

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001839-MR

JUDY BROUGHTON

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE WILLIAM T. JENNINGS, JUDGE  
ACTION NO. 05-CI-01019

MOTORCYCLE SAFETY FOUNDATION, INC.;  
WAYNE STEELE; GARY LAIL AND ADAM MOSS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: Judy Broughton appeals from an order of the Madison Circuit Court granting Appellees' motion for a judgment on the pleadings. At issue is the enforceability of a release signed by Broughton prior to her participation and subsequent injury during a motorcycle safety course operated by Appellees. The release relieves Appellees from all liability for those injuries. Because we find the release valid, we affirm.

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In August of 2003, Appellant enrolled in a motorcycle safety course offered at Eastern Kentucky University (EKU) as part of the Kentucky Motorcycle Safety Education Program (KMSEP). The KMSEP is a legislatively created program aimed at promoting motorcycle safety by offering rider education and training courses at various locations throughout the state. *See generally* KRS 15A.350, *et seq.* Appellee Wayne Steele is the director of the KMSEP and Appellees Gary Lail and Andy Moss are motorcycle safety instructors who are employed by ECU to assist with the courses administered there. Appellee Motorcycle Safety Foundation (MSF) is a national non-profit organization aimed at promoting motorcycle safety and the author of the motorcycle safety curriculum used during the ECU course.

Upon enrolling in the KMSEP, Broughton signed an agreement entitled the “Kentucky Motorcycle Program Course Waiver Form.” The form read, in pertinent part:

#### RELEASE, WAIVER AND INDEMNIFICATION

The undersigned participant and his/her parent or legal guardian (if under the age of 18 years) does hereby execute this release, waiver and indemnification for him/herself and his/her heirs, successors, representatives and assigns; and hereby agrees and represents as follows:  
To release the ECU its members, employees, agents, representatives and those governmental agencies and other organizations affiliated with this course including but not limited to the Motorcycle Safety Foundation, its members, employees, agents and representatives, and the Kentucky Motorcycle Program, its members, employers, agents and representatives, from any and all liability, loss damage, costs, claims and/or causes of action including but not limited to all bodily injuries and property damage arising out of participation in this motorcycle training course, it being specifically understood that said course includes the operation

and use by the undersigned participant and others of motorcycles.

On August 19, 2005, Broughton filed a complaint against Appellees alleging bodily injury during the motorcycle safety training course proximately resulting from the Appellees' negligence. Appellees filed an answer, citing Broughton's signed course waiver form as a complete bar to her claims against them. Subsequently they filed a motion for a judgment on the pleadings, requesting that the trial court dismiss Broughton's case on the grounds that the waiver was enforceable and not void as against public policy. On July 19, 2006, the trial court entered an order granting the Appellees' motion. After denying Broughton's motion to alter, amend, or vacate, the trial court entered a final judgment striking Broughton's complaint from the docket. This appeal followed.

Civil Rule (CR) 12.03 provides that, after the pleadings are closed, any party may move for judgment on the pleadings. The purpose of CR 12.03 is to expedite the termination of a controversy where the facts are not in dispute and to provide a method of disposing of cases where allegations in the pleadings themselves are admitted and only questions of law remain. A judgment on the pleadings should be granted if it appears that the nonmoving party cannot prove any set of facts that would entitle her to relief. *City of Pioneer Village v. Bullitt County*, 104 S.W.3d 757, 759 (Ky. 2003). "In making this decision, the circuit court is not required to make any factual determination<sup>2</sup>;

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<sup>2</sup> It is unnecessary to address Broughton's claim that Appellee's motion was prematurely granted. Because Broughton acknowledged in her pleading that she signed the waiver, its enforceability becomes the sole issue and additional fact-finding would be superfluous.

rather the question is purely a matter of law.” *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky.App. 2002). Broughton’s complaint was dismissed because the trial court found her negligence claim to be barred by the course waiver form she signed. Broughton urges this Court to find that the release is invalid.

