IN THE SUPREME COURT OF IOWA
No. 22–1419

KATHERINE AVENARIUS and PAUL AVENARIUS,

Plaintiffs–Appellees,

vs.

STATE OF IOWA,

Defendant–Appellant.

Appeal from the Iowa District Court for Polk County
Samantha J. Gronewald, District Judge

APPELLANT'S FINAL REPLY BRIEF

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II. Did Avenarius voluntarily agree to the terms of the Waiver and are the terms of the Waiver unconscionable so as to render it unenforceable?

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Gen. Conference of Evangelical Methodist Church v. Faith Evangelical Methodist Church, 809 N.W.2d 117 (Iowa Ct. App. 2011)

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REPLY ARGUMENT

Avenarius fails to provide substantiated facts or legal grounds to demonstrate the signed Waiver was anything but a voluntary agreement with clear and unequivocal terms where she agreed to waive negligence claims against the State. And she is unable to establish that the Waiver is an unconscionable contract of adhesion or conflicts with prevailing public policy.

I. THE TERMS OF THE WAIVER AVENARIUS SIGNED WERE CLEAR AND UNEQUIVOCAL.

Avenarius argues that *Sweeney v. City of Bettendorf*, 792 N.W.2d 873 (Iowa 2009), *Baker v. Stewarts' Inc.*, 433 N.W.2d 706 (Iowa 1988), and *Sears, Roebuck & Co. v. Poling*, 81 N.W.2d 462 (Iowa 1957) show that the terms of the Waiver here are deficient. Avenarius Br. at 8–10. But the forms in those cases are nothing like the Waiver here. *See* State's Br. at 21–28.

Unlike those cases, a plain reading of the Waiver here shows it contains clear and unequivocal language that alerts a casual reader that by signing she agreed to waive any and all claims against the State, including claims of negligence, as it related to

ILEA's training. *See Lukken v. Fleischer*, 962 N.W.2d 71, 79 (Iowa 2021).

Indeed, the Waiver here mirrors other waivers upheld in Iowa courts, even without the terms "negligence," "fault," or "omission." *See Korsmo v. Waverly Ski Club*, 435 N.W.2d 746, 748 (Iowa Ct. App. 1988) ("The words 'any and all rights, claims, demands and actions of any and every nature whatsoever . . . for any and all loss, damage or injury' is clearly intended to cover negligent acts."); *Transgrud v. Leer*, No. 19-0692, 2020 WL 5650734 at *6 (Iowa Ct. App. Sept 23, 2020) (holding by signing release the plaintiff acknowledged the defendant would not pay for any injuries she might incur, including ones arising from negligent conduct); *Cupps v. S & J Tube, Inc.*, No. 17-1922, 2019 WL 156583 at *5 (Iowa Ct. App. Jan 9, 2019) (holding the phrase "any claim for damage" is not ambiguous and includes negligence); *Hargrave v. Grain Processing Corp.*, No. 14-1197, 2015 WL 1331706 at *2–3 (Iowa Ct. App. Mar. 25, 2015). Like the terms upheld in those cases, the terms of the Waiver here are clear and unequivocal.

II. AVENARIUS VOLUNTARILY SIGNED THE WAIVER AND THE TERMS OF THE WAIVER ARE NOT UNCONSCIONABLE.

Avenarius claims that because an ILEA certification in firearms training would advance her career goals, she had no choice but to sign the Waiver. She then jumps to the legal conclusion that, therefore, she could not voluntarily agree to the terms of the Waiver, rendering it unenforceable. Avenarius Br. at 11.

But whether or not Avenarius believed entering an agreement with the State was her only route to achieving a professional aspiration has no bearing on whether she entered the agreement voluntarily, and she cites no legal support for such a novel proposition. The record here demonstrates the elements of a legally binding agreement are met. *See Margeson v. Artis*, 776 N.W.2d 652, 655 (Iowa 2009) (restating the fundamental elements of an agreement include offer, acceptance, and consideration). Avenarius acknowledges executing the Waiver, which states that she understood it to be a legal and binding document. SOUF, Exh. C-2, App. 37; SOUF, Exh. B-2, App. 34. She does not argue the existence

of duress, undue influence, coercion, incapacity, or any other tactic that might render her assent to the agreement involuntary.

Accepting Avenarius's argument would lead to absurd results. Under Avenarius's theory, a party could nullify any contract so long as the contract related to training or services that furthered the party's professional aspirations. But a contract is not invalid simply because a party subjectively values the services. Here, the evidence shows Avenarius voluntarily agreed to the terms of the Waiver, did not sign it under duress, was not subject to undue influence, and had sufficient mental capacity to know she was signing a waiver.

Avenarius also asserts that if she did voluntarily agree to the Waiver, it is a contract of adhesion and then implies that there is some kind of material factual dispute that prevents this Court from determining its enforceability. Avenarius Br. at 12-14. Avenarius argues it is a contract of adhesion because the State drafted the document, it is a "sign-it-or-you-can't-attend" contract, and she had no bargaining power. Avenarius Br. at 11. But the evidence in this record does not support her claims. There is no evidence in this record that Avenarius ever tried to bargain over the terms or would

have. And the document itself only states that failure to accept the terms of the Waiver *may* result in being refused admittance to the training, undercutting that it was a "take-it-or-leave-it" contract. *See* SOUF Exh. C-1, App. 36.

