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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

11.21.11

"Hold Harmless" Agreement Holds Water, Washes Away Plaintiff's Slip and Fall Case

By Drew Broaddus

Courts throughout the United States have long agreed "that one may expressly 'assume the risk' of another's negligence unless because of the particular facts there is some special public policy to the contrary…."[1] Courts have described such agreements as "hold harmless" or exculpatory clauses, or sometimes in terms of "expressed assumption of the risk." There are exceptions to the general rule that "hold harmless" or exculpatory clauses will be enforced; for example, "where such clauses are asserted by common carriers or public utilities or by employers as conditions of employment."[2] Likewise, such agreements will not be enforced when they are a pre-condition to receiving essential services such as medical treatment. Moreover, if an agreement is to protect a party from its own negligence, the agreement must express this in unambiguous language. *Skotak v Vic Tanny*, 203 Mich App 616, 617-618 (1994). But parties are free to contract, and a "hold harmless" agreement will generally be enforced if it is fairly and knowingly made. *Xu v Gay,* 257 Mich App 263, 272 (2003).

The Michigan Court of Appeals recently applied these principles in *Brown v Northwoods Animal Shelter,* unpublished opinion per curiam, released 10/25/2011 (Docket No. 299361). The suit arose out of a slip and fall that occurred at defendant's animal shelter. Plaintiff was a volunteer worker at the shelter and, prior to her injury, was required to sign a "Volunteer Hold Harmless Agreement." The Agreement indicated that she would not be able to bring any legal action for any personal injuries suffered at the shelter. The hold harmless Agreement provided as follows:

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"Hold harmless" or exculpatory agreements will not bar a claim in all circumstances. Courts are weary of possible adhesion contracts, and may not enforce such an agreement if a plaintiff had no realistic economic alternative but to accept it.

Although the plaintiff in *Brown* argued that the agreement was not enforceable due to lack of consideration, the fact that she was not paid actually weighed in the animal shelter's favor. Because she was a volunteer, and did not have to be there, it negated any argument for an adhesion contract.

Central to the *Brown* holding was the fact that the "hold harmless" agreement used the terms "any circumstance," "any loss," "any injury," and "any compensation." These are unambiguous terms which left no doubt that the plaintiff agreed to hold the animal shelter harmless even for its own negligence.

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[1] Dobbs & Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* (3d ed. 1997), § 2, p 267.

[2] Dobbs & Hayden, § 2, p 263.

> I, Patricia T. Brown, hereby agree to hold Northwoods Animal Shelter harmless and I agree that the Northwoods Animal Shelter shall not in any circumstance be responsible for any loss or damage to my property or any injury to myself which may occur, while I am volunteering at the Northwoods Animal Shelter….
>
> I am serving as a volunteer and I understand I may be working with animals which are unpredictable and dangerous. I am also well aware of the other possible risks in terms of personal injury and or property damage that I will be exposing myself to as a volunteer as a volunteer [sic] for the Northwoods Animal Shelter. I know and fully understand that I will not be able to claim any compensation against the Northwoods Animal Shelter for lost wages or any other losses or damages caused by anything that happens while I am volunteering for Northwoods Animal Shelter.

Based upon this agreement, the animal shelter moved for summary disposition. The animal shelter argued that the "hold harmless" agreement was tantamount to a release of liability. In response, Plaintiff argued that the release was invalid because of lack of consideration (in other words, the animal shelter did not pay her anything). The trial court rejected Plaintiff's argument and granted the motion. The Court of Appeals affirmed.

In affirming, the Court of Appeals noted that "[a] hold harmless agreement is a release of liability that is to be interpreted according to the rules of contract interpretation. … If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." The Court found that the agreement unambiguously expressed the parties' intent to release the animal shelter from any type of liability, including liability for its own negligence, if Plaintiff was hurt while volunteering.

Next, the Court rejected Plaintiff's "no consideration" argument, finding that "consideration consisted of Plaintiff being given the opportunity to work with the animals at the shelter; in turn, she agreed to hold defendant harmless for any personal injury she sustained while volunteering." This did not violate any public policy, said the Court, citing *Skotak, supra*. "Plaintiff voluntarily chose to volunteer at the animal shelter; she was not required to do so."

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