APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3110

NOT PRECEDENTIAL

CHRISTINE THOMPSON,
Appellant

v.

OVER THE LINE VI, LLC; JORDAN MAUPIN

On Appeal from the District Court
of the Virgin Islands
(D.C. No. 3:21-cv-00070)
District Judge: Honorable Robert A. Molloy

Argued: December 9, 2024

Before: CHAGARES, Chief Judge, MONTGOMERY-REEVES and FISHER, Circuit Judges

(Filed: January 28, 2025)

Joel H. Holt, Esq. [Argued]
Law Office of Joel H. Holt, Esq., P.C.
2132 Company Street
Christiansted, VI 00820

Counsel for Appellant

Matthew J. Duensing, Esq. [Argued]
Joseph Sauerwein, Esq.
Duensing & Casner
9800 Buccaneer Mall, Bldg. 2, Suite 9
P.O. Box 6785
St. Thomas, VI 00804

Counsel for Appellees

OPINION*

CHAGARES, Chief Judge

In this appeal, plaintiff–appellant Christine Thompson challenges the District Court's grant of summary judgment in favor of defendant–appellees Over the Line VI, LLC ("OTL") and Jordan Maupin on negligence claims arising out of injuries allegedly suffered during a boating excursion off the coast of the U.S. Virgin Islands. For the reasons set out below, we will reverse.

I.[1]

A.

---

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

[1] We write primarily for the parties, and so we recite only the facts necessary to decide the case.

On June 13, 2021, Thompson joined five family members and friends (the "passengers") for a recreational boating and snorkel excursion in the waters of Saint Thomas and Saint John. Choosing from several boat companies in the area, the group booked the charter with OTL, which supplied them with a powerboat captained by Maupin. Maupin met the passengers at a dock prior to boarding the vessel and handed them a clipboard holding a form contract purporting to release OTL and its agents from all liability for any injuries sustained during the excursion (the "Release").

The Release was a single-page document with two sides. One side (the "front page") was titled "GENERAL RELEASE OF ALL CLAIMS," written in bold text at the top of the page. Appendix ("App.") 359. The front page provided, in part, "**Releasor . . . hereby releases, waives and forever discharges any and all claims that Releasors may have or ever had or will have against [OTL and its agents]**," and that "**Releasors hereby assume full responsibility for the risk of bodily injury . . . whether caused by the negligence of the Releasees or otherwise.**" *Id.* (boldface emphasis in original). The other side of the Release (the "back page") was titled "GENERAL RELEASE OF ALL CLAIMS (CONTINUED)," again written in bold text at the top of the page. App. 360. The remainder of the back page contained twelve rows of blank lines split into three parts labeled: "Signature," "Print name," and "Address." *Id.*

No one disputes that all passengers, including

Thompson, signed the Release, but the record contains conflicting evidence about how the document was presented and represented to the passengers at the time they signed. Maupin testified that he handed the Release to the passengers with the front page up. The passengers, however, testified that they were only given a page containing "blank lines" because Maupin handed them the back page of the Release and the clipboard's clip covered the "GENERAL RELEASE OF CLAIMS (CONTINUED)" language at the top. App. 354–55, 373–74, 398–400, 419, 422, 425. They further testified that Maupin never described the document as a release or a waiver and, instead, only asked them to provide their "contact information." App. 340–41, 358, 400, 419, 422, 425.

Shortly after leaving the dock, the vessel crashed against a wave that dislodged Thompson from her seat. Upon landing, Thompson was visibly injured, and Maupin changed course to deliver her to a dock for medical care.

B.

Thompson filed a complaint in the District Court of the Virgin Islands asserting claims of negligence and gross negligence against OTL and Maupin. OTL and Maupin moved for summary judgment, and the District Court granted the motion in part, concluding that the Release precluded Thompson's negligence claims. Over Thompson's objections, the District Court held that the Release was enforceable as a matter of law because she had sufficient time to review the document and, notwithstanding disputes about how

the Release was presented, there was "no gen[uine] issue [of] material fact in dispute that [she] had the opportunity to remove the clip covering the second page." App. 6–7. Thompson's gross negligence claim was tried to a jury, which rendered a verdict in favor of OTL and Maupin. Thompson timely appealed, and she now asks this Court to reverse the District Court's summary judgment ruling.[2]

II.[3]

We apply substantive federal admiralty law to claims within our admiralty jurisdiction. *Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 126, 131 (3d Cir. 2002); *see also East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law."). A claim falls within our admiralty jurisdiction where it satisfies "conditions of both location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); *see also Exec. Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 253 (1972)) ("If the wrong occurred on navigable waters, the action is within admiralty jurisdiction . . . .").

---

[2] Thompson does not challenge the jury verdict on her gross negligence claim.

[3] Setting aside a dispute in the District Court as to whether diversity jurisdiction applied to Thompson's action, the District Court certainly possessed admiralty jurisdiction. 28 U.S.C. § 1331(1). This Court has jurisdiction over Thompson's appeal under 28 U.S.C. §§ 1291 and 1294(3).

Those conditions are further broken down into a three-part test that requires courts to consider whether (1) the incident "occurred on navigable water" or involved an "injury on land [that] was caused by a vessel on navigable water"; (2) the general features of the incident show that it "has a potentially disrupting impact on maritime commerce"; and (3) "the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Gibbs*, 314 F.3d at 131–32 (quoting *Jerome B. Grubart, Inc.*, 513 U.S. at 534)).

