STATE OF MICHIGAN

COURT OF APPEALS

AMANDA RIVERA,

Plaintiff-Appellant,

v

R. P. GORDON, INC., d/b/a MAYBURY RIDING STABLE,

Defendant-Appellee.

UNPUBLISHED
May 18, 2004

No. 246687
Wayne Circuit Court
LC No. 02-206520-NZ

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Plaintiff Amanda Rivera appeals the trial court's order that granted defendant R. P. Gordon, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(7), and we affirm.

I. SUMMARY

Prior to her injury at defendant's horseback-riding stable, plaintiff signed a contract whereby she released defendant of any personal injury claim caused by defendant's ordinary negligence, but expressly retained the right to sue if defendant's misconduct was so egregious as to constitute gross negligence (which the law defines as conduct so reckless as to constitute a substantial lack of concern for whether injury results),[1] or worse, wilful and wanton misconduct[2] (which the law defines as conduct just shy of intentional misconduct).[3]

[1] *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003).

[2] It is likely that the rental agreement contains the gross negligence and wilful and wanton misconduct exceptions because Michigan law holds that a preinjury personal injury release only releases a party from claims for ordinary negligence, and that one may not release a party from liability for that party's gross negligence or wilful and wanton misconduct. *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002).

[3] *Xu*, *supra* at 269-270 n 3, citing *Jennings v Southwood*, 446 Mich 125, 138; 521 NW2d 230 (1994).

After injuring her leg while dismounting her horse, plaintiff sued defendant and said that defendant's misconduct in helping her to dismount was so bad that this misconduct met the legal definition of wilful and wanton misconduct. The trial court disagreed with plaintiff, ruled that defendant's conduct constituted, at most, ordinary negligence, and thus dismissed plaintiff's personal injury claim. In so ruling, the trial court also found that defendant's conduct was not so flagrant as to meet the legal definition of willfulness and wantonness. Plaintiff appeals the trial court's ruling and maintains that because reasonable minds can differ on whether defendant's conduct met the legal definition of recklessness or wilful and wanton misconduct, this matter should not have been summarily dismissed, but rather, should have been allowed to go to a jury to determine if the alleged misconduct was ordinary negligence or reckless and/or wilful and wanton. We agree with the trial court's ruling and thus affirm the trial court's grant of summary disposition in favor of defendant.

II. FACTS AND PROCEDURE

Defendant operates a riding stable in Maybury State Park and rents horses to park visitors who wish to ride within the park. Consistent with the rules established by defendant, patrons must sign a rental agreement, that includes a liability release whereby the rider agrees not to bring any personal injury claims against defendant except in the case of defendant's "gross negligence and willful [sic] and wanton misconduct."[4] Each time a patron rents a horse, one or two of defendant's employees ride along with the patron. As a further precaution, defendant's rules provide that at the end of each ride, a patron is to ride into the stable, and to remain on the horse until one of defendant's employees helps the rider dismount.

Here, plaintiff rented a horse from defendant on August 25, 2001, and signed the rental agreement. Prior to August 25, 2001, plaintiff had ridden horses at the park "hundreds of times," as often as twice a week for at least five years. Each and every time she rode, she signed the rental agreement. After plaintiff completed her ride, and consistent with defendant's policy, one of defendant's employees helped plaintiff dismount. While preparing to dismount, plaintiff caught her foot in the stirrup, and called out to the attendant for assistance, but a nearby

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[4] The release reads as follows: "**LIABILITY RELEASE** I AGREE THAT: In consideration of [defendant] allowing my participation in this activity, under the terms set forth herein, I, the rider, for myself and on behalf of my child and/or legal ward, heirs, administrators, personal representatives or assigns, do agree to hold harmless, release, and discharge [defendant], its owners, agents, employees, officers, directors, representatives, assigns, members, owners of premises and trails, affiliated organizations, insurers, and others acting on its behalf . . . of and from all claims, demands, causes of action and legal liability, whether the same be known or unknown, anticipated or unanticipated, due to [defendant's] ordinary negligence; and I do further agree that except in the event of [defendant's] gross negligence and willful [sic] and wanton misconduct, I shall not bring any claims, demands, legal actions and causes of action, against [defendant] . . . for any economic and non-economic losses due to bodily injury, death, property damage, sustained by me and/or my minor child and/or legal ward in relation to the premises and operations of [defendant], to include while riding, handling, or otherwise being near horses owned by or in the care, custody and control of [defendant], whether on or off the premises of [defendant]."