But even if the Waiver is viewed as a contract of adhesion, it is still enforceable because it is not unconscionable. Courts will enforce a contract of adhesion as long as it does not result from unconscionable bargaining or contains unconscionable terms. *See Gen. Conference of Evangelical Methodist Church v. Faith Evangelical Methodist Church*, 809 N.W.2d 117, 123 (Iowa Ct. App. 2011). Thus, a contract of adhesion is not automatically unconscionable. *Home Fed. Sav. & Loan Ass'n of Algona v. Campney*, 357 N.W.2d 613, 619 (Iowa 1984).

Finding a contract unconscionable is a high bar. "A contract is unconscionable where no person in his or her right senses would make it on the one hand, and no honest and fair person would accept it on the other hand." *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 80 (Iowa 2011)**.** In considering such claims, Iowa courts consider the factors of "assent, unfair surprise, notice,

disparity of bargaining power, and substantive unfairness." *Id.* (quoting *C & J Fertilizer, Inc. v. Allied Mut. Ins.,* 227 N.W.2d 169, 181 (Iowa 1975)).

The doctrine of unconscionability, however, does not exist to rescue parties from bad bargains. *Id.* The Iowa Supreme Court has gone on further to say that unconscionability

> encompasses both procedural abuses arising from the contract's formation and substantive abuses related to the contract's terms. Procedural unconscionability involves an advantaged party's exploitation of a disadvantaged party's lack of understanding, unequal bargaining power between the parties, as well as the use of fine print and convoluted language. Substantive unconscionability involves whether or not the substantive terms of the agreement are so harsh or oppressive that no person in his or her right senses would make it. Finally, whether an agreement is unconscionable must be determined at the time it was entered.

Id. at 81 (internal citations omitted).

On the issue of unequal bargaining power, the Iowa Supreme Court has said:

> A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the

> transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

In re Marriage of Shanks, 758 N.W.2d 506, 515 (Iowa 2008) (quoting Restatement (Second) of Contracts § 208 cmt. d).

The record here shows that no factors of unconscionability are present. There is no claim or evidence that Avenarius could not understand what she was agreeing to. The Waiver does not contain fine print or convoluted language a casual reader would fail to notice or understand. SOUF, Exh. C, App. 36-37. It also does not contain harsh or oppressive terms. *Id.*, App. 36. By her own account, before shooting herself in the leg, Avenarius was an experienced police officer, trained in the use of firearms, who chose to enter into this agreement to help her train others on firearms use. *See* Avenarius Aff. Ex. A, App. 38-40. This is not a scenario of one party taking unfair advantage or exploiting another, and Avenarius's subjective opinion that she felt she had no bargaining power is not a sufficient reason to preclude summary judgment for the State.

Again, the terms of the Waiver here are nearly identical to other waivers that Iowa courts have upheld in negligence cases. *See*

Korsmo, 435 N.W.2d at 747; *Transgrud*, 2020 WL 5650734 at *1; *Cupps*, 2019 WL 156583 at *1; *Hargrave*, 2015 WL 1331706 at *1. Simply put, the Waiver does not have terms that no person in her right senses would make on the one hand, and no honest and fair person would accept on the other hand. *Wolfe*, 795 N.W.2d at 80. So, the Waiver is not unconscionable.

III. THE WAIVER IS NOT AGAINST PUBLIC POLICY.

Lastly, Avenarius urges this Court to ignore the Waiver on public policy grounds. Avenarius Br. at 14-16. But "contracts exempting a party from its own negligence are enforceable, and are not contrary to public policy." *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993).

"[D]eclaring contracts unenforceable as violating public policy is a delicate power which should be exercised only in cases free from doubt." *Lukken*, 962 N.W.2d at 79 (holding a waiver unenforceable on public policy grounds for claims of wanton and reckless conduct but enforceable for claims of negligence) (cleaned up). The Iowa Supreme Court has upheld against public-policy challenge every waiver for negligence claims except for *Galloway v. State*, 790

N.W.2d 252 (Iowa 2010). In *Galloway*, the Court held that allowing a parent to waive a negligence claim on behalf of their child was against public policy. *Id.* at 253.

The *Galloway* Court, however, recognized the distinction between an adult waiving a negligence claim on behalf of her child and an adult waiving a negligence claim on behalf of herself. An adult who waives liability for her own personal injury "is aware that she has done so and is on notice to be vigilant for negligence in the course of her participation. While participating in the activity, if she perceives an unreasonable risk of injury, the adult is free to withdraw from it." *Id.* at 257–58.

The same reasoning applies here. Avenarius, after reading and agreeing to the terms of the Waiver, could have taken it upon herself to be vigilant of negligence and withdrawn from any activity she perceived as risky. Also, contrary to Avenarius's contention, not enforcing the Waiver would harm the public. "[E]xculpatory provisions actually promote public interest because without such releases, it is doubtful these events would occur. . . . Public interest is served by allowing the parties the freedom to enter into such

agreements." *Korsmo*, 435 N.W.2d at 749. This Waiver is not against public policy.

CONCLUSION

For those reasons, the State of Iowa respectfully requests this Court reverse the decision of the district court and remand with instructions to grant the State's Partial Motion for Summary Judgment.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ Job Mukkada
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 1,843 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Job Mukkada
JOB MUKKADA

CERTIFICATE OF FILING AND SERVICE

I certify that on August 25, 2023 this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Job Mukkada
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