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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002212-MR

SUSAN DAVIS, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF
CHARLES A. DAVIS, DECEASED — APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 05-CI-00427

3 BAR F RODEO; MARCUS FANNIN;
BOBBY RAY FANNIN; GRANT COUNTY
FAIR, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, TAYLOR AND WINE, JUDGES.

WINE, JUDGE: Susan Davis ("Susan"), individually and as the Administratrix of the Estate of Charles A. Davis ("Charles"), deceased, appeals a summary judgment order entered by the Grant Circuit Court dismissing her claims against the Grant County Fair,

Inc. ("GCF"), 3 Bar F Rodeo ("3-BFR"), Marcus Fannin ("M. Fannin") and Bobby Ray Fannin ("B. Fannin") ("Appellees" collectively) for the injuries and wrongful death of her husband, Charles, which occurred on September 25, 2004. Specifically, Susan argues the trial court erred by denying her motion for summary judgment based upon the Appellees' alleged failure to give her husband the mandatory warning pursuant to KRS 247.4027, which resulted in Charles's severe internal bodily injuries which ultimately led to his death. For the reasons stated herein, we remand this case as summary judgment was not appropriate.

Appellant, GCF, is a non-profit corporation whose primary function is to own, maintain, and operate the Grant County Fairgrounds. 3-BFR is an unincorporated association comprised of M. Fannin and B. Fannin. 3-BFR's primary function is to conduct rodeo events for the general public. GCF entered into an agreement with 3-BFR, M. Fannin and B. Fannin whereby 3-BFR would hold a rodeo at the fairgrounds.

On September 25, 2004, Charles and Susan attended the rodeo at the Grant County Fair. The announcer for the rodeo, Aaron Platt ("Platt"), called for participants for a game called the "Ring of Fear." This game called for audience members to participate by entering the rodeo ring and standing in marked circles on the ground. Kenny, a bull from Ohio, was then released into the ring. The last person standing, without stepping outside of the circle, won the grand prize of $50.00. Charles proceeded to the ring to try his luck in the Ring of Fear. Susan alleges Kenny was angered by someone jabbing him with a wooden object and beating sticks against his cage prior to his release. Once released, Kenny proceeded to drive his head into Charles's abdomen, lifting him off the ground. Charles made his way back into the stands where his wife

Susan was seated. Unknown to Charles or anyone else, Kenny's blow to Charles's abdomen had caused his liver to burst and he was bleeding internally. Charles faded into temporary unconsciousness next to his wife in the stands. Charles died the next morning at the University of Cincinnati's trauma unit. The cause of death was ruled "blunt trauma to torso" and internal bleeding.

Susan then brought a wrongful death action against GCF, 3-BFR and the Fannins, alleging that their negligence had caused her husband's death. GCF moved for summary judgment based upon a release signed by Charles prior to his participation in the Ring of Fear. 3-BFR, M. Fannin and B. Fannin filed similar motions. After completing more discovery and taking depositions, Susan filed a cross-motion for summary judgment, asserting that the Appellees failed to properly warn of the dangers of the Ring of Fear as required by KRS 247.4027. Susan alleged the Appellees' failure to warn was a substantial factor in causing the injuries that led to her husband's death. The trial court granted summary judgment to the Appellees, finding that the release was sufficient to exempt them from liability in light of *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005). The trial court denied Susan's cross-motion for summary judgment. This appeal followed.

In reviewing a motion for summary judgment, a trial court must consider all the stipulations and admissions on file. CR 56.03. "[S]ummary judgment is proper only where the movant shows that the adverse party cannot prevail under any circumstances." *Steelvest, Inc. v. Scansteel Service Center*, *Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), c*iting* *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were

no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). There is no requirement that the appellate court defer to the trial court because factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

Susan argues the Appellees breached their duty to warn pursuant to the Farm Animals Activities Act ("FAAA"), found in KRS 247.401 through KRS 247.4029. Specifically, the FAAA represents a statutory plan designed to outline the duties and responsibilities of both participants and sponsors conducting animal activities. Having thoroughly read the statute, we agree with Susan that the statute applies to this case. However, KRS 247.4027(2)(a) allows for a waiver of liability if the participant signs a release waiving his right to bring an action against the farm animal event sponsor.

Susan asserts that non-compliance with the warning requirements of KRS 247.401 constitutes negligence *per se* and/or strict liability. We disagree. KRS Chapter 247 is generally recognized throughout the country as "Equine Activity Statutes" ("EAS"). In general, these statutes are an attempt to limit liability of persons engaging in animal activities. Therefore, if a sponsor of an animal activity does post the suggested warnings found in KRS Chapter 247, he is granted immunity from liability if someone gets hurt. If, as in this case, the warnings are not posted, the sponsor loses the immunity and may be held responsible for the injury in accordance with other applicable law. KRS 247.4013. Therefore, EAS statutes are "immunity statutes," not negligence *per se* or strict liability statutes as recognized in many of our sister states. *See Anderson v. Four*

Seasons Equestrian Center, Inc., 852 N.E.2d 576 (Ind. 2006); *Amburgey v. Sauder*, 605 N.W.2d 84 (Mich. App. 1999).

Although KRS 247.402 requires farm animal activity sponsors to warn of the inherent risks, there is no duty to reduce or eliminate the inherent risks. However, to intentionally mistreat or aggravate a farm animal would be the antithesis of this duty.

