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State of Minnesota
In Court of Appeals

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

Appellants,

vs.

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

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. DID THE DISTRICT COURT ERR BY DETERMINING THAT RESPONDENT'S EXCULPATORY CLAUSE IN ITS WAIVER AND RELEASE WAS VALID AND ENFORCEABLE AS A MATTER OF LAW?

The district court held that Respondent's exculpatory clause was valid and enforceable as a matter of law. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982).

2. DID THE DISTRICT COURT ERR BY DETERMINING THAT RESPONDENT WAS NOT NEGLIGENT AS A MATTER OF LAW?

The district court held that Respondent was not negligent as a matter of law. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666 (Minn. 2001); *Blatz v. Allina Health Sys.*, 622 N.W.2d 376 (Minn. Ct. App. 2001).

3. **DID APPELLANT ASSUME THE RISK OF INJURY?**

The district court did not rule on this issue. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982).

STATEMENT OF CASE

Plaintiffs Tammey J. Anderson, f/k/a Tammey Blazjak, and Michael Anderson ("Appellants") appeal the grant of summary judgment issued by the Honorable Stephen M. Halsey, presiding judge of Wright County District Court, Tenth Judicial District, in favor of Respondent Curves for Women ("Respondent"). Appellants contend that the district court erred by granting summary judgment in favor of Respondent because there are genuine issues of material fact as to the enforceability of the exculpatory clause in Respondent's Release and Waiver of Liability. Appellants also contend the district court erred by determining there were no issues of material fact as to Respondent's negligence.

The district court's judgment should be affirmed. As a matter of law, Respondent's exculpatory clause is valid and enforceable. Moreover, there are no genuine issues as to any material fact that Respondent was negligent.

STATEMENT OF FACTS

Respondent owned and operated a health-club called "Curves for Women" located in Monticello, Minnesota. (*See* A.P. 1-4.)[1] On April 2, 2003, Appellant joined Curves. According to Appellant, she wanted to "improve her muscle tone and weight." (R.A. 4.) Appellant had not worked out at a health club before, but her friend recommended she try Curves. (R.A. 7.)

When Appellant arrived at Curves, she sat down with a trainer and went through several registration forms, which included filling out a membership application, figure analysis, and health history. (R.A. 8, 15-17.) As part of her registration, she was also required to sign an Agreement and Release of Liability. (R.A. 18.) Appellant initialed, signed, and dated the Release. (R.A. 9, 18.) Appellant admits she agreed to all of the conditions of the Release. (R.A. 9.) She read the Release before she signed it but she claims she did not understand it. (*Id.*)

After filling out her membership materials, Appellant stretched out with a trainer. (R.A. 10.) She then began her workout. (*Id.*) About fifteen to twenty minutes into her workout, she began to notice

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[1] References to "A.P.___" are to Appellants' Appendix. References to "R.A.___" are to Respondent's Appendix.

pain in her head. (*Id.*) She told the trainer about the pain but continued to workout anyway. (*Id.*) A few minutes later, she began to feel pain in her right arm, neck, and shoulder. (*Id.*) She told the trainer about the pain but continued to workout because she "really wanted to be able to continue" and "wanted it to work." (R.A. 11.) Appellant admits she could have stopped working out at any time and was not forced to continue to the workout in any way. (*Id.*) Nevertheless, she completed her workout that day. (R.A. 11-12.)

On April 4, 2003, Appellant presented to Monticello Clinic for a routine exam, which had already been scheduled prior to her workout at Respondent's facility. (R.A. 13.) Appellant complained of back and shoulder pain to her gynecologist and asked to see a physicians' assistant. (*Id.*) She subsequently received some physical therapy and eventually had surgery on her back in June 2003. (*Id.*) The surgery was successful and Appellant has not treated with any physicians or chiropractors since June 2003. (R.A. 14.)

In March 2004, Appellant commenced this suit, along with her husband, alleging she sustained injuries due to the negligence of Respondents and its employees. (A.P. 1-4.) Respondent moved for summary judgment on the grounds that the exculpatory clause in its Release was enforceable and relieved it from any liability. Moreover,

the undisputed facts did not reveal Respondent was negligent as a matter of law.

On August 1, 2005, the district court issued its Findings of Fact, Conclusions of Law, and Order granting Summary Judgment and Judgment. (A.P. 8-13.) Relying on *Schlobohm v. Spa Petite,* 326 N.W.2d 920, 923 (Minn. 1982), the court found that Appellant signed, and entered into, an Agreement and Release of Liability with Respondent that exonerated Respondent from any liability. (A.P. 8.) The court determined that the exculpatory clause in the Agreement and Release was enforceable because it was unambiguous, did not attempt to release party from willful, reckless, or intentional torts, did not represent an adhesion contract, and did not contravene public policy. (A.P. 9.) Finally, the district court concluded that Appellants had not presented any genuine issues of material fact as to Respondent's negligence.

The district court entered judgment on June 21, 2005. (A.P. 8-13.) This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a grant of summary judgment, the appellate court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue of material facts exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.* at 71. A genuine issue for trial "must be established by substantial evidence." *Id.* at 69-70 (quoting *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976)).

II. APPELLANT SIGNED A VALID RELEASE AND WAIVER OF LIABILITY

Appellant does not present any genuine issue of material fact that the exculpatory clause in Respondent's Release and Waiver is not valid and enforceable.

Minnesota recognizes the validity of exculpatory clauses. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). A clause releasing a party from liability will be strictly construed against the benefited party. *Id.* An exculpatory clause is not enforceable if (1) the type of service being offered or provided by the exculpated party is either a public or an essential service; (2) there was a disparity of bargaining power between the parties to the agreement; or (3) it is ambiguous in scope or purports to release a party from liability for intentional, willful, or wanton acts. *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827 (Minn. Ct. App. 2001) (*citing Schlobohm*, 326 N.W.2d at 923).

An examination of Respondent's Release of Liability demonstrates no disparity of bargaining power, an absence of ambiguity, and does not purport to exonerate Respondent from liability for intentional, willful, or wanton acts. The Release provides:

> In consideration of being allowed to participate in the activities and programs of Curves for Women, * * * I do hereby waive, release, and forever discharge Curves International, Inc., Curves for Women, * * * from any and all responsibilities or liabilities from injuries or damages [sic] arising out of or connected with my attendance at Curves for Women, my participation in all activities, my use of equipment or machinery, or any action or

> omission, including *negligence* by Curves representatives.

(R.A. 18) (emphasis added).

The district court properly relied on *Schlobohm v. Spa Petite* in concluding that Respondent's Release and Waiver was valid and enforceable. *Schlobohm,* 326 N.W.2d at 920. In *Schlobohm v. Spa Petite, Inc.*, a member of a health spa filed suit for damages claiming personal injuries alleging negligence by Spa Petite and its employees. *Id.* The Plaintiff signed a membership contract on her initial visit, which included an exculpatory clause releasing Spa Petite and its employees for any liability based on active or passive negligence on the part of Spa Petite or its employees, servants, or agents. *Id.* at 922.[2] Before signing the contract, the Plaintiff had an opportunity to read it. *Id.* The Plaintiff developed back pain as a result of her workouts at Spa Petite. *Id.* at 923. The Plaintiff commenced suit, along with her husband, claiming that Spa Petite was negligent. *Id.*

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[2] In *Schlobohm*, the plaintiff signed a release agreeing not to hold Spa Petite "liable for any claims, demands, injuries, damages, actions or causes of action, whatsoever to member or property arising out of or connected with the use of any of the services and facilities of Spa Petite * * * member does hereby expressly forever release and discharge the said Spa Petite from all such claims, demands, injuries, actions or cause of action, and from all acts of active or passive negligence on the part of such company, corporation, club, its servants, agents, or employees." 326 N.W.2d at 921-922.

After discovery was completed, Spa Petite moved for summary judgment on the grounds that the exculpatory clause in its contract released it from liability. *Id.* The trial court denied the motion, holding the contract to be a contract of adhesion and the exculpatory clause to be void as against public policy. *Id.* The question of whether Spa Petite's exculpatory clause was one of adhesion and against public policy was certified to the Minnesota Supreme Court, as the courts had not determined whether an exculpatory clause in a health spa contract is invalid as contrary to public policy. *Id.* The Supreme Court reversed the trial court, holding the exculpatory clause in Spa Petite's membership contract to be unambiguous and limited to exoneration from negligence; there was no disparity of bargaining power; and that the clause was not void as against public policy.

A. Respondent's Release Is Unambiguous

This case is virtually identical to *Schlobohm v. Spa Petite.* First, Respondent's Release is unambiguous and clearly reveals an unvarying intent to release Respondent from claims arising in negligence and does not purport to release Respondent for intentional or wanton acts. *Schlobohm*, 326 N.W.2d at 922-23 (holding that exculpatory clause releasing health club from all "claims, demands, injuries, damages, actions or causes of action, and from all acts of active or passive

negligence" was unambiguous); *see also Telex Corp. v. Data Products Corp.*, 271 Minn. 288, 294, 135 N.W.2d 681, 686 (1965) (holding that where there is no ambiguity in written terms of contract, construction by a court is inappropriate). Further, the language in Respondent's Release is commonly used for recreational, sporting, and exercise activities and has been enforced in a number of other cases and jurisdictions. *Schlobohm*, 326 N.W.2d at 922; *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727 (Minn. Ct. App. 1986), *review denied* (Minn. Oct. 29, 1986) (upholding release for injuries from skydiving as valid exculpatory agreement); *see also Anderson v. Eby,* 998 F.2d 858, 992 (10th Cir. 1993) (analyzing exculpatory agreement that released organizers of snowmobile trip for liability "whether caused by the negligence of [r]eleasees or otherwise"); *Potter v. Nat'l Handicapped Sports*, 849 F.Supp. 1407, 1411 (D. Colo. 1994) (construing waiver releasing sponsor of handicapped ski race from injury caused by "negligence of the releasee or otherwise"); *Finkler v. Toledo Ski Club*, 577 N.E.2d 1114, 1117 (Ohio Ct. App. 1989) (upholding indemnity provision signed by member of ski club against negligence claim asserted against club for drowning death on club-sponsored canoeing trip, noting that agreement not to hold club liable for injury "arising as the result of negligence or otherwise" was

clear and unequivocal); *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 35 P.3d 383, 386 (Wash. Ct. App. 2001) (concluding that plain language of clause releasing ski resort from liability for "[n]egligence or otherwise," ... le[ft] no doubt" of intent to release ski resort from liability for all personal injuries arising from negligent operation of ski area).

B. Respondent's Release Is Not An Adhesion Contract

Second, Respondent's Release is not an adhesion contract and there was no disparity in bargaining power. By definition, an adhesion contract is drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere. *See generally Jones v. Dressel,* 623 P.2d 370, 374 (Colo. 1981)*; Chandler v. Aero Mayflower Transit Co.,* 374 F.2d 129, 135 (4th Cir. 1967). It 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. *Schlobohm v. Spa Petite*, 326 N.W.2d at 922. 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. *Id.*

There is no evidence in the record to suggest that Appellant was forced to sign the Release. She voluntarily applied for membership at Respondent's facility and signed, initialed, and agreed to the contents of the Release. (R.A. 9.) *See Schlobohm*, 326 N.W.2d at 922; *see also Beehner,* 636 N.W.2d at 827-28 (observing that no Minnesota case has held a recreational-activity release unenforceable because of a disparity of bargaining power); *see also Malecha*, 392 N.W.2d at 730 (stating that appellant's lack of opportunity to negotiate terms of exculpatory agreement not enough to show disparity of bargaining power that would invalidate release).

While Appellant claims that she did not understand the terms of the Release, this does not void the Release. (R.A. 9.) *See Gartner v. Eikill*, 319 N.W.2d 397, 398 (Minn. 1982) (holding that absent fraud or misrepresentation, "a person who signs a contract may not avoid it on the ground that he did not read it or thought its terms to be different").

