Cite as 2011 Ark. App. 265

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA10-992

KENNETH McCLURE APPELLANT V. CITY OF MAYFLOWER APPELLEE	**Opinion Delivered** APRIL 6, 2011 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. CV2009-1158] HONORABLE DAVID M. CLARK, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

Kenneth McClure agreed in December 2007 to perform public service for the City of Mayflower in order to work off fines levied against him in a criminal matter. As a part of his agreement, McClure signed a work-service worksheet which stated as follows:

> I, the undersigned, having been charged by the Court of the City of Mayflower, to do work services, do hereby appear before the Chief of Police of the City of Mayflower to perform my duties. I also do hereby agree to release the City of Mayflower and all its constituents of any and all liability, should injury, personal or otherwise, result from or during the performance of said service.

On March 17, 2008, McClure was injured in an automobile accident. The accident occurred while McClure was accompanying a city worker, Gary Tease,[1] in a city automobile to a recycling center to dispose of recyclables that had been collected.

[1] Mr. Tease is also referred to as Gary Teas in the record.

On October 14, 2009, McClure filed suit against the City of Mayflower (Mayflower), the Arkansas Municipal League Vehicle Program (Arkansas Municipal League), and Gary T. Tease to recover damages for his injuries and for a judgment declaring that the exculpatory provision in the work-service worksheet was ambiguous, not supported by consideration, void as against public policy, and in violation of the Motor Vehicle Responsibility Act. The claims against Tease and the Arkansas Municipal League were subsequently dismissed.

On March 31, 2010, Mayflower moved for summary judgment on the basis that the exculpatory agreement signed by McClure effectively waived any claims McClure had against the city. McClure opposed the motion, arguing that the exculpatory provision (1) violated public policy; (2) was ambiguous and unenforceable; (3) lacked consideration; and (4) was unconscionable. After a hearing, the trial court granted summary judgment in favor of Mayflower.

In its summary-judgment order, the trial court first found that the exculpatory provision did not violate public policy. More specifically, the court found that the employee's negligence did not arise from the existence of the exculpatory agreement; rather, the negligent employee and McClure were exposed to the same risk of harm from the employee's negligence, and the employee would not be willing to act carelessly and injure himself because the city could escape liability. The court further found that enforcement of the exculpatory agreement was not contrary to the public policy advanced by Ark. Code Ann. § 21-9-303 (or any other statute relevant to the responsible operation of motor vehicles) because the existence

of an exculpatory provision would not cause municipalities to fail in their responsibility for the operation of motor vehicles.

The court then noted that the work to be performed by McClure was not inherently dangerous, that McClure knew that by signing the provision he would relieve Mayflower of liability for his injuries, and that McClure benefited from the performance of community service. And, as the exculpatory clause was fundamental and integral to the community-service option provided to McClure, it was not a collateral undertaking for which additional consideration was required. Finally, the court found that the provision was not unconscionable, but was fairly entered into, without coercion, as McClure had other options through which to pay off his fines. Further, the provision was not ambiguous as it clearly covered McClure's actions while performing community service.

McClure timely appealed the order of summary judgment. His arguments on appeal are that the trial court erred in finding that (1) the exculpatory provision was unambiguous; (2) the exculpatory provision did not violate public policy; (3) there was sufficient consideration given for waiving his rights under the Motor Vehicle Responsibility Act; and (4) the exculpatory provision was not unconscionable.

> [S]ummary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. Once a moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. This court views the evidence in a light most favorable to the party

> against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. We have also stated that summary judgment is inappropriate where, although there may not be facts in dispute, the facts could result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law.

Fryar v. Roberts, 346 Ark. 432, 436, 57 S.W.3d 727, 729–730 (2001) (citations omitted). In the present case, the propriety of summary judgment hinges on the validity and enforceability of the exculpatory clause.

An exculpatory contract is one where a party seeks to absolve himself in advance of the consequences of his own negligence. *Finagin v. Ark. Dev. Fin. Auth.*, 355 Ark. 440, 139 S.W.3d 797 (2003). Contracts that exempt a party from liability for negligence are not favored by the law. *Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001); *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990); *Middleton v. Cato*, 251 Ark. 745, 474 S.W.2d 895 (1972); *Arkansas Power & Light Co. v. Kerr*, 204 Ark. 238, 161 S.W.2d 403 (1942); *Gulf Compress Co. v. Harrington*, 90 Ark. 256, 119 S.W. 249 (1909). This disfavor is based upon the strong public policy of encouraging the exercise of care. *Plant*, *supra*.

