COLORADO COURT OF APPEALS

DATE FILED: July 28, 2022
CASE NUMBER: 2021CA1258

Court of Appeals No. 21CA1258
Arapahoe County District Court No. 21CV30186
Honorable Elizabeth Beebe Volz, Judge

Bruce P. Fierst,

Plaintiff-Appellant,

v.

Greenwood Athletic Club Metropolitan District; and JAG Management Group, LLC, a Colorado Limited Liability Company,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE JOHNSON
Dunn and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 28, 2022

Tomazin Law Group, LLP, Thomas J. Tomazin, Haley M. Rank, Denver, Colorado, for Plaintiff-Appellant

Harris, Karstaedt, Jamison, & Powers, P.C., Jamey W. Jamison, Cathleen H. Heintz, Englewood, Colorado, for Defendants-Appellees

¶ 1 Plaintiff, Bruce P. Fierst (Fierst), appeals the district court's grant of summary judgment in favor of defendants, Greenwood Athletic Club Metropolitan District and JAG Management Group, LLC (collectively Greenwood). The district court concluded that Fierst's claims against Greenwood involving an injury he sustained after working out at the gym were waived by the membership agreement he signed. We affirm.

I. Background

¶ 2 Fierst became a member of Greenwood when he signed a membership application in 1998.[1] The application was two pages and contained an exculpatory provision at the bottom of the first page, which stated:

> A member, in attending and using the facilities and equipment therein, does so at his own risk. Seller shall not be liable for any damages arising from personal injuries sustained by buyer and/or members in, on or about the premises. Member assumes full responsibility for any injuries or damages which may occur

---

[1] Greenwood currently operates under the trade name "Club Greenwood." JAG Management Group, LLC manages Club Greenwood. At the time Fierst signed the membership agreement, Greenwood operated under the name of Greenwood Athletic Club, which was originally named in the complaint. The parties stipulated to dismissal of Greenwood Athletic Club, as that entity merged into Greenwood Athletic Club Metropolitan District.

> to member in, on, or about the property and he does hereby fully and forever release and discharge seller and all associated owners, employees and agents from any and all claims, demands, damages, rights of action or causes of action present or future, whether the same be known or unknown, anticipated or unanticipated, resulting from or arising out of the member's use or intended use of the said facilities and equipment thereof.

¶ 3 In February 2019, Fierst slipped and fell while walking to a locker room after completing a spin class. On his way to the locker room, while still wearing cycling shoes with metal clips on the soles, an acquaintance greeted Fierst with a "fist bump." When Fierst attempted to return the "fist bump," his left foot caught on a metal mechanism that was part of a fire door, causing him to lose his balance and fall. Fierst suffered severe injuries to his hip that led to multiple surgeries.

¶ 4 Fierst filed suit against Greenwood, asserting statutory negligence, negligence, and negligent supervision claims. Greenwood moved for summary judgment, arguing that there were no genuine issues of material fact in dispute. Greenwood took the position that the exculpatory provision of the membership agreement foreclosed Fierst's action. The district court agreed,

concluding that the exculpatory provision was enforceable, and therefore barred Fierst's claims. This appeal followed.

II. Standard of Review and Applicable Law

¶ 5 We review an order granting a motion for summary judgment de novo. *Stone v. Life Time Fitness, Inc.*, 2016 COA 189M, ¶ 8 (citing *Gagne v. Gagne*, 2014 COA 127, ¶ 24). Summary judgment is appropriate when the pleadings and supporting documents "establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Id.*; *see* C.R.C.P. 56(c).

¶ 6 Agreements for recreational activities may include an exculpatory provision, which are intended to relieve a party of negligence liability; they are generally disfavored and therefore strictly construed against the party seeking to be insulated from liability. *Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945, 948 (Colo. App. 2011) (citing *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 784 (Colo. 1989)); *Stone*, ¶ 14 (citing *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 136 (Colo. 1998)). "The determination of the sufficiency and validity of an exculpatory agreement is a question of law for the court to determine." *Jones v. Dressel*, 623 P.2d 370, 376

(Colo. 1981) (citing *Prod. Rsch. Assocs. v. Pac. Tel. & Tel. Co.*, 94 Cal. Rptr. 216 (Ct. App. 1971)).

¶ 7 To determine whether an exculpatory provision is valid and enforceable, a court analyzes four factors announced in *Jones*: "(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language." *Id.* The validity of exculpatory agreements is a matter of law reviewed de novo. *Id.* (citing *Prod. Rsch. Assocs.*, 94 Cal. Rptr. 216).

III. Analysis

¶ 8 We conclude that the district court did not err by granting summary judgment in favor of Greenwood for two reasons.

¶ 9 First, Fierst does not point to any genuine issue of material fact in dispute that would make the grant of summary judgment improper. Rather, he claims the disputed factual issue is whether the exculpatory provision is clear and unambiguous.[2] But whether

---

[2] Fierst argues for the first time in his reply brief that the disputed material fact relates to the district court not properly utilizing extrinsic evidence when determining that the provision was clear

a contract provision is clear and unambiguous is not a question of fact; it is a question of law. *Id.*

¶ 10 Second, we discern no error with the district court's conclusion that the provision is clear and unambiguous. The district court analyzed the four *Jones* factors. As to the first two factors — duty to the public and the nature of the service performed — the court, relying on *Raup v. Vail Summit Resorts, Inc.*, 233 F. Supp. 3d 934, 942 (D. Colo. 2017), determined that "[b]usinesses engaged in recreational activities . . . have been held not to owe special duties to the public or to perform essential public services." As to the third factor — whether the contract was fairly entered into — the court reasoned that Fierst's situation was similar to *Hamill*, 262 P.3d at 949. There, a division of this court determined that when there are other options available to the customer and the service is not essential, the contracting party is not at the "mercy" of the provider. *Id.* at 950. Finally, the court concluded that the fourth factor — whether the provision is clear and unambiguous —

---

and unambiguous. But "[w]e do not consider arguments raised for the first time in a reply brief." *See In Interest of L.B.*, 2017 COA 5, ¶ 48 (citing *Battle N., LLC v. Sensible Hous. Co.*, 2015 COA 83, ¶ 41).

was satisfied, as the exculpatory language was only a paragraph in length, was at the bottom of the first page of the agreement, and one of two signatures in the agreement immediately followed the exculpatory provision.

¶ 11 Fierst only challenges the fourth factor. On appeal, as he did below, he contends that the exculpatory provision is analogous to one that a division of this court in *Stone* held was unclear and ambiguous. That division determined that the waiver provision in a gym membership was invalid for seven reasons, among which included the provision was in small font, was rife with legal jargon, was contained within multiple sections of the contract that repeatedly used phrases like "includes, but is not limited to," and focused its wording on inherent dangers and strenuous exercise. *Stone*, ¶¶ 23–35.

¶ 12 When analyzing the fourth *Jones* factor, "[t]he inquiry should be whether the intent of the parties was to extinguish liability and whether this intent was clearly and unambiguously expressed." *Squires v. Breckenridge Outdoor Educ. Ctr.*, 715 F.3d 867, 872 (10th Cir. 2013) (quoting *Heil Valley Ranch, Inc.*, 784 P.2d at 785). To determine whether the intent of the parties was clearly and

unambiguously expressed, the provision's "language must be examined and construed in harmony with the plain and generally accepted meaning of the words employed." *Redden v. Clear Creek Skiing Corp.*, 2020 COA 176, ¶ 26 (quoting *Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 376 (Colo. 2000)). A provision is ambiguous when it is "susceptible to more than one reasonable interpretation." *Id.* (quoting *Ad Two*, 9 P.3d at 375). For this analysis, courts have "previously examined the actual language of the agreement for legal jargon, length and complication, and any likelihood of confusion or failure of a party to recognize the full extent of the release provisions." *Stone*, ¶ 14 (quoting *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004)).

¶ 13 Fierst argues that the exculpatory provision is invalid because, like in *Stone*, the provision used small print that required assistance to read and was at the bottom of a page for a gym membership agreement.[3] We disagree.

---

[3] We acknowledge that Fierst also argues that the exculpatory provision is illegible and faded, thus rendering it ambiguous. The parties read and quoted the provision, and the district court made no mention of having difficulty reading it. And there is nothing in the record to support that the agreement was faded at the time Fierst signed it over twenty years ago.

¶ 14 True, both the provision here and the one in *Stone* used small font and were part of gym membership agreements, but the similarities end there. The provision in *Stone* is distinguishable from Greenwood's provision for the other six reasons outlined in *Stone*. For example, Greenwood's provision was not rife with legal jargon, was short, was contained in one section, and did not have confusing inclusive and exclusive language. *See id.* at ¶¶ 23–35.

¶ 15 Fierst also asserts that Greenwood's exculpatory provision was overly broad, and that a person signing the agreement would be unaware what type of liability the provision covered. Related to this argument, he contends the provision could be interpreted to only cover exercise related injuries. We disagree.

¶ 16 In *B & B Livery*, the plaintiff argued that an exculpatory provision in a contract for renting a horse was ambiguous because of the provision's broad language regarding what kind of liability was being extinguished. 960 P.2d at 135, 138. Our supreme court held that the broad language did not create ambiguity but instead showed an intent for the provision to extinguish liability for a wide range of claims. *Id.* at 138.

¶ 17 Similarly, Greenwood's exculpatory provision clearly and unambiguously intended to extinguish liability for injuries related to exercise, the use of equipment, and the use of the premises. The first and second sentences of the provision explicitly mention injuries related to being on the premises or use of the facilities. Thus, we agree with the district court that the exculpatory provision's language does not limit waiver of liability only to injuries related to exercise.

¶ 18 As a result, the district court did not err when it granted summary judgment in favor of Greenwood.

IV. Conclusion

¶ 19 The district court's judgment is affirmed.

JUDGE DUNN and JUDGE HARRIS concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.