

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Josh Mitchell,
Appellant-Third-Party Defendant,

v.

Deborah Mitchell and Timothy Mitchell,
Appellees-Third-Party Plaintiffs.

February 26, 2021

Court of Appeals Case No.
20A-CT-1669

Appeal from the Elkhart Superior Court

The Honorable Kristine A. Osterday, Judge

Trial Court Cause No.
20D01-2003-CT-54

Brown, Judge.

[1] Josh Mitchell appeals the trial court's order denying his motion for judgment on the pleadings. We affirm.

Facts and Procedural History

[2] On March 16, 2020, Brayden Mitchell, Josh's minor son, by his mother and next friend, Jocylen Mitchell, filed a Complaint and Jury Demand against Deborah Mitchell and Timothy Mitchell. The complaint alleged that on July 23, 2018, Brayden was left in the care of Deborah and Timothy and, while under their care, was given access to a motorcycle to ride without supervision to another property abutting their property. It also alleged that, after a lengthy amount of time, Brayden's brother looked for him and found him incapacitated near a trail on or about the abutting property. The complaint further alleged that the lack of supervision led to Brayden riding the motorcycle in a dangerous manner and/or in a dangerous location and a delay in him being found after the accident. The complaint alleged that the lack of supervision and delay between the injury and being found proximately caused his injuries. It further stated that, as a direct and proximate cause of Deborah and Timothy's negligence, Brayden suffered and will continue to suffer past and future pain and suffering, mental suffering, medical bills, economic loss, lost wages, and loss of the ability to function as a whole person. The complaint sought compensatory damages.

[3] On April 20, 2020, Deborah and Timothy filed an Answer and Third-Party Complaint. They asserted that they occasionally allowed guests to use their property for various outdoor activities including dirt-bike riding, guests are

required to sign releases on behalf of themselves and their guests before they are permitted to engage in recreational activities, and Josh signed a release on March 10, 2018, which contained an indemnification clause that was in effect on July 23, 2018. They asserted that the alleged injuries to Josh and Jocelyn's son, Brayden, arose directly from his use of their property with Josh's consent. They alleged that, if Brayden and Jocelyn recover damages against them, then Josh must indemnify them for any sums they are required to pay to Brayden or Jocelyn. They requested a judgment against Josh requiring him to indemnify, save, hold harmless, and protect them against any damages they incur in connection with Brayden and Jocelyn's lawsuit. They attached a copy of the Waiver, Release, Indemnification and Hold Harmless Agreement signed by Josh to their third-party complaint.

[4] The Waiver, Release, Indemnification and Hold Harmless Agreement, which Josh signed, states:

This Waiver, Release, Indemnification and Hold Harmless Agreement (this "Agreement"), made and entered into the 10th day of March, 2018, in favor of Deborah J. Mitchell and Timothy J. Mitchell (Owners).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and with the intent to be legally bound hereby, the undersigned hereby expressly agrees as follows:

1. Waiver and Release by Tenant. In exchange for Owners agreeing to allow the undersigned to occasionally, with advanced notice and for lawful activities, to use the Property owned by Owners off State Road 15 in Bristol, Indiana

between Antone Road and the St. Joseph River, the undersigned hereby, expressly and specifically, forever releases and discharges Owners from, of and for, and hereby releases, waives and surrenders, any and all past, present and future claims, counterclaims, demands, suits, actions, causes of actions, liabilities, obligations, damages, injuries, of any nature or kind whatsoever, including claims for personal injury or property damages, plus any and all costs, fees and expenses, including reasonable attorney's fees, whether arising at law or in equity, under the common law, federal, state, local or other law, in any manner relating to or arising from the use of Owners property (collectively Claims). Further, I hereby make all these promises, covenants, and representations, on behalf of my estate, heirs, executors, agents, representatives, employees, successors or assigns.

It is the express intention of the undersigned that this Agreement shall constitute and serve as a full, comprehensive and final general release of Owners from all such Claims.

2. **Indemnification to Owner.** The undersigned shall indemnify, save, hold harmless and protect Owners and their agents, servants, employees and contractors from and against all suits, claims, arbitrations, actions, damages, losses and expenses, including, but not limited to, counsel fees and expenses, brought by any person or entity, including but not limited to, invitees, employees, contractors or agents of the undersigned, and for all the costs of liability Owners may incur relating to any injury or alleged injury including death, to the person or property of another resulting or arising from or in any way related to the use of Owner's property. I acknowledge that this permission is specifically for me and any invitees, who have been approved by Owners. This Agreement may be revoked at any time for any reason including if this form is altered, copied or used by anyone other than myself.

Appellant's Appendix Volume II at 16.

- [5] On July 14, 2020, Josh filed an answer to the third-party complaint, affirmative defenses, and jury demand. Josh admitted that he signed the document attached to the third-party complaint and admitted that his son Brayden was injured on July 23, 2018, while in Deborah and Timothy's care. He asserted that the agreement to indemnify Deborah and Timothy was unenforceable under Indiana law, their claim for indemnity was barred by lack of consideration, they waived their indemnity claim, and they were estopped in pursuing indemnity.
- [6] On July 16, 2020, Josh filed a motion for judgment on the pleadings and a memorandum in support of the motion. He asserted that the agreement upon which Deborah and Timothy relied did not include a duty to indemnify against their own negligence as a matter of law. On July 30, 2020, Deborah and Timothy filed a response to Josh's motion. On August 6, 2020, Josh filed a reply in support of his motion.
- [7] On August 3, 2020, the trial court denied Josh's motion for judgment on the pleadings. On September 1, 2020, Josh filed a Motion to Reconsider or Alternative Petition to Certify Interlocutory Order for Appeal. On September 2, 2020, the trial court entered an order granting the motion to certify the interlocutory order for appeal. On September 10, 2020, Josh filed a motion with this Court to accept jurisdiction over the interlocutory appeal. On October 8, 2020, this Court granted Josh's motion.

Discussion

- [8] We review *de novo* a trial court’s ruling on a Rule 12(C) motion for judgment on the pleadings. *Consol. Ins. Co. v. Nat’l Water Servs., LLC*, 994 N.E.2d 1192, 1196 (Ind. Ct. App. 2013) (citing *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010)), *trans. denied*. We accept as true the well-pleaded material facts alleged in the complaint, and base our ruling solely on the pleadings. *Id.* A Rule 12(C) motion for judgment on the pleadings is to be granted “only where it is clear from the face of the complaint that under no circumstances could relief be granted.” *Id.* (quoting *Murray*, 925 N.E.2d at 731 (quoting *Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 801 (Ind. 2001) (quoting *Culver-Union Twp. Ambulance Serv. v. Steindler*, 629 N.E.2d 1231, 1235 (Ind. 1994)))).
- [9] When reviewing a Rule 12(C) motion, we may look only at the pleadings and any facts of which we may take judicial notice, with all well-pleaded material facts alleged in the complaint taken as admitted. *Id.* “The ‘pleadings’ consist of a complaint and an answer, a reply to any counterclaim, an answer to a cross-claim, a third-party complaint, and an answer to a third-party complaint.” *Id.* “Pleadings” also consist of any written instruments attached to a pleading, pursuant to Ind. Trial Rule 9.2. *Id.*; *see also* Ind. Trial Rule 10(C) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”).
- [10] Josh argues the agreement does not include a duty to defend against Deborah and Timothy’s own negligence. He asserts the agreement does not explicitly and unambiguously extend to encompass the negligence of Deborah and

Timothy in supervising their grandson and shift the legal liability for Brayden’s claims to him. Deborah and Timothy argue “[t]he plain wording of the release describes premises-liability claims – which are negligence claims – and indemnifies [them] from all claims brought by certain claimants arising from their activities on the property.” Appellees’ Brief at 12. In reply, Josh argues that Brayden’s complaint does not allege that Deborah and Timothy’s duty of care arises from their ownership of the land but from their breach of duty to supervise him.

[11] Interpretation of a contract is a pure question of law and thus, is reviewed *de novo*. *Harrison v. Thomas*, 761 N.E.2d 816, 818 (Ind. 2002). Generally, with respect to indemnification clauses, the Indiana Supreme Court has held:

At one time, Indiana flatly prohibited at least some contracts for indemnity against a party’s own negligence. We later retreated from that prohibition and now generally allow parties, as a matter of freedom of contract, “to allocate risk by contract”—including by agreeing to “indemnification for one’s own negligence.” *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1130 (Ind. 1995) (citing *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 578 N.E.2d 669, 670 (Ind. 1991)). Even so, indemnity provisions are strictly construed – we treat them as “disfavor[ed] . . . because we are mindful that to obligate one party to pay for the negligence of another is a harsh burden that no party would lightly accept.” *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 757 (Ind. Ct. App. 2002). Accordingly, indemnity is permissible only if the contract language shows in “clear and unequivocal terms” that the obligated party “knowingly and willingly agrees to such indemnification.” *Id.*

In re Indiana State Fair Litig., 49 N.E.3d 545, 548-549 (Ind. 2016) (some citations omitted).

[12] The complaint against Deborah and Timothy alleged in part that the “lack of supervision led to the minor child riding in a dangerous manner and/or in a dangerous *location*.” Appellant’s Appendix Volume II at 8 (emphasis added). While the initial complaint asserted that Brayden was found incapacitated near a trail on or about the abutting property, it did not specify if the accident occurred before or after he entered the abutting property. In their third-party complaint, Deborah and Timothy alleged that Brayden was in an accident while riding a motorcycle on their property and that the “alleged injuries and damages arise directly from his use of the property with his parents’ consent.” *Id.* at 14. The indemnification clause states that Josh shall indemnify Deborah and Timothy from and against all suits, claims, arbitrations, actions, damages, losses, and expenses resulting or arising from or in any way related to the use of Deborah and Timothy’s property. Under these circumstances and based upon the pleadings, we conclude that the trial court did not err in denying Josh’s motion for judgment on the pleadings.

[13] For the foregoing reasons, we affirm the trial court’s order.

[14] Affirmed.

Vaidik, J., and Pyle, J., concur.