No. SC 93702

IN THE MISSOURI SUPREME COURT

CYNTHIA DECORMIER,

Plaintiff-Appellant,

VS.

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., Presiding

Transferred after opinion from the Missouri Court of Appeals, Eastern District
No. ED 99064

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Summary judgment was entered in favor of defendants Harley-Davidson Motor Company Group, Inc., ("Harley-Davidson") and St. Louis Motorcycle, Inc. d/b/a/ Gateway Harley Davidson ("Gateway") on August 22, 2012. (LF 80.) That judgment became final 30 days later, on September 21, 2012. Supreme Court Rule 81.05(a). Plaintiff filed a timely notice of appeal within 10 days thereafter on September 28, 2012. (LF 82.) Supreme Court Rule 81.04(a).

The Missouri Court of Appeals, Eastern District, reversed the Trial Court's ruling. This Court granted transfer after opinion by the Court of Appeals. This Court therefore has jurisdiction pursuant to Missouri Supreme Court Rule 83.04 and Article V, Section 10, of the Constitution of Missouri.

STATEMENT OF FACTS

Plaintiff filed suit against Harley-Davidson and Gateway alleging that she was injured on April 13, 2008, while participating in the Harley-Davidson Rider's Edge New Rider Course. (LF 8 at ¶5, LF 10 at ¶16.)

Count I of plaintiff's petition, captioned "Negligence," asserts that, while plaintiff was participating in the New Rider Course, the conditions on the outdoor range "started to become icy and slippery." (LF 9 at ¶ 13.) She further alleged that the course instructors (employees of Gateway) continued to send riders out on the course "[d]espite these icy and slippery conditions." (LF 9 at ¶ 14.) She alleged she was injured "[a]s a direct result of Defendants' negligence." (LF 10 at ¶18.)

Count II of plaintiff's petition, captioned "Premises Liability," incorporates the allegations of Count I. Plaintiff additionally alleges in Count II that Defendant Gateway owned and operated the premises where the course was being offered and that plaintiff was an invitee on that property when she "fell while operating a motorcycle on a motorcycle track that had become slippery and icy." (LF 11 at ¶¶ 23-24.) Plaintiff alleged that "Defendants' negligence and recklessness directly cause[d]

the accident," and that she was injured "[a]s a direct result of Defendants' negligence." (LF 11 at ¶26, LF 12 at ¶28.)

Defendants moved jointly for summary judgment based on a "Rider's Edge Release and Waiver" executed by plaintiff prior to her participation in the course. (LF 19.) Plaintiff admitted in response to defendants' Statement of Uncontroverted Facts that she had signed the release (LF 34 at ¶5) and that the release specifically released "ANY AND ALL CLAIMS… against the Released Parties arising out of [her] participation in the Class, including without limitation all such claims resulting from NEGLIGENCE of any Released Party (including but not limited to Claims of negligent instruction)…" (LF 35-36 at ¶ 14.)

Plaintiff opposed defendants' motion for summary judgment, arguing that the release did not bar her claims because the negligence at issue "rose to the level of recklessness or gross negligence." (LF 43.) Plaintiff further argued that the release did not bar her claims against Gateway because Gateway is not identified by name in that release. (LF 47.) The trial court disagreed and granted summary judgment in favor of both defendants. (LF 81.) Plaintiff now appeals.

ARGUMENT

The Trial Court Correctly Granted Summary Judgment in Favor of Defendants Based on the Affirmative Defense of Release Where Defendants Presented Undisputed Evidence of a Voluntarily Signed Exculpatory Agreement and Plaintiff Neither Pleaded Nor Provided Evidence Sufficient to Raise a Genuine Question as to Whether Defendants Were Guilty Aggravated Misconduct Not Released by the Agreement.

I. Standard of Review

A trial court's order granting summary judgment is reviewed by this court *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 SW 2d 371, 376 (Mo. banc 1993).

"It is well-settled that 'one may not plead one state of facts and theory and to the unprepared surprise of his adversary recover on another and different theory and state of facts.'" *The Medve Group v. Sombright*, 163 S.W.3d 453, 456 (Mo. App. E.D. 2005), quoting *Faught v. St. Louis-San Francisco Ry. Co.*, 325 S.W.2d 776, 781 (Mo. 1959). "Missouri is not a 'notice pleading' state." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo.

