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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0528**

Peter Christiansen, a minor,
by and through his parent and natural guardian,
Brad Christiansen,
Appellant,

vs.

Kyler Kobus,
Respondent,

Duluth Amateur Hockey Association,
Defendant

**Filed January 16, 2018
Affirmed
Worke, Judge**

St. Louis County District Court
File No. 69DU-CV-15-1918

Jeffrey M. Montpetit, Marcia K. Miller, SiebenCarey, PA, Minneapolis, Minnesota (for appellant)

Michael J. Tomsche, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondent, arguing that appellant's claims were not barred by an exculpatory clause; or, alternatively, that respondent's conduct was greater-than-ordinary negligence not covered by the exculpatory clause. We affirm.

FACTS

On October 9, 2013, appellant Peter Christiansen, a minor, by and through his parent and natural guardian, Brad Christiansen, participated in pee-wee hockey tryouts. Respondent Kyler Kobus was also at tryouts. Kobus was "tripping" and "slashing" Christiansen's friend during warmups.¹ Christiansen confronted Kobus and told him to stop. Kobus nudged Christiansen in the shoulder and hit him in the back of his helmet with his glove causing Christiansen to fall. Another player then fell on the ice and Kobus got "on top of him." Christiansen responded by hitting Kobus in the head with his stick. Kobus chased Christiansen and hit him in the back of the head with a glove or a stick. Christiansen fell. Christiansen had a headache and felt nauseous. A coach skated Christiansen to the bench and told him to go to the locker room. In the locker room, Christiansen threw up.

¹ Because we are reviewing a summary-judgment dismissal, the facts surrounding the incident are as depicted in Christiansen's deposition. *See Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (stating that when reviewing the grant of summary judgment, this court views "the evidence in the light most favorable to the party against whom judgment was granted").

Sometime later, Christiansen found medical staff and reported that he did not feel well and thought that he might have a concussion.

Christiansen filed a complaint against Kobus and defendant Duluth Amateur Hockey Association (DAHA), the sponsor of the youth hockey tryouts, alleging that he was seriously and permanently injured “when he was struck from behind by . . . Kobus.” Christiansen alleged that his injury “was the direct result of the negligence and carelessness of . . . Kobus and DAHA, whether jointly or severally.”

DAHA moved for summary judgment, arguing that Christiansen’s complaint should be dismissed because it was precluded by the Waiver of Liability, Release, Assumption of Risk and Indemnity Agreement that he and his parents executed when they registered for hockey tryouts (the waiver). DAHA also asserted that it was entitled to attorney fees pursuant to the waiver. Kobus joined in DAHA’s motion for summary judgment. In opposing summary judgment, Christiansen argued that while there was no dispute that his parents agreed to the terms of the waiver, there were genuine issues of fact as to whether Kobus and DAHA’s conduct “constituted greater-than-ordinary negligence,” which would fall outside of the waiver.

During a hearing on the summary-judgment motion, Kobus argued that the waiver included “other participants,” which included him. He further argued that Christiansen’s complaint alleged only a claim for general negligence, which was covered by the waiver. Christiansen acknowledged that “[the] waiver serves effectively to waive negligence,” but claimed that the case was about greater-than-ordinary negligence. Christiansen argued that

he properly pled greater-than-ordinary negligence in the complaint by including the word “carelessness.”

The district court granted DAHA and Kobus’s motion for summary judgment, concluding that there was no dispute that Christiansen agreed to the terms of the waiver and the waiver covered negligent conduct by DAHA and “other participants,” including Kobus. The district court concluded that there was no claim for greater-than-ordinary negligence before it because Christiansen failed to plead anything other than negligence in his complaint. Finally, the district court ruled that DAHA was entitled to attorney fees because the waiver included an indemnification provision. However, the district court ruled that if Kobus had moved for attorney fees, he would not be entitled to recover them under the waiver because the term “releasees,” in the context of the indemnification provision, did not refer to other children participating in the sport.

Following the summary-judgment ruling, Christiansen and DAHA entered into a *Pierringer* release. The district court dismissed Christiansen’s claims against DAHA based on the terms of the release. This appeal followed.

D E C I S I O N

Christiansen argues that the district court erred in granting summary judgment in favor of Kobus. This court “review[s] a district court’s summary judgment decision de novo. In doing so, [this court] determine[s] whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). Summary judgment must be granted “if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with [any] affidavits . . . show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. The moving party has the burden of showing the absence of a genuine issue of material fact. *Anderson v. State Dep’t of Nat. Res.*, 693 N.W.2d 181, 191 (Minn. 2005). A genuine issue of fact exists when reasonable minds can draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Waiver

Christiansen first argues that the waiver is ambiguous as to the term “releasees,” which creates a fact issue as to whether Kobus is covered under the waiver. Christiansen also argues that, even if Kobus is covered under the waiver, the waiver is invalid because it seeks to release greater-than-ordinary negligence. Kobus claims that Christiansen failed to raise these issues in district court. This court generally considers only issues that “were presented and considered by the [district] court.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). And a party is not allowed to switch theories on appeal. *Id.*

In his appellate brief, Christiansen states: “For purposes of this appeal, the relevant factors are whether the [waiver] was ambiguous or purported to release greater than ordinary negligence.” But Christiansen argued in district court that the issue was whether *Kobus’s conduct fell outside of the waiver* because it was greater-than-ordinary negligence. He did not assert that the waiver was ambiguous and he acknowledged that “th[e] waiver serves effectively to waive negligence, but this is about greater than ordinary negligence.”

