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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

APPELLEES' FINAL BRIEF

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ISSUE PRESENTED FOR REVIEW

IS THE STATE'S FORM IT FORCED AVENARIUS TO SIGN TO ESCAPE LIABILITY UNENFORCEABLE?

ANSWER: YES.

Authorities:

Sweeney v. City of Bettendorf, 762 N.W.2d 873 (Iowa 2009)

Baker v. Stewarts' Inc., 433 N.W.2d 706 (Iowa 1988)

Sears, Roebuck & Co. v. Poling, 81 N.W.2d 462 (Iowa 1957)

Lukken v. Fleischer, 962 N.W.2d 71

ROUTING STATEMENT

The Appellee, Katherine Avenarius ("Avenarius" herein), agrees with the Appellant's ("State" herein) routing statement, statements on error preservation, scope of review and standard of review.

STATEMENT OF THE CASE

Avenarius does not disagree with the State's Statement of the Case regarding the procedural history. Avenarius disagrees with the summary conclusions the State makes with regards to Avenarius waiving and releasing liability against the State. Avenarius's arguments set forth below will detail the reasons why she disagrees with the State's conclusionary statements about the facts contained in the State's Statement of the Case.

STATEMENT OF FACTS

Avenarius provides the following facts that are relevant and were omitted from the State's Statement of Facts. The State required Avenarius to sign its form entitled "Waiver Release From Liability And Assumption of Risk Agreement." App. pp. 36-37. Avenarius had no choice but to sign the document in order to become a certified firearms instructor in Iowa. App. pp. 38-40. Avenarius was not aware of any other options but to sign the State's pre-printed form prepared by the State. App. pp. 38-40. Avenarius had no power to negotiate any of the terms and was forced to sign the paper lest she forego the certification class. App. pp. 38-40. Avenarius's signature on the State's form was not voluntary as she had no meaningful alternative but to sign the

State's piece of paper. App. pp. 38-40. Avenarius earned a distinguished and decorated position of trust as a veteran police officer. Her career path was headed toward a high level of command; a path that required her to obtain a firearms instructor certification. App. pp. 39-40.

ARGUMENT

I. THE FORM THE STATE FORCED AVENARIUS TO SIGN IS UNENFORCEABLE.

The State's entire argument rests solely on its misplaced reliance on an unenforceable form. The State claims the form it forced Avenarius to sign before it would allow Avenarius to attend firearms instructor training contains only one interpretation. App. pp. 25, 36-37. The District Court correctly informed the State that its interpretation was incorrect when the Court denied the State's Motion for Partial Summary Judgement. App. pp. 41-48. This Court should affirm the District Court's ruling for the following reasons: 1) The terms in the State's form are deficient and unenforceable to relieve it of liability. 2) The State's form is unenforceable as it is a contract of adhesion. 3) The State's form is against public policy and thus unenforceable.

A. The terms in the State' form are deficient.

The terms in the State's form are deficient and unenforceable and the State, therefore, cannot escape liability. The Iowa Supreme Court has made it clear that it demands a party to clearly express its intention to exclude liability for its negligent acts and omissions before a defendant escapes liability for its fault. In *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 879–80 (Iowa 2009) the Supreme Court considered what other jurisdictions required for liability waivers to apply. The *Sweeney* court recognized that other courts have not required magic words but have imposed a demanding requirement that the intention to exclude liability for acts and omissions of a party must be expressed in clear terms. *Id.* at 879 *citing Gross v. Sweet,* 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 306, 309–10 (N.Y.1979) (noting that while the word "negligence" need not specifically be used, words conveying a similar import must appear). The *Sweeney* court concluded that, "…the approach of these cases is consistent with the approach in Iowa exculpatory clause cases generally. *See Baker,* 433 N.W.2d at 708 -709 (requiring a clear and unequivocal expression). We see no reason to relax from the approach in *Baker*." *Id.* at 880.

After its in-depth analysis, the *Sweeney* court determined that a party must express in clear terms an intention to exclude liability for its *acts and omissions.* Applying the *Sweeney* guidelines to the facts of this case, the State's form it forced Avenarius to sign is unenforceable. The State's form in this case did not include *any* terms like *acts of negligence, fault, omission, covenant not to sue, caused by the acts or conduct of the released party/releasees.* App. pp. 25, 36-37. In addition, the State's form makes no reference to its actions or that of its employee's actions as the type of conduct that informs Avenarius she is releasing. This is the type of language the *Sweeney* court and the cases it reviewed and relied upon, required to be included in a form before a party could be relieved of its responsibility.

