In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

CYNTHIA DECORMIER,	)	No. ED99064
	)	
Appellant,	)	
	)	
vs.	)	Appeal from the Circuit Court of St. Louis County
	)	
HARLEY-DAVIDSON MOTOR COMPANY GROUP, INC. and ST. LOUIS MOTORCYCLE, INC. d/b/a GATEWAY HARLEY-DAVIDSON,	)	Honorable John D. Warner, Jr.
	)	
Respondents.	)	Filed: August 13, 2013

Introduction

Cynthia DeCormier (Plaintiff) appeals the judgment of the Circuit Court of St. Louis County granting summary judgment in favor of St. Louis Motorcycle, Inc. d/b/a Gateway Harley-Davidson (Gateway) and Harley-Davidson Motor Company Group, Inc. (Harley-Davidson) (collectively, Defendants) on Plaintiff's petition. In her petition, Plaintiff sought damages for injuries she sustained while participating in a Harley-Davidson Rider's Edge New Rider Course (New Rider Course) at Gateway's place of business. Plaintiff argues that the trial court erred in granting Defendants' motion for summary judgment because: (1) the release Plaintiff signed prior to the New Rider Course did not release Defendants from liability for either gross negligence or recklessness and a genuine dispute exists as to whether Defendants were either grossly negligent or reckless; and (2) the release did not explicitly name Gateway as a released party. We reverse the judgment and remand to the trial court.

Factual and Procedural Background

The record reveals the following undisputed facts: On April 13, 2008, Plaintiff participated in a New Rider Course at Gateway's place of business. Prior to the New Rider Course, Plaintiff signed a document entitled "Release and Waiver," which provided in pertinent part:

> I hereby **RELEASE AND FOREVER DISCHARGE** (i) Harley-Davidson Motor Company, Inc., Harley-Davidson, Inc., . . . each of their respective parent, subsidiary, and affiliated companies . . . ; [and] (ii) all authorized dealers of Harley-Davidson Motor Company . . . who are sponsoring or conducting the [New Rider Course] . . . (hereinafter all collectively referred to as "Released Parties") from **ANY AND ALL CLAIMS, DEMANDS, RIGHTS, CAUSES OF ACTION AND LOSSES (collectively, "CLAIMS") OF ANY KIND WHATSOEVER THAT I . . . NOW HAVE OR LATER MAY HAVE AGAINST ANY RELEASED PARTY IN ANY WAY RESULTING FROM, OR ARISING OUT OF OR IN CONNECTION WITH, MY PARTICIPATION IN THE [NEW RIDER COURSE]** . . . .
>
> I acknowledge and understand that this Release **EXTENDS TO AND RELEASES AND DISCHARGES ANY AND ALL CLAIMS** I . . . have or may have against the Released Parties arising out of my participation in the [New Rider Course], including without limitation all such Claims resulting from the **NEGLIGENCE** of any Released Party . . . .

The Gateway employees who conducted the New Rider Course were certified as course instructors by the Motorcycle Safety Foundation (MSF) and used a curriculum guided by MSF instructional materials. During the New Rider Course, Plaintiff sustained injuries.

Plaintiff filed a two-count petition against Defendants, alleging that Defendants' instructors for the New Rider Course instructed Plaintiff to perform motorcycle exercises on an icy and slippery outdoor range. Plaintiff stated in "Count I: Negligence" 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." In "Count II: Premises

Liability," Plaintiff incorporated the allegations in Count I and further asserted that "Defendants' negligence and recklessness directly caused [Plaintiff's] accident in that . . . Defendants knew or should have known that the [range] became wet and icy, therefore creating a dangerous condition on the premises."

Defendants moved for summary judgment on the basis of the affirmative defense of release, claiming that Plaintiff released Defendants from any negligence claims when she signed the release. In support of their motion, Defendants asserted that the following facts, among others, were uncontroverted: (1) Gateway was an authorized dealer of Harley-Davidson Motor Company[1] on the date of Plaintiff's injury; and (2) Gateway sponsored and conducted the New Rider Course in which Plaintiff participated. Thus, Defendants contended, the exculpatory clause released Gateway.[2] Defendants supported these statements with an affidavit of Gateway's director of marketing.

