# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-17-00234-CV

Tom **MCCLOSKEY**,
Appellant

v.

**THE CLUBS OF CORDILLERA RANCH, LP**, Nicklaus Design, LLC,
and The Weitz Company, LLC,
Appellees

From the 451st Judicial District Court, Kendall County, Texas
Trial Court No. 15-149CCL
Honorable Bill R. Palmer, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Irene Rios, Justice

Delivered and Filed: December 20, 2017

AFFIRMED

Tom McCloskey appeals the trial court's order granting traditional and no evidence summary judgments in favor of The Clubs of Cordillera Ranch, LP, Nicklaus Design, LLC, and The Weitz Company, LLC. McCloskey argues: (1) the appellees failed to conclusively establish the affirmative defense of release or assumption of the risk; (2) the appellees failed to conclusively establish the condition of the premises causing McCloskey's injury was open and obvious; (3) The Weitz Company, LLC's no evidence motion failed to comply with Rule 166a(i); (4) McCloskey presented more than a scintilla of evidence to defeat The Weitz Company's no evidence motion as

to his negligence claim; and (5) McCloskey presented more than a scintilla of evidence to defeat the appellees' no evidence motions as to his gross negligence claim. We affirm the trial court's order.

## BACKGROUND

McCloskey was a member of The Clubs of Cordillera Ranch and owned a unit at the Di Lusso Condominiums. The Clubs of Cordillera Ranch was owned by The Clubs of Cordillera Ranch, LP which retained the services of Nicklaus Design, LLC and The Weitz Company, LLC to design and construct Cordillera Ranch's golf course.

The golf course's sixteenth hole has an elevated green surrounded on three sides by cliffs. While playing the sixteenth hole, McCloskey stumbled on the green, rolled to the edge, and fell off the side. McCloskey sustained severe injuries to his right shoulder as a result of his fall.

McCloskey subsequently sued Cordillera Ranch, Nicklaus Design, and The Weitz Company, asserting claims for premises liability, negligence, and gross negligence. Cordillera Ranch, Nicklaus Design, and The Weitz Company each filed traditional and no evidence motions for summary judgment which the trial court granted. McCloskey appeals.

## STANDARD OF REVIEW

"We review the grant of [a] summary judgment de novo." *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). To prevail on a traditional motion for summary judgment, the movant must show "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c). A trial court must grant a no-evidence motion for summary judgment unless the nonmovant produces more than a scintilla of evidence raising a genuine issue of material fact on each challenged element of the nonmovant's claims. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015); *Boerjan v. Rodriguez*, 436 S.W.3d 307, 312 (Tex. 2013). We take as true all evidence favorable to the nonmovant, resolve

all conflicts in the evidence in the nonmovant's favor, and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Katy Venture, Ltd.*, 469 S.W.3d at 163.

**RELEASE**

McCloskey first challenges whether the trial court erred in granting summary judgment in favor of the appellees because they failed to conclusively establish their affirmative defense of release. McCloskey acknowledges various documents relating to his membership at the Clubs of Cordillera Ranch and his ownership of the condominium unit contained releases, including the Clubs at Cordillera Ranch Membership Agreement, the Clubs at Cordillera Ranch Membership Plan, and the Supplemental Declaration to Cordillera Ranch Master Declaration of Covenants (the "Supplemental Declaration"). We focus our attention on the following release contained in the Supplemental Declaration:

> H. **Release and Disclaimer**. … EACH ***OWNER*** … HEREBY (I) ACKNOWLEDGES, ACCEPTS AND ASSUMES THE RISKS ASSOCIATED WITH SAID ***CLUB FACILITIES PROPERTY*** HAZARDS, INCLUDING ANY … PERSONAL INJURY … CAUSED BY OR ARISING IN CONNECTION WITH ANY OF SAID GOLF COURSE HAZARDS OR OTHER RISKS, HAZARDS AND DANGERS ASSOCIATED WITH THE OPERATION OF A GOLF COURSE AND OTHER ***CLUB FACILITIES*** (COLLECTIVELY THE "***ASSUMED RISKS***"), AND (II) RELEASES …***CORDILLERA RANCH LTD.*** … ***THE CLUBS***, THE OWNER OF THE ***CLUB FACILITIES PROPERTY***, AND THE DIRECTORS, OFFICERS, MEMBERS, PARTNERS, AGENTS, CONTRACTORS, AND EMPLOYEES OF ALL SUCH ENTITIES (COLLECTIVELY THE "***RELEASED PARTIES***") FROM ANY AND ALL LIABILITY TO THE ***OWNER*** … FOR ANY DAMAGES, LOSSES, COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES), CLAIMS, DEMANDS, SUITS, JUDGMENTS, ORDINARY NEGLIGENCE, OR OTHER OBLIGATIONS ARISING OUT OF OR CONNECTED IN ANY WAY WITH ANY OF THE ***ASSUMED RISKS***. ….

With regard to this release, McCloskey contends the Supplemental Declaration violates the statute of frauds. McCloskey also contends the release is unenforceable because the language does not meet the fair notice requirements.

A. Supplemental Declaration and Statute of Frauds

The evidence is undisputed that McCloskey signed a lot sales contract in purchasing a unit at the Di Lusso Condominiums. Paragraph 2B of the agreement section of the lot sales contract states the unit McCloskey was contracting to purchase was "subject to [the] restrictions and conditions set forth in the Cordillera Declarations." Paragraph 2B lists all of the documents included in the defined term "Cordillera Declarations." Immediately after the Supplemental Declaration is referenced as one of the documents included in the defined term, the contract states, "(a copy of which has been received by Buyer)." The contract also states the location where the Supplemental Declaration is recorded in the Official Public Records of Kendall County, Texas.

"Condominium declarations are treated as contracts between the parties." *Schwartzott v. Etheridge Prop. Mgmt.*, 403 S.W.3d 488, 498 (Tex. App.—Houston [14th Dist.] 2013, no pet.). In rejecting a statute of frauds argument, this court has held a contract in writing signed by one party and expressly accepted by the other is binding on both. *Rubin v. Polunsky*, 366 S.W.2d 234, 236 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.). "'Owners of condominium units accept the terms, conditions, and restrictions in the condominium declaration by accepting deeds to individual units.'" *Bosch v. Open Pines Condo. Owners Ass'n, Inc.*, No. 01-09-00507-CV, 2010 WL 4484189, at *4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. denied) (quoting *Daly v. River Oaks Place Council of Co-Owners*, 59 S.W.3d 416, 418 (Tex. App.—Houston [1st Dist.] 2001, no pet.)). Therefore, in purchasing the condominium unit, McCloskey accepted the terms of the Supplemental Declaration, and the Supplemental Declaration does not, therefore, violate the statute of frauds. *See Rubin*, 366 S.W.2d at 236.

B. Fair Notice Requirements

Because pre-injury releases involve an extraordinary shifting of risk, the law imposes fair notice requirements that must be met for such releases to be enforceable. *Dresser Indus., Inc. v.*

*Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564, 569 (Tex. App.—San Antonio 2004, no pet.). The fair notice requirements include the express negligence doctrine and the conspicuousness requirement. *Dresser Indus., Inc.*, 853 S.W.2d at 508; *Tamez*, 155 S.W.3d at 569. "[C]ompliance with both of the fair notice requirements is a question of law." *Dresser Indus., Inc.*, 853 S.W.2d at 509.

"The conspicuousness requirement mandates that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." *Id*. at 508 (internal quotation omitted). Language in a contract is conspicuous if it is in all capital letters. *Id*. at 510-11 (quoting and adopting standard for conspicuousness contained in section 1.201(10) of the Texas Business and Commerce Code). In this case, the release language in the Supplemental Declaration is in all capital letters as opposed to the surrounding sections of the document; therefore, the release language satisfies the conspicuousness requirement.

"The express negligence doctrine requires that the parties' intent to release liability from the releasee's own future negligence must be expressed in unambiguous terms within the four corners of the agreement." *Tamez*, 155 S.W.3d at 569. "Another formulation of the rule is that the provision must 'mention' the claim to be released." *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 333 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (citing *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991)). "Any claims not clearly within the subject matter of the release are not discharged." *Victoria Bank & Trust Co.*, 811 S.W.2d at 938; *see also Ramirez v. FFE Transp. Servs., Inc.*, No. 04-12-00342-CV, 2013 WL 1342453, at *2 (Tex. App.—San Antonio Apr. 3, 2013, pet. denied) (mem. op.) (noting "a claim will not be released unless it is mentioned in the instrument").

As previously noted, the release language in the Supplemental Declaration provides, in pertinent part:

> H. **Release and Disclaimer**. … EACH ***OWNER*** … HEREBY (I) ACKNOWLEDGES, ACCEPTS AND ASSUMES THE RISKS ASSOCIATED WITH SAID ***CLUB FACILITIES PROPERTY*** HAZARDS, INCLUDING ANY … PERSONAL INJURY … CAUSED BY OR ARISING IN CONNECTION WITH ANY OF SAID GOLF COURSE HAZARDS OR OTHER RISKS, HAZARDS AND DANGERS ASSOCIATED WITH THE OPERATION OF A GOLF COURSE AND OTHER ***CLUB FACILITIES*** (COLLECTIVELY THE "***ASSUMED RISKS***"), AND (II) RELEASES …***CORDILLERA RANCH LTD.*** … ***THE CLUBS***, THE OWNER OF THE ***CLUB FACILITIES PROPERTY***, AND THE DIRECTORS, OFFICERS, MEMBERS, PARTNERS, AGENTS, CONTRACTORS, AND EMPLOYEES OF ALL SUCH ENTITIES (COLLECTIVELY THE "***RELEASED PARTIES***") FROM ANY AND ALL LIABILITY TO THE ***OWNER*** … FOR ANY DAMAGES, LOSSES, COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES), CLAIMS, DEMANDS, SUITS, JUDGMENTS, ORDINARY NEGLIGENCE, OR OTHER OBLIGATIONS ARISING OUT OF OR CONNECTED IN ANY WAY WITH ANY OF THE ***ASSUMED RISKS***. ….

Because the release refers to Cordillera Ranch and its contractors, the release includes claims against all of the appellees in the instant case.

In his brief, McCloskey argues the language does not satisfy the express negligence doctrine because it only refers to claims relating to the "Hazardous Conditions" which is defined in another section of the agreement to be limited to naturally-occurring conditions such as cliffs. Because McCloskey alleged the slope of the green, a condition that is not naturally-occurring, also contributed to his injury, McCloskey contends the release does not mention his claim. We disagree.

The release language is not limited to a release of claims arising out of or connected with the "Hazardous Conditions," but extends to claims arising out of or connected in any way with any of the "Assumed Risks." "Assumed Risks" is defined in the same paragraph to include risks associated with "***CLUB FACILITES PROPERTY*** HAZARDS," "GOLF COURSE HAZARDS," and "OTHER RISKS, HAZARDS AND DANGERS ASSOCIATED WITH THE OPERATION OF A GOLF COURSE." Stumbling and falling off an elevated green is a risk, hazard or danger associated with the operation of a golf course. Therefore, we conclude the release satisfies the

express negligence doctrine by sufficiently mentioning the claims McCloskey asserts against the appellees.[1]

C. Conclusion

Because we hold the trial court did not err in granting summary judgment in favor of the appellees based on the affirmative defense of release, we need not address any other grounds on which the trial court's order might properly have been based as to McCloskey's premises liability and negligence claims. Because a pre-injury release of future liability for gross negligence is void as against public policy, however, we still must address whether summary judgment was proper as to McCloskey's gross negligence claim. *See Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 116 (Tex. 2014).

**GROSS NEGLIGENCE**

Each of the appellees filed a no evidence motion for summary judgment as to McCloskey's gross negligence claim. "Gross negligence requires a showing of two elements:

> '(1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed[s] in conscious indifference to the rights, safety, or welfare of others.'"

*Boerjan*, 436 S.W.3d at 311 (quoting *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001)). "Under the first, objective element, an extreme risk is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Id*. (internal quotation omitted). "Under the subjective element, actual awareness means

[1] We note that the release language explicitly refers to "ORDINARY NEGLIGENCE" as a claim encompassed by the release.

the defendant knew about the peril, but its acts or omissions demonstrated that it did not care." *Id.* (internal quotation omitted).[2]

In response to the no evidence motion, McCloskey did not provide any evidence that any of the appellees had an actual, subjective awareness of the risk and proceeded with conscious indifference. Although McCloskey offered his deposition testimony regarding the manner in which he fell, his testimony does not address the appellees' actual, subjective awareness of a risk or of a decision to proceed with conscious indifference. For example, no evidence was offered that any other invitee had fallen from the sixteenth green. In addition, no expert testimony was introduced to establish the manner in which the sixteenth green was constructed involved an extreme degree of risk. Accordingly, we hold the trial court did not err in granting the appellee's no evidence summary judgment on McCloskey's gross negligence claim.

## CONCLUSION

The trial court's order is affirmed.

Sandee Bryan Marion, Chief Justice

[2] We note McCloskey also asserted The Weitz Company's motion did not comply with Rule 166a(i); however, the motion lists both elements McCloskey was required to establish and asserted there was no evidence The Weitz Company "had actual knowledge and conscious indifference to an extreme risk." *See* TEX. R. CIV. P. 166a(i) ("The motion must state the elements as to which there is no evidence.").