

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLSON : CIVIL ACTION
 :
 v. :
 :
 MOUNT AIRY LODGE, INC. : NO. 96-5381

M E M O R A N D U M

WALDMAN, J.

December 29, 1997

I. Introduction

This is a personal injury action. Subject matter jurisdiction is predicated on diversity of citizenship. Plaintiff is a citizen of New Jersey. Defendant owns and operates a roller skating rink in Mt. Pocono, Pennsylvania. Plaintiff alleges that he was injured while skating at defendant's rink when a wheel on a skate he had leased from defendant became loose.

This case was initiated by plaintiff in a state court in Monmouth County, New Jersey from which it was then removed to a federal court in the District of New Jersey. Sometime after removing the case, defendant moved to dismiss the action, apparently for lack of personal jurisdiction or venue. Thereafter the federal court in New Jersey, apparently pursuant to 28 U.S.C. § 1406(a), ordered that the case be transferred to the Middle District of Pennsylvania. Thereafter, the court in the Middle District entered an order transferring the case to

this district.

Presently before the court is defendant's Motion for Summary Judgment.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. Id. at 256. Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

III. FACTS

Viewing the record in a light most favorable to

plaintiff, the pertinent facts are as follow.

On October 31, 1995, plaintiff went roller skating at the Mount Airy Lodge in the Poconos near Scranton, Pennsylvania, using roller skates rented from Mount Airy Lodge. After plaintiff had skated for a short time, the right rear wheel on his right roller skate suddenly came loose causing him to fall and suffer injuries.

Before plaintiff began skating, he signed a document which provided, in pertinent part:

Mount Airy Lodge Resorts

ACKNOWLEDGMENT OF RISKS, ASSUMPTION OF RISKS AND
RESPONSIBILITY AND RELEASE OF LIABILITY

ACTIVITY: Skating

I am aware that certain foreseeable and unforeseeable events can pose a dangerous risk to my safety; that certain risks associated with this activity including but not limited to collision, falls, equipment failure, and operator error can result in personal injury and accidents; . . . and that I should ask about other potential hazards and recommended precautions and procedures. . . .

EXPRESS ASSUMPTION OF RISK AND RESPONSIBILITY: In recognition of the inherent risks of the activity which I . . . will engage in, I confirm that I am . . . physically and mentally capable of participating in the activity and using the equipment. I . . . participate willingly and voluntarily. I assume full responsibility for personal injury, accidents or illnesses (including death), and any related expenses.
. . .

I assume the risk(s) of personal injury, accidents and/or illnesses, including but not limited to sprains, torn muscles and/or ligaments; fractured or broken bones; . . . eye damage; cuts, wounds, scrapes,

abrasions, and/or contusions; dehydration, oxygen shortage (anoxia), and/or exposure; head, neck, and/or spinal injuries; . . . shock, paralysis, drowning, and/or death; and acknowledge that if, during the activity, I . . . experience fatigue, chill and/or dizziness, my . . . reaction time may be diminished and the risk of an accident, increased.

RELEASE: In consideration of services or property provided, I, for myself . . . and heirs, personal representatives or assigns, do hereby release: MOUNT AIRY LODGE, INC, its principals, directors, officers, agents, employees and volunteers, and each and every land owner, municipal and/or governmental agency upon whose property an activity is conducted, from all liability and waive any claim for damage arising from any cause whatsoever (except that which is the result of gross negligence).

I HAVE READ AND UNDERSTOOD THE FOREGOING ACKNOWLEDGMENT OF RISK, ASSUMPTION OF RISK AND RESPONSIBILITY, AND RELEASE OF LIABILITY, I UNDERSTAND THAT BY SIGNING THIS DOCUMENT I MAY BE WAIVING VALUABLE LEGAL RIGHTS.

. . . .

[signed] Gary Nicholson

Approximately fifteen months after the accident, plaintiff's expert inspected the skates plaintiff had worn and found them to be in poor condition.¹ According to the expert, the skates were at least twenty years old, all eight wheels were worn, the right boot was ripped, the right rear wheel on the right skate had lost all of its ball bearings and the nut which secured them could be removed by hand without a wrench.

