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 REPLY BRIEF

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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

Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 334 (Mo. banc 1996).

Mo. v. Turnbo, 740 S.W.2d 232, 234 (Mo. App. E.D. 1987).

Itt Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 378 (Mo. 1993)

A. Defendants' conduct cannot be released if they knew or should have known that their conduct created an unreasonable risk of harm to Plaintiff and that Defendants' conduct was either with knowledge of the serious danger to Plaintiff or with knowledge of the facts which would disclose the danger to any reasonable man.

[T]here is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence…." Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 334 (Mo. banc 1996).

This case turns on the meaning of the words "gross negligence," as used in Alack, and the application of that meaning in the context of a motion for summary judgment.

Defendants argue that the holding in Alack stands for the proposition that intentional conduct is the ***only*** type of conduct that can never be exonerated by operation

of an exculpatory clause in a release. Resp. Sub. Br. at 7-11. To support this position Defendants cite one case, Warner v. Southwestern Bell Tel. Co., 428 S.W.2d 596 (Mo. 1968).

Warner, however, does not deal with an exculpatory clause in a release. Warner deals with the application of public utility regulations. As the Court explains, a utility's liability is limited in Missouri because:

"[T]he utility is strictly regulated in its rights and privileges, it should likewise be regulated to some extent in its liabilities, and that such limitations are at least indirectly considered and involved in establishing its rates." *Id.* at 601.

There is no support in Missouri law for Defendants' position that in a tort case "conduct tantamount to intentional conduct is necessary to avoid an exculpatory clause." Resp't.. Substitute Br. at 7.

The Court's holding in Alack is based upon legal principles set forth in legal treatises.[1] Specifically, the language used by Professor Corbin in his leading treatise on contracts where he stated "It is generally held that those who are not engaged in public service may properly bargain against liability for harm caused by their ordinary negligence in performance of contractual duty; but such an exemption is always invalid if it applies to harm willfully inflicted or caused by gross or wanton negligence." Liberty Financial Management Corp. v. Beneficial Data Processing Corp., 670 S.W.2d 40, 47-48, (Mo. App. E.D. 1984)*citing* 6A Corbin on Contracts, § 1472 (1962).

1 6A Corbin on Contracts, § 1472 (1962); 57A Am. Jur. 2d Negligence §§ 49-67; 76 C.J.S. Release §§ 63-67; 4 Williston on Contracts § 602A (3d ed.)

The Court held in Alack that intentional torts *or* gross negligence are the types of conduct that cannot be exonerated by a release. By stating the principle in the disjunctive, a plain reading supports the proposition that in this context, the phrase "gross negligence" as used by the Alack Court did not mean an "intentional tort."

To resolve any confusion surrounding terminology, this Court should adopt the well-reasoned opinion of the appellate court, which clearly stated the standard to apply in this case:

Defendants conduct cannot be exonerated "[…]if they knew or should have known that their conduct created an unreasonable risk of harm to Plaintiff and that Defendants' conduct was 'either with knowledge of the serious danger to' Plaintiff or 'with knowledge of the facts which would disclose the danger to any reasonable man.'" Decormier v. Harley Davidson Motor Co. Group, Inc., ED 99064, slip op. at 12 (Mo. App E.D., Aug. 13, 2013) *citing* Mo. v. Turnbo, 740 S.W.2d 232, 234 (Mo. App. E.D. 1987).

This approach is consistent with Missouri case law, case law in other jurisdictions, sound public policy and learned writings of legal treatises.

B. A genuine dispute of fact exists as to whether Defendants knew or should have known that their conduct created an unreasonable risk of harm to Plaintiff and that Defendants' conduct was either with knowledge of the serious danger to Plaintiff or with knowledge of the facts which would disclose the danger to any reasonable man.

There is a genuine dispute as to the facts underlying this case, [2] therefore summary judgment is not proper. Itt Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 378 (Mo. 1993)

Instead of addressing the disputed facts, Defendants attack Plaintiffs pleadings on several fronts.

First, Defendants state that Plaintiff was required to file a reply to its affirmative defense. Defendant, however, never raised this issue until its substitute brief in this Court. If a Plaintiff does not file a responsive pleading to an affirmative arguing for an avoidance of the defense, and the Defendant does not object, an appeals Court treats the matter as if Plaintiff has made a general denial in accordance with the evidence. Warren v. Paragon Techs. Group, 950 S.W.2d 844, 846 (Mo. 1997).

