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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1372**

Marvin Jay Resnick,
Appellant,

vs.

Life Time Fitness, Inc. d/b/a Life Time Fitness, et al.,
Respondents.

**Filed June 8, 2010
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27CV0830136

James S. Ballentine, James R. Schwebel, Schwebel, Goetz & Sieben, P.A., Minneapolis,
Minnesota (for appellant)

Michael S. Kreidler, Louise A. Behrendt, Stich, Angell, Kreidler & Dodge, P.A.,
Minneapolis, Minnesota; and

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the district court's application of an exculpatory clause contained in his membership agreement with a fitness club to dismiss, on the pleadings, appellant's negligence claim against respondents, a fitness club and its subsidiary construction company. Appellant sought damages for an injury that resulted from his fall on a racquetball court. Appellant asserts that the district court erred by: (1) failing to treat the motion as a motion for summary judgment; (2) not permitting further discovery; (3) making fact findings; and (4) interpreting the exculpatory clause to bar his claims against respondents. We affirm.

FACTS

Appellant Marvin Resnick, a racquetball player, joined the Northwest Swim and Fitness Club (Northwest) in St. Louis Park about thirty years ago. In approximately 2006, respondent Life Time Fitness, Inc. (Life Time) acquired Northwest. Resnick then became a member of Life Time and signed Life Time's Member Usage Agreement (MUA). The agreement contains the following provisions:

... ASSUMPTION OF RISK

I understand that there is an inherent risk of injury, whether caused by me or someone else, in the use of or presence at a Life Time Fitness center, the use of the equipment and services at a Life Time fitness center, and participation in Life Time Fitness' programs. This includes, but is not limited to, indoor and outdoor pool areas with waterslides, a climbing wall area, ball and racquet courts, cardiovascular and resistance training equipment, personal training and nutrition classes and services, member programs,

a child center, and spa and cafe products and services. This risk includes, but is not limited to:

- 1) Injuries arising from the use of any of Life Time Fitness' centers or equipment including any accidental or "slip and fall" injuries;
- 2) Injuries arising from participation in supervised or unsupervised activities and programs within a Life Time Fitness center or outside a Life Time Fitness center, to the extent sponsored or endorsed by Life Time Fitness

I understand and voluntarily accept this risk. I agree to specifically assume all risk of injury, whether physical or mental, as well as all risk of loss, theft or damage of personal property for me, any person that is a part of this membership and any guest under this membership while such persons are using or present at any Life Time Fitness center. . . .

RELEASE OF LIABILITY

I waive any and all claims or actions that may arise against Life Time Fitness, Inc., its affiliates, subsidiaries, successors or assigns (collectively, "Life Time Fitness") as well as each party's owners, directors, employees or volunteers as a result of any such injury, loss, theft, or damage to any such person, including and without limitation, personal, bodily or mental injury, economic loss or any damage to me, my spouse, my children, or guests resulting from the negligence of Life Time Fitness or anyone else using a Life Time Fitness center. I agree to defend, indemnify and hold Life Time Fitness harmless against any claims arising out of the negligent or willful acts or omissions of me, any person that is a part of my membership, or any guest under this membership.

In January 2008, Resnick was seriously injured when he slipped and fell during a racquetball game at one of Life Time's fitness centers. Resnick is certain that he slipped on construction dust and debris caused by construction work being performed at the facility by Life Time's wholly owned subsidiary, respondent FCA Construction Company, LLC (FCA).

Resnick sued respondents Life Time and FCA, alleging that their negligence in allowing an accumulation of dust and debris on the court floor caused his fall and injury.

Life Time and FCA moved for judgment on the pleadings, based on the exculpatory provisions contained in the MUA. Resnick opposed the motion and submitted an affidavit addressing matters outside the complaint, including that Resnick did not read or understand the agreement that he signed. Resnick then argued that because matters outside the pleadings were presented to the court, the motion for judgment on the pleadings should be treated as a summary-judgment motion. Resnick asked the district court to deny the motion under summary-judgment standards and to allow discovery.

