

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

TARIQ DAVIS, a minor, by his parents and next
of friends, DIANNE BYNOE and ROOSEVELT
DAVIS, and DIANNE BYNOE and ROOSEVELT
DAVIS, on their own behalf,

Plaintiffs,

v.

AMERICAN YOUTH SOCCER ORGANIZATION,
VIRGIN ISLANDS AMERICAN YOUTH SOCCER
ORGANIZATION, THE UNIVERSITY OF THE
VIRGIN ISLANDS, and LAVAR BROWNE,

Defendants.

CASE NO. ST-09-CV-70

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: May 18, 2016)

Pending before this Court is a "Motion for Partial Summary Judgment Against Plaintiff Dianne Bynoe" filed by Defendants American Youth Soccer Organization and Virgin Islands American Youth Soccer Organization (hereinafter "AYSO Defendants"). Plaintiffs submitted a response in opposition thereto, and the AYSO Defendants replied. For the reasons set forth below, the motion will be denied.

I. FACTUAL BACKGROUND

Plaintiffs Dianne Bynoe and Roosevelt Davis are the parents of Tariq Davis ("Tariq"), who was born on June 30, 1997, and, therefore, a minor at the time of the incident which led to this

litigation. Defendant UVI is an entity created by, and existing under, Virgin Islands law. Defendant American Youth Soccer Association is a national organization which sponsors and promotes soccer for children throughout the United States of America. Defendant Virgin Islands American Youth Soccer Association sponsors and promotes the sport of soccer for youths in the United States Virgin Islands. Tariq was a member of a youth soccer team which practiced and played games under the governance of the AYSO Defendants. The practices and games were conducted on one of UVI's fields located on St. Thomas, U.S. Virgin Islands.¹

On February 17, 2007, Tariq and his teammates were practicing soccer on the UVI field, which runs parallel and immediately adjacent to a public roadway, when he chased a ball from the grounds and onto the abutting roadway. Tariq was struck by a passing vehicle, driven by Defendant Lavar Browne, and as a result suffered numerous injuries that require continuing medical care.

At issue is the AYSO Defendants' motion seeking partial summary judgment against Plaintiff Dianne Bynoe based on exculpatory clauses she signed on behalf of herself and Tariq. The clauses, set forth in player registration forms, purport to release and hold the AYSO Defendants harmless for any injuries and damages to Plaintiff Bynoe and Tariq as a result of the AYSO Defendants' negligence at a sponsored event. The AYSO Defendants also raise a limit on liability pursuant to Title 32, Section 25a, Virgin Islands Code. The Court addresses each argument below.

II. LEGAL DISCUSSION.

a. Summary Judgment Standard.

In resolving a motion for partial summary judgment, the Court applies the same standard used for evaluating a motion for summary judgment on all issues.² Summary judgment is appropriate where the "pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."³ The Court does not weigh evidence, but is limited to determining

¹ UVI has campuses on both St. Thomas and St. Croix. The underlying incident is alleged to have occurred on UVI's St. Thomas campus.

² *Concepcion v. V.I. Hous. Auth.*, 47 V.I. 112, 114-15 (V.I. Super. Ct. 2005). See also *Pease v. Lycoming Engines*, Civil Action No. 4:10-CV-00843, 2011 U.S. Dist. LEXIS 108950 at * 3 (M.D. Pa. Sept. 23, 2011).

³ FED. R. CIV. P. 56(c)(2). The Supreme Court of the Virgin Islands has cautioned against this tribunal's wholesale incorporation of the Federal Rules of Civil Procedure and the Local Rules of Civil Procedure pursuant to Rule 7 of the Rules of the Superior Court. See, e.g., *Vanterpool v. Gov't of the V.I.*, S. Ct. Civil No. 2013-0072, 2015 V.I. Supreme LEXIS 23 (V.I. Aug. 10, 2015). Nevertheless, both the Supreme Court and the Superior Court consistently apply the summary judgment standard set forth in Rule 56 of the Federal Rules of Civil Procedure, and the judicial precedents established thereunder. E.g., *Brouillard v. DLJ Mortg. Capital, Inc.*, S. Ct. Civil No. 2014-0063, 2015 V.I. Supreme LEXIS 37 (V.I. Oct. 28, 2015); *Certain Underwriters at Lloyds of London v. Garcia*, Case No. SX-07-CV-141, 2015 V.I. LEXIS 138 (V.I. Super. Ct. Nov. 25, 2015). The summary judgment procedure resolves unsustainable claims and defenses in advance of trial, thereby narrowing the number of outstanding legal issues and serving the interests of judicial economy and efficiency. See SUPER. CT. R. 1. Therefore, the Court will apply these legal principles to this motion.

whether there is any genuine issue of material fact.⁴ The movant has the initial burden of demonstrating an absence of any genuine issue of material fact.⁵ If the movant meets that burden, the opponent then has an obligation to point to items in the record on which a reasonable jury could find in its favor at trial.⁶ The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.⁷ A fact is material only if its existence or non-existence will affect the outcome of a lawsuit under applicable law, and a dispute over a material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.⁸ If there is no genuine issue of material fact, the Court determines whether the movant is entitled to judgment as a matter of law.⁹

b. There is a Genuine Issue of Fact Regarding Whether Any Registration Form was in Effect at the Time of the Underlying Accident.

The AYSO Defendants contend that Plaintiff Bynoe executed a player registration form which contained two sets of exculpatory language: a) one section on the front page of a two-sided document stating in capital and bold letters “Disclaimer, Assumption of Risk and Waiver;” and b) another section on the reverse side which is untitled, but contains broad release and hold harmless language in favor of the AYSO Defendants. Based on this document, the AYSO Defendants assert that Plaintiff Bynoe released any and all future claims for injuries or damages to her which occurred during any AYSO-sponsored event. In their view, the plain language of the clauses mandate the dismissal of Plaintiff Bynoe’s individual claims. Plaintiff Bynoe counters that the AYSO used more than one player registration form, and that there was no registration form or exculpatory clause in effect at the time of the underlying accident of February 17, 2007. She also contends that the language relied upon by the AYSO Defendants is ambiguous.

Although Virgin Islands courts have routinely applied contract principles to exculpatory releases, the Supreme Court of the Virgin Islands has not definitively established the standard under which such clauses should be reviewed, nor has any trial court conducted a *Banks*¹⁰ analysis on the issue.¹¹ Under *Banks*, the Superior Court must ascertain “(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands.”¹²

⁴ *Simpson v. Golden Resorts, LLP*, 56 V.I. 597, 605 (V.I. 2012). See also *Skopbank v. Allen-Williams Corp.*, 39 V.I. 220, 227 (D.V.I. 1998).

⁵ E.g., *Weary v. Long Reef Condo. Ass’n*, 57 V.I. 163, 169 (V.I. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

⁶ *Simpson*, 56 V.I. at 605.

⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

⁸ *Id.*

⁹ *Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990).

¹⁰ *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 981 (V.I. 2011).

¹¹ In *Walker v. V.I. Waste Mgmt. Auth.*, 62 V.I. 109 (V.I. Super. Ct. 2015), this Court did conduct a *Banks* analysis on whether, and how, public policy affected an exculpatory clause it already determined to contain enforceable language. However, the *Walker* Court did not address what standard should be applied to the language of an exculpatory clause to determine whether or not it is enforceable in the first instance.

¹² *Poblete v. Palisoc*, 60 V.I. 607, 613-14 (V.I. 2014).

Courts in the Virgin Islands have stated that an exculpatory clause which limits or absolves a party for its own ordinary negligence is generally enforceable, but the language used must be “broad and unambiguous” or “clear and unequivocal.”¹³ Courts around the United States have overwhelmingly adopted very similar standards.¹⁴ Hence, the first two prongs of *Banks* favor adopting the standard already enunciated by our local courts. Further, this standard is the best policy for the Virgin Islands. As a general rule, each person is responsible for the harm caused by one’s own negligence. While parties are free to negotiate their respective liabilities among one another, care is appropriate when looking at the absolution of liability for events which have not yet occurred. Because it is not possible to predict what may happen in the future, ascertaining the intention of the contracting parties is more difficult when releasing liability for such an occurrence, than when liability is released for a past episode. This impediment warrants imposing a standard which ensures, to the extent possible, that the intention of the parties is honored, but does not too freely allow persons to be excused from the consequences of their actions. Therefore, the Court adopts the standard applied in *Delponte*, *Joseph*, and *Walker*, and holds that the language of an exculpatory clause must be clear, unambiguous, and unequivocal to be enforceable.

During motion practice, the parties presented two registration forms executed by Plaintiff Bynoe. The first was dated September 6, 2003, and consisted of a single page, with no language on the reverse side. The second document was dated September 17, 2005, and was a two-sided document. While the language of the two documents is very similar, it is not identical. Additionally, the parties presented affidavit and deposition testimony on the issue of the registration process. The deposition testimony of Thomas Tobin on more than one occasion indicated that registration for the AYSO Defendants occurred on an annual basis and covered the calendar year. Further, the affidavit of John McDonald¹⁵ also established that the AYSO

¹³ *Delponte v. Coral World V.I., Inc.*, 48 V.I. 386, 392 n.7 (D.V.I. 2006) (citing *Beloit Power Sys., Inc. v. Hess Oil V.I. Corp.*, 757 F.2d 1431, 1433 (3d Cir. 1985)), *aff’d*, 233 F. Appx. 178 (3d Cir. 2007); *Walker*, 62 V.I. at 113-14 (citations omitted); *Joseph v. Church of God (Holiness) Acad.*, 47 V.I. 419, 425-27 (V.I. Super. Ct. 2006) (citations omitted).

¹⁴ *E.g., Frittelli, Inc. v. 350 N. Canon Drive, L.P.*, 135 Cal. Rptr. 3d 761, 774-75 (Cal. Ct. App. 2011) (“Generally, when a party relies on an exculpatory clause that it has prepared to exempt itself from liability for negligence, words *clearly and explicitly* expressing that intent of the parties are required.”) (italics in original, citations and internal quotations omitted); *Slowe v. Pike Creek Court Club, Inc.*, C.A. No. 08C-08-029 PLA, 2008 Del. Super. LEXIS 377 at * 6-7 (Del. Super. Ct. Dec. 4, 2008) (exculpatory clause language must be “crystal clear and unequivocal” to be enforceable); *Offord v. Fitness Int’l, LLC*, 44 N.E.3d 479, 484 (Ill. Ct. App. 2015) (using a “clear, explicit and unequivocal language” standard) (citation omitted); *Warren v. Paragon Techs. Group, Inc.*, 950 S.W.2d 844, 845 (Mo. 1997) (“To release a party from its own future negligence, exculpatory language must be clear, unambiguous, unmistakable, and conspicuous.”) (citations and internal quotations omitted); *Forward Indus., Inc. v. Rolm of N.Y. Corp.*, 506 N.Y.S.2d 453, 454 (N.Y. Sup. Ct. App. Div. 1986) (using a “clear and unequivocal” standard) (citations omitted); *Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1189 (Pa. 2010) (exculpatory language must be clear to be enforceable) (citation omitted); *Rourke v. Garza*, 511 S.W.2d 331, 342-43 (Tex. Civ. App. 1974) (exculpatory and indemnity clauses must be unequivocal and are strictly construed) (citations omitted), *aff’d*, 530 S.W.2d 794 (Tex. 1975); *Vodopost v. MacGregor*, 913 P.2d 779, 783 (Wash. 1996) (“Exculpatory clauses in preinjury releases are strictly construed and must be clear if the exemption from liability is to be enforced.”) (citation omitted).

¹⁵ In her response to the AYSO Defendants’ motion, Plaintiff Bynoe submitted two versions of the John McDonald affidavit. One was signed by the affiant, with corrections he inserted and initialed. The other was an unsigned clean copy of a proposed affidavit for Mr. McDonald, and was accompanied by a certification of counsel explaining that this version contains the facts to which the affiant initially agreed. The AYSO Defendants have challenged Plaintiffs’ counsel’s method of presenting the unsigned affidavit in a separate motion. For purposes of the present motion, the Court considers only the executed affidavit of Mr. McDonald. *See Adickes v. S.H. Kress & Co.*,

Defendants conducted registration on an annual basis. Notably, no registration form executed by Plaintiff Bynoe for 2007, the year Tariq was injured, has been presented to the Court. In the absence of an indisputably applicable agreement, the Court cannot review the pertinent exculpatory language to determine if it is clear, unambiguous, and unequivocal. As the movants, the AYSO Defendants bear the initial burden of pointing to language in an applicable agreement which meets this standard, and they have failed to do so. Thus, they failed to satisfy their primary obligation of showing an absence of a genuine issue of material fact.¹⁶

