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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31531-2-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

DANNY DEASIS, a single person,

Appellant,

vs.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF YAKIMA (YMCA),
a non-profit organization,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The trial court properly granted summary judgment dismissing Danny Deasis' claim for personal injury against the Young Men's Christian Association of Yakima (YMCA) that he incurred when he slipped on some water outside the pool facility. Mr. Deasis admits to having signed a Release and Waiver of Liability and Indemnity Agreement before being admitted to the YMCA facility, and the undisputed facts further establish that there is no evidence his injuries were caused by the gross negligence of the YMCA, when the spilled water was observed on the floor seconds before Mr. Deasis slipped, and a lifeguard was undertaking an immediate cleanup of the water at the time of his fall.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should Washington law change to prohibit a private health club from obtaining a release and waiver of liability?
2. Is the YMCA's waiver and release agreement, which spans an entire page, has appropriate capitalized headings, and which Mr. Deasis signed, certifying he had read and understood it, inconspicuous and thus void as a matter of law?

3. Did Mr. Deasis submit substantial evidence of gross negligence sufficient to create an issue of fact to void the release when it was undisputed that Mr. Deasis slipped on water which had been dripped seconds before, and a lifeguard was undertaking an immediate clean-up of the drip?

III. STATEMENT OF THE CASE

On November 17, 2010, Danny Boy Deasis filled out information on the YMCA application for admission, which required little more than name, address and date of birth. (CP 18) On November 18, 2010, Mr. Deasis admits that he signed a Release and Waiver of Liability and Indemnity Agreement. (CP 19, 119-125) Mr. Deasis admits the document was entitled "**RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT**," and that his signature appears before the language: "I HAVE READ AND UNDERSTOOD THIS DOCUMENT AND RELEASE," and "THE UNDERSIGNED HAS READ AND VOLUNTARILY SIGNS THIS RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT..." (CP 19) The release also contains the following capitalized terms:

...THE UNDERSIGNED HEREBY AGREES TO THE FOLLOWING:

1. THE UNDERSIGNED...HEREBY RE-
LEASES, WAIVES, DISCHARGES AND
COVENANTS NOT TO SUE THE
YMCA...

...

2. THE UNDERSIGNED HEREBY AGREES
TO INDEMNIFY AND SAVE AND HOLD
HARMLESS THE RELEASEES...

...

3. THE UNDERSIGNED HEREBY AS-
SUMES FULL RESPONSIBILITY FOR
AND RISK OF BODILY INJURY, DEATH
OR PROPERTY DAMAGE...

(CP 19)

While Mr. Deasis testified that he was not specifically told to read the document, and that he "believed" it was a credit card application, he admits he was told he must sign, or he could not access the facility. (CP 152) He did not testify that the YMCA personnel prevented him from reading it, prevented him from asking questions about it, or misrepresented that it was a credit card application. It is undisputed that Mr. Deasis is fluent in English, has lived in the United States since 2005, graduated from high school, studied college in which he had to pass an English exam, has worked assisting a tax return corporation, obtained his driver's license, obtained a certificate to do tax assistance for H&R Block, obtained bank accounts, pays bills online, has credit cards, and a

sophisticated iPhone application program for use in his farming business to allow debits and credits as payments for the produce. (CP 100-118) Mr. Deasis does not disclaim any ability to enter into, understand the nature of, or execute any of these contractual arrangements necessary to day-to-day life in the United States.

While neither Mr. Deasis nor YMCA personnel have any specific recollection of Mr. Deasis signing the waiver, Mr. Deasis presumes he signed it at the front desk of the YMCA. (CP 121-12) It is a standard practice that a card used by a member who has not signed the waiver and release triggers a computer message precluding entry to the facility, and the member is given the release to sign before admittance. (CP 134-136)

It is also undisputed that a person may not become a member of the YMCA unless and until the waiver agreement has been signed by the proposed member. (CP 131; CP 139) If a potential member wants to take the form home, they are allowed to do so. (CP 137) It is undisputed no party has ever objected to the waiver or gone to YMCA personnel or management to request an explanation or alteration of the liability agreement. (CP 131-132)

The circumstances of Mr. Deasis' fall are similarly undisputed.

- YMCA employee Nathan Vanderhoof saw a YMCA patron drip a small amount of water on the floor outside the pool, near the aquatics office. (CP 141-147)
- Mr. Vanderhoof walked to the nearby aquatics office to grab a towel to clean up the water. (CP 146)
- He did not stand over the dripped water and call for help; he did not leave the dripped water to go get a cone to show there was water; he chose to clean it up with a towel as soon as he saw it drip. (CP 145-146)
- Mr. Vanderhoof said the towels were only a couple of steps away and it was easier to grab a towel and take care of the mess; he believed the spill would have been there longer if he had gone to get a cone. (CP 146)
- As Mr. Vanderhoof was returning with the towel, he saw Mr. Deasis fall. (CP 147-148)
- The YMCA has areas nearer to the pool or locker room on which there are floor mats. (CP 169-170)

- The YMCA also places mats and/or cones in other various locations a few times year when there is heavy traffic around the pool area during special events. (CP 169)

Based on these undisputed facts, Mr. Deasis claims that summary judgment was inappropriate, because the YMCA waiver and release clause is violative of public policy, unenforceable because it is "inconspicuous," and that he presented evidence of gross negligence which required trial.

IV. ARGUMENT

This Court reviews summary judgment de novo and engages in the same inquiries as the trial court. Heath v. Uruga, 106 Wn.App. 506, 512, 24 P.3d 413 (2001). Summary judgment is appropriate if, in view of all of the evidence, reasonable persons could reach only one conclusion. Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). In this instance, Mr. Deasis failed to meet the necessary burden to establish the existence of "substantial evidence" of gross negligence, or that the release was void as a matter of law.

A. Mr. Deasis failed to provide "substantial evidence" of gross negligence sufficient to create an issue of fact to defeat summary judgment.

When a summary judgment involves a heightened burden of proof, the court must view the evidence presented through "the prism of the substantive evidentiary burden." Kofmehl v. Baseline Lake, LLC, 167

Wn.App. 677, 275 P.3d 328 (2012). When a standard of proof is higher than ordinary negligence, the non-moving party must show that they can support their claim with prime facie proof supporting the higher level of proof. Woody v. Stapp, 146 Wn.App. 16, 22, 189 P.3d 807 (2008).

Contrary to Mr. Deasis' claim, he did not present substantial evidence of gross negligence sufficient to create an issue of fact to defeat summary judgment. The undisputed evidence does not establish any lack of even slight care "appreciably less" than ordinary negligence. Further, the trial court did not improperly weigh the evidence relative to gross negligence, and the standard for a business invitee is no different in relation to a finding of gross negligence to void a signed release, and thus no basis for reversal of the summary judgment exists.

1. There is no evidence to create an issue of fact on YMCA's gross negligence in cleaning up the spill.

The substantive burden of proof on gross negligence requires the plaintiff to supply substantial evidence that the defendant's act or omission represented care "appreciably less" than the care inherent in ordinary negligence. Boyce v. West, 71 Wn.App. 657, 665, 862 P.2d 592 (1993).¹

¹ Mr. Deasis asserts that Boyce was improperly used by the trial court; it is unclear whether he is asserting that the "substantial" burden of proof is inapplicable, but if so, that standard is simply based on the underlying requirements of Washington law on gross negligence. The Boyce standard is a proper statement of law, irrespective of the facts of the case.

To meet this burden of proof on summary judgment, the plaintiff must offer something more substantial than mere argument that the defendant's breach of care rises to the level of gross negligence. Boyce, 71 Wn.App. at 66.

Gross negligence must consist of negligence that is "substantially and appreciably greater than ordinary negligence" and care that is "substantially or appreciably less than the quantum of care inhering in ordinary negligence." Nist v. Tuder, 67 Wn.2d 322, 331, 407 P.2d 798 (1965). Ordinary negligence is the act or omission of which a person of ordinary prudence would do or fail to do under like circumstances or conditions. Kelley v. State, 104 Wn.App. 328, 17 P.3d 1189 (2000) (summary judgment granted on claim of gross negligence). Here, all the undisputed facts (and inferences) viewed in a light most favorable to the appellant do not constitute the significant deviation from ordinary negligence to create a jury issue.

Contrary to the appellant's assertions, Washington courts do not consistently submit issues of gross negligence to the jury; it is often a matter for summary judgment, depending entirely upon the evidence submitted. See e.g., Boyce, *supra*.; Craig v. Lakeshore Athletic Club, Inc., 1997 WL 305228 (Wash. App. 1997) (fitness club release not vitiated by a

claim of gross negligence as a matter of law)²; Spencer v. King County, 39 Wn.App. 201, 692 P.2d 874 (1984). In fact, other jurisdictions similarly recognize that a claim of gross negligence against a health club is susceptible to resolution in a motion for summary judgment. See e.g., Palmer v. Lakeside Wellness Center, 798 N.W.2d 845, 850 (Neb. 2011) (claim of inadequate lighting and spacing of exercise equipment does not rise to the level of absence of even slight care necessary for gross negligence as a matter of law); Flood v. YMCA of Brunswick, Georgia, 398 F.3d 1261 (11th Cir. 2005) (no evidence of gross negligence as a matter of law where lifeguards may have been inattentive but took immediate rescue efforts on noticing swimmer in distress.)

All of the cases on which Mr. Deasis relies to re-argue that gross negligence presents issues of fact are irrelevant to the facts here. They are primarily vehicle accidents in which the drivers affirmatively cause injury by driving erratically, running stop signs at high rates of speed with oncoming traffic, consuming alcohol, driving off the road, and failing to warn passengers of defective brakes, all of which caused injury producing crashes.

² This unpublished opinion is not cited for precedential grounds, but only to establish the grant of summary judgment on claims of gross negligence exist.

Unlike any of these cases, the allegations here are that the YMCA employee had a variety of courses of action he could have taken, and chose the one which he believed would have cleaned up the water most quickly. The YMCA employee did not create the hazard and did not ignore the hazard; neither he nor the YMCA failed to exercise even "slight care." See, WPI 10.07. Even assuming his conduct was unreasonable for the purposes of the motion, there is no substantial evidence sufficiently egregious to allow the jury to speculate on gross negligence.

The issue of whether a party should have taken a different action than the one taken does not create a basis to establish evidence of gross negligence, which is often defined as a complete failure to act. See, Kelley, 104 Wn.App. at 323. In Kelley, an appellant argued that a corrections officer was grossly negligent in supervising an inmate on community custody status by not investigating, discovering, and enforcing curfew violations, or making the required contacts with the inmate. The Kelley court conceded that the officer could have more carefully investigated the inmate's conduct, but that conduct did not rise to the level of "substantial evidence of serious negligence" as a matter of law. 104 Wn.App. at 335-338.

Here, Mr. Deasis' evidence is simply that there were other courses of action available, speculating that mats or cones could be used

throughout the facility at all times, although no evidence of the need for such measures exists. There is simply no evidence to create an issue of fact that the YMCA exercised substantially or appreciably less care than ordinary negligence.

2. The court did not improperly weigh the evidence in granting summary judgment on the issue of gross negligence.

Contrary to the Mr. Deasis' assertion, there is no evidence that the trial court improperly weighed the evidence on summary judgment relative to the issue of gross negligence. The facts that Mr. Deasis outlines remain undisputed, and the court did not weigh credibility to reach its conclusions. The evidence is simply that the YMCA employee testified that he believed the quickest method of cleaning up the small spill area that he witnessed was to grab towels from the nearby lifeguard room, and that it would have taken him longer to go and get cones in an area beyond the lifeguard room. He testified that the YMCA had in the past utilized mats or cones in areas closer to the pool, and in times of high traffic. The area where the water dripped was on a tile floor outside the area that people normally would traverse to go in or out of the pool, and the lifeguard had not been given an established specific protocol to deal with such events.

Analyzing these factors did not necessitate "weighing" of the evidence to determine if it was sufficient to create an issue of fact for gross negligence, because it was all undisputed. As outlined above, the court is required to analyze the evidence through the prism of the gross negligence summary judgment standard, and require that it be substantial enough to reach the higher level of proof. See, Woody, supra. It did so, properly granting summary judgment.

3. Mr. Deasis' status as a business invitee does not alter the standard of care to establish gross negligence to void a release.

To prevail again on the negligence claim against YMCA, Mr. Deasis had to establish that the YMCA owed a duty which was breached. However, the parties may, subject to certain exceptions, as will be discussed below, expressly agree in advance that one party is under no obligation of care to the other, and shall not be held liable for ordinary negligence. Chauvlier v. Booth Creek Ski Holdings, Inc., 109 Wn.App. 334, 339, 35 P.3d 383 (2001). There is no question that Mr. Deasis was an invitee, and that the YMCA owed a duty. The standard of that duty is irrelevant to the analysis of whether he voluntarily released the YMCA from all liability, and whether there exists a gross negligence sufficient to invalidate that waiver. Nothing about Mr. Deasis' status as an invitee alters the analysis.