In Plaintiff's memorandum of law in opposition to Defendants' motion for summary judgment, Plaintiff argued that "Defendants' conduct is not released through an exculpatory clause as a matter of law because the negligence rose to the level of recklessness or gross negligence." Plaintiff asserted that a genuine issue of material fact existed as to whether Defendants' conduct was either reckless or grossly negligent. In her "statement of additional material facts," Plaintiff included the following facts:

(1) The MSF "Basic RiderCourse RiderCoach Guide" provides that a rule of conduct for "RiderCoaches" is to "maintain a low-risk student environment";

[1] According to Defendants' motion, Defendant Harley-Davidson is the parent company of Harley-Davidson Motor Company, Inc.

[2] Defendants also asserted, and Plaintiff did not dispute, that the release covered Harley-Davidson.

(2) The MSF "takes the position that training not be conducted during a thunderstorm, snowstorm, windstorm, with ice on the range, or if the RiderCoaches determine the safety of the students is at risk"; and

(3) Weather records show that "there was rain, drizzle, snow, and mist" on the date of Plaintiff's injury.

Defendants admitted these facts.

Plaintiff also stated the following facts in her "statement of additional material facts":

(1) "Defendants advertised that the outdoor range [for the New Rider Course] was a controlled environment";

(2) Although the range was "icy and slippery," instructors "continued to send riders out . . . to perform exercises on the motorcycle";

(3) "Neither Defendants [nor] their instructors took any action to remediate the slick and dangerous conditions";

(4) Defendants instructed Plaintiff to perform motorcycle exercises on the range;

(5) Plaintiff's "bike slipped and landed on her leg," causing injuries to her leg, ankle, and foot;

(6) Defendants knew or should have known that the icy conditions of the range created an unreasonable risk of bodily harm; and

(7) Defendants knew or should have known that instructing an inexperienced rider to ride on icy or slippery conditions created an unreasonable risk of bodily harm.

Defendants denied these facts.

Plaintiff further argued in response to Defendants' summary judgment motion that the release did not specifically name Gateway as a released party and therefore did not bar her claims against Gateway. However, Plaintiff admitted that Gateway sponsored and conducted the New Rider Course in which she participated. In response to Defendants' asserted fact that Gateway was an authorized dealer of Harley-Davidson Motor Company, Plaintiff stated: "Denied in part and admitted in part, it is not clear from the waiver that Defendant Gateway was an authorized dealer . . . , however Plaintiff admits that Defendant's affidavit states this fact." Plaintiff also claimed that Defendants produced in discovery a different release form containing a blank line for the program sponsor's name and that Defendants could have easily used that form and written in Gateway's name.

The trial court granted Defendants' motion for summary judgment without providing a basis for its decision. Plaintiff appeals.

Standard of Review

We review the entry of summary judgment de novo. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." Id. "Summary judgment is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." Id. Thus, "[t]he propriety of summary judgment is purely an issue of law." Id.

"As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." Id. "If the trial court grants summary judgment without specifying the basis upon which it was granted, we will uphold the decision if it was appropriate under any theory." English ex rel. Davis v. Hershewe, 312 S.W.3d 402, 404 (Mo. App. S.D. 2010) (quotation omitted).

When reviewing a trial court's grant of summary judgment, this court views the record in the light most favorable to the party against whom summary judgment was entered. ITT Commercial Fin. Corp., 854 S.W.2d at 376. "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." Id. "We accord the non-movant the benefit of all reasonable inferences from the record." Id.

A defendant moving for summary judgment may establish its right to judgment as a matter of law 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 (emphasis in original). "Where the facts underlying this right to judgment are beyond dispute, summary judgment is proper." Id.

Discussion

In her first point on appeal, Plaintiff contends that the trial court erred in granting summary judgment in Defendants' favor based on the release. In particular, Plaintiff maintains that an exculpatory clause never releases a party from liability for either gross negligence or recklessness and that a genuine dispute exists as to whether Defendants' actions constituted either gross negligence or recklessness rather than ordinary negligence. In their brief, Defendants argued that "gross negligence sufficient to invalidate an exculpatory clause means willful and wanton conduct[, which] in turn means an intentional act." At oral argument, Defendants appeared to abandon this contention, asserting instead that a plaintiff who has signed a release must bring a cause of action for recklessness to recover from the released party and that here, Plaintiff alleged in her petition that Defendants were merely negligent, not reckless.[3] Defendants did not counter Plaintiff's argument on appeal that genuine issues of material fact exist.

"Although exculpatory clauses in contracts releasing an individual from his or her own future negligence are disfavored, they are not prohibited as against public policy." Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 334 (Mo. banc 1996). However, "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." Id. at 337.

Plaintiff argues that the facts in the summary judgment record support a reasonable inference that Defendants' conduct rose to the level of either gross negligence or recklessness and, therefore, the release does not relieve Defendants of liability. To support her argument, Plaintiff relies on Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. App. E.D. 1999).

