STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0109

Marcia Goldstein,
Appellant,

vs.

Wintergreen Lodge,
Respondent.

Filed August 19, 2013
Affirmed
Stoneburner, Judge

St. Louis County District Court
File No. 69VICV12858

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota (for appellant)

Timothy W. Waldeck, Lindsey J. Woodrow, Waldeck Law Firm, Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

STONEBURNER, Judge

Appellant challenges the summary-judgment dismissal of her claims for injuries she sustained while on a dog-sledding trip offered by respondent. Appellant asserts that the district court erred as a matter of law by holding that (1) the Minnesota dog-owner liability statute does not apply to her injuries; (2) her claim is barred by the common-law

doctrine of primary assumption of the risk; (3) the exculpatory clause in the release form appellant signed is valid and precludes her claims; and (4) the Consumer Credit Sales Act does not void the exculpatory clause. We affirm.

FACTS

Marcia Goldstein, a resident of Florida, registered for a dog-sledding trip offered by respondent Wintergreen Lodge, d/b/a Wintergreen Dogsled Lodge (Wintergreen). Wintergreen is based in Ely. Goldstein and her partner Harvey Morse registered with Wintergreen after Goldstein researched various dog-sledding adventures. Another couple, Dr. and Ms. Rhodes (the Rhodeses), who are friends of Goldstein and Morse, also registered. Goldstein used a credit card to pay a $100-per-person deposit. The registration form required Goldstein to initial an acknowledgement of the following information:

> A. Wintergreen programs involve physical endeavors in a wilderness area which, like all outdoor adventures, include an element of risk, are subject to the vagaries of weather and are removed from the facilities of civilization.
> B. Your itinerary and route may be adjusted to accommodate varying weather and snow conditions.
> C. You assume full responsibility for yourself (and participating minor children) for injury or loss of property and you agree to release and hold harmless Wintergreen and any of its agents from liability.
> D. You understand that your participation is voluntary and that you will be required to sign an "Assumption of Risk and Release of Liability" to participate.
> E. You're ready for a great time!

On October 30, 2008, before she left Florida for the trip, Goldstein signed a document titled "Assumption of Risk & Liability Release" (the release). The release states:

> I understand that Wintergreen adventure activities involve physically and mentally strenuous activities in wilderness areas that are removed from the facilities of civilization. I understand that risks exist of serious injury, disability, death and loss or damage to property from any number of causes, including negligent acts or omissions by me, other guests, Wintergreen representatives, or others.
>
> Knowing of the inherent risks of Wintergreen adventure activities, I agree to assume all risk and responsibility surrounding my participation in these activities. To the maximum extent permitted by law, I agree to release, hold harmless, and indemnify Wintergreen and its officers, directors, staff, representatives, employees and agents, and all owners of property on which activities take place and parties who provide goods or services in connection with the Wintergreen adventure activities, from and against all present or future claims, losses or liabilities for injuries to person or property which I may suffer, or for which I may be liable to any other person, related to my participation in Wintergreen adventure activities resulting from the negligence of Wintergreen or any other person. I agree that this Assumption of Risk and Release of Liability will apply to claims made by me or on my behalf, or by family members, heirs or personal representatives, each of which is bound by the terms of this Agreement, and covenant not to sue Wintergreen.
>
> I have carefully read and freely signed this assumption of Risk and Release Agreement. I understand and agree that no oral or written representations can or will alter the contents of this document . . . .

Goldstein testified in her deposition that she did not read the release before she signed it but that she had no concerns about the effect of the release and would have signed it even if she had read it.

Goldstein, Morse, and the Rhodeses arrived at Wintergreen on January 14, 2009. They met with their guide, who taught them "three or four commands" to use while sledding. The guide reviewed with them a document titled "The Top 10 Mushing Do's and Don'ts: What you need to know to safely drive a dogteam." The next morning, the group met the dogs that would pull their sleds. Each sled had at least five dogs. The group then went on a morning run. Goldstein and Morse were on one sled. Morse was in charge of braking. The guide cross-country skied ahead of the two sleds.

During the morning run, which was in an open area, Goldstein and Morse both fell from their sled. Neither was injured, and both continued to participate in the day's dog-sledding activities.

After lunch, the group went dog sledding on a narrow forest trial that had tree branches hanging down. Goldstein and Morse were on the second sled. They lost sight of the Rhodeses' sled at some point. Morse stopped their sled when they came in sight of the Rhodeses, who had fallen off of their sled. The Rhodeses told Goldstein and Morse to "go slowly" because "[t]here was a log across the path." Goldstein could not see a log in the path, but she and Morse knew the general area referred to by the Rhodeses. The Rhodeses got back on their sled and proceeded on the trail.

Goldstein and Morse then started their dogs with Goldstein standing in front of Morse. They started off slowly, but, according to Goldstein, they were then not able to control the dogs, and the dogs went faster than Goldstein and Morse wanted them to go. Goldstein does not remember whether the dogs had behaved this way at any other point

during the trip. Goldstein does not know whether Morse was braking, but Goldstein heard Morse say "It's not stopping."

When they came to the log across the trail, "the left side of [the] sled angled up in the air and [they] were catapulted off and thrown up in the air into a very big tree." Goldstein hit the tree with her shoulder. She broke her shoulder, back, and wrist. Her injuries required extensive hospitalization and rehabilitation.

Goldstein sued Wintergreen alleging absolute liability for damages under Minn. Stat. § 347.22 (the dog-owner liability statute); "negligent, careless and unlawful ownership, control and supervision of [the] dogs" and employees; and that Wintergreen's release is void as a matter of law and cannot be enforced because of the Minnesota Consumer Credit Sales Act (CCSA), Minn. Stat. § 325G.16. Wintergreen answered, denying liability and asserting that Goldstein's injuries resulted from conditions over which Wintergreen had no control, from an act of God, or from risks that Goldstein had knowingly agreed to encounter.

Wintergreen moved for summary judgment, arguing that (1) Goldstein assumed the risk when she voluntarily signed the release and participated in dog sledding, (2) the release precludes Goldstein's negligence claims, and (3) neither the CCSA nor the dog-owner liability statute applies in this situation. The district court concluded that there were no genuine issues of material fact regarding Goldstein's legal claim and granted summary judgment to Wintergreen, holding that, as a matter of law, neither the dog-owner liability statute nor the CCSA apply to the circumstances of this case and the

exculpatory clause in the release signed by Goldstein is valid and precludes her claims against Wintergreen. This appeal followed.

D E C I S I O N

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "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). "[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). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.* No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 69 (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

I. The exculpatory clause

Goldstein challenges the district court's conclusion that the exculpatory clause in the release is enforceable. An exculpatory clause is enforceable if the clause is unambiguous, does not relieve a party of liability for willful or wanton acts, and if it does not contravene public policy. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). "An exculpatory clause is ambiguous when it is susceptible to more than one reasonable construction." *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827 (Minn. App. 2001). When a contract is unambiguous, the intent of the parties must be deduced from the language of the contract. *Metro. Sports Facilities Comm'n v. General Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991).

At oral argument on appeal, Goldstein conceded that the exculpatory clause is valid on its face; she did not dispute the district court's conclusions that the exculpatory clause is unambiguous, that it does not seek to release Wintergreen from any intentional, willful, or wanton acts, and that it does not violate public policy. Goldstein instead makes two arguments challenging the enforcement of the exculpatory clause. First she argues that the CCSA bars use of an exculpatory clause. Second, she argues that the exculpatory clause does not apply to the circumstances of her injury because the risks covered do not include the risk that she encountered, and because to hold that the exculpatory clause applies to her injury would make the clause impermissibly broad.

A. The CCSA does not apply to Goldstein's claims

Goldstein argues that application of the CCSA was triggered by her use of a credit card to hold her reservation with Wintergreen. The CCSA states, in relevant part, that

"[n]o contract or obligation relating to a consumer credit sale shall contain any provision by which: . . . the consumer agrees not to assert against an assignee any claim or defense arising out of the transaction; . . . [or] the consumer relieves the seller from any liability for any legal remedy which the consumer may have against the seller under the contract or obligation or any separate instrument executed in connection therewith." Minn. Stat. § 325G.16, subd. 2(a), (f) (2012).

The CCSA applies to a sale of goods or services for personal, family, or household purposes where "credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind" to a buyer who is a "natural person." Minn. Stat. § 325G.15, subd. 2 (2012). Because there is no evidence in the record that Wintergreen, rather than the credit card company, extended credit to Goldstein, and because there is no evidence in the record that Wintergreen is a seller regularly engaged in granting credit, the district court did not err by concluding that CCSA does not apply.[1]

B. The exculpatory clause covered the risk encountered

Goldstein also argues that the exculpatory clause is not enforceable because the release "warned about various risks that were subject to the exculpatory agreement, but the list must be read 'strictly' and not expansively." Goldstein argues that the inherent and well-accepted risks of sledding do not include "dogs jumping over fallen trees and pulling the patron's sled into these objects . . . [or] smashing into a tree." Goldstein

[1] Goldstein asserts on appeal that Wintergreen extended credit to her when it accepted her reservation based on the deposit she paid with a credit card. This argument was not presented to the district court and will not be considered for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

characterizes Wintergreen's argument as asserting that, "while it is not written into the agreement . . . the document should be read *so broadly* that a dog pulling a sled into a tree[] should be read into the agreement, despite the rules of 'strict' or narrow construction that apply to these 'disfavored' type of agreements." We disagree.