However, such exculpatory contracts are not invalid per se. *Id*. Because of the disfavor with which exculpatory contracts are viewed, two rules of construction apply to them. First, they are to be strictly construed against the party relying on them. *Id*. Second, we have said that it is not impossible to avoid liability for negligence through contract, but that, to avoid such liability, the contract must at least clearly set out what negligent liability is to be avoided. *Id*. Further, we have held that when we are reviewing such a contract, we are not restricted

to the literal language of the contract; we will also consider the facts and circumstances surrounding the execution of the release in order to determine the intent of the parties. *Finagin*, *supra*.

McClure first argues that the exculpatory provision was ambiguous and, therefore, unenforceable. A contract's language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one equally reasonable interpretation. *Lynn v. Wal-Mart Stores, Inc.*, 102 Ark. App. 65, 280 S.W.3d 574 (2008). This contract is unambiguous as it does not meet either requirement.

The language of the exculpatory clause specifically provides that McClure would release the city from "any and all liability" should injury result from or during the performance of said service work. Part of his community-service work necessarily involved traveling between locations to perform those services. Because this agreement's exculpatory clause was unambiguous, its construction was a question of law for the court, and no question of fact was presented. *Vogelgesang v. U.S. Bank, N.A.*, 92 Ark. App. 116, 211 S.W.3d 575 (2005). Thus, summary judgment was appropriate.

McClure next argues that the exculpatory provision violates public policy. However, nothing in this agreement discourages the employer or its employees from exercising reasonable care. In fact, Tease had just as much of an interest, if not more, to exercise reasonable care given that any negligence on his part would likely result in his own injury.

Nor does the exculpatory provision violate the public policy set forth by statute which requires municipalities to carry motor-vehicle-liability insurance or to self-insure. Ark. Code

Ann. § 21-9-303 (Repl. 2004). Mayflower had motor-vehicle-liability coverage and was in compliance with the act. However, McClure, a competent adult, contractually waived his right to recover. This is similar to an insured who contractually agrees to a household exclusion under a policy of insurance. Under such an exclusion, an innocent, injured family member cannot recover under a policy. Such exclusions have been consistently upheld as not violative of public policy. *See Cook v. Wausau Underwriters Ins. Co.*, 299 Ark. 520, 772 S.W.2d 614 (1989); *State Farm Mut. Ins. Co. v. Cartmel*, 250 Ark. 77, 463 S.W.2d 648 (1971). Likewise, this contractual waiver does not violate public policy.

For his third point on appeal, McClure argues that the exculpatory clause was not supported by consideration. Specifically, McClure, citing *Capel v. Allstate Insurance Co.*, 78 Ark. App. 27, 77 S.W.3d 533 (2002), argues that, while there was consideration for performing the community-service work, the exculpatory clause was a collateral undertaking for which additional consideration was required. However, additional consideration is required only when parties to a contract enter into an additional contract. *See Crookham & Vessels, Inc. v. Larry Moyer Trucking, Inc.*, 16 Ark. App. 214, 699 S.W.2d 414 (1985). Here, there was no such additional contract or undertaking. As the trial court correctly noted, McClure was allowed to perform community service to pay off his fines on the condition that he waive liability. If McClure had refused to sign the waiver, there would have been no contract. As the exculpatory clause was integral to the underlying agreement, it was not a collateral undertaking for which additional consideration was required.

Finally, McClure argues that the exculpatory provision was unconscionable. He argues that he never conceived that, by signing the waiver, he would be waiving his right to recover for injuries sustained while riding in a city vehicle covered by motor-vehicle insurance. We have stated that, in assessing whether a particular contractual provision is unconscionable, we review the totality of the circumstances surrounding the negotiation and execution of the contract. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Guardtronic*, 76 Ark. App. 313, 64 S.W.3d 779 (2002) (citing *State ex rel. Bryant v. R & A Inv. Co.*, 336 Ark. 289, 985 S.W.2d 299 (1999)). Two important considerations are whether there is a gross inequality of bargaining power between the parties and whether the aggrieved party was made aware of and comprehended the provision in question. *Id.*

Here, the exculpatory provision was not hidden in fine print or otherwise obscured from McClure's notice. In fact, it was, in essence, the only information contained in the document signed by McClure. Further, there is no evidence that McClure was coerced into entering into the agreement. McClure had two other options if he did not want to sign the release of liability. He made a conscious decision to enter into the agreement rather than exercise his alternatives—jail time or cash payment. Thus, there was no gross inequality of bargaining power, and there is no question that McClure was aware of the provision he was signing.

Summary judgment was appropriate. The order granting summary judgment in favor of the City of Mayflower is affirmed.

PITTMAN and MARTIN, JJ., agree.