RENDERED: SEPTEMBER 27, 2024; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1033-MR

LAURA HELMBRECHT, IN HER INDIVIDUAL CAPACITY AND AS ADMINISTRATRIX OF THE ESTATE OF CESAR E. MARQUEZ CHAVEZ — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 23-CI-00480

BAILEY JAYNES BAKERY AND CAFE, LLC AND THE CITY OF WALTON — APPELLEES

OPINION AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, EASTON, AND GOODWINE, JUDGES.

ACREE, JUDGE: The Appellant, Laura Helmbrecht, in her individual capacity and as administratrix of the estate of Cesar E. Marquez Chavez, appeals the Boone

Circuit Court's order granting summary judgment on all claims asserted against the Appellees.[1] We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

In September of 2021, Appellant City of Walton held its annual "Old Fashion Day" festival. Helmbrecht and her husband, decedent Chavez, were in attendance, and Chavez entered the donut eating contest. Chavez was required to sign a waiver to participate. The waiver read in full:

> In consideration of being allowed to participate in the City of Walton, Donut Eating Contest and related events and activities, the undersigned, for myself, my personal representatives, assigns, heirs and next of kin agrees to the following:
>
> 1. I acknowledge and agree that I am 18 years of age or older.
>
> 2. I acknowledge and fully understand I will be engaging in activities that involve risk of damage to personal property or serious injury, including choking, vomiting, or feeling nauseous or dizzy, and social and economic losses which might result not only from my own actions, inactions or negligence, but also the actions, inactions, or negligence of others, the rules of play, the condition of the premises or of any equipment used or food consumed. Further, there may be other risks not known or not reasonably foreseeable at this time.

[1] Helmbrecht's Notice of Appeal indicates she is also appealing the circuit court's denial of her motion to alter, amend, or vacate. However, "there is no appeal from the denial of a [Kentucky Rule of Civil Procedure] CR 59.05 motion. The denial does not alter the judgment. Accordingly, the appeal is from the underlying judgment, not the denial of the CR 59.05 motion." *Ford v. Ford*, 578 S.W.3d 356, 366 (Ky. App. 2019).

3. I assume all of the foregoing risks and accept personal responsibility for all expenses, medical or otherwise, following such damages, injury, disability or death.

4. I RELEASE, WAIVE, DISCHARGE and COVENANT NOT TO SUE the City of Walton, Bailey Jaynes Cafe & Bakery, Local Organizers of the Walton Old Fashion Day, any other sponsors of the Walton Old Fashion Day and their respective administrators, directors, officers, agents, employees, contractors, other participants, sponsoring agencies, sponsors, advertisers, and if applicable, owners and lessors of the premise used to conduct the Donut Eating Contest (collectively, the Releasees), from any liability to me, my heirs and next of kin for any and all claims, demands, losses, expenses or damages on account of damage to personal property or injury or death caused or alleged to be caused in whole or in part by the negligence of the Releasees or otherwise. I further agree that if, despite this release and waiver of liability, assumption or risk, and indemnity agreement, I, or anyone on my behalf, makes acclaim [sic] against one of the Releasees as a result of my involvement in the Donut Eating Contest, I WILL INDEMNIFY, SAVE, and HOLD HARMLESS each of the Releasees from any expenses, attorney fees, loss, liability, damage or cost which any of the Releasees may incur as a result of such claim or demand.

5. This waiver may not be modified in any way. If any part of this waiver is determined to be invalid by law, all other parts of this waiver shall remain valid and enforceable.

I HAVE READ THE ABOVE WAIVER AND RELEASE, FULLY UNDERSTAND ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT AND HAVE SIGNED IT FREELY AND WITHOUT INDUCEMENT OR ASSURANCE OF ANY NATURE AND INTEND IT TO BE A COMPLETE AND UNCONDITIONAL

> RELEASE OF ALL LIABILITY TO THE GREATEST ETENT [sic] PERMITTED BY LAW AND AGREE THAT IF ANY PORTION OF THIS WAIVER AND RELEASE IS HELD INVALID, THE BALANCE, NOTWITHSTANDING, SHALL CONTINUE IN FULL FORCE AND EFFECT.

