

CITATION: Paksa v. Ontario Gymnastics, 2019 ONSC 7019
COURT FILE NO.: 56527/16
DATE: 20191209

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ZSUZSANNA PAKSA, Plaintiff

AND:

ONTARIO GYMNASTICS FEDERATION EVENTS INC. operating as
QUANTUM NIAGARA GYMNASTICS, Defendant

BEFORE: Justice Robert B. Reid

COUNSEL: S. Mackay and D. Chambers, Counsel, for the Plaintiff

M. Farb, Counsel, for the Defendant

HEARD: November 25, 2019

DECISION ON MOTION FOR SUMMARY JUDGMENT

- [1] In this action, the plaintiff alleges that she suffered personal injuries as a result of the defendant's negligence on September 20, 2014.
- [2] The defendant seeks summary judgment against the plaintiff dismissing the action on the basis that the plaintiff signed a waiver. The defendant submits that the waiver is a complete bar to the plaintiff's claim and therefore that there is no genuine issue requiring a trial.

Background Facts:

- [3] On Friday, September 12, 2014, the plaintiff enrolled her son, Chase Lacroix, through an online registration process in a toddlers' gymnastics program operated by the defendant. At the time, Chase was two years of age.
- [4] When the plaintiff and her son arrived at the defendant's premises for the child's first class on September 13, 2014, the plaintiff was requested to sign a waiver. She did so.
- [5] On September 20, 2014, during the next class, the plaintiff alleges that she was injured when she stepped down from a mat while in the process of supervising her son. She alleges that the mat was unstable because it was not properly supported. She lost her balance and fell to the gym floor.

The Waiver:

- [6] There is no dispute that the plaintiff signed a document entitled: “Release of Liability, Waiver of Claims and Indemnity Agreement” in advance of participating in the first class.
- [7] The circumstances of signing are not significantly in dispute:
- the document was provided by the defendant but not specifically explained;
 - the plaintiff was in a busy area with other parents and children, including her son, waiting to begin the class when she was given the document for signature;
 - the document consisted of one page;
 - the plaintiff did not read over the document, which is consistent with her prior practice;
 - the plaintiff understood that the waiver was a necessary prerequisite to her son’s participation in the class, although she denied specifically understanding the purpose of a waiver.
- [8] Because it is important to my analysis, I quote the entirety of the waiver, maintaining as much as possible the font size, emphasis and format:

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY
AGREEMENT

(By signing this document you will waive certain legal rights, including the right to sue.)

AWARENESS AND ASSUMPTION OF RISK

I am aware that gymnastics/trampoline involves risks including risk of personal injury, death, property damages, expense and related loss, including loss of income. Included in these risks are negligence on the part of Quantum Niagara Gymnastics Inc., its directors, officers, officials and volunteers, other participants and owners of the facilities where the activities occur (referred to in the rest of this agreement as “Quantum Niagara Gymnastics Inc.” **AND OTHERS**. I freely accept and fully assume all such risks and the possibility of personal injury, death, property damage, expenses and related loss, including loss of income.

RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT

In consideration of Quantum Niagara Gymnastics Inc. accepting my application to participate in this activity,

I agree:

1. To waive any and all claims that I may have in future against Quantum Niagara Gymnastics Inc. **AND OTHERS**.

2. To release the Quantum Niagara Gymnastics Inc. **AND OTHERS** from any and all liability for any personal injury, death, property damage, expense and related loss of income that I or my next of kin may suffer as a result of my participation in this activity, due to any cause whatsoever, including negligence, breach of contract or breach of any statutory duty of care.
3. To hold harmless and indemnify Quantum Niagara Gymnastics Inc. **AND OTHERS** from any and all liability for any damage to property of, of personal injury to, any third party, resulting from my participation in this activity.
4. That this agreement is binding on not only myself but my next of kin, heirs, executors, administrators and assigns.

I HAVE READ THIS AGREEMENT AND UNDERSTAND IT. I AM AWARE THAT BY SIGNING THIS DOCUMENT I AM WAIVING CERTAIN RIGHTS WHICH I OR MY NEXT OF KIN, HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS MAY HAVE AGAINST QUANTUM NIAGARA GYMNASTICS INC. AND OTHERS.

