

Honorable Frank E. Cuthbertson

FURY BAILEY

MAR 10 2004

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IN THE SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR PIERCE COUNTY

JAY COLBERT, as Personal Representative of
the Estate of Denise Colbert; and for himself,

Plaintiffs,

v.

MOOMBA SPORTS, Inc., a Tennessee
corporation; UNITED MARINE
CORPORATION OF TENNESSEE, a Tennessee
corporation; AMERICAN MARINE
CORPORATION, a Tennessee corporation;
and SKIER'S CHOICE, INC., an Oklahoma
Corporation,

Defendants.

NO. 03-2-13666-8

PLAINTIFFS' FIRST REQUESTS FOR
ADMISSION DIRECTED TO
DEFENDANT SKIER'S CHOICE AND
RESPONSES THERETO

TO: Skier's Choice, Inc., Defendant;

AND TO: Raymond S. Weber and Mills Meyers Swartling, its attorneys

Pursuant to CR 36, Plaintiff requests that you admit the truth of the matters stated below, under oath, within thirty (30) days from the date of service. As stated in CR 36, your answer to each request shall specifically deny the matter, or set forth in detail the reason why you cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder.

PLAINTIFFS' FIRST REQUEST FOR ADMISSION DIRECTED
TO DEFENDANT SKIER'S CHOICE AND RESPONSES
THERETO (No. 03-2-13666-8)-1

LAW OFFICES OF
MILLS MEYERS SWARTLING
1000 SECOND AVENUE, 30TH FLOOR
SEATTLE, WASHINGTON 98104-1064
TELEPHONE (206) 382-1000

ORIGINAL

1 You may not give lack of information or knowledge as a reason for failure to admit or
2 deny unless you state that you have made reasonable inquiry and that the information
3 known to you or readily obtainable by you is insufficient to admit or deny.
4

5 A party who considers that a matter of which an admission has been requested
6 presents a genuine issue for trial or a central fact in dispute may not, on that ground
7 alone, object to the request; you may, subject to the provisions of CR 37(c), deny the
8 matter or set forth reasons why you cannot admit or deny it. CR 37(c) provides that if
9 you fail to admit the truth of any matter requested under CR 36, and if the plaintiffs
10 who are requesting the admission thereafter proves the truth of the matter, the
11 plaintiffs may apply to the court for an order requiring you to pay the reasonable
12 expenses incurred in making that proof, including reasonable attorney fees.

13 **Request for Admission No. 1:**

14 The document attached hereto as Exhibit 1 is a true and correct copy of a page
15 from your January 23, 2004, website.
16

17 **Response:**

18 Admitted.

19 **Request for Admission No. 2:**

20 The following is the text of the statement contained on your website in Exhibit 1.

21 Sure, you could pay more, but now you don't have to. No boating
22 company has scored a higher reputation for quality and performance as
23 fast as Moomba. After all, who would have thought a "value priced" boat
24 like this would be selected as the official towboat of the 2002 and 2003
GRAVITY GAMES competition? But then again, we've been shaking up
the "norms" for years.

25 Since 1991 our ski boats have been out-performing established
26 boating lines costing up to twice as much as Moomba. And the word is
getting around. Recreational water sports enthusiasts and professionals

1 alike, are taking a good look at the value, getting great performance, and
2 buying Moomba.

3 The secret to our success is continuous quality improvement. We don't
4 bring back the same ski boats year after year. We make them better.
5 Because we know that our continuous dedication to quality is rewarded
6 by customer loyalty and satisfaction. Take our construction process for
7 example. With 100% hand-laid fiberglass, Moomba boats are lighter and
8 stronger than chopper gun sprayed boats. We also use 100% composite
9 structural construction to manufacture our boats. The "shoebox" hull and
10 deck joint has twice the glass at impact areas, and Moomba boats are so
11 well made, every one has a limited lifetime warranty. Engineering
12 processes aside, how about changing to market demands? 5 new hulls in
13 the last 5 years, means we are changing to meet the performance needs of
14 today. This means our hulls have the greatest stability, produce the best
15 wakes for wakeboarding or skiing, and the softest ride every time you're
16 out. In short, the ultimate boating experience. Now isn't that what you
17 want in a boat?

18 So in the end, the only real question is, can you enjoy all the performance
19 of a Moomba, just as much - guilt free - even though you paid about
20 \$10,000 less than any other boat in its class? Yeah, we thought so.

21 **Response:**

22 Admitted.

23 **Request for Admission No. 3:**

24 The factual statements made in the text of Request for Admission No. 2 above
25 are true and correct.

26 **Response:**

Skier's Choice objects to this request on the ground the quoted text contains
both "factual statements" and statements of opinion. Without waiver of this objection,
to the extent the text contains "factual statements," Skier's Choice admits such
statements are true and correct.

1 Request for Admission No. 4:

2 In 1998, the Moomba product line was advertised with the logo of a kangaroo
3 holding a tow-rope.

4 Response:

5 Admitted.

6 Request for Admission No. 5:

7 In 1999, the Moomba product line was advertised with the same logo of a
8 kangaroo holding a tow-rope.

9 Response:

10 Admitted.

11 Request for Admission No. 6:

12 In 2000, the Moomba product line was advertised with the same logo of a
13 kangaroo holding a tow-rope.

14 Response:

15 Admitted.

16 Request for Admission No. 7:

17 In 2001, the Moomba product line was advertised with the same logo of a
18 kangaroo holding a tow-rope.

19 Response:

20 Admitted.

21 Request for Admission No. 8:

22 In 2002, the Moomba product line was advertised with the same logo of a
23 kangaroo holding a tow-rope.

1 **Response:**

2 Admitted.

3 **Request for Admission No. 9:**

4 In 2003, the Moomba product line was advertised with the same logo of a
5 kangaroo holding a tow-rope.
6

7 **Response:**

8 Admitted.

9 **Request for Admission No. 10.:**

10 In 1998, the purpose of using the logo of a kangaroo holding a tow-rope in
11 advertisements for the Moomba product line was to reinforce an established Moomba
12 brand identification.

13 **Response:**

14 Admitted.

15 **Request for Admission No. 11:**

16 In 1999, the purpose of using the same logo of a kangaroo holding a tow-rope in
17 advertisements for the Moomba product line was to reinforce an established Moomba
18 brand identification.
19

20 **Response:**

21 Admitted.

22 **Request for Admission No. 12:**

23 In 2000, the purpose of using the same logo of a kangaroo holding a tow-rope in
24 advertisements for the Moomba product line was to reinforce an established Moomba
25 brand identification.
26

1 Response:

2 Admitted.

3 Request for Admission No. 13:

4 In 2001, the purpose of using the same logo of a kangaroo holding a tow-rope in
5 advertisements for the Moomba product line was to reinforce an established Moomba
6 brand identification.
7

8 Response:

9 Admitted.

10 Request for Admission No. 14:

11 In 2002, the purpose of using the same logo of a kangaroo holding a tow-rope in
12 advertisements for the Moomba product line was to reinforce an established Moomba
13 brand identification.
14

15 Response:

16 Admitted.

17 Request for Admission No. 15:

18 In 2003, the purpose of using the same logo of a kangaroo holding a tow-rope in
19 advertisements for the Moomba product line was to reinforce an established Moomba
20 brand identification.

21 Response:

22 Admitted.

23 Request for Admission No. 16:

24 The Moomba "Boomerang" ski boat at issue in this case, hull identification
25 number UME M 1650 G 697, was manufactured by United Marine Corporation of
26 Tennessee at its Maryville, Tennessee plant in the year 1996.

1 Response:

2 Admitted.

3 Request for Admission No. 17:

4 An owner's manual accompanied the subject Moomba "Boomerang" ski boat
5 when it left the factory.

6 Response:

7 Admitted. By way of further response, in addition to the Moomba owner's
8 manual, an owner's packet of manuals and other materials covering various
9 component parts would have also accompanied the boat when it left the factory.

10 Request for Admission No. 18:

11 The purposes of the owner's manual referred to in the preceding request for
12 admission include instructing the owner on the safe and proper use of this ski boat.

13 Response:

14 Admitted, subject to the caveat that it is neither practicable, possible nor
15 reasonable for any product manufacturer to provide an instruction on every possible
16 aspect of the boat, or every possible hazard associated with its use.

17 Request for Admission No. 19:

18 The subject Moomba "Boomerang" ski boat was manufactured with a ski
19 platform at the stern of the boat.

20 Response:

21 Admitted.

1 Request for Admission No. 20:

2 The owner's manual referred to previously states that the primary function of
3 the ski platform is, "to provide easy access into and out of the water for skiers and
4 swimmers."
5

6 Response:

7 Admitted. However, the Moomba owner's manual also contains the following
8 warnings about the swim platform: First, immediately following the quoted text, the
9 Moomba owner's manual states "It is recommended that all entries to and exits from
10 the water are made from the platform while the engine is turned off so as to avoid any
11 unforeseen accident. CAUTION: Fiberglass deck can become slippery when wet." In
12 addition, on the very next page of the Moomba owner's manual, the following warning
13 is provided concerning the swim platform: "DANGER Moving propeller will cause
14 injury. Propeller may turn with boat in neutral. Shut off engine when people are on
15 the platform or in the water near the platform."
16

17 Request for Admission No. 21:

18 There was no warning of any kind in the owner's manual referred to
19 previously that users of the ski platform were subject to serious injury or death from
20 carbon monoxide poisoning due to emissions from the engine.

21 Response:

22 Admitted. However, the owner's manual made it clear, as did the warning label
23 on the transom, that people could be seriously injured or killed if they were in or
24 around the platform when the motor was running. For example, the Moomba owner's
25 manual contains the following warnings about the ski platform: First, immediately
26 following the quoted text, the Moomba owner's states "It is recommended that all

1 entries to an exits from the water are made from the platform while the engine is
2 turned off so as to avoid any unforeseen accident. CAUTION: Fiberglass deck can
3 become slippery when wet." In addition, on the very next page of the Moomba
4 owner's manual, the following warning is provided concerning the swim platform:
5 "DANGER Moving propeller will cause injury. Propeller may turn with boat in
6 neutral. Shut off engine when people are on or in the water near the platform."
7

8 Request for Admission No. 22:

9 There was no warning decal of any kind placed on the subject Moomba
10 "Boomerang" ski boat at the time of manufacture pertaining to the risk of serious
11 injury or death from carbon monoxide poisoning.

12 Response:

13 Denied. (The warning on transom indicates users should not be on or around
14 the platform when the motor is running).

15 Request for Admission No. 23:

16 Carbon Monoxide emissions from ski boat exhaust is a potential source of
17 serious injury and death to product users.

18 Response:

19 Admitted that carbon monoxide is a potential cause of injury or death from any
20 gasoline-powered motor, not just ski boat motors.

21 Request for Admission No. 24 :

22 The article attached as Exhibit 2, from the Journal of the American Medical
23 association, November 22/29, 1995, Vol. 274, No. 20, "Carbon Monoxide Poisoning
24 Among Recreational Boaters," was available to defendant manufacturer's managing
25 agents within a reasonable period of time after publication.
26

1 **Response:**

2 Skier's Choice does not subscribe to the Journal of the American Medical
3 Association. Skier's Choice admits it would have the same access to the subject article
4 as any other non-subscribing person or entity that had knowledge that the article had
5 been published.
6

7 **Request for Admission No. 25:** The publication attached as Exhibit 3, from the
8 U.S. Department of Health and Human Services, Centers for Disease Control and
9 Prevention, National Institute for Occupational Safety and Health, Report No. EPHB
10 171-31a, April 2003, "Carbon Monoxide Emissions and Exposures on Recreational Boats
11 Under Various Operating Conditions (Lake Norman, NC)," was available to defendant
12 manufacturer's managing agents within a reasonable period of time after publication.

13 **Response:**

14 Skier's Choice lacks sufficient information to admit or deny this request because
15 it does not know the date the subject article was "published" or the timing, manner and
16 scope of its dissemination in the public domain.
17

18 **Request for Admission No. 26:**

19 The publication attached as Exhibit 4, from the U.S. Department of Health and
20 Human Services, Centers for Disease Control and Prevention, National Institute for
21 Occupational Safety and Health, Report No. EPHB 171-31a, April 2003, "Carbon
22 Monoxide Emissions and Exposures on Recreational Boats Under Various Operating
23 Conditions (Lake Mead, NV, and Lake Powell, AZ)," was available to defendant
24 manufacturer's managing agents within a reasonable period of time after publication.
25
26

1 Response:

2 Skier's Choice notes that the "Report Date" and "Report No." are stated
3 incorrectly. After reasonable inquiry, the information known or readily obtainable by
4 Skier's Choice is insufficient to enable it to admit or deny this request because it does
5 not know the date the subject article was "published" or the timing, manner and scope
6 of its dissemination in the public domain.