Record (R.) at 63.

Helmbrecht alleges that during the contest, Chavez began choking, lost consciousness, and went into cardiac arrest. She further alleges that because the "Appellees failed to organize and provide any emergency medical services at the contest, he received untimely medical treatment for his airway obstruction." Appellant's Br. at 3. Helmbrecht alleges that when paramedics finally arrived, Chavez was unresponsive, and he was transported to St. Elizabeth Edgewood Hospital, where he died from "asphyxia due to food bolus." *Ibid.* The Appellees affirm these basic facts, but contest there is any support in the record as to Chavez's cause of death.

Helmbrecht filed a complaint in April of 2023, asserting claims of: negligence; negligent hiring, training, retention, and supervision; wanton and willful negligence (as well as gross negligence);[2] wrongful death; loss of consortium; negligent infliction of emotional distress; concert of action; and outrage. Appellee City of Walton filed a motion to dismiss, asserting the waiver

[2] Although Helmbrecht's complaint did not specifically set forth a count of gross negligence, gross negligence is alleged within her count of willful or wanton negligence. R. at 11.

acted "as a complete bar to all claims." R. at 51. Appellee Bailey Jaynes joined in the motion.

The circuit court treated the motion as a motion for summary judgment, and ultimately granted the Appellees summary judgment on all claims, concluding they were barred by the waiver. In denying Helmbrecht's motion to alter, amend, or vacate, the circuit court concluded Helmbrecht's claim of willful or wanton negligence was not waived, but rather failed as a matter of law.[3] This appeal followed.

STANDARD OF REVIEW

As "summary judgments involve no fact finding," we review the circuit court's grant of summary judgment *de novo*. *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 61 (Ky. 2010). Further, while "summary judgment is designed to expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised . . . the rule is to be cautiously applied." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). In determining whether a grant of summary judgment is proper, "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."

[3] The circuit court subsequently amended its order denying Helmbrecht's motion to alter, amend, or vacate. The amended order corrected the caption.

Id. (citations omitted). Even where "a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* (citations omitted).

ANALYSIS

The circuit court granted summary judgment to the Appellees on all Helmbrecht's claims. On appeal, Helmbrecht alleges error with respect to only three of these claims: negligence, gross negligence, and willful or wanton negligence.[4] More particularly, Helmbrecht alleges the negligent, grossly negligent, and wanton and willfully negligent "provision of emergency medical services." Appellant's Br. at 11.

I. Negligence.

Helmbrecht argues the waiver is unenforceable as to her claim of negligence. With respect to exculpatory contracts, such as the waiver at issue, our Supreme Court has explained:

> An exculpatory contract for exemption from future liability for negligence, whether ordinary or gross, is not invalid per se. However, such contracts are disfavored and are strictly construed against the parties relying upon them. The wording of the release must 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. Specifically, a preinjury release will be upheld only if (1) it explicitly

[4] In Helmbrecht's reply brief, she includes her claim of "outrage" among claims that "do not fail as a matter of law," Appellant's Reply Br. at 7, but she furnishes no substantive argument.

> 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.

Hargis v. Baize, 168 S.W.3d 36, 47 (Ky. 2005) (internal quotation marks and citations omitted). While conceding the waiver "did contemplate negligence," Helmbrecht insists the waiver "failed to adhere to the *Hargis* [C]ourt's clear disclosure requirement," arguing "the clear disclosure language is to have some effect independent of the four-prong test." Appellant's Br. at 9.

