IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 16, 2008

HOLLY THRASHER v. RIVERBEND STABLES, LLC, ET AL.

Appeal from the Circuit Court for Davidson County
No. 06C-97 Walter Kurtz, Judge

No. M2008-02698-COA-RM-CV - Filed February 4, 2009

Plaintiff appeals the summary dismissal of her complaint arising out of the death of her Tennessee Walking Horse while the horse was being trained at Riverbend Stables, LLC. Plaintiff filed suit claiming the horse died as a result of the defendants' negligence and gross negligence. The trial court dismissed the complaint upon a finding that the claims of negligence were barred by the exculpatory provisions in the parties' written agreement and Plaintiff had failed to make out a prima facie claim of gross negligence. Finding the exculpatory agreement between Plaintiff and Riverbend Stables enforceable, we affirm the trial court's determination that Plaintiff's claim of ordinary negligence is barred by the parties' agreement. As for Plaintiff's claim of gross negligence, we have concluded Riverbend Stables failed to negate an essential element of that claim and failed to establish that Plaintiff cannot prove an essential element of that claim at trial, as is required under the summary judgment analysis stated in *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008) and *Hannan v. Alltel Publ'g Co.,* 270 S.W.3d 1 (Tenn. 2008); therefore, Riverbend Stables is not entitled to summary judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Kirk L. Clements, Goodlettsville, Tennessee, for the appellant, Holly Thrasher.

Michael H. Johnson and M. Kristin Selph, Nashville, Tennessee, for the appellees, Riverbend Stables, LLC, Stephen Daniel, and Michael Daniel.

OPINION

This matter is before this court upon remand from the Tennessee Supreme Court pursuant to an order filed December 8, 2008. This court rendered a prior opinion in this matter on May 21,

2008, in which we affirmed the trial court's summary dismissal of the plaintiff's claims.[1] Thereafter, the plaintiff, Holly Thrasher, filed an application to the Supreme Court for permission to appeal. The application was granted and the Supreme Court remanded the case to this court for reconsideration of our prior opinion in light of the recent holding in *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008).[2]

The relevant facts and the procedural history of this case in the trial court are as follows. In February of 2004, Holly Thrasher ("Plaintiff") began boarding her Tennessee Walking Horse, Irish Sweepstakes, aka Lola, at Riverbend Stables, LLC[3] for training purposes. When Plaintiff began boarding Lola at Riverbend, she executed an Agreement that contained the following clause:

> 6. Riverbend and its employees, owners and agents shall not be liable to Owner or any of Owner's guests for any negligent conduct or malfeasance of any sort, including any personal injury or property damage (including the injury or death of a horse). Owner agrees to indemnify and hold harmless Riverbend from any such liability. In the event a claim is filed against Riverbend, Owner agrees to indemnify Riverbend for all loss and damages, including reasonable attorney fees, resulting from the filing of any such claim.

On August 18, 2005, Michael Daniel, a Riverbend trainer and member of the LLC, attached Lola to an equine exercise machine known as a "hot walker." Riverbend had purchased this machine two weeks earlier from Robert Nelms, who had used the machine with approximately thirty horses per day prior to the sale. While attached to the machine, Lola became spooked and lunged forward, impaling herself with a lead bar that extended from the machine. Tragically, Lola died as a result.

Plaintiff filed suit on January 13, 2006, against Riverbend Stables, LLC, Steven Daniel, and Michael Daniel (collectively, "Defendants") claiming that Defendants were negligent, grossly negligent, and reckless in the training and boarding of her horse. Following discovery, Defendants filed a motion for summary judgment claiming, *inter alia*, that the exculpatory clause relieved them of liability. After a hearing on the motion, the trial court granted Defendants' motion, summarily dismissing all of Plaintiff's claims. Specifically, the trial court found that "[r]elying on the factors enumerated in *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977), [t]he Exculpatory Clause in the Defendants' contract relieves them from all negligence." Further, "[t]he contract also is not void as against public policy." As to gross negligence, the trial court held that there was no evidence that

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[1] *See Thrasher v. Riverbend Stables, LLC*, No. M2007-01237-COA-CV, 2008 WL 2165194 (Tenn. Ct. App. May 21, 2008) for this court's prior opinion in this matter.

[2] The Supreme Court Order reads: "Upon consideration of the application for permission to appeal of Holly Thrasher and the record before us, the application is granted and remanded to the Court of Appeals for reconsideration in light of Martin v. Norfolk S. Ry. Co., [271] S.W.3d [76], 2008 WL 4922434 (Tenn. 2008)."

[3] Riverbend Stables, LLC has two members, Michael Daniel and Stephen Daniel.

the Defendants' actions were wanton, willful, or showed a conscious disregard for the safety of others and therefore Plaintiff had failed to show that the alleged acts or omissions of Defendants constituted gross negligence. Accordingly, the claim of gross negligence was summarily dismissed. This appeal followed.

ANALYSIS

Plaintiff presents two issues. First, Plaintiff contends the exculpatory clause is void as against public policy. Second, Plaintiff contends the trial court erred in granting Defendants' Motion for Summary Judgment. We will address each issue in turn.

