IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DOE 6, FATHER, *et al*., **Plaintiffs,** **v.** **WASHINGTON HEBREW CONGREGATION, INC., *et al.*,** **Defendants.**	**2019 CA 002488 B** **Judge Alfred S. Irving, Jr.** **Next: Status Hearing** **Date: January 10, 2023**
PARENT 1-A, *et al*., **Plaintiffs,** **v.** **WASHINGTON HEBREW CONGREGATION, INC.,** **Defendant.**	**2019 CA 003193 B** **Judge Alfred S. Irving, Jr.** **Next: Status Hearing** **Date: January 10, 2023**

ORDER

Before the Court is *Washington Hebrew Congregation's Motion for Summary Judgment Based on Liability Releases*, filed on July 19, 2022. On August 19, 2022, Plaintiffs filed an opposition. On September 9, 2022, Defendant Washington Hebrew Congregation, Inc. ("WHC") filed a reply. In short, WHC seeks summary judgment on all claims, arguing that Plaintiffs waived all of their claims consistent with a release waiver that governed injuries arising from school activities. The Court finds curious the timing of the filing in view of the facts that litigation has been underway since 2019, WHC has already resolved at least one of the claims with one set of parents, and the existence of an insurance policy that provides coverage for the claims of abuse and sexual molestation, the activities that resulted in this civil filing. What is

more, Defendants have sought a ruling as to the existence of a cap on liability. No matter, the Court has considered the pleadings and finds it must deny the motion.

As a preliminary matter, the Court will dispense with including a section setting forth a factual background because it would simply mirror that which the Court set forth in its October 13, 2022 Order. For a factual recitation, the Court refers the Parties to that decision. Further, while the Parties have requested oral argument, the Court finds that the pleadings are sufficient, rendering arguments unnecessary.[1]

I. Summary Judgment Standard

To prevail on summary judgment, the moving party "must demonstrate that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001) (citing Super. Ct. Civ. R. 56(a)). If the moving party is successful, the burden shifts to the non-moving party, who must raise a genuine issue of material fact to survive summary judgment. *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012); *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

In reviewing a motion for summary judgment, a court must construe all evidence in the light most favorable to, and make all inferences in favor of, the non-moving party. *See Linen v. Lanford*, 975 A.2d 1173, 1178 (D.C. 2008); *O'Donnell v. Associated Gen. Contractors of Am.*, 645 A.2d 1084, 1086 (D.C. 1994). "Summary judgment is an extreme remedy that is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law." *Maddox v. Bano*, 422 A.2d 763, 764 (D.C. 1980)

[1] *See* Super. Ct. Civ. R. 12-I (h) ("[T]he court in its discretion may decide the motion without a hearing.").

(citing *Sartor v. Ark. Nat. Gas Corp.*, 321 U.S. 620, 627 (1944)). "[M]ere conclusory allegations are insufficient to avoid entry of summary judgment." *Jones v. Thompson*, 953 A.2d 1121, 1124 (D.C. 2008) (internal quotations omitted). And the "mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party." *Id.* at 1124 (internal quotations and alterations omitted).

Contract interpretation cases "may be resolved by summary judgment if the contract is reasonably susceptible to only one reading under the governing law." *Nat'l Hous. P'ship v. Mun. Capital Appreciation Partners. I, L.P.*, 935 A.2d 300, 309 (D.C. 2007). Where there remains a "critical question whether the provisions of the Release are indeed applicable" to the litigation, there exist disputed questions of material fact and summary judgment is therefore improper. *Klock v. Miller & Long Co.*, 763 A.2d 1147, 1150 (D.C. 2000).