We disagree. Not only does *Hargis* explicitly state that an exculpatory contract "will be upheld" if it satisfies the four-pronged test, our case law has repeatedly affirmed exculpatory contracts must satisfy merely one of those prongs: "As evidenced by the *Hargis* Court's use of the word 'or' between the four alternatives, if a waiver satisfies just one of the foregoing criteria, it is legally valid." *Thomas v. Allen*, 650 S.W.3d 303, 308 (Ky. App. 2022). *See also Rieff v. Jesse James Riding Stables, Inc.*, 656 S.W.3d 225, 230 (Ky. App. 2022) (an exculpatory contract "need not meet all four alternatives – only one"). Although Helmbrecht contends there is an additional "clear disclosure requirement," separate and apart from satisfaction of one of the four prongs, the Supreme Court made

clear, in its view, clarity is the *result* of satisfying one of the four prongs. The Supreme Court set forth its four-pronged test, and stated: "*Thus*, an exculpatory clause must clearly set out the negligence for which liability is to be avoided." *Hargis*, 168 S.W.3d at 47 (emphasis added).

With respect to whether the waiver bars Helmbrecht's claim of negligence, the waiver is enforceable if it satisfies just one of the prongs set forth in *Hargis*. The waiver explicitly apprised contestants of the risk of "serious injury" due to the "action, inaction, or negligence of others," and waived liability with respect to claims flowing "in whole or in part by the negligence of the Releasees." R. at 63. The waiver satisfies the first prong of the *Hargis* test as it "explicitly expresses an intention to exonerate by using the word 'negligence.'" On this basis alone, we conclude the waiver is enforceable as to negligence and need not examine the waiver's satisfaction of the remaining prongs.

II. Gross Negligence.

Helmbrecht next contends the waiver is not enforceable as to gross negligence, arguing that while the waiver employs the term "negligence," it never employs the term "gross negligence." However, "negligence" encompasses those subcategories of negligence for which liability may be waived. Just as civil law encompasses contracts and torts, and torts encompasses intentional and

unintentional torts, and unintentional torts encompasses negligence, negligence encompasses both ordinary and gross negligence.

This is precisely how our Supreme Court has discussed negligence in the context of exculpatory contracts, *i.e.*, "An exculpatory contract for exemption from future liability for negligence, *whether ordinary or gross* . . . ." *Hargis*, 168 S.W.3d at 47 (emphasis added). This construction of "negligence," as encompassing both ordinary and gross negligence, is well-established in our case law. *See, e.g., Louisville & N.R. Co. v. George*, 129 S.W.2d 986, 988 (Ky. 1939) ("negligence has been defined in this jurisdiction as being either gross or ordinary").

Helmbrecht points to our unpublished opinion in *Davis v. 3 Bar F Rodeo*, No. 2006-CA-002212-MR, 2007 WL 3226295 (Ky. App. Nov. 2, 2007), in support of her position. In *Davis*, this Court concluded a release from liability was not enforceable as to gross negligence. However, the release at issue in *Davis* employed the narrower term "ordinary negligence," and this Court reasoned: "The language of the release is specific as to its purpose to exonerate the sponsors from ordinary negligence liability." *Id.* at *4. The waiver at issue in the case before us does not employ the narrower term "ordinary negligence" at any point.

Helmbrecht also directs us to the dissenting opinion in *Bowling v. Mammoth Cave Adventures, LLC*, No. 2019-CA-000822-MR, 2020 WL 1970595

(Ky. App. Apr. 24, 2020), another unpublished case. In that matter, as here, the waiver merely used the term "negligence," and the dissent asserted this was insufficient to waive liability for "conduct that would constitute gross negligence under Kentucky law." *Id.* at *3 (Taylor, J., dissenting). However, the majority opinion did not discuss that question, and we find the dissenting opinion unavailing in light of how "negligence" is construed in *Hargis* and elsewhere in our case law, as discussed above.

As we conclude the waiver's employment of "negligence" encompassed both ordinary and gross negligence, for the same reasons discussed above in addressing Helmbrecht's claim of negligence, the waiver is enforceable as a bar to her claim of gross negligence.