1993). Accordingly, mere conclusions are not sufficient to place a claim in issue. *Id.*, citing *Sofka v. Thal*, 662 S.W.2d 502, 509 (Mo. banc 1983).

In *ITT*, this Court explained in detail the interaction of Missouri's fact-pleading standards and summary judgment. The role of summary judgment in Missouri practice is to dispose of baseless claims. *ITT*, 854 S.W.2d at 380. Summary judgment serves to "identify cases (1) in which there is no genuine dispute as to the facts and (2) the facts as admitted show a legal right to judgment for the movant." *Id.* A defendant establishes a right to summary judgment, *inter alia*, "by showing... that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." *Id.* at 381.

Once the moving party has made a *prima facie* showing of a right to summary judgment, the burden shifts to the non-movant "to show – by affidavit, depositions, answers to interrogatories, or admissions on file – that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed." *Id.* A genuine dispute as to a fact "must be real and substantial, not merely argumentative, frivolous, or imaginary." *Id.* at 380. The non-

moving party may not, at this stage, "rely on mere allegations or denials of the pleadings." *Dilley v. Valentine*, 401 S.W.3d 544, 548 (Mo. App. W. D. 2013).

II. "Gross Negligence" Means "Willful And Wanton Conduct" and Must Be Pleaded To Be Placed In Issue in Avoidance of a Voluntarily Executed Release.

Plaintiff's argument on appeal rests on the premise that summary judgment was improper because a genuine dispute exists as to whether defendants' actions constituted "gross negligence" not released by the exculpatory agreement she voluntarily executed. To evaluate this argument, this Court must first determine to what degree misconduct must rise before an actor's conduct will lose the protection of a such a freely signed release.

Plaintiff directs this Court chiefly to *Alack v. Vic Tanny Intern. of Missouri Inc.*, 923 S.W.2d 330 (Mo. banc 1996). This Court in *Alack* observed, in *dicta*, that "there is no question that one may never exonerate oneself from future liability for… gross negligence…." 923 S.W. 2d at 337. As no such claim was at issue in *Alack*, this Court did not endeavor to define "gross negligence" in the context of an exculpatory clause. Nor did this Court endeavor to outline the proper method of raising an

issue of "gross negligence" for the purpose of avoiding an affirmative defense of release. Such questions, however, squarely face this Court here.

As explained below, this Court should adhere to the standard adopted in *Warner v. Southwestern Bell Tel. Co.* 428 S.W.2d 596 (Mo. 1969), in which this Court held that a limitation of liability will be enforced unless the defendant's fault rises to the level of "willful and wanton conduct."

Whatever standard the Court decides should apply for claims of gross negligence, however, summary judgment in favor of defendants should be affirmed because plaintiff never properly pleaded any heightened degree of fault to avoid the voluntarily executed exculpatory clause and never introduced evidence sufficient to create any genuine issue of heightened fault.

A. Conduct Tantamount to Intentional Conduct is Necessary To Avoid an Exculpatory Clause

Plaintiff does not attempt to define what is meant by "gross negligence," such as cannot be released. Rather, plaintiff simply assumes that "gross negligence" and "recklessness" are one and the same thing for purposes of Missouri law governing exculpatory clauses. But this begs the

very question that this Court must decide: accepting that one may not exculpate oneself from future liability for certain forms of aggravated misconduct, how should that conduct be defined?

Although this Court did not attempt in *Alack* to define what qualifies as "gross negligence" sufficient to defeat an exculpatory clause, this Court did consider the issue in *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596, 603 (Mo. 1969). In *Warner*, telephone subscribers brought a claim for damages after the telephone company incorrectly listed their business in two consecutive directories. At issue on appeal was the validity of a limitation of liability contained in the telephone company's "General Exchange Tariff."

The *Warner* court noted decisions in other states holding that liability limitations were not applicable to either "gross negligence" or willful misconduct. Because "Missouri courts, generally, do not distinguish between negligence and gross negligence, as such," however, the *Warner* court did not find claims of "gross negligence" excluded from the protection of a liability limitation.

