ELECTRONICALLY FILED
12/22/2016 11:16 AM
02-CV-2016-000224.00
CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
JOJO SCHWARZAUER, CLERK

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

VALENTINA HENRY, as Personal Representative and Administratrix of the Estate of Robert Lonnel Thomas,	*	**CIVIL ACTION NO.: 02-CV-2016-000224**
Plaintiff	*	
v.	*	
FAIRHOPE YACHT CLUB,	*	
Defendant	*	

ANSWER AND AFFIRMATIVE DEFENSES OF FAIRHOPE YACHT CLUB

COMES NOW, Defendant FAIRHOPE YACHT CLUB, and for answer to the Plaintiff's Complaint states as follows:

Statement of the Parties

1. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

2. Admitted.

3. Denied.

Statement of the Facts

4. Defendant admits it hosted the race. All other allegations contained in this paragraph are denied.

5. Denied.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Defendant admits that the race start was delayed and a restart occurred. All other allegations of this paragraph are denied.

11. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

12. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

13. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

14. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

15. Denied.

16. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

17. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

18. Defendant is without sufficient information to admit or deny the allegations of this paragraph at this time, and the same are, therefore, denied.

COUNT ONE – Wrongful Death/Negligence

19. No answer is required from Defendant. To the extent an answer is required, denied.

20. Denied.

21. Denied.

22. Denied

23. Denied.

24. Denied.

COUNT TWO – Wanton or Gross Negligence

25. No answer is required from Defendant. To the extent an answer is required, denied.

26. Denied.

27. Denied.

28. Denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Plaintiff's Complaint, and each cause of action contained therein, fails to state a claim upon which relief may be granted.

Second Affirmative Defense

Plaintiff's decedent was guilty of negligence which proximately caused or contributed to injuries and damages.

Third Affirmative Defense

Venue is improper in Mobile County.

Fourth Affirmative Defense

Defendant affirmatively asserts the defense of forum non conveniens.

Fifth Affirmative Defense

At all times material thereto, Plaintiff's decedent assumed the risk for the injuries and damages for which Plaintiff claims against Defendant.

Sixth Affirmative Defense

Defendant avers that all situations, conditions or dangers, if any, arising from the incident alleged in Plaintiff's Complaint were open and obvious, or constructively open and obvious, to the Plaintiff's decedent.

Seventh Affirmative Defense

The injuries and damages for which Plaintiff complains were not proximately caused by any act or omission of Defendant.

Eighth Affirmative Defense

Defendant affirmatively pleads and alleges that the injuries and/or damages, if any, sustained by the Plaintiff, were proximately caused by the intervening or superseding acts of persons other than this Defendant for which this Defendant is not liable.

Ninth Affirmative Defense

The injuries suffered by Plaintiff were not due to any negligent or wanton act of Defendant.

Tenth Affirmative Defense

To the extent Plaintiff alleges breach of a duty to warn, Plaintiff's decedent and his vessel captain were aware, or should have been aware, of weather conditions and reports.

Eleventh Affirmative Defense

Plaintiff's damages were caused by an Act of God.

Twelfth Affirmative Defense

Any recovery by the Plaintiff must be set off, reduced, or apportioned to the extent that any other person or party's actions caused or contributed to the damages, if in fact there are any damages.

Thirteenth Affirmative Defense

Defendant states that the Plaintiffs have not alleged sufficient facts to state a cause of action for wantonness.

Fourteenth Affirmative Defense

Defendant denies each and every material allegation of the Plaintiff's Complaint and demands strict proof thereof.

Fifteenth Affirmative Defense

The facts not having been fully developed, Defendant asserts all applicable defenses under Rule 8 of the Alabama Rules of Civil Procedure, including, but not limited to, accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant,

laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, intervening and superseding cause, and any other matter constituting an avoidance or affirmative defense.

Sixteenth Affirmative Defense

Defendant asserts all applicable defenses under Rule 12 of the Alabama Rules of Civil Procedure, including, but not limited to, lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relied can be granted and failure to join a necessary and indispensable party under Rule 19.

Seventeenth Affirmative Defense

Plaintiff is not entitled to recover attorneys' fees, and any such claim, to the extent asserted, is due to be dismissed.

Eighteenth Affirmative Defense

Some or all of the damages allegedly incurred by Plaintiff were caused by superseding or intervening causes for which Defendant is not responsible.

