## MEMORANDUM DECISION




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# IN THE
# COURT OF APPEALS OF INDIANA

Brice Kennedy, et al.,

*Appellants-Plaintiffs*,

v.

Mooresville Consolidated School Corporation,

*Appellee-Defendant*.

November 24, 2021

Court of Appeals Case No. 21A-CT-830

Appeal from the Morgan Superior Court

The Honorable Sara A. Dungan, Judge

Trial Court Cause No. 55D03-1902-CT-308

**Brown, Judge.**

[1] Brice Kennedy ("Brice") and his parents (collectively, "Plaintiffs") appeal the trial court's entry of summary judgment in favor of Mooresville Consolidated School Corporation ("MCSC"). We reverse and remand.

## *Facts and Procedural History*

[2] On July 12, 2016, then twelve-year old, Brice, and his father, Brian Kennedy, signed an "Online Signature Page" which states in part:

> STUDENT ACCIDENT INSURANCE
>
> I have carefully read about Student Accident Insurance Coverage and accessed the online link provided Here. My signature below indicates I have been provided with the information on how to obtain Student Accident Insurance and school and school employees will not be liable to injuries occurred during participation that occur with the sport.
>
> Check here to confirm Yes
>
> INHERENT RISK IN PARTICIPATION
>
> My child and I have carefully read the Inherent Risk in Participation document[1] accessed through the online link provided Here. I accept and understand that there are inherent risks that are associated with participation in my child's chosen sport and that the school and employees will not be liable to injuries that occur during participation within that sport.
>
> Check here to confirm Yes
>
> CONCUSSION and SUDDEN CARDIAC ARREST

[1] The designated evidence does not include a copy of the Inherent Risk in Participation document.

* * * * *

> As a student athlete, I have received and read both of the fact sheets regarding concussion Here and sudden cardiac arrest Here. I understand the nature and risk of concussion and head injury to student athletes, including the risks of continuing to play after concussion or head injury, and the symptoms of sudden cardiac arrest.
>
> Click here to confirm Yes
>
> I, as the parent or legal guardian of the above named student, have received and read both of the fact sheets regarding concussion Here and sudden cardiac arrest Here. I understand the nature and risk of concussion and head injury to student athletes, including the risks of continuing to play after concussion or head injury, and the symptoms of sudden cardiac arrest.
>
> Click here to confirm Yes

Appellants' Appendix Volume II at 77.

[3] The 2016-2017 season was Brice's first year participating on the dive team. At some point prior to February 14, 2017, Nicholas Huether, the Paul Hadley Middle School Head Swim Coach who was a certified swim coach through USA Swimming, asked Brice and Keith Payne, members of the middle school dive team, if they wanted the opportunity to participate in a freestyle relay swimming event.

[4] On February 14, 2017, Keith and Brice were scheduled to participate in a diving competition and a 200 freestyle relay at a swim meet. Coach Huether was present along with Head Diving Coach Corey Ervin and Assistant Diving Coach Briana Lee Paige-Ongay. While they were practicing for the relay

shortly before the meet, Keith entered the water, suffered a scraped nose and nosebleed, and exited the pool at the far end. Brice dove in, did a tuck, and "headed straight for the bottom of the pool."[2] Appellants' Appendix Volume III at 60. Brice struck the bottom of the pool, surfaced, and appeared dazed. He suffered a concussion, headaches, and issues with short-term memory.

[5] On February 12, 2019, Brice and his parents filed a complaint against MCSC. They alleged that employees and coaches of MCSC carelessly and negligently failed to: allow sufficient time to adequately practice and train Brice to compete as a member of the swim team; properly instruct, direct, and supervise his practice using the swimming blocks; and provide proper medical attention to him following his injuries. They alleged he suffered injuries as a direct and proximate result of MCSC's negligence. On March 18, 2019, MCSC filed an answer and affirmative defenses.

[6] On July 6, 2020, MCSC filed a motion for summary judgment. On February 2, 2021, Plaintiffs filed a brief in opposition to the motion. Plaintiffs' designated evidence included Brice's deposition in which he asserted he had never participated with the swimming team and their practices, he never had swimming lessons before joining the diving team, and the diving team did not teach him how to swim. When asked if he received any instruction from his

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[2] Coach Huether testified that "[a] tuck would be where you bend your body so if you're going off the block, you're heading in a straight line. [Brice] went off and then tucked his body as though he would be doing a dive off of the diving board." Appellants' Appendix Volume III at 60. He also testified that tuck dives are a style of competitive diving and something Brice would have learned as a member of the dive team.

swimming or diving coaches on how to dive from the side of the pool or off the starting blocks, he answered in the negative. He indicated Coach Huether helped teach him how to go off the blocks. When asked what kind of instruction he provided, Brice answered: "I don't remember the exact thing he said, but I know it was more going off like normally off the diving board kind of, but it wasn't very clear I guess." *Id.* at 30. He stated that neither Coach Huether nor anyone else explained the difference between diving when one is diving off the board versus diving into more shallow water.

[7] On March 16, 2021, the court held a hearing.[3] On April 8, 2021, it entered an order granting MCSC's motion for summary judgment. The order states:

> The Plaintiff child involved chose to participate in diving and a swim relay the evening of the injury. The parties were aware the Plaintiff child was going to be participating in a swim relay prior to the date of the injury. The evidence supports that the Plaintiffs were aware the online release/waiver applied to all sports the Plaintiff child participated in that school year. The evidence does not support a distinction of swim team versus dive team as the Plaintiffs argue, therefore, the online release/waiver still applies. The online release/waiver was not so vague, misleading or ambiguous such that it should not be enforced.
>
> Getting injured when jumping or diving into the shallow end of a pool is an inherent risk to the sport of swimming. In particular, hitting one's head on the bottom of the pool, when diving off the starting blocks or the side of the pool, is an inherent risk to the sport of swimming. The child in this case was injured when he

[3] The record does not contain a transcript of the hearing.

> dove too deep off the starting blocks into the pool's known shallow end. Therefore, the Court agrees with Defendant that the injuries incurred were from an inherent risk covered by the online release/waiver. Plaintiffs waived their right through the online release/waiver to hold Defendant responsible for injuries from this inherent risk.

Appellants' Appendix Volume II at 15-16.

### *Discussion*

[8] The issue is whether the trial court erred in entering summary judgment in favor of MCSC. We review an order for summary judgment *de novo*, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* We construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. *Id.* In the summary judgment context, we are not bound by the trial court's specific findings of fact and conclusions of law. *Rice v. Strunk*, 670 N.E.2d 1280, 1283 (Ind. 1996). They merely aid our review by providing us with a statement of reasons for the trial court's actions. *Id.* Summary judgment is rarely appropriate in negligence cases because they are particularly fact-sensitive and

are governed by a standard of the objective reasonable person, which is best applied by a jury after hearing all the evidence. *Kramer v. Catholic Charities of Diocese of Fort Wayne–S. Bend, Inc.*, 32 N.E.3d 227, 231 (Ind. 2015).

[9] Plaintiffs argue that relying on the Online Signature Page was inappropriate because Brice's chosen sport was diving, not swimming. They assert that the Online Signature Page does not refer to multiple sports and refers to a chosen sport in the singular. They contend that a genuine issue of material fact exists regarding whether the inherent risks of diving or swimming should apply when Brice was a diver on the dive team. They argue that Brice was a novice and spent two months training as a diver and was asked to participate in a swimming event only two days before a scheduled meet.

[10] MCSC asserts the trial court correctly granted summary judgment based upon the signed Online Signature Page. They note that the issue on appeal relates to waiver or release of liability and that the issue of negligent instruction or supervision is not at issue in this appeal.

[11] "Interpretation of a contract is a pure question of law and is reviewed de novo." *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d 249, 252 (Ind. 2005). "[R]elease documents shall be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document governing." *OEC-Diasonics, Inc. v. Major*, 674 N.E.2d 1312, 1314 (Ind. 1996) (quoting *Huffman v. Monroe Cty. Cmty. Sch. Corp.*, 588 N.E.2d 1264, 1267 (Ind. 1992)). If a contract's terms are clear and unambiguous, courts must

give those terms their clear and ordinary meaning. *Dunn*, 836 N.E.2d at 252. Courts should interpret a contract so as to harmonize its provisions, rather than place them in conflict. *Id.* "We will make all attempts to construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless." *Rogers v. Lockard*, 767 N.E.2d 982, 992 (Ind. Ct. App. 2002). Generally, an ambiguous contract will be construed against its drafter. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1132 (Ind. 1995). "If a contract is ambiguous solely because of the language used in the contract and not because of extrinsic facts, then its construction is purely a question of law to be determined by the trial court." *Id.* at 1133. "A contract will be found to be ambiguous only if reasonable persons would differ as to the meaning of its terms." *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 528 (Ind. 2002), *reh'g denied*. "Rules of contract construction and extrinsic evidence may be employed in giving effect to the parties' reasonable expectations." *Johnson v. Johnson*, 920 N.E.2d 253, 256 (Ind. 2010). "When a contract's terms are ambiguous or uncertain and its interpretation requires extrinsic evidence, its construction is a matter for the factfinder." *Id.*

[12] With respect to the Online Signature Page, we note that the release does not define "chosen sport." Rather, it is silent as to whether "chosen sport" refers to all sports a student may participate in during the school year, even sports a student does not practice, or if it refers only to the specific sport for which a student signed up to participate.

[13] As to whether Brice's "chosen sport" was swimming or whether the diving team and the swimming team constituted the same team, the designated evidence at least suggests that the swim team and the diving team were two separate "sports" with separate practices, different coaches, and separate instruction. In his deposition, Brice asserted that he was on the diving team, he had never participated with the swimming team and their practices, he never had swimming lessons before joining the diving team, and the diving team did not teach him how to swim. When asked how he knew Brice and Keith, Coach Ervin answered that they were "members of the diving team." Appellants' Appendix Volume III at 71. While he asserted that the diving team and swimming team were "all one team," he also acknowledged that there was a separate swim coach. *Id.* While Coach Paige-Ongay stated in her deposition that the dive team and swim team were all one team, she also said that the divers and swimmers "practice completely different." *Id.* at 122. In his deposition, when asked if Brice was on the swim team at any time, Coach Huether answered: "Not to my knowledge." *Id.* at 49. He stated that Brice was a part of the dive team and, "[n]ow, the teams are together as one team, but we practice separately." *Id.* Moreover, the designated evidence does not include a copy of the Inherent Risk in Participation document, which was referenced in the Online Signature Page. Under these circumstances, and resolving all doubts as to the existence of a material issue against the moving party, we cannot say

as a matter of law that summary judgment in favor of MCSC was proper based merely on the Online Signature Page.[4]

[14] For the foregoing reasons, we reverse the entry of summary judgment in favor of MCSC and remand for further proceedings.

[15] Reversed and remanded.

Najam, J., and Riley, J., concur.

[4] As noted, MCSC asserts that the issue of negligent instruction or supervision is not at issue in this appeal, and we express no opinion on those aspects of the case.