Specifically, the *Warner* court held "that the limitation of defendant's liability was and is effective if defendant's conduct

was merely negligent, but that it does not constitute an exemption for willful and wanton conduct." Accord *Sale v. Slitz*, 998 S.W. 2d 159, 164 (Mo. App. S.D. 1999) ("A limitation of liability provision within a contract is ineffective in a cause of action where the conduct is willful and wanton.").

The New Hampshire Supreme Court reached a similar conclusion in *Barnes v. New Hampshire Karting Ass'n, Inc.*, 509 A. 2d 151 (N.H. 1986). There, the court acknowledged "cases from other jurisdictions that hold on public policy grounds that an exculpatory agreement does not release defendants from liability for gross negligence." *Id.* at 155. Because New Hampshire, like Missouri, does not recognize degrees of negligence and, therefore, does not distinguish between ordinary and gross negligence, the *Barnes* court held that such cases were simply inapposite. *Id.* See also *R.F.C. v. Faulkner*, 143 A.2d 403, 408 (N.H. 1958) ("exculpatory agreements... which relieve a [party] from liability for negligence are valid and enforceable; but such provisions which purport to relieve from bad faith or intentional wrongs are considered to be against public policy and will not be enforced").

Willful and wanton conduct that will not be protected by a contractual limitation of liability provision has been held by Missouri courts to "mean[ ] an intentional act." *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 230 (Mo. App. W.D. 1995). Accord *Evans v. Illinois Cent. R. Co.*, 233 S.W. 397, 400 (Mo. banc 1921) ("Willfulness implies intentional wrongdoing. A wanton act is a wrongful act done on purpose, or in malicious disregard of the rights of others.") Holding that a party cannot obtain a release of liability for future willful, wanton, or intentional conduct is sound public policy because enforcing a release of such liability would serve to encourage "intentional wrongdoing" and "malicious disregard of the rights of others."

Plaintiff, in contrast, implicitly urges that this Court redefine and expand the meaning of "gross negligence" in the context of an exculpatory clause (as the appellate court did in this case: *Decormier v. Harley-Davidson Motor Co. Group, Inc.*, ED 99064, slip op. at 7-10 (Mo. App. E.D., Aug. 13, 2013)) as synonymous with recklessness as defined by the Restatement (Second) of Torts § 500:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally

> 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, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

(Pl. Br. p. 8, quoting Restatement (Second) of Torts § 500.)

The distinction between the Restatement definition of recklessness and this Court's definition of willful and wanton conduct in *Evans* turns on the wrongfulness of the actor's intent. In each case, the act in issue is performed intentionally (or intentionally not performed in the case of an omission). In the case of willful and wanton conduct, however, the *wrongfulness* of the act is intended or the act is performed with *malicious* disregard for others. *Evans*, 233 S.W. at 400. See also Restatement (Second) Torts § 500, Special Note (phrase "willful and wanton misconduct" is "sometimes used by courts to refer to conduct intended to cause harm to another")

Reckless conduct, in contrast, does not require deliberate malice or intentionally wrongful conduct but only knowledge of facts that would lead a reasonable person to realize that: (1) his

or her conduct "creates an unreasonable risk of physical harm to another," and (2) the risk is "substantially greater" than that presented by negligent conduct. Restatement (Second) of Torts § 500. A willful and wanton act is deliberately bad; recklessness is not.

This distinction is significant in terms of public policy. The implication of malice and intent inherent in willful and wanton conduct is consistent with conscious consideration of potential legal consequences and exculpation of liability. A party who is engaging in deliberately bad – i.e., willful and wanton – conduct is likely to be deterred by the knowledge that a contractual exculpatory clause will not release him from liability for such conduct.

Recklessness, in contrast, does not imply the same degree of conscious forethought. While the degree of carelessness implicit in reckless conduct must be "substantially greater" than that involved in ordinary negligence, there is little reason to believe that a reckless actor, knowing an exculpatory clause will release negligent but not reckless conduct will somehow try to calibrate his carelessness so that he is negligent but not reckless.