IV. DISCUSSION

¹ The skates were in defendant's possession during the fifteen month interval and there is no evidence that they had since been used or that their condition was altered.

Defendant moves for summary judgment on the basis of the exculpatory clause in the release signed by plaintiff. Defendant claims that the language of the release shields it from all liability resulting from plaintiff's fall.

Under Pennsylvania law,² an exculpatory agreement is valid and enforceable when: the contract does not contravene any policy of the law; the contract is an agreement between individuals relating to their private affairs; and, each party was a free bargaining agent, not simply one drawn into an adhesion contract. The agreement must be construed strictly and against the party asserting it, and it must spell out the intent of the parties with the utmost particularity. See Employers Liab. Assurance Corp. v. Greenville Bus. Men's Ass'n, 224 A.2d 620, 622-23 (Pa. 1966); Kotovsky v. Ski Liberty Operating Corp., 603 A.2d 663, 665 (Pa. Super. Ct. 1992), appeal denied, 609 A.2d 168 (Pa. 1992); Zimmer v. Mitchell and Ness, 385 A.2d 437, 439 (Pa. Super. Ct. 1979), aff'd, 416 A.2d 1010 (Pa. 1980); see also Schillachi v. Flying Dutchman Motorcycle Club., 751 F. Supp. 1169, 1172-73 (E.D. Pa. 1990); Weiner v. Mt. Airy Lodge, 719 F. Supp. 342, 345 (M.D. Pa. 1989).

While exclusionary clauses are construed strictly against the party who seeks to avoid liability, the court "must

² The parties agree that Pennsylvania law governs the substantive issues in this case.

use common sense in interpreting the agreement." Weiner 719 F. Supp. at 345; see Zimmer 385 A.2d at 439.

Plaintiff first contends that the release is not intended to protect defendant from acts of gross negligence and an issue of fact remains as to whether defendant was grossly negligent. Plaintiff next asserts that defendant's negligence pre-dated the agreement and therefore cannot be waived by the release. Plaintiff finally claims that the release should not be enforced because he was in an unfair bargaining positions.

Plaintiff's second and third contentions can be quickly dismissed.

Any negligence by defendant for failing to maintain or inspect the roller skates occurred simultaneously with plaintiff's signing of the rental agreement and acceptance of the skates. See Zimmer, 385 A.2d at 440 (holding ski rental shop released from liability because any negligence in renting equipment to plaintiff without first testing and fitting ski bindings "occurred simultaneously with plaintiff's acceptance of the rental agreement and receipt"). See also Grbac v. Reading Fair Co, 521 F. Supp. 1351, 1356 (W.D. Pa. 1981)(racetrack released from liability for failing to install warning lights on the track because "any breach of a duty owed to the plaintiff occurred when the plaintiff and the defendants executed the contract"), aff'd, 688 F.2d 215 (3d Cir. 1982).

Because plaintiff decided to roller skate as a recreational activity while on vacation and there is no evidence that he was under any compulsion to do so, he cannot complain that he was in an unfair bargaining position when he signed the exculpatory agreement. See, Schillachi, 751 F. Supp. at 1172-73 (plaintiff who signed release before participating in ATV race was a free bargaining agent because the activity did not involve a necessity of life, plaintiff could have engaged in the activity at other locations and there was no evidence that plaintiff tried to negotiate the terms of the agreement); Wilson v. American Honda Motor Co., 693 F. Supp. 228, 230 (M.D. Pa. 1988)(plaintiff who signed release was free bargaining agent as he was under no compulsion to engage in ATV riding); Grbac, 521 F. Supp. at 1355 (driver who signed release was free bargaining agent because he participated in the automobile race as a form of recreation, his livelihood did not depend on racing and he was under no other compulsion to race); Valeo v. Pocono Int'l Raceway, Inc., 500 A.2d 492, 493 (Pa. Super. Ct. 1985)(driver who signed release was free to participate or not because he was under no economic or other compulsion to engage in automobile racing).