The district court stated: “[Christiansen] . . . argues that the acts . . . of [Kobus] constitute greater than ordinary negligence, thus placing [his] conduct outside the protections of the . . . [w]aiver” The district court concluded: “As a result, [Christiansen] yields to the argument . . . that the waiver is clear, unambiguous, does not release more than ordinary negligence, does not contravene public policy, and applies to the negligent acts of . . . ‘other participants,’ including . . . Kobus.” Because Christiansen did not challenge whether Kobus was an “other participant,” which is included in the definition of “releasees” covered by the waiver, or whether the waiver was invalid for purporting to release greater-than-ordinary negligence, he forfeits those issues on appeal.

However, Christiansen argues that this court should consider whether the term “releasees” is ambiguous because the “district court created an issue” when it interpreted the term two different ways. It is this court’s responsibility to “decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s . . . failure to specify issues.” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted). When the interests of justice require it, this court may consider issues not raised by a party in district court. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010). But even in reviewing Christiansen’s claim that the waiver is ambiguous as to the term “releasees,” we still conclude that no genuine issue of material fact exists and summary judgment was appropriate.

Under certain circumstances, “parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence.” *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 922-23 (Minn. 1982). When the language

of a contract is clear and unambiguous, this court enforces the agreement of the parties as expressed in the contract. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). A contract is ambiguous if it is susceptible to more than one reasonable interpretation. *Id.* This court reviews de novo whether a contract is ambiguous. *Id.*

The waiver indicates that it “waive[s] and relieve[s] releasees from liability for personal injury . . . caused by negligence . . . of releasees.” “Releasees” is defined to include: “USA Hockey, Inc., its affiliate associations, local associations, member teams, event hosts, *other participants*, coaches, officials, sponsors, advertisers, and each of them, their officers, directors, agents and employees.” (Emphasis added.) The waiver states that, in consideration of the *participant’s* registration, “*participant* . . . waive[s], release[s] and relinquish[es] any and all claims for liability . . . arising out of participation.” (Emphasis added.) It also states that the *participant* assumes risks related to ice hockey, including “risks and dangers . . . arising from participating with bigger, faster and stronger *participants*.” (Emphasis added.)

The district court determined that Kobus was a releasee because he was an “other participant[.]” This interpretation was proper because Christiansen, as the registered hockey player, is referred to as “participant” in the waiver. Thus, the district court properly determined that Kobus, also a hockey player, was covered under the waiver as a releasee because he was an “other participant[.]”

Christiansen claims that the district court created an issue of ambiguity when it interpreted “releasee” to not include Kobus for purposes of the waiver’s indemnification provision. The waiver provides: “Participant . . . agree[s] if any claim for participant’s

personal injury . . . is commenced against releasees, he/she shall defend, indemnify and save harmless releasees from any and all claims or causes of action . . . presented for participant's personal injuries" The district court determined that this language required Christiansen to pay fees and costs incurred by DAHA, as a releasee, in defending a lawsuit precluded by the waiver. The district court determined, however, that when read in context, the indemnification provision did not "specifically identify other players such as . . . Kobus," despite the provision including the term "releasees." Christiansen claims that the district court's interpretation of "releasee" as including Kobus when waiving liability but excluding Kobus regarding indemnification renders the waiver ambiguous. The district court's conflicting interpretations, however, do not render the waiver ambiguous.

The waiver includes only one list of "releasees." "Releasees" includes "other participants." The waiver refers to the registered hockey player as "participant"; thus, the reasonable interpretation of "other participants," included as "releasees," is other hockey players participating in the sponsored events. Based on the waiver's unambiguous language, Kobus is a releasee and protected from liability under the waiver.

Greater-than-ordinary negligence

Christiansen argues that even if the waiver is valid and covers Kobus, Kobus is still liable because his conduct was greater-than-ordinary negligence not covered by the waiver. The district court concluded that no claim for greater-than-ordinary negligence was before the court because Christiansen failed to properly plead greater-than-ordinary negligence.

Christiansen asserts that he included greater-than-ordinary negligence in his complaint when he alleged that his injury “was the direct result of the negligence and carelessness of . . . Kobus.” Christiansen asserts that the word “carelessness” and his statement that “he was struck from behind” by Kobus put Kobus on notice of his claim for greater-than-ordinary negligence. But the supreme court has held that “carelessness,” construed in accordance with its recognized meaning, is synonymous with ordinary negligence. *State v. Hayes*, 244 Minn. 296, 300, 70 N.W.2d 110, 113 (1955); *see also In re Welfare of M.B.W.*, 364 N.W.2d 491, 493 (Minn. App. 1985) (stating that “ordinary negligence” resulting in property damage can constitute “careless” driving). And the allegation that “he was struck from behind” by Kobus does not, in itself, put Kobus on notice of a claim of anything more than negligence.

Because Christiansen alleged only negligent or careless conduct, and the supreme court has held that carelessness is synonymous with ordinary negligence, Christiansen failed to properly plead a greater-than-ordinary-negligence claim that would put Kobus on notice.² Because negligent acts are covered under the waiver, the district court did not err in granting summary judgment in favor of Kobus.

Affirmed.

² Christiansen could have moved to amend his complaint, but he did not do so.