It is true that exculpatory clauses are disfavored and must be "strictly construed against the benefited party." *Beehner*, 636 N.W.2d at 827. But Goldstein's argument would require Wintergreen to hypothesize every possible manner in which a patron could possibly be injured and the precise circumstances under which such injury could occur, and to include all manners and circumstances in the exculpatory agreement for it to be enforceable. It is clear from the record that: (1) Goldstein researched Wintergreen's company and prepared for the trip; (2) Goldstein was specifically informed that "Wintergreen programs involve physical endeavors in a wilderness area which, like all outdoor adventures, include an element of risk, are subject to the vagaries of weather and are removed from the facilities of civilization" and acknowledged that she was so informed in both the Registration Form and the Liability Release form; (3) Goldstein was specifically informed that "Wintergreen adventure activities involve physically and mentally strenuous activities in wilderness areas . . . [and] that risks exist of serious injury, disability, death and loss or damage to property from any number of causes" and acknowledged receiving that information; (4) Goldstein was specifically informed by Wintergreen staff that the dogs sometimes run too fast, that riders should brake to prevent this, and what to do if she lost control or fell off the sled; (5) Goldstein was specifically informed that it was possible for sleds to tip over; (6) Goldstein fell off her sled earlier in

the day and did not ask to stop sledding; (7) Goldstein knew that the path they were on was narrow and surrounded by trees; and (8) Goldstein knew that there was an obstruction in the path, and that the Rhodeses had fallen off of their sled near this obstruction and had warned Goldstein and Morse to proceed with caution. Goldstein's unfortunate accident falls within the category of "risk of injury to oneself," and the district court did not read the clause too broadly when it characterized the risk that Goldstein encountered as covered by the exculpatory clause. The district court did not err by concluding that the exculpatory clause is valid and precludes Goldstein's negligence claims against Wintergreen.

II. The dog-owner liability statute

Goldstein argues that Minnesota's dog-owner liability statute imposes absolute liability on Wintergreen for her injuries, and that the district court erred by finding that "[t]he chain of events which lead to [Goldstein's] injuries [was] too attenuated to constitute legal causation" and therefore concluding that the statute does not apply.

The dog-owner liability statute provides: "[i]f a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained." Minn. Stat. § 347.22 (2012). "[I]n order to be subject to the statute, 'legal causation for absolute liability under the statute must be direct and immediate, i.e., without intermediate linkage.'" *Anderson v. Christopherson*, 816 N.W.2d 626, 631 (Minn. 2012) (quoting *Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991)). "The correct question to be answered . . . is whether the dog's conduct

was the proximate cause of the plaintiff's injuries such that injury was the *direct and immediate result*." *Id*. (emphasis added). The supreme court has stated that "the legislature intended the verb 'injures' to cover a dog's affirmative but nonattacking behavior which injures a person who is immediately implicated by such nonhostile behavior." *Lewellin*, 465 N.W.2d at 64.

The application of a statute to undisputed facts involves a legal conclusion that this court reviews de novo. *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 5 (Minn. 2008). The question is whether the dogs' behavior was the direct cause of Goldstein's injuries, *see Anderson*, 816 N.W.2d at 631. Taking all the facts alleged by Goldstein as true, we conclude that no reasonable person could find that the dogs were the direct and immediate cause of Goldstein's injuries. The dogs' behavior would have been harmless if the dogs had not been harnessed to a sled. Goldstein's injuries were caused by the sled hitting a known obstruction in the trail causing Goldstein to be thrown into a tree. That the dogs were pulling the sled under the command of Goldstein's companion is an act too attenuated from Goldstein's injuries to impose absolute liability under the statute. *See Lewellin*, 465 N.W.2d at 66 (holding that the actions of a dog were too attenuated from the injury to impose absolute liability under the dog-owner liability statute where the dog distracted the driver of a car who then lost control of the car which went off the road and killed a child). The district court did not err by concluding that as a matter of law the dog-owner liability statute does not impose absolute liability on Wintergreen under the circumstances of injury asserted by Goldstein. *See id*. (stating that "public policy and

legislative intent are best served by limiting proximate cause to direct and immediate results of the dog's actions, whether hostile or nonhostile").

Affirmed.