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In re Velocity Park

February 2008

§ 41 Contracts involving minors; limitations on authority of minor.

This section is intended to protect minors and to help parents and legal guardians exercise reasonable care, supervision, protection, and control over minor children.

(a) A minor cannot make a contract relating to real property or any interest therein.

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(b)(1) The contract of a minor may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards, unless the contract at issue is one for necessaries, such as food or medical care.

(b)(2) Where a minor enters into a contract, whether one for necessaries or not, said contract may be enforced against that individual if, upon reaching the age of majority, the individual expressly or implicitly ratifies the contract.

(b)(3) Subsections (b)(1) and (b)(2) shall not apply to contracts made on behalf of a minor by the minor's parent or guardian.

Lund v. Swim World, Inc.
Franklin Supreme Court (2005)

Tim Lund sued Swim World, Inc., for the wrongful death of his mother, Annie Lund, who suffered a fatal head injury at its facility. The trial court granted summary judgment to Swim World, ruling that the waiver signed by Lund released Swim World from liability. The court of appeal affirmed. For the reasons set forth below, we reverse.

Swim World is a swimming facility with a lap pool open to members and visitors. On May 3, 2001, Lund visited Swim World as part of a physical therapy program. Because Lund was not a Swim World member, she had to fill out a guest registration card and pay a fee before swimming.

The guest registration, a five-inch-square preprinted card, also contained a "Waiver Release Statement," which appeared below the "Guest Registration" section, requesting the visitor's name, address, phone number, reason for visit, and interest in membership. The entire card was printed in capital letters of the same size, font, and color. The waiver language read as follows:

WAIVER RELEASE STATEMENT. I AGREE TO ASSUME ALL LIABILITY FOR MYSELF, WITHOUT REGARD TO FAULT, WHILE AT SWIM WORLD. I FURTHER AGREE TO HOLD HARMLESS SWIM WORLD, AND ITS EMPLOYEES, FOR ANY CONDITIONS OR INJURY THAT MAY RESULT TO ME WHILE AT SWIM WORLD. I HAVE READ THE FOREGOING AND UNDERSTAND ITS CONTENTS.

The card had just one signature and date line. Lund completed the "Guest Registration" portion and signed at the bottom of the "Waiver Release Statement" without asking any questions.

After swimming, Lund used the sauna in the women's locker room. The bench she was lying on collapsed beneath her, causing her to strike her head against the heater and lose consciousness. Lund was rushed to the hospital but died the next day as the result of complications from her head injury.

The complaint alleged that Swim World was negligent in the maintenance of its facilities and that its negligence caused Lund's death.

Summary judgment is granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Samuels v. David* (Franklin Sup. Ct. 1991). The case at bar turns on the interpretation of Swim World's waiver form and whether it relieves Swim World of liability for harm caused by its negligence.

Waivers of liability, also known as exculpatory contracts,[1] are permitted under Franklin law except when prohibited by statute or public policy. As no statute bars the contract at issue, we proceed to a public policy analysis of the exculpatory clause.

Public policy can restrict freedom of contract for the good of the community. Thus, claims that an exculpatory contract violates public policy create a tension between the right to contract freely without government interference and the concern that allowing a tortfeasor to contract away responsibility for negligent acts may encourage conduct below a socially acceptable standard of care.

We examine the particular facts and circumstances of the case when determining whether an exculpatory contract is void and unenforceable as contrary to public policy. Exculpatory contracts are generally construed against the party seeking to shield itself from liability. In *Schmidt v. Tyrol Mountain* (Franklin Sup. Ct. 1996), we set forth two requirements for an enforceable exculpatory clause: "First, the language of the waiver cannot be overbroad but must clearly, unambiguously, and unmistakably inform the signer of what is being waived. Second, the waiver form itself, viewed in its entirety, must alert the signer to the nature and significance of what is being signed." *Id*. We also noted that a relevant consideration in the enforceability of such a clause is whether there is a substantial disparity in bargaining power between the parties.

Thus, a release having language that is so broad as to be interpreted to shift liability for a tortfeasor's conduct under all possible circumstances, including reckless and intentional conduct, and for all possible injuries, will not be upheld. Likewise, release forms that serve two purposes and those that are not conspicuously labeled as waivers have been held to be insufficient to alert the signer that he is waiving liability for other parties' negligence as well as his own.

