STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1318

Carter Justice,
Appellant,

vs.

Marvel, LLC d/b/a Pump It Up Parties,
Respondent.

Filed July 19, 2021
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CV-19-9495

Mahesha P. Subbaraman, Subbaraman, P.L.L.C., Minneapolis, Minnesota; and

Patrick W. Michenfelder, Throndset Michenfelder, L.L.C., St. Michael, Minnesota (for appellant)

Joseph A. Nilan, Daniel A. Ellerbrock, Jacob T. Merkel, Gregerson, Rosow, Johnson & Nilan, Ltd., Minneapolis, Minnesota (for respondent)

Matthew J. Barber, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota (for *amicus curiae* Minnesota Association for Justice)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Gaïtas, Judge.

SYLLABUS

1. A parent is authorized to sign, on behalf of his or her minor child, an exculpatory clause that releases a negligence claim against a third party. If the exculpatory clause is valid and enforceable, it is binding on the child after the child becomes an adult.

2. Section 184B.20 of the Minnesota Statutes does not apply retroactively to an exculpatory clause signed before August 1, 2010, the effective date of the statute.

3. An exculpatory clause that is overly broad because it purports to release claims of intentional, willful, or wanton negligence is valid and enforceable to the extent that a plaintiff has alleged a claim of ordinary negligence but is invalid and unenforceable to the extent that a plaintiff has alleged a claim of greater-than-ordinary negligence.

OPINION

JOHNSON, Judge

When he was seven years old, Carter Justice attended a birthday party at a business that provided inflatable amusement equipment on which children were allowed to jump, climb, and play. Before entering the party, Justice's mother signed a form agreement that included an exculpatory clause that released the business from any and all claims she and Justice might have based on his use of the inflatable amusement equipment. During the party, Justice fell off an inflatable obstacle course and hit his head on the floor, which caused him a head injury.

When Justice was 18 years old, he sued the business that hosted the birthday party. The district court denied Justice's motion to amend the complaint to seek punitive damages. The district court later granted the defendant's motion for summary judgment on the ground that the exculpatory clause signed by Justice's mother is valid and enforceable. We conclude that the district court did not err by granting the motion for summary judgment. Therefore, we affirm.

FACTS

In February 2007, Justice attended a friend's birthday party at an indoor amusement facility in the city of Plymouth. The facility, known as Pump It Up, was owned and operated by Marvel, L.L.C. Upon entering the facility, Justice's mother, Michelle Sutton, was asked to sign, and did sign, a form agreement that stated as follows:

> In consideration of being allowed to enter into the play area and/or participate in any party and/or program at Pump It Up of Plymouth, MN, the undersigned, on his or her own behalf, and/or on behalf of the participant(s) identified below, acknowledges, appreciates and agrees to the following conditions:
>
> I represent that I am the parent or legal guardian of the Participant(s) named below . . .
>
> . . . .
>
> *I, for myself and the participant(s) named below, . . . hereby release . . . MARVEL, LLC, dba Pump It Up of Plymouth . . . from and against any and all claims, injuries, liabilities or damages arising out of or related to our participation in . . . the use of the play area and/or inflatable equipment.* (Emphasis added.)

During the party, while playing on an inflatable obstacle course, Justice fell approximately six feet and hit his head on the carpeted floor. He was taken to a hospital, where he received treatment.

In September 2007, Sutton and her husband, Steve Sutton, who is Justice's step-father, entered into a written agreement with Marvel. The one-page agreement states that the Suttons had incurred unreimbursed medical expenses as a result of Justice's head injury and that Marvel agreed to pay $1,500 of those expenses. The agreement provided that, if

no new medical complications arose within six months, the Suttons would "execute a full and complete release and discharge of any and all claims" against Marvel. The Suttons did not thereafter execute such a release.

In June 2018, after Justice had turned 18 years old, he commenced this action against Marvel. He alleged that Marvel had "negligently failed to cover the landing surface of the fall zone surrounding the inflatable." In March 2020, Justice moved to amend the complaint to add a request for punitive damages. In April 2020, the district court denied the motion to amend.

In May 2020, Marvel moved for summary judgment on the ground that Justice's claim is barred by the exculpatory clause that his mother signed and, in addition, by the post-injury agreement that both of the Suttons signed. In August 2020, the district court granted the motion for summary judgment, reasoning that Justice's claim is barred by the pre-injury exculpatory clause. Justice appeals.

ISSUE

Did the district court err by granting Marvel's motion for summary judgment based on the exculpatory clause that Justice's mother signed on his behalf when he was a minor child?

ANALYSIS

On appeal, Justice makes two arguments. First, he argues that the district court erred by granting Marvel's motion for summary judgment. Second, he argues that the district court erred by denying his motion to amend the complaint to add a request for punitive damages. We begin by addressing his first argument, which is dispositive of the appeal.

A district court "shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to the district court's legal conclusions on summary judgment and views the evidence in the light most favorable to the party against whom summary judgment was granted. *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

Justice argues that the district court erred on the ground that the exculpatory clause is invalid and unenforceable for five reasons. First, he argues that a pre-injury exculpatory clause releasing claims arising from the use of inflatable amusement equipment is void as a matter of law pursuant to a statute that was enacted after Justice's mother signed Marvel's exculpatory clause. Second, he argues that a parent does not have authority to agree to a pre-injury exculpatory clause on behalf of a minor child and that any such agreement is not binding on the child after he becomes an adult. Third, he argues that Marvel's exculpatory clause is invalid and unenforceable because it is overly broad or arguably overbroad and in violation of public policy. Fourth, he argues that the post-injury agreement abrogated or modified the pre-injury exculpatory clause. And fifth, he argues that there is a genuine issue of material fact as to whether Marvel engaged in greater-than-ordinary negligence. We will consider each of Justice's arguments but in a different order.

A. Parental Authority

Justice argues that a parent does not have authority to agree to a pre-injury exculpatory clause on behalf of a minor child and that any such agreement is not binding on the child after he becomes an adult.[1] Neither party has cited any Minnesota caselaw that is directly on point, and we are unaware of any such caselaw.[2]

The district court ruled in favor of Marvel on this issue by stating that "a parent may sign a waiver on behalf of a child under the laws of Minnesota." In support of this statement, the district court quoted the following sentence in *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007): "A parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right." *Id.* at 820 (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000)). The supreme

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[1]Marvel contends that Justice did not preserve this argument by presenting it to the district court. Marvel's contention is colorable because Justice presented the issue to the district court in a somewhat indirect manner. But the district court determined that the issue was presented, stating that it "was addressed in the [parties'] memoranda and is therefore worth clarifying." Accordingly, the argument is sufficiently preserved for appellate review.

[2]The Minnesota Association for Justice has filed an *amicus* brief supporting Justice's position. The association notes that a person may void a contract that he or she entered into as a minor, contends that compensation of children who are tort victims is an important objective, and asserts that courts in 17 other states do not enforce parental waivers of minors' claims. Our research indicates that courts in other states have resolved the issue in various ways. Courts in some states have enforced exculpatory clauses signed by a parent on behalf of a minor child. *See, e.g.*, *Sharon v. City of Newton*, 769 N.E.2d 738, 745-47 (Mass. 2002); *BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345, 353-55 (Md. 2013); *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 206-07 (Ohio 1998). Courts in other states have not enforced such exculpatory clauses. *See, e.g.*, *Woodman ex rel. Woodman v. Kera, LLC*, 785 N.W.2d 1, 8 (Mich. 2010); *Hawkins ex rel. Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001); *Scott v. Pacific W. Mountain Resort*, 834 P.2d 6, 10-12 (Wash. 1992).

court's statement in *SooHoo* was made in the context of analyzing an argument that a custodial parent of a minor child has a constitutional right to substantive due process with respect to governmental interference with the parent-child relationship. *Id.* There was no issue in that case concerning a parent's authority to enter into a contract on behalf of a minor child. *See id.* at 819-26.

Nonetheless, the existence of a parent's fundamental right "to make decisions concerning the care, custody, and control of his or her children," *id.* at 820, implies that a parent has authority to act on behalf of a minor child when interacting with third parties. The United States Supreme Court has recognized as much: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham v. J.R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 2505 (1979). This principle is based on "a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 602, 99 S. Ct. at 2504. Furthermore, the law recognizes that "natural bonds of affection lead parents to act in the best interests of their children." *Id.* (citing 1 William Blackstone, *Commentaries of the Law of England* 447 (Legal Classics Library 1983) (1769); 2 James Kent, *Commentaries on American Law* 190 (1827)). The Supreme Court stated in *Parham* that a parent's authority to make health-care decisions on behalf of a minor child is limited only in atypical situations, such as if the parent has neglected or abused the child. *Id.* at 604, 99 S. Ct. at 2505.

Several Minnesota statutes recognize by implication that a parent generally is authorized to enter into agreements with third parties on behalf of a minor child. For example, in matters related to education, the legislature has recognized that parents have authority to make binding decisions on behalf of their minor children. *See, e.g.*, Minn. Stat. §§ 120A.22, subds. 4-5, 8, 120A.38, 120B.07 (2020). Similarly, in the context of medical care, the legislature has provided for only a limited number of situations in which a parent's consent to the medical treatment of a minor child is unnecessary, thereby implying that, in all other situations, a parent's agreement or consent is necessary. For example, a minor child "may give effective consent to personal medical, dental, mental and other health services" only if the minor child is "living separate and apart from parents or legal guardian . . . and is managing personal financial affairs." Minn. Stat. § 144.341 (2020). In addition, a health-care provider may give emergency treatment to a minor child without parental consent only if "the risk to the minor's life or health is of such a nature that treatment should be given without delay and the requirement of consent would result in delay or denial of treatment." Minn. Stat. § 144.344 (2020). Each of these statutes presupposes that a parent generally has authority to make decisions on behalf of a minor child.

The legislature's recognition of a parent's authority to enter into an agreement on behalf of a minor child also is reflected in two recent statutes that are especially pertinent to this case. In 2010, the legislature passed, and the governor signed, a bill to regulate inflatable amusement equipment in various ways. 2010 Minn. Laws ch. 347, art. 3, § 2, at 46 (codified at Minn. Stat. § 184B.20 (2020)). One provision of the statute (which is discussed further below in part B) broadly prohibits exculpatory clauses with the following

language: "A waiver of liability signed by *or on behalf of* a minor for injuries arising out of the negligence of the owner or the owner's employee or designee is void." Minn. Stat. § 184B.20, subd. 5(b) (emphasis added). The italicized language in section 184B.20 would be unnecessary unless another person—such as a parent—has authority to sign a waiver of liability on behalf of a minor child. Also, in 2013, the legislature and the governor enacted a law to, among other things, prohibit exculpatory clauses that purport to release claims of greater-than-ordinary negligence in the context of consumer services, including recreational activities. 2013 Minn. Laws ch. 118 (codified at Minn. Stat. § 604.055 (2020)). The statute applies to agreements entered into by "a minor *or another who is authorized to sign or accept the agreement on behalf of the minor*." Minn. Stat. § 184B.20, subd. 2 (emphasis added). Again, the italicized language impliedly recognizes that, in the absence of the statute, another person—such as a parent—may be authorized to sign agreements of that type, which is the same general type of agreement as the exculpatory clause in this case.

In light of these statutes, and in the absence of any law that either forbids parents from entering into contracts on behalf of their minor children or limits their ability to do so, it is clear that a parent generally has authority, on behalf of a minor child, to enter into an agreement that includes an exculpatory clause.

Justice contends that a parent should not be permitted to bind his or her minor child to an exculpatory clause after the child becomes an adult because a minor child who independently enters into a contract may avoid the contract after reaching adulthood. *See Kelly v. Furlong*, 261 N.W. 460, 466 (Minn. 1935); *Goodnow v. Empire Lumber Co.*, 18

N.W. 283, 284-85 (Minn. 1884); *Dixon v. Merritt*, 21 Minn. 196, 200 (1875). This rule of law exists "for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do." *Goodnow*, 18 N.W. at 284. For that reason, "the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them." *Id.* at 284-85. But that rationale simply does not apply if an adult parent signed an exculpatory clause on behalf of a minor child. An adult parent is presumed to be competent to make decisions on behalf of a minor child and to act in the child's best interest. *See Parham*, 442 U.S. at 602, 99 S. Ct. at 2504. Such a parent may balance the relevant considerations and either elect to sign an exculpatory clause on behalf of a minor child and thereby obtain the benefits of doing so or elect to not sign it and thereby forego any such benefits.

Justice also contends that a parent should not be permitted to sign an exculpatory clause on behalf of a minor child *before* any injury occurs because a parent is not permitted to settle a pending lawsuit on behalf of a minor child *after* a child has been injured, unless a district court approves. Justice refers to a statute that authorizes a parent to "maintain an action for the injury of a minor son or daughter" and also provides, "No settlement or compromise of the action is valid unless it is approved by a judge of the court in which the action is pending." Minn. Stat. § 540.08 (2020). Justice's contention fails to recognize the differences between the two situations. Section 540.08 guards against the risk that a parent might enter into an improvident settlement that is not in the minor child's best interests or

the risk that a parent might be motivated by an intent to use settlement proceeds for improper purposes. Such risks are especially ripe after a child has been injured and a civil action has been commenced and settled. But such risks are not present and are unlikely to arise in the more common situation in which a parent is presented with an exculpatory clause and no injury has yet occurred. In that situation, there is no immediate prospect of a settlement that is contrary to a minor child's best interests.

Justice contends further that this court held in *O'Brien Entertainment Agency, Inc. v. Wolfgramm*, 407 N.W.2d 463 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987), that a parent's agreement on behalf of his minor children was unenforceable. We disagree with Justice's interpretation of our opinion in *O'Brien*. The opinion states that a father of six children signed a contract, but the opinion does not clearly state that the father signed the contract on behalf of his children. *Id.* at 465-66. Absent from the court's reasoning is any statement that the father purported to enter into the contract on behalf of his children. *See id.* at 466-67. We concluded that the statute of frauds barred the breach-of-contract claim against the children because none of the children signed the contract. *Id.* at 466. Thus, our opinion did not address the question whether a parent may enter into a contract on behalf of a minor child.

In sum, various provisions of Minnesota law recognize that a parent may enter into an agreement on behalf of a minor child. Recent statutory enactments clearly indicate that the legislature has assumed that a parent is authorized to sign an exculpatory clause—including an exculpatory clause concerning the use of inflatable amusement equipment—

on behalf of a minor child. Justice has not cited any Minnesota authority for the proposition that a parent may not enter into an agreement on behalf of a minor child.

Thus, the district court did not err by reasoning that Justice's mother was authorized to sign Marvel's exculpatory clause on Justice's behalf.

B. Section 184B.20

Justice also argues that section 184B.20 of the Minnesota Statutes, which was enacted in 2010, voids the exculpatory clause that his mother signed in 2007 because the statute voids all waivers of claims based on injuries caused by the use of inflatable amusement equipment.

As noted above, section 184B.20 provides, "A waiver of liability signed by or on behalf of a minor for injuries arising out of the negligence of the owner or the owner's employee or designee is void." Minn. Stat. § 184B.20, subd. 5(b). The session law that led to the codification of this statute states that the law "is effective August 1, 2010." 2010 Minn. Laws ch. 347, art. 3, § 2, at 46. The district court rejected Justice's argument that section 184B.20 voids Marvel's exculpatory clause on the grounds that Justice's mother signed the exculpatory clause before the statute's effective date and that the legislature did not intend for the statute to apply retroactively.

