STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF A N T R I M

MELISSA SHARPSTEEN,

Plaintiff,

vs

File No. 92-5731-NI
HON. PHILIP E. RODGERS

SHANTY CREEK MANAGEMENT, INC.,

Defendant.
/

Grant W. Parsons (P38214)
Attorney for Plaintiff

Margaret A. Costello (P41868)
Attorney for Defendant

DECISION AND ORDER

On February 17, 1993, this Court issued its Decision and Order granting the Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (10), based upon a release of liability signed by Plaintiff. Subsequently, Plaintiff filed a Motion for Reconsideration and sought leave to amend. Although the better procedure would have been to request leave to amend as a defense to the motion, MCR 2.116(I)(5), and not as an element of a motion to reconsider a ruling, the Court nevertheless provided the Plaintiff with the opportunity to amend her pleadings. Plaintiff then filed an amended complaint setting forth claims of gross negligence and willful and wanton misconduct, and the Defendant moved for summary disposition. The matter was fully briefed by the parties and the Court entertained the oral arguments of counsel on October 11, 1993. The Court then took the matter under advisement. The Court will now provide its legal conclusions. MCR 2.517.

In its present form, the Plaintiff's Motion for Summary Disposition addresses Counts III and IV of Plaintiff's Amended Complaint. Counts I and II are identical to those claims earlier

dismissed and the parties have agreed to their dismissal here without prejudice to their right of appeal.

Turning first to Count III, gross negligence, it is important to determine what constitutes gross negligence under Michigan law. Quite simply, it is subsequent negligence and not conduct identical with willful and wanton misconduct. Gibbard v Cursan, 225 Mich 311, 319; 196 NW 398 (1923). Recognizing that the conduct at issue in a gross negligence case is a mere failure to provide ordinary care, subsequent negligence may be the subject of a valid release. Shelby Mutual Ins Co, 6 Mich App 95, 98; 148 NW2d 260 (1967) and Klann v Hess Cartage Co, 50 Mich App 703; 214 NW2d 63 (1973). This Court, having previously determined that a valid release existed, must dismiss the gross negligence claim.[1]

Since counsel for the parties agreed that gross negligence was identical with subsequent negligence and that a release could avoid liability for such claims, the focus of their oral argument necessarily centered on Count IV and the allegation of willful and wanton misconduct. Plaintiff predicates this claim on the Defendant's alleged failure to fit her actual rental boots of the same size to her rental skis and bindings as opposed to fitting exemplar boots to her skis and bindings. Defendant argues that there is no evidence that the use of the exemplar boots caused different release settings to be made or that Defendant had any prior notice that injury was more likely to occur from the use of exemplar boots. Defendant also alleged that post-accident testing of the Plaintiff's skis, bindings and actual boots indicated that the binding settings were within the accepted range as established by the manufacturer's specifications. Plaintiff supports her motion with a reference to the affidavit of her expert,

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[1]It may well be that gross negligence no longer has any vitality as a legal theory given the adoption of comparative fault. See, Pavlov v Community EMS, 195 Mich App 711, 718-719; 491 NW2d 874 (1992) and Placek v Sterling Heights, 405 Mich 638; 275 NW2d 511 (1979).

establishing the Defendant's violation of industry standards, and the deposition testimony of Defendant's binding technician.

The motion at hand is one for summary disposition. A ruling cannot be made without first delineating the elements of Plaintiff's claim. For this purpose, this Court relies upon Gibbard v Cursan, supra, and Ellsworth v Highland Lakes Development Associates, 198 Mich App 55; 498 NW2d 5 (1993). In Gibbard, the Supreme Court described the elements of a prima facie case of willful and wanton misconduct:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another;
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand;
>
> (3) The omission the use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. Id., p 322.

See Also, Burnett v City of Adrian, 414 Mich 448, 455-456; 326 NW2d 810 (1982) and Montgomery v DNR, 172 Mich App 718, 721; 432 NW2d 414 (1988).

The Ellsworth Court cited Gibbard and discussed the difference between ordinary negligence and willful conduct.

> Mere negligence cannot be cast as "willfulness" simply for the purposes of bringing a complaint. Willful negligence is quasi-criminal and manifests an intentional disregard for another's safety. Plaintiff has not pleaded facts establishing defendant's 'intentional disregard' for the decedent's safety. Rather, plaintiff asserts that defendant's failure to recognize and remove the hazard posed by the motorcyclist is "such indifference to whether harm will result as to the equivalent of a willingness that it does." Id., p 61.

Both parties also referred the Court to Cheeseman v Metro Authority, 191 Mich App 334; 477 NW2d 700 (1991). There, in the context of a sledding accident occasioned by contact with a post, the Court held that the requisite indifference sufficient to go to the jury was shown where "the park ranger and winter sports supervisor, Lavern Long stated that, although he knew of prior injuries, he was not concerned with finding out why the posts were not protected." Id., p 336.

A consistent reading of Cheeseman, Ellsworth and Gibbard leads this Court to the conclusion that conduct alleged to be willful and wanton must contain allegations of fact that show either an intent to harm or such indifference to whether harm will result as to amount to a willingness that harm does occur. Burnett, supra, p 456.

Construed most favorably from Plaintiff's perspective, the Court can find nothing in the deposition of Mr. Small (Defendant's binding technician) nor the affidavit of Plaintiff's expert which would support a factual allegation that Defendant's ski technician intended to injure the Plaintiff or was indifferent as to whether she was injured. Not only is there a dearth of evidence that Defendant was on notice that the use of exemplar boots was inappropriate, but it is undisputed that the settings on the bindings, as described in the rental agreement, were consistent with the specifications provided by the manufacturer. See, Defendant's Exhibit B (Rental Agreement and Release of Liability) and Defendant's Exhibit C (Tyrolia Adjustment Chart) and Defendant's Exhibit D (Post-Accident Test Report).

Viewing the case most favorably from Plaintiff's perspective, and assuming that Mr. Small knew or should have known that it was better to check the setting of rental bindings by inserting the actual boots rented as opposed to exemplar boots of the same size and make, his failure to do so on the undisputed facts of this case cannot rise to the level of willful and wanton misconduct. Such behavior has neither been shown to be quasi-criminal nor likely to

prove disastrous to Plaintiff or any other renter of ski equipment.[2]

In consideration of the significant discovery which has already occurred in this case, the Court is not persuaded that further discovery would likely change Mr. Small's deposition testimony, the binding settings recommended by the manufacturer at the time Plaintiff rented her skis or the results of the Post-Accident Test Report. The Court will not, then, grant further discovery and will dismiss Plaintiff's Complaint in its entirety and with prejudice. MCR 2.116(C)(7), (8) and (10).

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, Jr.
Circuit Court Judge

Dated: 4/15/94

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[2]The Defendant has cited a trilogy of drowning cases where the failure to fence or warn was not found sufficient to state a claim for willful and wanton misconduct. Wilson v Thos L McNamara, Inc, 173 Mich App 372; 433 NW2d 851 (1988), Hill v Guy, 161 Mich App 519, 524-525; 411 NW2d 757 (1987) and Matthews v Detroit, 141 Mich App 712; 367 NW2d 440 (1985). In upholding the dismissal in Matthews, the Court of Appeals stated:

> We find nothing in those allegations suggesting an intent to harm, and plaintiff has not alleged facts suggesting that injury is so probably, expected or likely that the indifference to harm is tantamount to a willingness that it occur so as to meet the Burnett test of willful and wanton misconduct.

Similar holdings may be found in Montgomery, supra, [failure to place warning signs along a snowmobile trail at an allegedly dangerous intersection], in Mallory v Detroit, [delay in dispatching emergency medical vehicles and providing proper care once the EMTs arrived], and Graham v Gratiot Co, 126 Mich App 385; 337 NW2d 73 (1983) [failure to warn, supervise, or secure a gravel pit where it was known that young people swam.] None of these alleged facts were found sufficient to support a valid claim for willful and wanton misconduct.