

FILED

OCT 17 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31531-2-III



IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DANNY DeASIS,

Appellant,

v.

YOUNG MEN'S ASSOCIATION OF YAKIMA (YMCA),

Respondents.

APPELLANT'S REPLY BRIEF

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I. Introduction

Plaintiff requests that the Court reverse the trial court's decision that removed the question of gross negligence from the jury, and that the matter be returned for trial on the merits.

II. Assignments of Error

A. The Trial Court Committed Reversible Error by Granting Defendant's Motion for Summary Judgment.

B. The Trial Court Committed Reversible Error by Denying Plaintiff's Motion for Partial Summary Judgment.

III. Issues Pertaining to the Assignments of Error

Defendant improperly attempts to reframe the issues presented by Plaintiff's assignment of error. In so doing, the facts are misrepresented.

Despite the Defendant's attempts to redirect the discussion, the issues are (a) whether there is substantial evidence of gross negligence, (b) whether the court impermissibly weighed the evidence in finding gross negligence instead of submitting the

question to the jury, (c) whether the YMCA document is enforceable, and (d) whether Defendant conformed to the duty it owed to Plaintiff as a business invitee.

IV. Statement of the Case

It is undisputed that Mr. DeAsis filled out membership application paperwork on Wednesday 11/17/2010. When he tried to enter the facility on Thursday 11/18/2010 the door would not open. When he asked for help a YMCA employee told that he had to sign additional paperwork.

The record is clear that Plaintiff, Danny DeAsis, was not told by the YMCA what he was signing. His testimony is undisputed that he believed it was merely a document that authorized YMCA to charge his credit card for membership fees. It is also undisputed that YMCA was unable to produce even one witness to testify that Mr. DeAsis was told the true nature of the document he was being asked to sign, or that he was warned not to sign the document until he read it carefully.

It is also undisputed that a YMCA member walked from the pool down a long hallway, dripping water then entire way. A YMCA employee followed her down the hall, past a storeroom where “Wet Floor” caution pylons were kept, and made a conscious choice to leave a hazardous spill unattended on the slippery tile floor to find a towel. Whether this gamble was gross negligence or not presents a jury question.

Whether leaving a trail of water on the slippery tile floor stretching from the pool to the office is gross negligence is a jury question. Whether YMCA met its duty owed to Plaintiff as a business invitee is also a jury question.

V. Argument

A. Defendant Fails to Provide Case Law Basis to Affirm Summary Judgment.

The Court of Appeals will review summary judgment *de novo*, of course, and all facts and reasonable inferences are construed in a light most favorable to the non-moving party. *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602

(2002). In this case, the trial court failed to follow these requirements.

On the issue of burden of proof, Defendant cites to *Kofmehl v. Baseline Lake, LLC*, 167 Wn.App. 677, 275 P.3d 328 (2012)¹ which is a case from this court, but it is not helpful to the Defendant's argument. The Court held in *Kofmehl* that the vendee seeking restitution of earnest money has the burden of proving the vendor was not ready, willing and able to perform. Certainly, that issue is unrelated to this case.

Defendant also cites to *Woody v. Stapp*, 146 Wn.App. 16, 189 P.3d 807 (2008) which also is inopposite. In *Woody* the plaintiff alleged his at-will employment was terminated due to a civil conspiracy, but was able to produce only speculation instead of the requisite clear, cogent and convincing evidence. Again, that issue is unrelated to this case.

¹ Defendant's Brief at p. 6-7.

The cases cited by Defendant do not support the position urged by YMCA.

B. The Issue of Gross Negligence Presents a Question of Fact and Was Not Properly Decided on Summary Judgment.

Plaintiff (and the trial court) relied almost exclusively on *Boyce v. West*, 71 Wn.App. 657, 862 P.2d 592 (1993), however, that case should not control the decision here.

Boyce involved wrongful death claims by the family of a SCUBA student. Boyce successfully completed SCUBA Diving 1 which required him to read and sign a waiver and release the contained express assumption of risk language. He registered for SCUBA Diving II which required him to again sign a waiver and release containing an express assumption of risk. The Court noted that diving is an inherently dangerous activity and that Mr. Boyce voluntarily and knowingly participated, thereby intentionally assuming that risk.

Clearly the trial court strained to apply the *Boyce* decision here. Considering the facts in favor of Mr. DeAsis as the non-moving party, he did not knowingly sign a release and did not intentionally waive anything.

Defendant also argues that *Boyce* supports the trial court's decision on the basis of gross negligence. However, the Plaintiff in *Boyce* failed to allege gross negligence, and only proved negligence². The Court concluded that Plaintiff presented only argument to support a claim of gross negligence.

In this case, the trial court expressly recognized that gross negligence was pled. CP 251-254. Further, Mr. DeAsis presented the trial court with ample evidence of gross negligence, including YMCA's failure to properly instruct employees how to respond to slipping hazards, and, of course, the decision by Defendant's employee to leave unattended a

² *Boyce supra*, at p. 665-666.

long trail of dripping water leading from the pool to the point where Plaintiff slipped and dislocated his knee cap.

