2014 IL App (1st) 130522-U

SECOND DIVISION
August 26, 2014

No. 1-13-0522

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BARBARA NESBITT, Plaintiff-Appellant, v. NATIONAL MUSCLE CAR ASSOCIATION; PROMEDIA, LLC; SKINNY KID RACE CARS, LLC; NATIONAL HOT ROD ASSOCIATION; and TED PETERS, individually and as agent/servant/employee of NATIONAL HOT ROD ASSOCIATION, Defendants-Appellees.	)	Appeal from the Circuit of Cook County No. 12 L 8496 Honorable William Gomolinksi Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err by dismissing plaintiff's claims against the NMCA, Promedia, the NHRA, and Ted Peters on the basis of a release and waiver of liability signed by plaintiff because: 1) those defendants fell within the definition of "releasees" set forth in the agreement; 2) the language of the release was sufficiently clear to define the "event" as the drag racing event during which plaintiff was injured; 3) the danger that caused plaintiff's injury was within the range of dangers of which plaintiff assumed the risk when she signed the release; and 4) plaintiff forfeited her claim that the NHRA and Peters did not provide consideration in exchange for her promise to release them from liability because she did not raise that claim before the circuit court. The court erred by

dismissing plaintiff's claims against Skinny Kid because the language of the release was ambiguous as to whether Skinny Kid was a "releasee" and there is no evidence that plaintiff had any knowledge of the warranty in the invoices prepared by Skinny Kid.

¶ 2 Plaintiff, Barbara Nesbitt, appeals from an order of the circuit court of Cook County dismissing with prejudice her claims against defendants, the National Muscle Car Association (NMCA), Promedia, LLC (Promedia), the National Hot Rod Association (NHRA), Ted Peters, and Skinny Kid Race Cars, LLC (Skinny Kid). On appeal, plaintiff contends that the court erred by dismissing her claims on the basis of a release and waiver of liability she had signed because the language in the release did not specifically name defendants as parties to the agreement and the term "event" was never defined therein, a genuine issue of material fact existed as to whether the danger that caused plaintiff's injuries was one which ordinarily accompanied the activity of drag racing, and the NHRA, Peters, and Skinny Kid did not provide consideration in exchange for their release from liability. Plaintiff also contends that the court's decision was not supported by the additional documents defendants attached to their motions to dismiss. For the reasons that follow, we affirm the dismissal of plaintiff's claims against the NMCA, Promedia, the NHRA, and Peters, reverse the dismissal of her claims against Skinny Kid, and remand the matter to the circuit court for further proceedings.

¶ 3 BACKGROUND

¶ 4 On July 30, 2012, plaintiff filed a complaint alleging negligence claims against the NMCA, Promedia, the NHRA, and Peters and product liability claims, based on theories of strict liability and negligence, against Skinny Kid. Plaintiff asserted that on August 8, 2010, she was driving a racecar designed and manufactured by Skinny Kid at a drag racing competition that was sponsored and organized by the NMCA and Promedia when the drive train and other parts of her vehicle failed, causing her severe and permanent injuries. Plaintiff alleged that Skinny

Kid negligently failed to design or install a metal shield to guard the drive train and that the racecar was defective and unreasonably dangerous. Plaintiff also alleged that the NHRA, which organized and managed various drag racing events, required that all vehicles undergo a chassis inspection and certification before being driven at a drag racing event and that on July 6, 2010, Peters, an employee of the NHRA, negligently inspected her vehicle and certified it as race-worthy even though the racecar lacked a metal shield to guard the drive train. Plaintiff further alleged that officials employed by the NMCA and Promedia negligently inspected her racecar on the day of the race and certified that it was in race-ready condition even though it lacked a metal shield to guard the drive train.

¶ 5 On October 5, 2012, the NMCA, Promedia, the NHRA, and Peters filed a joint motion to dismiss plaintiff's claims under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)), asserting that plaintiff's claims were barred by a release and waiver of liability she had signed, exculpatory agreements in the NMCA tech card and NHRA chassis certification forms she had signed, and the rules and regulations of the NMCA and the NHRA. The NMCA, Promedia, the NHRA, and Peters attached a copy of the release and waiver of liability to their motion to dismiss. The release reflected that it covered an event occurring from August 5 to August 8, 2010, at the Zmax track in Charlotte, North Carolina, and provided that, by signing the document, plaintiff:

> "2. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any affiliated entities thereof, track operators, track owners, officials, car owners, drivers, pit crews, rescue personnel, any persons in any RESTRICTED AREA, promoters, sponsors, equipment and parts manufacturers

> and suppliers, advertisers, owners and lessees of premises used to conduct the EVENT(S), premises and event inspectors, surveyors, underwriters/brokers, consultants and others who give recommendations, directions, or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(S) and for each of them, their directors, officers, agents, and employees, all for the purposes herein referred to as "Releasees" FROM ALL LIABILITY TO THE UNDERSIGNED, his/her personal representatives, assigns, heirs, and next of kin, FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFORE ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S), WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
>
> 3. HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the RELEASEES and each of them FROM ANY LOSS, LIABILITY, DAMAGE, OR COST they may incur arising out of or related in any manner to my attendance at or participation in the EVENT(S) and WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
>
> 4. HEREBY ASSUMES FULL REPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE arising out of or related to the EVENT(S) whether caused by the NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
>
> 5. HEREBY acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or property damage."

By signing the release, plaintiff also represented that she read the document, fully understood its terms, and intended to grant a complete and unconditional release of all liability to the greatest extent allowed by law.

¶ 6 On October 11, 2012, Skinny Kid filed a motion concurring with and joining in the motion to dismiss filed by the other defendants and asserted therein that the claims alleged against it should be dismissed for the same reasons set forth in the previous motion and because

the invoices for the modifications it made to plaintiff's vehicle all contained a warranty releasing it from liability for failures of racing components or accessories that it had manufactured or sold. Skinny Kid attached copies of three invoices sent to Billy Adams, the person who hired Skinny Kid to manufacture plaintiff's racecar. Each invoice provided:

> "There is no warranty stated or implied due to the unusual stresses placed on race cars, modified street cars or components, and because we have no control over how they are maintained, installed, and used. Neither seller [n]or manufacturer will be liable for loss, damage or injury – direct or indirect – arising from the use of any product. Skinny Kid Race Cars make no guarantees to the legality for any specific class. Due to the hazards involved with racing, Skinny Kid Race Cars accepts no liability for failure of racing components or accessories manufactured or sold by Skinny Kid Race Cars and the Customer accepts all risks involved with racing and hazards thereof."

Skinny Kid also attached a signed affidavit from Keith Engling, a member of Skinny Kid, in which he averred that Adams accepted delivery of plaintiff's racecar pursuant to the attached invoice.

¶ 7 On December 3, 2012, plaintiff filed responses to both motions to dismiss, asserting that none of the defendants were relieved from liability by the release and waiver of liability because the release did not name any of the defendants as parties to the agreement or reference the danger that caused her injury and the incident that caused her injury was not a reasonably foreseeable consequence of drag racing. Plaintiff also asserted that the rules and regulations of the NMCA and NHRA did not have the force of law, the NMCA tech card did not include any reference to the event at which she was injured, she did not sign the NHRA chassis certification form, and there was no evidence showing that she knew the racecar lacked a metal shield to guard the drive train.

¶ 8 Plaintiff attached her own signed affidavit to her response to the motions to dismiss, in which she averred that the drive train and other components of her racecar failed while she was racing and flew upward into the driver's compartment because the vehicle lacked a drive train cover or guard. Plaintiff also averred that she did not know that her vehicle lacked a drive train cover or was unsafe to race, she had never before heard of an incident in which a racecar's components flew upward into the driver's compartment, and she did not associate that sort of danger with the sport of drag racing.

¶ 9 Plaintiff also attached a signed affidavit from Billy Adams, who averred that he hired Skinny Kid to manufacture plaintiff's racecar, the vehicle had an open drive train that ran next to the driver and was exposed to the driver because it was in a position that was inside the driver's compartment and above the frame rail, and the drive train was not covered by a steel plate or tunnel. Adams also averred that the purpose of a steel plate or cover was to protect the driver in the event of a failure of the drive train and that he did not know that the racecar lacked a drive train cover until he received the vehicle after having been told that it had been completed and was ready for pickup.

¶ 10 On January 16, 2013, the court conducted a hearing on defendants' motions and entered an order dismissing plaintiff's claims with prejudice. Plaintiff now appeals from that order.

¶ 11 ANALYSIS

¶ 12 A motion to dismiss brought under section 2-619(a)(9) of the Code of Civil Procedure admits the legal sufficiency of the plaintiff's complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West

2012); *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20. When ruling on a motion brought under section 2-619, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. On appeal, this court must decide whether the existence of a genuine issue of material fact precludes dismissal of the plaintiff's claims or whether dismissal is proper as a matter of law. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. A court's decision to dismiss a plaintiff's claim under section 2-619 is reviewed *de novo*. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011).

