Boles v. Sun Ergoline

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA0482
City and County of Denver District Court No. 05CV1821
Honorable Robert S. Hyatt, Judge

Savannah Boles,

Plaintiff-Appellant,

v.

Sun Ergoline, Inc., a Delaware corporation,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division III
Opinion by: JUDGE CASEBOLT
Russel and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: October 9, 2008

Lichtenfels, Pansing & Miller, P.C., James F. Scherer, Denver, Colorado, for Plaintiff-Appellant

Hall & Evans, L.L.C., Peter Moyson, Denver, Colorado, for Defendant-Appellee

In this personal injury action, plaintiff, Savannah Boles, appeals the summary judgment in favor of defendant, Sun Ergoline, Inc. We affirm.

Plaintiff sustained damages when her fingers contacted the operating fan blades of an exhaust fan installed in an upright tanning booth operated by Executive Tans. Defendant manufactured the booth, into which it incorporated an exhaust fan assembly provided by others. Plaintiff asserted negligence and strict liability claims against defendant and the manufacturer of the exhaust fan assembly. Plaintiff eventually resolved her claims against the exhaust fan manufacturer.

Defendant moved for summary judgment, asserting that the terms of a release form plaintiff had signed before using the tanning booth barred her claims. The trial court agreed and granted the motion. This appeal followed.

I.

Plaintiff contends that the trial court erred in granting summary judgment because the release form does not constitute a valid release of her claim. We disagree.

We review a summary judgment de novo. Summary judgment is proper only upon a showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346, 348 (Colo. 2000). The nonmoving party is entitled to all favorable inferences that may be drawn from the undisputed facts, and all doubts as to whether a genuine issue of fact exists must be resolved against the moving party. *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 613 (Colo. 1999).

The determination of the sufficiency and validity of an exculpatory agreement also presents a question of law, which is likewise subject to de novo review. *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981).

An exculpatory agreement, which attempts to insulate a party from liability for his or her own negligence, must be closely scrutinized, and in no event will it provide a shield against a claim for willful and wanton negligence. *Id.*

The issue of the validity of an exculpatory clause implicates the competing principles of freedom of contract and responsibility for damages caused by one's own negligent acts. *Heil Valley Ranch,*

Inc. v. Simkin, 784 P.2d 781, 784 (Colo. 1989). To balance these principles fairly, the determination of the validity of a particular clause requires consideration of the public policy implications of the subject matter involved (whether it concerns a duty to the public and whether the type of services performed affects the public interest) and the circumstances of the specific contract (whether the contract was fairly entered into and whether the parties' intentions were expressed in clear and unambiguous language). *Jones*, 623 P.2d at 376; *Stanley v. Creighton Co.*, 911 P.2d 705, 706 (Colo. App. 1996).

In determining whether an exculpatory agreement is valid, a court must consider four factors: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. *B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 136 (Colo. 1998). The inquiry should be whether the intent of the parties was to extinguish liability and whether this intent was clearly and unambiguously expressed. *Heil Valley Ranch*, 784 P.2d at 785.

Here, the release form provides, in pertinent part:

Having been advised and fully informed by Executive Tans concerning the nature of the sun tanning process proposed to be administered, including the effects of such process and the possible risks and consequences of exposure to the indoor sun tanning equipment used in such process, I hereby authorize and direct them to administer such indoor tanning process and perform such indoor tanning procedures as may be deemed necessary or advisable. I hereby confirm that no warranty or guarantee, or other assurance, has been made to me covering the results of the indoor tanning process, and I hereby relieve them and hold them harmless from all liability for injury or damage that may occur to me. I fully understand the administration of the indoor sun tanning process, including possible adverse skin reaction, side effects, or other possible complications. It is understood that this CONSENT is being given in advance of any administration of the process, and is being given by me, voluntarily to induce them to exercise their best judgment as to the manner and requirement of administering the sun tanning process and procedures to me.

My signature below constitutes my acknowledgment that (1) I have read, understand and fully agree to the foregoing CONSENT, (2) the proposed indoor sun tanning process has been satisfactorily explained to me and I have all of the information I desire and (3) I hereby give my authorization and consent. This CONSENT shall stand as long as I tan with any Executive Tans location now and in the future.

I have read the instructions for proper use of the tanning facilities and do so at my own risk, and hereby release the owners, operators, franchisor or manufacturers, from any damage or harm that I might incur due to use of the facilities.

A.