II. Analysis

It is undisputed that, as part of the enrollment process for the E-T ECC and Camp Keetov, each Plaintiff family signed an enrollment form, which included a Consent and Liability Waiver. *See* Mem. P. & A. Supp. WHC Mot. Summ. J. (hereinafter "WHC MSJ"), Exs. O-BB. The liability waiver provides as follows:

> Consent and Liability Waiver Blanket Permission for all Given Activities
>
> As lawful consideration for my child being permitted to participate in the activities of the Washington Hebrew Congregation's Edlavitch Tyser Early Childhood Center (the "School"), including, without limitation, any transportation provided to my minor child by an employee, officer, director, volunteer, agent or servant of the School (each, an "Authorized Person"), I agree that neither my minor child nor I, nor our respective heirs, assigns, personal representatives or estates, may or will make any claim against, sue or attach the property of the School or of any Authorized Person for damages by reason of death, personal injury, accident, illness or property damage which I or my minor child may sustain as a result

> of his or her participation in these activities. This release is intended to discharge in advance the School and all Authorized Persons from and against liability, including negligent acts or omissions, except liability arising out of willful or wonton [sic] misconduct by such Person.

WHC MSJ, Ex. O. The end of this section of the enrollment form includes the following language, in all capital letters:

> I HAVE CAREFULLY READ THIS AGREEMENT AND FULLY UNDERSTAND ITS CONTENTS. I AM AWARE THAT THIS IS A RELEASE OF LIABILITY FOR MYSELF AND MY CHILD AND A CONTRACT BETWEEN MYSELF, MY CHILD AND THE SCHOOL AND ITS EMPLOYEES, OFFICERS, DIRECTORS, VOLUNTEERS AND AGENTS, AND I HAVE SIGNED IT OF MY OWN FREE WILL.

Id.

WHC argues that this contract language bars all of Plaintiffs' claims in these consolidated matters. *See generally* WHC MSJ. Specifically, WHC notes that Plaintiffs' claims all sound in negligence, and that, as such, the plain language of the waiver releases WHC from liability on those claims. *Id.* WHC further contends that its alleged misconduct does not rise to the level of "willful or w[a]nton" behavior that would bring it outside the protection of the waiver. *Id.* at 6-9. WHC, therefore, requests that this Court enforce a "straightforward application of clear and unambiguous contract terms" and grant its motion for summary judgment on all claims. *Id* at 9.

Plaintiffs, among other arguments, assert that the Release, by its terms, only covers harm sustained from "school activities." They contend, and there is no quarrel from WHC, that abuse and sexual molestation are not school activities. Mem. P. & A. Opp'n. WHC Mot. Summ. J. (hereinafter "Opp'n MSJ") at 6-8. Moreover, Plaintiffs argue that neither Plaintiff Parents nor WHC contemplated that the Release would exculpate WHC from liability relating to sexual abuse, and that the Release therefore cannot extend to such claims. *Id.* at 9. Further, as to the

cases upon which WHC relies, Plaintiff Parents assert that, in those matters, the trial judges enforced a liability waiver after finding a "clear nexus between the harm alleged and the harm covered by the at-issue release," and that such nexus is lacking here. *Id.* at 10-11.

Exculpatory contract provisions are enforceable in the District of Columbia, with "the rules of contract construction govern[ing their] interpretation." *GLM P'shp. v. Hartford Cas. Ins. Co.*, 753 A.2d 995, 998 (D.C. 2000); *cf. Carleton v. Winter*, 901 A.2d 174, 181 (D.C. 2006) (noting District of Columbia courts "do not enforce agreements to exempt parties from tort liability if the liability results from that party's own gross negligence, recklessness, or intentional conduct"); *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 802 n.18 (D.C. 2011) (finding that exculpatory clauses may not be valid "in the context of transactions that affect the public interest"); *Moore v. Waller*, 930 A.2d 176, 181 (D.C. 2007) ("[P]ublic policy will not permit exculpatory agreements in certain transactions affecting the performance of a public service obligation or 'so important to the public good that an exculpatory clause would be patently offensive.'") (*quoting Wolf v. Ford*, 335 Md. 525, 644 A.2d 522, 526 (Md. 1994)).