In fact, in instances in which a party signs a release, he or she will often be a business invitee; no Washington case has established some different analysis of the necessary evidence to defeat a voluntary release. See e.g., Chauvlier, *supra*; Stokes v. Bally's Pacwest, Inc., 113 Wn.App. 442, 54 P.3d 161 (2002); Boyce, *supra*. All of the cases cited by Mr. Deasis simply outline the duty of reasonable care owed to invitees with respect to dangerous conditions on land, but fail to analyze any standard of care or duty in relation to an invitee that has waived and released all liability, and the gross negligence necessary to invalidate such a release. Irrespective of the duty of care to investigate, discover a hazard, and warn a business invitee, voiding a Release and Indemnity Agreement requires the existence of gross negligence. See, Boyce, *supra*. Whatever the underlying standard of duty to Mr. Deasis, he waived liability, and only the existence of gross negligence invalidates that waiver. Mr. Deasis' outline of business invitee status fails to establish that the evidence submitted here created an issue of fact as to gross negligence.

B. The YMCA waiver and release is enforceable.

A waiver provision is enforceable unless: (1) it violates public policy; (2) the negligent act falls greatly below the legal standard for protection of others; or (3) it is inconspicuous. Stokes, 113 Wn.App. at 445. Appellant here asserts that the YMCA waiver and release is

unenforceable because it violates public policy, is inconspicuous, and is an "adhesion" contract. As a matter of law, none of these factors void the release to which Mr. Deasis agreed.

1. No public policy precludes a health club from requiring a waiver of liability.

Washington law has established that health clubs such as the YMCA do not violate public policy by requiring a limitation of liability and waiver of claims as a condition of membership. See, Shields v. Sta-Fit, 79 Wn.App. 584, 585, 903 P.2d 525 (1995). In determining whether a pre-injury exculpatory release violates public policy, the court considers whether (1) the agreement concerns an endeavor of a type generally thought suitable for public regulations; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) because of the essential nature of the service, and the economic setting of the transaction, the party invoking exculpation possess a decisive advantage of bargaining strength against any member of the public who seeks the services; (5) in exercising a superior bargaining power, the party confronts the public with a

standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and (6) the person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents. Wagenblast v. Odessa School District, 110 Wn.2d 845, 851-55, 758 P.2d 968 (1988).³

Analyzing these factors, Washington courts have routinely found that health clubs do not meet any of the necessary elements to establish a basis to void a release based on public policy. The Shields court noted that while health clubs are beneficial to the public, they do not rise to the level of an essential service to the welfare of the state or its citizens, that alternative clubs or methods of achieving fitness goals are available, and thus the bargaining advantage is non-existent. 79 Wn.App. at 588-591. Moreover, because other options are available, a patron voluntarily submits to a health club, which differentiates it from instances in which an organization has a monopoly to require adhesion contracts. Id. Other courts analyzing exculpatory clauses in health club contracts analyze only

³ Mr. Deasis' claim that the YMCA release is an "adhesion contract" is subsumed in the public policy determination which governs the enforcement of pre-injury exculpatory release clauses.

the conspicuousness of the clause, recognizing that public policy is not "at issue." See, Stokes, 113 Wn.App. at 445; Johnson v. UBAR, LLC, 150 Wn.App. 533, 210 P.3d 1021 (2009).

And contrary to Mr. Deasis' argument, Washington has not limited the enforceability of pre-injury exculpatory agreements to instances in which adults engage in "high risk activities." Mr. Deasis fails to establish that Shields, although decided 20 years ago, incorrectly analyzed the public policy issues outlined above, or that it involved the "high risk" weight lifting activity. Neither the statutes nor the WACs Mr. Deasis cites change that analysis. The statute relating to "health studio services," RCW 19.142.010(3), exempts non-profits such as the YMCA, and is aimed at improper business methods of "health studios" engaged in the sale of instruction and training to improve physical appearance. WAC 388-832-0315 simply defines recreational activities available for persons with developmental disabilities which the state may fund, and includes a day camp or YMCA activities. The other WAC cited, 296-17A-6203, does no more than establish a classification of workers for various recreational workers for worker compensation rates. These regulations do not create a public policy to prevent the use of exculpatory clauses for fitness facilities, and do not require a different analysis than that performed by the court in Shields. The YMCA provides low cost

health club access, but is hardly a "practical necessity"; its provision of service is not "essential," such that a party has no choice but to enter into such a contract.

In fact, the non "high risk sports" situations cited by Mr. Deasis in which a release violates public policy (Appellant's Brief, p. 11), all involve significantly essential services such as public housing, provision of utilities, common carriers, and the like, for which the consuming public is forced to contract. Generally, health clubs are not providing important public services akin to essential services, not all members of the public participate, and no inequality of bargaining exists because Mr. Deasis could have chosen not to participate and selected a different club.

