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§ 44-2828 of the NHMLA was applicable to this case and subject to tolling under § 25-213 for a mental disorder and that there were genuine issues of material fact regarding whether and on what dates the action was tolled. The Court of Appeals correctly reversed the summary judgment entered in favor of the doctors and remanded the cause for further proceedings.

AFFIRMED.

WRIGHT and CONNOLLY, JJ., not participating.

APRIL PALMER, APPELLANT, V. LAKESIDE WELLNESS CENTER, DOING BUSINESS AS ALEGENT HEALTH, AND PRECOR, INC., APPELLEES.

798 N.W.2d 845

Filed June 24, 2011. No. S-10-974.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Parties: Intent.** In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them.
4. **Contracts: Parties.** The right of a third party benefited by a contract to sue must affirmatively appear from the language of the instrument when properly interpreted or construed.
5. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
6. **Negligence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.
7. **Negligence: Summary Judgment.** The issue of gross negligence is susceptible to resolution in a motion for summary judgment.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Heather Voegele-Andersen and Brenda K. George, of Koley Jessen, P.C., L.L.O., for appellant.

David L. Welch and Ashley E. Dieckman, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Lakeside Wellness Center.

Albert M. Engles and Cory J. Kerger, of Engles, Ketcham, Olson & Keith, P.C., for appellee Precor, Inc.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

HEAVICAN, C.J.

INTRODUCTION

The appellant, April Palmer, was injured while on a treadmill at Lakeside Wellness Center (Lakeside). The district court granted summary judgment in favor of Lakeside, doing business as Alegent Health, and Precor, Inc. Palmer appeals. We affirm.

FACTUAL BACKGROUND

Palmer's Accident.

Palmer and her husband joined Lakeside in November 2006. The accident occurred several months later, on March 7, 2007. On that date, Palmer approached the treadmill in question to begin her workout. Unaware that the treadmill belt was running, Palmer stepped onto the treadmill from the back and was thrown off the belt and into an elliptical training machine located behind her. During her deposition, Palmer stated that she looked at the treadmill's control panel before getting on, but did not look at the belt of the treadmill. Palmer indicated that had she looked at the belt, she probably would have been able to see that it was operating, but that since she assumed the treadmill was off, she did not look further. According to Palmer, she thought the area was poorly lit, though she had never complained about it to any Lakeside staff members. And Palmer indicated that the facility was loud and that she was unable to hear whether the machine was operating.

This treadmill was located in a row of treadmills, and the treadmills to the right and left of the machine in question were

being used at the time of the accident. In Palmer's husband's deposition, he testified that the woman on a neighboring treadmill told him she had been on that treadmill briefly before switching to the neighboring machine and had mistakenly thought she had turned it off.

Palmer's Familiarity With Treadmills.

During her deposition, Palmer was asked about her exercise history and her familiarity with treadmills. Palmer testified that she and her husband had been members of other gyms prior to joining Lakeside. Palmer testified that she received instruction from a trainer after joining Lakeside, though she stated that she did not need specific instruction on how to operate a treadmill. According to Palmer's testimony, she had been using treadmills for approximately 21 years. At the time of the accident, Palmer had been using the Lakeside facility at least 5 times a week and had used that actual treadmill 10 to 15 times total prior to the accident. Palmer also testified that she had a treadmill in her home.

Palmer's Membership Agreement and Health History Questionnaire.

At the time Palmer and her husband became members at Lakeside, Palmer filled out and signed a membership agreement and a health history questionnaire. The membership agreement provided:

> WAIVER AND RELEASE—You acknowledge that your attendance or use of [Lakeside] including without limitation to your participation in any of [Lakeside's] programs or activities and your use of [Lakeside's] equipment and facilities, and transportation provided by [Lakeside] could cause injury to you. In consideration of your membership in [Lakeside], you hereby assume all risks of injury which may result from or arise out of your attendance at or use of [Lakeside] or its equipment, activities, facilities, or transportation; and you agree, on behalf of yourself and your heirs, executors, administrators, and assigns to fully and forever release and discharge [Lakeside] and affiliates and their respective officers, directors, employees, agents,

> successors and assigns, and each of them (collectively the "Releasees") from any and all claims, damages, rights of action or causes of action, present or future, known or unknown, anticipated or unanticipated, resulting from or arising out of your attendance at or use of [Lakeside] or its equipment, activities, facilities or transportation, including without limitation any claims, damages, demands, rights of action or causes of action resulting from or arising out of the negligence of the Releasees. Further, you hereby agree to waive any and all such claims, damages, demands, rights of action or causes of action. Further you hereby agree to release and discharge the Releasees from any and all liability for any loss or theft of, or damage to, personal property. You acknowledge that you have carefully read this waiver and release and fully understand that it is a waiver and release of liability.