Ultimately, the central question is whether the trial court correctly concluded that there is no issue of fact. Plaintiff urges this Court to find that the facts should be submitted to a jury to determine if the acts and omissions of YMCA constitute gross negligence.

C. The YMCA Waiver and Release is Unenforceable.

As indicated in Plaintiff's opening brief at p. 11-12 the exculpatory language in the YMCA membership application should be viewed with a jaundiced eye. Courts in Washington usually enforce pre-injury releases only in high risk sports.

Vodapest v. MacGregor, 128 Wn.2d 840, 849, 913 P.2d 779 (1996). *Boyce*, of course, involved SCUBA diving which is a classic example of a high risk sport.

Perhaps most importantly the release at issue (CP 19) fails to comply with the requirement that the language clearly and

unequivocally articulate that YMCA was being released from its own negligence. In *Markel American Ins. Co. v. Dagmar's Marina, L.L.C.*, 139 Wn.App. 469, 161 P.3d 1029 (2007) the court explained that exculpatory language must state unequivocally that the club is relieved of its own negligence.

The YMCA release language³ is certainly not clear and is apparently not intended to be understood by non-lawyers. It certainly does not comply with the requirement that exculpatory language must state expressly that it is releasing the YMCA from its own negligence. The language reads as follows:

1. "THE UNDERSIGNED ON HIS OR HER BEHALF AND BEHALF OF HIS OR HER CHILDREN HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the YMCA and all branches thereof, its directors, officers, employees and agents (hereinafter referred to as "releasees") from all liability to the undersigned or such children and all his personal representatives, assigns, heirs and next of kin for any loss or damage, and any claim or demands thereof on account of injury to the person or property or resulting in death of the undersigned or such children whether caused by the negligence of the releasees, or

³ As shown in CP 19 the language is in small type and densely typed on the back of the membership information questionnaire.

otherwise, while the undersigned or such children is in, upon, or about the premises or any facilities or equipment therein or participating in any program affiliated with the YMCA.

2. THE UNDERSIGNED HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the releasees and each of them from any loss, liability, damage or cost they may incur due to the presence of the undersigned or such children in, upon, or about the YMCA premises or in any way observing or using any facilities or equipment of the YMCA or participating in any program affiliated with the YMCA whether caused by the negligence of the releases or otherwise.

3. THE UNDERSIGNED HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY [sic] DAMAGE to the undersigned or such children to negligence of releasees or otherwise while, in about, or upon the premises of the YMCA and/or while using the premises or any facilities or equipment of the YMCA or participating in any program affiliated with the YMCA whether caused by the negligence of the releases or otherwise.”

Nowhere in the three paragraphs does YMCA state that it is being released from its own negligence. In addition to being absurdly complex, the language is confusing and ambiguous. All ambiguity, of course, is construed against the YMCA which drafted the document.

Further, the language of paragraph 3 is gibberish. It purports to require that Mr. DeAsis assume full responsibility "...to the undersigned or such children to negligence of releases or otherwise...". That is not a complete thought or sentence.

Washington courts have explained why it is critically important that exculpatory language clearly describes what and who is being released, because waiver and release agreements are foreign to most people.

"The factors that were important to the court's holding were that: (1) the clause did not expressly state that the marina was relieved of its own negligence; (2) the clause did not contain language that conveyed a similar meaning to disclaim negligence, without actually using the word "negligence"; and (3) the marina's customers may not be sophisticated business people. Other maritime cases have found exculpatory clauses insufficient to exculpate an entity from liability for its own negligence."

Markel American Ins. Co. v. Dagmar's Marina, L.L.C., 139

Wn.App. 469, 476, 161 P.3d 1029 (2007).

Therefore, contrary to the Defendant's argument, the exculpatory clause in the membership application is not enforceable.

Also, as previously discussed, it was inappropriate for the trial court to find that Mr. DeAsis knowingly and voluntarily signed a release, especially when the facts (being construed in his favor) show he did not know what he was signing because of the way YMCA presented the document.

“Whether reasonable persons in the circumstances presented could agree his signature was unwittingly made **presents an issue for the trier of fact** as does the question of whether the disclaimer language was so conspicuous that he could not have unwittingly signed the application.” [emphasis added]

McCorkle v. Hall, 56 Wn.App. 80, 782 P.2d 574 (1989) (emphasis added).

D. Trial Court Improperly Weighed Evidence to Grant Summary Judgment.

The trial court should not have evaluated the evidence to conclude that the acts and omissions of YMCA did not rise to gross negligence.

While it is true that summary judgment is appropriate if reasonable persons could reach only one conclusion from all of the evidence (*Doherty v. Municipality of Metropolitan Seattle*, 83 Wn.App. 464, 921 P.2d 1098 (1996)), this standard does not allow a court to weigh the evidence presented, thereby discounting the evidence of the non-moving party (Plaintiff here). Instead, all of the evidence presented must be viewed in the light most favorable to the non-moving party. *Ashcraft v. Wallingford*, 17 Wn.App. 853, 565 P.2d 1224 (1977). Accordingly, summary judgment is warranted pursuant to the reasonable person standard **only if**, viewing the evidence in such a light, no reasonable person would reach a conclusion other than that asserted by the moving party.