Amicus Curiae Missouri Association of Trial Attorneys ("MATA") offers the sweeping assertion that "each state in the Union which has considered the question at bar prohibit[s] enforcement of exculpatory clauses that exempt a business organization from responsibility for grossly negligent or reckless conduct." (MATA Br. p. 5.) MATA overlooks[1] contrary authority in which courts have upheld to prospective release of "gross negligence." See, *e.g.*, *Barnes*, 509 A.2d at 155; *Maness v. Santa Fe Park Enterprises, Inc.*, 700 N.E.2d 194 (Ill. App. 1998) (enforcing agreement releasing liability for "negligence or gross negligence," and declining to recognize a tort claim for "outrageous misconduct"); *Theis v. J & J Racing Promotions*, 571 So.2d 92, 94 (Fla. App. 1990)(release of liability for "negligence" "must be construed as intended to encompass all forms of negligence, simple or gross negligence"); *Valeo v. Pocono Intern. Raceway, Inc.*, 500

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1 That MATA overlooked such cases in proclaiming the unanimity of authority on the issue is somewhat surprising given that these contrary cases are addressed in *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1104 n.21 (Cal. 2007), a case cited by MATA in its brief.

A.2d 492, 493 (Pa. Super. 1985) (release for "negligence" held "broad enough to exclude liability for all degrees of negligence" and was not voided by allegation of "gross negligence").

MATA cites cases prohibiting the release, variously, of "gross negligence," "willful and wanton conduct," and "recklessness." Like plaintiff, MATA elides any distinction between "recklessness," "willful and wanton conduct," and "gross negligence," treating all three forms of misconduct as interchangeable in its effort to portray "a resounding and unanimous" consensus among courts nationwide.

While consensus does appear to exist that some conduct is too egregious to permit its prospective release in an exculpatory agreement, the states have drawn varying lines in defining what types of misconduct cross that line. In *Warner*, this Court drew the line at "willful and wanton conduct." *Warner*, 428 S.W.2d at 603. This Court should adhere to that standard and decline plaintiff's invitation to create a new rule prohibiting a release based on degrees of negligence that Missouri courts do not otherwise recognize.

B. Aggravated Conduct, However Defined, Must Be Properly Pleaded to be in Issue.

Whether the aggravated culpability prohibiting a prospective release of liability is held to refer to a cause of action based on "recklessness," or "willful and wanton conduct," or to instead refer to some third, as-yet-unestablished category of "gross negligence," such a cause of action must still be properly pleaded to be placed in issue in defense to an exculpatory release.

Because Missouri does not recognize degrees of negligence, a plaintiff generally "gains nothing by branding the negligence 'gross'" in pleading a negligence claim. *Milligan v. Chesterfield Village GP, LLC*, 239 S.W.3d 613, 618 n.5 (Mo. App. S.D. 2007), quoting *Sherrill v. Wilson*, 653 S.W.2d 661, 664 (Mo. banc 1983).

Missouri does, in contrast, recognize a cause of action for recklessness. *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126, 139 (Mo. App. E.D. 1999). By branding the conduct "reckless" in the pleadings (and, of course, pleading facts to support that conclusion), the plaintiff gains the opportunity to recover on a claim different in quality rather than merely in degree from a negligence claim. *Id.*

Likewise, Missouri courts have long-recognized a distinction between a cause of action for negligence and one for willful and wanton conduct. *State ex rel. Payne v. Wilson*, 207 S.W.2d 785, 791 (Mo. App. 1948.) "[C]auses of action based upon the one differ fundamentally in their nature and legal consequences from causes of action based upon the other." *McCarty v. Bishop*, 102 S.W.2d 126, 128 (Mo. App. 1937).

The matters before the court are framed by the pleadings. Thus, if the type of conduct not released by an exculpatory clause means "recklessness" or "willful and wanton conduct" – causes of action recognized under Missouri law – then a plaintiff who wishes to assert such reckless or willful and wanton conduct must be required to put such claims in issue by pleading facts to support them in the petition. To hold otherwise would effectively permit a plaintiff to plead a negligence theory in his petition only to proceed "to the unprepared surprise of his adversary" on a different theory. See *The Medve Group*, 163 S.W.3d at 456, quoting *Faught*, 325 S.W.2d at 781.

