STATE OF MICHIGAN

COURT OF APPEALS

PHILIP BUJANDA, Plaintiff-Appellant,	UNPUBLISHED April 17, 2014
v	No. 314637 Ingham Circuit Court
SPARTAN ATHLETICS, LLC d/b/a SPARTAN CROSSFIT, Defendant-Appellee.	LC No. 12-000744-NI

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

In this premises liability case, plaintiff's claim arises from injuries that he incurred while waiting to participate in physical training that defendant conducted at its facility. The trial court concluded that a waiver and release signed by plaintiff barred plaintiff's action and granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). Because we conclude that there is a genuine issue of material fact regarding whether plaintiff's injury arose under circumstances not covered by the waiver and release, we reverse and remand for further proceedings.

Plaintiff was injured while waiting for a CrossFit class to begin at defendant's workout facility. There is a factual dispute regarding whether plaintiff was engaged in exercise or just standing around talking at the time he was injured. According to plaintiff, he was injured when he turned to introduce himself to a fellow CrossFit participant who was waiting in the same area. Plaintiff testified during his deposition that as he turned toward the other gym member his right foot got caught under something. Plaintiff states that he turned to see what his foot was caught on, saw a ladder, felt a sharp pain, and fell to the ground. Plaintiff explains that his Achilles heel was severed by a sharp part of the ladder when he fell. However, another CrossFit participant was waiting in the same area as plaintiff was deposed, and she testified that while she did not see plaintiff fall, she observed him doing air squats right before the accident. Similarly, the operative report from Sparrow Hospital stated that the patient "was working out, lifting weights, when he tripped over a ladder," and an initial evaluation of plaintiff prepared as part of his physical therapy stated that plaintiff was "warming up for CrossFit and his right foot got caught under a ladder and he fell."

Plaintiff filed the instant lawsuit against defendant, and following discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). Specifically, defendant argued that the release and waiver signed by plaintiff when he joined the gym barred the lawsuit. Defendant also argued that the open and obvious doctrine barred plaintiff's claims. Plaintiff argued that his injury occurred under circumstances outside the scope of the release and waiver. The trial court took the matter under advisement following a hearing on defendant's motion, and issued a written opinion and order several days later granting defendant's motion. Specifically, the trial court determined that the waiver and release covered plaintiff's injury and that there was no evidence to suggest defendant was grossly negligent. In light of its ruling regarding the release and waiver, the trial court declined to reach the open and obvious issue. Plaintiff now appeals as of right.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Pursuant to MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of release. A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence so long as the evidence would be admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "[T]he trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Coblentz*, 475 Mich at 567. The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden*, 461 Mich at 120.

The proper interpretation of a contract is a question of law that we review de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "Contracts must be construed so as to give effect to every word or phrase as far as practicable," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), and terms used in a contract must be read in context, *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 516; 773 NW2d 758 (2009). If the language is clear and unambiguous, the contract must be interpreted and enforced as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

The release and waiver signed by plaintiff when he joined the gym provides in pertinent part:

> **Express assumption of risk:**
>
> I am aware that there are significant risks involved in all aspect [sic] of physical training. These risks include but are not limited to: falls which can result in serious injury or death, injury or death due to improper use or failure of equipment. I am aware that any of these above mentioned risks may result in

> serious injury or death to myself and/or my partner(s). I affirm that I have read the article on rhabdomyolysis that is on the bulletin board. I willingly assume full responsibility for the risks that I am exposing myself to and accept full responsibility for any injury or death that may result from participation in any activity or class while at Spartan CrossFit.
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> * * *
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> **Release:**
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> In consideration of the above mentioned risks and hazards and in consideration of the fact that I am willingly and voluntarily participating in the activities available at Spartan CrossFit, I hereby release Spartan CrossFit, their principals, agents, employees, and volunteers from any and all liability, claims, demands, actions or rights of action, which are related to, arise out of, or are in any way connected with my participation in this activity, including those allegedly attributed to the negligent acts or omissions of the above mentioned parties. This agreement shall be binding upon me, my successors, representatives, heirs, executors, assigns, or transferees. . . .