Nineteenth Affirmative Defense

Defendant owed no such duty to Plaintiff's decedent as alleged.

Twentieth Affirmative Defense

Defendant further affirmatively pleads that Plaintiff has no verifiable or identifiable proof of any allegations alleged in the complaint.

Twenty-First Affirmative Defense

Defendant breached no duty owed to Plaintiff or Plaintiff's decedent.

Twenty-Second Affirmative Defense

Plaintiff's jury demand is due to be struck.

Twenty-Third Affirmative Defense

The claim of Plaintiff for punitive damages cannot be sustained, because any award of punitive damages under Alabama law or Maritime law, without bifurcating the trial and trying all punitive damages issues only if and after liability on the merits has been found, would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and the due process provisions of the Alabama Constitution and would be

improper under the common law and public policies of the State of Alabama and under applicable court rules and statutes.

Twenty-Fourth Affirmative Defense

Each claim for punitive damages, on its face and/or as applied in this case, is in violation of the Fifth Amendment of the Constitution of the United States; of the right to counsel provided by the Sixth Amendment of the Constitution of the United States; of the right to trial by jury of the Seventh Amendment of the Constitution of the United States; of the proportionality principles contained in the Eighth Amendment of the Constitution of the United States; the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States; and Article 1, §§ 1, 2,6, 11, 13, 15, 27 and 35 of the Constitution of Alabama of 1901, and is improper under the common law and public policies of the State of Alabama and under applicable court rules and statutes for the following reasons, jointly and separately:

1. There are no standards provided by Alabama law for the imposition of punitive damages, and therefore, this Defendant has not been put on notice and given the opportunity to anticipate punitive liability and/or the potential size of an award and to modify or conform their conduct accordingly;
2. The procedures to be followed would permit an award of punitive damages against this Defendant upon the satisfaction of a burden of persuasion (standard of proof) less than that applicable to the imposition of criminal sanctions for equal culpability;
3. The procedures to be followed would permit the award of multiple punitive damages for the same act or omission;
4. There are no provisions or standards for clear and consistent appellate review of any award of punitive damages against this Defendant under present Alabama law;
5. The standards of conduct upon which punitive damages are sought against this Defendant are vague and ambiguous;
6. The procedures used by Alabama courts and the guidelines given to the jurors; jointly and separately, are vague and ambiguous;
7. The procedures used by Alabama courts and guidelines given to jurors, jointly and separately, are vague and ambiguous and, thus, impermissibly allow jurors broad, unlimited, and undefined power to make determinations on their notations of what the law should be instead of what it is;
8. The procedures under which punitive damages are awarded and instructions used in Alabama courts, jointly and separately, are vague and ambiguous and, thus fail to eliminate the effects of, and to guard against, impermissible juror passion;
9. Present Alabama law does not provide for sufficiently objective and specific standards to be used by the jury in its deliberations on whether to award punitive damages and, if so, on the amount to be awarded;
10. Present Alabama law does not provide a meaningful opportunity for challenging the rational basis for, and any excessiveness of, any award of punitive damages;

11. Present Alabama law does not provide for adequate and independent review by the trial court and the appellate court of the imposition of punitive damages by a jury or of the amount of any punitive damages awarded by a jury;
12. The present Alabama procedures fail to provide a constitutional and reasonable limit on the amount of any punitive award against this Defendant;
13. The present Alabama procedures may permit the admission of evidence relative to punitive damages in the same proceedings during which liability is determined;
14. The present Alabama procedures permit the imposition of joint and several judgments against multiple co-defendants for different acts of degrees of wrongdoing or culpability; and
15. An award of punitive damages would compensate plaintiffs for elements of damage not otherwise recognized by Alabama law.

Twenty-Fifth Affirmative Defense

The award of punitive or extra-contractual damages on the basis of vicarious liability for the conduct of others violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution as well as the Alabama Constitutional provisions set forth above.