Different pleading requirements are in play if a plaintiff can avoid a release of negligence claims by asserting conduct

beyond ordinary negligence by asserting conduct involving a heightened degree of negligence ("gross negligence") but which does not constitute a cause of action other than negligence. In such circumstances, the facts establishing the heightened degree of negligence would properly be characterized as a defense to ("avoidance") the affirmative defense of release. A plaintiff is generally not required to anticipate an affirmative defense in the petition.

A plaintiff wishing to avoid an affirmative defense is not, however, relieved of the obligation to plead the facts asserted in opposition to that affirmative defense. Rather than pleading such facts in the petition, the plaintiff would, instead, be required to plead facts in avoidance of the defense in a reply to the defendant's properly pleaded affirmative defense. *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 845 (Mo. 1997). This rule "is necessary to the fair and orderly administration of justice to plead new matter affirmatively, and to give notice to the opposing party so that he or she may be prepared on that issue." *Id.* citing Mary Coffey, 15 Missouri Practice 295, 369-70 (2d ed. 1997).

Whether pleaded in the petition as recklessness or willful and wanton conduct, or in a reply to affirmative defenses as

"gross negligence," the facts a plaintiff hopes to rely on to defeat an exculpatory clause must be placed into issue by appropriate pleadings. See *Carl v. Carl*, 284 S.W. 2d 41, 44 (Mo. App. 1955) ("Courts only have power to decide such questions as are presented by the parties in their pleadings.")

This Court should hold that a validly executed exculpatory agreement will be effective to release claims against a defendant unless the conduct alleged rises to the level of willful and wanton misconduct. This Court should further hold that a cause of action for willful and wanton conduct must be pleaded in the petition to be placed in issue. Mere unpleaded assertions of willful and wanton conduct will not prevent summary judgment based on a release where plaintiff has pleaded only negligence.

III. The Exculpatory Release Was Sufficient to Meet Defendants' Burden on Summary Judgment Where Plaintiff Pleaded Only Negligence and Premises Liability Claims

Plaintiff has never disputed that claims for negligence and premises liability, the two counts pleaded in her petition, were released by the liability waiver she signed. Instead, she contends that defendants were not entitled to summary

judgment because they "did not put forth any affirmative evidence... that [their] actions did not constitute gross negligence or recklessness." (Pl. Br. p. 6.) Plaintiff misapprehends the defendants' burden.

As discussed above, a defending party meets its initial burden on summary judgment by showing that "that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." *ITT*, at 381. "The key to the affirmative defense of release is that an agreement was, in fact, reached." *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 846 (Mo. 1997). "A validly executed release is *prima facie* evidence that the movant is entitled to judgment as a matter of law." *Wenthe v. Willis Corroon Corp.*, 932 S.W.2d 791, 797 (Mo. App. E. D. 1996), citing *Andes v. Albano*, 853 S.W.2d 936, 940 (Mo. banc 1993). Plaintiff has never disputed that she freely and voluntarily executed the liability waiver at issue.

Just as she did not dispute the execution of the liability waiver, plaintiff has also never disputed that the exculpatory clause effectively released claims for negligence and premises liability. Having presented *prima facie* evidence that plaintiff waived claims of negligence and premises liability, defendants

met their burden of proving they were entitled to summary judgment on the only claims put in issue by plaintiff's petition.

A. Plaintiff Never Pleaded Recklessness in Her Petition

If this Court concludes that either "willful and wanton misconduct" or "recklessness," are necessary to overcome a voluntarily executed exculpatory clause, then this is the end of the story. Having failed to allege recklessness in her petition, and having never claimed defendants' conduct was willful and wanton, plaintiff cannot recover on those theories. The only theories that she has pleaded and could otherwise recover on – negligence and premises liability – have been released.

Although plaintiff never argues in her brief before this Court that she pleaded recklessness in her petition, the appellate court so held below (*Decormier*, at 12-13). According to the appellate court, "the language of the petition was sufficient to put Defendants on notice that Plaintiff claimed more than ordinary negligence."

