

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

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

Appellants,

vs.

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

Respondent.

APPELLANTS' BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

- I. WHETHER THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WITH REGARD TO THE ENFORCEABILITY OF THE EXCULPATORY CLAUSE WHERE:**
- 1. THE EXCULPATORY CLAUSE WAS AMBIGUOUS; AND**
 - 2. THE RELEASE WAS AN ADHESION CONTRACT WITH A DISPARITY IN BARGAINING POWER; AND**
 - 3. CURVES PROVIDED A PUBLIC SERVICE.**
- II. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF NEGLIGENCE.**

The trial court issued summary judgment in favor of Defendant McOskar Enterprises, Inc. d/b/a Curves for Women, finding that there was no genuine issues of material fact. Plaintiff asserts the most apposite case is: *Schlobohm v. Spa Petite, Inc.* 326 N.W.2d 920 (Minn. 1982).

STATEMENT OF THE CASE

This matter arises from a Decision and Order from Wright County District Court, Tenth Judicial District, the Honorable Stephen M. Halsey presiding. Plaintiffs brought a negligence case against Defendant McOskar Enterprises, Inc. d/b/a Curves for Women for injuries sustained by Plaintiff Tammeey Jo Anderson during her April 2, 2003 visit to the Curves for Women in Monticello, Minnesota. Defendant moved for summary judgment. Judge Halsey granted Defendant's motion, holding that Plaintiff Anderson signed a release exonerating Defendant from acts of negligence that was: 1) unambiguous; 2) did not contravene public policy; and 3) did not constitute an adhesion contract. Also, he found that there was insufficient evidence to support the claim that Defendant breached a duty owed to Plaintiff and that the breach was the proximate cause of Plaintiff's injuries.

RECORD REFERENCES

Factual support of Plaintiffs' assertions came from affidavits, statements and deposition testimony incorporated into the record via the Affidavit of Martin M. Montilino. These items are referenced as follows:

1. Affidavit of Rebecca Costello (hereinafter "Costello Aff.")
Exhibit A to the Affidavit of Martin Montilino
2. Deposition transcript of Tammeey Anderson (hereinafter "Anderson Depo.")
Exhibit B to the Affidavit of Martin Montilino
3. Deposition transcript of Diane Bramhall (hereinafter "Bramhall Depo.")

Exhibit C to the Affidavit of Martin Montilino

4. Statement of Terry Peterson (hereinafter "Peterson Stmt.")
Exhibit D to the Affidavit of Martin Montilino

STATEMENT OF FACTS

I. Tammey Jo Anderson

On April 2, 2003, Plaintiff Tammey J. Anderson, f/k/a Tammey J. Blazjak, ("Plaintiff") visited a health club owned and operated by Defendant McOskar Enterprises d/b/a Curves for Women ("Curves") in Monticello, Minnesota. Prior to this day, Plaintiff had never worked out at a health club. (Anderson Depo. at pg. 46). When Plaintiff arrived at Curves, she sat down with an employee of Defendant, Diane Bramhall, and went through paperwork that included registration, financial agreements, health information, body weight, body fat, and body mass indexes. (*Id.* at 48). Plaintiff was also required to sign several documents prior to working out. Given the fact that Ms. Bramhall was verbally walking her through the forms, Plaintiff did not read the documents in their entirety. (*Id.* at 50, 51). Similarly, although Plaintiff did sign the agreement and release, she did not fully understand the contents of the document. (*Id.* at 57, 58).

During the initial take-in, Plaintiff was also asked to provide background information which would allow Ms. Bramhall to complete a figure analysis. (*Id.* at 51). In the course of completing the figure analysis, Plaintiff advised Ms. Bramhall that she had a 3.5% permanent disability to her low back and made

reference to a prior neck injury. Specifically, Plaintiff told Diane Bramhall that she had a permanent disability in her neck region. (*Id.* at 54, 55). Ms. Bramhall explained to Plaintiff that they would address her neck injury later in the evaluation. (*Id.* at 52, 53). Also, Ms. Bramhall informed Plaintiff that there was a spot in the paperwork to identify the neck injury but Plaintiff was never able to find that spot. (*Id.* at 54).