"Where a reply is required but not filed-and the defendant does not object-the case proceeds as if plaintiff made a general denial of the affirmative defense. If the case is tried without a reply to the affirmative defense, on appeal the matter is treated as if a reply traversing the defense has been filed in accordance with the evidence." *Id.* citing Mahurin v. St. Luke's Hosp., 809 S.W.2d 418, 421 (Mo. App. 1991).

Second, Defendant argues that Plaintiff pled inconsistent theories within the same count and therefore the Petition should have been dismissed. Again, even if it were true, Defendants' argument at this stage fails because they never filed a Motion to Dismiss but

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2 *See* Appellant Substitute Br. at 3 Decormier v. Harley Davidson Motor Co. Group, Inc., ED 99064, slip op. at 11-12.

instead filed an Answer and then a Motion for Summary Judgment. "Plaintiff in one count pleaded claims based upon negligence and reckless and wanton acts which were held to be inconsistent. However, defendant filed an answer rather than a motion to dismiss or motion to elect and by so doing waived the irregularity of the pleading." Gallatin v. W.E.B. Restaurants Corp., 764 S.W.2d 104, 105, (Mo. Ct. App. 1988).

Defendants finally argue that the Court cannot draw a reasonable inference that the Defendants actions were reckless. Defendants argue that the Court cannot infer that 1) Defendants knew or should have known that the track was icy, and 2) that even if they did know the track was icy, that it is not a reasonable inference that an icy track presented an unreasonable risk because motorcycle riding is inherently dangerous.[3] These are questions of fact for a jury to decide.

Summary judgment tests simply for the existence, not the extent, of genuine disputes of material facts. Itt Commercial Fin. Corp., at 378, [I]t is not the "truth" of the facts upon which the court focuses, but whether those facts are disputed. *Id.* at 382.

Defendants do not deny that the track was icy, they simply raise a doubt that Plaintiff cannot prove it.[4] This is a disputed fact, therefore summary judgment is not

3 This argument, is redundantly argued by Amicus Curiae Missouri Organization of Defense Lawyers (MODL).

4 When asked in interrogatories about whether the track was wet, icy or covered with snow on April 13, 2008, Defendants refused to answer stating that it would supplement its answers to this interrogatory at a later time. Defendants have never supplemented their answers to Plaintiff's interrogatories. *See* Trial Exhibit 6, paragraph 26.

appropriate. This Court need not come to a conclusion of whether the facts are true, only if they are in dispute.

The protection that Defendants seek is not the limited protection from negligent acts that the Release signed by Plaintiff affords them. Instead, Defendants are seeking blanket immunity from civil liability. This is the argument put forth by Amicus Curiae Motorcycle Safety Foundation (MSF).[5]

Plaintiff agrees with the MSF that Motorcycle riding is dangerous. That is why the Missouri legislature has a separate set of regulations for licensing motorcycle riders and why those regulations include special training requirements for motorcycle riders. The reason why Cynthia Decormier signed up for a beginner motorcycle class was to learn how to safely drive a motorcycle and become eligible for her Missouri Motorcycle license.

As MSF points out, Defendants operated their course with the promise to both students and the State of Missouri that they would develop, adopt and follow safety standards for instructing beginner motorcycle students. Those safety standards included the promise that instructors would not send beginner riders out on slick track. Trial Exhibit 4, page 39. Plaintiffs have established a reasonable inference that Defendants

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5 The "Motorcycle Safety Foundation" omitted an integral fact from its description of its interest in this case. Specifically, the "Motorcycle Safety Foundation" has a financial interest in the outcome of this litigation since it is the named insured on the insurance policy which also covers the Defendants in this case. *See* Trial Exhibit 6, paragraph 8.

violated their own safety rules, with the knowledge that doing so meant their students were at an unreasonable risk for serious bodily harm. That is the type of conduct that cannot be released. That is the type of conduct that only a jury is empowered to excuse.

II. 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.

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 5th day of February, 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 Defendants.

/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, signature block, this certification, and the certificate of filing and service, the brief contains 2,358words 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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