

7/11/2017

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JAMES W. McCONNEL,)

Plaintiff,)

v.)

OMNI HOTELS MANAGEMENT)
CORPORATION,)

Defendant.)

Civil Action No.: 5:16-CV-064

By: Michael F. Urbanski,
Chief United States District Judge

ORDER

On July 6, 2017, the court held a hearing on the motions in limine filed by the parties.

For the reasons set forth at that hearing, the court rules as follows:

Defendant Omni Hotels Management Corporation's ("Omni") motion in limine (ECF No. 46) is **GRANTED in part** and **DENIED in part**. Specifically, as to paragraph 1 of the motion, plaintiff James W. McConnell may not put forward evidence as to Omni's profit motive in conducting Segway Polo. However, McConnell may bring evidence as to the development and implementation of the Segway Polo activity. As to paragraph 2, McConnell may not bring evidence of Omni's financial status, size, or reference Omni's corporate form, except to the extent that such evidence is relevant to the conduct of the Segway Polo program. As to paragraph 3, the motion is **DENIED as moot**, as counsel for McConnell has indicated that he will not offer evidence related to future medical treatment or future physical limitations. However, McConnell himself may testify as to his current symptoms. As to paragraphs 4 and 5, the motion is **DENIED**. McConnell may present the jury with evidence regarding the circumstances surrounding the planning and implementation of the

Segway Polo activity—including field size, training procedures, and the number of people involved in playing and overseeing the activity.

Plaintiff McConnell's motion in limine (ECF No. 48) is **GRANTED in part** and **DENIED in part**. McConnell asks the court to rule that the "Segway Personal Transporter Tours Liability Release Form," (the "Release") is inadmissible in its entirety. He notes that, under Virginia law, prospective waivers of liability are void as against public policy. ECF No. 49, at 1 (citing Hiett v. Lake Barcroft Cmty. Ass'n, Inc., 244 Va. 191, 196 (1992)). Omni does not disagree, but asks the court to redact those portions of the Release pertaining to waiver of liability, and allow admission of the Release to the extent it indicates that McConnell was aware of the risks associated with Segway Polo. ECF No. 55, at 3. McConnell opposes this partial admission, on the grounds that the Release was prepared by counsel for Omni, and that attorneys presenting "laypersons with documents which they represent to be valid and to have the force of law, when they know they are in fact void and unenforceable" constitutes fraud on the public. ECF No. 49, at 2. In support, McConnell cites Virginia State Bar Standing Committee on Legal Ethics Opinion 1495, in which the Committee opines that it would be improper for a Virginia lawyer to issue a subpoena duces tecum to an out of state individual knowing the subpoena to be unenforceable. Id.; see ECF No. 49-3. Thus, McConnell contends that it would be inadequate to "simply redact certain language from the liability waiver." ECF No. 49, at 3.

While the court appreciates McConnell's argument, it is simply not supported by the case law. The ethics opinion McConnell cites suggests that a lawyer should not present to laypersons documents known to be unenforceable; nonetheless, it does not concern the

precise issue at question here: whether the use of a pre-liability waiver by a business should be seen as sufficiently fraudulent to require the court to exclude the waiver in its entirety.

By contrast, courts have addressed how documents such as the Release should be treated for admissibility purposes. Manchanda v. Hays Worldwide, LLC, 142 F. Supp. 3d 465 (E.D. Va. 2015) concerned a fatal scuba diving accident, in which the decedent signed documents (the “Agreements”) similar to the Release at issue here. The court noted that “Virginia public policy will not permit the Court to view those Agreements as decisive evidence that [decedent] expressly assumed the risk of Defendants’ negligence.” Id. at 474. Nonetheless, the court admitted “other parts of the Agreements as evidence of [decedent’s] knowledge of the dangers of scuba diving.” Id. at 475. Manchada is one of many cases that takes such an approach, and holds “that an agreement with void releases may still be admissible as evidence for an alternative legal purpose.” Id.; see, e.g., Haga v. L.A.P. Care Servs., Inc., No. 1:01CV00105, 2002 WL 1754485 (W.D. Va. July 29, 2002); Poston v. Skewes, No. 2:00cv00129, 2001 WL 1478661 (W.D. Va. Nov. 21, 2001), aff’d, 49 F. App’x 404 (4th Cir. 2002); see also Coles v. Jenkins, 34 F. Supp. 2d 381, 389 (W.D. Va. 1998) (“[T]he legal effect of the release should not be construed as dispositive on evidentiary questions such as admissibility.”). These cases do not note whether the releases in question were drafted by attorneys or laypersons, which is itself evidence that such a distinction should be considered immaterial. More importantly, McConnell has not provided—and the court’s independent search has failed to reveal—any authority for the proposition that a partially admissible release becomes wholly inadmissible if drafted by an attorney.

In sum, though McConnel's position would have the salutary effect of disincentivizing the use of unenforceable pre-liability waivers, Virginia precedent is clear that the proper treatment of such documents is to redact those provisions that are void as against public policy, and admit the remainder to the extent independently relevant. As such, Omni may not introduce the Release, or offer evidence as to its contents, to the extent the Release purports to waive Omni's liability or establish assumption of risk as a matter of law. However, the court will allow entry of a redacted version of the Release, disclosing only those portions that tend to indicate McConnel's awareness of the risks posed by Segway Polo.

Finally, it is **ORDERED** that McConnel provide to Omni information regarding plaintiff's expert Corey Andres' compensation sufficient to satisfy the requirements of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. McConnel shall provide this information to Omni on or before July 16, 2017, or Andres will not be permitted to testify at trial.

It is **SO ORDERED**.

Entered: 07-10-2017

/s/ Michael F. Urbanski

Michael F. Urbanski
Chief United States District Judge