STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1919

Thomas Johnson,
Appellant,

vs.

Fit Pro, LLC, d/b/a Gold's Gym,
Respondent.

Filed July 27, 2010
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-C6-06-006097

Stephen D. Gabrielson, Stephen D. Gabrielson, Ltd., Sartell, Minnesota (for appellant)

Mark A. Solheim, Paula Duggan Vraa, Troy F. Tatting, Larson King, LLP, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Connolly, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

Appellant challenges the district court's denial of his posttrial motions for judgment as a matter of law, a new trial, and amended findings of fact and conclusions of law after a bench trial. Appellant argues that the exculpatory clause in his membership agreement with respondent health club is void as against public policy. Because there was no disparity in bargaining power and respondent did not offer a public or essential service, the district court did not err in concluding that the exculpatory clause was enforceable. We affirm.

FACTS

This case arises out of an accident involving appellant Thomas Johnson at Gold's Gym in St. Cloud, which is owned and operated by respondent Fit Pro, LLC. On December 24, 2005, Johnson entered the sauna at Gold's Gym. When Johnson stepped on the bench in the sauna, a board slipped or rotated, which caused Johnson to fall backward, injuring his head and neck. According to Johnson's physician, Johnson suffered a significant strain to his cervical spine, causing persistent neck and head pain and "associated intermittent tingling feelings in either hand."

In November 2006, Johnson sued Fit Pro for negligence. Johnson alleged that the sauna bench was negligently maintained, defective, and not adequately secured, and that Gold's Gym knew or should have known of the unsafe condition of the bench, of which he was not aware and had no reason to be aware.

Fit Pro moved for summary judgment, arguing that the exculpatory clause in Johnson's membership agreement precluded liability for its alleged negligence as a matter of law. Following briefing by the parties, the district court issued an order granting partial summary judgment in favor of Fit Pro. The district court concluded that the exculpatory clause in the membership agreement was enforceable, but that the membership agreement was ambiguous with respect to whether it automatically renewed, and that there was thus a genuine issue of material fact as to whether the contract was in effect at the time of Johnson's injury.

Following a bench trial, the district court found that Gold's Gym had been warned by other gym members that there were problems with the benches in its sauna and that despite attempted ad hoc repairs, Gold's Gym negligently failed to maintain the sauna bench. The district court found that Johnson's accident was 100% attributable to the negligence of Gold's Gym. As a direct result of his fall, Johnson sustained $12,096.03 in damages. Johnson incurred $7,096.03 in medical costs, of which $3,375.45 constituted out-of-pocket expenses not covered by his insurance. The district court also found that Johnson was entitled to $5,000 for pain and suffering. None of those findings are challenged by either party.

But Johnson had signed a contract in order to become a member of Gold's Gym. The membership agreement contained a conspicuous "waiver and release of liability and indemnity agreement." This provision purported to release the health club from all liability for its negligent acts or omissions. The agreement expressly mentioned that Johnson's assumption of risk included use of the "sauna . . . or any equipment in the Club

facility." It expressly released Gold's Gym from liability due to "improper maintenance of any exercise equipment or facilities" and Johnson's "slipping and falling while on the facility or on any portion of the premises for any reason, including Club's negligent inspection or maintenance of its facility." This section of the membership agreement also included a provision indicating that Johnson acknowledged reading and understanding the agreement; this provision stated in part: "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." The exculpatory clause also purported to be severable, such that if any part of it were invalid under Minnesota law, the remainder would "continue in full legal force and effect."

However, the district court concluded that the exculpatory clause[1] remained in effect at the time of the accident and "was a valid waiver provision." Despite the fact that Gold's Gym negligently caused Johnson to be injured and sustain $12,096.03 in damages, the district court concluded that the terms of the contract were valid under Minnesota law and thereby precluded recovery by Johnson.

[1] The membership agreement's indemnity clause was not litigated and is not relevant to this appeal. Indemnity clauses are more disfavored in law than exculpatory clauses. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 792 n.6 (Minn. 2005) ("We 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.").

Johnson filed a motion for posttrial relief. Johnson sought judgment as a matter of law, a new trial, or amended findings of fact and conclusions of law on the grounds that (1) the exculpatory clause was contrary to public policy and (2) the contract had lapsed and the exculpatory clause was no longer applicable. The district court issued an order denying Johnson's motion for posttrial relief, concluding that its reasoning, factual findings, and legal conclusions were sound, and that Johnson had failed to present arguments warranting judgment as a matter of law, a new trial, or amended findings. Johnson now appeals.

