

CANADA / JUDGMENT

Arndt v. The Ruskin Slo Pitch Association

2011 BCSC 1530

COURT

Supreme Court of British Columbia

DECIDED

10 November 2011

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2011 BCSC Arndt v. The Ruskin Slo Pitch Association

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Arndt v. The Ruskin Slo Pitch Association,

2011 BCSC 1530

Date: 20111110

Docket: S098518

Registry: Vancouver

Between:

Danielle Arndt

Plaintiff

And

The Ruskin Slo Pitch Association, Slo Pitch National Softball Inc., District of Maple Ridge, John Doe #1 and John Doe #2

Defendants

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the plaintiff:

D.M. Mah

Counsel for the defendants:

L.C. Galvin

K. Wigmore

Place and Date of Hearing:

Vancouver, B.C.

October 7, 2011

Place and Date of Judgment:

Vancouver, B.C.

November 10, 2011

- [1] The plaintiff was injured on June 8, 2009 when she stepped in a hole on a softball field while running to catch a fly ball. The defendants apply under Rule 9-7 for summary judgment to dismiss on the basis of a waiver signed by the plaintiff.
- [2] Counsel agree the waiver, if effective, covers all of the defendants and also covers the injuries sustained by the plaintiff. The plaintiff takes the position that she is not bound by the waiver.

BACKGROUND

- [3] The President of the Ruskin Slo Pitch Association ("the Association") Mr. Gosselin, filed an affidavit. He deposed that the Association is an affiliated league of the Slo Pitch National Softball Inc. organization, and pays a fee of \$2,250 to belong to the league. The Association is a non profit organization that operates a recreational league in Maple Ridge, British Columbia. In 2009, there were 30 teams in the league, with 450 players. The Association rents various fields from the District of Maple Ridge.
- [4] At the beginning of the 2009 season, Mr. Gosselin held a meeting of team captains, as he did every year. He deposed that "The purpose of the meeting is to sign up teams and to provide information about the upcoming softball season".
- [5] At the team meeting, Mr. Gosselin provided a document to the team captains. He deposed that he always informs team captains that each player on their team needs to read and sign the Release and Team Roster form in order to participate in softball games. The affidavit states: "Generally, the team captains then take the Release and Team Roster back to their teams and ask the players to sign the document."
- [6] Before being allowed to play in the league, a team must submit the form signed by all players.
- [7] The plaintiff deposed that she is a financial services representative for TD Canada Trust. She has played softball for over 20 years, but has never been a coach or a team captain.

[8] In 2009, the plaintiff signed up to play for the Longnecks team in the Association and paid her registration fee. She deposes that she understood she needed to sign a team roster in order to play with the Longnecks. She had signed the rosters before. The team roster was provided to her by her coach, Mr. Vanderwal. In her affidavit, she states:

I do not remember exactly when Mr. Vanderwal gave me the team roster to sign but it was when we were together on the field warming up for the first time. Mr. Vanderwal had the team roster on a clipboard and it was passed around for me to sign before passing it on to the other players to sign. Mr. Vanderwal did not tell me what the purpose of the team roster was and did not provide me with any instructions on how to fill out the team roster. Mr. Vanderwal did not explain to me that the team roster included a waiver and did not direct my attention to the back side of the team roster which contains the waiver. I do not recall noticing any printing on the backside of the team roster. Mr. Vanderwal did not explain to me that by signing the team roster, I would waive my right to sue if I was injured by someone else's negligence.

I did not ask Mr. Vanderwal any questions and was not given the opportunity to read the team roster because I understood that I needed to sign the team roster in order that the league could track the players on our team and I could play softball. As instructed, I signed the team roster in the middle of warm up and then, passed it along I was not required to have anyone witness my signature.

When I signed the team roster, I do not recall noticing, seeing, or reading the words "I agree to waiver" under my signature. When I signed the team roster, I was under the impression that I was signing a team roster only. I did not understand that I was agreeing to a wavier and had no intention to agree to a waiver. I was not told or advised that I needed to sign a waiver before I could play softball.