"'No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.'" *In re Individual 35W Bridge Litigation*, 806 N.W.2d 811, 819 (Minn. 2011) (A09-1776) (hereinafter *35W Bridge (A09-1776)*) (quoting Minn. Stat. § 645.21 (2010)). One way in which the legislature may indicate its intent for a law to

operate retroactively is to use the term "retroactive." *Duluth Firemen's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn. 1985).

Justice does not argue that the legislature intended the statute to apply retroactively. Instead, he contends that the statute's application in this case would be a prospective application, not a retroactive application. But the supreme court has stated, "A statute operates retroactively if it affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." *35W Bridge (A09-1776)*, 806 N.W.2d at 819-20 (quotation omitted). If section 184B.20 were applied to this case, it would affect the parties' respective rights and obligations concerning events—the signing of Marvel's exculpatory clause and Justice's head injury—that occurred more than three years before the effective date of the statute. Such an application would result in a retroactive application of the statute because it would affect rights and obligations that were pre-existing when the statute became effective. *See id.*

Justice attempts to avoid a retroactive characterization by relying on *Tapia v. Leslie*, 950 N.W.2d 59 (Minn. 2020), in which the supreme court concluded that a 2014 statutory amendment governed a 2017 application for a permit to carry a pistol. *Id.* at 63. In *Tapia*, the relevant statute was amended three years *before* the application for a permit, which was the operative event. *Id.* In this case, the statute was enacted three years *after* Justice's mother agreed to the exculpatory agreement. Thus, *Tapia* is distinguishable from this case.

Justice also contends that the application of section 184B.20 in this case would not impair any vested rights belonging to Marvel. The existence of vested rights may, in certain circumstances, defeat the intended retroactive application of a statute if retroactive

application would be unconstitutional. *See In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 829-33 (Minn. 2011) (No. A10-87); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 357-58 (Minn. 1969); *Yaeger v. Delano Granite Works*, 84 N.W.2d 363, 366-67 (Minn. 1957); *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 84 N.W.2d 282, 287 (Minn. 1957); *K.E. v. Hoffman*, 452 N.W.2d 509, 512-13 (Minn. App. 1990), *review denied* (Minn. May 7, 1990). This understanding of vested rights is apparent in *Larson v. Independent School District No. 314*, 233 N.W.2d 744 (Minn. 1975), the case on which Justice primarily relies in his principal brief. In *Larson*, the supreme court concluded that the retroactive application of a rule of civil procedure, as intended, did not "deprive[] defendants of vested rights of property and privacy *in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution*." *Id.* at 748 (emphasis added). Outside the context of land use and zoning, the vested-rights doctrine simply does not affect the determination of whether a statute is intended to have retroactive application. *Cf. Interstate Power Co. v. Nobles County Bd. of Commissioners*, 617 N.W.2d 566, 575-78 (Minn. 2000) (citing cases). Because we have determined that the legislature did not intend for section 184B.20 to apply retroactively, the vested-rights doctrine is not relevant.

Thus, the district court did not err by reasoning that section 184B.20 does not apply retroactively to Justice's mother's agreement to Marvel's exculpatory clause.

C. Marvel's Exculpatory Clause

Justice also argues that Marvel's exculpatory clause is unenforceable on the grounds that it is overly broad and contrary to public policy.

"A clause exonerating a party from liability will be strictly construed against the benefited party." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). "If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." *Id.* In addition, an exculpatory clause is unenforceable if it "contravenes public policy." *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005) (citing *Schlobohm*, 326 N.W.2d at 923).

1. Public Policy

Justice contends that Marvel's exculpatory clause is unenforceable on the ground that it is contrary to public policy.

The supreme court has prescribed a "two-prong test" to determine whether an exculpatory clause is contrary to public policy. *Schlobohm*, 326 N.W.2d at 923. The test focuses on two factors: "(1) whether there was a disparity of bargaining power between the parties (in terms of a compulsion to sign a contract containing an unacceptable provision and the lack of ability to negotiate elimination of the unacceptable provision)" and "(2) the types of services being offered or provided (taking into consideration whether it is a public or essential service)." *Id.* In this case, the district court determined that Marvel's exculpatory clause is not contrary to public policy because there was no bargaining-power disparity and because Marvel did not provide "an essential or public service."