III. Willful or Wanton Negligence.

Finally, Helmbrecht argues the waiver is unenforceable as to her claim of willful or wanton negligence. Exculpatory clauses are enforceable as to liability for "negligence and even gross negligence *short of willfulness and wantonness*." *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 654 (Ky. 2007) (emphasis added) (internal quotation marks omitted). The circuit court initially ruled Chavez "waived any claims he or his estate may have for ordinary or gross negligence, including any alleged willful or wanton conduct." R. at 110. This was clearly erroneous in light of our case law.

Subsequently, in denying Helmbrecht's motion to alter, amend, or vacate, the circuit court discussed gross negligence and reasoned that even if the waiver did not encompass gross negligence, it would fail as a matter of law, concluding the waiver:

> specifically warned Chavez of the exact peril he faced and the risk that he could face that danger amid the inaction of others. The issuance of this warning and Chavez's reception thereof means that, as a matter of law, [Helmbrecht] is unable to demonstrate "a wanton or reckless disregard for the lives, safety, or property of others."

R. at 137. The circuit court then addressed Helmbrecht's claim of willful or wanton negligence, stating, "It is on this same basis [Helmbrecht]'s claims for willful and wanton negligence must also fail as a matter of law . . . . [T]here is no fact that is plead [sic] or that could be proved to demonstrate the requisite level of disregard." R. at 137. The circuit court's alternative basis fares no better.

Without question, willful or wanton negligence is difficult to establish, as it "signifies the entire absence of care for the life, person or property of others with an element of conscious disregard of the rights or safety of others, which deserves extra punishment in tort." *Cumberland Valley*, 238 S.W.3d at 655 n.33 (cleaned up). The circuit court construed the waiver itself as evidence of sufficient care to defeat the claim, as the waiver "warned" contestants of the risks. However, not only did the circuit court fail to construe the waiver in a light most

favorable to Helmbrecht as the party opposing summary judgment, we also disagree the waiver can be construed as evidence of care.

A liability waiver, of course, is inherently protective of the party who obtains it – the releasee. By its nature, such a waiver benefits *only* the releasee. The releasor gains nothing from the waiver itself; his benefit is the privilege of participating in the risked activity. Consequently, the waiver itself cannot logically serve as evidence of care toward the releasor; it is quite the opposite. Finding otherwise, as the circuit court did here, is effectively abolishing the Supreme Court's holding that exculpatory contracts are unenforceable as to claims of willful or wanton negligence. *Id.* at 654. Finding otherwise is equivalent to saying, "You cannot sue the releasee because he warned you that he might harm you willfully or wantonly – that is, intentionally or with utter indifference to your safety or life." *Poindexter v. Commonwealth*, 389 S.W.3d 112, 117 (Ky. 2012) ("[Willfulness] 'means with intent or intention.'") (internal quotation marks and citations omitted); *Holbrook v. Ky. Unemployment Ins. Comm'n*, 290 S.W.3d 81, 87 (Ky. App. 2009) (defining wanton conduct as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences").

Because Chavez did not waive his estate's claim of willful or wanton negligence, that tort claim remains viable. The summary judgment we are

reviewing only tested the waiver and not whether there is an absence of evidence supporting the elements of that tort claim.

CONCLUSION

For the foregoing reasons, the Boone Circuit Court's June 9, 2022 order granting summary judgment is reversed as to Helmbrecht's claim of willful or wanton negligence, and is otherwise affirmed. This matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Anthony Gonzalez
Lexington, Kentucky

BRIEF FOR APPELLEE BAILEY JAYNES BAKERY AND CAFE, LLC:

Charles A. Walker
Louisville, Kentucky

BRIEF FOR APPELLEE CITY OF WALTON:

John M. Dunn
Lauren M. Spuzzillo
Ft. Mitchell, Kentucky