Following the completion of the registration materials, Plaintiff began the exercise portion of her visit. First, Plaintiff stretched for five minutes. (*Id.* at 60). Next, she began her work-out on the machines. (*Id.* at 61). Approximately 15-20 minutes into the exercise routine, Plaintiff noticed pain in the back of her neck going up into her head. (*Id.* at 61, 62). Plaintiff then told Ms. Bramhall about the pain, to which Ms. Bramhall responded, “it’s just muscles you haven’t used in a long time. You’re going to be fine.” (*Id.* at 62). Following this statement, Plaintiff continued her exercise workout. (*Id.*). Soon thereafter, Plaintiff’s pain began to expand from her head, into her right arm and throughout her right hand and fingers. (*Id.* at 62, 63). Plaintiff advised Ms. Bramhall of this pain to which Ms. Bramhall again told her that the pain was the result of muscles that needed to “need to be stretched out” and worked-out. (*Id.* at 64). Based on the advice and counsel of Ms. Bramhall, Plaintiff continued her workout. (*Id.*).

Shortly thereafter, Plaintiff rotated to the squat machine for the second time that day. (*Id.* at 65). Plaintiff had experienced pain during her first set of exercises on the squat machine, thus, she asked Ms. Bramhall if she could skip

that machine. (*Id.*) Ms. Bramhall replied that it was a part of her routine and told Plaintiff that she “could handle it.” (*Id.*) Plaintiff testified that she continued to utilize the squat machine because Ms. Bramhall told her to do so. (*Id.*) At one point, the pain was so bad that Plaintiff lost her balance and almost fell. (*Id.* at 66).

As a result of Ms. Bramhall’s encouragement, Plaintiff completed her workout and then left the facility. (*Id.* at 66, 68). Before Plaintiff left the facility, however, she reiterated to Ms. Bramhall how bad she was hurting. Ms. Bramhall told her to go home, put some heat on it and return to Curves the following day. (*Id.* at 68).

Ms. Bramhall does not specifically recall the events of April 2, 2003. She does not recall how long Plaintiff used the machines that day. (Bramhall Depo. pg. 28), nor does she recall if Plaintiff did an exercise routine at all. (*Id.*) Ms. Bramhall indicated that a standard exercise routine included two cycles through the eleven machines followed by three additional machines. (*Id.*).

Ms. Bramhall does not recall if Plaintiff made any complaints about neck pain or headaches on the day in question. (*Id.* at 30, 31). Ms. Bramhall also denied telling Plaintiff that she was just using muscles that haven’t been used for awhile or encouraging her to keep exercising. (*Id.* at 32). Ms. Bramhall does not recall if any modifications were recommended by her to Plaintiff on the day in question. (*Id.*) Ms. Bramhall was never questioned by Curves about the events on the date of injury through the time she left the company. (*Id.* at 36). Finally,

Ms. Bramhall testified that the only paperwork completed by Plaintiff prior to exercise was the figure analysis. (*Id.* at 25).

Plaintiff got home later that same day, iced her neck and head, and called the Monticello Clinic. (Anderson Depo. at pg. 70). Following an examination and subsequent physical therapy, Plaintiff ultimately underwent surgery to her cervical spine. (*Id.* at 77).

II. Diane Bramhall

Diane Bramhall was hired by Defendant as a fitness technician in December, 2002. (Bramhall Depo. at pg. 17). Ms. Bramhall was a graduate of Big Lake High School in 1999. (*Id.* at 6). Although she had participated in some additional home schooling through Stratford University, she had not received any additional certificates or degrees. (*Id.* at 6, 7). In March 2003, Ms. Bramhall completed a job application for Curves wherein she indicated that she had no prior experience working in the health club or fitness industry. (*Id.* at 16). Ms. Bramhall's past work experience included collections and personal care attendant type positions. (*Id.* at 13-15).