In *Schmidt*, an action on behalf of a woman who fatally collided with the base of a chairlift tower while skiing, the plaintiff alleged that the defendant ski resort negligently failed to pad the lift tower. The resort moved for summary judgment, relying on the exculpatory clause in the ski pass signed by the skier. The waiver read, in part: "There are certain inherent risks in skiing and I agree to hold Tyrol Mountain harmless for any injury to me on the premises."

The court in *Schmidt* held that the release was void as against public policy. First, the release was not clear; it failed to include language expressly indicating the plaintiff's intent to release Tyrol Mountain from its own negligence. Without any mention in the release of the word "negligence," and the

1. The words "release," "waiver," and "exculpatory agreement" have been used interchangeably by the courts to refer to written documents in which one party agrees to release another from potential tort liability for future conduct covered in the agreement.

ambiguity of the phrase "inherent risks in skiing," the court held that the skier had not been adequately informed of the rights she was waiving.

As to the second factor, the form, in its entirety, did not fully communicate its nature and significance because it served the dual purposes of an application for a ski pass and a release of liability. Furthermore, the waiver was not conspicuous, in that it was one of five paragraphs on the form and did not require a separate signature. In addition, we noted that there was a substantial disparity in bargaining power between the parties.

Following *Schmidt*, we hold that Swim World's exculpatory clause violates public policy. First, the waiver is overly broad and all-inclusive. The waiver begins: "I AGREE TO ASSUME ALL LIABILITY FOR MYSELF, WITHOUT REGARD TO FAULT. . . ." Here, it is unclear what type of acts the word "fault" encompasses; it could potentially bar any claim arising under any scenario.[2] We reject Swim World's claim that negligence is synonymous with fault and conclude that the word "fault" is broad enough to cover a reckless or an intentional act. A waiver of liability for an intentional act would clearly violate public policy. *See* Restatement (Second) of Contracts § 195(1) (term exempting party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy).

Exculpatory agreements that, like this one, are broad and general will bar only those claims that the parties contemplated when they executed the contract. Here, we must determine whether the collapse of a sauna bench was a risk the parties contemplated when the exculpatory contract was executed. If not, the contract is not enforceable.

Here, given the broadness of the exculpatory language, it is difficult to ascertain exactly what was within Lund's or Swim World's contemplation. Nevertheless, it appears unlikely that Lund, when she signed the guest registration and waiver form, would have contemplated receiving a severe head injury from the collapse of a sauna bench.

Further, Swim World's guest registration and waiver form failed to provide adequate notice of the waiver's nature and significance. Like the contract in *Schmidt*, the form served two purposes: it was both a "Guest Registration" application and a "Waiver Release Statement." The exculpatory language appeared to be part of, or a requirement for, a larger registration form. The waiver could have been a separate document, giving Lund more notice of what she was signing. Also, a separate signature line could have

2. While including the word "negligence" in exculpatory clauses is not required, we have stated that "it would be helpful for such a contract to set forth in clear terms that the party signing it is releasing others for their negligent acts." *Schmidt*.

been provided, but was not. Clearly identifying and distinguishing those two contractual arrangements could have provided important protection against a signatory's inadvertent agreement to the release.

Another problem with the form is that the paragraph containing the "Waiver Release Statement" was not conspicuous. The entire form was printed on one card, with the same letter size, font, and color. It is irrelevant that the release language is in capital letters; *all* of the words on the form were in capital letters. Further, the only place to sign the form was at the very end. This supports the conclusion that the waiver was not distinguishable enough that a reviewing court can say with certainty that the signer was fully aware of its nature and significance.

Finally, we consider the bargaining positions of the parties. This factor looks to the facts surrounding the execution of the waiver. We hasten to add that the presence of this factor, by itself, will not automatically render an exculpatory clause void under public policy.

Here, the record suggests that there was an unequal bargaining position between the parties. Lund had no opportunity to negotiate regarding the standard exculpatory language in the form. In his deposition, Swim World's desk attendant testified that Lund was simply told to complete and sign the form; the waiver portion was not pointed out, nor were its terms explained to her. No one discussed the risks of injury purportedly covered by the form. The desk attendant further testified that Lund did not ask any questions about the form but that there was pressure to sign it because other patrons were behind Lund waiting to sign in. These facts undeniably generate, at a minimum, a genuine dispute of material fact regarding the parties' disparity in bargaining power.

For these reasons we conclude that the exculpatory clause in Swim World's form violates public policy and, therefore, is unenforceable.

Reversed.

Holum v. Bruges Soccer Club, Inc.