The health history questionnaire signed by Palmer stated in relevant part as follows:

> 1. In consideration of being allowed to participate in the activities and programs of [Lakeside] and to use its facilities, equipment and machinery in addition to the payment of any fee or charge, I do hereby waive, release and forever discharge [Lakeside] and its directors, officers, agents, employees, representatives, successors and assigns, administrators, executors and all other [sic] from any and all responsibilities or liability from injuries or damages resulting from my participation in any activities or my use of equipment or machinery in the above mentioned activities. I do also hereby release all of those mentioned and any others acting upon their behalf from any responsibility or liability for any injury or damage to myself, including those caused by the negligent act or omission of any way arising out of or connected with my participation in any activities of [Lakeside] or the use of any equipment at [Lakeside]. . . .
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> 2. I understand and am aware that strength, flexibility and aerobic exercise, including the use of equipment are a potentially hazardous activity. I also understand that fitness activities involve the risk of injury and even death,

> and that I am voluntarily participating in these activities and using equipment and machinery with knowledge of the dangers involved. I hereby agree to expressly assume and accept any and all risks of injury or death. . . .

Palmer sued Lakeside and Precor for her injuries, which generally consisted of an injured hand and chest. Both Lakeside and Precor filed motions for summary judgment, which were granted. Palmer appeals.

ASSIGNMENTS OF ERROR

Palmer assigns that the district court erred in (1) granting summary judgment in favor of Lakeside and Precor; (2) holding that the waiver and release contained in the membership agreement and health history questionnaire signed by Palmer were clear, understandable, and unambiguous; and (3) holding that Palmer assumed the risk of using the treadmill.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1]

[2] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

Waiver and Release.

Palmer first argues that the district court erred in finding that the waiver and release contained in the membership agreement and health history questionnaire she completed and signed when joining Lakeside were clear, understandable, and unambiguous. We read Palmer's argument as contending that the waivers, while perhaps applicable to instances of ordinary negligence,

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[1] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

[2] *Id.*

could not operate to relieve Lakeside or Precor from gross negligence or willful and wanton misconduct. We further understand Palmer to argue that both Lakeside and Precor committed gross negligence or willful and wanton misconduct—Precor by delivering a treadmill without proper safety features, and Lakeside by not providing adequate space or lighting around the treadmill and by modifying the treadmill's belt such that the treadmill became unsafe.

[3,4] Before reaching the merits of Palmer's argument, we note that contrary to Precor's argument, Precor is not protected from liability as a result of the waivers signed by Palmer. Precor contends in its brief that it is a third-party beneficiary of these waivers. This court recently addressed a similar issue in *Podraza v. New Century Physicians of Neb.*[3] In *Podraza*, we noted that we have traditionally strictly construed who has the right to enforce a contract as a third-party beneficiary.

> In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them. The right of a third party benefited by a contract to sue thereon must affirmatively appear from the language of the instrument when properly interpreted or construed.
>
> Authorities are in accord that one suing as a third-party beneficiary has the burden of showing that the provision was for his or her direct benefit. Unless one can sustain this burden, a purported third-party beneficiary will be deemed merely incidentally benefited and will not be permitted to recover on or enforce the agreement.[4]

A review of the record shows that Precor was not explicitly mentioned in the language of the waiver. Nor is there any other evidence that Precor was an intended third-party beneficiary. Precor has the burden to show its status as a third-party beneficiary, and it has failed to meet that burden. As such, Precor

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[3] *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

[4] *Id.* at 686, 789 N.W.2d at 267.

is not shielded from liability as a result of the waivers signed by Palmer.

Lakeside's Gross Negligence or Willful and Wanton Conduct.