Twenty-Sixth Affirmative Defense

The imposition of punitive damages deprives this Defendant of the right to equal protection under the laws provided in the Fifth and Fourteenth Amendments of the Constitution of the United States and in Article 1, §§ 1, 6 and 22 of the Constitution of Alabama of 1901 for the following reasons, jointly and separately:

1. The Plaintiff seek punitive damages in excess of the respective maximums established by the Alabama Legislature in §§ 13A-5-11 and 13A-5-12, Code of Alabama (1975), jointly and separately, whereas those charged under the Criminal Code for similar or identical culpability would have the benefit of the cited code provisions;
2. The procedures to be followed would permit the awarding of punitive damages against this Defendant upon the satisfaction of a burden of persuasion (standard of proof) less than the applicable standard in criminal cases for criminal sanctions involving similar or identical levels of culpability;
3. The absence of sufficiently specific and objective standards for the imposition of punitive damages fails to insure the equality of treatment between and among similarly situated civil defendants; and
4. Punitive damages are penal in nature and this Defendant, without procedural protection, is compelled to disclose documents and/or other evidence without constitutional safeguards against self-incrimination whereas persons charged under criminal provisions for acts or omissions of similar culpability are protected from being compelled to disclose documents and/or other evidence by constitutional procedures and safeguards available in criminal cases.

Twenty-Seventh Affirmative Defense

The imposition of punitive damages in this case is unconstitutional under the Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, § 6 of the Constitution of Alabama of 1901 because punitive damages are penal in nature and this Defendant is compelled to disclose documents and/or other evidence without constitutional safeguards against self-incrimination.

Twenty-Eighth Affirmative Defense

By virtue of Alabama Code § 6-11-20 (1975), punitive damages are not recoverable in this case. By virtue of Alabama Code § 6-11-21 (1975), the amount of punitive damages Plaintiff can recover is limited.

Twenty-Ninth Affirmative Defense

Plaintiff cannot recover punitive damages against this Defendant because such an award, which is penal in nature, would violate this Defendant's constitutional rights protected under the Alabama Constitution of 1901, as amended (the "Alabama Constitution"), and the Constitution of the United States ("the United States Constitution"), unless this Defendant is afforded the same procedural safeguards as are due a criminal defendant, including, but not limited to, the right to avoid self-incrimination, the right to forego production and ¬disclosure of incriminating documents, and the right to the requirement of a level of proof beyond a reasonable doubt.

Thirtieth Affirmative Defense

Subjecting this Defendant to punitive damages, or affirming an award of punitive damages against this Defendant in this case, would amount to and constitute a denial of due process as afforded by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and by the Due Process Clause of Article 1, Section 13 of the Alabama Constitution, as a deprivation of property without due process, or standards or criteria of due process, based upon the following grounds and circumstances, separately and severally assigned:

(a) Any award of punitive damages against this Defendant under the evidence in this case would necessarily be based upon an evidentiary standard no higher or more than a standard of simple negligence, and not upon a standard of proof beyond a reasonable doubt;

(b) There is a lack of reasonable standards necessary to instruct the jury on the propriety and amount of any punitive damages award, and such an award is subject to no predetermined limits;

(c) Use of either Alabama Pattern Jury Instruction 11.03 or 11.18, or both, in instructing the jury as to the award of punitive damages, and the amount of such an award, does not provide sufficient guidance or standards for the award or amount of punitive damages;

(d) Any punitive damages award would not be subject to post-trial and appellate review on the basis of suitable and sufficient objective standards and criteria;

(e) The power and authority imposed upon the jury under Alabama law as to the amount of punitive damages award is so relatively unfettered that there is lacking any reasonable or logical standard, uniform criteria, or guidance in the assessment of the amount of the award of punitive damages;

(f) Under Alabama law and procedure, there is no objective, logical, or rational relationship between the award, or the amount of the award, of punitive damages and this Defendant's alleged wrongful or culpable conduct;

(g) Under Alabama law and procedure, there is no objective, logical, or rational relationship between the award, or the amount of the award, of punitive damages and the interests or goals of the State of Alabama referable to the imposition or allowance of punitive damages;

(h) In the event that a single verdict is mandated against all (or two or more) defendants herein for an award of punitive damages in this case, such a single verdict would be imposed regardless of the degree of culpability of a particular defendant, and such a nonapportionment rule could result in a joint and several verdict against all defendants whereby punitive damages could be assessed against one defendant based in part upon the culpability of another defendant, and such a joint verdict in a single amount could be enforced against this Defendant for any portion of that judgment regardless of this Defendant's culpability, or relative culpability;

(i) Should the Court require the award of punitive damages in a single, joint and several verdict of one amount, an adoption of this nonapportionment rule would be contrary to the objective of punishing specific misconduct, and would be contrary to the objective of assessing punitive damages according to culpability of conduct;