When I signed the form, no one from the Ruskin Slo Pitch Association or Slo Pitch National Softball Inc. told me what the purpose of the team roster was, provided me with any instructions on how to fill out the team roster, explained to me that the team roster included a waiver, directed my attention to the back side of the team roster which contains the wavier, explained to me that by signing the team roster, I would waive my right to sue if I was injured by someone else's negligence, or advised that I needed to sign a waiver before I could play softball.

I was not provided with a copy of the team roster after I signed it.

[9] A similar affidavit was provided by two of Ms. Arndt's teammates.

[10] On examination for discovery, Ms. Arndt admitted she knew what a waiver was. She provides documents for clients to sign in the course of her work, although she did not say she dealt with waivers. She deals with applications for credit and mortgages. Most of the time she explains a document to clients and they sign it without reading it.

- [11] The plaintiff said she had signed the roster every year, had asked no questions about it and was given no instructions. She said she did not see the reverse side of the form until after she was hurt. She was asked if she recalled if there was writing in red saying "I agree to waiver" on the form she signed and she said "I honestly don't know."

THE WAIVER

- [12] The document is an 8 x 11 sheet, closely and completely filled out across the width of the form with various pieces of information, and is entitled [*italics are used in this text to indicate red type on the original document*]:

SLO-PITCH NATIONAL SOFTBALL INC. - RELEASE OF LIABILITY, ASSUMPTION OF RISK
AGREEMENT AND TEAM MEMBERSHIP/ROSTER APPLICATION FOR YEAR 20__

TYPE OR PRINT CLEARLY - YOU ARE MAKING 2 COPIES

- [13] The date is not filled in.

- [14] This heading is following by various boxes and lines to be filled in with general information about the team.

- [15] Just above the middle of the page, the following words appear in red font about 1/8" high:

READ AND UNDERSTAND BACK OF PAGE BEFORE SIGNING RELEASE AND ASSUMPTION: IN SIGNING THIS FORM, I DECLARE THAT I HAVE READ AND UNDERSTAND FULLY THE DETAILS OF THE "RELEASE AND ASSUMPTION AGREEMENT" ON THE REVERSE AND AGREE TO RELEASE FROM LIABILITY AND WAIVE ALL CLAIMS.

- [16] Under these words is a box with lines for 20 names, requiring the following information: name, sex, date of birth, full address, telephone number and signature. Under the portion allowed for the signature, the words "I agree to waiver" appear in very faint small red type.

- [17] Under the box for the names, the following words appear in very small red type:

MANAGERS/COACHES: **I, the undersigned, hereby declare that I have read, accept and understand fully the details of the "Release and Assumption Agreement" on the reverse. PLAYING MANAGER/COACHES MUST ALSO SIGN IN THE PLAYER SECTION.

- [18] Under those words, there is a box containing three lines for the coach and managers to provide the same information that is required from the players.

- [19] On the bottom of the form, in red type, the following words appear:

Return Original Copy to #101 11410 Kingston St., Maple Ridge, BC V2X 0Y5

NOTE: MEMBERS MUST BE A FULL TIME CANADIAN RESIDENT AND 18 YEARS OF AGE TO SIGN. - SEE REVERSE FOR DETAILS -

- [20] On the other side of the form, printed lengthwise, is the release, in black type. It is headed:

PLEASE READ COMPLETELY AND UNDERSTAND FULLY BEFORE SIGNING

RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT

VOLUNTARY DISCLOSURE CONSENT

In signing this form, I declare that all the information herein is valid and am aware that SLO-PITCH NATIONAL SOFTBALL INC., or its agents may contact any persons or sources necessary for verification of validity. I am aware that my signature hereon may be used for verification of legality in protests. I warrant that I am physically fit to participate and that I am of legal age to sign this agreement OR have read and completed fully the "UNDER EIGHTEEN YEARS OF AGE" section below. I am aware that events may not allow the participation of minors or persons under the age of eighteen years.

[21] This is followed by a box about 4 inches in length containing the words:

****WAIVER OF RESPONSIBILITY, RELEASE OF LIABILITY AND ASSUMPTION OF RISK**

and the substance of the waiver, which counsel agree covers these defendants and this injury.

[22] Under the box, there is a portion of the form devoted to **"**MANAGERS/COACHES RESPONSIBILITIES"** which includes the sentence:

I agree to make all reasonable effort to control the conduct of all team members, staff, accompanying personnel and fans and/or family members and will advise said persons that they are fully responsible for any damage caused or incurred by them. [emphasis in original]

[23] The bottom third of the page contains a form to be filled in and signed by players between 16 and 18 years of age, and by their parents.

POSITIONS OF THE PARTIES

[24] The parties agree on the law. The basic test is set out in *Karroll v. Silver Star Mountain Resorts Ltd* (1988), 33 B.C.L.R. (2d) 160. The exceptions to the basic proposition that a party is bound by a document she signs, according to *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 (C.A.), are:

- the document was signed in circumstances which made it not her act (non est factum)
- the document was induced by fraud or misrepresentation.

[25] A third exception was added in *Tilden Rent-A-Car v. Clendenning* (1978), 18 O.R. (2d) 601:

-Where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, those terms should not be enforced.

[26] *McLauchlin C.J.S.C.* (as she then was) said at para. 24 of *Karroll*:

It emerges from these authorities that there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

The case law

[27] Counsel went through a number of cases supporting their respective positions.

Karroll v. Silver Star, *supra*

The plaintiff was injured in a downhill ski race. Prior to the race, she signed a one page document entitled "Release and Indemnity - Please read carefully." She knew it was a legal document which affected her rights - she explained to her friend that she had to sign it to race, and it precluded her from suing the mountain if she fell and hurt herself of her own accord. The release was short and easy to read. Signing releases was a common feature of the ski race.

The plaintiff was bound by the release. A reasonable person would conclude she agreed to the terms of the release, and in any event, the defendant took reasonable steps through the capitalized heading, to bring the contents of the document to her attention.

Mayer v. Big White Ski Resort Ltd., 1997 CarswellBC 836 (BCSC In Chambers)

The plaintiff was injured while skiing at Big White when he collided with a snowmobile. He had signed and dated a release at the time he received his season's pass. The release was on single piece of paper, headed: "Release liability, Waiver of claims, Assumption of risks and Indemnity Agreement". He was in a long line up and was told he had to sign the document to get his pass. The plaintiff maintained he did not read it or appreciate its nature or content.

The court held that the plaintiff chose not to read the document and could not rely on his own carelessness in failing to do so. The release was binding.

Loychuk v. Cougar Mountain Adventures Ltd., 2011 BCSC 193

The plaintiffs were injured when they collided on a zip line due to a miscommunication between the operators of the line. One plaintiff was a law school graduate, taking the Professional Legal Training Course. The other was a businesswoman who required clients of her gymnasium to sign waivers. Prior to being strapped into the zip line harness, they had each signed a one page release, headed "Release of Liability, Waiver of Claims and Assumption of Risk Agreement". They were given sufficient time to read it. The document was witnessed. The release was held to be enforceable.

Ocsko v. Cypress Bowl Recreations Lt.d (1992), 74 B.C.L.R. (2d) 159 (BCCA)

The plaintiff, an experienced skier, was injured skiing. He had signed a one page release at the time he purchased a season pass. He was not under pressure to sign. The court held that there were no circumstances that would have caused the defendant to conclude that he was not consenting to the terms. The release was enforceable.

Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186

The plaintiff was injured in a rube race run by the defendant. A few days before the race he had signed an "Official Entry Form and Waiver". The trial judge found the waiver provision in the form was not drawn to the plaintiff's attention, he did not read it and did not know of its existence. He thought he was simply signing an entry form. Relying on the trial judge's findings of fact, the SCC held that the waiver was not binding.

Lafontaine v. Prince George Auto Racing Assn., 45 A.C.W.S. (3d) 419 (BCSC)

The plaintiff's husband was killed on a race track. The husband had signed an application for membership in the racing association, which included a "release and waiver of liability and indemnity agreement" above his signature. The release was also reproduced in the association's rule book. The husband had also signed a further release which was required prior to entering the pit area of the race track, and had in fact signed 16 similar releases in the two years prior to the accident.

Taking all of this into account, as well as the husband's knowledge of the sport and the way it was organized, the court found the release to be enforceable.

Clarke v. Action Driving School Ltd., 62 A.C.W.S. (3d) 1240 (BCSC)

The plaintiff was injured while learning to ride a motorcycle. He had signed an application form containing a release at the desk. He was an educated professional, asked no questions, and signed below the waiver. His signature was witnessed. He had the opportunity to read the document if he wished to do so. The court found that he had adequate notice of the waiver and it was enforceable.

Parker v. Ingalls, 2006 BCSC 942

The plaintiff was injured during a demonstration at a martial arts studio. There were a number of documents signed over time, but the only one that had a bearing on the actual time of injury was an enrolment form containing student information, and under that a "liability waiver" of one paragraph, after which the document contained boxes for other information. The document was signed by the plaintiff. The plaintiff said he did not read the waiver, and understood the purpose of the document was to ensure that he was responsible for making payments. The court held that the liability waiver portion was printed in very small font and did not refer to negligence. It was not explained or discussed and no provision drew the student's attention to the fact that by

signing, he was waiving his legal rights. No reasonable steps were taken to bring the contents of the waiver to the plaintiff's attention and a reasonable person would have known he did not agree to release the defendant from negligently injuring him.

Defendants' position

- [28] Counsel for the defendants says the Association is a non profit organization, and can only survive if the players sign waivers of liability.
- [29] The defendants say the plaintiff cannot escape the consequences of the waiver merely by stating that she thought she was signing a roster and did not appreciate it was also a waiver. That is, the exception of non est factum does not apply.
- [30] Since this is not a case of fraud or misrepresentation, the plaintiff must show that a reasonable person would know she did not intend to agree to waive her rights, and that the defendants failed to take reasonable steps to bring the content of the waiver to her attention. Here, the plaintiff, a knowledgeable businesswoman who deals with legal documents in her work, should have known what she was signing. The capitalized statements in red on the face of the documents and the words "I agree to waiver" on the line where she had to sign were sufficient to alert anyone to the nature of the document. The waiver language itself is clear and unambiguous.

Plaintiff's position

- [31] The plaintiff says the defendant bears the burden of proving the waiver was drawn to her attention. They have not done so.
- [32] In every case where a waiver has been held to be enforceable, it has been printed on a separate sheet with a signature line under the applicable provisions.
- [33] Here, the plaintiff thought she was signing a team roster - that is what it looks like and that is what it was assumed to be. The "waiver" information is hidden within the roster requirements. She was not provided with any explanation, nor was she given an opportunity to read the document which was simply passed around at the first practice, attached to a clipboard. She knew she had to sign the roster to be allowed to play. Thus the act of signing the document was not the act of signing a waiver.
- [34] Given the nature of the document and the circumstances under which it was presented to the plaintiff, there were no reasonable steps taken by the defendants to ensure she understood what she was signing. The defendants simply left it to the coaches/managers to explain what the document was and to ensure it was signed by all players. There was no system in place to ensure that the players had had the nature of the document explained to them. The coaches and managers have provided no evidence to show that the plaintiff and the other players were advised of the release, nor that anyone was directed to the back of the document. There was no signature on the actual release on the back of the document. The document was not witnessed. The plaintiff did not get a copy. Although the plaintiff deals

with legal documents in her work, she does not give legal advice nor does she deal with waivers.

- [35] The plaintiff also submits that the lack of a date on the face of the document means it is not enforceable, and that no consideration flowed from the signing. That is, the fee and registration took place sometime earlier so no consideration passed at the time the document was signed.