First, we reject plaintiff's argument that the waiver and release is ambiguous. A contract is ambiguous if "its provisions are capable of conflicting interpretations." *Klapp*, 468 Mich at 467. A contract is not ambiguous if, "although inartfully worded or clumsily arranged," it "fairly admits of but one interpretation." *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008) (quotation and citation omitted). In this case, we find the language of the contract is clear and capable of only one interpretation. We further find plaintiff's reliance on *Hoffner v Lanctoe*, 290 Mich App 449; 802 NW2d 648 (2010), overruled on other grounds 492 Mich 450 (2012), unavailing. Plaintiff argues that *Hoffner*, wherein this Court determined a waiver and release contract was ambiguous, compels the same conclusion of ambiguity in this case. However, we find that this case is distinguishable from *Hoffner* because the language used in the instant waiver and release is different from the language used in that case. In *Hoffner*, the release stated that the member signing the release agreed to "waive, release and forever discharge," the gym from any liability for injury or damages sustained "in connection with participation/membership or use of equipment at [the defendant gym.]" *Id.* at 458. As the Court held in *Hoffner*, the waiver and release in that case could reasonably be interpreted broadly to include a slip and fall while attempting to enter the gym, which is what happened in that case, or narrowly to include only activities related to exercise. *Id.* at 460. In this case, the wavier and release is clearly limited to injuries and liabilities arising from "physical training," and the language of the contract cannot reasonably be interpreted to encompass any other activity. Accordingly, we conclude that the waiver in this case is unambiguous.

Applying the plain language of the unambiguous contract, we conclude that the waiver and release covers only injuries that result from physical training. The contract plainly sets forth in the first sentence that the signor is aware of the "significant risks" associated with "physical training." The contract goes on to note that such risks, previously identified as risks arising from physical training, can include but are not limited to "falls which can result in serious injury or death, injury or death due to improper use or failure of equipment." The release section of the

contract refers back to the "above mentioned risks and hazards," which again, are plainly identified as risks involved in "physical training," and states that the signor of the contract releases Spartan CrossFit from "any and all liability, claims, demands, actions, or rights of action which are related to, arise out of, or are in any way connected with my participation in this activity . . . ." Again, "this activity" refers to "the above mentioned risks and hazards," which plainly refers only to physical training.

Therefore, whether the waiver and release bars plaintiff's claim depends completely on the resolution of the factual dispute regarding what exactly plaintiff was doing when he was injured. If, as asserted by plaintiff, he was simply standing around waiting and turning to speak to another person he was not injured while engaging in physical training and the waiver and release does not bar his claim. However, if plaintiff was doing air squats, a form of physical training, while he was injured, his injury occurred within the scope of the waiver and release contract. Therefore, we conclude that the trial court erred by granting summary disposition in favor of defendant, and we remand this case for resolution of the factual dispute.

Finally, we note that plaintiff also argues on appeal that the waiver and release "was not supported by valid consideration due to him terminating his membership at defendant's gym and then returning months later without signing a new waiver/release against liability." Initially, we note that this argument was not properly presented to the trial court because plaintiff raised the issue for the first time during oral argument at the motion hearing and thereafter filed a supplemental brief that was untimely under MCR 2.116(G)(1)(*ii*). In light of these procedural defects the trial court declined to address the issue. Because an issue must be raised, addressed, and decided by the trial court before it is raised in this Court, this issue is not properly preserved for review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). However, we may overlook preservation requirements when consideration of an issue is necessary to a proper determination of the case or where an issue raises a question of law and all the facts necessary for resolution of the issue have been presented. *Heydon v MediaOne*, 275 Mich App 267, 278; 739 NW2d 373 (2007). Despite plaintiff's failure to properly preserve this issue, because the issue raises a question of law and all the facts necessary for its resolution are before us, we will address plaintiff's claim. *Id.*

"Consideration for agreements exists where there is a benefit on one side, or a detriment suffered, or service done on the other." *Sands Appliance Servs, Inc, v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000) (alterations and citation omitted). In regard to the waiver and release agreement in this case, the benefit on one side is the that defendant cannot be liable for any injury arising from plaintiff's use of its facility, and plaintiff's detriment is that he agrees to waive his right to sue for any injury sustained. Further, plaintiff receives the benefit of the use of the gym facility, and defendant maintains and operates the facility as a service. Thus, the waiver and release contract was supported by adequate consideration because plaintiff was entitled to use defendant's gym in exchange for his agreement to release defendant from liability. See *Paterek v 6600 Ltd*, 186 Mich App 445, 451; 465 NW2d 342 (1990) (rejecting the plaintiff's argument that a waiver and release was invalid for lack of consideration when the agreement allowed the plaintiff to play softball on its field in exchange for plaintiff's promise to release the defendant from liability). Moreover, no evidence has been presented to us that indicates that the waiver and release was predicated on whether plaintiff was paying membership dues to defendant. In particular, the waiver and release contract itself contains no reference to plaintiff's

payment of membership dues. Therefore, we reject plaintiff's contention that the waiver and release agreement was not supported by adequate consideration.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher