IN THE SUPREME COURT OF MISSOURI

No. SC 93702

CYNTHIA DeCORMIER

Plaintiff - Appellant

v.

HARLEY-DAVIDSON MOTOR COMPANY GROUP, INC.
and
ST. LOUIS MOTORCYCLE, INC. d/b/a GATEWAY HARLEY-DAVIDSON

Defendants - Respondents

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable John D. Warner, Jr.

APPELLANT'S SUBSTITUTE BRIEF

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STATEMENT OF JURISDICTION

Appellant/Plaintiff Cynthia Decormier filed suit against Respondents/ Defendants Harley-Davidson Motor Company Group, Inc. and St. Louis Motorcycle Inc. doing business as Gateway Harley Davidson on September 2, 2011 asserting violation of Defendants' various duties to Plaintiff under Missouri common law resulting in personal injuries to the Plaintiff. On August 22, 2011, the Honorable John D. Warner, Jr. Circuit Court of St. Louis County, Twenty-First Judicial Circuit of the State of Missouri entered judgment against Plaintiff Cynthia Decormier, by granting Defendants Motion for Summary Judgment on the basis of an affirmative defense that Plaintiff had released her claims against Defendants. Plaintiff Cynthia Decormier filed a timely notice of appeal.

This case does not involve the validity of a treaty or statute or the Constitution of the United States, the validity of a statute or Constitution of the State of Missouri, the construction of the revenue laws of Missouri or the title of any Missouri office. It does address the applicability of statutes of the State of Missouri. Therefore, this appeal is within the general appellate jurisdiction of the Missouri Court of Appeals, Eastern District, pursuant to Mo. Const. art. V, §3 of the Missouri Constitution and R.S.Mo. §512.020.

STATEMENT OF FACTS

On April 13, 2008, Cynthia DeCormier, was enrolled in the "Rider's Edge New Rider Course" ("the class")(L.F.14,33,34).[1] Defendant Harley-Davidson Motor Company Group, Inc. ("Harley Davidson") was involved in the marketing, training, development and authorization for the class. (L.F. 34) This remedial instruction course for beginners to learn how to ride a motorcycle was held on the property owned by Defendant St. Louis Motorcycle, Inc. (L.F.14,33) The instructors for the course that Ms. Decormier signed up for were employees of St. Louis Motorcycle and were certified through the Missouri Motorcycle Safety Program and the Harley-Davidson Rider Services Department. (L.F. 34-35, 78).

Through discovery, Defendants produced several documents that illustrated the safety procedures that instructors of the class were supposed to follow to insure the safety of students like Ms. Decormier. (L.F. 57-58).

First, basic rider courses were "not be conducted during a thunderstorm, snowstorm, windstorm, with ice on the range or if the certified instructors, known as "RiderCoaches" determine the safety of the students is at risk" (L.F. 57). Instructors had the duty to maintain a low-risk environment and ensure that participant safety is the highest priority when conducting a class. (L.F. 57, 58).

[1] L.F. refers to the Legal File as filed in the Court of Appeals.

Instructors are also supposed to teach students that a higher degree of care and experience is needed when riding in icy, rainy, or slippery conditions. (L.F. 57).

On April 13, 2008, Plaintiff was participating in the class at St. Louis Motorcycle, Inc.'s place of business in St. Louis County, Missouri. (L.F. 33). On April 13, 2008, there was rain, drizzle, snow, and mist at the location of the class. (L.F. 57,58).

Plaintiff alleged, and defendant denied, that on April 13, 2008, what was promised by the Defendants to be an outdoor "controlled environment," became icy and slippery due to the inclement weather conditions. (L.F. 56,58). Plaintiff also alleged, and Defendants denied, that despite these icy and slippery conditions, Defendants' instructors for the class continued to send riders out on the course to perform exercises on their motorcycles. (L.F. 58). Plaintiff alleged, and Defendants denied, that neither Defendants nor their instructors took any action to remediate the slick and dangerous conditions. (L.F. 58,59). Finally, Plaintiff alleged, and Defendants denied, that while performing an exercise on the icy and slippery motorcycle track, at the bequest of her instructor, Plaintiff's motorcycle slipped and landed on her leg, causing her severe injuries. (L.F. 59).

POINT RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BASED ON THE EXISTENCE OF AN EXCULPATORY CLAUSE IN A RELEASE BECAUSE GIVING THE BENEFIT OF ALL REASONABLE INFERENCES TO THE PLAINTIFF THERE EXISTS A GENUINE DISPUTE AS TO WHETHER THE ACTIONS OF THE DEFENDANTS CONSTITUTED GROSS NEGLIGENCE

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993).

Alack v. Vic Tanny Intern. of Missouri Inc., 923 S.W.2d 330, (Mo. banc 1996)

Hatch v. V.P. Fair Foundation, 990 S.W.2d 126 (Mo. App. E.D. 1999)

A. ARGUMENT

The standard of review for the entry of summary judgment is *de novo*. Rice v. Shelter Mut. Ins. Co., 301 S.W.3d 43, 46 (Mo. banc 2009).

The record is reviewed in the light most favorable to the party against whom judgment was entered. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). "Where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant's right to judgment, summary judgment is not proper."

Id. at 378. "[I]f the movant requires an inference to establish his right to judgment as a matter of law, and the evidence reasonably supports **any inference other than (or in addition to)** the movant's inference, a genuine dispute exists and the movant's *prima facie* showing fails." *Id.* at 381. (emphasis added).

Defendants sought summary judgment based solely on the affirmative defense that their conduct was released because of an exculpatory clause in a document signed by the Plaintiff. (L.F. 19-21) Even though the State of Missouri allows exculpatory clauses exonerating parties from future negligence, this Court has held that one may never exonerate oneself from liability for **gross negligence**. Alack v. Vic Tanny Intern. of Missouri Inc., 923 S.W.2d 330, 337 (Mo. banc 1996).

In order to accept that Plaintiff's suit was barred by the affirmative defense of release, the trial court had to accept defendants' view of the facts. That is to say that the trial court had to find that the actions of the trained and certified motorcycle instructors who sent Plaintiff, an inexperience rider, onto a slippery outdoor motorcycle track in the ice, rain and mist was not an act of gross negligence or recklessness. In addition, in order to grant summary judgment to the Defendants, the trial court had to find that these actions by the Defendants did not constitute gross negligence or recklessness despite the fact that the extensive training and certification that the course instructors underwent, as well as the rules and guidelines that Defendants created and adopted, forbid instructors from doing exactly what they did, send a new rider out to drive her motorcycle in the rain and ice on a slippery track.

Said another way, in order to obtain summary judgment, the trial court had to infer from Defendants' evidence that Plaintiff's allegations did not rise to the level of gross negligence or recklessness, ***and*** that nothing put forth by the Plaintiff inferred otherwise. By granting Summary Judgment the trial court erred because Plaintiff established evidence from which a reasonable inference could be drawn that defendants conduct was of the type that could not be excused through a waiver of liability.

Defendants' did not put forth any affirmative evidence, other than a signed release and a general denial of Plaintiff's allegations that Defendants' actions did not constitute gross negligence or recklessness. Defendants, therefore, never met their burden for summary judgment, which is "to show a right to judgment flowing from facts about which there is no genuine dispute." Itt Commercial Fin. Corp. 854 S.W.2d 371, 378.

In Hatch v. V.P. Foundation, Inc. the Court of Appeals held that a signed waiver of liability did not prevent Plaintiff from bringing a claim against the released party based on the risk of harm that the defendant's actions brought upon the plaintiff. Hatch, 990 S.W.2d at 140 (Mo. App. E.D. 1999). In that case the plaintiff sustained serious injuries after a bungee jumping accident where the defendant forgot to attach the bungee cord to the crane from which the plaintiff was jumping. *Id.* at 130. The plaintiff had signed a waiver of liability. *Id*. Similar to Hatch, Ms. Decormier signed a waiver of liability with the implicit understanding that the Defendants' were going to take the necessary steps to protect her from an unreasonable risk of substantial harm. Just as the Defendant in Hatch could not be released from its failure to take the basic step of attaching the bungee cord before she jumped off a crane, the Defendants in this case should not be released from

failing to follow their own basic procedures and fulfill their promised duties as instructors to, "maintain a low risk environment," "by using a higher degree of care and experience []when riding in icy, rainy, or slippery conditions." (L.F. 57,58).

Despite Defendants' contention that they are excused from following their own safety rules because the law does not recognize degrees of negligence and therefore their conduct is absolved, Missouri Courts regularly make the distinction between something more than ordinary negligence and less than an intentional act.

In Brown v. Westinghouse Electric Corp., the Court of Appeals for the Eastern District distinguished between a tort that is something more than negligence and less than an intentional act. 803 S.W.2d 610, 617 (Mo. App. E.D. 1990) ("The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong.") Similarly, this Court has examined what it has called gross negligence in terms of statutory exceptions to official immunity. *See* Southers v. City of Farmington, 263 S.W.3d 603, 614-615 (Mo. 2008). Missouri Courts also utilize a gross negligence standard in terms of professional licensing cases. *See* Boyer v. Tilzer, 831 S.W.2d 695, 698 (Mo. App. E.D. 1992).

It matters less what you call the conduct but instead how it is defined. As the lower court opinion in this case emphasized, Missouri courts have accepted the definition of "recklessness" set forth in the Restatement of Torts, and have used that definition numerous times. Decormier v. Harley-Davidson Motor Co. Group, Inc., ED 99064, slip

op. at 9-10 (Mo. App. E.D.. Aug. 13, 2013). Recklessness is different from ordinary negligence but it is not an intentional tort. *Id.*

As the Court of Appeals explained:

> "A person is negligent, if his inadvertence, incompetence, unskillfulness or failure to take precautions precludes him from adequately coping with a possible or probable future emergency." 740 S.W.2d at 235. "To be reckless, a person makes a conscious choice of his course of action, 'either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to any reasonable man.'" Id. (quoting Restatement (Second) of Torts § 500 cmt. g (1965)). "Recklessness also differs from that negligence which consists of intentionally doing an act with knowledge it contains a risk of harm to others." Id. "To be reckless, a person must 'recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent.'" Id. (quoting Restatement (Second) of Torts § 500 cmt. g (1965)).

Decormier, at 9 (*Citations in the original.)*

The undisputed record in this case supports a reasonable inference in favor of Ms. Decormier that the conduct of Defendants was of the type which they could not exonerate themselves by way of an exculpatory clause. The type of conduct that cannot be exonerated by an exculpatory clause is when a defendant, " intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know

of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him." Hatch, 990 S.W.2d 126, 139-140(citations omitted).

As the Court of Appeals decided, it is a reasonable inference that defendants knew, or had reason to know, that sending a student in a beginner motorcycle class to ride her motorcycle on a slippery track in the ice and rain created a high degree of probability that substantial harm would result to her. Defendants had reason to know that such harm would happen because they were trained that a "higher degree of care and experience was needed in icy rainy and slippery conditions." Defendants had reason to know that such harm would occur because sending beginning riders onto an icy, rainy and slippery track was contrary to their own rules.

All inferences from the pleadings and the evidence, taken in favor of the Plaintiff, clearly support the fact that Defendants had established clear safety rules that they would not send novice motorcycle students out onto the track in adverse weather conditions or when the track was wet and slick because it was known to be dangerous. All inferences taken in favor of the Plaintiff suggest that Defendants violated their own rules. These facts, which Plaintiff established upon the record, demonstrate a belief or consciousness on the part of the Defendants that they were causing an appreciable risk of harm, and that the risk of harm to Plaintiff was great. *See* Brown v. Westinghouse Electric Corp 803 S.W.2d 610, 617 (Mo. App. E.D. 1990). In other words, Defendants conduct was reckless.

Defendants dispute these facts, but these are the facts that Plaintiff put forth in the record on summary judgment and which the trial court was obligated to accept as true. The trial court had to overlook these facts in order to grant summary judgment for Defendants and that was not proper. *See* ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 378 (Mo. 1993).

If exculpatory releases are truly disfavored in Missouri, and gross negligence or recklessness cannot be exonerated in a release, then Plaintiff is entitled to have a jury decide her claim. *See* Alack at 337.

In order to grant summary judgment, the trial court had to overlook all of Plaintiff's evidence that the actions of the Defendants constituted gross negligence or recklessness. Because a genuine dispute as to these facts exists, the trial court erred in granting summary judgment in favor of Defendants.

IV. CONCLUSION

The trial court erred in granting Summary Judgment based on Defendants' affirmative defense of release, because there exists a genuine dispute of material fact as to whether Defendants' conduct was the type that cannot be exonerated through a exculpatory clause in a release. The Trial Court's entry of Summary Judgment should be reversed and the case should be remanded for trial.

F or all of the above-stated reasons the Trial Court's judgment granting these Defendants' Motion for Summary Judgment should be reversed and this Court should remand this case for a just resolution under the allegations of Appellant's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served via the Court's electronic filing system in accordance with Rule 103.09, this 6th day of January, 2014 to: Terese A. Drew and Timothy A. Etzkorn, 701 Market Street, Ste. 1300, St. Louis, MO 63101, tdrew@hinshawlaw.com, tetzkorn@hinshawlaw.com, Attorneys for Respondents.

/s/ Matthew R. Davis

CERTIFICATE OF COMPLIANCE

The undersigned certifies the following pursuant to Rule 84.06(c):

1. The attached brief complies with the requirements and limitations contained in Missouri Supreme Court Rules 55.03 and 84.06.

2. The brief was prepared using:

    a. Microsoft Word

    b. Times New Roman font; and

    c. Font size 13.

3. Excluding the cover page, table of contents, table of authorities, signature block, this certification, and the certificate of filing and service, the brief contains 2,008 words and does not exceed the words allowed.

4. The electronic version of the brief, saved as a PDF in searchable format, has been filed via the Court's electronic filing system. The attorney has signed the original and will maintain a copy in accordance with Rule 55.03.

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