DISCUSSION

- [36] On the affidavit and discovery evidence before me, I accept that the plaintiff thought she was signing a team roster and that she did not know it was a waiver of liability. However, the defendants are correct in stating that that is not the end of the enquiry. I agree with the defendants that the relevant analysis in this case must take place under the third exception. The first two exceptions - non est factum and fraud or misrepresentation - are not applicable.
- [37] As noted by McLachlin C.J.S.C. (as she then was) in *Karrol*, there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that she reads and understands them, unless a reasonable person would conclude that the plaintiff was not agreeing to the terms of the release when she signed the document.
- [38] The issue is whether a reasonable person would know that the plaintiff did not intend to agree to a liability release. If the answer is yes, then the waiver's enforceability depends on whether or not reasonable steps were taken to bring the waiver to the plaintiff's attention.
- [39] In the circumstances here, the method in place for obtaining signatures is such that the defendants themselves do not tender the document for signature. On its face, the document has a dual purpose. The defendants have no particular method to ensure that the document is presented in such a way as to facilitate understanding of its terms, other than the general instructions given by Mr. Gosselin to the team managers and coaches, and there is no evidence that the defendants have any system in place to check to see that the coaches or managers have told the players about the document. Nor is there any evidence from the coach or manager about the circumstances under which the document was signed by the plaintiff and the players, or what, if anything, was said at the time.
- [40] Since the presentation and signing of the document takes place in circumstances outside the defendants' knowledge and control, there is no follow-up, and there is no evidence the coach or manager did anything other than attach the document to a clipboard and have the players sign it as a roster, I am not persuaded that a reasonable person in the defendants' position would conclude that the plaintiff was agreeing to sign a release of liability.

- [41] The issue then becomes whether the defendants took reasonable steps to ensure the plaintiff understood the nature of the document when she signed it. On the evidence presently before the court, that comes down solely to the face of the document itself because there is no evidence that the coach or manager drew the players' attention to the waiver, as they were apparently expected by Mr. Gosselin to do.
- [42] The considerations taken into account by courts in determining whether a plaintiff is bound by a waiver include:
- is the effect of the exclusion clause contrary to normal expectations?
 - what is the format?
 - how long is the document?
 - how much time was made available to read it?
- [43] This is a non-profit softball league, so the general concept of a waiver of liability would not be contrary to normal expectations. That leaves the question of whether it would be contrary to normal expectations to have a waiver included as part of a team roster. I am of the view that one would not normally expect a signature on a team roster to also be a waiver of liability.
- [44] The document, looked at on its face, does not appear to be a waiver. It appears to be a roster. The attention of the person asked to sign it as a roster would inevitably be drawn to the lines in the box for the team signatures and information. While there is red type above the box requiring the person to "READ AND UNDERSTAND BACK OF PAGE BEFORE SIGNING" there was, on the evidence on this application, no direction or information given by the coach who presented the document attached to a clipboard, to be handed around and signed by the team at the first practice. The words "I agree to waiver" on the signature lines are so faint as to almost undetectable. Unlike the waivers that have been held to be enforceable in the cases referred to above, the release is not a separate sheet and the waiver and signature are not on the same page. The back of the form requires the coach to advise the people on the list that they are fully responsible for any damages "incurred by them". That was not done, nor was any step taken by the defendants to ensure it had been done.
- [45] If the defendants wanted to ensure that they were released from liability it would be a simple matter to have individual release forms prepared and signed by each player. The defendants had no means of determining if the plaintiff understood the document because they did not present it to her, leaving its nature to be explained by coaches or managers who did not do so. The form of the document itself and the circumstances under which it was presented for signature are not such that a reasonable observer would understand its nature. I am unable to conclude that the defendants took reasonable steps to have the nature of the document as a waiver rather than a team roster brought to the plaintiff's attention.

- [46] I conclude, on the information before me, that the waiver is not enforceable against the plaintiff. It is not necessary to deal with the plaintiff's additional arguments respecting consideration and the failure to date the document.
- [47] Based on the material before me on this application, I dismiss the defendants' application for dismissal of the action based upon the release. None of the findings or comments I have made in respect of the evidence are to be considered binding on the trial judge in respect of any issues before him or her.
- [48] Unless there is a reason counsel wish to address costs not evidence on the material before me, they will be in the cause.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humpries

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