In Hatch, the plaintiff signed a release before participating in a bungee jump in which he was injured. 990 S.W.2d at 131. The plaintiff asserted the following claims, among others, against the bungee jump operator: (1) a "negligence claim" seeking damages for the operator's "negligence in failing to take reasonable efforts to ensure the safety of the bungee jumping operation"; and (2) a "recklessness claim" seeking damages for the operator's "gross negligence

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[3] The following exchange occurred at oral argument:

> Defendants: We believe that recklessness is the cause of action in between negligence and intentional torts.
> Judge Odenwald: So that recklessness is gross negligence? Is that your position?
> Defendants: Essentially, when—yes, that would be our position. . . .
> Judge Odenwald: And if I understand your position, your position is that plaintiff did not plead recklessness, she only pleaded negligence, and therefore we shouldn't be looking beyond?
> Defendants: That's correct.

or recklessness in failing to inspect the bungee jumping equipment and in failing to attach the bungee cord to the crane or cage assembly prior to [the plaintiff's] jump." Id. at 131-33. The trial court granted summary judgment in the operator's favor on the negligence claim, finding that the release barred the negligence claim. Id. at 132. The trial court conducted a jury trial on the recklessness claim. Id. The jury returned a verdict in the plaintiff's favor on the recklessness claim, and the trial court entered judgment on the verdict. Id. at 132-33.

On appeal, the bungee jump operator argued that Missouri does not recognize a cause of action for recklessness and the trial court therefore erred in submitting the plaintiff's recklessness claim to the jury. Id. at 139. To support its argument, the bungee jump operator relied on the Supreme Court's statement in Fowler v. Park Corp., 673 S.W.2d 749 (Mo. banc 1984), that "there are no legal degrees of negligence." Hatch, 990 S.W.2d at 139. The Hatch court held: "The fact that Missouri does not recognize legal degrees of negligence has nothing to do with whether Missouri recognizes a cause of action for recklessness." Id. The court noted that "Missouri recognizes a cause of action for recklessness" and held that the trial court properly submitted the recklessness claim to the jury. Id. at 139-40.

"Recklessness is an aggravated form of negligence which differs in quality, rather than in degree, from ordinary lack of care." Id. at 139. Missouri courts have accepted the definition of "recklessness" set forth in the Restatement of Torts:

> The actor's (defendant's) conduct is in reckless disregard of the safety of another if he intentionally does an act or 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 that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.

Nichols v. Bresnahan, 212 S.W.2d 570, 573 (Mo. 1948) (quoting RESTATEMENT (FIRST) OF TORTS § 500 (1934)); Hatch, 990 S.W.2d at 139-40; Farm Bureau Town & Country Ins. Co. of Mo. v. Turnbo, 740 S.W.2d 232, 234 (Mo. App. E.D. 1987).

Recklessness differs from intentional conduct. RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965). "A person intends an act if he desires to cause the consequences of his act or believes the consequences are *substantially certain* to result." Turnbo, 740 S.W.2d at 234-35 (emphasis in original). "As the certainty of the consequences decreases, the characterization of the person's mental state shifts to reckless, then to negligent." Id. at 235 (citation omitted). "Thus, a person is reckless, if he realizes or, from the facts which he knows, should realize there is a *strong probability* that harm may result, even though he hopes or expects his conduct will prove harmless." Id. (emphasis in original). "To commit an intentional tort, the person must not only commit the act, he must also intend to produce the resulting harm." Id. "To be reckless, however, the person intends the act, but does not intend to cause the harm that results." Id. (citation omitted).

Recklessness is also distinct from ordinary negligence. RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (1965). As we explained in Turnbo: "A person is negligent, if his inadvertence, incompetence, unskillfulness or failure to take precautions precludes him from adequately coping with a possible or probable future emergency." 740 S.W.2d at 235. "To be reckless, a person makes a conscious choice of his course of action, 'either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to any reasonable man.'" Id. (quoting RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (1965)). "Recklessness also differs from that negligence which consists of intentionally doing an act with knowledge it contains a risk of harm to others." Id. "To be reckless, a person must 'recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent.'" Id. (quoting RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (1965)).

"Summary judgment is often inappropriate in negligence cases . . . ." Tiger v. Quality Transp., Inc., 375 S.W.3d 925, 928 (Mo. App. S.D. 2012). Although Missouri courts have not specifically addressed the advisability of summary judgment when considering whether a defendant's conduct amounts to recklessness in the context of a release, we agree with other jurisdictions that have held that where a genuine issue of material fact exists as to whether a defendant's conduct amounted to more than ordinary negligence so as to render an exculpatory clause unenforceable, summary judgment is not appropriate. See, e.g., Carleton v. Winter, 901 A.2d 174, 182 (D.C. 2006) (reversing summary judgment "given the possibility that the negligence amounted to not ordinary negligence but gross negligence"); Beehner v. Cragun Corp., 636 N.W.2d 821, 829 (Minn. Ct. App. 2001) ("In a dispute over the applicability of an exculpatory clause, summary judgment is appropriate only when it is uncontested that the party benefited by the exculpatory clause has committed no greater-than-ordinary negligence."); Adams v. Roark, 686 S.W.2d 73, 76 (Tenn. 1985) (reversing summary judgment where a genuine issue of fact existed "as to whether defendants' actions amounted to gross negligence so as to negate the effect of the release and waiver"); 57A Am. Jur. 2d Negligence § 59 (2013) ("Whether a defendant's conduct was willful or amounted to no more than ordinary negligence for the purposes of determining the effectiveness of an exculpatory provision is a question of fact.").

The following facts are undisputed for purposes of Defendants' summary judgment motion: Plaintiff was injured on April 13, 2008 while participating in a New Rider Course at

Gateway's place of business. The Gateway employees who conducted the New Rider Course were MSF-certified course instructors and used a curriculum guided by MSF instructional materials. The "MSF Basic RiderCourse RiderCoach Guide" provides that a rule of conduct for "RiderCoaches" is to "maintain a low-risk student environment." The MSF "takes the position that training not be conducted during a thunderstorm, snowstorm, windstorm, with ice on the range, or if the RiderCoaches determine the safety of the students is at risk." Weather records establish that "there was rain, drizzle, snow, and mist" on the date of Plaintiff's injury. This undisputed evidence reasonably supports inferences that the Gateway instructors: (1) had control over when they sent students on to the range; and (2) knew that conducting the New Rider Course during a snowstorm or with ice on the range presented a risk to student safety.

Plaintiff asserted the following facts to support her claim that Defendants were reckless:

(1) "Defendants advertised that the outdoor range [for the New Rider Course] was a controlled environment";

(2) Although the range was "icy and slippery," instructors "continued to send riders out . . . to perform exercises on the motorcycle";

(3) "Neither Defendants [nor] their instructors took any action to remediate the slick and dangerous conditions";

(4) Defendants instructed Plaintiff to perform motorcycle exercises on the range;

(5) Plaintiff's "bike slipped and landed on her leg," causing injuries to her leg, ankle, and foot;

(6) Defendants knew or should have known that the icy conditions of the range created an unreasonable risk of bodily harm; and

(7) Defendants knew or should have known that instructing an inexperienced rider to ride on icy or slippery conditions created an unreasonable risk of bodily harm.

Defendants denied these facts.

These disputed facts are crucial to a determination of whether Defendants' alleged actions were reckless. Defendants were reckless 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." See Turnbo, 740 S.W.2d at 235.

Defendants admitted that the MSF manual for course instructors provided specific guidance with regard to inclement weather. The MSF's "position that training not be conducted during a . . . snowstorm [or] with ice on the range" tends to establish that sending an inexperienced motorcycle rider on an icy range presents a strong probability that harm may result. If, as Plaintiff alleges, Defendants knew that the range was icy and that Plaintiff was an inexperienced motorcycle rider, then a fact-finder could reasonably infer that Defendants knew or should have known that instructing Plaintiff to ride on the range in violation of the MSF manual created an unreasonable risk of harm.

Finally, Defendants argue that because Plaintiff used the term "negligence" in her petition to describe Defendants' conduct and because she denominated her claims "Count I: Negligence" and "Count II: Premises Liability," Plaintiff only pleaded an action for ordinary negligence and Defendants are therefore entitled to summary judgment. We disagree. "[I]n determining whether a pleading adequately states a claim for relief on a particular basis, the rule is well established in Missouri that the character of a cause of action is determined from the facts stated in the petition and not by the prayer or name given the action by the pleader." Am. Eagle Waste Indus., LLC v. St. Louis County, 379 S.W.3d 813, 829 (Mo. banc 2012) (quotation omitted). "To properly plead a cause of action, the petition must state allegations of fact in support of each essential element of the cause pleaded." Id. (quotation omitted). "To be deemed sufficient, a petition need not even label the theory upon which a plaintiff seeks recovery." Id. Therefore, the labels Plaintiff used in her petition to describe her claims have no bearing on the nature of the claims she pleaded.