In their reply brief, the AYSO Defendants argue that the absence of an executed 2007 registration form does not defeat their motion for summary judgment. They point to deposition testimony indicating that their computer records show that Tariq was registered as a participant in 2007. The AYSO Defendants also contend that participants in their program did not have to execute a registration form every year, and that the 2005 registration form was in effect at the time of Tariq's accident in 2007. However, in light of the evidence that the AYSO Defendants have used different registration forms, had annual registration periods, and collected fees annually, a reasonable jury could legitimately draw several inferences. For instance: 1) each executed registration form was of a one-year duration; 2) an executed registration form continued in effect for as long as the named player participated in the AYSO program; or 3) an executed registration form was effective for the named player until a new registration form was developed and implemented. Of course, in drawing any inferences as to the duration of the registration forms, and the exculpatory clauses contained therein, the jury must be guided by the legal principle that the language at issue must be clear, unambiguous, and unequivocal. Where there is a genuine issue about the duration of an agreement, and the temporal term is material, as it is here, summary judgment is inappropriate.¹⁷

c. Title 32, Section 25a, Virgin Islands Code, Does Not Limit the Liability of the AYSO Defendants.

In their reply brief, the AYSO Defendants contend that their liability in this case is limited by virtue of Title 32, Section 25a, of the Virgin Islands Code. This argument fails for two reasons. First, the argument is not properly before this Court because it was raised for the first time in the reply brief. Courts of this Territory have repeatedly criticized this procedure as unfair, because it usually leaves the opposing party without an opportunity to respond.¹⁸ Since the AYSO

398 U.S. 144, 158 n.17 (1970) (noting that an unsworn affidavit does not meet the requirements of Rule 56 of the Federal Rules of Civil Procedure).

¹⁶ The parties also dispute the proper construction of the language used in the 2003 and 2005 registration forms. Again, the language of these two documents is similar, but not identical. Because it is not clear whether the language of the 2003 form, the 2005 form, or some other form, governed at the time of the accident, it is inappropriate for the Court to construe the language presently proffered by the parties. The Court need only construe the language that was actually in effect at the time of the accident, and neither side can point to such language at this time.

¹⁷ See *Choice ATM Enters., Inc. v. Petrig*, Case No. 13-CV-359-JED-TLW, 2014 U.S. Dist. LEXIS 161541 at * 10-11 (N.D. Okla. Nov. 17, 2014); *Anderson v. Fel-Pro Chem. Prods., L.P.*, Case No. 95 C 4604, 1996 U.S. Dist. LEXIS 19551 at * 23-24 (N.D. Ill. Jan. 2, 1996); *Mackay v. Four Rivers Packing Co.*, 179 P.3d 1064, 1068-69 (Idaho 2008); *Prod. Credit Ass'n of Fargo v. Ista*, 451 N.W.2d 118, 126-27 (N.D. 1990).

¹⁸ E.g., *Hansen v. O'Reilly*, 62 V.I. 494, 517 n.24 (V.I. 2015) (citation omitted). See also *Gov't of the V.I. v. AT & T of the V.I., Inc.*, 51 V.I. 731, 741 (D.V.I. App. Div. 2009) (citations omitted); *Davis v. Hovensa, LLC*, Case No. SX-02-CV-333, 2015 V.I. LEXIS 131 at * 35-37 (V.I. Super. Ct. Oct. 28, 2015).

Defendants only raised this issue in their reply brief, they have waived the matter.¹⁹ Nonetheless, because this tribunal has been instructed to address all issues raised by a party,²⁰ the Court will address the AYSO Defendants' argument on the merits.

In reviewing Section 25a, the Court is mindful that statutory interpretation begins by examining the literal and plain language of the statute at issue.²¹ If the plain language is unambiguous, the inquiry into its meaning comes to an end.²² Further, under territorial law, unless specifically modified within 5 V.I.C. § 1451, the common law rule that a joint tortfeasor is liable to a plaintiff for the full amount of the damages awarded at trial is controlling.²³ Since Section 25a is in derogation of the common law, as it limits an injured party's right to recover all of his or her damages from a liable tortfeasor, it must be construed strictly to avoid exceeding the Legislature's intention in passing the law.²⁴

Title 32, Section 25a, Virgin Islands Code, provides a limitation on liability for a real property owner who, without charge, provides the public with a park area or other real property for recreational or educational purposes.²⁵ "Charge" is defined within the statute as an admission fee for permission to go upon or use the land, but does not include:

(A) Any contribution in kind, services or cash contributed by a person, legal entity, nonprofit organization, or governmental entity other than the owner, whether or not sanctioned or solicited by the owner, the purpose of which is to (i) remedy damage to land caused by educational or recreational use; or (ii) provide warning of hazards on, or remove hazards from, real property used for educational or recreational purposes; or

(B) Unless otherwise agreed in writing or otherwise provided by the Territorial or federal tax codes, any property tax abatement, contribution of any kind to reduce or offset costs and eliminate losses from recreational use of real property or relief received by the owner from the Government in exchange for the owner's agreement to open the real property for educational or recreational purposes.²⁶

When construing 32 V.I.C. §25a strictly, it does not limit the liability of the AYSO Defendants. They specifically note that they charged a registration fee to participants to cover uniforms, equipment and medical insurance with a portion of the locally collected fee being

¹⁹ See *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 528 n.4 (V.I. 2014) ("Like an issue raised for the first time in an appellate reply brief, an issue raised for the first time in a reply brief supporting summary judgment is deemed waived because the opposing party typically does not have the opportunity to respond.") (citations omitted).

²⁰ Generally, this tribunal has an obligation to address all legal issues raised by litigants in their written submissions. E.g., *Mahabir v. Heirs of George*, S.Ct. Civ. No. 2014-0075, 2015 V.I. Supreme LEXIS 29 at * 26 (V.I. Sept. 2, 2015) (citing *Gardiner v. Diaz*, 58 V.I. 199, 205 n.5 (V.I. 2013)).

²¹ E.g., *People v. Baxter*, 49 V.I. 384, 388 (VI. 2008).

²² *Id.*

²³ *Davis v. Am. Youth Soccer Org.*, Case No. ST-09-CV-70, 2016 V.I. LEXIS 3 at * 18-19 (V.I. Super. Ct. Jan. 20, 2016).

²⁴ *Id.*

²⁵ 34 V.I.C. § 25a(b).

²⁶ *Id.*

transmitted to the national organization. Further, to be allowed into the soccer program which took place on the UVI field, payment of these fees was required. Plainly, these expenses are not within the exceptions to "charge" laid out within the text of Section 25a(1)(A) or (B). In addition, the AYSO Defendants did not point to any record evidence that the UVI field had been registered with the Office of the Lieutenant Governor, which is a prerequisite to obtaining the protections of the statute.²⁷ Consequently, the AYSO Defendants are not entitled to a limitation on their liability under this statute, and summary judgment is inappropriate.

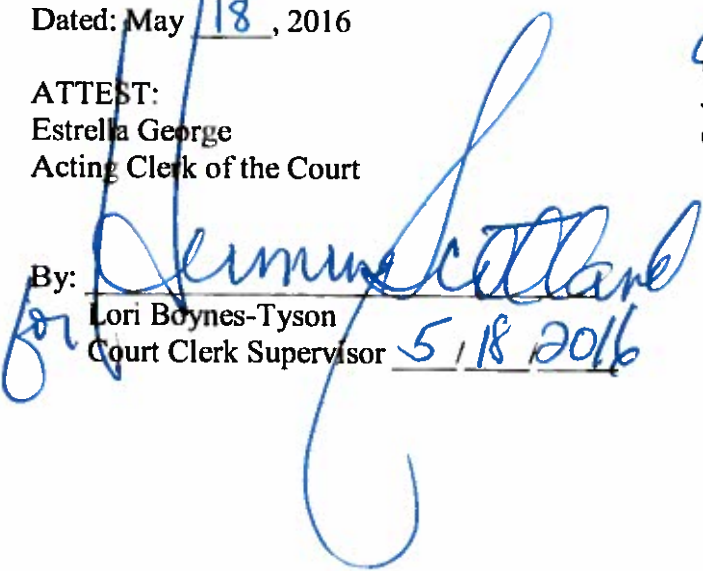
III. CONCLUSION.

There are genuine issues of material fact regarding the duration and language of the exculpatory clause on which the AYSO Defendants rely to limit their liability for Plaintiff Bynoe's asserted damages. Further, the AYSO Defendants waived any issues regarding 32 V.I.C. §25a, and, even if they did not, it is inapplicable to the matter at hand based upon the summary judgment record. Therefore, the Court will deny the AYSO Defendants' motion for partial summary judgment against Plaintiff Bynoe in an order of even date.

Dated: May 18, 2016

ATTEST:
Estrella George
Acting Clerk of the Court


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

By: 
Lori Boynes-Tyson
Court Clerk Supervisor 5, 18, 2016

²⁷ 32 V.I.C. § 25a(c).