COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3141 **Cir. Ct. No. 2003CV955**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RYAN CASS,

PLAINTIFF-APPELLANT,

V.

AMERICAN HOME ASSURANCE COMPANY AND GRANITE PEAK CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Dykman, JJ.

¶1 PER CURIAM. Ryan Cass appeals a summary judgment determining a signed release of liability bars his negligence claim against the Granite Peak Corporation. Cass argues the release is void as contrary to public

policy. We conclude the release does not apply to the negligent act of the employee in this case and, consequently, we reverse the judgment and remand for further proceedings.

Background

¶2 Cass purchased a season pass for Granite Peak, a ski hill at Rib Mountain State Park. The application for the pass consists of one page and includes season pass rules, a responsibility code, pass policies, and a release of liability. The release states:

> **RELEASE OF LIABILITY**: I understand and accept the fact that skiing/snowboarding in its various forms is a hazardous sport that has many inherent dangers and risks. I realize that injuries are a common and ordinary occurrence of these sports. In consideration of the right to purchase a season pass, I freely accept and voluntarily assume all risk of personal injury or death or property damage, and **HEREBY RELEASE AND FOREVER DISCHARGE GRANITE PEAK CORPORATION** and the State of Wisconsin, and their agents, employees, owners, directors, officers and shareholders from any and all liability which results in any way from any **NEGLIGENCE** of **GRANITE PEAK CORPORATION** or the State of Wisconsin, or their owners, agents, employees, directors, officers, and shareholders with respect to the design, construction, inspection, maintenance, or repair of the conditions on or about the premises or facilities, including equipment or the operation of the ski area, including but not limited to grooming, snow making, trail design, ski lift operations, including loading and unloading, conditions on or about the premises, and conditions in or about the terrain park including man made features, or my participation in skiing, snow boarding, or other activities in the area, accepting for myself the full responsibility for any and all such damage or injury of any kind which may result. The performance of inverted ariel maneuvers is strongly discouraged by Granite Peak Corporation. These activities are extremely dangerous and can result in severe debilitating injuries, paralysis, or even death. I, the undersigned, have carefully read and understand the terms of the season pass and the **RELEASE OF LIABILITY**, which is an essential part of the season pass terms. I am

> signing this season pass and **RELEASE OF LIABILITY** freely and of my own accord. I understand that by signing this **RELEASE OF LIABILITY** I am waiving certain legal rights, including the right to sue. I realize this season pass and **RELEASE OF LIABILITY** is binding upon myself, my heirs and assigns, and in the event that I am signing it on behalf of any minors (ages 17 & under), I have full authority to do so, realizing its binding effect on them as well as myself.
>
> **CAUTION! READ BEFORE SIGNING. THIS DOCUMENT AFFECTS YOUR LEGAL RIGHTS AND WILL BAR YOUR RIGHT TO SUE.**

¶3 On November 15, 2003, while Cass was snowboarding down an established run, he and a snowmobile driven by a Granite Peak employee collided.[1] The employee testified at his deposition that he was "driving uphill to investigate some young people building jumps." As a result of the collision, Cass suffered injuries, including permanent disabilities, and filed this suit against Granite Peak and its insurer.

¶4 Granite Peak moved for summary judgment, arguing the release of liability barred recovery. The circuit court agreed with Granite Peak and granted its motion. Cass appeals.

Discussion

¶5 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). That methodology is well established and we will not repeat it here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001

[1] The parties dispute whether Cass hit the snowmobile or the snowmobile hit Cass. It is irrelevant for purposes of this appeal.

WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. This case turns on our interpretation of the release of liability. ***Atkins v. Swimwest Fam. Fitness Ctr.***, 2005 WI 4, ¶12, 277 Wis. 2d 303, 691 N.W.2d 334. Generally, we analyze exculpatory clauses using contract principles. ***Id.***, ¶13. Contract interpretation is a question of law we review de novo. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). Exculpatory clauses or liability releases are also reviewed on a public policy basis. ***Atkins***, 277 Wis. 2d 303, ¶13.