Moreover, "[t]he purpose of a pleading is to limit and define the issues to be tried in a case and to put the adversary on notice thereof." Smith v. City of St. Louis, 395 S.W.3d 20, 24 (Mo. banc 2013) (quotation omitted). Here, the language of the petition was sufficient to put Defendants on notice that Plaintiff claimed more than ordinary negligence. Plaintiff asserted in her petition, among other things, 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." This language reflects the definition of recklessness. See, e.g., Hatch, 990 S.W.2d at 140 (an actor is reckless if he acts despite "knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct . . . creates an unreasonable risk of bodily harm to the other"). Accordingly, Plaintiff's failure to denominate her cause of action as "recklessness" fails to support the trial court's grant of summary judgment. Point granted.

Although our resolution of Plaintiff's first point is dispositive of the appeal, the issue presented in her second point is likely to recur on remand. Therefore, we address Plaintiff's second point on appeal to guide the trial court. See, e.g., Muehlheausler v. City of St. Louis, 211 S.W.3d 153, 156 (Mo. App. E.D. 2007).

In her second point, Plaintiff asserts that the trial court erred in granting summary judgment in favor of Gateway because the release did not explicitly name Gateway as a released party. In response, Defendants argue that: (1) the exculpatory clause released "all authorized dealers of Harley-Davidson Motor Company . . . who are sponsoring or conducting the [New Rider Course]"; and (2) Gateway was such an authorized dealer.

"We have routinely held that the word 'any' when used with a class in a release is all-inclusive, it excludes nothing, and it is not ambiguous." Holmes v. Multimedia KSDK, Inc., 395 S.W.3d 557, 560 (Mo. App. E.D. 2013). This court has applied the same reasoning to classes of persons in prospective releases for future acts of negligence. See id. Missouri law "simply does not require that for a release of liability for future negligence to be effective, it must identify every individual sought to be released by name rather than by class." Id. at 561. Thus, for example, "[t]he release of 'any Event sponsors and their agents and employees' from liability for future negligence clearly releases all Event sponsors and their agents and employees without exclusion." Id. "It is not ambiguous because it does not name each individual Event sponsor it purported to release from liability." Id.

Here, the exculpatory clause released "all authorized dealers of Harley-Davidson Motor Company . . . who are sponsoring or conducting the [New Rider Course]." In support of their motion for summary judgment, Defendants asserted that the following facts were uncontroverted: (1) Gateway was an authorized dealer of Harley-Davidson Motor Company on the date of Plaintiff's injury; and (2) Gateway sponsored and conducted the New Rider Course in which Plaintiff participated. Defendants supported these statements with an affidavit of

Gateway's director of marketing. "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

In Plaintiff's response to the summary judgment motion, she either admitted or failed to controvert these facts. Plaintiff admitted that Gateway sponsored and conducted the New Rider Course in which she participated. In response to the asserted fact that Gateway was an authorized dealer of Harley-Davidson Motor Company, Plaintiff stated: "Denied in part and admitted in part, it is not clear from the waiver that Defendant Gateway was an authorized dealer . . . , however Plaintiff admits that Defendant's affidavit states this fact." Plaintiff did not support her denial with references to discovery, exhibits, or affidavits. Accordingly, Plaintiff's response was insufficient to create a genuine dispute as to this asserted fact.

Plaintiff contends that Defendants produced in discovery a different release form containing a blank line for the program sponsor's name and that Defendants could have easily used that form and written in Gateway's name. To support this argument, Plaintiff relies on Milligan v. Chesterfield Village GP, LLC, 239 S.W.3d 613 (Mo. App. S.D. 2007). Milligan does not assist Plaintiff. There, a tenant signed a lease releasing "Lessor" from liability for future negligence. 239 S.W.3d at 615. The court held that the exculpatory clause did not preclude the tenant's claims against the lessor's management company, noting "how easily 'and [management company],' 'and agents,' etc. could have been added to [the exculpatory clause]." Id. at 623. We are not persuaded that the court's statement that the lessor could have easily added language to release its agents means, as Plaintiff asserts, that Gateway was required to use the fill-in-the-blank release form simply because it had the form on file and therefore could have "easily" used it. In any event, Milligan is inapposite because unlike in the instant case, the release in Milligan did not contain language exonerating a class of persons. See id. at 615. Point denied.

Conclusion

We reverse the judgment and remand to the trial court.

Patricia L. Cohen, Judge

Lawrence E. Mooney, P.J., and
Kurt S. Odenwald, J., concur.