STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1173

Carmen Price,
Appellant,

vs.

Unverzagt and Associates, LLC d/b/a Fitness Together Maple Grove,
Respondent.

Filed March 20, 2017
Reversed and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CV-15-14481

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

Michael D. Tewksbury, Tewksbury & Kerfeld, P.A., Minneapolis, Minnesota (for appellant)

Peter M. Waldeck, Waldeck Law Firm, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges the summary-judgment dismissal of her claims against respondent health club arising out of personal injuries suffered when a trainer purportedly

dropped a weight on appellant's head. Appellant asserts that the district court erred by concluding that the claims were barred by an agreement containing an indemnity clause, arguing that the indemnity clause (1) should not have been considered because it was not disclosed in discovery; (2) does not bar first-party claims; (3) is overbroad and unenforceable; and (4) is void as against public policy. Because we conclude that the relevant language in the agreement is void because it is not a release and is not clear and unequivocal, we reverse the district court's grant of summary judgment to respondent and remand this case for a trial on the merits.

FACTS

Appellant Carmen Price, who was 28 years old at the time of the incident, purchased a membership at respondent health club Fitness Together through LivingSocial, a website and phone application that provides coupons and discounts for products and services. Appellant testified at her deposition that she purchased ten personal training sessions for $99 because it was a great deal. Appellant had her initial fitness assessment on January 26, 2015, the first time appellant went to the health club. The trainer asked appellant to fill out a "Quick F.I.T." form and sign the agreement on the back. The Quick F.I.T. form is a two-page document that asked for appellant's "goals & dreams" and her "medical health & lifestyle"; the second page held an "Agreement Release & Acknowledgement of Risk" (the agreement), which stated:

> You are responsible for ensuring that your exercise program is the right one for you. We strongly recommend that you consult with your physician before beginning or modifying your exercise regime. By signing below you hereby represent, warrant and agree as follows:

> . . . .
> 5. You hereby agree to indemnify and hold harmless the Fitness Together studio, Fitness Together Franchise Corporation, the franchisor of the Fitness Together franchise system, Calories Inc. and its and their affiliates and their respective share-holders, members, principals, owners, officers, directors, employees, agents, representatives, supervisors and assigns (the "Indemnified Parties") from any and all claims, demands, actions and causes of action, including personal injury, and all other liability whatsoever arising out of your participation in the Fitness Together training program, the Nutrition Together program, the use of equipment located at the Fitness Together studio and any and all violation(s) of codes, statutes, licensing requirements or regulations of the state in which the Fitness Together studio is located, wherever known or unknown as of the date hereof.

At her deposition, appellant agreed that, by signing the document, she was agreeing to the terms contained therein whether she read it or not. Appellant's affidavit stated that the language contained in the agreement was not explained to her and that no contract negotiations took place regarding the signing of the form. Membership at Fitness Together was offered on a take-it-or-leave-it basis and appellant was required to sign the form prior to being able to use the personal-training sessions.

After her first personal-training session, appellant continued to work out with several different trainers employed by respondent. The accident at issue occurred during her 13th personal-training session while appellant was being trained by a certified strength and conditioning specialist employed by respondent. Appellant was performing the second set of a bench press exercise when, according to appellant:

> I was laying down on the bench looking up, and as my hands reached up to grab the bar, grip the bar, the trainer released the bar and the next thing I know it fell on my head. So I had not actually gripped the bar, the bar fell on my head. And after that

> happened, he . . . caught the bar, and I sat up, and it felt like my head had split open.[1]

Appellant testified at her deposition that she had done the bench press exercise countless times prior to the incident and the bench press she was doing was not different than the bench press exercise she had done on previous occasions.

As a result of the accident, appellant claims damages for past and future medical expenses for treatment of the injuries, impairment of wages and earning capacity, and pain, disability, embarrassment, and emotional stress and requested judgment in an amount in excess of $50,000. The district court granted respondent summary judgment, concluding that the agreement contained an exculpatory clause that prevents appellant from bringing an action against respondent as a matter of law.

D E C I S I O N

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). "We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted).

[1] On summary judgment, we review the evidence in the light most favorable to the nonmoving party, in this case, appellant. *Hoyt Properties, Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007). Therefore, we assume the accident occurred as appellant claims.

I. Did the trial court err in considering the agreement because it was not produced through initial disclosures or in response to discovery requests?

Appellant first argues that respondent did not produce the agreement in its initial disclosures under Minn. R. Civ. P. 26.01 and therefore it should have been barred from consideration in the summary-judgment motion. The district court did not address the late discovery disclosure in its order granting summary judgment.

"[A] party must, without awaiting a discovery request, provide to the other parties: . . . a copy . . . of all documents . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Minn. R. Civ. P. 26.01. "If a party fails to provide information or identify a witness as required by Rule 26.01 or .05, the party is not allowed to use that information or witness to supply evidence on a motion . . . *unless the failure was substantially justified or is harmless*." Minn. R. Civ. P. 37.03 (emphasis added). We conclude that the failure to more promptly disclose the Quick F.I.T. form was harmless.

The decision to permit evidence is within the discretion of the district court. *Wojciechowski v. William D. Stanley Shows, Inc.*, 378 N.W.2d 87, 88-89 (Minn. App. 1985). "Factors to be considered are the willfulness of the failure to disclose, the resulting prejudice, and the harm to the truth-seeking process if severe sanctions are imposed." *Id.* at 89. One of the purposes of discovery is to prevent unjust surprise and prejudice. *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 317 (Minn. 1987). In this case, appellant was not surprised nor prejudiced. Appellant signed the document with the language in question in January 2015. While the agreement was in smaller font, it was

not unreadable and was approximately half of one page long. This was not a short, hidden clause buried in a lengthy agreement. She was given the Quick F.I.T. form again at her deposition on January 14, 2016. On March 1, 2016, respondent filed a motion for summary judgment. Appellant was able to depose the trainer who was involved in the accident and the owner of the health club on March 15, 2015, two months after receiving the Quick F.I.T. form at her deposition. The Quick F.I.T. form was mentioned in the deposition of the trainer and was discussed at length by the owner of respondent at his deposition. Appellant filed her response to the summary judgment on March 18, 2016. No evidence in the record suggests that the failure to disclose the Quick F.I.T. form was done willfully or maliciously.

Appellant argues that, because the district court made no factual findings on whether the failure to disclose was justified or harmless, this court is not in a position to find facts on those issues and may only make rulings as a matter of law. While "[i]t is not within the province of this court to determine issues of fact on appeal[,]" *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966), a determination of whether a document produced late in discovery should be excluded is a question of law. Because the relevant facts are not in dispute, we can make a legal determination as to whether the late production of the documents was harmless. Appellant did not depose key defense witnesses until after the Quick F.I.T. form was disclosed at appellant's deposition. We conclude that the failure to timely disclose was ultimately harmless.

II. Did the district court err in characterizing the agreement as an exculpatory clause rather than an indemnity clause and by holding that the clause barred appellant's personal-injury claims?

Appellant next argues that the district court erred in characterizing the relevant clause in the Quick F.I.T. agreement as an exculpatory clause when it is actually an indemnification clause. Respondent characterizes the language as both an exculpatory clause and an indemnity clause. The district court concluded it was an exculpatory clause. We disagree.[2]

The clause reads:

> You hereby agree to *indemnify and hold harmless* the Fitness Together studio, Fitness Together Franchise Corporation, the franchisor of the Fitness Together franchise system, Calories Inc. and its and their affiliates and their respective share-holders, members, principals, owners, officers, directors, employees, agents, representatives, supervisors and assigns (*the "Indemnified Parties"*) from any and all claims, demands, actions and causes of action, including personal injury, and all other liability whatsoever arising out of your participation in the Fitness Together training program, the Nutrition Together program, the use of equipment located at the Fitness Together studio and any and all violation(s) of codes, statutes, licensing requirements or regulations of the state in which the Fitness Together studio is located, wherever known or unknown as of the date hereof.

(Emphasis Added.)

An exculpatory clause is "[a] contractual provision relieving a party from liability resulting from a negligent or wrongful act." *Black's Law Dictionary* 608 (8th ed. 2004). An indemnity clause is "[a] contractual provision in which one party agrees to answer for

[2] We note that these are difficult concepts that are not always readily distinguishable.

any specified or unspecified liability or harm that the other party might incur." *Black's Law Dictionary* 784 (8th ed. 2004). "Technically, an indemnity clause and an exculpatory clause differ in form, but the substantive effect of each to shift liability operates essentially the same under either type of contract clause, and they are usually given the same treatment by the courts." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 922 n.3 (Minn. 1982). However, courts "examine the enforceability of exculpatory and indemnification clauses under different standards. Indemnification clauses are subject to greater scrutiny because they release negligent parties from liability, but also may shift liability to innocent parties." *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 792 n.6 (Minn. 2005).

While we do not require any "magic language" to create an exculpatory clause, we observe that an example of a proper exculpatory clause would read something to the effect of, "YOU ARE AWARE AND AGREE THAT BY EXECUTING THIS WAIVER AND RELEASE, YOU ARE GIVING UP YOUR RIGHT TO BRING A LEGAL ACTION OR ASSERT A CLAIM AGAINST CLUB FOR ITS NEGLIGENCE, OR FOR ANY DEFECTIVE PRODUCT ON ITS PREMISES." *Johnson v. Fit Pro, LLC*, No. A09-1919, 2010 WL 2899661, at *1 (Minn. App. July 26, 2010). The language in this case is completely different.

Read together, the first sentence of the agreement reads that "[appellant] agrees to *indemnify and hold harmless* . . ." and then continues to classify each person or entity covered by the clause as "the indemnified parties." Additionally, the language used in the agreement is common to other clauses that have been considered to be indemnification

clauses. *See Yang*, 701 N.W.2d at 787; *Braegelmann v. Horizon Development Co.*, 371 N.W.2d 644, 646 (Minn. App. 1985).

Because we conclude that the clause is an indemnification clause, we must next determine whether or not the clause is valid.

"Agreements seeking to indemnify the indemnitee for losses occasioned by its own negligence are not favored by law and are not construed in favor of indemnification unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it." *Yang*, 701 N.W.2d at 791. Courts also will not enforce an indemnification clause if it is contrary to public policy. *Id.* Thus, an indemnity agreement seeking to indemnify a party for losses caused by its own negligence is enforceable where (1) the terms of the agreement are expressed in clear and unequivocal terms, and (2) the agreement is not contrary to public policy. We conclude that the terms of the agreement are ambiguous and not expressed in clear and unequivocal terms.

The language states that appellant shall indemnify and hold harmless respondent and its employees from "all claims, demands, actions and causes of action, including personal injury, and all other liability whatsoever arising out of your participation in the Fitness Together training program [and] . . . the use of equipment located at the Fitness Together studio." It is undisputed that the incident happened while using the bench press located at respondent's studio, that the trainer was an employee of respondent, and the blow to the head was a personal injury.

However, because the clause does not specifically state that appellant indemnifies and holds harmless respondent from negligent actions, we conclude that the language is

not clear and unequivocal. *See id.* at 791 n.5. In *Yang*, the supreme court stated, in dicta, that the indemnification clauses were not enforceable because the language was not clear and unequivocal: it did not "(1) specifically refer[] to negligence, (2) expressly state[] that the renter will indemnify [respondent] for [respondent's] negligence, or (3) clearly indicate[] that the renter will indemnify [respondent] for negligence occurring before the renter took possession of the houseboat." *Id.* The indemnification clause here does not specifically state that appellant agreed to indemnify and hold harmless respondent for any personal injury, even if caused by respondent's own negligence.

We do not hold that all indemnification agreements that indemnify a party for its own negligence are automatically void. S*ee Nat. Hydro Systems v. M.A. Mortenson Co.*, 529 N.W.2d 690, 693 (Minn. 1995). Rather we conclude that an indemnification agreement is not clear and unambiguous if it does not apprise the indemnifying party that it is responsible for the indemnified party's own negligence. Because the language is not clear and unequivocal in that it does not expressly state that appellant would be responsible for the negligence of respondent or its employees, we reverse the district court's grant of summary judgment to respondent. Since the indemnification clause is not clear and unequivocal, we decline to address the issue of whether the indemnification clause is void as against public policy.

Finally, although we are reversing the district court, we wish to commend it for the thoughtful way it explained its decision to appellant. This is the essence of procedural fairness.

Reversed and remanded.