**IN THE SUPREME COURT OF MISSOURI**

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**SC 93702**

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CYNTHIA DeCORMIER

Plaintiff - Appellant

v.

HARLEY-DAVIDSON MOTOR COMPANY GROUP, INC.

and

ST. LOUIS MOTORCYCLE, INC. d/b/a GATEWAY HARLEY-DAVIDSON

Defendants - Respondents

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

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# BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF PLAINTIFF - APPELLANT

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

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**Other Jurisdiction Cases**

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Kalisch-Jarcho, Inc. v. New York, 58 N.Y.2d 377, 448 N.E.2d 413, (N.Y. 1983)

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Lees v. Dunkerly Bros., (1910 Eng.) 103 L.T. 467, 468 [1911] AC 5 (HL)

**Secondary Sources**

*Restatement (First) of Contracts, § 574*

*Restatement (Second) of Contracts, § 195(1)*

*Prosser & Keeton on Torts (5th edition)*

*The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law* (1980), 15 J.Legl.Stud. 461 (1985)

## INTEREST OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a professional organization of trial lawyers in Missouri whom represent seriously injured Missouri citizens in civil liability claims. This case presents a question of whether a business entity that injured a Missouri citizen through grossly negligent or reckless behavior can completely escape responsibility if the victim signed an adhesion contract containing an exculpatory clause before the victim was injured. Resolution of this question is an important public safety matter and will impact current and future injured clients whom MATA's members represent. In order to protect the safety of all persons in this state, the law should not allow for any businesses entity to create for themselves, through the use of exculpatory clauses, a de facto license to engage in grossly negligent or reckless behavior.

## CONSENT OF THE PARTIES

MATA received consent from both counsel for Appellant and counsel for Respondent to file this *Amicus Curiae* Brief. Before MATA received consent from Respondent, MATA also filed a Motion for Leave pursuant to Rule 840.05(f)(3), which has been granted as well.

## JURISDICTIONAL STATEMENT

MATA hereby adopts the Jurisdictional Statement of Plaintiff-Appellant.

## STATEMENT OF FACTS

MATA hereby adopts the Statement of Facts of Plaintiff-Appellant.

## ARGUMENT

### II. Exculpatory Clauses are Generally Disfavored and are Unenforceable to the Extent they Attempt to Allow a Business Entity to Engage in Grossly Negligent or Reckless Behavior with Impunity.

One of the fundamental principles of the civil justice system is to create a safer environment by forcing those who would otherwise engage in dangerous behavior to internalize the costs of accidents resulting from their dangerous conduct. *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law* (1980), 15 J.Legl.Stud. 461 (1985). Enforcing an exculpatory clause violates this principle, and, for this reason, "exculpatory clauses in contracts releasing an individual from his or her own negligence are disfavored[.]" *See* Alack v. Vic Tanny Intern. of Mo.,

Inc., 923 S.W.2d 330 (Mo. 1996). The Appellate Court of England may have stated it best, "[I]t is a very difficult proposition to say that a man is not to be responsible for his own negligence. That would mean a free hand to everybody to neglect his duty . . . and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty. Lees v. Dunkerly Bros., (1910 Eng.) 103 L.T. 467, 468 [1911] AC 5 (HL).

The question before this Court, however, is not whether exculpatory clauses releasing a party from future injuries caused by future violations of ordinary care are against public policy. Instead, the question 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*. Across the United States, in academia and in practice, the answer to this question has been a resounding and unanimous no. The *Restatement (First) of Contracts § 574*, *Restatement (Second) of Contracts § 195(1), Prosser & Keeton on Torts (5th ed.)*, and each state in the Union which has considered the question at bar prohibit enforcement of exculpatory clauses that exempt a business organization from responsibility for grossly negligent or reckless conduct. *See* Lamp v. Reynolds, 645 N.W.2d 311, 314 (Ct. App. Mich. 2002); Keenan Packaging Supply, Inc. v. McDermott, 700 N.W.2d 645, 655 (Ct.App.Neb. 2005) ("public policy prevents a party from limiting its damages for gross negligence or willful and wanton misconduct."); Hojnowski v. Vans Skate Park, 901 A.2d 381 (N.J. 2006) ("It is well settled that to contract in advance to release tort liability resulting from intentional or reckless conduct violates public policy."); Holmes v. Clear

