IN THE COURT OF APPEALS OF IOWA

No. 8-891 / 08-0745
Filed March 11, 2009

HILLIS JAMES FORRESTER,
Plaintiff-Appellant,

vs.

ASPEN ATHLETIC CLUBS, L.L.C.,
SAFARI II, L.L.C., and THE HANSEN COMPANY, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

A plaintiff appeals multiple summary judgment rulings in favor of several defendants in his action arising out of an injury at a health club. **AFFIRMED.**

Kyle Reilly of Thomas J. Reilly Law Firm, P.C., Des Moines, for appellant.

Stephen Hardy of Grefe & Sidney, P.L.C., Des Moines, John Hodges and Jason Madden of Bradshaw, Fowler, Proctor & Fairgrave, P.C., for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Hillis James Forrester appeals summary judgment rulings in favor of several defendants in his action arising out of an injury at a health club. We affirm.

I. Background Facts and Proceedings

Forrester joined an Aspen Athletic Clubs facility. He signed a membership agreement with the club that contained a release of liability clause. The release stated:

> The use of the Facilities at Aspen naturally involves risk of injury to you or your guest, whether you or someone else cause it. As such, you understand and voluntarily accept this risk and agree that Aspen will not be liable for any injury, including, without limitation, personal, bodily or mental injury, economic loss or any damage to you, your spouse, guests, unborn child, or relatives resulting from the negligence of Aspen or anyone on Aspen's behalf or anyone using the Facilities.

Shortly after Forrester joined the club, he tripped over an electrical box as he was walking from one part of the facility to another. The box was located in front of the treadmills.

Forrester filed suit against Aspen and others identified as "Designer D, Installer I, and Manufacturer M." The district court granted summary judgment in favor of Aspen based on the release.

After the statute of limitations expired, Forrester amended his petition to include Safari II, L.L.C., the Hansen Company, Inc., Savage-Ver Ploeg & Associates, Inc., and Paradise Flooring. Safari, Hansen, and Savage filed

motions for summary judgment, all of which were granted.[1] Forrester appealed the district court's rulings in favor of Aspen, Hansen, and Safari.[2]

II. Analysis

Review in this case is for correction of errors at law. *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993). "When reviewing a grant of summary judgment we ask whether the moving party has demonstrated the absence of any genuine issue of material fact and is entitled to judgment as a matter of law." *Id.*

A. Aspen

The district court ruled that the release in the membership agreement encompassed the type of injury sustained by Forrester and precluded imposition of liability on Aspen. Forrester contends this ruling was error. He asserts the release (1) was "buried in the Agreement and Unnoticeable, and therefore Unenforceable," (2) did not cover the particular event causing his injuries, and (3) was against public policy.

1. Placement of Release Language

We preliminarily address Aspen's contention that this issue was not preserved for review. Although the district court's conclusions of law did not explicitly address this argument, the findings of fact referred to the placement of the release provision. Affording Forrester the benefit of the doubt, we conclude this issue was preserved for review.

Generally a party is "bound by the documents [the party] signs even though . . . it has not expressly accepted all of the contract provisions or is even

[1] Paradise was not served with process.
[2] Forrester did not file an appeal as to Savage-Ver Ploeg.

aware of them." *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317, 323 (Iowa 1977). Additionally, it is well settled that

> if a party to a contract is able to read (the contract), has the opportunity to do so, and fails to read the contract he cannot thereafter be heard to say that he was ignorant of its terms and conditions for the purpose of relieving himself from its obligation.

Id. (quoting *Preston v. Howell*, 219 Iowa 230, 236, 257 N.W. 415, 418 (1934)).

Forrester does not argue that he was unable to read Aspen's membership agreement. That agreement contained the following language printed in italic typeface on the front page, within one inch of the signature line: "See the back of this Agreement for the Release of Liability and Assumption of Risk & Right to Cancel upon death or disability." The release was on the lower left-hand column of the back page, preceded by the following language, in bold print: "Release of Liability and Assumption of Risk." As the court stated in *Wilmotte*,

> [W]e are constrained to the view that a reasonable [person], on reading the face of the confirmation documents, and particularly the first sentence thereof referring to the provisions on the reverse side would have looked at the back of the instrument before signing and accepting the contract. A reasonable [person] would therefore have had notice of the provisions on the back side of the documents and would have accepted the terms on the back by signing the documents.

Id. at 323–24. We conclude the district court did not err in enforcing the release provision despite its placement in the membership agreement.

2. Coverage of Release Provision

Forrester next contends the release provision applies only to "[i]nherent [r]isks of [e]xercising, and [he] was not [i]njured by such an [i]nherent [r]isk."

When a contract does not contain any ambiguities, it is to be enforced as written. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d

859, 862–63 (Iowa 1991). The district court concluded the Aspen's membership agreement was not ambiguous. The court noted that the release encompassed "personal, bodily, or mental injury" at "the Facilities" and pointed out that the definition of "Facilities" was broad. The court wrote,

> In the present case, the types of activities covered by the agreement are spelled out in subsection 2 of the agreement. Subsection 2(a) provides permission "to use Aspen's premises, facilities, equipment and services (collectively called "Facilities") . . . ." Ex. A. The use of broad designations, like "premises, facilities, equipment and services," demonstrates an intent to encompass all potential activities of a member while on Aspen's premises. The Court is unable to deduce any intent of the parties to limit the liability exclusion to only acts of "exercising." Clearly, walking around Aspen's facilities from one exercise area to another, or from an exercise area to locker rooms, is expected and contemplated conduct under this agreement.