Justice contends that there was a disparity in bargaining power because there was no opportunity for his mother to negotiate the terms of the exculpatory clause and because he would not have been permitted to attend the birthday party if his mother had not signed

the form agreement. Justice's contention is not legally viable. "Even though a contract is on a printed form and offered on a 'take it or leave it' basis, those facts alone do not cause it to be an adhesion contract." *Id.* at 924. More is required. The agreement must relate to a "*necessary* service," and there also "must be a showing . . . that the services could not be obtained elsewhere." *Id.* at 924-25. Consequently, there is no disparity in bargaining power, for purposes of the *Schlobohm* public-policy analysis, if a consumer has the choice to simply forego the activity. *See Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827-28 (Minn. App. 2001), *review denied* (Minn. Feb. 28, 2002); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 730 (Minn. App. 1986), *review denied* (Minn. Oct. 29, 1986). There is no evidence in the summary-judgment record that the services Marvel provided were unavailable elsewhere, and we may presume that Justice was not compelled to participate in the birthday party because the provision of inflatable amusement equipment is not a necessary service. Thus, as in *Schlobohm* and *Malecha*, there was no disparity in bargaining power, as required for a conclusion that an exculpatory clause is contrary to public policy.

Justice also contends that the type of services offered by Marvel causes its exculpatory clause to be incompatible with public policy. He likens Marvel's services to the "[t]ypes of services thought to be subject to public regulation," such as "common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, employers and services involving extra-hazardous activities." *Schlobohm*, 326 N.W.2d at 925. But the supreme court has recognized that "contracts relating to recreational activities do not fall within any of the categories where the public interest is involved," on the ground

that they are not "services of great importance to the public, which were a practical necessity for some members of the public." *Id.* at 926. Subsequent opinions have relied on this principle in concluding that the use of an exculpatory clause in connection with a recreational activity is not contrary to public policy. *See Anderson v. McOskar Enterprises, Inc.*, 712 N.W.2d 796, 802 (Minn. App. 2006) (health club); *Beehner*, 636 N.W.2d at 829 (horseback riding); *Malecha*, 392 N.W.2d at 730 (skydiving). A business that provides inflatable amusement equipment is well within the category of recreational activities for which exculpatory clauses are not prohibited.

Justice counters that providing inflatable amusement equipment is the type of service that is "generally thought suitable for public regulation," *Schlobohm,* 326 N.W.2d at 925, because it now is, in fact, regulated by statute, as of 2010. *See* Minn. Stat. § 184B.20; 2010 Minn. Laws ch. 347, art. 3, § 2, at 46. Furthermore, he contends that Marvel's exculpatory clause is contrary to public policy because the legislature has declared that all exculpatory clauses concerning inflatable amusement equipment are void. To rely on section 184B.20 for purposes of the *Schlobohm* public-policy analysis would be, in effect, to apply the statute retroactively. We have already concluded that section 184B.20 does not apply retroactively to an exculpatory clause that was signed before the statute's effective date. *See supra* part B. Accordingly, Justice cannot rely on section 184B.20 to establish that Marvel's exculpatory clause is contrary to public policy in the sense described in *Schlobohm*.

Thus, the district court did not err by reasoning that Marvel's exculpatory clause does not violate public policy.

2. Scope of Release

Justice contends that Marvel's exculpatory clause is unenforceable on the ground that it purports to release Marvel from claims arising from Marvel's intentional, willful or wanton acts. Justice alternatively contends that Marvel's exculpatory clause is unenforceable on the ground that it is ambiguous with respect to whether it releases Marvel from claims arising from Marvel's intentional, willful or wanton acts.