Ms. Bramhall testified that the job duties of a fitness technician included calling to obtain new members, doing figure analysis, taking weight and measurements, showing new members the machines, and demonstrating machines to make sure people use them correctly. (*Id.* at 17). After Ms. Bramhall was hired, but before she started performing fitness technician duties, she attended a class sponsored by Defendant which demonstrated how to conduct phone calls to

obtain new members, the names and the muscles that the machines worked, how to make sure that customers were doing the machines properly and CPR. (*Id.* at 17-20). Ms. Bramhall also testified that the training included instruction that if a client had medical problems or a back injury, that Curves' "trainers" would request that they not use particular machines, such as the squat machine. (*Id.* at 19, 20). Further, the training included the instruction that if a client identified that they were having some sort of medical problem or pain, the "trainer" was to let them know that they could skip that particular machine. (*Id.* at 19). There is no documentation of the training provided to Ms. Bramhall by Defendant. (*Id.* at 20).

III. Athletic Club/Health Club Industry Standard

In the athletic club/health club industry, the required training for personal trainers is that they hold at a minimum, certification status through the American Council of Exercise or the National Strength and Conditioning Association. (Costello Aff.). In addition, if a potential health club member identified that they had a prior medical condition, the industry standard of care is that the client would need to provide proof of medical clearance prior to his or her participation in any exercise regimen. (*Id.*).

At any time during the exercise regimen, if a client identifies symptoms of pain or complaints of pain, which would include headaches, tingling or numbness, then the standard of care for the personal trainer would be to immediately stop all exercise activity and refer the client to a medical doctor for clearance prior to any additional exercises being performed. (*Id.*).

IV. Summary Judgment Motion

In opposition to Defendant's motion for summary judgment, Plaintiffs asserted that:

1. The exculpatory clause was ambiguous and therefore invalid and unenforceable.
2. The Curves release was an adhesion contract with a disparity in bargaining power.
3. Curves provided a public service.
4. Plaintiff did not assume the risk of injury.

After argument, the District Court specifically found that:

1. Plaintiffs demonstrated no genuine issues of material fact to establish negligence on behalf of the Defendant.
2. Plaintiffs presented no specific facts that there is a genuine issue for trial.

The court proceeded to dismiss Plaintiffs' complaint against McOskar Enterprises, Inc. d/b/a Curves for Women. Here, Plaintiffs assert that there is ample evidence demonstrating that the release and waiver of liability signed by Plaintiff is unenforceable. Further, there is overwhelming evidence in the record upon which to establish that Defendant breached a duty owed to Plaintiff that that breach was that proximate cause of Plaintiff's injuries.

STANDARD OF REVIEW

On appeal from summary judgment, the court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether a party is entitled to judgment as a matter of law. *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 584 (Minn.2003); *see also* Minn. R. Civ. P. 56.03.

Summary judgment is inappropriate if a sufficient fact issue is raised even if such evidence may be inadequate to withstand a motion for a directed verdict. *Carl v. Pennington*, 364 N.W.2d 455 (Minn. App. 1985). A summary judgment motion does not permit a court to weigh evidence or determine the credibility of witnesses. *Cox v. American Fidelity & Casualty Co.*, 249 F.2d 616 (9th Cir. 1957). In summary judgment proceedings, all factual inferences and conclusions must be construed in favor of the party opposing summary judgment. *Grandahl v. Bullock*, 318 N.W.2d 240 (Minn. 1982). Similarly, on appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993). Here, the evidence should be viewed in a light most favorable to Plaintiff Anderson.

ARGUMENT

I. The district court erred in its determination that there was no genuine issue of material fact with regard to the enforceability of the exculpatory clause.

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 exculpatory clause is ambiguous, thus unenforceable.

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); *see also Nimis v. St. Paul Turners*, 521 N.W.2d 54, 58 (Minn.App. 1994) (language "or otherwise" is ambiguous in scope as to whether it releases Defendant's for injuries caused intentionally).

In *Schlobohm*, an examination of the exculpatory clause in Spa Petite's contract demonstrated an absence of ambiguity because the clause specifically exonerated Spa Petite from liability for acts of negligence and negligence only. 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 difficult to imagine how a clause that essentially states that it is not limited to negligence, does not purport to release

Curves from liability for intentional willful or wanton acts as well. Hence, even though the Curves release does not explicitly release employees for willful, wanton, or intentional torts, this language creates an ambiguity in scope that invalidates the exculpatory clause.