C. Respondent's Facility Is Not Offered To The Public As An Essential Public Service

Finally, Respondent's workout facility is not offered to the public as an essential public service. In examining whether the type of service being offered is a public or essential service, courts consider

whether it is the type generally thought suitable for public regulation. *Schlobohm,* 326 N.W.2d at 923. Types of services thought to be subject to public regulation have included common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, employers and services involving extra-hazardous activities. *Id.* In Minnesota there is no statute regulating health clubs, gymnasiums or spas. *Id.* Like Spa Petite, the business of Respondent is not suitable for public regulation. *Id.*

The district court properly agreed with Respondent's arguments at the summary judgment hearing. In its Order granting Summary Judgment, the court held:

> An examination of the release agreement signed by Plaintiff Tammy Anderson demonstrates an absence of ambiguity where the clause specifically exonerates Defendant from liability of acts of negligence. There is no credible evidence before the Court that any of Defendant's employee's acted willfully, intentionally, or wantonly. Where there is no ambiguity in the written terms of the contract, construction by a court is appropriate.

(A.P. 11-12) (citing *Telex Corp. v. Data Products Corp.*, 271 Minn. 288, 294, 135 N.W.2d 681, 686 (1965)).

The district court properly relied on the law and the factual record before it to determine that Respondent's Release was valid and

enforceable. The court did not find this to be an adhesion contract, as it found, "there is absolutely no evidence before the Court that [Respondent's] contract was forced upon [Appellant] as an unwilling participant, for services which could not be obtained elsewhere. (A.P. 12.) Finally, the district court concluded that Respondent's Release was not against public policy as its facility was not subject to public regulation. It concluded, "[c]ontracts relating to recreational activities do not fall within any of the categories where the public interest is involved. (*Id.*) The district court did not err by determining that Respondent's Release was valid and enforceable.

III. APPELLANT CANNOT PROVE NEGLIGENCE AS A MATTER OF LAW

Appellant has not presented any issues of material fact on appeal to demonstrate negligence on behalf of Respondent. Even if the Court found the Release unenforceable, Appellant cannot meet her burden of establishing that Respondent breached any duty of care it may have owed her. A defendant in a negligence action is entitled to summary judgment if the record indicates a lack of proof on *any* of the four requirements of the negligence cause of action: (1) the existence of a legal duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty being the proximate cause of the injury. *Funchess*

v. Cecil Newman Corp., 632 N.W.2d 666, 672 (Minn. 2001) (citation omitted); *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

On the date of incident, a trainer was with Appellant at all times during her workout. The trainer, Ms. Diane Bramhall, ("Bramhall") explained to Appellant how to use each machine and stayed by Appellant throughout her entire workout. (R.A. 10-11, 20.) While Appellant claims she was in pain during her workout and felt "encouraged" by Bramhall to continue her workout despite her pain, Bramhall testified "we never tell anyone to keep proceeding if they are in pain * * * I wouldn't have anybody continue if they were in pain." (R.A. 11, 21.) If a client stated she could not continue with a specific machine, it was Bramhall's practice to tell the client to skip the machine. (R.A. 21.)

Appellant simply cannot meet her burden of proof in establishing that Respondent, or its trainer, Bramhall, breached any duty owed to her. Bramhall explained how to use each machine, was with Appellant throughout the entire workout, and did not force Appellant to continue to with the workout if she claimed pain. Appellant has presented no evidence that Respondent, or Bramhall, breached any standard of care. *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 383-84 (Minn. Ct. App. 2001) (holding that determination of the proper standard of care

presents a question of law to be determined only by court and nor jury). Appellant's deposition testimony alone, that Bramhall "encouraged" her to continue her workout when she was feeling pain during her workout, is not sufficient to establish a question of material fact precluding summary judgment. *Bondy v. Allen*, 635 N.W.2d 244 (Minn. Ct. App. 2001) (testimony that is speculative and lacks foundation to support a claim for negligence is not sufficient to defeat a grant of summary judgment).

The district court found absolutely no evidence in the record of a breach of any duty by Respondent. It held:

> There is insufficient evidence before the Court that [Respondent] breached a duty owed to [Appellant] and that any breach was the proximate cause of [Appellant's] injuries

(A.P. 13.) Appellant does not cite to any case law or authority to support her argument that "industry standard holds that if a client has a prior medical condition, medical clearance must be provided before exercises are commenced." (Appellant's Brief at 15). Contrary to Appellant's assertion, Respondent does not have a "duty under industry standards to require medical clearance when presented with information" about prior medical conditions. (Appellant's Brief at 16).

Appellant simply cannot present any genuine issues of fact regarding Respondent's negligence. As a matter of law, therefore, the district court's judgment should be affirmed.