First, the appellate court has held on several occasions that a "pleading that contains inconsistent theories within the same count is subject to dismissal." *Gallatin v. W.E.B. Rest. Corp.*, 764 S.W.2d 104, 105 (Mo. App. W.D.1988). Accord *Eoff*

v. Senter, 317 S.W.2d 666, 670 (Mo.App. 1958) (claims based on negligence could be included in same *petition* as claims based on reckless or wanton conduct, but could not be united in same *count*).

Count I of plaintiff's petition is captioned as a claim for "Negligence." (LF 7.) The allegations of that count allege plaintiff's injuries were caused by "Defendants' negligence." (LF 10 ¶ 18.) A negligence claim requires, under Missouri law:

> a (1) legal duty on the part of the defendant to conform to a certain standard of conduct to protect others against unreasonable risks; (2) a breach of that duty; (3) a proximate cause between the conduct and the resulting injury; and (4) actual damages to the claimant's person or property.

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc., 700 S.W.2d 426, 431 (1985).

While the nature of a claim is determined by the facts pleaded rather than the label given to the claim by the pleader (*Am. Eagle Waste Indus., LLC v. St. Louis County*, 379 S.W.3d 813, 829 (Mo. banc 2012)), there can be little dispute that Count I does, in fact, plead a claim of negligence. If Count I

were construed as pleading recklessness in addition to negligence, such pleading would be improper. *Eoff*, 317 S.W.2d at 670.

The petition cannot, however, reasonably be construed as stating a claim for recklessness. In holding that it did, the appellate court pointed to allegations that: "(1) 'Defendants knew or should have known that the icy conditions of the [range] created an unreasonable risk of bodily harm'"; and "(2) 'Defendants knew or should have known that an inexperienced rider on icy or slippery conditions created an unreasonable risk of bodily harm,'" suggesting that these allegations "reflect the definition of recklessness." The appellate court is wrong.

"Unreasonable risk" is indeed a component of the Restatement definition of recklessness. Restatement (Second) of Torts § 500. But "unreasonable risk" is likewise an element of negligence under Missouri law. *Hoover's Dairy, Inc.*, 700 S.W.2d at 431 (duty to "conform to a certain standard of conduct to protect others against unreasonable risks" identified as element of negligence claim). As "unreasonable risk" is a necessary component of a negligence claim, such language could not, as the appellate court held, "put Defendants on notice that Plaintiff claimed more than ordinary negligence."

Further, the Restatement definition of recklessness requires more than just an "unreasonable risk." The Restatement requires both that a reasonable person would realize that his conduct would create an "unreasonable risk" under given facts, *and* that the defendant actually knew or had reason to know of the existence of those facts in the first place. Restatement (Second) of Torts § 500.

Here, while plaintiff's petition may allege that defendants should have known that icy conditions created an "unreasonable risk," the petition does not allege facts suggesting that defendants knew or should have known that the condition of the training course was, in fact, "icy" prior to plaintiff's fall. The petition alleges that at some time during plaintiff's participation in the training course, the range "started to become icy and slippery." (LF 9 ¶ 13) This is all.

The petition does not allege how long before plaintiff's accident the alleged "icy and slippery" conditions "started to" develop. The petition does not allege whether or when defendants' agents became aware of these conditions nor does the petition allege any facts from which it could be inferred that defendants' agents should have become aware of the alleged icy and slippery conditions. The petition does not

allege, for example, that any ice was visible on the course prior to her fall or that any other participant or instructor encountered any ice on the course prior to the fall.

Further, while the petition alleges that defendants should have known that placing an inexperienced rider onto an icy and slippery course created an unreasonable risk, the petition does not allege that plaintiff was an inexperienced rider. The petition alleges that the training course plaintiff participated in was "designed to teach [both] new and experienced motorcycle riders skills in operation motorcycles." (LF 8 ¶ 5) Plaintiff alleges she participated in the course (LF 9 ¶ 13), but alleges nothing regarding her experience level.