Further, if Curves is not released from liability for the willful and wanton acts of its employees, then it should be held responsible for the actions of Ms. Bramhall as she failed to, after discussing Plaintiff's prior back and neck injuries and listening to Plaintiff's complaints of pain while working out, exercise ordinary care to prevent the impending injury. *Brannan v. Shertzer*, 64 N.W. 2d 755, 757 (Minn. 1954)(Willful and wanton negligence is a reckless disregard of the safety of the person or property of another by failing after, and not before, discovering the peril to exercise ordinary care to prevent impending injury). By failing to require a medical release and encouraging Plaintiff to continue with her exercises even though Ms. Bramhall had no knowledge of kinesiology or sports medicine, there exists a genuine issue of material fact as to whether there was reckless disregard for Plaintiff's safety, thus negating the release and waiver of liability.

B. The Curves Release was an adhesion contract with a disparity in bargaining power.

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 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.*

In *Schlobohm*, a four-Justice dissent of Justice Simonett, Yetka, Wahl, and Todd found that Spa Petite's contract was a contract of adhesion between parties of disparate bargaining power and consequently unenforceable. Here, Plaintiff had signed a contract prepared unilaterally by Spa Petite after looking over it "somewhat". No contract negotiations took place, and there was an inference that Ms. Schlobohm was offered the contract on a "take it or leave it basis." Also, it appeared to Justices Simonett, Yetka, Wahl, and Todd that the parties were not really bargaining and clearly not from positions of anywhere near bargaining strength.

Like *Schlobohm*, when meeting with Ms. Bramhall, Plaintiff was presented with a pre-printed contract form, which had been prepared unilaterally by Curves. Also, no contract negotiations took place. It was essentially offered to Ms. Anderson to initial and sign on a take it or leave it basis. It was Plaintiff's first time in a health club and at no time was she offered the various clauses on a negotiable basis. For instance, she did not have the opportunity to pay more money for instructions if the exculpatory clause was removed. There is ample evidence supporting the inference that Plaintiff would not have been allowed the use of the facility had she not signed away her right to sue.

Curves further argues that because Ms. Anderson was not forced to sign the release, that Ms. Anderson had parity of bargaining power because she could take

her business elsewhere. However, “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.” *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 732 (Minn. App. 1986)(dissent).

In addition, although Minnesota case law has not invalidated liability releases for releases for recreational activities because of disparity in bargaining power, the issue here is instruction, not recreation. Ms. Anderson was not made aware of the fact that she was relying on an employee with 4-hours of training to advise and instruct her on a proper work-out program. Admittedly, the “fitness technician’s” only training regarding a client who, due to a medical condition or ailment was having some sort of difficulty performing the machine, was to instruct the person to skip the machine. In fact, there is a genuine issue of fact as to whether or not Ms. Bramhall instructed Plaintiff to skip any of the machines. Ms. Bramhall has testified she doesn’t recall making any recommendations or alterations to the regular routine. Ms. Anderson did not contemplate that the fitness technician’s deviation from accepted practices was within the intended exculpatory agreement. Clearly, the exculpatory clause was not fairly or honestly negotiated, nor was it understood by both parties. As Justice Simonett noted in *Schlobohm*, “it does not seem to me that the public policy favoring parties being able to make their own bargain is so compelling as to justify the dominant contracting party imposing such a far-reaching disclaimer of negligence.” *Schlobohm*, 326 N.W.2d at 927.

C. Curves provided a public service.

In determining whether a service is "essential" or "public," courts look to whether the service is a type, "generally thought suitable for public regulation." *Schlobohm*, 326 N.W.2d at 925. In *Schlobohm*, Justice Wahl (dissent) stated that given the American obsession with health and physical fitness, along with the fact that society benefits from a physically fit populace, that the health business offers an essential public service which may well be suitable for public regulation. This dissent was joined by also joined by Justice Todd.