Plaintiff agreed to release defendant "from all liability and waive any claim for damage arising from any cause whatsoever (except that which is the result of gross negligence)." The express language of the agreement reserves

plaintiff's right to assert a claim against defendant for any conduct that amounts to gross negligence.³

Gross negligence is generally said to be "a want of even scant care, but something less than intentional indifference to consequences of acts." See Fidelity Leasing Corp. v. Dun & Bradstreet, Inc., 494 F. Supp. 786, 790 (E.D. Pa. 1980). As the court in Douglas W. Randall, Inc. v. AFA Protective Servs., Inc., charged the jury:

gross negligence differs from ordinary negligence only in degree. It is materially greater than ordinary negligence, and consists of the absence of even slight care. You recall that I told you what ordinary care meant. Gross negligence is an extreme departure from

³ Defendant argues that degrees of negligence do not exist under Pennsylvania common law. There is some support for this position. See Ferrick Excavating v. Singer Trucking, 484 A.2d 744, 749 (Pa. 1984)(agreeing with West Penn Admin., Inc. v. Union Nat'l Bank of Pittsburgh, 335 A.2d 725, 735 n.19 (Pa. Super. Ct. 1974), that there are "no degrees of negligence in Pennsylvania"); see also Matthews v. Shoemaker, 1988 WL 167262, *3 (M.D. Pa. Dec. 23, 1988)("the distinction . . . between negligence and gross negligence is questionable"). But see, Home Indemn. Co. v. National Guardian Sec. Servs., 1995 WL 298233, *4 (E.D. Pa. May 11, 1995)(recognizing that there are numerous post-Ferrick opinions by Pennsylvania state and federal courts recognizing gross negligence under Pennsylvania law); Stark Co. v. National Guardian Sec. Servs., 1990 WL 112110, *2 (E.D. Pa. Aug. 3, 1990)("The liability limitation clause applies to "negligent" acts of [defendant's] employees. It does not specifically apply to acts of gross negligence."); Stevens v. Ireland Hotels, Inc., 1986 WL 21331, *3 (M.D. Pa. Feb. 10, 1986)("it would appear that, in Pennsylvania, all degrees of negligence may be the subject of a valid disclaimer").

In any event, it does not follow that the release may be read to preclude liability for any type or degree of negligence as defendant suggests. The parties expressly agreed to exclude from the limitation of liability "gross negligence," a term which has been meaningfully defined by Pennsylvania courts.

ordinary care. Gross negligence has been defined as performing or failing to perform a duty in reckless disregard of the consequences.

Douglas W. Randall, Inc. v. AFA Protective Servs., Inc., 516 F. Supp. 1122, 1126 (E.D. Pa. 1981), aff'd, 688 F.2d 820 (3d Cir. 1982). See also Newark Ins. Co. v. ADT. Sec. Sys., Inc., 1997 WL 539752, *6 (E.D. Pa. Aug. 5, 1997).

Generally "the issue of whether a given set of facts satisfies the definition of gross negligence is a question of fact to be determined by a jury." Albright v. Abington Mem'l Hosp., 696 A.2d 1159, 1164-65 (Pa. 1997) (discussing "gross negligence" under 50 P.S. § 7114(a)); Stark Co., 1990 WL 112110, *3 (generally whether "defendant's actions demonstrate the lack of care required of gross negligence is a question for the jury"). The court may decide the issue as a matter of law only when the "conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence." Albright, 696 A.2d at 1165.

Although rather thin, plaintiff presents evidence from which a jury might reasonably infer gross negligence. If the testimony of plaintiff's expert is credited, a jury might find that even by the exercise of slight care defendant would have discovered a loose wheel and rectified it or removed the skate from its rental stock.

V. CONCLUSION

The exculpatory agreement clearly limits plaintiff's claim to one of gross negligence. Because plaintiff may be able

to show that defendant failed to exercise even slight care and that such gross negligence proximately caused his injury, defendant's motion will be denied.

An appropriate order will be entered.

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	:	
v.	:	
	:	
MOUNT AIRY LODGE, INC.	:	NO. 97-1296

O R D E R

AND NOW, this day of December, 1997, upon
consideration of defendant's Motion for Summary Judgment and
plaintiff's response thereto, consistent with the accompanying
memorandum, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.