IV. APPELLANT CONTRACTUALLY ASSUMED THE RISK OF INJURY

Appellant contractually assumed the risk of any injury when she decided to become a member at Respondent's facility. In *Schlobohm v. Spa Petite*, the court held that the Plaintiff had contracted to assume the risk of any injury when she decided to become a member of Spa Petite and signed the contract releasing Spa Petite from any liability. 326 N.W.2d at 922. The court relied on a decision by the New York Court of Appeals, *Ciofalo v. Vic Tanney Gyms, Inc.*, which stated that a "health club member who voluntarily applied for membership in a private organization, and agreed to the terms upon which [the] membership bestowed * * * may not repudiate" those terms. 177 N.E.2d 925, 927 (N.Y. 1961). The *Schlobohm* majority found the Appellant had likewise contracted to assume the risks that went along with being a health club member. 326 N.W.2d at 922. The court stated, "[i]t should have been obvious to anyone of [the plaintiff's] age, education, and experience that an exercise program in a gymnasium bears with it a certain risk of injury, and that by the

exculpatory clause Spa Petite indicated clearly that it was unwilling to shoulder the risk for the relatively nominal membership fee is charged its members." *Id.*

Like *Schlobohm*, Appellant also contractually assumed the risk of injury when she signed the Agreement and Release of Liability. In addition to the exculpatory clause cited above, Plaintiff initialed and signed off to the following:

> 2) I understand and am aware that strength training, flexibility, and aerobic exercise, including the use of equipment, are a potentially hazardous activity. I also understand that fitness activities involve a risk of injury and even death, and that I am *voluntarily* participating in these activities and using equipment and machinery with knowledge of the dangers involved. I hereby agree to *expressly assume and accept any and all risk of injury* or death.
>
> * * *
>
> 3) . . . I acknowledge that I have either had a physical examination and been given my physician's permission to participate, or that I have decided to participate in activities and use of equipment and machinery without the approval of my physician and do hereby *assume all responsibility for my participation, activities, and utilization of equipment and machinery in my activities*.

(R.A. 18) (emphasis added).

Exculpatory clauses of this type are "usually looked upon as being in the nature of a contractual, or express, assumption of the risk." *Schlobohm*, 326 N.W.2d at 923, citing Restatement Second of

Torts, § 496B, cmt. (a) (2004) ("[t]he risk of harm from the defendant's conduct may be assumed by express agreement between the parties."), and relying on *Coates v. Newhall Land & Farming, Inc.*, 236 Cal.Rptr. 181, 182 (1987) (holding that "contractual assumption of the risk eliminates a defendant's liability for otherwise tortuous conduct if (1) the contract is not against public policy and (2) the risk * * * is inherent in the activity."), review denied (Cal. July 1, 1987); *Finkler v. Toledo Ski Club*, 63 Ohio App.3d 11, 577 N.E.2d 1114, 1118 (Ohio Ct. App. 1989) (contractual assumption of risk is "an agreement that one party does not owe a duty of ordinary care to the other party.")

Appellant contractually assumed the risk of any injury by initializing each of these paragraphs and signing the Agreement and Release. (R.A. 9.) The Agreement and Release is not against public policy, Appellant acknowledged the risk of injury with exercising and agreed to accept that risk, and there was no disparity in bargaining power when Appellant signed the Release. *Schlobohm*, 326 N.W.2d at 923; *but see Walton v. Fujita Tourist Enters.*, 380 N.W.2d 198, 203 (Minn. Ct. App. 1986) (finding exculpatory agreement between travel agent and airline invalid because disparity in bargaining power existed

between airline (which had near monopoly on trips) and travel agent (who signed document on "take it or leave it" basis)).

CONCLUSION

The district court's decision should be affirmed. Respondent is entitled to summary judgment because Appellant contractually assumed the risk of any injury by executing a valid and enforceable Release of liability against Curves. The Release is unambiguous, limited to exoneration from negligence, does not evident a disparity in bargaining power, and is not against public policy. Appellant cannot meet her burden of establishing negligence in any instance and Respondent is entitled to judgment as a matter of law.

Respectfully submitted,

Dated: October 11, 2005

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).