To reiterate, because a release is a form of contract, the "normal rules of contract interpretation apply." *Lamphier v. Wash. Hosp. Ctr.*, 524 A.2d 729, 732 (D.C. 1987). Accordingly, "the parties' intentions are paramount to construction of the instrument." *Id.* Where the document is facially unambiguous, the court should look to its explicit language to prove the intent; if the document is ambiguous, the court may consider extrinsic evidence of the parties' subjective intent. *Davis v. Davis*, 471 A.2d 1008, 1009 (D.C. 1984). Courts may also consider extrinsic evidence to determine the circumstances surrounding formation to ascertain what a reasonable person in the position of the parties would have thought the words of the agreement meant. *1010 Potomac Assoc. v. Grocery Mfrs.*, 485 A.2d 199, 205-06 (D.C. 1984);

see Jabbour v. Bassatne, 673 A.2d 201, 203 (D.C. 1996) (finding that the release language may be "viewed in context to determine what a reasonable person in the shoes of the parties making the agreement would have thought its language meant"). An ambiguity exists where the "parties never contemplated a particular contingency and therefore included nothing in the contract that addresses it." *Aziken v. District of Columbia*, 70 A.3d 213, 219-20 (D.C. 2013). "[O]nce a contract is determined to be ambiguous, summary judgment generally is improper." *Id.*

First, the Court will consider the plain language of the release, starting with the title of the provision, which arguably provides a preview of what is to follow. The title references "given activities," suggesting that the Parties have a notion about the specific types of activities covered by the provision. So, the first question logically would be whether "given activities" either explicitly or implicitly encompasses abuse and molestation. Neither side answers that question in the affirmative. In other words, and importantly, WHC never contends that sexual molestation activity is an activity from which it asked the Parents to waive liability.

Each parent explicitly agreed not to hold liable WHC or any WHC employee for personal injury that the parent or their "minor child may sustain as a result of his or her participation in these activities." WHC MSJ, Ex. O. Fundamentally, no one envisioned that a child would be participating in abuse and molestation activities. The provision, itself, suggests, in fact, that "activities" are activities those typically engaged in by children in a school or child development setting. The provision does not elaborate further. The only school activity that the provision explicitly references is "transportation provided to my minor." *Id.* At least with respect to transportation, WHC thought the nature of this activity warranted a special, independent reference. This seems understandable given that vehicle transportation is particularly fraught

with danger that is separate and apart from injuries typically attendant to a child's participation in activities on the campus.

Thus, a natural question for the Court is whether the above language is beset with some ambiguity that requires further clarity. Stated another way, the Court must answer the question of whether the language demonstrates an unambiguous intention by the Parties to disclaim liability related to alleged sexual abuse of minor children. The answer is assuredly, no. The Court observes that, at the very least, one could argue that there is ambiguity whether that sexual abuse of minor children is a "school activity." The Court notes that, when signing the Release, the Parents had to attest that their children were "physically fit" to participate in school activities, which, to the Court, implies that the possible injuries of which the provision speaks related to school activities typically expected in a playground or gymnasium context, ranging from scraped knees to broken bones. *Id.*

The Court's reasoning, here, is shared by a trial judge who was faced with a similar question in Massachusetts. In *Skelley v. Trs. of the Fessenden Sch.*, which the Court concedes is not binding, a trial court at the summary judgment stage concluded that a release which waived liability against the school for "any damage" sustained by a student from "all school activities" did not apply where a high school hockey coach stalked and sexually harassed the student. There, the judge opined that, "it is less clear which activities are included in the release clause, and it is certainly improbable that a parent would contract away the right to sue in the event that a child was sexually harassed or abused by a member of the faculty." No. 95-2512, 1997 Mass. Super. LEXIS 149, at *8 (Aug. 28, 1997).

The Court also appreciates that in WHC's view, the language is patently clear. Given that an argument likely can be made that the explicit language of the Release does not

unambiguously waive liability related to alleged sexual abuse of minors, however, the Court will next consider the Parties' subjective intentions is executing the agreement.

Plaintiff parents all signed sworn declarations attesting that, by signing the Release, they did not contemplate that they would be releasing claims against WHC relating to their children being sexually abused while under WHC's supervision. Pls.' Resp. to WHC's Statement of Material Facts ¶ 51. And, WHC Executive Director Steven Jacober, in his deposition, testified that, prior to the instant litigation, he did not contemplate the risk of a preschool employee sexually abusing children. Pls. Ex. 33 (Jacober Dep. Tr.) at 71:3-74:5. In fact, neither side has submitted any evidence that would support the proposition that the Parties *did* contemplate that the Release would waive liability for the sexual abuse of minor children.