At oral argument, Palmer conceded that by virtue of these waivers, Lakeside was not liable to Palmer for damages caused by ordinary negligence. But, as noted above, Palmer contends that Lakeside is nevertheless liable, because its actions were grossly negligent or were willful and wanton.

Having examined the record in this case, we find that as a matter of law, Palmer's allegations against Lakeside do not rise to the level of gross negligence. Palmer alleges that the Lakeside facility had inadequate lighting and inadequate spacing between equipment and that Lakeside's employees modified the treadmill in question by installing a treadmill belt that did not contain markings.

[5-7] Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.[5] Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.[6] The issue of gross negligence is susceptible to resolution in a motion for summary judgment.[7] We simply cannot conclude that the allegations against Lakeside—inadequate lighting and spacing and the installation of a new treadmill belt—rise to such a level. We therefore conclude that as a matter of law, any negligence by Lakeside was not gross negligence or willful or wanton conduct. As such, the district court did not err in granting Lakeside's motion for summary judgment.

Precor's Negligence.

We next turn to the question of whether the district court erred in granting summary judgment in favor of Precor. Because we concluded above that the waiver signed by Palmer did not

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[5] *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003).

[6] *Id.*

[7] *Id.*

act to relieve Precor from liability, we address whether there was a genuine issue of material fact on the issue of whether Precor breached any duty it had to Palmer.

In arguing that Precor was liable, Palmer alleges that Precor breached its duty by not equipping the treadmill with (1) a safety feature that would prevent the treadmill from operating when no one was on it and (2) handrails extending down the sides toward the back of the treadmill. Palmer originally argued that Precor was also liable because the belt on its treadmill failed to contain adequate markings, but it is this court's understanding that Palmer no longer makes such allegations with regard to Precor because the belt on the treadmill at the time of the incident was not original to the treadmill and had been installed by Lakeside.

In response to Palmer's allegations, Precor introduced evidence in the form of an affidavit from its director of product development, Greg May. May averred that at the time of manufacture and delivery, the treadmill met or exceeded the voluntary guidelines set by the American Society for Testing and Materials in that group's international standard specifications for motorized treadmills in all ways, including handrails. Though there was no specific feature on this treadmill designed to stop the treadmill from running when no one was operating it, the machine was manufactured with a clip to be attached to the user's clothing. The manual for this treadmill noted that "by taking this precaution, a tug on the safety switch cord trips the safety switch and slows the running speed to a safe stop." May also averred that the treadmill in question left Precor's control on July 29, 1999, or over 7 years prior to the date of the incident.

In addition to May's affidavit, Precor also introduced photographs of the treadmill at issue, which photographs showed that the treadmill did have front handrails, though not side handrails.

In an attempt to rebut May's affidavit and show a genuine issue of material fact, Palmer introduced the affidavit of a fitness consultant. That affidavit noted in part that

> based on [the consultant's] experience, in order for treadmills to meet appropriate safety standards from the late

> 1990s forward, treadmills should contain adequate safety features, emergency/safety stop mechanisms, warning labels, and markings on a treadmill belt. A treadmill should contain a safety stop mechanism such that the treadmill will turn off if no one is currently on the treadmill, adequate handrails extending towards the back of the treadmill and warning labels at the rear of the treadmill.

Even after drawing all reasonable inferences in favor of Palmer, we conclude that there is no genuine issue of material fact as to Precor's alleged breach of duty. While the fitness consultant's affidavit indicates that treadmills "should" contain various safety features, he does not speak in absolutes and does not refer specifically to this treadmill. On the other hand, May's affidavit references the treadmill at issue in this case and details the safety features this treadmill possessed, as well as Precor's compliance with all applicable, though voluntary, safety standards when manufacturing the treadmill. Because the record affirmatively shows that Precor did not breach any duty it owed to Palmer, we conclude that the district court did not err in granting Precor's motion for summary judgment.

Assumption of Risk.

Palmer also argues that the district court erred in finding that she assumed the risk of injury when she used the treadmill. Because we conclude that the district court did not err in granting Lakeside's and Precor's motions for summary judgment for the foregoing reasons, we need not address Palmer's assignment of error regarding the assumption of the risk.

CONCLUSION

The district court's order granting summary judgment in favor of Lakeside and Precor is affirmed.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., not participating.