Columbia Supreme Court (1999)

Pamela Holum registered her seven-year-old son, Bryan, for soccer with Bruges Soccer Club, Inc. (the Club), a nonprofit organization that provides local children with the opportunity to learn and play soccer. Its members are parents and other volunteers. As part of the registration process, Mrs. Holum signed a release form whereby she agreed to release "the Club from liability for physical injuries arising as a result of [Bryan's] participation in the soccer club."

Bryan was injured when, after a soccer practice, he jumped on the goal and swung on it. The goal tipped backward and fell on Bryan's chest, breaking three ribs. Bryan's parents, Phil and Pamela Holum, sued the Club, alleging negligence on their own behalf and on behalf of Bryan. The trial court granted summary judgment to the Club, holding that the release signed by Bryan's mother barred the Holums' action against the Club.

The court of appeal affirmed in part and reversed in part. It held that the release barred Mr. and Mrs. Holum's claims. However, it went on to hold that the release did not bar Bryan's claim. Thus, while the parents' claims were barred, Bryan still had a cause of action against the Club, which a guardian could bring on his behalf, or which he could assert upon reaching the age of majority.

We agree with the court of appeal that the release applies to the injuries at issue. As to whether the release executed by Mrs. Holum on behalf of her minor son released the Club from liability for Bryan's claim and his parents' claims as a matter of law, we conclude that the release is valid as to all claims. Accordingly, we reverse that portion of the court of appeal decision holding that the release would not prevent Bryan from asserting a claim for his injuries.

We first consider whether the release is valid. In Columbia, with respect to adults, the general rule is that releases from liability for injuries caused by negligent acts arising during recreational activities are enforceable, whether the negligence is on the part of the participant in the recreational activity or the provider of the activity, in this case, the Club. This approach recognizes the importance of individual autonomy and freedom of contract.

For that reason, the release agreement is valid as to the parents' negligence claim. Mrs. Holum acknowledged that she read the agreement and did not ask any questions. Mr. Holum did not sign the release, but he accepted and enjoyed the benefits of the contract. In fact, when the injury occurred, he was at the practice field, thereby indicating his intention to enjoy the benefits of his

wife's agreement and be bound by it. It is well settled that parents may release their own claims arising out of injury to their minor children. Accordingly, we find that Bryan's parents are barred from recovery as to their claims.

Here, however, the release was executed by a parent on behalf of the minor child. The Holums contend that the release is invalid on public policy grounds, citing the general principle that contracts entered into by a minor, unless for "necessaries," are voidable by the minor before the age of majority is reached. The Club, however, argues that the public interest justifies the enforcement of this agreement with respect to both the parents' and the child's claims.

Organized recreational activities provide children the opportunity to develop athletic ability as well as to learn valuable life skills such as teamwork and cooperation. The assistance of volunteers allows nonprofit organizations to offer these activities at minimal cost. In fact, the Club pays only 19 of its 400 staff members. Without volunteers, such nonprofit organizations could not exist and many children would lose the benefit of organized sports. Yet the threat of liability deters many individuals from volunteering. Even if the organization has insurance, individual volunteers could find themselves liable for an injury.

Faced with the threat of lawsuits, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible by the services of volunteers and their sponsoring organizations.

Therefore, although when his mother signed the release Bryan gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements. Because of this agreement, the Club can offer affordable recreation without the risks and overwhelming costs of litigation. Bryan's parents agreed to shoulder the risk. Accordingly, we believe that it is in the public interest that parents have authority to enter into these types of binding agreements on behalf of their minor children. We also believe that the enforcement of these agreements may promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities.

A related concern is the importance of parental authority. Parents have a fundamental liberty interest in the care, custody, and management of their offspring. Parental authority extends to the ability to make decisions regarding the child's school, religion, medical care, and discipline. Invalidating the release as to the minor's claim is inconsistent with parents' authority to make important life choices for their children.

Mrs. Holum signed the release because she wanted Bryan to play soccer. In making this family decision, she assumed the risk of physical injury on behalf of Bryan and the financial risk on behalf of the family as a whole. Apparently, she determined that the benefits to her child outweighed the risk of physical injury. The situation is comparable to Columbia Stat. § 2317, which gives parents the authority to consent to medical procedures on a child's behalf. In both cases, the parent weighs the risks of physical injury to the child and its attendant costs against the benefits of a particular activity.

Therefore, we hold that parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed. We need not decide here whether there are other circumstances, beyond the realm of nonprofit organizations, which will support a parent's waiver of a child's claims.

Accordingly, we hold that the release is valid as to the claims of both the parents and the minor child.

Affirmed in part and reversed in part.