2. The release was not inconspicuous.

The undisputed facts establish that Mr. Deasis signed the waiver provision, and its clear terms speak for themselves. (CP 19) None of the factors which would render a release and waiver provision inconspicuous exist: the waiver is not set apart or hidden within other provisions; the heading is clear; the waiver is set off in capital letters and bold type; there is a signature line below the waiver provision; and it is clear that the signature is related to the waiver. See, Baker v. Seattle, 79 Wn.2d 198, 202, 484 P.2d 405 (1971); McCorkle v. Hall, 56 Wn.App. 80, 83, 782 P.2d 574 (1989); Chauvlier, 109 Wn.App. at 342; Stokes, 113 Wn.App. at 448.

The release signed by Mr. Deasis sets apart the language in either bold, capital letters or both. The document is clearly entitled "Release and Waiver of Liability and Indemnity Agreement." The waiver repeatedly warned Mr. Deasis that he was giving up his legal rights by signing it. It further specifies that the signator has "read and voluntarily signs the Release and Waiver of Liability and Indemnity Agreement" and has "read and understand this...release." (CP 19) There is simply nothing for the jury to decide here on the conspicuousness and enforceability of this document.

And while Mr. Deasis testifies he was "unaware" he was signing a release, there is no evidence that there was any misrepresentations made to him or that the nature of the print or the text of the release was somehow hidden or inconspicuous, which may have necessitated some additional explanation. Inconspicuousness is not established because the release was not explained line by line or pointed out in any detail. Inconspicuousness is instead established when there is some hidden or deceptive means or methods by which a limitation of liability clause is unclear to the party signing it, thus demanding further explanation. Stokes, 113 Wn.App. at 446. (A signator's claim that he "subjectively unwittingly signed" is not the issue). A person who signs an agreement without reading it is bound by its terms so long as there was an opportunity to do so and the person

chose not to for personal reasons. Stokes, 113 Wn.App. at 446; McCorkle, 56 Wn.App. at 83. A fundamental principle of Washington law is that a party to a contract which he has voluntarily signed will not be heard to declare he did not read it or was ignorant of its contents. Washington Federal Savings & Loan Association v. Alsager, 165 Wn.App. 10, 266 P.3d 905 (2011). Parties have a duty to read the contracts they sign. Nishikawa v. U.S. Eagle High, LLC, 138 Wn.App. 841, 158 P.3d 1265 (2007). Mr. Deasis has established no issue of fact that the release was "objectively" inconspicuous.

In fact, Washington courts have found releases very similar to the YMCA release conspicuous as a matter of law. In Chauvlier, 113 Wn.App. at 446-447, the court affirmed summary judgment that a release was conspicuous because it was entitled "Liability Release and Promise Not to Sue, please read carefully"; it had "release" and "hold harmless and indemnify" set off in capital letters throughout; and just above the signature line it stated: "I have read, understand and accepted the conditions of the liability release printed above." The same is true of the Stokes release for the use of the Bally's Health Club; it was entitled "Waiver and Release" and ended with the language "You acknowledge that you have carefully read this waiver and release and fully understand that it is a release of liability. You are waiving any rights that you may

have to bring a legal action to assert a claim against us for our negligence." Stokes, 113 Wn.App. at 449. The court directed summary judgment in Bally's favor because the language in the release was conspicuous and enforceable. Id. at 450. In Conradt v. Four Star Promotions, Inc., 45 Wn.App. 847, 849, 728 P.2d 617 (1986), the court found the release enforceable as a matter of law where the appellant signed it directly below language "I have read this release," despite appellant's testimony it was partially covered and no one told him he was signing a release.

Here, Mr. Deasis has offered no more evidence than his own subjective testimony that he was unaware of what he was signing, and thought it was a credit card application. There is no testimony that he was "tricked" into signing it, that the words were hidden from him, the words were covered, that he was prevented from reading it, that he was prevented from asking questions about it, that it was embedded in some separate document such as a credit card application, or that he was incorrectly informed of what it was. The very simple and undisputed fact is that Mr. Deasis simply chose to sign it without reading it. That fact does not render the YMCA's exculpatory limitation of liability agreement inconspicuous, and it is enforceable as a matter of law.

V. CONCLUSION

For the foregoing reasons, the Young Men's Christian Association of Yakima requests this court affirm the trial court's summary judgment dismissing this case.

DATED this 17th day of September, 2013.



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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 17th day of September, 2013, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

J. Scott Miller
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VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED
BY FACSIMILE
VIA FEDERAL EXPRESS

Attorney for Appellant

DATED at Spokane, Washington, this 17th day of September, 2013.



Linda Lee

452601