This stands to reason. Both sides reasonably appreciated that young children may suffer an injury whether negligence is involved or otherwise. WHC spoke movingly in its pleadings of its history and the meaning its very existence has held for its members. *See generally* WHC MSJ. Likewise, one can imagine that the Parents appreciated very much that history, and that it indeed influenced their decision to enroll their children in the school and their decision to sign the waiver. Further, the facts seem to show that there was a strong expectation on the part of both sides that the children would be protected from abuse and molestation. Against this backdrop, it would be hard for this Court to envision a situation where such a waiver would apply to the charges of sexual molestation and abuse in this case. Accordingly, the Court concludes that evidence of the Parties' subjective intent likewise does not support WHC's contention that the Release unambiguously waives liability for the instant claims. In any event, the Court will address the cases upon which WHC relies.

As an initial matter, the cases simply are not sufficiently analogous to the facts that this case presents for their reasoning to be instructive. The cases, collectively, support a different proposition, one that has already been analyzed above: that a release should be enforced if it is reasonable to impute to the parties an intention to waive the injury alleged. *See Mero v. City Segway Tours of Wash. DC, LLC*, 962 F. Supp. 2d 92, 97 (D.D.C. 2013) (finding that the injuries allegedly suffered were "expressly contemplated in the Agreement itself" where the plaintiff suffered fractures after falling from a Segway scooter and the agreement specifically disclaimed injuries arising from Segway use, including those due to collisions and falls); *Wright v. Sony Pictures Entm't, Inc.*, 394 F. Supp. 2d 27, 34 (D.D.C. 2005) (barring plaintiff's claims for personal injuries suffered as a result of his participation as a contestant on Wheel of Fortune after the game show host jumped on him in excitement, and where the release covered any claim "arising out of [his] participation on the program or in any way related to the program"); *Ferenc v. World Child, Inc.*, 977 F. Supp. 56, 61 (D.D.C. 1997) (holding that a release should be "given the effect it was obviously intended to have" where a couple sued an adoption agency for wrongful adoption based on the adoptee's severe neurological issues, and the release specifically disclaimed that the adoption agency was unable to vouch for the accuracy of medical information provided by Russian authorities); *Potomac Plaza Terraces, Inc. v. QSC Prod., Inc.*, 868 F. Supp. 346, 354 (D.D.C. 1994) (enforcing a release that specifically covered "any damage" arising out of "any leaks" or "failure to repair any leaks" where the alleged injury was caused by a leaking roof); *Moore v. Waller*, 930 A.2d 176, 181 (D.C. 2007) (holding that the alleged physical injuries were "reasonably within the contemplation of the parties" where plaintiff suffered them while participating in a kickboxing demonstration at a fitness club and the release barred claims arising out of "attendance at or use of the Club or participation in any of the Club's programs or

activities"); *GLM Pshp.* 753 A.2d at 999 (holding that a release was "effective in accordance with its terms" where the release covered any additional claims arising from a specific fire that had already occurred).

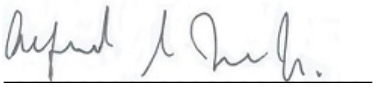
Neither the facts of this case nor the law support granting WHC's motion for summary judgment. *See Noonan v. Williams*, 686 A.2d 237, 246 (D.C. 1996) (reversing the trial court's grant of summary judgment because the language in the release was "sufficiently ambiguous to raise a contested issue of fact as to the intent of the parties when they agreed to the release"). The Court declines to address Plaintiffs' remaining arguments given that the Court's finding on this point is dispositive.

For the foregoing reasons, the Court declines WHC's request for summary judgment on all claims based on the liability releases.

ACCORDINGLY, it is by the Court this 19th day of October 2022, hereby

ORDERED that Defendant Washington Hebrew Congregation, Inc.'s *Motion for Summary Judgment Based on Liability Releases* is **DENIED.**

So ordered.



Judge Alfred S. Irving, Jr.

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