Date: Sept. 13/14 _____ 2014/2015

Signature of Parent/Guardian

Please print name clearly

Zs Paksa

Zsuzsanna PAKSA

Analysis:

- [9] In support of their respective submissions, the parties referred to a substantial body of law as to the enforceability of waivers. Those cases are typically quite fact-specific although they do identify general principles.
- [10] One essential prerequisite common to all cases where a waiver is considered to be binding is that it is unambiguous. Any ambiguity is construed against the party who prepared it.¹
- [11] The wording of the waiver in this case is clearly focused on the potential injury to the participant child. The waiver is said to be in consideration of the defendant accepting “my application to participate in this activity”, in response to which the person purports to say “I agree....”. In the on-line registration form, the “gymnast” is identified as Chase Lacroix. The document is designed to relate to him as the participant (and releasor), through the signature of his mother as parent/guardian. The plaintiff did not sign in her personal capacity.
- [12] The defendant submitted that the terms of the waiver making it binding on “next of kin, heirs, executors, administrators and assigns” expanded its scope to include the plaintiff

¹ *Okihiro v. 572412 B.C. Ltd.*, 2008 BCSC 1161 at paras. 21 - 23

personally. I disagree. Phrases of that nature relate to claims that persons other than the named individual might make in lieu of that person (in this case, the child) himself.

- [13] In numbered paragraph two of the waiver, the release is said to apply to liability for injury, death, damage, expense and related loss of income “that I or my next of kin may suffer as a result of my participation in this activity”. Again, in my view, the focus is on the result of the child’s participation and any related claims by next of kin, as opposed to claims made by a third party directly for damages.
- [14] In this case, at the very least it is ambiguous that the scope of the waiver extends to the plaintiff and to any injury suffered by her. That ambiguity must be resolved against the defendant who created the document.
- [15] I find additional support for my conclusion in the cross-examination of Shannon Dawe, the owner of the defendant, to the effect that while a signed waiver was essential to a child’s participation in class, there was no requirement that the same adult who signed the document, whether parent or otherwise, accompany the child on each occasion. Put another way, there was no requirement that a new waiver be signed whenever a different adult accompanied the child. The signing of the waiver on behalf of the child is ineffective to prevent the claims of third parties.
- [16] I note that the releasee named in the waiver has a corporate name different from that of the defendant. While that discrepancy could support another aspect of ambiguity, it was not argued by the parties and therefore I make no comment in that regard.
- [17] I am satisfied that, as counsel have submitted, all the relevant material on the issue of the waiver was before me at the summary judgment motion. There would be no additional relevant evidence to be provided at trial. As such, I can rely on the provisions of rule 20.04 of the *Rules of Civil Procedure*² to grant summary judgment because I have concluded that there is no genuine issue requiring a trial with respect to the waiver. There is no need to go beyond the evidence submitted by the parties to exercise my expanded powers found in subrule 20.04(2.1).
- [18] I have considered the benefits of remaining seized of the action for the purpose of trial³. Doing so has the potential to save time based on the information gleaned from the summary judgment motion which can be applied to the trial to enhance cost effective and timely access to justice. In the particular circumstances of this case, my involvement has been very minimal and restricted to a narrow issue. Matters of liability and damages were of no consequence to the summary judgment motion but will be critical at the trial.
- [19] Further, my schedule as a judge circuiting in this region is such that if I was to remain seized, it might have the effect of actually increasing the time and costs required in the litigation as counsel attempt to schedule further steps including trial in conjunction with

² R.R.O. 1990, Reg. 194

³ *Hryniak v. Mauldin* 2014, SCC 7 at para. 78

my availability. Therefore, I decline to remain seized of the matter but, of course, with no restriction on the possibility of hearing the trial or other parts of the case.

[20] In summary, and for the reasons noted above, the summary judgment motion of the defendant is dismissed.

Costs:

[21] I encourage the parties to resolve the issue of costs of the motion consensually. In the event that they are not able to do so, I am prepared to receive written submissions according to the following timetable:

- The plaintiff is to serve the defendant with written costs submissions, maximum three pages and bill of costs on or before December 20, 2019.
- The defendant is to serve the plaintiff with written costs submissions, maximum three pages and a bill of costs on or before January 10, 2020.
- The plaintiff is to serve the defendant with any responding submissions on or before January 17, 2020.

[22] All submissions are to be filed with the court no later than January 24, 2020. If submissions are not received by that date, or any agreed extension, the matter of costs will be deemed settled.

Reid J.

Date: December 9, 2019