Finally, even if plaintiff had alleged that the defendants knew of the icy conditions, and even if a reasonable person would have realized that continuing the training exercises created an unreasonable risk, "recklessness" as defined by the Restatement also requires that a reasonable person would realize that the risk of continuing the training exercises created a risk "substantially greater" than that which would make the decision to continue the exercises negligent. Restatement (Second) Torts § 500. The petition alleges no facts from which it could be inferred that defendants' conduct created an

"unreasonable risk" that was "substantially greater" than would make their conduct merely negligent.

Plaintiff alleged that she was injured when her motorcycle slipped[2] and landed on her leg. Presumably, this is the precise risk presented by participating in a motorcycle training course under any conditions: a rider may fall and be injured. Plaintiff alleges no facts as to the degree of risk presented by participating in a properly conducted motorcycle training course for inexperienced riders, no facts as to the risks created when such a course is conducted negligently, and no facts as to the risk created when such a course is conducted on an icy and slippery range. Absent any allegations regarding the relative risks involved, there are no facts from which to infer that defendants' alleged conduct created a "substantially greater" risk than would be created by negligent conduct.

Indeed, even the allegation that conducting the course under icy conditions created an "unreasonable risk" is nothing more than a conclusion unsupported by specific facts. See *Berga v. Archway Kitchen and Bath, Inc.*, 926 S.W.2d 476, 478

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[2] Significantly, plaintiff does not allege that the motorcycle slipped on any ice.

(Mo. App. E.D. 1996) (allegation of "unreasonable risk" deemed legal conclusion). See also *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 292 (Mo. App. E.D. 1983) (determination of "unreasonable risk" requires balancing magnitude of risk against utility of the actor's conduct). Some risk is inherent in a motorcycle training course. But the risk is not unreasonable given the value – both to individual riders and to the public at large – of providing and participating in such course.

Plaintiff pleaded a negligence claim. Defendants met their burden on summary judgment when they produced an exculpatory clause expressly releasing such claims. That the clause might not release claims for either willful and wanton conduct or recklessness is irrelevant as plaintiff did not plead recklessness and has never claimed defendants were willful and wanton. See *Sale v. Slitz*, 998 S.W.2d 159, 164 (Mo. App. S.D. 1999) (disregarding provision in contract limiting damages for breach of contract where "the petition, although not altogether clear, sets forth a cause of action in tort").

B. Plaintiff Never Pleaded "Gross Negligence" in Avoidance of Defendants' Affirmative Defense of Release.

If this Court holds that the "gross negligence" which cannot be released by an exculpatory clause is not "willful and wanton conduct," "recklessness" or any other recognized cause of action but is instead merely a theory in avoidance of the affirmative defense of release, the story ends a few steps later but nevertheless ends the same way: the claim was never pleaded and is therefore not in issue.

To avoid an affirmative defense of release, a plaintiff must file a reply pleading the facts in avoidance. *Warren*, 950 S.W.2d at 845. Plaintiff did not do so. Accordingly, any issue of "gross negligence," recklessness, or other conduct beyond ordinary negligence was never placed before the court and could not properly be urged in defense against defendants' release.

Because defendants presented uncontested evidence that plaintiff executed the executed liability waiver, and because that liability waiver released defendants from the only claims placed in issue by the plaintiff's pleadings, defendants met their burden of demonstrating that "there is no genuine dispute

as to the existence of each of the facts necessary to support [defendants'] properly-pleaded affirmative defense" of release.

C. Plaintiff Presented No Evidence That Would Overcome Defendants' Affirmative Defense of Release.

Finally, no matter how "gross negligence" is defined, and even if plaintiff could raise this argument on summary judgment without ever having placed it in issue by properly pleading it, plaintiff has not offered any evidence that the defendants' conduct was either willful and wanton or reckless.

First, plaintiff's position on appeal, that "[o]n April 13, 2008, there was rain, drizzle, snow, and mist *at the location of the class*" (emphasis added, Pl. Br. p. 5) is unsupported by the record and is a misstatement of the legal file. For this contention plaintiff relies on Defendant's Reply to Plaintiff's Additional Uncontroverted Material Fact 19, which was admitted by defendant on summary judgment. The admitted fact states:

> " 19. There was rain, drizzle, snow and mist on April 13, 2008 as indicated by the Certified Record of River and Climatological Observations *See Certified Records of River*

> *and Climatological Observations, attached hereto as Exhibit 1."* (hereinafter referred to as Uncontroverted Fact 19.)