Broughton relies on *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), as requiring a heightened degree of precision by a party drafting an exculpatory contract (or release) in an attempt to avoid liability for its future, potential negligence – be it ordinary or gross. While *Hargis* does not hold such agreements to be invalid *per se*, it nonetheless states that “such contracts are disfavored and are strictly construed against the parties relying upon them.” *Id.* at 47. In addition to imposing the rule of more strict construction against the drafter of such a release, *Hargis* requires that the release be “so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable.” *Id.* (Citation omitted).

*Hargis* sets forth four alternative methods by which a release may satisfy the requirement.

[A] pre-injury release will be upheld only if (1) it explicitly expresses an intention to exonerate by using the word “negligence;” or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision. Thus, an exculpatory clause must clearly set out the negligence for which liability is to be avoided.

*Id.* (citations omitted).

Broughton contends that the course waiver form fails to meet any of the four conditions described in the opinion above. We disagree.

Although the language of the course waiver form is rather broad, it provides that the participant will “hold [the KMP, its members, employers, agents and representatives] harmless for any liability, loss, damage, cost, claim, judgment or settlement which may be brought or entered against them as a result of the undersigned’s participation in said course.” It further states that the Appellees, shall be released “from any and all liability . . . including . . . all bodily injuries . . . arising out of participation in this motorcycle training course[.]” “[P]rotection against negligence is the only reasonable construction of the contract language” because the waiver form clearly intended that the Appellees be released from any and all liability, including bodily injury, resulting from their own negligence, Broughton’s negligence, or the negligence of any other course participant. The course waiver form complies with the substantive requirements of *Hargis*.

We next consider Broughton's alternative argument that the course waiver form is contrary to public policy and is therefore void. We do not find this argument persuasive.

Our Supreme Court recently addressed this issue in *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.* --- S.W.3d ---, 2007 WL 188041 (Ky. 2007)(Petition for Rehearing pending).

Recognizing the importance of freedom to contract, the courts of this Commonwealth have traditionally enforced

exculpatory provisions unless such enforcement violates public policy. And despite perceived inconsistencies in recent Kentucky case law, the basic principles regarding the enforceability of exculpatory clauses or contracts were set forth over a century ago in *Greenwich Insurance Co. v. Louisville & Nashville Railroad Co.*, [112 Ky. 598, 66 S.W. 411 (1902)]. In deciding to uphold the exculpatory clause at issue there, our predecessors noted that the parties were “dealing at arm's length and upon an equal footing[,]” and that the contract was entered into voluntarily without either party being compelled to enter into the contract on the basis of necessity.

*Id.*, 2007 WL 188044 (footnotes omitted). In *Cumberland Valley*, Justice Minton draws the conclusion that, “recent cases, even those invalidating exculpatory clauses on the basis of public policy, can be harmonized with *Greenwich* by focusing on the parties’ bargaining power.” *Id.*, 2007 WL 188045.

Broughton urges that we focus instead on the parties' relative disparity of experience at riding motorcycles. But, as Justice Minton points out, that is not the proper focus. The parties’ respective expertise at motorcycle riding is not relevant to the issue of whether the parties were dealing at arm's length and upon an equal footing. Broughton, desiring a certain proficiency at driving a motorcycle, could have elected to walk away from KMSEP's offer to teach her to ride. KMSEP's course was not the only avenue to Broughton's goal. It is that absence of exclusivity and KMSEP's potential loss of Broughton as a customer that gave Broughton the relatively equal bargaining power that she simply declined to exercise.

Broughton suggested at oral argument that KMSEP should have offered an alternative, that is, the same course at a higher price without the waiver, or the

opportunity to purchase insurance. But KMSEP was not obliged to offer such terms as part of this bargain. Those terms were options of negotiation equally available to Broughton that she apparently never sought prior to agreeing to KMSEP's terms. There is no suggestion in the pleadings that she refused to sign the waiver or that she attempted to negotiate lessons, perhaps even at a higher price, without signing the waiver, or that she, in any other way attempted to avoid signing the waiver.

Broughton simply was not compelled to take the KMSEP course or to sign the course waiver form. She did both voluntarily. We find no significant disparity in bargaining power between the contracting parties and will enforce the agreement into which they voluntarily entered. *See Schultz v. Cooper*, 134 S.W.3d 618, 621 (Ky.App. 2003). The course waiver form is enforceable.

The judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

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