IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SCOTT DEVECCHIO and JENNIFER DEVECCHIO, Plaintiffs, v. DELAWARE ENDURO RIDERS, INC., and AMERICAN MOTORCYCLIST ASSOCIATION Defendants.	)	C.A. No. 03C-01-191 CHT

Opinion and Order

On the Defendants' Motion for Summary Judgment

Submitted: May 26, 2004
Decided: November 30, 2004
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B. Wilson Redfearn, Esquire, TYBOUT REDFEARN & PELL, 300 Delaware Avenue, Suite 1110, Wilmington, DE 19899, Attorney for the Defendants.

Jeffrey L. Rudnick, Esquire, WEIR & PARTNERS, LLP, 1339 Chestnut Street, The Widener Building, Suite 500, Philadelphia, PA 19107, and Michael D. Bednash, Esquire, KIMMEL CARTER ROMAN & PELTZ, 200 Biddle Avenue, Suite 101, Springside Plaza, P.O. Box 1158, Bear, DE 19701, Attorneys for the Plaintiffs.

TOLIVER, JUDGE

Before the Court is the motion of the defendants, Delaware Enduro Riders, Inc. ("DER") and American Motorcyclist Association ("AMA"), summarily seeking the entry of judgment in their favor as to the claims by the plaintiffs, Scott Devecchio and Jennifer Devecchio, which arise out of an accident involving plaintiff Scott Devecchio. The matter having been briefed and oral argument completed, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

On October 28, 2001, Scott Devecchio competed in the Thirty-Eighth Annual Delaware State Enduro, a competitive amateur motorcycle event.[1] The race was hosted by Defendant DER and was sanctioned by defendant AMA. All Enduro events, including the race in question, are required to follow the written rules and guidelines known as the 2001 AMA Sports Rules Governing Pro Am, Semi-Professional, Amateur, ATV and Youth Competition ("AMA Guidelines").

At some point during the course of the race, Mr. Devecchio was thrown from his motorcycle and injured as he

[1]The Enduro event is a timed motorcycle race with competitors of varying skills competing. Devecchio Aff., D.I. 32, ¶ 2. At the time of the race, Mr. Devecchio was classified as a class A rider, meaning he was a skilled and experienced rider. *Id.* ¶ 4.

approached a "ditch".[2] It is alleged that the area of the course where this incident occurred lacked any warning that a possible hazard existed as required by the AMA guidelines.[3] The resultant injuries, the plaintiffs claim, were proximately caused by the negligence of the defendants in organizing and/or conducting the race and for which they seek compensation in this litigation.

Before taking part in the Enduro race, Mr. Devecchio signed three releases. It is those releases which form the center of the instant controversy.

The first release was signed during registration for the October 28 event. It contained the following language:

> THIS IS A RELEASE AND INDEMNITY AGREEMENT - READ IT BEFORE SIGNING . . . I hereby give up all rights to sue or make claim whatsoever against the American Motorcyclist Association and its district organizations, the promoters, sponsors, and all other persons, participants, or organizations conducting or connected with

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[2] The ditch was over one hundred and fifty feet long, sixteen feet wide and five feet deep and completely traversed the entire course. *Id.* ¶ 16,18.

[3] The AMA Guidelines state, "The promoter is responsible for clearly and properly marking the course . . . Danger markers must be posted . . . ." *Playing by the Rules,* American Motorcyclist, March 2001, at 56, (citing 2001 AMA Sports Rules Governing Pro AM, Semi-Professional, Amateur, ATV and Youth Competition, Ch. 4, Sec.H). Participants in an AMA event are not allowed to pre-ride or inspect the course and the riders rely on the markers provided to indicate dangerous areas throughout the course. Devecchio Aff., D.I. 32, ¶ 10. *See also*, *Playing by the Rules*, American Motorcyclist, March 2001, at 56, (citing 2001 AMA Sports Rules Governing Pro AM, Semi-Professional, Amateur, ATV and Youth Competition, Ch. 4, Sec. B).

> this event for any injury to property or person that I may suffer, including crippling injury or death, whether such injury arises while I am preparing for or participating in the event or while I am on the premises.
> I know the risks of danger to myself and my property while participating in the event and while upon the event premises and, relying on my own judgment and ability, assume all such risks of loss *and* (emphasis added) hereby agree to reimburse all costs to those persons and organizations connected with this event for damages incurred as a result of my negligence.

Mr. Devecchio remembers seeing and signing this release although he asserts he did not read it. He admits to having signed many similar releases in the past and commented the releases are almost exact copies of each other.

The second release was signed by Mr. Devecchio when his AMA card was imprinted shortly after he arrived at the October 28 race.[4] That release read:

> THIS IS A RELEASE AND INDEMNITY AGREEMENT - READ IT BEFORE SIGNING. I hereby give up all my rights to use or make claim for damages due to negligence or any other reason whatsoever against the American Motorcyclist Association and its district organizations, the promoters, sponsors, and all other persons, participants or organizations conducting or connected with

[4] Imprintation occurs when the rider arrives at the sign-up area the morning of the race and gives his card which the promoter runs through a machine. This makes an imprint on a slip of paper, which includes another release. Devecchio Aff., D.I. 32, ¶ 22.

> this event for injury to property or person I may suffer, including crippling injury or death, while participating in the event and while upon the event premises.
> I know the risks of danger to myself and my property while preparing for and participating in the event and while upon the event premises and, relying upon my own judgment and ability, assume all such risks of loss *and* (emphasis added) hereby agree to reimburse all costs to those persons or organizations connected with this event for damages incurred as a result of my negligence.

Again, Mr. Devecchio does not recall reading this release, but admits to having read many similar releases prior to the date he suffered the injuries about which he now complains.[5]

The third and final release was signed by Mr. Devecchio at the starting gate of the Enduro Race. The language in question contained a more detailed explanation of the extent of what was being relinquished as well as segregated it into separate categories. By signing the document, each participant averred that he or she:

> 1. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoter, participants, racing association, sanctioning organization or any subdivision thereof . . . all for the purposes herein referred to as "releasees", from all liability to the undersigned . . . for any and all loss or

[5] *Id.*

> damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise while the undersigned is on or upon the restricted area, and/or, competing, officiating in, observing, working for, or for any purpose participating in the event;
> 2. HEREBY AGREES TO IDEMNIFY [sic] AND SAVE AND HOLD HARMLESS the releasees and each of them from any loss, liability, damage, or cost they may incur due to the presence of the undersigned in or upon the restricted area or in any way competing, officiating, observing, or working for, or for any purpose participating in the event and whether caused by the negligence of the releasees or otherwise.
> 3. HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence of releasees or otherwise while in or upon the restricted area and/or while competing, officiating, observing, or working for or for any purpose participating in the event.

Mr. Devecchio claims this release was given to him moments before the race and he was not given the opportunity to read it. However, he admits that even if he had been given the opportunity, he would have signed the release anyway since he would not have been allowed to compete unless he did so.[6] Moreover, he believed that each of the releases

[6] Devecchio Aff., D.I. 32, ¶ 23.

he signed was limited to excusing the defendants from any liability arising out of any negligence by Mr. Devecchio, and not any negligence committed by the defendants.[7]

The plaintiffs initiated this litigation against the defendants on January 23, 2003. Both defendants have denied they were negligent and that anything they did or failed to do, proximately caused injury or loss to the plaintiffs. Each defendant also filed a counterclaim against the plaintiffs which the plaintiffs in turn have opposed.

On April 23, 2004, the defendants filed a motion for summary judgment claiming the releases in question insulate the defendants from any responsibility for the losses allegedly suffered by the plaintiffs. The plaintiffs argue in response that the first two releases related only to liability incurred as a result of Mr. Devecchio’s own negligence, not liability incurred as a result of action taken, or which should have been taken, by the defendants. And while the third release contains broader language, the plaintiffs contend it was invalid because the consideration upon which the release was based, failed.

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[7] Devecchio Aff., ¶ 21.

DISCUSSION

Summary judgment may be granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[8] The moving party bears the initial burden of showing there are no material facts in dispute.[9] Once that initial burden is satisfied, through affidavits or otherwise, the non-moving party must establish the existence of disputed material issues of fact.[10] The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it will bear the burden of proof at trial.[11]

Neither party disputes that a general release allowing a party to avoid its own negligence or that of others is permissible under Delaware law.[12] However, it must meet three criteria. It first must not be ambiguous, secondly it must

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[8] *Dale v. Town of Elsmere*, 702 A.2d 1219, 1221 (Del. 1997).

[9] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[10] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[11] *Id.*

[12] *Hollerman v. Hicks*, 1997 WL 358453 (Del. Super.), (citing *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981)).

not be unconscionable, and lastly the release must not be against public policy.[13]

In determining whether a release is clear and unambiguous, the intent of the parties is controlling as to the scope and effect of the release.[14] "In interpreting a release to determine whether a particular claim has been discharged, the primary rule of construction is that the intention of the parties shall govern, and this intention is to be determined with a consideration of what was within the contemplation of the parties when the release was executed."[15] It must appear that the plaintiff, or a reasonable person in the place of the plaintiff, would have understood the terms of the release.[16] The court will therefore attempt to determine the parties' intent from the overall language of the document.[17] Where the language of the release is

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[13] *Hallman v. Dover Downs, Inc.*, D. Del., C.A. No. 85-618-CMW, Wright, J. (Dec. 31, 1986). Neither the defendants nor the plaintiffs argue the releases are unconscionable or against public policy. The arguments focus on the issue of ambiguity and therefore that element will be the focus of this opinion.

[14] *Tucker v. Alban, Inc.*, 1999 WL 1241073 (Del. Super.).

[15] 66 Am.Jur.2d Release § 30 (1973), *quoted in Hallman*, D. Del., C.A. No. 85-618-CMW, Wright, J. (Dec. 31, 1986).

[16] *Tucker*, 1999 WL 1241073, at *2 (Del. Super.).

[17] *Id.*

unambiguous it will not lightly be set aside.[18] Yet when the language of the release is ambiguous, it must be most strongly construed against the party who drafted it.[19]

As noted above, the dispute may be segregated between the third release on one hand, and the first and second releases on the other. The defendants argue that all three releases are valid. The plaintiffs contend the first two are not applicable because they are limited to the negligence of Mr. Devecchio. The third, they insist, did not constitute a valid agreement because the plaintiff was not allowed to read it and the consideration upon which it was based, failed. Consequently the third release will be discussed separately from the first two releases.

The Third Release

Simply put, the language of the third release is anything but ambiguous. In exchange for the stated consideration, each participant first agreed not to hold the promoters and related officials sponsoring the event responsible for any injuries or losses the participant suffered, regardless of

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[18] *Id.*

[19] *Id.*

the cause or source of the loss or injury. Each participant also agreed to hold the defendants harmless and/or indemnify the defendants for any injuries or losses of any kind arising out of the presence or any activity by the participants or the defendants at or during the event. The protection specifically applied regardless of whether the injuries or losses were occasioned by the negligence of the event's participants, its promoters or its sponsors. If the resolution of the defendants' motion was premised soley on this language, there could be no doubt that judgment would be entered in favor of the defendants.

The problem with the third release does not lie in with the language releasing those so named. Instead, its vulnerability lies in the language contained in the opening and unnumbered paragraph of the release. That paragraph states the participants have had the opportunity to inspect the course and have in fact found the course to be safe,[20]

[20] The pertinent language reads as follows:

> EACH OF THE UNDERSIGNED . . . acknowledges, agrees and represents that he has, or will immediately upon entering any of such restricted areas, and will continuously thereafter, inspect such restricted areas and all portions thereof which he enters and with which he come in contact, and he does further warrant that his entry upon such restricted area or areas and his participation, if any, in the event constitutes an acknowledgment that he has inspected such restricted area and that he finds and accepts the same as being safe and reasonably suited for the purposes of his use . . . .

when defendants have admitted that riders are not allowed to inspect the course, as inspection goes against AMA guidelines.[21]

The release could not have, as a result, constituted a valid understanding between the defendants and Mr. Devecchio so as to release the defendants from the consequences of their conduct. Stated differently, the failure of the consideration upon which the release was based invalidated the agreement.[22] It is not necessary as a consequence to reach the scope or clarity of the document.

<u>The First and Second Releases</u>

While they are not models of linguistic precision, it is readily apparent that each release addresses the same two concerns. The operative language of each is separated by "and" and obviously refers to two different categories of injuries and losses. The first refers to the right to sue the event sponsors and promoters for injuries and losses suffered by each participant. The second addresses a promise

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[21] Def. Answ., D.I. 15 at 15; Def. Answ., D.I. 7,8 at 15.

[22] *Rodgers v. Erikson Air-Crane Co.,* 2000 Del. LEXIS 259 (Del. Super.). *See also*, *Egan & Sons Air Conditioning Co. v. General Motors Corp.*, 1988 WL 47314, at *3 (Del. Super.).

to reimburse those same sponsors and promoters for any damages suffered as a result of the negligence of the participant. The first clause refers to "negligence" while the second uses the phrase "my negligence". The meaning of the language in question is capable of being understood by a reasonable person standing in Mr. Devecchio's shoes to release the defendants from any and all responsibility for the negligence of the participants as well as the defendants' own negligence.

To the extent the plaintiffs contend Mr. Devecchio may have believed he was only releasing his right to sue based on any accidents that occurred as a result of his own negligence, that belief is unreasonable. First there is Mr. Devecchio's long standing and frequent involvement in events of this kind coupled with his frequent exposure to such releases. While he may not have read the first two releases on this occasion, he had seen this language before. Second, and notwithstanding the failure of the consideration underlying the third release, that document, which Mr. Devecchio had seen before, similarly segregated the categories of responsibility being released. The court therefore cannot accept the argument that his belief was reasonable and that the language of the first two releases

was ambiguous.[23]

Notwithstanding the plaintiffs' assertion that Mr. Devecchio was not given adequate time to read the releases and was not aware of their content as a result, Mr. Devecchio is presumed to understand the importance of the releases he signed. "A plaintiff's failure to apprise himself of, or otherwise understand the language of, a release that he is asked to sign is insufficient as a matter of law to invalidate the release . . . ."[24] He also had the option of not signing the releases and/or not participating in the race until he had the opportunity to review them more fully. His ignorance on this occasion is not helpful.

Given the absence of any other challenges to their validity, the first two releases must be deemed as binding upon the plaintiffs. The Court must further conclude as a result that the plaintiffs are barred from pursuing this litigation. Any other result would not be consistent with the record in this case and the applicable law.

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[23] Nor is the *Lafate* decision upon which the plaintiffs rely any more persuasive. *Lafate v. New Castle County*, 1999 WL 1241074 (Del. Super.). The court there focused on the absence of the term 'negligence' in resolving the question of ambiguity of that release. The instant release is not similarly deficient.

[24] Malcom v. Sears, 1990 WL 9500, at *2 (Del. Super.).

CONCLUSION

For the aforementioned reasons, the Defendants' Motion for Summary Judgment must be, and hereby is, **granted**.

IT IS SO ORDERED.

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TOLIVER, JUDGE