Exculpatory clauses are permissible but not favored and, thus, are "strictly construed against the benefited party." *Schlobohm*, 326 N.W.2d at 923. An exculpatory clause is unenforceable if it is "either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts." *Id.*

By signing Marvel's exculpatory clause, Justice's mother agreed, on her own behalf and on behalf of Justice, to "release . . . MARVEL, LLC, . . . from and against *any and all* claims, injuries, liabilities or damages." (Emphasis added.) The plain language of this clause purports to release claims of both ordinary negligence and greater-than-ordinary negligence, including claims based on intentional, willful or wanton acts. Marvel contends that its exculpatory clause is similar to exculpatory clauses in other cases in which the appellate courts concluded that the clauses were limited to ordinary negligence. In each of those cases, however, the exculpatory clause expressly referred to claims of "negligence," which provided the appellate courts with a basis for concluding that the clauses were limited to claims of ordinary negligence. *See Schlobohm*, 326 N.W.2d at 922-23; *Anderson*, 712 N.W.2d at 799, 801; *Malecha*, 392 N.W.2d at 728-30; *see also Beehner*, 636 N.W.2d at 825-27. But Marvel's exculpatory clause does not make any reference to

claims of "ordinary negligence" or simply "negligence." Rather, it expansively refers to "any and all claims," which means that it purports to release Marvel from claims arising from its intentional, willful or wanton acts. Thus, Marvel's exculpatory clause is overly broad.

3. Effect of Overbreadth

Having determined that Marvel's exculpatory clause is overly broad, we must consider the consequences of that determination. The question arises whether Marvel's exculpatory clause is completely unenforceable, even with respect to claims of ordinary negligence, or unenforceable only to the extent that Justice asserts a claim of greater-than-ordinary negligence. Justice contends that an overly broad exculpatory clause is "invalid," without discussing more specifically the nature or extent of its invalidity. Marvel argues only that the exculpatory clause is valid, without making any alternative argument about whether or how this court should apply the exculpatory clause if it is invalid.

This court considered this precise issue in *Anderson*, in which we characterized a health club's exculpatory clause as "arguably ambiguous." 712 N.W.2d at 801. The plaintiff had asserted only a claim of ordinary negligence. *Id.* We stated that it "would subvert the parties' manifested intent" to conclude that the plaintiff's ordinary-negligence claim was not barred by a release that clearly released such a claim. *Id.* We reasoned that "*any term in a contract* which attempts to exempt a party from liability for gross negligence or wanton conduct is unenforceable, *not the entire contract*." *Id.* (emphasis added) (quotation and alteration omitted). In light of *Anderson*, Marvel's exculpatory clause is enforceable to the extent that Justice asserts a claim of ordinary negligence, but it is

unenforceable to the extent that Justice asserts a claim of greater-than-ordinary negligence. *See id.*; *see also ADT Security Services, Inc. v. Swenson*, 276 F.R.D. 278, 300-01 (D. Minn. 2011) (concluding that overly broad nature of exculpatory clause "limit[s] its applicability to claims which do not implicate willful and wanton negligence or intentional behavior").

Thus, the district court did not err by enforcing Marvel's exculpatory clause and concluding that it released Justice's claim of ordinary negligence, even though the clause is overly broad.

D. Greater-than-Ordinary Negligence

Justice argues that he has introduced evidence that is sufficient to create a genuine issue of material fact as to whether Marvel engaged in greater-than-ordinary negligence. In response, Marvel argues that Justice did not preserve this argument because he did not present it to the district court.

Marvel is correct. Justice did not argue to the district court that Marvel's summary-judgment motion should be denied on the ground that there is a genuine issue of material fact as to whether Marvel engaged in greater-than-ordinary negligence. The district court expressly stated in its order that "Plaintiff's claims are based solely on negligence, and there is no claim by Plaintiff nor evidence in the record to suggest that Defendant or its employees acted willfully, intentionally or wantonly." Justice is making a claim of greater-than-ordinary negligence for the first time on appeal. In that situation, an appellate court generally will not consider an argument that was forfeited because it was not presented to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Doe 175 v. Columbia Heights Sch. Dist.*, 842 N.W.2d 38, 42-43 (Minn. App. 2014).