"commotion" both distracted the attendant and spooked the horse, causing it to "take off" with plaintiff's left foot caught in the stirrup. This nearly simultaneous confluence of circumstances caused plaintiff injuries to her right ankle for which she seeks damages. It is this uncomplicated, yet unfortunate, incident that the trial court ruled amounts to, at most, negligence, but surely not willfulness or wantonness. Plaintiff's complaint alleged only "*wilful and wanton misconduct*" against defendant, not gross negligence. Defendant filed a motion for summary disposition and argued that plaintiff's claim was barred because plaintiff released defendant of any personal injury claims except those caused by defendant's wilful and wanton misconduct, and the conduct of defendant's employee was not wilful and wanton. The trial court agreed with defendant and granted summary in defendant's favor disposition pursuant to MCR 2.116(C)(7).[5]

II. STANDARD OF REVIEW

"'We review a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 244-245; 673 NW2d 805 (2003), quoting *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998). When this Court reviews such motions, it accepts as true the well-pleaded allegations of the nonmoving party, and construes them in that party's favor. *Id.* at 245. It is further necessary for this Court to consider the "pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether the claim is barred by law." *Id.*, citing MCR 2.116(G)(5). A motion for summary disposition pursuant to MCR 2.116(C)(7) "should be granted only if no factual development could provide a basis for recovery." *Xu v Gay*, 257 Mich App 263, 267; 668 NW2d 166 (2003).

III. ANALYSIS

A. GROSS NEGLIGENCE

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendant because defendant's conduct was grossly negligent and there exists a question of fact about defendant's "alleged" grossly negligent conduct. However, as we noted above, plaintiff did not allege gross negligence in her complaint, and therefore, defendant argues that she has waived this issue. Plaintiff may not raise an issue for the first time on appeal. *Booth v University of Michigan Board of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). However, the record is unclear whether plaintiff in fact raised the gross negligence issue at the motion hearing, and whether the trial court specifically addressed or ruled on this issue. Accordingly, though plaintiff may have waived this issue by failing to plead it, we will address the issue.

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[5] Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10). Though the trial court's order did not specify which subrule it relied upon in granting summary disposition, our review of the hearing transcript reveals that the trial court appeared to base its decision on the aforementioned release, and thus the trial court appears to have granted the motion pursuant to subrule (C)(7).

During the hearing on defendant's motion for summary disposition, it appears that plaintiff made the argument that Michigan law regarding "wilful and wanton misconduct" and "gross negligence" was "confused," and that, for all intents and purposes, the former was the equivalent of the latter. Plaintiff continues to argue, on appeal, that the law relating to these two standards of conduct was "confused," and implies that the confusion was resolved only recently by this Court's opinion, issued after the trial court entered its order, in *Xu*, *supra*. In *Xu*, the plaintiff initiated a wrongful death action against the defendant, who owned a fitness center. *Xu*, *supra* at 264-265. The decent in *Xu* died after falling and hitting his head while using one of the defendant's treadmills. *Id.* at 265. As in this case, the decedent in *Xu* had signed what defendant alleged was a preinjury liability release. *Id.* The plaintiff in *Xu* filed a complaint and alleged a claim of gross negligence against the defendant. *Id.*

Here, plaintiff says that "gross negligence" and "wilful and wanton misconduct" are equivalent terms. This is not the case. This Court in *Xu* held that the terms "wilful and wanton misconduct" and "gross negligence" are "separate concepts." *Xu*, *supra* at 269-270 n 3. Furthermore, in 1994, our Supreme Court in *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), observed that the previous definition of gross negligence referred to the "last-chance" doctrine, which addressed the negligence of the defendant that follows negligence of the plaintiff. *Jennings v Southwood*, 446 Mich 125, 130; 521 NW2d 230 (1994); see also *Xu*, *supra* at 269-270 n 3.[6] As this Court in *Xu* explained, our Supreme Court in *Jennings* defined "wilful and wanton misconduct" as tantamount to "'an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalence of a willingness that it does.'" *Id.* at 269-270 n 3, quoting *Jennings*, *supra* at 138. Assuming, *arguendo*, that there was confusion regarding the correct definition of "gross negligence" to be applied in liability release cases (and we do not believe there was or is any confusion), we nevertheless find that a careful reading of our Supreme Court's 1994 opinion in *Jennings* clearly shows that "gross negligence" is different from "wilful and wanton misconduct."

In *Xu*, this Court also noted that our Supreme Court, in *Jennings*, rejected the previous common law definition of gross negligence in the context of the Emergency Medical Services Act (EMSA), MCL 333.20901 *et seq.* In *Jennings*

, the Court adopted the definition of gross negligence used in the Government Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, that defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Xu*, *supra* at 267-269,

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[6] The Court in *Jennings* stated that the common-law rule was articulated by its opinion in *Gibbard v Cursan*, 225 Mich 311, 319; 196 NW 398 (1923). *Jennings*, *supra* at 129. However, the Court went on to call *Gibbard*'s definition "last clear chance in disguise" and stated that "its usefulness is dubious at best" given the Court's previous rejection of the contributory negligence rule in *Placek v Sterling Heights*, 405 Mich 638, 650; 275 NW2d 511 (1979), that led to its rejection of the last clear chance doctrine in its opinion in *Petrove v Grand Trunk W R Co*, 437 Mich 31, 33; 464 NW2d 711(1991). *Jennings*, *supra* at 130-132. The Court then held that, notwithstanding the fact that the *Gribbard* definition of gross negligence was a long-standing doctrine, it "must nevertheless discard it because it has outlived its usefulness." *Id.* at 132.

citing *Jennings*, *supra* at 135-137; see also MCL 691.1407(2)(c). The *Xu* panel applied this definition of gross negligence to liability release cases. *Id.* at 269.

Here, defendant's employee became momentarily distracted, albeit at an inopportune time, and was unable to adequately help plaintiff dismount from her horse. We find that no reasonable trier of fact could conclude that this momentary distraction constituted conduct that was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Xu*, *supra* at 269. Accordingly, we hold that summary disposition was properly granted in favor of defendant pursuant to MCR 2.116(C)(7) because no factual development could provide a basis of recovery under a theory of gross negligence.

B. WILFUL AND WANTON MISCONDUCT

Plaintiff also says that the trial court erred in granting summary disposition in favor of defendant because defendant's conduct was wilful and wanton and that a reasonable trier of fact could come to such a determination. As we stated above, under Michigan law, wilful and wanton misconduct requires a showing that "'the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalence of a willingness that it does.'" *Xu*, *supra* at 269-270 n 3, quoting *Jenning*, *supra* at 138. Wilful and wanton misconduct occurs where the conduct alleged is either "intentional, *or* its effective equivalent." *Jennings*, *supra* at 140 (emphasis in the original). Here, plaintiff's own testimony is that defendant's employee was momentarily distracted at the time of the accident. We find that such a momentary distraction does not display an intent to harm plaintiff, and that no reasonable trier of fact could determine this conduct to be the equivalent of an intention to harm plaintiff. We further find that no factual development could provide plaintiff with a basis of recovery under this theory. The conduct challenged here may have been negligent, but it clearly was not so egregious as to constitute wilful and wanton misconduct. Also, because we find defendant's conduct insufficiently egregious to constitute gross negligence, *a fortiori*, the very same conduct does not meet the more rigorous "wilful and wanton misconduct" standard. As a result, we hold that the trial court correctly held that the liability release in the rental agreement, signed by plaintiff, barred her claim, and that the trial court properly granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood