WAIVER IN HEALTH CLUB MEMBERSHIP VALID AND ENFORCEABLE
MOORE v. WALLER

District of Columbia Court of Appeals.
August 2, 2007

[Note: Attached opinion of the court has been edited and citations omitted.]

Richard Moore claims that he was injured on February 26, 2001, while participating in a demonstration of kick boxing at Club Fitness, which is operated by the Square 345 Limited Partnership (hereinafter Grand Hyatt).

Relying on a waiver and release of liability Moore signed when he joined the fitness center, the Superior Court granted summary judgment, first for Grand Hyatt and then for Terrell Waller, the instructor who allegedly injured Moore. We affirm.

Plaintiff Moore alleged that he had gone to the fitness center on February 26, 2001, to exercise. Although he was not participating in the kick boxing classes, the instructor, defendant Waller, asked Moore to hold a detached Everlast body bag, so Waller could demonstrate a kick to his class." According to Moore, he reluctantly agreed, saying to Waller, "Not hard." Defendant Waller showed Moore how to hold the bag, braced against his body, and then kicked the bag five times, in rapid succession, with great force. He claims that when Waller finished, "he was out of breath from the strenuous effort, and commented with obvious sarcasm and irony, `That wasn't hard, was it.'" Moore states that he "immediately felt trauma to his body," felt "stiff and achy" the next day, and consulted a physician about one month later. Mr. Moore asserts that "[h]e has been diagnosed as having torn ligaments and tendons from the trauma of the injury, and may have neurological damage, as well." The resulting limitations on his physical activity allegedly have diminished the quality of his life in specified ways.

Moore had joined the fitness center on January 16, 2001, signing a membership agreement and initialing that portion of the agreement that purports to be a waiver and release of liability.

Article V — WAIVER AND LIABILITY

Section 1. The Member hereby acknowledges that attendance at or use of the Club or participation in any of the Club's activities or programs by such Member, including without limitation, the use of the Club's equipment and facilities, . . . exercises (including the use of the weights, cardiovascular equipment, and apparatus designed for exercising), [and] selection of exercise programs, methods, and types of equipment, . . . could cause injury to the Member or damage to the Member's personal property. As a material consideration for the Club to enter into this Agreement, to grant membership privileges hereunder and to permit the Member and the Member's guests to use the Club and its facilities, the Member, on its own behalf and on behalf of the Member's guests, agrees to assume any and all liabilities associated with the personal injury, death, property loss or other damages which may result from or arise out of attendance at or use of the Club or participation in any of the Club's programs or activities, notwithstanding any consultation on any exercise programs which may be provided by employees of the Club.

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By signing this Agreement, the Member understands that the foregoing waiver of liability on its behalf and on the behalf of the Member's guests will apply to any and all claims against the Club and/or its owners, shareholders, officers, directors, employees, agents or affiliates . . . for any such claims, demands, personal injuries, costs, property loss or other damages resulting from or arising out of any of foregoing risks at the Club, the condominium or the associated premises.

The Member hereby, on behalf of itself and the Member's heirs, executors, administrators, guests and assigns, fully and forever releases and discharges the Club and the Club affiliates, and each of them, from any and all claims, damages, demands, rights of action or causes of action, present or future, known or unknown, anticipated or unanticipated resulting from or arising out of the attendance at or use of the Club or their participation in any of the Club's activities or programs by such Member, including those which arise out of the negligence of the Club and/or the Club and the Club affiliates from any and all liability for any loss, or theft of, or damage to personal property, including, without limitation, automobiles and the contents of lockers.

THE MEMBER, BY INITIALING BELOW, ACKNOWLEDGES THAT HE/SHE HAS CAREFULLY READ THIS WAIVER AND RELEASE AND FULLY UNDERSTANDS THAT IT IS A WAIVER AND RELEASE OF LIABILITY, AND ASSUMES THE RESPONSIBILITY TO INFORM HIS/HER GUESTS OF THE PROVISIONS OF THIS AGREEMENT.________

If effective, this provision waives and releases not only claims against the Club but also claims against its "employees [and] agents."

Ruling on Grand Hyatt's motion for summary judgment, the trial court concluded:

“The Waiver and Liability section of the contract . . . expresses a full and complete release of all liability for personal injury occurring in the fitness center. Moore signed an acknowledgment indicating that [he] had read and understood that he was releasing Grand Hyatt from all liability for personal injuries that he might sustain. Furthermore, there is no allegation of fraud or overreaching in the amended complaint. In the circumstances, the court finds that the waiver and release is valid and enforceable and is a complete defense for Grand Hyatt in this action.”

The court later held that the terms of the waiver apply equally to defendant Terrell Waller.

This court has not often addressed the validity of exculpatory clauses in contracts. We have enforced them, however. After surveying "leading authorities" and cases from other jurisdictions, we recognized that courts have not generally enforced exculpatory clauses to the extent that they limited a party's liability for gross negligence, recklessness or intentional torts.

As Moore's counsel conceded at oral argument, he does not claim that Waller intentionally or purposefully injured him. The complaint does allege reckless conduct, however, and he argued to the trial court, as he does to us, that the fitness center could not exempt itself from liability for reckless or wanton behavior or gross negligence. Nevertheless, the defendants had moved for

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summary judgment, and mere conclusory allegations on the part of the non-moving party are insufficient to stave off the entry of summary judgment.

Nothing Moore presented in opposition to summary judgment would be sufficient to prove gross negligence or reckless conduct. Indeed, in one of his affidavits Moore stated that "as I was shown by defendant Waller exactly how to hold the body bag while he demonstrated his kick(s), the purpose of his directions as communicated to me as to how to hold the bag were plainly for safety." Such concern for safety is inconsistent with recklessness or gross negligence.

Moreover, Moore did not allege that defendant Waller kicked an unprotected portion of his body. Nor did he offer expert testimony suggesting that the demonstration was so hazardous that it was reckless to undertake it, even with the protection of the Everlast body bag.

Because there is no viable claim for gross negligence, recklessness, or an intentional tort, we turn to the question of whether this particular contractual provision is sufficient to bar claims for negligence.

This court has not previously considered the effect of an exculpatory clause in a membership agreement with a health club or fitness center, but many jurisdictions have done so. After surveying the legal landscape, the Maryland Court of Special Appeals concluded that most courts hold "that health clubs, in their membership agreements, may limit their liability for future negligence if they do so unambiguously." We have found the analysis to be very helpful.

A fundamental requirement of any exculpatory provision is that it be clear and unambiguous. The provision at issue here meets the requirement of clarity.

Article V is entitled, in capital letters, "WAIVER AND LIABILITY." The Article ends with a prominent "box" containing a sentence typed in capital letters. Moore initialed that box, verifying that he had "carefully read this waiver and release and fully understands that it is a waiver and release of liability. . . ." By accepting the terms of membership, Moore "agree[d] to assume any and all liabilities associated with the personal injury, death, property loss or other damages which may result from or arise out of attendance at or use of the Club or participation in any of the Club's programs or activities. . . ." He understood that this waiver of liability would "apply to any and all claims against the Club and/or its owners, shareholders, officers, directors, employees, agents or affiliates . . . for any . . . personal injuries . . . resulting from or arising out of any of [the] foregoing risks at the Club . . . ." He "release[d] and discharge[d] the Club . . . from any and all claims, damages, demands, rights of action or causes of action . . ., including those which arise out of the negligence of the Club . . . ."

This release is conspicuous and unambiguous, and it is clearly recognizable as a release from liability. Moreover, the injuries alleged here were reasonably within the contemplation of the parties. Because the parties expressed a clear intention to release liability and because that release clearly included liability for negligence, that intention should be enforced.

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Moore protests that the waiver provisions are so broad that they could be construed to exempt the Club from liability for harm caused by intentional torts or by reckless or grossly negligent conduct. Because such provisions are unenforceable, he argues that the entire release is invalid. We disagree.

A better interpretation of the law is that any "term" in a contract which attempts to exempt a party from liability for gross negligence or wanton conduct is unenforceable, not the entire contract. Where less than all of an agreement is unenforceable on public policy grounds, a court may nevertheless enforce the rest of the agreement `in favor of a party who did not engage in serious misconduct.

Nor is Article V (the waiver and release) unenforceable due to unequal bargaining power, as Moore asserts. We do not suppose that the parties in fact had equal power, but Moore does not meet the criteria for invalidating a contract on the grounds he invokes. He does not invite our attention to any evidence that he objected to the waiver provision or attempted to bargain for different terms. Nor has he shown that the contract involved a necessary service.

Even though a contract is on a printed form and offered on a "take it or leave it" basis, those facts alone do not cause it to be an adhesion contract. 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. Health clubs do not provide essential services and the Washington metropolitan area is home to many exercise and fitness clubs.

We, of course, would not enforce such a release if doing so would be against public policy. However, we agree with the Maryland Court of Special Appeals and with numerous other courts which have held that it does not violate public policy to enforce exculpatory clauses contained in membership contracts of health clubs and fitness centers. There is no special legal relationship and no overriding public interest which demand that this contract provision, voluntarily entered into by competent parties, should be rendered ineffectual.

The trial court properly held that the waiver and release is valid and enforceable and is a complete defense for Grand Hyatt and Waller in this action. The judgment of the Superior Court is hereby *Affirmed.*

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