II. The district court erred in determining that appellant failed to establish a prima facie case of negligence.

The four essential elements of a negligence claim are: (1) The existence of a duty of care; 2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

1. Defendant had a legal duty of care.

An ordinary person has a duty to do what a reasonable person would do under the same or similar circumstances. A person providing professional services, however, is under a duty to exercise such care, skill, and diligence as persons in that profession ordinarily exercise under like circumstances. *City of Eveleth v. Ruble*, 225 N.W.2d 521, 524 (Minn. 1974). Because Curves held out

Ms. Bramhall as a personal trainer it had a duty to ensure that she conformed to the standard of care required of an ordinary careful trainer. 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.

2. Defendant breached its duty.

Ms. Bramhall has testified that she had no prior health club experience prior to joining Curves, and her education consisted of completion of high school. Further, she was never certified as a personal trainer through the American Council of Exercise or the National Strength and Conditioning Association, which is the industry standard for training in individuals acting in the role of a personal trainer. Personal trainers are thought to have the knowledge and wherewithal to give fitness advice, treat physical injuries and make judgments about the severity of a physical condition. At no time did Curves explain to Plaintiff 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. More importantly, Curves did not acknowledge that its employees were not qualified to diagnose, examine or treat any medical condition or make any other such evaluation or recommendation.

As set forth in the Statement of Facts, Plaintiff complained to Ms. Bramhall when the pain initially began, 15-20 minutes into her exercise routine, again when the pain traveled down her right arm into her hand, again when she had concerns about the squat machine, and finally when she was about to leave the facility. Plaintiff 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" Bramhall had some professional training or certification that entitled her to dispense fitness advice. To the contrary, had Ms. Bramhall received certification in accordance with the industry standard, she would have known that if a client identified symptoms of pain at any time during an exercise regimen, Ms. Bramhall was to immediately stop all exercise activity and refer the client to a medical doctor. Instead, Ms. Bramhall instructed Plaintiff to put heat on it and return the following day.

Given that Plaintiff had never worked out at a health club or fitness center prior to Curves, and Defendant held out Diane Bramhall as a personal trainer, it is reasonable to believe that Plaintiff relied upon Ms. Bramhall's statements that she work through the pain and continue her workout routine.

In addition, the industry standard holds that if a client has a prior medical condition, medical clearance must be provided before exercises are commenced. In this case, when Ms. Bramhall was presented with historical information that Plaintiff had a permanent neck and back condition, Ms. Bramhall did nothing to require medical clearance prior to engaging in the exercise protocol. As such,

Defendant had a duty under industry standards to require medical clearance when presented with this information and failed to do so. This also resulted in a breach of the duty of care which led to the injury in question.

3. Defendant's breach was the proximate cause of Plaintiff's injury.

Defendant offered no evidence refuting Plaintiff's testimony that her injuries were the direct and proximate cause Defendant's breach.

As reiterated in the Statement of Facts, approximately 15-20 minutes into her exercise routine, Plaintiff noticed pain in the back of her neck going up into her head. Soon thereafter, Plaintiff's pain began to expand from her head, into to her right arm and throughout her right hand and fingers. Two days following this incident, Plaintiff sought care at the Monticello Clinic whereupon she complained of back and shoulder pain. Subsequently, Plaintiff received physical therapy and ultimately, back surgery in June 2003.

Prior to the incident at Curves, Plaintiff neck was "feeling really good." Although Plaintiff had a 3.5 permanent partial disability in her neck, her chiropractor had stated that it was fine and healed. Clearly, Ms. Bramhall's misguided assurances under the guise of being a "trainer", as well as her failure to require medical clearance after learning of Plaintiff's prior injuries, were a direct cause of Plaintiff's injuries.

CONCLUSION

The record reasonably supports the claim that the release and waiver of liability signed by Plaintiff was unenforceable. Further, there is evidence in the record upon which to establish that Defendant breached a duty owed to Plaintiff that that breach was that proximate cause of Plaintiff's injuries. As such, the District court's order dismissing claims against Curves should therefore be reversed.

Respectfully submitted,

BORKON, RAMSTEAD, MARIANI
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Dated: _____

8/31/05

By _____



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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).