Channel Outdoor, Inc., 644 S.E.2d 311, 314 (Ct.App. Ga. 2007) (holding that exculpatory clauses are void if they "purport to relieve liability for acts of gross negligence or willful and wanton conduct."); Farina v. Mr. Bachelor, Inc., 66 F.3d 233, 235 (9th. Cir. 1995); Merten v. Nathan, 321 N.W.2d 173 (Wisc. 1982) (adopting Restatement § 195(1)); Atkins v. Swimwest, 691 N.W.2d 334, 340 (Wisc. 2005) (holding a release of recklessness was unenforceable); Kalisch-Jarcho, Inc. v. New York, 448 N.E.2d 413, 416 (N.Y. 1983) ("an exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances. Under announced public policy, it will not apply to exemption of willful or grossly negligent acts."); Butler Mfg. Co. v. Americold Corp., 835 F. Supp. 1274, 1283 (D. Kan. 1993) ("Kansas law prohibits the enforcement of liability limitation provisions limiting damages for gross negligence and willful or wanton conduct."); Downing v. United Auto Racing Ass'n, 211 Ill. App. 3d 877, 888 (Ill. App. Ct. 1st Dist. 1991) ("Generally, a release does not bar plaintiffs maintenance of an action alleging willful and wanton misconduct by the defendants. This rule is based on the determination that, as a matter of public policy, a plaintiff cannot exculpate or indemnify a defendant for the defendant's willful and wanton acts"); City of Santa Barbara v. Superior Court, 41 Cal. 4th 747, 777 (Cal. 2007) ("public policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a minimal standard of care."); Planters Gin Co. v. Fed. Compress & Warehouse Co., 78 S.W.3d 885, 893 (Tenn. 2002) ("indemnity clauses are invalid as to damages caused by gross negligence or willful conduct on the part of the indemnified party."); Courtney v. Pacific Adventures (In re Pacific Adventures), 5 F. Supp. 2d 874,

881-882 (D. Haw. 1998); Zavras v. Capeway Rovers Motorcycle Club, 687 N.E.2d 1263 (Mass. App. Ct. 1997).

The reason for such consensus is clear. "The public interest is at stake when a party attempts to contract to exempt himself for harm caused by his gross negligence." Wheelock v. Sport Kites, Inc., 839 F.Supp. 730, 736 (D. Hawaii 1993). Any contract that allows a business to engage in grossly negligent or reckless conduct with impunity affects the public as a whole by putting everyone at risk for harm. This increased risk of harm to all makes the prohibition of releases for future gross negligence or recklessness a clear matter of public importance. If the law were to allow a business to force each of its patrons, as a precondition to receiving goods or services, to contract away any and all future claims against the business caused by the business' reckless or grossly negligent conduct, the American civil justice system's capacity to deter dangerous conduct would be diminished. The risk of harm to communities that have only one grocery store, one department store, one pharmacy, one doctor's office, or one hospital would be greatly increased. A simple lack of choice would force the citizens of such communities to either adhere to the exculpatory agreements or go without basic services and sustenance.

While counsel for *Amicus Curiae* could find no case where a Missouri court had to determine whether an exculpatory clause for future recklessness or gross negligence was void against public policy, this Court has stated that "there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." Alack v. Vic Tanny Intern. Of Missouri, Inc., 923 S.W.2d 330, 337 (Mo. 1996). While this Court in Alack refused to enforce the

exculpatory clause in a gym membership on the ground that the clause was not sufficiently clear, as opposed to public policy reasons, the Court did recognize that exculpatory clauses which put the public at risk by encouraging grossly negligent or reckless behavior should never be enforced.

## CONCLUSION

In conclusion, for all the reasons herein mentioned, the Missouri Association of Trial Attorneys (MATA), as *Amicus Curiae*, respectfully suggests that this Court should expressly hold that an exculpatory clause which attempts to exempt a party from tort liability for harm caused by its reckless or grossly negligent behavior is unenforceable on grounds of public policy.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served through the Missouri Supreme Court electronic filing system on this 6th day of January, 2014, to:

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## 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 1,336 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.

_/s/ Leland Dempsey_____
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**Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys**