STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

WESSON E. SCHULZ,

Plaintiff/Appellee,

v

File No. 05-24619-AV
HON. PHILIP E. RODGERS, JR.

GRADY C. JORDAN,

Defendant/Appellant.
_____/

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DECISION AND ORDER GRANTING
APPLICATION FOR LEAVE TO APPEAL
AND
AFFIRMING THE DECISION OF THE DISTRICT COURT

This is an application for leave to appeal an interlocutory order of the 86th District Court denying the Defendant's motion for summary disposition. On May 31, 2005, this Court issued a pre-hearing order giving any opposing party 7 days from the date of the order to file and serve a response and giving the Applicant 14 days from the date of the order to file and serve a reply. These time limits have now expired.

The Defendant claims that "a ruling from this Court on the issue of whether Plaintiff's case is barred by the Waiver of Liability signed by Plaintiff would dispose of this case and make a counter-claim by Defendant's insurer against Plaintiff moot." In the interest of achieving judicial economy, if possible, this Court dispenses with oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order, granting the Defendant's application for

leave to appeal. In addition, based upon the transcript and the written submissions, this Court affirms the ruling of the District Court.

FACTUAL BACKGROUND

Plaintiff Wesson Schulz and Defendant Grady Jordan are both members of the Grand Traverse Yacht Club ("GTYC"). On June 9, 2004, they were captains of two sail boats that participated in a GTYC sponsored race. In order to participate in the race, they had to complete and sign a Grand Traverse Yacht Club (GTYC) Race Registration Form. The bottom of the Form, immediately above the signature line, reads: "I have read and agree to the Grand Traverse Yacht Club Waiver of Liability. (See reverse)." The following waiver of liability, in pertinent part, was purportedly printed on the reverse side of the Form:

> The Grant Traverse Yacht Club and any other associated sponsors, groups, or corporations, their officers, members, or associates appointed or volunteer, do not accept liability for loss of life or property personal injury or damage caused or arising for any reason whatsoever . . . By participation in these events, I understand that I voluntarily assume and am knowledgeable of the risks of sailing . . . I agree, for myself and for my crew members, and for heirs or assigns, current or which may survive us, to hold harmless and free of any liability the sponsoring clubs, organizations, groups, and corporations, their members, employees, or individuals appointed or volunteering, and any local, state, national, or international association, for any damage or injury, material or personal, suffered by me, or a member of my crew, during racing or otherwise.

During the race, the Plaintiff's and Defendant's boats collided. The cause of the collision is in dispute.

PROCEDURAL HISTORY

The Plaintiff filed this small claims action against the Defendant for the damages to Plaintiff's boat. The Defendant removed the case to District Court and filed a counterclaim.

The Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), based upon the waiver. The Trial Court denied the motion, finding that the waiver did not waive liability against members who participate in the race. The Trial Court also questioned, but did

not decide, whether Plaintiff could be bound by the waiver if, as he claims, it was not actually printed on the back of the registration form that he signed.[1]

The Defendant filed an application for leave to appeal this interlocutory ruling which this Court granted.

ISSUE

The issue presented is whether the Waiver of Liability that is pre-printed on the Race Registration Form precludes the Plaintiff from recovering against the Defendant for the damages to his boat.

APPLICABLE LAW

A contractual waiver of liability serves to insulate against ordinary negligence. *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002). In *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996), the Court outlined the law pertaining to releases, stating:

> A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release. [*Adell v Sommers, Schwartz, Silver & Schwartz*, PC, 170 Mich App 196, 201; 428 NW2d 26 (1988) (citations omitted).]
>
> If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become "subjective, and irrelevant," and the legal effect of the language is a question of law to be resolved summarily. [quoting *Gortney v Norfolk & W R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996).]
>
> A release is knowingly made even if it is not labeled a "release," or the releasor fails to read its terms, or thought the terms were different, absent fraud or intentional misrepresentation designed to induce the releasor to sign the release

[1] "It is well established that a person cannot avoid a written contract on the ground that he did not attend to its terms, did not read it, supposed it was different in its terms, or that he believed it to be a matter of mere form." *Gardner v Johnson*, 236 Mich 258; 210 NW 295 (1926); *Rowady v K-Mart Corp*, 170 Mich App 54, 60; 428 NW2d 22 (1988).

through a strategy of trickery. *Dombrowski v City of Omer*, 199 Mich App 705, 709-710; 502 NW2d 707 (1993). A release is not fairly made if "(1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct." *Skotak, supra* at 618, 513 NW2d 428.

"The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 14; 614 NW2d 169 (2000).

The law relating to summary disposition on the basis of a release can be summarized as follows:

Summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties. MCR 2.116(C)(7). A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release. *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 201; 428 NW2d 26 (1988). *Trongo v Trongo*, 124 Mich App 432, 435; 335 NW2d 60 (1983). However, this Court will look beyond the language of the release to determine its fairness and the intent of the parties upon executing it. *Id.*

The party challenging a release bears the burden of establishing its invalidity. *Callen v Pennsylvania R Co*, 332 US 625, 629; 68 S Ct 296, 297; 92 L Ed 242 (1948).

When reviewing a motion for summary disposition under MCR 2.116(C)(7), an appellate court accepts all the plaintiff's well-pleaded allegations as true, and construes them most favorably to the plaintiff, unless specifically contradicted by documentary evidence. *Sewell v Southfield Pub Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). The court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted, and the motion should be granted only if no factual development could provide a basis for recovery. *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428, mod on other grounds *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994).

ANALYSIS

It is undisputed that GTYC prepared the registration form containing the release and that, in order to participate in the race sponsored by GTYC, every participant had to complete and sign the form. By signing the form, the participants release GTYC and the other sponsors from their own ordinary negligence. Participants release GTYC and "any other associated sponsors,

groups, or corporations" from any direct or vicarious liability. The "officers, members, or associates" referred to in the release would include any officer, member or associate whose negligent conduct could give rise to vicarious liability on the part of GTYC or any other sponsor. In other words, GTYC only had an interest in participants releasing those members who were acting in the capacity as an agent of GTYC or one of the other sponsors in conjunction with the race.

As a matter of law, GTYC could not be vicariously liable for the negligence of a member simply because he participates in the race. Only members who "work" the race act as agents of GTYC. Those are the only members that GTYC has an interest in having the participants release from liability. They are the only members whose negligence can give rise to vicarious liability on the part of GTYC and the other sponsors.

To illustrate the point, consider that, on the day of the race, one of the GTYC members volunteers to help at the race and is assigned by GTYC to park cars for the spectators. That member is negligent and causes damage to one of the participant's boats that is sitting in the parking area on a trailer. The Waiver of Liability would insulate the member and GTYC from liability because the member was acting as an agent of GTYC at the time of the collision and the waiver expressly releases GTYC and its members from liability. By the same token, suppose that a member volunteer, who is assigned the task of registering participants, negligently pokes a participant in the eye with his pencil or a member volunteer who is officiating at the race negligently drops his flag causing two boats to collide. In each of these situations, the release would preclude the participants who have suffered personal injury or property damage because of the negligence of a member from suing GTYC either directly for negligent supervision and training or indirectly for vicarious liability because of the negligence of its members.

If a member participates in the race, however, and negligently causing his boat to collide with the boat of another participant, the member participant would not be released from liability because, as a participant, he is not acting as an agent of GTYC and GTYC can not be vicariously liable for his negligence.

Vicarious liability is "indirect responsibility imposed by operation of law." *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988). As this Court stated in 1871:

> [T]he master is bound to keep his servants within their proper bounds, and is responsible if he does not. The law contemplates that their acts are his acts, and

that he is constructively present at them all. [*Smith v Webster*, 23 Mich 298, 299-300 (1871) (emphasis added).]

In other words, the principal "is only liable because the law creates a practical identity with his [agents], so that he is held to have done what they have done." *Id* at 300. See also *Ducre v Sparrow-Kroll Lumber Co*, 168 Mich 49, 52; 133 NW 938 (1911).

Vicarious liability describes the existence of a relationship, not a cause of action. Because of this relationship, the principal is held responsible for the torts of its agent which are **committed in the scope of the agency**. *Cronk v Chevrolet Local 659*, 32 Mich App 394, 401; 189 NW2d 16 (1971), lv den 385 Mich 784 (1971). [Emphasis added.]

This is the type of liability that GTYC sought to protect itself against when it included "members" in the waiver. Since the negligence of a participant can not, as a matter of law, give rise to liability on the part of GTYC, a participant, just because he is also a member, is not released from liability by the waiver.

ALTERNATE ANALYSIS

This case involves two parties who voluntarily participated in a sail boat race. Therefore, it is governed by the recklessness standard adopted by our Supreme Court in *Ritchie-Gamester v City of Berkley,* 461 Mich 73; 597 NW2d 517 (1999).

In *Ritchie-Gamester*, the adult plaintiff sued the twelve-year-old defendant for carelessly skating backward on an ice-skating rink, causing the two to collide, and further resulting in the plaintiff's injuring her knee from her fall on the ice rink. *Id* at 75. Our Supreme Court reviewed the published cases in Michigan involving injuries to participants in recreational activities and concluded that "there seems to be general agreement that participants in recreational activities are not liable for every mishap that results in injury, and that certain risks inhere in all such activities." *Id* at 81.

Next, our Supreme Court looked at the law in other jurisdictions and noted that the majority of other jurisdictions have adopted a "reckless or intentional conduct" standard. *Id* at 82. Our Supreme Court went on to note that, no matter whether the legal effect of participating in a recreational activity is classified as "consent to inherent risks," "notice," "an implied contract," or "assuming the risks," the bottom line is that people who engage in recreational

activities voluntarily "subject themselves to certain risks inherent in that activity." *Id* at 86-87. Thus, our Supreme Court concluded:

> With these realities in mind, we join the majority of jurisdictions and adopt reckless misconduct as the minimum standard of care for coparticipants in recreational activities. We believe that this standard most accurately reflects the actual expectations of participants in recreational activities. As will be discussed in more detail below, we believe that participants in recreational activities do not expect to sue or be sued for mere carelessness. A recklessness standard also encourages vigorous participation in recreational activities, while still providing protection from egregious conduct. Finally, this standard lends itself to common-sense application by both judges and juries. [*Id* at 89.]

The subject waiver can not, as a matter of law, insulate either party from the reckless conduct of the other. *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002).

CONCLUSION

The Plaintiff and Defendant as members of GTYC, who participated in the subject race and who were not acting as agents of GTYC, did not release one another from liability for their ordinary negligence. Ordinary negligence is not, however, the applicable standard. Because these parties voluntarily participated in the race and were aware of the risks inherent in doing so, the standard that applies is the recklessness standard adopted by our Supreme Court in *Ritchie-Gamester, supra*. Accordingly, the trial court did not err in denying Defendant summary disposition based on the waiver. This case is hereby remanded to the District Court for further proceedings.

This decision resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 7/12/05