¶6 "For a contractual inquiry, we need only 'look to the contract itself to consider its validity. Specifically, we examine the facts and circumstances of the agreement' … to determine if it was broad enough to cover the activity at issue." ***Id.*** (citation omitted). If the waiver or release does not cover the activity, "the analysis ends and the contract should be determined to be unenforceable in regard to such activity." ***Id.*** If the activity is covered, we may then proceed to a public policy analysis. ***Id.***

¶7 Here, the alleged negligence is Granite Peak's employee driving the snowmobile to investigate the patrons constructing jumps. Granite Peak's affirmative defense is that "Cass assumed the risks inherent in the sport of skiing/snowboarding, specifically by executing" the release. It also argues there is "no dispute the Granite Peak snowmobile operator was inspecting the conditions on the Granite Peak premises, an activity expressly covered" by the release. We disagree.

¶8 We start by pointing out that the entire release paragraph, containing approximately 376 words, is for the most part in fine print. Granite Peak argues

"the plain-English release language in the Granite Peak release is a far cry from ***Richards'***[2] confusing release packed with legalese." However, the exculpatory language of this release is a 176-word run-on sentence. While not packed with legalese, it is also unendowed with any particular clarity.

¶9 Although they are not invalid per se, Wisconsin case law does not favor these exculpatory clauses. ***Atkins***, 277 Wis. 2d 303, ¶12. A release of liability must "clearly, unambiguously, and unmistakably inform the signer of what is being waived." ***Id.***, ¶15 (quoting ***Yauger v. Skiing Enters., Inc.***, 206 Wis. 2d 76, 84, 557 N.W.2d 60 (1996)). Moreover, we strictly construe such releases against the party seeking to rely on them. ***Atkins***, 277 Wis. 2d 303, ¶12. We conclude the release in this case is not sufficiently clear, unambiguous, or unmistakable to release Granite Peak from the alleged negligence in this case.

¶10 First, the release refers to skiing and snowboarding as having "many inherent dangers and risks," and Granite Peak argues Cass assumed those risks. It is not self-evident, however, that injury by Granite Peak's employee's negligent operation of a snowmobile, driven against the flow of skiers and snowboarders, is an "inherent" risk, or a "common and ordinary occurrence" associated with these sports.[3]

¶11 Second, we reject Granite Peak's argument that the release expressly covers the employee's actions. The employee testified he was "driving uphill to

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[2] ***Richards v. Richards***, 181 Wis. 2d 1007, 513 N.W.2d 118 (1994).

[3] We note parenthetically that Granite Peak's corporation manager and the snowmobile operator both opined in deposition testimony that colliding with a snowmobile driven against the downhill flow is not a risk normally anticipated in skiing and snowboarding.

investigate some young people building jumps." The release says nothing about Granite Peak's monitoring other users on the hill or the possibility of snowmobiles or other maintenance vehicles operating against the flow on active ski hills. Nonetheless, Granite Peak insinuates the employee went to "inspect conditions on Granite Peak premises." Granite Peak's argument is based on a strained, non-contextual reading of the release.[4]

¶12 We acknowledge that, if the jumps present a danger to other users, Granite Peak likely has an obligation to remove them. But the employee testified he was on his way to investigate the users, not to inspect the condition of the ski hill. We do not believe the two activities are necessarily synonymous. While this might be viewed as splitting definitional hairs, Granite Peak insists its release expressly covers the employee's activities that day. However, we see nothing implicit in the release that covers either the negligent monitoring of other patrons or negligent use of the snowmobile. We certainly see nothing in the express language.

¶13 At best, we consider the release ambiguous as whether the employee's actions in this case are contemplated as part of "inspection." However, we must strictly construe the release against Granite Peak and, as such, we conclude it is inapplicable in this case. *See* ***Atkins***, 277 Wis. 2d 303, ¶12. Because we conclude the release by its terms does not apply to the negligent activity in this case, we need not address the public policy arguments. ***Id.***, ¶13.

[4] In context, the release appears to refer to an employee's negligence that either: (1) causes the physical conditions or the equipment to present a hazard or (2) fails to identify and remove a preexisting hazard. We acknowledge, however, that "conditions" and "equipment" are not expressly so modified.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.