The district court granted respondent's motion, dismissing Resnick's claims. The district court concluded that the exculpatory clause in the agreement barred Resnick's negligence claims against Life Time and its subsidiary FCA. The district court stated that it had "considered only the pleadings, including the [MUA] attached to and incorporated" in the answer. Judgment was entered, and this appeal followed.

D E C I S I O N

I. Standard of Review

When reviewing a dismissal on the pleadings, "[t]he reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted). "The standard of review is therefore de novo." *Id.*

If “matters outside the pleadings are presented to and not excluded by the [district] court, the motion shall be treated as one for summary judgment.” Minn. R. Civ. P. 12.03. When this occurs, the district court’s decision is reviewed under a summary-judgment standard. *Peoples State Bank Truman v. Triplett*, 633 N.W.2d 533, 537 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). “On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

II. Procedural issues

In this case, the district court stated that it did not consider matters outside of the pleadings and that it determined the motion solely on the pleadings. Resnick argues that this statement is contradicted by findings of fact that the district court could not have made without relying on matters outside of the pleadings. The supreme court has stated that it is not an “approved practice” to make findings in connection with deciding a motion for judgment on the pleadings. *Jackson v. Minnetonka Country Club*, 166 Minn. 323, 326, 207 N.W. 632, 633 (1926) (reversing judgment on the pleadings granted to defendants and stating that findings are not appropriate on granting a motion for judgment on the pleadings); *see also Chilson v. Travelers Ins. Co.*, 180 Minn. 9, 12, 230 N.W. 118, 119 (1930) (stating that “there should be no findings of fact when judgment is granted on the pleadings”).

With two exceptions, the district court’s “findings of fact” merely recite facts asserted in the complaint. Appellant is correct, however, that the district court erred by

making two findings of fact that are outside of the pleadings and that appear to be based on argument of counsel. The district court found (1) that construction dust is an open and obvious hazard that Resnick chose to ignore and (2) that Resnick assumed the risks associated with racquetball.¹ But we disagree that the error requires reversal. To prevail on appeal, an appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993).

Life Time and FCA did not base their motion to dismiss on open-and-obvious condition or assumption-of-risk theories. And the district court stated that its decision was not based on matters outside the pleadings. Our de novo review requires that we examine the enforceability of the exculpatory clause in light of the facts alleged in the complaint, accepting those facts as true. *See Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2007) (stating that reviewing court must accept allegations in the pleading under attack as true); *see also Anderson v. McOskar Enters., Inc.*, 712 N.W.2d 796, 799 (Minn. App. 2006) (stating that the enforceability of the involved release of liability is dispositive). That the district court erroneously made findings of fact about theories not asserted and based on information outside of the pleadings is irrelevant to our review and is not prejudicial to Resnick.

¹ The finding on assumption of risk includes a description of racquetball that is not in the complaint.

III. Exculpatory and release clauses

“It is settled Minnesota law that, under certain circumstances, ‘parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence.’” *Anderson*, 712 N.W.2d at 799–800 (citing *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 922–23 (Minn. 1982)). An exculpatory clause in a health and fitness membership contract is enforceable unless (1) the clause releases the club from liability for intentional, willful or wanton acts; 2) the clause is ambiguous in scope; or (3) the clause contravenes public policy due to a disparity of bargaining power between the parties contracting for a public or essential service. *Schlobohm*, 326 N.W.2d at 922–23. Resnick challenges the enforceability of the exculpatory clause in this case, claiming that he has asserted acts not permitted to be released by an exculpatory clause and that the scope of the assumption-of-risk language in the clause is ambiguous. Resnick does not challenge the exculpatory clause as contravening public policy.

A. Resnick’s complaint asserts a claim of simple negligence.

Resnick argues that construing all reasonable inferences in his favor requires that his allegation of negligence be construed as asserting “heightened forms of negligence,” such as gross negligence, culpable negligence or willful and wanton negligence, not subject to application of the exculpatory clause. *See Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827 (Minn. App. 2001) (stating that “[a]n exculpatory clause may be unenforceable if . . . it . . . purports to release a party from liability for intentional, willful, or wanton acts”), *review denied* (Minn. Feb. 28, 2002); *see also Ryan v. Lodermeier*, 387 N.W.2d 652, 653 (Minn. App. 1986) (stating that “[a] motion for judgment on the

pleadings is not a favored way of testing the sufficiency of a pleading, and will not be sustained if by a liberal construction the pleading can be held sufficient”).