Here, the trial court improperly failed to view all of the evidence in a light most favorable to the Plaintiff.

Further, appellate courts recognize that it is rarely appropriate for a trial court to determine whether a defendant breached a duty of care, regardless of whether that duty is measured by a negligence standard or a gross negligence standard.

“Second as to foreseeability and gross negligence: Gross negligence means negligence means negligence substantially and appreciably greater than ordinary negligence. *O'Connell v. Scott Paper Co.*, 77 Wn.2d 186, 189, 460 P.2d 282 (1969); *Nist v. Tudor*, 67 Wn.2d 322, 331, 407 P.2d 282 (1965). The term gross negligence to have practical validity should be related to and connected with the law's polestar on the subject, ordinary negligence. *Nist v. Tudor, supra* at 331, 407 P.2d 798. Gross negligence, like ordinary negligence, must arise from foreseeability and the hazards out of which the injury arises. *Nist v. Tudor, supra* at 331, 407 P.2d 798.

Ordinarily, the question of negligence is one of fact for the jury to determine from all the evidence presented. *Shea v. Spokane*, 17 Wn.App. 236, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978); *Breivo v. Aberdeen*, 15 Wn.App. 520, 550 P.2d 1164 (1976). The jury's function is also to decide the foreseeability of the danger. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 793 (1985). Additionally, proximate cause (cause in fact), that is, a

determination of what actually occurred, is generally left to the jury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).”

Bader v. State, 43 Wn.App. 223, 228, 716 P.2d 925 (1986) (emphasis added).

Reasonable minds can certainly differ whether the acts and omissions of the YMCA rise to the level of gross negligence. Therefore, the trial court should not have granted Defendant’s motion for summary judgment. The case should be submitted to a jury to resolve.

E. Defendant Owed Highest Duty of Care to Plaintiff as a Business Invitee

Defendant argues that Plaintiff voluntarily and knowingly released YMCA, regardless of the fact the evidence clearly shows he did not, when the facts are construed in his favor.

Again, Defendant falls back on *Boyce* which involved facts that clearly showed the deceased student had signed similar releases, was fully familiar with the dangers of a high risk sport, and he voluntarily assumed those risks. Clearly, Mr. DeAsis

was not told he was waiving his rights, and he did not knowingly assume the risk that YMCA would intentionally create a slipping hazard in the hallways.

Because he was in the building pursuant to the business conducted by Defendant YMCA, Mr. DeAsis was a business invitee. *McKinnon v. Washington Federal S&L*, 68 Wn.2d 644, 414 P.2d 773 (1966).

Defendant fails to recognize that the facts, when viewed in favor of the non-moving party, do not support a finding that Mr. DeAsis knowingly waived his rights as a business invitee.

Defendant also fails to appreciate the fact that as a business invitee YMCA owed Plaintiff the highest duty. As the possessor of the property YMCY must exercise reasonable care with respect to conditions on the premises which pose an unreasonable risk of harm. *Johnson v. State*, 77 Wn.App. 934, 894 P.2d 1366 (1995); *Fuentes v. Port of Seattle*, 119 Wn.App. 864, 82 P.3d 1175 (2003).

Obviously, reasonable minds can differ whether YMCA exercised any care when the employee abandoned the slipping hazard of water dripped down the length of a hallway, allegedly to search for a towel.

Contrary to Defendant's view, the distinction between a negligence standard and a gross negligence standard does not affect the duty owed to a business invitee. The possessor of land owes a business invitee the duty of ordinary care. *Enerson v. Anderson*, 55 Wn.2d 486, 348 P.2d 401(1960).

Members are considered business invitees when lawfully on the premises. *Erdman v. Lower Yakima Valley, Washington Lodge No. 2112 of B.P.O.E.*, 41 Wn.App. 197, 704 P.2d 150 (1985)⁴.

Therefore, there can be no question that YMCA owed Mr. DeAsis the duty owed to a business invitee.

⁴ Erdman cited several cases including *Kalinowski v. YWCA*, 17 Wn.2d 380, 135 P.2d 852 (1943)

DATED: October 17, 2013.

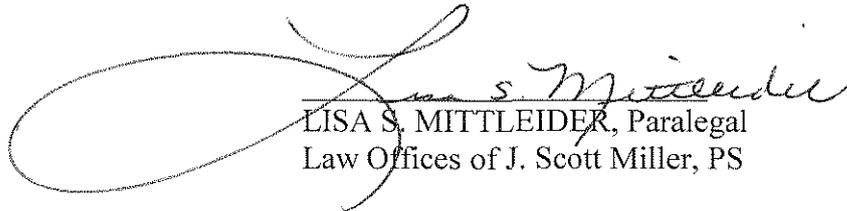
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CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on October 17, 2013, that a true and correct copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

<input checked="" type="checkbox"/>	Hand delivery	Patrick J. Cronin
<input type="checkbox"/>	Overnight mail	Winston & Cashatt
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