We discern no error in this conclusion.

"[W]e have repeatedly held that contracts exempting a party from its own negligence are enforceable, and are not contrary to public policy." *Huber*, 501 N.W.2d at 55; *Rich v. Dyna Tech., Inc.*, 204 N.W.2d 867, 870 (Iowa 1973) (stating that a release should "be construed according to its terms"). In *Grabill v. Adams County Fair & Racing Ass'n*, 666 N.W.2d 592, 596 (Iowa 2003), the Iowa Supreme Court specifically stated, "a releasing party does not need to have contemplated the precise occurrence that caused injury as long as the occurrence was within the broad range of events that might transpire with respect to the matter being undertaken." *See also Korsmo v. Waverly Ski Club*, 435 N.W.2d 746, 748 (Iowa Ct. App. 1988) (concluding release exempting liability "from any and all rights, claims, demands and actions of any and every nature whatsoever . . . sustained . . . before, during and after said competitions"

encompassed activities at issue). Based on this precedent, we conclude Aspen's release encompassed the injuries he sustained while walking to another part of the facility.

3. Public Policy Argument

Forrester finally argues that the release of liability clause is against public policy. This argument was not preserved for review. Therefore, we decline to consider it. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. Hansen Company

The district court dismissed Hansen Company on statute of limitations grounds. Forrester contends this was error. We disagree.

The statute of limitations for injury to a person is two years. Iowa Code § 614.1(2) (2005). Forrester claimed his injury occurred on January 26, 2005. The original petition was filed on December 7, 2006, which was within the two-year limitations period. The petition, however, did not identify Hansen. It only identified Aspen and "Designer D, Installer I, and Manufacturer M." Hansen was identified on July 6, 2007, more than two years after the claimed injury.

Forrester attempts to circumvent his late addition of Hansen by relying on Iowa Code section 613.18(3). That section provides:

> An action brought pursuant to this section [concerning products liability], where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

Iowa Code § 613.18(3). Forrester specifically argues that the combination of his attorney's signature on the petition, the effect given to that signature by another provision, Iowa Code section 619.19,[3] and the designation in the original petition of the obviously fictitious "Manufacturer M" constituted the certification that the manufacturer was not yet identifiable as required by section 613.18(3).

The district court rejected this argument, stating "Iowa Code § 619.19 does not provide support for Forrester's argument that his legal counsel's signature on the original petition certifies that the manufacturer was unknown after reasonable inquiry." We discern no error in this conclusion. Assuming without deciding that an attorney's signature on a petition could constitute a certification under Iowa Code section 613.18(3), Forrester's original petition did not state that Designer D, Installer I, and Manufacturer M were substituted names for entities that were not yet identifiable. Accordingly, we conclude that Iowa Code section 613.18(3) does not remove this case from the two-year statute of limitations bar.

[3] Section 619.19 states in relevant part:

> The signature of a party, the party's legal counsel, or any other person representing the party, to a motion, pleading, or other paper is a certificate that:
> 1. The person has read the motion, pleading or other paper.
> 2. To the best of the person's knowledge, information, and belief, formed after reasonable inquiry, it is grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.
> 3. It is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.

C. Safari

Safari was the landlord of the Aspen premises. The district court granted summary judgment in favor of Safari, concluding

> Under the terms of [the] lease, which are unambiguous, Safari did not occupy or maintain control of the premises and is not a "possessor" of the land. Therefore, Safari owed no duty to the Plaintiff and cannot be found liable for damages in this case.

Forrester takes issue with this conclusion, arguing that Safari "maintained sufficient control over the premises where Forrester's injury occurred to impose liability."

As Forrester's argument implies, the question of whether Safari owed Forrester a duty turns on whether it controlled the premises. *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 720 (Iowa 1999) ("The crucial question is whether the [plaintiffs] have shown that [the owner/defendant] retained control of the [property].").

There is no question that, in its lease with Aspen, Safari retained the right to inspect the premises and perform maintenance, replacement, and repairs. However, other provisions of the lease required Safari to notify Aspen before entering the premises, limited its maintenance obligations to the exterior and structural portions of the premises, and explicitly absolved it of responsibility for other maintenance obligations as follows:

> Except as set forth above, Landlord shall not be obligated to make repairs, replacements, or improvements of any kind to the premises, or any equipment, facilities, systems, or fixtures therein contained or for the exclusive use of the Tenant, including specifically, but not limited to, the HVAC and utility systems serving the premises, even if such equipment, facilities or equipment fixtures are located outside of the Premises.

Aspen was assigned the responsibility of cleaning, maintaining, and repairing "all other portions of the Premises, including floor and wall coverings, plumbing, electrical, and HVAC systems and equipment." We conclude the lease, therefore, did not afford Safari the level of control needed to trigger a duty of care. *See Allison by Fox v. Page*, 545 N.W.2d 281, 283 (Iowa 1996) ("As a general rule, a landlord is not liable for injuries caused by the unsafe condition of the property arising after it is leased, provided there is no agreement to repair."); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 815 (Iowa 1994) (concluding "McDonald's retained authority does not establish sufficient control of the property to render McDonald's a 'possessor' of land"); *Stupka v. Scheidel*, 244 Iowa 442, 447, 56 N.W.2d 874, 877 (1953) ("As a general rule an owner who has leased a building to another without any agreement to repair is not liable to the tenant . . . ."). The district court did not err in granting summary judgment in favor of Safari.

III. Disposition

We affirm the district court's grant of summary judgment in favor of Aspen, Hansen, and Safari.

AFFIRMED.