(LF 37 ¶ 19.) Plaintiff offered no other evidence as to the weather or outdoor range conditions during the time frame in question.

Uncontroverted Fact 19 demonstrates only that there was rain, drizzle, snow and mist on the date of the accident; it does not specify when or where those conditions existed. Uncontroverted Fact 19 most certainly does not indicate that such conditions resulted in icy conditions on any roadway, much less on the outdoor training course range at the time of the accident. As a result, plaintiff would have this Court infer recklessness based entirely upon weather conditions at an unspecified location, which may or may not have been prior to or at the time of the accident.

Importantly, plaintiff did not include the *Certified Records of River and Climatological Observations* in the record on appeal and relied instead on the general language of Uncontroverted Fact 19. The trial court, which reviewed the *Certified Records of River and Climatological Observations,*

found it unpersuasive and entered judgment in favor of defendants.

Even if this Court were to infer there was rain, snow, drizzle or mist at the location of the course as claimed by plaintiff, plaintiff's argument for gross negligence/recklessness is premised on the defendants' violation of safety procedures which discourage instructors from conducting the class "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." (Pl. Br. p. 5, citing LF 57.) Plaintiff offered no evidence that there were thunderstorms, snowstorms, or ice on the range.

Under plaintiff's theory of gross negligence/recklessness, an additional inference is required: that the inclement weather at the location was sufficient for the defendants to know there was an unreasonable risk of physical harm. For this inference to be reasonable, evidence regarding the timing and location of the weather, the specific conditions, and the RiderCoaches' knowledge of the conditions are necessary. Plaintiff offered no evidentiary support for these claims.

If the Court were to infer based on the evidence presented by plaintiff that the defendants knew or should have known of

facts that would make a reasonable person aware of a risk of physical harm to plaintiff substantially greater than would be created by ordinary negligence, this Court would be overturning *Alack* from a practical standpoint. If a plaintiff merely needs to utter the magic word "reckless" with no evidence that the conditions at the time of injury support a claim of recklessness, then the purpose of an exculpatory clause will be substantially compromised and the parties' bargain overridden.

IV. No Claim Regarding an Adhesion Contract is Before this Court.

Finally, MATA asserts that the question in this case "is whether an exculpatory clause contained in an adhesion contract can be used by a business entity to escape responsibility for physical injuries to a person caused by that business' *reckless conduct or gross negligence*." (Emphasis in original, MATA Br. p. 5)

Plaintiff has never claimed that the Release she signed was an "adhesion contract" nor that its enforceability would be affected by labeling it as such. Any such argument has long since been forfeited. *Estate of Overbey v. Chad Franklin National Auto Sales North, LLC*, 361 S.W.3d 364, 381 n.9 (Mo.

2012) (a party must raise an issue in the trial court to preserve it for appeal"), citing *Vance Bros., Inc. v. Obermiller Const. Services, Inc.*, 181 S.W.3d 562, 564 (Mo. 2006).

Any concerns MATA may have with respect to contracts of adhesion must await an appropriate case in which a contract of adhesion is, in fact, in issue. This is not that case.

CONCLUSION

For the foregoing reasons, defendants Harley-Davidson Motor Company Group, Inc. and St. Louis Motorcycle, Inc. d/b/a Gateway Harley Davidson, respectfully request that this Court affirm the trial court's order granting summary judgment in their favor.

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CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 84.06. Relying on the word count of Microsoft Word, which was used to prepare the brief, this brief contains 6,607 words of proportional type, excluding the cover, certificate of service, this certificate and the signature block.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief was served via the e-filing system on the 27th day of January, 2014, to: Mr. Timothy J. Gallagher (#37872), Mr. Matthew R. Davis (#58205), Heller Gallagher Finley LLP, 1670 South Hanley Road, St. Louis, MO 63144, O: (314) 725-1780, F: (314) 725-0101, Attorneys for Plaintiff-Appellant.

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