RENDERED: OCTOBER 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001687-MR

CHRISTINA BOWLING — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CI-009101

ASYLUM EXTREME, LLC;
PAINTBALL ASYLUM, LLC.;
AMERICAN AMATEUR SPORTS
ASSOCIATION; AND OWNERS AND
OPERATORS OF PAINTBALL FACILITY
LOCATED AT 3101 POND STATION ROAD,
LOUISVILLE, KENTUCKY 40272 — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Christina Bowling appeals from the August 12, 2010, opinion and order of the Jefferson Circuit Court, which granted summary judgment in favor of Asylum Extreme, LLC; Paintball Asylum, LLC; American Amateur

Sports Association; and owners and operators of paintball facility located at 3101 Pond Station Road, Louisville, Kentucky, 40272 (collectively "appellees") in Bowling's personal injury action against appellees. We affirm.

On September 6, 2008, Bowling assembled with her youth group at the appellees' paintball facility to participate in paintball games. Several days prior, Bowling read and signed a waiver agreement ("waiver"), which was a prerequisite of participating in paintball activities at the facility. While playing her fourth game of paintball, Bowling's mask slid down her face and she was struck in the eye with a paintball, suffering permanent injury.

On September 3, 2009, Bowling filed a complaint against appellees and sought compensation for her injuries. Bowling asserted that the appellees were negligent by failing to properly instruct her on how to use and adjust her safety equipment, specifically the mask. Appellees filed a motion for summary judgment, arguing that Bowling's claims were precluded by the waiver. Discovery was conducted by appellees in the form of interrogatories, requests for production of documents, and the deposition of Bowling. On August 12, 2010, the trial court held that the waiver was valid and enforceable and granted summary judgment in favor of appellees. This appeal followed.

Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). The record must be viewed in a light

most favorable to the party opposing the motion and all doubts must be resolved in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

We review a trial court's grant of summary judgment to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

Bowling argues that the trial court improperly granted summary judgment because there were genuine issues of material fact and the appellees were not entitled to judgment as a matter of law. More specifically, Bowling argues that the waiver was not sufficiently clear to preclude her personal injury claim. In support

of this argument, Bowling cites to *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), in which the Kentucky Supreme Court indicated that "the wording of the release must be so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable." *Id.* 47 (citation omitted).

The Court continued:

> Specifically, a preinjury release will be upheld only if (1) it explicitly expresses an intention to exonerate by using the word "negligence;" or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision. Thus, an exculpatory clause must clearly set out the negligence for which liability is to be avoided.

Id. (citations omitted).

Bowling argues that the waiver was too general and did not specifically identify the failure to adequately instruct on the use and adjustment of her mask as a potential source of injury. She further indicates that, due to her lack of knowledge regarding paintball activities, she could not have possibly known that she was waiving any potential claims against appellees. We disagree.

The waiver which Bowling signed reads, in pertinent part, as follows:

> WAIVER AND RELEASE OF LIABILITY
>
> In consideration of AE furnishing services and/or equipment to enable me to participate in paintball games, I agree as follows:
>
> I fully understand and acknowledge that; (a) risks and dangers exist in my use of Paintball equipment and my participation in Paintball activities; (b) my participation in such activities and/or use of such equipment may result in my injury illness including but not limited to bodily injury, disease strains, fractures, partial and/or total paralysis, **eye injury**, blindness, heat stroke, heart attack, death or other ailments that could cause serious disability; (c) **these risks and dangers may be caused by the negligence of the owners, employees, officers or agents of AE**; the negligence of the participants, the negligence of others, accidents, breaches of contract, the

> forces of nature or other causes. **These risks and dangers may arise from foreseeable or unforeseeable causes**; and (d) by my participation in these activities and/or use of equipment, I hereby assume all risks and dangers and all responsibility for any losses and/or damages, whether caused in whole or in part by the negligence or other conduct of the owners, agents, officers, employees of AE, or by any other person.
>
> I, on behalf of myself, my personal representatives and my heirs, hereby **voluntarily agree to release**, waive, discharge, hold harmless, defend, and indemnify AE and it's [sic] owners, agents, officers and employees from any and all claims, actions or losses for bodily injury, property damages, wrongful death, loss of services or otherwise which may arise out of my use of Paintball equipment or my participation in Paintball activities. **I specifically understand that I am releasing, discharging and waiving any claims or actions that I may have presently or in the future for the negligent acts or other conduct by the owners, agents, officers or employees of AE.** (Emphasis added).

Our review of the waiver indicates that it clearly states that Bowling was releasing appellees from any liability resulting from negligence. It specifically lists eye injury as a potential injury and clearly and specifically indicates intent to release appellees from liability. Furthermore, the only reasonable construction of the waiver's language is to release appellees from liability, and the hazard, an eye injury, was clearly, and specifically, contemplated. Thus, not only does the waiver meet one of the *Hargis* requirements, it meets all four. *Id*. No ordinarily prudent and knowledgeable party would be unaware as to what he or she was contracting away by signing the waiver. Therefore, the trial court acted properly in enforcing it.

Bowling further argues that summary judgment was improper because a question of fact exists as to whether appellees' actions, in failing to provide instruction concerning the use and adjustment of her helmet, constituted willful or wanton negligence. Again, we disagree.

Although a party can release another from liability, a party cannot waive his or her right to hold another liable for acts of willful or wanton negligence. *See, e.g., Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 655 (Ky. 2007). Willful or wanton negligence is demonstrated by "an entire absence of care for the life, person, or property of others which exhibits indifference to consequences." *Louisville & N.R. Co. v. George*, 279 Ky. 24, 129 S.W.2d 986, 989 (1939). Bowling's testimony indicates that she was given a protective mask; that she was instructed not to remove the mask; that she asked for another mask that would match her team's, but was not given one because there were none available; that she did not experience her mask falling off prior to the fourth game; that she did not complain of her mask falling off; and that she did not ask for help in adjusting her mask. The evidence presented to the trial court could not support a finding that the appellees exhibited an entire absence of care for Bowling or the other players. Said otherwise, no evidence was presented to support a finding of willful or wanton negligence. Therefore, Bowling's argument is without merit.

For the foregoing reasons, the August 12, 2010, opinion and order granting summary judgment by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David L. Sage
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas G. Goodwin
Richard W. Edwards
Louisville, Kentucky