7
8 Request for Admission No. 27:

9 The article attached as Exhibit 5, from The United States Coast Guard
10 Headquarters, dated August 2, 2001, entitled, "SAFETY ALERT: The United States Coast
11 Guard advises boaters not to 'teak surf,'" was available to defendant manufacturer's
12 managing agents within a reasonable period of time after publication.

13 Response:

14 After reasonable inquiry, the information known or readily obtainable by Skier's
15 Choice is insufficient to enable it to admit or deny this request because it does not know
16 the date the subject article was "published" or the timing, manner and scope of its
17 dissemination in the public domain.

18
19 Request for Admission No. 28:

20 The publication attached as Exhibit 6, from the United States Coast Guard, dated
21 March 19, 2003, entitled, "Boat Related Carbon Monoxide (CO) Poisonings," was
22 available to defendant manufacturer's managing agents within a reasonable period of
23 time after publication.

24 Response:

25 After reasonable inquiry, the information known or readily obtainable by Skier's
26 Choice is insufficient to enable it to admit or deny this request because it does not know

1 the date the subject article was "published" or the timing, manner and scope of its
2 dissemination in the public domain.

3 Request for Admission No. 29:

4 Defendants' managing agents made no attempt at any time prior to the death of
5 Denise Colbert on August 3, 2003, to determine the danger from carbon monoxide
6 emissions.
7

8 Response:

9 Denied.

10 Request for Admission No. 30:

11 Defendants' managing agents made no attempt at any time prior to the death of
12 Denise Colbert on August 3, 2003, to warn past purchasers of Moomba ski boats of the
13 danger from carbon monoxide emissions.

14 Response:

15 Denied.

16 Request for Admission No. 31:

17 Defendants' managing agents were physically capable, prior to the death of
18 Denise Colbert on August 3, 2003, of sending out a notice to past purchasers of
19 Moomba ski boats of the dangers from carbon monoxide emissions.
20

21 Response:

22 Skier's Choice admits it was physically capable of sending out notices to past
23 purchasers of Moomba ski boats to the extent it could identify and locate such
24 purchasers. However, the current owner of the boat was a subsequent owner and was
25 not on Skier's Choice mailing list.
26

1 Request for Admission No. 32:

2 The cause of decedent Denise Colbert's death, as identified by the Pierce County
3 Medical Examiner on the autopsy report attached as Exhibit 7, was carbon monoxide
4 poisoning.

5 Response:

6 Denied.

7 Request for Admission No. 33:

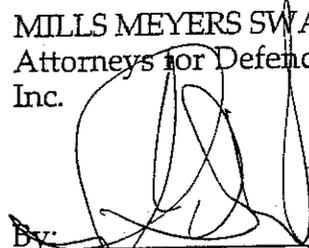
8 The source of the carbon monoxide that poisoned Denise Colbert on August 3,
9 2003, was the subject Moomba "Boomerang" ski boat.

10 Response:

11 After reasonable inquiry, the information known or readily obtainable by Skier's
12 Choice is insufficient to enable it to admit or deny this request.

13 DATED: March 10, 2004.

14 MILLS MEYERS SWARTLING
15 Attorneys for Defendant Skier's Choice,
16 Inc.

17 
18 By: _____
19 Raymond S. Weber
20 WSBA No.: 18207

21 I CERTIFY UNDER PENALTY OF PERJURY UNDER
22 THE LAWS OF THE STATE OF WASHINGTON THAT
23 ON _____ I () MAILED () DELIVERED VIA LEGAL
24 MESSENGER () FAXED A TRUE COPY OF THIS
25 DOCUMENT TO: Fury Bailey

26 SIGNED AT SEATTLE, WA
27 THIS _____ DAY OF March
28 BY [Signature]
29 OF MILLS MEYERS SWARTLING

1
2 STATE OF Tennessee)
3) ss.
4 COUNTY OF Bloont)

5 Rick Tinker, being first duly sworn, on oath deposes and says:

6 That he/she is the President of Skier's Choice, Inc., defendant
7 herein; that he/she has read the foregoing answers to the plaintiff's requests for
8 admission, knows the contents thereof and believes the same to be true.

9 SKIER'S CHOICE, INC.

10 By: *Rick*

11
12 SUBSCRIBED AND SWORN TO BEFORE ME this 19th day of
13 March, 2004.

14 *Julie A. Stamey*
15 NOTARY PUBLIC in and for the
16 State of Tennessee
17 Residing at Monroe County
18 My Commission expires August 8, 2008

