

IN THE SUPREME COURT OF MISSOURI

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.**

Transferred after opinion from the Missouri Court of Appeals, Eastern District

**BRIEF OF MISSOURI ORGANIZATION OF DEFENSE LAWYERS
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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INTEREST OF AMICUS CURIAE

The Missouri Organization of Defense Lawyers (“MODL”) is a private, voluntary association of Missouri attorneys dedicated to promoting improvements in the administration of justice and to optimizing the quality of the services that the legal profession renders to society. To that end, MODL members work to advance and exchange information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL’s membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

In this case, MODL supports the position that individuals who voluntarily enter into agreements to release another from liability should not be permitted to avoid the release by pleading a negligence claim and later arguing that such claim was actually for the separate and distinct tort of “recklessness.” On behalf of Missouri attorneys who advise, represent and defend individuals and businesses against tort actions, MODL urges the Court to reject Appellant’s argument that she should be allowed to proceed on an unpleaded and unsupported claim of recklessness.

JURISDICTIONAL STATEMENT

MODL adopts and incorporates herein Respondents' Jurisdictional Statement. MODL further files its brief pursuant to its Motion for Leave to File Brief in accordance with Missouri Rule of Civil Procedure 84.05(f)(3).

STATEMENT OF FACTS

MODL adopts and incorporates herein Respondent's Statement of Facts.

ARGUMENT

Missouri recognizes a cause of action for recklessness. *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126, 139 (Mo. App. E.D. 1999). Recklessness involves a conscious choice to act, either with knowledge of the serious danger to others involved or with knowledge of facts that would disclose the danger to any reasonable person. *Farm Bureau Town & Country Ins. Co. v. Turnbo*, 740 S.W.2d 232, 235 (Mo. App. E.D. 1987). Unlike negligence, "[r]ecklessness looks to the tortfeasor's state of mind." *Hatch*, 990 S.W.2d at 139. For this reason, the critical element elevating negligence to recklessness is knowledge of the dangerous condition that creates the high probability that immediate physical harm will result. "A vague and generalized knowledge of danger is insufficient." *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330, 339 (Mo. banc 1996). Prior to acting, the person must recognize that his or her conduct involves a risk substantially greater in amount than that which is necessary to make the conduct merely negligent. *Turnbo*, 740 S.W.2d at 235.

In the present case, the facts asserted by Plaintiff do not support a recklessness claim because they do not establish Defendants' knowledge of a substantially greater risk than that which is necessary to make the conduct merely negligent. As such, Plaintiff's facts support, at most, a claim of ordinary negligence. The trial court correctly entered summary judgment because there is no dispute that the "Release and Waiver" executed by Plaintiff discharged Defendants from liability for negligence claims arising out of Plaintiff's participation in the motorcycle safety training course.

In an effort to avoid summary judgment, Plaintiff argued that her claim—which was denominated "Negligence" and alleged the elements of negligence—was actually a claim for "recklessness" because it contained the allegation that Defendants had acted recklessly and unreasonably. However, a cause of action for recklessness is a separate and distinct cause of action, requiring different elements of proof. *Nichols v. Bresnahan*, 212 S.W.2d 570, 573 (Mo. 1948); *Hatch*, 990 S.W.2d at 139-40. Regardless of what Plaintiff labeled her claim, or what she now argues, she simply did not plead the required elements to support a claim of recklessness. Nor did she properly contradict Defendants' summary judgment material facts. Plaintiff alleged:

- The track started to become icy and slippery (§13)
- Defendants took no action to remediate the slick condition (§15)
- Defendants continued to send riders onto the track to perform exercises (§14)
- Defendants knew, or should have known, the icy conditions created an unreasonable risk of bodily harm (§17-b)

- Defendants knew, or should have known, an inexperienced rider on a slippery course created an unreasonable risk of bodily harm (§17-c)
- As a direct cause (sic) of Defendants’ “negligence,” Plaintiff sustained injury. (§s 19 & 20)
- As to Count II for Premises Liability, Plaintiff alleged that Defendants failed to use reasonable care to ensure Plaintiff’s safety (§26-b)
- Defendants knew or should have known the icy track created a dangerous condition (§26-c)
- Defendants knew, or should have known, the icy conditions posed a substantial risk of bodily injury (§26-f)
- As a direct cause (sic) of Defendants’ negligence, Plaintiff sustained injuries. (§s 27 & 28)

Plaintiff did not name or describe any agent of Defendants who had knowledge of the dangerous condition that created the substantial likelihood of imminent physical harm. There was no evidence to show that the instructors were aware of any ice on the track or that the track was slippery. Plaintiff acknowledged that the track was not icy prior to the class but only “started to become” icy and slippery during the class. She did not plead any specific facts, or contend such facts during the summary judgment proceeding, that Defendants knew that the track purportedly had become icy. There was no evidence of prior incidents on the track due to the alleged icy weather conditions. Although Plaintiff submitted a weather report for the general geographic area, she did not

present any evidence of the weather conditions at the track at the time of the training course, such as through witness affidavits from other students.

In short, Plaintiff did not establish a genuine factual dispute sufficient to defeat Defendants' *prima facie* showing of an executed release. Even if a recklessness claim was properly pleaded, Plaintiff failed to show a genuine dispute about whether Defendants' conduct was reckless because she did not set forth any evidence that Defendants knew the track was purportedly slippery or icy.

Motorcycle rider training is not without risks. Learning to ride a motorcycle is an inherently risky activity and there may be instances when a student-rider loses control. Plaintiff assumed a risk that she might be injured by a motorcycle falling over. Plaintiff signed a Release discharging Defendants from liability for negligence arising out of her participation in the training course. Even taking all reasonable inferences in favor of Plaintiff, the evidence in the summary judgment record shows nothing more than ordinary negligence, a claim for which is undisputedly barred by the release. Accordingly, the trial court properly granted summary judgment in favor of Defendants.

CONCLUSION

Based on the foregoing, *Amicus Curiae* Missouri Organization of Defense Lawyers respectfully suggests that this Court affirm summary judgment in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served through the Missouri Supreme Court electronic filing system on this 28th day of January, 2014, to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Rule 84.06(c), that the attached brief complies with the requirements and limitations contained in Missouri Supreme Court Rules 55.03 and 84.06, that it contains 1,250 words as determined by Microsoft Word, and that the originals of the certificate of service, this certificate and the brief were signed in compliance with Rule 55.03.

/s/ Michael P. Robertson

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