IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 2, 2016 Session

SANDRA GIBSON v. YOUNG MEN'S CHRISTIAN ASSOCIATION OF MIDDLE TENNESSEE

Direct Appeal from the Circuit Court for Rutherford County
No. 68283 J. Mark Rogers, Judge

No. M2015-01465-COA-R9-CV – Filed May 16, 2016

This is an appeal from an order denying summary judgment. The appellee signed a YMCA membership application and release agreement prior to tripping and falling on a sidewalk in front of the YMCA. The appellee filed suit, alleging negligence. The YMCA then filed a motion for summary judgment, claiming that the appellee expressly assumed the risk of her injuries. The trial court denied the YMCA's motion for summary judgment but granted a motion for interlocutory appeal. We reverse the trial court's order denying summary judgment and remand with instructions to enter summary judgment.

Tenn. R. App. P. 9 Interlocutory Appeal By Permission; Judgment of the Circuit Court Reversed and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which RICHARD H. DINKINS and KENNY ARMSTRONG, JJ., joined.

Brian Walthart and Richard Charles Mangelsdorf, Jr., Nashville, Tennessee, for the appellant, Young Men's Christian Association of Middle Tennessee.

Robert John Foy, Murfreesboro, Tennessee, for the appellee, Sandra Gibson.

OPINION

BACKGROUND & PROCEDURE

The appellee, Sandra Gibson[1] ("Appellee"), fell and sustained injuries on July 15,

[1]Ms. Gibson passed away during the pendency of this appeal. On October 26, 2015, the trial court entered an agreed order substituting the administrator of Ms. Gibson's estate, Alfred Minor, as the named plaintiff under Tenn. R. Civ. P. 25.01. However, for the sake of uniformity and clarity, we refer to Ms.

2013 when she tripped on an allegedly uneven or cracked sidewalk approximately twenty feet from the entrance to the Rutherford County YMCA ("YMCA"). Prior to that visit, Appellee completed and signed a Membership Application for membership to the YMCA. In pertinent part, the Membership Application reads:

> In consideration of gaining membership and/or being allowed to participate in the activities and programs of the YMCA of Middle Tennessee ("YMCA") and to use its facilities (whether owned or leased), equipment and machinery, I do hereby waive, release and forever discharge the YMCA and its officers, agents, employees, volunteers, representatives, directors and all others from any and all responsibility or liability for injuries or damages resulting from participation in such activities or programs or my use of such facilities, equipment or machinery, even if such damage or injury results from a negligent act or omission.

Appellee filed suit against YMCA on July 11, 2014, alleging negligence. On November 17, 2014, YMCA filed a motion arguing that it was entitled to summary judgment because Appellee expressly assumed the risk for her injuries by signing the Membership Application. After hearing argument from both parties, the trial court entered an order denying YMCA's motion for summary judgment on April 7, 2015. In its order, the trial court found that Appellee, "in entering the facilities was in fact using the facilities, which was contemplated by the parties in the signing of the release." However, the court, relying on *Sweat v. Big Time Auto Racing, Inc.*, 117 Cal. App. 4th (2004), a California case, then ruled that the language of the release did not charge Appellee with "assuming the risk of [injury] from a defectively constructed or maintained sidewalk." Further, the court determined that there existed "a question of fact as to whether [Appellee] and [YMCA] intended that the release signed by [Appellee] contemplated a trip and fall on a cracked or area of disrepair . . . ." YMCA then filed a motion asking the court to revise the order denying the motion for summary judgment or, in the alternative, permission to seek an interlocutory appeal. On July 27, 2015, the trial court entered an order denying YMCA's motion for revision of its previous order but granting YMCA's motion for interlocutory appeal.

ISSUE

YMCA raises one issue on appeal:

I. Whether the trial court erred by not granting YMCA's motion for summary judgment.

Gibson and the named plaintiff as "Appellee."

STANDARD OF REVIEW

YMCA appeals the trial court's order denying summary judgment in favor of Appellee. We therefore apply the standard of review applicable to summary judgment decisions. Summary judgment is appropriate in virtually any civil case that can be resolved on the basis of legal issues alone. *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 81 (Tenn. 2010). Summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04. Our supreme court, in *Rye v. Women's Health Care Center of Memphis, MPLLC*, set forth Tennessee's summary judgment standard as follows:

> Our overruling of *Hannan* means that in Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.

Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 264 (Tenn. 2015). A trial court's decision to grant a summary judgment motion presents a question of law, and we review it *de novo* with no presumption of correctness. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008). In doing so, we must make a fresh determination that the requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013). With these principles in mind, we turn to the substance of the appeal.

ANALYSIS

Exculpatory agreements, such as the one signed by Appellee, have long been enforceable in Tennessee. *See Maxwell v. Motorcycle Safety Foundation, Inc.*, 404 S.W.3d 469, 474 (Tenn. Ct. App. 2013); *see also Empress Health and Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190 (Tenn. 1973); *Moss v. Fortune*, 340 S.W.2d 902, 903–04 (Tenn. 1960) ("[P]arties may contract that one shall not be liable for his negligence to another but that such other shall assume the risk incident to such negligence.") (citations omitted). These agreements are analyzed under the doctrine of express assumption of the risk. "Express assumption of the risk refers to an express release, waiver, or exculpatory clause, by which one party agrees to assume the risk of harm arising from another party's negligence." *Perez v. McConkey*, 872 S.W.2d 897, 900 (Tenn. 1994). In Tennessee, express assumption of the risk is a complete defense to liability. *Bielfeldt v. Templeton*,

No. M2008-01093-COA-R3-CV, 2009 WL 416002 at *4 (Tenn. Ct. App. Feb. 18, 2009); Tenn. R. Civ. P. 8.03. Because such agreements are contractual in nature, we employ the familiar rules of contract interpretation. When interpreting contractual language, courts look to the plain meaning of the words in the document to ascertain the parties' intent. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 889-90 (Tenn. 2002). If the language is clear and unambiguous, the literal meaning controls the outcome of the dispute. *Id.*

The agreement signed by Appellee released YMCA from liability for any and all injuries resulting from Appellee's participation in YMCA activities or programs or Appellee's "use of [YMCA] facilities, equipment or machinery, even if such damage or injury results from a negligent act or omission." In its order, the trial court explicitly found that Appellee "was in fact using the facilities." This finding by the trial court is not before us as an issue for review on appeal.[2] Notably, the court made no finding that any portion of the agreement was ambiguous. While Appellee argues that she did not contemplate tripping and falling on a sidewalk in front of the YMCA when she signed the release, whether or not she contemplated that exact injury is immaterial because the agreement was not ambiguous. Therefore, because the trial court did not find ambiguity in the agreement but did find that Appellee was using the facilities as "contemplated by the parties in the signing of the release," summary judgment was proper in this case. Accordingly, we reverse the decision of the trial court.

CONCLUSION

For these reasons, we reverse the order of the trial court denying summary judgment in favor of Appellee and remand for entry of judgment in favor of Appellant and all further proceedings as may be necessary and consistent with this opinion. Costs of this appeal are taxed to the appellee, Alfred Minor, for which execution may issue, if necessary.

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BRANDON O. GIBSON, JUDGE

[2]At oral argument in this appeal, Appellee's counsel argued an issue not raised in her appellate brief, specifically that the trial court improperly found that Appellee was using the facilities. We decline to address issues not raised in Appellee's brief. An issue not presented in the Statement of Issues in the appellate brief is not properly before the Court of Appeals. *Bunch v. Bunch*, 281 S.W.3d 406, 409-10 (Tenn. Ct. App. 2008).