Justice contends that he adequately preserved a claim of greater-than-ordinary negligence by pleading his claim broadly. He also contends that he raised an issue of greater-than-ordinary negligence in his motion to amend the complaint to add a request for punitive damages. Regardless of how Justice pleaded his claim or claims in his complaint, and regardless of the arguments he made with respect to a different motion, he had an obligation to oppose Marvel's summary-judgment motion by submitting and citing admissible evidence in support of all of his claims and by presenting all of his legal arguments for denying the motion. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-71 (Minn. 1997); *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853, 855-56 (Minn. 1986); *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 44 (Minn. App. 2010); *Fontaine v. Steen*, 759 N.W.2d 672, 676 (Minn. App. 2009). But Justice did not mention a claim of greater-than-ordinary negligence in his memorandum of law in opposition to Marvel's motion.

Thus, we will not consider Justice's argument that the district court should have denied Marvel's summary-judgment motion with respect to a claim of greater-than-ordinary negligence. *See Thiele*, 425 N.W.2d at 582; *Doe 175*, 842 N.W.2d at 42-43.

E. Post-Injury Agreement

Justice argues that the district court erred by reasoning that the agreement signed by his mother and step-father in September 2007, after Justice was injured, does not abrogate or modify the exculpatory clause.

The September 2007 agreement provides, in relevant part,

> As of the date of this Agreement, Carter Justice seems to have recovered completely from the Accident and has been removed from any restrictions by his attending physician(s). Parents agree that if there are no new medical complications arising as a result of the Accident within six months following the date of this Agreement they will execute a full and complete release and discharge of any and all claims against [Marvel] stemming from the Accident.

Justice argued to the district court that this post-injury agreement abrogated the exculpatory clause on the ground that the parties "agreed to substitute a new contract" for the exculpatory clause. The district court rejected the argument, reasoning that the post-injury agreement does not abrogate or modify the exculpatory clause because it does not refer to the exculpatory clause and because it states that it is not "an admission of any fault or legal liability."

On appeal, Justice contends that the post-injury agreement abrogates the exculpatory clause because the post-injury agreement is specifically related to Justice's head injury, Justice's mother and step-father agreed to release claims arising from Justice's head injury only if certain conditions were present, and the conditions stated in the post-injury agreement were not present. In response, Marvel contends that the post-injury agreement did not modify the exculpatory clause because the agreement does not refer to the waiver and because it was entered into by Justice's mother and step-father on their own behalf but not on behalf of Justice.

Justice's argument requires us to interpret the post-injury agreement, which is a contract. "The primary goal of contract interpretation is to determine and enforce the intent

of the parties." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). "Where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself." *Id.* If a contract is clear and unambiguous, courts should apply the plain language of the contract and "not rewrite, modify, or limit its effect by a strained construction." *Id.* This court applies a *de novo* standard of review to a district court's interpretation of a contract. *Id.*

The district court correctly interpreted the post-injury agreement. It is an agreement between Marvel and Justice's mother and step-father but not between Marvel and Justice, the two parties to this case. It does not refer to the pre-injury exculpatory clause in any way. It provided for the possibility of "a full and complete release and discharge of any and all claims against [Marvel] stemming from" Justice's injury. If such a release had been signed, it would have provided Marvel with an additional defense to Justice's claim. But Justice's mother and step-father never signed the release that was contemplated by the post-injury agreement. The absence of a second release does not in any way alter the release contained in the exculpatory clause that was signed by Justice's mother on the day of Justice's injury.

Thus, the district court did not err by reasoning that the post-injury agreement does not abrogate or modify the exculpatory clause.

DECISION

The district court did not err by granting Marvel's motion for summary judgment on the ground that Justice's sole claim of ordinary negligence is barred by the exculpatory clause that his mother signed on his behalf. In light of that conclusion, Justice's argument

that the district court erred by denying his motion to amend the complaint to add a request for punitive damages is moot.

Affirmed.