printed contract form, which had been prepared unilaterally by Curves. No contract negotiations took place. It was essentially offered to Appellant to initial and sign on a take it or leave it basis. At no time was Appellant offered the various clauses on a negotiable basis.

In addition, although Appellant was not "forced" to sign the release, this did not mean that Appellant had parity of bargaining power. As noted in the *Malechra* dissent, "even if there were one or two businesses in the same area, all each would have to do is use the same type of exculpatory clause and there would be no chance to negotiate to shop around."

## II. PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF NEGLIGENCE

Respondent argues that Appellant cannot meet her burden of proof in establishing a breach of duty because Ms. Bramhall explained how to use each machine, was with Appellant for her entire workout, and did not force Appellant to continue with the workout if she claimed pain.

Because Curves held out Ms. Bramhall as a personal trainer, however, it had a duty to ensure that she conformed to the standard of care required of an ordinary, careful trainer. *City of Eveleth v. Ruble*, 225 N.W.2d 521, 524 (Minn. 1974). In accordance with athletic/health club industry standards, personal trainers are required to hold, at a minimum, certification status through either the American Council of Exercise, the National Strength and Conditioning Association, or the American College of Sports Medicine. (Costello Aff.). Although there are no national board exams for fitness licensure, there are industry standards regarding the qualifications, skills and training of personal trainers. In particular, Rebecca Costello, a personal trainer actively practicing in the health club industry for the last eight years, testified that the athletic club/health club industry requires personal trainers to hold certification status through the American Council of Exercise of the National Strength and Conditioning Associations or the American College of Sports Medicine. (Costello Aff.). To be sure, in order to be a personal trainer and perform services as a personal trainer, one must have at a minimum, one of the above mentioned certifications. *Id.*

Given that Plaintiff had never worked out at a health club or fitness center prior to Curves, and Respondent held out Diane Bramhall as a personal trainer, it is reasonable to believe that Appellant relied upon Ms. Bramhall's statements that she work through the pain and continue her workout routine. Appellant testified that, she relied on Ms. Bramhall's assurances that "it's just muscles you haven't used in awhile," and "it's part of your work-out and you need to do it," because she was under the impression that as a personal "trainer" Ms. Bramhall had some professional training or certification that entitled her to dispense fitness advice

To be sure, Curves never explained to Appellant that its "trainers" were any less qualified to give fitness advice, treat physical injuries and make judgments about the severity of a physical condition than the trainers employed by other athletic clubs such as Northwest or Lifetime. As a result, following her discussion with Appellant regarding her permanent neck and back condition, Ms. Bramhall's failure to require that Appellant receive medical clearance prior to exercising as well as her failure to immediately stop all exercise and refer Appellant to a doctor following her complaints of pain, constituted a breach in the duty of care owed to Appellant. (Costello Aff.)

### III. PLAINTIFF DID NOT CONTRACTUALLY ASSUME THE RISK OF INJURY.

Respondent argues that Appellant contractually assumed the risk of injury by signing the Agreement and Release of Liability. Once again, the only controlling case that Respondent cites to in support of its claim is *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982).

In *Schlobohm*, the court held that the Plaintiff contracted to assume the risk of injury when she decided to become a member of Spa Petite. 326 N.W.2d at 922. Granted, any individual assumes some degree of risk when embarking on any exercise routine, the issue of injury as the result of trainer incompetence was not addressed in *Schlobohm*.

In the current case, Ms. Bramhall, the health club employee in charge of supervision, lacked the appropriate education, experience or certification. Further, she ignored the industry standard with regard to medical clearance and continued to advise Appellant to continue to exercise despite significant pain being reported.

In *Konovsky v. Krause Anderson, Inc.*, 237 N.W. 2d. 630 (Minn. 1976), the court held that assumption of risk did not apply in a slip and fall accident in a shopping mall parking lot because the necessary element of knowledge had not been established. There, the patron was aware of several patches of ice in the parking lot, but it was not shown patron was aware of apparently more dangerous spots that were concealed by a film of water. Similarly, in *Bakhos v. Driver*, 275 NW 2d. 594 (Minn. 1979), a plaintiff who fell from a tree while sawing one of the

branches, did not assume the risk of injury due to the negligent conduct of Defendant pulling on the limb causing the fall. Also, *Gerrin v. Walmart Stores, Inc.*, 53 Fed. 3d. 216 (8th Cir. 1995), the Eighth Circuit Court of Appeals held that assumption of the risk did not apply where Plaintiff slipped and fell on the ice in a parking lot despite the fact that the ice was obvious and the Plaintiff saw the ice.

In each of these cases, the Plaintiff was found to have assumed the risk of the known and obvious dangers present in the activity in question. However, the courts found that hidden or unforeseen dangers created by the actions of other individuals did not provide a proper basis for the defense of assumption of risk.

In the present case, Appellant arguably assumed the risk of the known and obvious dangers of healthclub membership, such as the risk of injury while utilizing the exercise equipment. However, it was unforeseen and unknown to Appellant that the "trainer" would be unqualified, would fail to require medical clearance despite knowledge of Appellant's permanent neck and back injuries, and would continue to encourage Appellant to proceed with exercises despite a background completely void of any kinesiology or sports medicine training. This information was not obvious or known to Appellant at the time she executed her agreement with Respondent and therefore she could not have assumed those risks.

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**CERTIFICATE OF COMPLIANCE**

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I hereby certify that, according to the word count of our word-processing system, Microsoft Word, version 2002, 13-point font, the word count of the Appellants' Reply Brief totals 1,757.

Dated: 10/24/03



Amy Baumgarten

**CONCLUSION**

Based on the foregoing, as well as the argument set forth in Appellants' Brief, Appellants are entitled to a reversal of the District Court's order dismissing their claims against Curves for Women.

Respectfully submitted,

BORKON, RAMSTEAD, MARIANI  
FISHMAN & CARP, LTD.

Dated: 10/24/05

By Amy Baumgarten  
Amy L. Baumgarten (337857)  
Attorney for Appellants  
Suite 100 Parkdale I  
5401 Gamble Drive  
Minneapolis, MN 55416-1552  
(952) 546-6000