While it is clear that the Appellees did not have warning signs posted at the ring entrance, it is undisputed that Charles signed a release just prior to his participation in the Ring of Fear. Therefore, the central issue in this case is the validity of the release Charles signed. The release Charles signed states as follows:

> We the undersigned hereby request permission (1) to enter the restricted area (2) to participate as a contestant, assistant, official or otherwise rodeo events (3) to compete for money, prizes, recognition or reward.
>
> In consideration of "permissive entry" into the restricted areas, which is the area from which admission to the general public is restricted, which includes, but is not limited to the rodeo arena, chutes, pens, adjacent walkways, concessions and other appurtenances, I undersigned, my personal representatives, heirs, next of kin, spouses and assigns to hereby:
>
> 1. I release, discharge and covenant not to sue the rodeo committee, stock contractor, sponsors, arena operators or owners and each of them, their officers, agents and employees all hereafter collectively referred to as (Releases) from any and all claims and liability arising out of strict liability or ordinary negligence of Releases or any other participant which causes the undersigned injury, death, damages or property damage. I, the undersigned, jointly, severally, and in common, covenant to hold releases from any claim, judgment or expenses that may incur arising out of my activities or presence in the restricted area.
>
> 2. Understand that entry into the restricted area and/or participation in rodeo events contains danger and risks

of injury or death, that conditions of the rodeo arena change from time to time and may become more hazardous, that rodeo animals are dangerous and unpredictable, and that there inherent danger in rodeo which I appreciate and voluntarily assume because I chose to do so. Each of the undersigned has observed events of this type and that I seek to participate in. I further understand that the arena surface, access ways or lack thereof, lighting or lack thereof, and weather conditions all change and pose a danger. I further understand that other contestants and participants pose a danger, but nevertheless, I voluntarily elect to accept all risks connected with the entry into restricted areas and/or participate in any rodeo events.

3. I agree that this agreement shall apply to any incident, injury, and accident death occurring on the above date and fore [sic] a period of one (1) year thereafter. All subsequent agreement and release documents signed by any of the undersigned shall amplify, shall in no way limit the provisions of the document.

4. I the undersigned agree to indemnify the Releases and each of them from loss, liability damage or costs they may incur due to the presence or participation in the described activities whether caused by the negligence of the Releases or otherwise.
WE HAVE READ THIS DOCUMENT, WE UNDERSTAND IT IS A RELEASE OF ALL CLAIMS, WE APPRECIATE AND ASSUME ALL RISKS INHERENT IN RODEO.

Charles's signature appears below this language along with the signatures of the other participants of the Ring of Fear on September 25, 2004.

While agreements to exempt future liability for either ordinary or gross negligence are not invalid *per se*, they are generally disfavored and are strictly construed against the parties relying upon them. *Hargis*, 168 S.W.3d at 47.

> [A] preinjury 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.

Id., *citing* 57A AM. JUR. 2d, *Negligence* § 53 (citations omitted). The trial court held that the release met the above requirements in *Hargis* and, absent genuine issues of fact as to the release, its enforceability warranted summary judgment in favor of Appellees.

We disagree with the trial court that the release form signed by Charles satisfies all of the factors in *Hargis*. The release uses the word "negligence." The release does specifically and explicitly release the Appellees from liability for "any and all claims and liability arising out of strict liability or ordinary negligence of Releases [Appellees] . . . which causes the undersigned [Charles] injury . . . [or] death . . . ."

The language of the release is specific as to its purpose to exonerate the sponsors from ordinary negligence liability. The release specifically warns that rodeo events contain danger and risks of injury or death; that the conditions of the rodeo arena change and may become more hazardous; that rodeo animals are dangerous and unpredictable; and finally that anyone choosing to participate voluntarily assumes the inherent danger that exists in rodeo events. However, there is no language that releases Appellees from conduct that would constitute gross negligence. Susan contends that Appellees provoked Kenny by prodding him and beating on his cage prior to his release into the ring. The intentional provocation of the bull by Appellees to attack the participants is clearly not contemplated by the release. While the Appellees dispute the allegations of intentionally mistreating Kenny, if true, it would at the very least constitute gross negligence. The release contemplates getting into the ring with a bull and even mentions that rodeo animals are unpredictable. However, the release does not

contemplate a bull that has been infuriated by the Appellees prior to its release into the ring. Such conduct could be construed as willful or wanton for which a party may not contract away any liability through a release. *Hargis, supra*. This material issue of fact as disputed by the parties can only be resolved by a trier of fact and is not appropriately resolved by summary judgment. If the jury determines that Appellees' conduct was grossly negligent, the release would be unenforceable as to this conduct. Of course, under comparative negligence, the jury could also consider Charles's own conduct in contributing to his death.

Susan also argues that the trial court was presented with a genuine issue of material fact as to whether the Appellees offered her husband protective chest gear. M. Fannin testified that the participants in the Ring of Fear on the date in question were given an opportunity to put on a protective vest before entering the rodeo ring. Conversely, Rob Wells ("Wells"), who participated on the same day as Charles, submitted an affidavit indicating that he was never offered a protective vest nor did he observe that there were protective vests available. Susan further submits that Appellees should have inquired as to the abilities of the participants to participate in the Ring of Fear. Finally, Susan contends that Charles did not have an opportunity to read the release prior to signing it. In support of this contention, Susan relies on the affidavit of Wells wherein he indicates that *he* did not read the release. These are all factual issues to be resolved by a trier of fact.

Accordingly, we reverse and remand this case to the Grant Circuit Court for a jury trial.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Jerry M. Miniard
Florence, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE, GRANT COUNTY FAIR, INC.:

Thomas R. Nienaber
Covington, Kentucky

NO BRIEFS FILED FOR APPELLEES, 3 BAR F RODEO, MARCUS FANNIN, AND BOBBY RAY FANNIN