EXCULPATORY CLAUSE

It is well established in Tennessee that "subject to certain exceptions, parties may contract that one shall not be liable for his negligence to another." *Olson v. Molzen*, 558 S.W.2d 429, 430 (Tenn. 1977) (citing *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960)). There are, however, public policy exceptions to this general rule. *Id*. As the Supreme Court explained in *Olson*, certain professional relationships, such as those with doctors or lawyers, require a greater responsibility and, therefore, a release from liability of the professional's negligence would be "obnoxious." *Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730 (Tenn. Ct. App. 2005) (citing *Olson*, 558 S.W.2d at 430).

The Supreme Court identified criteria to consider when determining whether an exculpatory provision is contrary to public policy. *Henderson*, 174 S.W.3d at 732 (citing *Olson*, 558 S.W.2d at 431). Criteria to be considered include:

> [a.] It concerns a business of a type generally thought suitable for public regulation.
>
> [b.] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
>
> [c.] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
>
> [d.] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.
>
> [e.] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

> [f.] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Olson, 558 S.W.2d at 431. It is not necessary that all six criteria be present. *Russell v. Bray*, 116 S.W.3d 1, 6 (Tenn. Ct. App. 2003). An exculpatory agreement may be deemed offensive, and thus void, if less than all six of the criteria are present. *Id*. (citing *Olson*, 558 S.W.2d at 431).

The application of the foregoing criteria, however, is to be "limited to situations involving a contract with a professional person, rather than a tradesman." *Id.* (citing *Olson*, 558 S.W.2d at 430; *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 636 (Tenn. Ct. App. 1987) (stating "we do not think the Supreme Court intended the [*Olson*] rule to be applied to transactions by what the Court termed 'tradesmen in the market place.'")).

Plaintiff contends the *Olson* public policy exception to the enforceability of an exculpatory provision applies in this case because Defendants are professionals. This contention is based primarily on the holding in *Russell v. Bray* that a "home inspector" is a professional, not a tradesman, and the exculpatory provision was held to be unenforceable. 116 S.W.3d at 6. The *Russell* court concluded that home inspectors were not like automobile mechanics or other tradesmen because, as the court stated, home inspectors "are not performing *hands-on tasks to create or repair a product*." *Id.* (emphasis added.) The court went on to conclude that home inspectors, like many professionals, "sell their *expert analysis and opinion*." *Id.* (emphasis added.) The court also found it significant that Tennessee regulates home inspectors and requires home inspectors to hold "a contractor's license or a proper certification or membership." *Id.*

We, however, believe the public policy exception does not apply to this case. Although Defendants may possess a great deal of expertise in boarding and training horses, we find the duty owed by Defendants for the services at issue here is not equivalent to the public duty a doctor owes her patient or a lawyer owes his client.

The Federal District Court in the matter of *Teles v. Big Rock Stables, L.P.*, 419 F. Supp. 2d 1003, 1008 (E.D. Tenn. 2006) came to a similar conclusion. The District Court found that owners and operators of horse stables do not fall under the public policy exception prohibiting exculpatory clauses. As the court explained:

> It is well settled in Tennessee that parties may contract that one shall not be liable for his negligence to another but that such other shall assume the risk incident to such negligence. *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960). This rule is subject to exception. A party cannot contract away his liability for willful or gross negligence. *Memphis & Charleston R.R. Co. v. Jones*, 39 Tenn. 517 (1859). *Neither can a party contract away liability if the duty under which he acts is a public one*. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Saulsbury*, 90 S.W. 624, 626 (Tenn.1905); *Carolina, Clinchfield & Ohio Ry. Co. v. Unaka Springs Lumber Co.*, 170 S.W. 591

> 594 (Tenn.1914); *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U.S. 91 (1899).
>
> The existence of a public duty which would disallow giving effect to an exculpatory provision is determined by looking at several factors. If the service provided is the type which may generally be subject to public regulation then the duty probably exists. *Smith v. Southern Bell*, 364 S.W.2d 952, 958 (Tenn. Ct. App.1962). Other factors include the degree to which the service is of practical necessity for some members of the public, whether the service is offered to any member of the public who seeks it or qualifies for it, whether one party has greater bargaining power than members of the general public, whether in exercising that bargaining power, the party presents a standardized "adhesion" contract making no provision whereby protection against negligence may be obtained, or whether the person or property of one party is placed under the control of the other. *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977). Particularly offensive in Tennessee are exculpation contracts executed by persons in professional vocations. *Id.* at 432.
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> *Analyzing the facts of this case under the foregoing rules, the court finds that a horse stable generally, and the services provided in this case specifically, are governed by the general rule and do not fall under the exception prohibiting exculpatory clauses*.

Teles, 419 F. Supp. 2d at 1007-08 (emphasis added.)

We, therefore, conclude that the services at issue here do not fall under the exception prohibiting exculpatory clauses. Accordingly, we affirm the trial court's determination that the exculpatory clause contained in the agreement between Plaintiff and Riverbend Stables, LLC, is enforceable. As a consequence, Plaintiff's claim of ordinary negligence is barred by the parties' agreement.