D E C I S I O N

We review a district court's denial of a motion for a new trial or for amended findings of fact and conclusions of law under an abuse-of-discretion standard. *See Bains v. Piper, Jaffray, & Hopwood, Inc.*, 497 N.W.2d 263 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993). Denial of a motion for judgment as a matter of law is reviewed de novo. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). On appeal, Johnson challenges the enforceability of the exculpatory clause in his membership agreement to use Gold's Gym; he does not maintain his argument that the membership agreement had lapsed and was no longer in effect at the time of his accident. Whether a clause in a contract is ambiguous is a question of law reviewed de novo. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). "The construction and effect of an unambiguous contract also are questions of law." *Id.* at 788-89.

An exculpatory clause is a provision in a contract that relieves a party from liability resulting from its negligent or wrongful conduct. *Black's Law Dictionary* 648

(9th ed. 2009). Exculpatory clauses are disfavored in law and are strictly construed against the party being released from liability. *Yang*, 701 N.W.2d at 789. "An exculpatory clause is unenforceable if it is ambiguous in scope, purports to release the benefited party from liability for intentional, willful or wanton acts; or contravenes public policy." *Id.*

Johnson suggests for the first time on appeal that the exculpatory clause is ambiguous. He concedes that it "is true in large part" that he did not argue in district court that the language was ambiguous, but nevertheless contends that this court should hold that the exculpatory clause is ambiguous because neither Johnson nor the health club's representative understood its terms. This argument may not be raised for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts may not consider issues not litigated in district court, and a party may not shift theories on appeal). Furthermore, the language in the agreement is unambiguous—it clearly purports to release Fit Pro from liability for any of its or its employees' negligent acts or omissions, and does not permit recovery from a slip-and-fall accident in the sauna. "Where there is no ambiguity in the written terms of the contract, construction by a court is inappropriate." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

The heart of this appeal is the question of whether the exculpatory clause in the membership agreement violates public policy and is, therefore, not enforceable against Johnson. In determining whether an exculpatory clause violates public policy, courts consider (1) whether there was disparity in bargaining power between the parties and (2) whether the type of service being offered or provided is a public or essential service.

Id. In *Schlobohm*, the supreme court found no disparity in bargaining power when the plaintiff failed to show that the services were necessary and could not have been obtained elsewhere. *Id.* at 925. As in *Schlobohm*, here Johnson "voluntarily applied for membership in [the health club] and acceded to the terms of the membership." *Id.* We find no disparity in bargaining power in this case.

The second prong of the public-policy test considers whether the type of service being offered "is the type generally thought suitable for regulation." *Id.* "Types of services thought to be subject to public regulation have included common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, employers and services involving extra-hazardous activities." *Id.* In contrast, health clubs, gymnasiums, or spas do not provide the type of service thought suitable for public regulation. *Id.* Generally, "recreational activities do not fall within any of the categories where the public interest is involved." *Id.* at 926. This court has stated that "[a]lthough fitness activities surely are desirable for most people, they cannot plausibly said to be necessary." *Anderson v. McOskar Enters., Inc.*, 712 N.W.2d 796, 802 (Minn. App. 2006). Under Minnesota caselaw, no public or essential service is implicated by the facts of this case.

Johnson contends that a growing awareness of the costs to individuals and to society of poor health and poor physical fitness should result in a new judicial understanding that fitness activities are necessary, rather than merely desirable. Johnson suggests that this court should revisit *Schlobohm* in light of changes to health clubs and demographic trends in this country. Whatever the merit of this argument, this court is not

a policy-making court, and these arguments are properly addressed to the supreme court or the legislature. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."); *In re Margolis Revocable Trust*, 765 N.W.2d 919, 928 (Minn. App. 2009) (holding that this court's role is not to create a new rule of law based on developments in other jurisdictions).

Johnson also contends, again for the first time on appeal, that the pool and sauna at Gold's Gym are suitable for public regulation because public pools and ancillary facilities, including saunas, are now regulated by various statutes and agency rules. It is well established that this court may not consider an issue that a party failed to litigate in district court. *Thiele*, 425 N.W.2d at 582. "Nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Id.* Because the argument that public pools, saunas, and ancillary facilities are now regulated by law was not litigated in district court, we will not now consider it.

Affirmed.