Plaintiff asserts that, while the release form expresses the intent of the parties to release Executive Tans and its franchisees from liability in clear and unambiguous terms, it does not clearly and unambiguously release Sun Ergoline, a manufacturer. Specifically, plaintiff points out that the release form states in three places that the person signing the form releases Executive Tans, but only in the last sentence does it use the term "manufacturers." In addition, plaintiff argues, the form does not describe the products or items whose manufacturers are intended to be released, nor does it describe or identify the parties who come within the term "manufacturer." We are not persuaded for four reasons.

First, plaintiff has cited no Colorado authority, nor are we aware of any, requiring the entity being released to be specifically named, or requiring that the products or items a manufacturer creates to be specifically described.

Second, there is no dispute that plaintiff thoroughly read and understood the contents of the form before she signed it.

Third, the release language is not couched in legal jargon, nor is it inordinately long or complicated. *See Heil Valley Ranch*, 784

P.2d at 785 (upholding release where it was written in simple and clear terms, was not inordinately long or complicated, and was free from legal jargon). In addition, the release of manufacturers is not placed in an obscure part of the document. Instead, the release clearly and unambiguously states that plaintiff releases "manufacturers" just above the place where plaintiff signed the document.

Fourth, contrary to plaintiff's additional assertion, we do not perceive that there is any ambiguity in the release. One could not fail to understand that the term "manufacturer" includes those who make the machines that are part of the service being provided. *See Webster's Third New International Dictionary* 1378 (3d ed. 1976)(a manufacturer is one who creates a commodity).

B.

Plaintiff asserts that the product defect that resulted in her injuries does not fall within the risks covered by the release. We disagree.

No Colorado authority requires that an injury or the consequences for which liability is released must fall within any described risk. When the release so describes the risk, it is more

likely that the release will be upheld. *See Heil Valley Ranch*, 784 P.2d at 785. However, the supreme court has declined to require that any particular language, including the term "negligence," must be included for a release to be valid. *Id.*

In addition, the covered risks here are broadly described. For example, the release states that plaintiff releases the owners, operators, franchisor, or manufacturers "from any damage or harm that I might incur due to use of the facilities," and "from all liability for injury or damage that may occur to me." "All" means the whole amount or quality of a thing, or the greatest amount possible. *See Webster's* at 52. "Any" is a comparable term. *See Austin v. Weld County*, 702 P.2d 293, 294 (Colo. App. 1985). The exhaust fan is part of the facility, and risk from its operation is within the broad parameters described.

C.

The trial court addressed the four factors outlined in *Jones*, 623 P.2d at 376, found that the release related to the service of indoor tanning, and concluded that, because indoor tanning is not a necessity or essential service, the release did not affect the public interest. Plaintiff asserts that the release, as it relates to defendant,

does not relate to tanning services but, instead, relates to defendant's liability for manufacture and distribution of a defective product. For that reason, she contends, the release is contrary to public policy. We disagree.

As plaintiff asserts, Colorado has adopted the Restatement (Second) of Torts section 402(A), which imposes strict liability upon a manufacturer for harm caused by a defective product. However, nothing in existing Colorado law precludes a release from insulating a manufacturer from any liability for a defective product where, as here, the release meets the four-part *Jones* test.

II.

Plaintiff asserts that there is a genuine issue of material fact whether defendant's conduct involves willful and wanton or gross negligence. We disagree.

An exculpatory agreement will not release liability for a party's willful and wanton or gross negligence. *Jones*, 623 P.2d at 376.

Plaintiff asserts that the fan guard and assembly were not inspected or tested before defendant incorporated them into the tanning booth. Even assuming the truth of such allegations, we fail

to perceive how such conduct would satisfy the willful and wanton or gross negligence requirement.

Willful and wanton behavior is defined as "a mental state of the actor consonant with purpose, intent, and voluntary choice." *Shoemaker v. Mountain States Tel. & Tel. Co.*, 38 Colo. App. 321, 324, 559 P.2d 721, 724 (1976). "Willful misconduct consists of conduct purposely committed under circumstances where the actor realizes that the conduct is dangerous but nonetheless engages in the conduct without regard to the safety of others." *United Blood Servs. v. Quintana*, 827 P.2d 509, 523 n.10 (Colo. 1992); *see also* § 13-21-102(1)(b), C.R.S. 2008 (defining willful and wanton conduct as "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff").

Here, there is no evidence of purpose, intent, or voluntary choice, nor is there any indication that defendant realized that its conduct was dangerous but nonetheless engaged in that conduct without regard to the safety of others.

The judgment is affirmed.

JUDGE RUSSEL and JUDGE J. JONES concur.