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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000822-MR

BILLY D. BOWLING — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE JOHN T. ALEXANDER, JUDGE
ACTION NO. 18-CI-00357

MAMMOTH CAVE ADVENTURES, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

GOODWINE, JUDGE: Billy D. Bowling ("Bowling") appeals the Barren Circuit Court's order granting summary judgment in favor of Mammoth Cave Adventures, LLC ("MCA"). The circuit court found the exculpatory agreement between the parties was enforceable. On appeal, Bowling argues material facts precluded

summary judgment. After careful review of the record, finding no error, we affirm.

On June 10, 2017, Bowling went to MCA to zip line with his friends. Before engaging in the activity, Bowling signed a release of liability. Bowling injured his right ankle when approaching the landing platform.

On June 8, 2018, Bowling filed suit against MCA in Barren Circuit Court alleging he was injured as a result of MCA's negligence. He asserted the zip lining course and landing ramp were unlit, which resulted in his injury.

MCA moved for summary judgment, arguing the release of liability was an enforceable exculpatory agreement under *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005). Because the agreement was enforceable, MCA was not liable for any alleged negligent conduct.

The circuit court heard MCA's motion on February 25, 2019. On April 18, 2019, the circuit court entered an order granting summary judgment in favor of MCA. The circuit court examined the release of liability, which provides:

> RELEASE OF LIABILITY
>
> In consideration of being given the opportunity to participate in the zip line activities of Mammoth Cave Adventures, LLC, I, on behalf of myself, my personal representatives, assigns, heirs and next of kin, do hereby state as follows:
>
> 1. I acknowledge that participating in the zip line activity is dangerous. I understand the nature and

> rigors of the activity and the risk involved in participation.
>
> 2. I wish to participate in the zip line activities and as a result, I fully accept and assume all the risks and dangers involved in said activity and accept responsibility for all injuries, losses, costs and damages I incur as a result of the participation in the activity and I release and discharge and covenant not to sue the Mammoth Cave Adventures, LLC, for any liability, claims, damages, demands or losses which I has [sic] been caused by or alleged to have been caused by the actions or negligence of Mammoth Cave Adventures, LLC, and I will indemnify and save and hold it harmless from any litigation expenses, attorney fees, liabilities, damages or costs, it may incur as a result of any claim of mine to the fullness [sic] extent permitted by law.
>
> 3. I understand that I have released Mammoth Cave Adventures, LLC, and I have signed this document freely and without any inducement or assurance of any kind.

The circuit court applied the following four factors in determining the agreement was enforceable:

> 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. at 47 (citations omitted).

Bowling subsequently filed a motion to alter, amend, or vacate, which the circuit court denied. This appeal followed.

"Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (citations omitted).

On appeal, Bowling does not contest the circuit court's determination that the release of liability was enforceable under *Hargis*. Instead, he argues: (1) an employee of MCA negligently misrepresented that he could zip line despite being over the weight limit, (2) MCA was negligent in not lighting the course or landing area, and (3) the doctrine of equitable estoppel applies.

First, we address Bowling's negligence arguments. By signing the release of liability, Bowling surrendered his "right to prosecute a cause of action" against MCA. *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky. App. 2004) (citation omitted). Although exculpatory agreements "are disfavored and are strictly construed against the parties relying upon them," Bowling fails to assert why the agreement at issue is unenforceable. *Hargis*, 168 S.W.3d at 47 (citations omitted). He does not contest the circuit court's thorough analysis under *Hargis* and does not raise a public policy argument under *Miller as Next Friend of E.M. v.*

House of Boom Kentucky, LLC, 575 S.W.3d 656, 660 (Ky. 2019). Instead, Bowling asks this Court to consider whether MCA acted negligently. Bowling signed an exculpatory agreement agreeing not to sue MCA for any damages caused by its alleged negligence, which the circuit court found enforceable. Bowling has no factual basis for his claim against MCA as a matter of law because he signed an enforceable exculpatory agreement. As such, because this agreement cut off Bowling's right to sue for the injuries he sustained, his allegation that MCA acted negligently does not amount to a genuine issue of material fact to survive summary judgment.

Furthermore, we decline to address Bowling's equitable estoppel argument. Not only is it conclusory, he also failed to raise the argument before the circuit court. "It is axiomatic that a party may not raise an issue for the first time on appeal." *Sunrise Children's Services, Inc. v. Kentucky Unemployment Insurance Commission*, 515 S.W.3d 186, 192 (Ky. App. 2016) (citation omitted). "As this Court has stated on numerous occasions, 'appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.'" *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (quoting *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)). As this argument is not properly before us and Bowling does not request review for palpable error under

Kentucky Rules of Civil Procedure ("CR") 61.02, we decline to address this argument.

For the foregoing reasons, we affirm the summary judgment of the Barren Circuit Court.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent.

I must disagree with the majority and the trial court that the release form signed by Bowling satisfies all of the factors in *Hargis*, 168 S.W.3d 36. The release uses only the word "negligence." The release does specifically and explicitly release MCA from liability for ordinary negligence claims. The language of the release is specific as to its purpose to exonerate MCA from ordinary negligence liability only. The release specifically warns that zip line activity is dangerous, without any detailed explanation or discussion. However, importantly for the claims in this case, there is no language that releases MCA from conduct that would constitute gross negligence under Kentucky law.

Bowling claims that an employee of MCA told him immediately prior to getting on the zip line that there was a weight limit, although it was not disclosed to Bowling before signing the release nor was it set out in the release.

This is a relevant disputed material issue of fact in my opinion. Additionally, Bowling alleges there was no lighting on the landing, which is also a disputed factual issue, which would make an inherently dangerous activity even more dangerous. If true, this would clearly be an enhancement to the danger of the activity that would require, at minimum, disclosure and perhaps a warning. The release makes no reference to the lack of lighting on the landing and its enhancement of the dangerous activity.

A weight limit for participants (and allowing overweight participants to access the zip line) and no lighting in the landing area could be construed as willful or wanton conduct for which a party may not contract away liability through a generic release, without full disclosure in my opinion. This type of release is disfavored under Kentucky law and requires a strict construction of the agreement against MCA that precludes summary judgment in this case. *See Hargis*, 168 S.W.3d at 47. These material issues of fact as disputed by the parties can only be resolved by a trier of fact and are not appropriately resolved by summary judgment. If the jury determines that MCA's conduct was grossly negligent, the release would be unenforceable as to this conduct. Of course, under comparative negligence, the jury could also consider Bowling's conduct in contributing to his injuries.

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