Despite the fatal flaws in the State's form, the State references Iowa Court of Appeals decisions that seem to say the omission of the term like omission is "good enough." Plaintiff asserts that the Iowa Supreme Court decisions, even as recent as *Lukken v. Fleischer,* 962 N.W.2d 71, (Iowa 2021) confirm that if a party wants to relieve itself of liability for any of its acts, omissions or negligence, then it must expressly state those terms in the form.

The District Court correctly ruled the State failed to expressly

state the necessary terms to escape liability. The District Court accurately analyzed the relevant caselaw, including *Sears, Roebuck & Co. v. Poling,* 81 N.W.2d 462 (Iowa 1957) and its progeny, and succinctly concluded, "…the waiver did not contain clear and unequivocal language that Katherine [Avenarius] was waiving liability as to the negligent acts or omissions of Defendant. App. p. 47. The District Court's decision is well-reasoned, accurately analyzed and should not be overturned. App. pp. 41-48.

B. The State's form is unenforceable because it is a contract of adhesion.

The form the State required Avenarius to sign before she could attend the certification training program is not enforceable because it was not voluntarily entered into by Avenarius. If the form is deemed a contract, then it is a contract of adhesion. A contract of adhesion has been described as being "drafted unilaterally by the dominant party and then presented on a take-it-or-leave-it basis to the weaker party who has no real opportunity to bargain about its terms." *Penn. Life Ins. Co. v. Simoni,* 641 N.W.2d 807, 813 (Iowa 2002) (internal quotation marks omitted). *Gen. Conf. of Evangelical Methodist Church v. Faith Evangelical Methodist Church,* 809 N.W.2d 117, 122 (Iowa Ct. App.

2011). In this case, the pertinent terms include the following:

> "A failure to fully accept the terms and conditions of this waiver may result in being refused admittance into the training program." App. p. 36.
> "…THIS FORM TO BE RECEIVED TWO WEEKS PRIOR TO THE START OF THE CLASS…" App. p. 37.

Since the State required both Avenarius and her employer, the City of Dubuque, to sign and return the form weeks before it would permit her to attend the training began, this form was not voluntarily entered into by Avenarius. She had no choice. She had no bargaining power. If she wanted to fulfill her career goal of becoming a certified firearms instructor in the State of Iowa, she was required to sign the form without any other options. Thus, it was not voluntarily executed and is therefore unenforceable.

If the Court deems the form is a contact, then it was clearly a contract of adhesion since the State unilaterally drafted the document as the dominant party, presented it to Avenarius as a sign-it-or-you-can't-attend training and provided no bargaining opportunity to Avenarius.

Once a contract of adhesion is established, like that which is present in this case, then the courts will look to the unconscionability

in the bargaining process. The Restatement (Second) of Contracts § 208(d), at 109 (1981) states, in pertinent part:

> Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

Gen. Conf. of Evangelical Methodist Church v. Faith Evangelical Methodist Church, 809 N.W.2d 117, 123 (Iowa Ct. App. 2011)

The Iowa Supreme Court has determined that Courts have an, "…obligation to examine the voluntariness of an agreement…and is supported by our law of contracts." *State v. Baldon*, 829 N.W.2d 785, 801 (Iowa 2013). The Iowa Supreme Court has refused to enforce unconscionable contracts. *See Casey v. Lupkes,* 286 N.W.2d 204, 207 (Iowa 1979) (recognizing unconscionability as a generally available contract defense); *see also* Restatement (Second) of Contracts § 208 (1981) (permitting a court to refuse to enforce all or part of a contract if the contract was unconscionable when formed). The doctrine is especially applicable to contracts of adhesion. *See C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.,* 227 N.W.2d 169, 179–81 (Iowa 1975). This

refusal is based on a strong distaste for the enforcement of unjust terms between parties of grossly disproportionate bargaining power. *Id.* at 801.

The Iowa Supreme Court analyzed this issue and concluded:

> "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.*"

State v. Baldon, 829 N.W.2d 785, 801 (Iowa 2013)

Applying the factors set forth above to Avenarius's case, there are material factual disputes regarding Avenarius' bargaining power that preclude granting the State's Motion for Partial Summary Judgement. Avenarius had no bargaining power. If she wanted to become a certified firearms instructor, she had to sign the form. She had no other realistic alternative. She had no meaningful choice. At a minimum, there are material factual disputes regarding the issue of whether or not the form is enforceable that requires the Court to deny the State's Motion for Partial Summary Judgment.

C. The State's form is against public policy.

The State's attempt to escape liability by hiding behind the form it forced Avenarius to sign is against public policy. Exculpatory agreements, like the one the State is relying upon in this case, are invalid when they are against public policy. In *Baker v. Stewarts' Inc.*, 433 N.W.2d 706, 707–08 (Iowa 1988), the Iowa Supreme Court spent some time considering whether exculpatory agreements were against public policy depending on the situation in which they were entered. The *Baker* court acknowledged:

> Some courts have recognized that public policy prevents enforcement of exculpatory agreements where the party seeking to be exculpated is a professional person pursuing a profession subject to licensure by the state, and is rendering a service of great importance to the public. For example, courts have refused to enforce a patient's agreement exculpating a physician from liability for future negligent performance of medical treatment. *E.g., Belshaw v. Feinstein,* 258 Cal.App.2d 711, 726, 65 Cal.Rptr. 788, 798 (1968); *Olson v. Molzen,* 558 S.W.2d 429, 432 (Tenn.1977)

Baker, at 707.

The *Baker* court further analyzed this issue when it observed:

> It is recognized that the status of the party seeking exculpation affects the validity of an exculpatory agreement. As one commentator has observed:
> [S]ome relationships are such that once entered upon they involve a status requiring of one party greater responsibility than that required of the

> ordinary person, and, therefore, a provision avoiding liability is peculiarly obnoxious.
>
> S. Williston, *Contracts* § 1751, at 148 (3d ed. 1972). The finding of a special relationship led a California court to hold that a hospital could not enforce a release from future liability executed as a condition of admission. *Tunkl v. Regents of Univ. of Cal.,* 60 Cal.2d 92, 383 P.2d 441, 32 Cal.Rptr. 33 (1963).

Baker, at 708.

Finally, the *Baker* court looked at the factors used in the *Tunkl* case to determine if a contract triggered a public interest. The factors the *Baker* court reviewed included:

> whether (1) it concerns business of a type subject to public regulation, (2) the party seeking exculpation performs a service of great importance to the public which is of practical necessity for at least some members of the public, (3) that party holds itself out as willing to perform the service for any member of the public who seeks it, (4) due to the essential nature of the service the party possesses a decisive advantage in bargaining power, (5) the exculpatory clause appears in a standardized adhesion contract, and (6) the purchaser is placed under the control of the seller and is thus subject to the risk of carelessness by the seller or its employees. 60 Cal.2d at 98–101, 383 P.2d at 444–46, 32 Cal.Rptr. at 36–38.

Baker, at 708.

Applying the *Baker* analysis to the facts of this case, the State's form is against public policy. First, the business of firearms instruction is subject to extensive public regulation. Second, the State of Iowa

performs a service of great importance to the public with regards to its training and certification of firearms instructors. Third, the State of Iowa holds itself out as willing to perform the service to members of law enforcement who seek to become firearms instructors. Fourth, the State of Iowa has a decisive advantage of bargaining power since it is the governing body that establishes all of the rules, regulations and requirements to become a certified firearms instructor and it is the entity that has the power to grant the certifications. Fifth, as discussed above, the exculpatory clause appears in a standardized adhesion contract. Finally, Avenarius is under the control of the State of Iowa during the training and is required to abide by the State's instructions and demands. Since the State's form is against public policy its Motion for Partial Summary Judgement must be denied.

CONCLUSION

The State has the burden of proof to show the nonexistence of a genuine issue as to amaterial fact in order to succeed on this motion. The State has failed to meet this burden when taking into account all of the factors in this case including the pleadings, Exhibits, Affidavit and applicable case law which clearly establish there are genuine issues of material fact that preclude granting the State's motion.

Appellee Katherine Avenarius respectfully requests this Court to deny Appellant's Appeal and Affirm the District Court's Denial of the State's Motion for Partial Summary Judgment.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellee does not request oral argument. If the Court grants oral argument, then the Appellee does request the opportunity to be heard at oral argument.

ATTORNEY'S COST CERIFICATE

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

/s/ Todd Klapatauskas
Todd Klapatauskas

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 proportionally spaced typeface using Microsoft Word in 14-point Georgia font and contains 2,565 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Todd Klapatauskas
Todd Klapatauskas

CERTIFICATE OF FILING AND SERVICE

I certify that on August 23rd, 2023 this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Todd Klapatauskas
Todd Klapatauskas