

Honorable Frank E. Cuthbertson

**FURY BAILEY**

MAR 10 2004

COPY RECEIVED

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

5                   Response:

6                   Admitted.

7                   Request for Admission No. 5:

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

10                  Response:

11                  Admitted.

12                  Request for Admission No. 6:

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

15                  Response:

16                  Admitted.

17                  Request for Admission No. 7:

18                  In 2001, the Moomba product line was advertised with the same logo of a  
19 kangaroo holding a tow-rope.  
20

21                  Response:

22                  Admitted.

23                  Request for Admission No. 8:

24                  In 2002, the Moomba product line was advertised with the same logo of a  
25 kangaroo holding a tow-rope.  
26

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 Response:

20 Admitted.

21 Request for Admission No. 12:

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

8 Admitted.

9 Request for Admission No. 14:

10 In 2002, the purpose of using the same 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. 15:

16 In 2003, 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 Response:

20 Admitted.

21 Request for Admission No. 16:

22 The Moomba "Boomerang" ski boat at issue in this case, hull identification  
23 number UME M 1650 G 697, was manufactured by United Marine Corporation of  
24 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

14        **Response:**

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

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

14 Response:

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

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 Response:

8 Denied.

9 Request for Admission No. 30:

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

13 Response:

14 Denied.

15 Request for Admission No. 31:

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

19 Response:

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

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

6                   Response:

7                   Denied.

8                   Request for Admission No. 33:

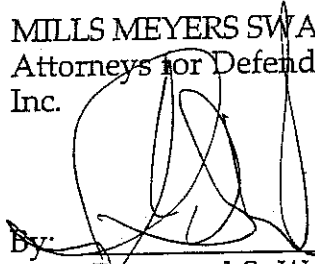
9                   The source of the carbon monoxide that poisoned Denise Colbert on August 3,  
10 2003, was the subject Moomba "Boomerang" ski boat.

11                  Response:

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

14 DATED: March 10, 2004.

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

16  
17  
18 By:   
Raymond S. Weber  
WSBA No.: 18207

19  
20  
21 I CERTIFY UNDER PENALTY OF PERJURY UNDER  
THE LAWS OF THE STATE OF WASHINGTON THAT  
ON \_\_\_\_\_ I ( ) MAILED ☒ DELIVERED VIA LEGAL  
22 MESSENGER ( ) FAXED A TRUE COPY OF THIS  
DOCUMENT TO: Fury Bailey

23 SIGNED AT SEATTLE, WA  
THIS 10th DAY OF March  
24 BY [Signature]  
OF MILLS MEYERS SWARTLING

1  
2 STATE OF \_\_\_\_\_ )  
3 ) ss.  
4 COUNTY OF \_\_\_\_\_ )

5 \_\_\_\_\_, being first duly sworn, on oath deposes and says:

6 That he/she is the \_\_\_\_\_ 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  
10 SKIER'S CHOICE, INC.

11 By: \_\_\_\_\_

12 SUBSCRIBED AND SWORN TO BEFORE ME this \_\_\_\_\_ day of  
13 \_\_\_\_\_, 2004.

14  
15 NOTARY PUBLIC in and for the  
16 State of \_\_\_\_\_  
17 Residing at \_\_\_\_\_  
18 My Commission expires \_\_\_\_\_  
19  
20  
21  
22  
23  
24  
25  
26

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  
10 SKIER'S CHOICE, INC.

11 By: 

12 SUBSCRIBED AND SWORN TO BEFORE ME this 19<sup>th</sup> day of  
13 March, 2004.

14   
15 NOTARY PUBLIC in and for the  
16 State of Tennessee  
17 Residing at Monroe County  
18 My Commission expires August 8, 2005