¶ 13 Under certain circumstances, a plaintiff may be barred from bringing a claim against a defendant by an exculpatory clause in a contract entered into by the plaintiff and the defendant. *Harris v. Walker*, 119 Ill. 2d 542, 548 (1988). However, liability release clauses are disfavored and are strictly construed against the benefitting party. *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 14. An exculpatory clause may be broadly worded, but it must contain clear language referencing the types of activities, circumstances, or situations that are encompassed by the release. *Hussein v. L.A. Fitness International, LLC*, 2013 IL App (1st) 121426, ¶ 13. While an exculpatory agreement need not contemplate the precise occurrence which resulted in the plaintiff's injury, the danger which caused the injury must be one which ordinarily accompanies the activity covered by the release. *Johnson v. Salvation Army*, 2011 IL App (1st) 103323, ¶ 36. Thus, the exculpatory clause must give the plaintiff notice of the range of dangers of which she assumes the risk, and the scope of a release is often defined by the foreseeability of a particular danger. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 120 (2010).

¶ 14 Plaintiff first contends that the release and waiver of liability does not exculpate any of

the defendants from liability for her injuries because none of the defendants were specifically named as parties to the agreement in the release. The beneficiaries of an exculpatory clause do not need to be specifically named in the agreement and the release need only designate a class of beneficiaries covered by the agreement. *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 412 (2007).

¶ 15 In this case, multiple parties are defined as "releasees," including promoters, racing associations, sanctioning organizations or any affiliated entities thereof, sponsors, premises and event inspectors, and all officers, agents, and employees of those parties. Plaintiff alleged in her complaint that the NMCA and Promedia sponsored the event at which she was injured, that the NHRA sponsored various drag racing events and was "the largest motor sports sanctioning body in the world," and that Peters was an employee of the NHRA. Thus, the NMCA, Promedia, the NHRA, and Peters all fall within the plain definition of "releasees" set forth in the release.

¶ 16 Skinny Kid maintains that it also falls within the definition of "releasees" set forth in the agreement because that term is defined as including "equipment and parts manufacturers and suppliers" and plaintiff alleged that Skinny Kid "manufactured, constructed, and developed" her racecar. However, for the reasons that follow, we determine that it is not clear from the text of the release whether Skinny Kid qualifies as a "releasee" and that a genuine issue of material fact exists as to whether Skinny Kid is exculpated from liability by the release.

¶ 17 Although a court will interpret the unambiguous terms of a contract as a matter of law without the use of parol evidence, outside evidence may be used to ascertain the parties' intent regarding the meaning of an ambiguous contractual term. *Air Safety, Inc. v. Teachers Realty*

Corp., 185 Ill. 2d 457, 462-63 (1999). Contractual language is ambiguous when the terms used therein are susceptible to more than one meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011).

¶ 18 It is unclear whether the term "equipment and parts manufacturers and suppliers" applies to Skinny Kid because Skinny Kid is alleged to have manufactured and supplied plaintiff's entire racecar, rather than merely a component part of the vehicle. As the word "equipment" is defined as "the set of articles or physical resources serving to equip a person or thing" (Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/equipment (last visited August 5, 2014)), it is unclear whether the term "equipment and parts manufacturers and suppliers" only applies to the manufacturers and suppliers of the racecar's component parts or also applies to the manufacturer and supplier of the entire vehicle as well. If the parties had intended to include the manufacturers of the racecars within the class of "releasees," they could have specifically named that class of entities in the release. However, no such term is included in the release and the term "equipment and parts manufacturers and suppliers" is susceptible to more than one meaning. As such, plaintiff's claims against Skinny Kid should not have been dismissed on the basis of the release and waiver of liability because an issue of material fact exists as to the intended meaning of the term "equipment and parts manufacturers and suppliers."

¶ 19 Plaintiff contends that the release and waiver of liability does not exculpate the NMCA, Promedia, the NHRA, and Peters from liability because the term "event" is never defined in the agreement. The word "event" has been defined as "any one of the contests in a sports program" (Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/event (last

visited August 5, 2014)). In *Platt v. Gateway International Motorsports Corp.*, 351 Ill. App. 3d 326, 330-31 (2004), this court held that the plaintiff's claim arose out of or was related to an "event" because the plaintiff was injured while preparing a racetrack for the qualifying rounds of an auto racing event.

¶ 20 In this case, there is a space at the top of the release for "NAME OF TRACK AND/OR EVENTS" that is filled in with "Zmax Charlotte, NC" and a space for "EVENT DATE(S)" that is filled in with "8-5 to 8-8-10." Plaintiff alleged in her complaint that she was injured at a drag racing event sponsored and organized by the NMCA and Promedia that took place on August 8, 2010, in Charlotte, North Carolina, and that she had competed in hundreds of races sponsored and organized by the NMCA and Promedia. Thus, the language in the release was sufficiently specific to notify her that it applied to the drag racing event at which she was injured.

¶ 21 Plaintiff next contends that the court erred by dismissing her claims against the NMCA, Promedia, the NHRA, and Peters because a genuine issue of material fact existed as to whether the danger that caused her injuries was one which ordinarily accompanied the activity of drag racing. In *Schlessman v. Henson*, 83 Ill. 2d 82, 86 (1980), our supreme court held that the plaintiff, an auto racer who was injured during a race when a portion of the racetrack on which he was driving collapsed, was barred from bringing a claim against the defendant for negligence in the design and operation of his track because the plaintiff had signed a waiver and release of liability exculpating the defendant from any claim of liability for injuries suffered while upon the racing surface. In doing so, the court stated that auto racing gives rise to various situations which may result in injury to the driver and that such accidents occur "because of factors

involving mechanical failures, defective design of guardrails, driver error or weather conditions." *Id.* The court also stated that "a myriad of factors, which are either obvious or unknown, may singly or in combination result in unexpected freakish racing accidents" and that experienced drivers are "obviously aware of such occurrences and the risks attendant to the sport of auto racing." *Id.* The court further stated that while "[t]he parties may not have contemplated the precise occurrence which resulted in plaintiff's accident," the exculpatory clause applied to the plaintiff's injury because, "[i]n adopting the broad language employed in the agreement, it seems reasonable to conclude that the parties contemplated the similarly broad range of accidents which occur in auto racing." *Id.*

¶ 22 Following *Schlessman*, Illinois appellate courts have enforced releases and waivers of liability in differing circumstances. In *Platt*, 351 Ill. App. 3d at 327, the plaintiff was injured by a tow truck that was drying the racetrack prior to an auto racing event. The court held that the plaintiff's injury fell within the scope of possible dangers that ordinarily accompany auto racing because "[t]he parties were aware that the common practice to dry a track for auto racing consisted of tow trucks driving at high speeds around the racetrack, and the parties were aware that the plaintiff must cross the racetrack to reach his base of operations." *Id.* at 332. In *Hellweg v. Special Events Management*, 2011 IL App (1st) 103604, ¶ 3, the plaintiff was injured while preparing for a bicycling race when he collided with a nonparticipating bicyclist during a warm-up session organized by the defendants, and the court held that the plaintiff's claims were barred because the plaintiff signed a release that "plainly contemplates the possibility of pedestrians, vehicles, other riders, and/or fixed or moving objects on the course." *Id.* ¶¶ 6-7. In *Oelze*, 401

Ill. App. 3d at 113, the plaintiff was injured during a tennis match when she became entangled with a rope ladder located behind a curtain at the back of a tennis court at the defendant's tennis club. The court held that the plaintiff's injury was within the scope of possible dangers that accompanied playing tennis at the club because the plaintiff was an experienced tennis player who knew that a player could come in contact with the curtain during a match and could be injured if an object was placed too close to the curtain. *Id.* at 121-22. In *Falkner v. Hinckley Parachute Center, Inc.*, 178 Ill. App. 3d 597, 599 (1989), the decedent fell to his death in a parachute jump during a parachuting class operated by the defendants. The court held that a risk of fatal injury ordinarily attaches to the sport of parachute jumping, the decedent would have been aware of such a risk as a former officer and pilot in the Army Air Corps, and the risk of unsafe equipment, negligent instruction, and death can be contemplated by a participant in the defendant's classes. *Id.* at 602-03.

¶ 23 In contrast, in *Simpson v. Byron Dragway, Inc.*, 210 Ill. App. 3d 639, 649 (1991), the decedent was killed while participating in a drag racing event when his vehicle collided with a stray deer, and the court held that the striking of a deer while operating a racecar on a drag strip was not the type of risk which ordinarily accompanied drag racing. Also, in *Larsen v. Vic Tanny International*, 130 Ill. App. 3d 574, 575 (1984), the plaintiff was injured by the inhalation of harmful vapors while he utilized the defendant's health club facilities and alleged that the vapors were caused by the negligent mixing of cleaning compounds by the defendant's employees. The court held that the risk of suffering a respiratory injury due to the mixing of combustible cleaning compounds was not ordinarily associated with the use of a health club's facilities. *Id.* at 577-78.

¶ 24 In this case, plaintiff was injured when the drive train of her racecar flew upward into the driving compartment while she was competing in a drag racing event, and plaintiff alleged that her injuries were caused by defendants' failure to ensure that her vehicle was equipped with a metal shield to guard the drive train. As our supreme court noted in *Schlessman*, 83 Ill. 2d at 86, auto racing gives rise to the risk of various injuries due to numerous factors, including mechanical failures, and experienced drivers, such as plaintiff, are aware of such risks. Although plaintiff maintains that her injuries were not caused by a mechanical failure because they were caused by the lack of a drive train cover, and not the failure of the drive train itself, defendants' failure to ensure that plaintiff's racecar was equipped with a drive train cover could not have resulted in an injury to plaintiff absent the underlying mechanical failure of the drive train itself. Thus, the danger that caused plaintiff's injury, the danger of injury as a result of the mechanical failure of a component of her racecar, was within the range of dangers of which plaintiff assumed the risk when she signed the release and waiver of liability. While plaintiff averred that she had never heard of an incident in which a racecar's components flew up into the driver's compartment and did not associate that sort of danger with the sport of drag racing, the determination of whether an injury is within the scope of an exculpatory agreement turns on whether the plaintiff was given notice of the range of dangers of which she assumed the risk, and not on whether the plaintiff contemplated the precise occurrence that caused her injuries.

¶ 25 As in *Platt*, *Hellweg*, *Oelze*, and *Falkner*, plaintiff was engaged in the normal conduct associated with the activity covered by the release, the drag racing itself, when she was injured and, as in *Platt*, *Oelze*, and *Falkner*, plaintiff was experienced at her activity and was aware of

the dangers ordinarily associated with it. Also, as in *Hellweg* and *Oelze*, plaintiff was aware that she was at risk of the general type of danger which caused her injuries even though she was not aware of the specific risk that caused her injuries. Further, as in *Falkner*, plaintiff was aware of the risk of performing the relevant activity with unsafe equipment and allegedly performed the activity with unsafe equipment as a result of defendants' negligence. Unlike in *Simpson* and *Larsen*, where the plaintiffs' injuries arose from outside factors that were not related to the relevant activities, in this case plaintiff's injuries arose from a mechanical failure in the vehicle she was racing at that time. As such, we conclude that no genuine issue of material fact exists as to whether the danger that caused plaintiff's injuries was one which ordinarily accompanies the activity of drag racing.

¶ 26 Plaintiff contends that the release does not apply to the NHRA or Peters because they did not provide consideration in exchange for her promise to exculpate them from liability. Plaintiff, however, did not challenge the consideration supporting the release before the circuit court and, because issues not raised before the circuit court cannot be argued for the first time on appeal (*Robidoux v. Oliphant*, 201 Ill. 2d 324, 344 (2002)), plaintiff has forfeited her claim regarding a lack of consideration. While plaintiff maintains that her appellate claim regarding consideration is substantively the same as the argument she made before the circuit court, an examination of the portions of the record cited by plaintiff discloses otherwise. Although plaintiff argued that the term "event" was not defined in the agreement and that the release was only signed by a representative of the NMCA and Promedia, she never claimed that the NHRA or Peters failed to provide consideration in exchange for her release and waiver of liability.

¶ 27 Skinny Kid asserts that, regardless of the release and waiver of liability, plaintiff's claims against it were barred by the warranty releasing it from liability contained in the invoices it sent to Billy Adams. Plaintiff maintains, and we agree, that the warranties in the invoices do not bar plaintiff's claims against Skinny Kid because the invoices were sent to Adams, not plaintiff, and there is no evidence that plaintiff had any knowledge of the warranty in the invoice. As such, we cannot say as a matter of law that the warranties in the invoices barred plaintiff from bringing her claims against Skinny Kid.

¶ 28 CONCLUSION

¶ 29 Accordingly, we affirm the portion of the circuit court's order dismissing plaintiff's claims against the NMCA, Promedia, the NHRA, and Peters, reverse the portion of the order dismissing plaintiff's claims against Skinny Kid, and remand the matter for further proceedings.

¶ 30 Affirmed in part; reversed and remanded in part.