GROSS NEGLIGENCE

In addition to asserting a claim of ordinary negligence, Plaintiff asserted a claim that Defendants were "grossly negligent, and reckless in the training and boarding of her horse." The parties' agreement bars Plaintiff's claim of ordinary or general negligence, however, it does not bar a claim of gross negligence. *See Jones v. Tenn. Riders Instruction Program*, No. M2006-01087-COA-R3-CV, 2007 WL 393630, at *1 n.3 (Tenn. Ct. App. Feb. 5, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Buckner v. Varner*, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990) (stating that an exculpatory clause in a contract "will not operate to protect a party who is guilty of gross negligence")).

In order to prevail on a claim of gross negligence, a plaintiff must first establish that the defendant engaged in conduct that amounts to ordinary negligence. *See Menuskin v. Williams*, 145 F.3d 755, 766 (6th Cir. 1998). In addition to proving that the defendant has committed a negligent

act, the plaintiff must prove that the act was "done with utter unconcern for the safety of others, or one done with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law." *Ruff v. Memphis Light, Gas, and Water Div.*, 619 S.W.2d 526, 528 (Tenn. Ct. App. 1981) (quoting *Odum v. Haynes*, 494 S.W.2d 795, 807 (Tenn. Ct. App. 1972)). Gross negligence is defined as "a conscious neglect of duty or a callous indifference to consequences" or "such entire want of care as would raise a presumption of a conscious indifference to consequences." *Jones*, 2007 WL 393630, at *2 (citing *Buckner v. Varner*, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990); *Thomason v. Wayne County*, 611 S.W.2d 585 (Tenn. Ct. App. 1980); *Sampley v. Aulabaugh*, 589 S.W.2d 666 (Tenn. Ct. App. 1979)).

The trial court summarily dismissed the claim of gross negligence based on the following finding:

> The Plaintiff failed to show that the alleged acts or omissions of Riverbend Stables constitute gross negligence and that the Plaintiff . . . failed to show a conscious neglect of duty. Further there is no evidence that the Defendants' actions were wanton, willful, or showed a conscious disregard for safety of others.

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

The summary judgment analysis has been clarified in two recent opinions by the Tennessee Supreme Court. *See Martin*, 271 S.W.3d 76; *see also Hannan v. Alltel Publ'g Co.,* 270 S.W.3d 1 (Tenn. 2008). The summary judgment analysis to be used is as follows:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or

discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

Martin, 271 S.W.3d at 83-84.

Defendants, as the moving party, had the burden to *negate* an essential element of Plaintiff's claim of gross negligence *or* establish that Plaintiff *cannot prove* an essential element of the claim at trial. *Martin*, 271 S.W.3d. at 83 (citing *Hannan*, 270 S.W.3d at 5; *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5). Therefore, Defendants were required to shift the burden of production to Plaintiff by either affirmatively negating an essential element of Plaintiff's claim or showing that Plaintiff cannot prove an essential element of her claim at trial. *Id*; *Hannan*, 270 S.W.3d at 9; *McCarley*, 960 S.W.2d at 588. We have determined Defendants failed to do either.

We find it significant that Defendants point to four "facts" they apparently consider sufficient to support their motion for summary judgment: (1) Riverbend Stables did not consider the hot walker to be inherently dangerous; (2) Riverbend Stables took every precaution to make Lola comfortable with new training device; (3) Lola's injury was unforeseeable as Michael Daniel had seen both colts and older horses trained on the same type of walker purchased from Robert Nelms; and (4) had the injury to Lola been foreseeable, Michael Daniel and Riverbend Stables would have never placed Lola on the machine. None of these contentions affirmatively negates an element of Plaintiff's gross negligence claim. Defendants have, therefore, failed to shift the burden of production to Plaintiff by either affirmatively negating an essential element of Plaintiff's claim of gross negligence or showing that Plaintiff cannot prove an essential element of that claim at trial. *See Martin*, 271 S.W.3d at 83; *see also Hannan*, 270 S.W.3d at 9; *McCarley*, 960 S.W.2d at 588. Moreover, none of these contentions establishes that Plaintiff cannot prove an essential element of the claim of gross negligence at trial. In this regard, in opposing the motion for summary judgment, Plaintiff filed the affidavits of two horse training experts, Paul Walker and Richard Moores, each of whom testified that in their respective opinions the hot walker was inherently dangerous to a full grown horse, such as Lola. It is upon this testimony that Plaintiff supports her contention that Defendants were grossly negligent in placing Lola, a fully grown horse, on the hot walker.

For the foregoing reasons, we have determined that Defendants are not entitled to summary judgment on Plaintiff's claim of gross negligence.

IN CONCLUSION

We, therefore, affirm the trial court's determination that Plaintiff's claim of ordinary negligence is barred by the parties' agreement, but reverse the summary dismissal of Plaintiff's claim of gross negligence. This matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Plaintiff and Defendants.

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FRANK G. CLEMENT, JR., JUDGE