(j) Where a joint and several punitive damages award is mandated to be in a single amount against each defendant, such a rule additionally violates a defendant's right to trial by jury as the jury would be prohibited from apportioning damages against the defendants according to the degree of culpability of the conduct of the respective defendants;

(k) Alabama procedures, pursuant to which amounts of punitive damages are awarded, permit the imposition of different penalties for the same or similar acts;

(l) Under Alabama law and procedures governing the award and assessment of punitive damages, there is no objective, logical, or reasonable standard or criteria which governs the award, or the amount of the award, of punitive damages;

(m) The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against this Defendant;

(n) The procedures pursuant to which punitive damages are awarded are unconstitutionally vague;

(o) The procedures pursuant to which punitive damages are awarded fail to provide a clear post-trial or appellate standard of review for an award of punitive damages;

(p) The procedures pursuant to which punitive damages are awarded may permit the admission of evidence relative to punitive damages in the same proceedings during which liability and compensatory damages are determined; and

(q) An award of punitive damages would constitute an arbitrary and capricious taking of property of this Defendant without due process of law.

Thirty-First Affirmative Defense

Imposition of punitive damages in this case against this Defendant would contravene the Commerce Clause of the United States Constitution in that such an award would constitute, if imposed, an undue and unreasonable burden on interstate commerce.

Thirty-Second Affirmative Defense

To award punitive damages against this Defendant in this case would have a chilling effect upon this Defendant's rights to open access to the courts of this State, in violation of the United States Constitution and the Alabama Constitution, separately and severally.

Thirty-Third Affirmative Defense

In the event that any portion of a punitive damages award against this Defendant in this case were to inure to the benefit of the State of Alabama, or any governmental or private entity other than Plaintiff, such an award would violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and Article 1, Section 15, of the Alabama Constitution.

Thirty-Fourth Affirmative Defense

Based upon Alabama procedures relative to punitive damages, which provide no objective, logical, or reasonable standards or criteria which govern the award, and the amount of the award, of punitive damages, this Defendant is denied equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article 1, §§ 1, 6, and 22 of the Alabama Constitution, separately and severally.

Thirty-Fifth Affirmative Defense

Plaintiff's claim for punitive damages violates the rights of this Defendant to due process and equal protection of the law as guaranteed by the Constitution of the United States and the Alabama Constitution in that the procedure for post-trial review of punitive damages set forth in Hammond v. City of Gadsden and Green Oil Company v. Hornsby is unconstitutionally vague and inadequate in the following respects:

(a) The Hammond and Green Oil procedure provides no clearly defined standard for courts to apply in reviewing punitive damages;

(b) The Hammond and Green Oil procedure provides inadequate review as to the issues of need to deter, whether deterrence has been accomplished, and whether punishment is appropriate for this Defendant;

(c) The Hammond and Green Oil procedure provides inadequate review and a vague standard regarding the relationship of the punitive damage award to the harm;

(d) The Hammond and Green Oil procedure does not address nor cure the lack of guidelines given the jury in the assessment of punitive damages;

(e) This procedure is inadequate in that the trial court according to Hammond and Green Oil "may" take certain factors into account and these procedures lack predictable and objective standards of review, allow for inconsistent application of the factors, and allow for unpredictable and inconsistent results; and

(f) The Hammond and Green Oil procedure fails to provide definite and meaningful constraints on jury discretion in awarding punitive damages.

s/Allen E. Graham
Allen E. Graham, (GRA051)
Joseph M. Aguirre, (AGU002)
Attorneys for the Fairhope Yacht Club

OF COUNSEL:
Phelps Dunbar LLP
101 Dauphin Street, Suite 1000
Mobile, Alabama 36602
Post Office Box 2727
Mobile, Alabama 36652-2727
251-432-4481
teeto.graham@phelps.com
joseph.aguirre@phelps.com

CERTIFICATE OF SERVICE

I do hereby certify that I have on December 22, 2016, served a copy of the foregoing on each counsel of record by electronic means, including filing through the AlaCourt e-filing system, as follows:

James J. Crongeyer, Jr.
H. Ruston Comley
WATKINS & EAGER, PLLC
Post Office Box 650
Jackson, Mississippi 39205

Omar L. Nelson
GIBBS TRAVIS, PLLC
1400 Meadowbrook Road, Suite 100
Jackson, Mississippi 39211

s/Allen E. Graham
Allen E. Graham