But Resnick’s complaint alleges that he slipped and fell “as a result of the carelessness and negligence” of Life Time and FCA, and lists several “careless and negligent acts and omissions” on the part of Life Time and FCA. The language in the complaint plainly asserts only a claim for ordinary negligence. *See State v. Hayes*, 244 Minn. 296, 300, 70 N.W.2d 110, 113 (1955) (holding that the term “careless,” used in the statute being interpreted, “must be construed in accordance with its recognized meaning . . . as . . . synonymous with *ordinary negligence*” (emphasis added)). Resnick did not allege “reckless disregard” or any type of intentional or willful conduct that heightened forms of negligence involve. And *Beehner* does not stand for the proposition asserted by Resnick that this court has read “negligence to include ‘heightened negligence.’” The complaint in *Beehner* asserted a claim of gross negligence. 636 N.W.2d at 826 (stating that the district court found that “no issues of material fact existed as to [defendant’s] alleged *gross negligence*” (emphasis added)). Even construed liberally, Resnick’s complaint asserts only an ordinary negligence claim against Life Time and FCA.

B. The exculpatory clause is not ambiguous in scope.

Resnick’s argument that the exculpatory clause is ambiguous relates only to the “assumption of risk” provision. Resnick argues that because the provision is not limited to negligence and does not mention negligence, it is ambiguous in scope. But we decline to address whether the assumption of risk provision alone would be sufficient to bar Resnick’s claims, because the “release of liability” provision unambiguously provides, in

relevant part, that Resnick waives “any and all claims or actions that may arise” against Life Time and its subsidiaries for injuries “resulting from the negligence of Life Time Fitness [including its subsidiaries] or anyone else using a Life Time Fitness center.” This provision plainly releases only claims for negligence and is not ambiguous in scope.

Resnick also argues, without any citation to authority, that failure of the release clause to specifically identify FCA as a subsidiary makes the agreement ambiguous in scope and violates the rule that such clauses must be strictly construed. But Resnick concedes that FCA is a wholly-owned subsidiary of Life Time, and the agreement unambiguously releases Life Time’s subsidiaries. We conclude that failure to name all subsidiaries does not make the agreement ambiguous.

Resnick argues that the district court erred by failing to apply common-law principles to determine the scope of his contractual assumption of risk. Because we have already concluded that the district court’s erroneously made findings of fact, including the finding relating to assumption of risk, are irrelevant to our review, we decline to address this argument. Our decision is based on Resnick’s unambiguous waiver of all claims arising out of the negligence of Life Time and its subsidiaries.

IV. Indemnity

Resnick relies on caselaw stating that *indemnity* clauses are construed narrowly to argue that the agreement is improperly broad or ambiguous in scope by purporting to require indemnity for the negligence of Life Time’s unnamed subsidiaries. *See Nat’l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn. 1995) (stating:

“Indemnity agreements are to be strictly construed when the indemnitee . . . seeks to be indemnified for its own negligence. There must be an express provision in the contract to indemnify the indemnitee for liability occasioned by its own negligence; such an obligation will not be found by implication.” (quotation omitted)). But Resnick misreads the indemnity clause in the agreement. The clause provides that Resnick agrees to indemnify Life Time and its subsidiaries for Resnick’s own “negligent or willful acts or omissions” and those of his guests. The indemnity provision is not an issue in this case.

Resnick’s argument that the indemnity clause in the agreement is an unenforceable indemnity agreement executed in connection with a construction contract under Minn. Stat. § 337.02 (2008) was never raised or considered by the district court. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if we were to consider this argument, we would conclude that, for the reasons stated above, it is irrelevant to this case.

Affirmed.