The events giving rise to the boating incident in this case satisfy the three-part test for admiralty jurisdiction. The alleged torts occurred onboard a vessel that was traveling on navigable waters off the coast of Saint Thomas. The alleged torts also involved injury to a passenger during a paid excursion, which is a type of incident that has the potential to disrupt maritime commerce by, for example, "causing a commercial vessel to divert from its course." *Hargus v. Ferocious & Impetuous, LLC*, 840 F.3d 133, 138 (3d Cir. 2016). Further, the type of water activity involved — a recreational shore excursion involving transportation over water — has a substantial relationship to traditional maritime activity. *See Exec. Jet Aviation, Inc.*, 409 U.S. at 255–56 (describing "traditional maritime activities" as those "involving navigation or commerce on navigable waters"). As such, admiralty jurisdiction is proper, and federal

maritime common law applies.[4]

The Court "review[s] the District Court's order granting summary judgment *de novo*," evaluating the record "in the light most favorable to the nonmoving party." *In re Processed Egg Prods. Antitrust Litig.*, 881 F.3d 262, 267–68 (3d Cir. 2018).

III.

It is a well-established rule of admiralty contract law "that exculpatory clauses, whether fully exonerating a party from its own negligence or not, 'must be clearly and unequivocally expressed.'" *Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 715 (8th Cir. 2004) (collecting cases). Exculpatory clauses may "not be inflicted by a monopoly[] or a party with excessive bargaining power" either. *Piché v. Stockdale Holdings, LLC*, 51 V.I. 657, 667 (D.V.I. 2009) (citing *Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 274 (1st Cir. 2006)). The Release in this case meets both requirements. There is no dispute that the Release contains express, unambiguous language releasing OTL and its agents from "any and all claims" and even provides for an assumption of risk for injuries "caused by [OTL's] negligence." App. 359.

---

[4] Federal admiralty law consists of an "amalgam of traditional common-law rules, modifications of those rules, and newly created rules," which may be supplemented by state law "when maritime law is silent or where a local matter is at issue." *Floyd v. Lykes Bros. S.S. Co.*, 844 F.2d 1044, 1046–47 (3d Cir. 1988); *see also Sosebee v. Rath*, 893 F.2d 54, 56 (3d Cir. 1990) ("There is a strong interest in maintaining uniformity in maritime law.").

There is also no dispute that OTL offered purely recreational services and was not a monopoly, thus the Release cannot reasonably be characterized as a contract of adhesion.

Yet Thompson does not challenge the language of the Release and focuses instead on how the Release was presented, arguing that a reasonable factfinder could conclude that Thompson had no "reason to suspect [she] w[as] being asked to do anything other than provide the charterer with [her] name and contact information." Thompson Br. 22. Thompson's argument is, in substance, "a claim of excusable ignorance of the contents of the writing signed," *Connors v. Fawn Mining Corp.*, 30 F.3d 483, 492 (3d Cir. 1994), also known as "fraud in the execution" or "fraud in the factum," Restatement (Second) of Contracts § 163 & cmt. a. This defense to contract formation applies when an offeror "procures a party's signature to an instrument without [the signatory's] knowledge of its true nature or contents," rendering the manifestation of assent invalid and the contract void. *Langley v. Fed. Deposit Ins. Co.*, 484 U.S. 86, 93 (1987); *accord MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 404 (3d Cir. 2020). The offeror need not act with "an affirmative intent to defraud," but the objective circumstances must nonetheless establish that the signatory's ignorance was reasonable. *MZM Constr. Co.*, 974 F.3d at 404–05.

Reviewing the record in the light most favorable to Thompson without "weigh[ing] the evidence or mak[ing] credibility determinations," *Pichler v.*

UNITE, 542 F.3d 380, 386 (3d Cir. 2008), we cannot agree with the District Court that the Release is enforceable as a matter of law. A reasonable factfinder could find that Maupin handed the passengers a clipboard showing only the back page of the Release, obscured the sole liability-waiver language with the clip, and left visible only a series of blank lines to write signatures, names, and addresses. A reasonable factfinder could further conclude that when Maupin "asked that [Thompson] put [her] contact information on the clip board" and said nothing else about the document, Thompson reasonably believed that "[t]here was nothing to read" on this "blank piece of paper."[5] App. 340–41, 356, 373, 400. Under that reading of the record, the Release is unenforceable and thus summary judgment was improper. Just as "one who signs a promissory note reasonably believing he only gave his autograph is not liable on the note," *Operating Eng'rs Pension Tr. v. Gilliam,* 737 F.2d 1501, 1504 (9th Cir. 1984), one who signs a liability waiver reasonably believing that she only completed a

[5] The threshold for "reasonable" ignorance depends in part on the intent of the party seeking to avoid the contract. "[L]ess care will ordinarily be expected of [a signatory] if he did not intend to assume a legal obligation at all than if he intended to assume a legal obligation, although one of a different nature." Restatement (Second) of Contracts § 163 cmt. b; *see also Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 136 (4th Cir. 1967) ("[T]he average reasonable man would not be expected to exercise that caution which he would if he knew that he was signing what purported to be a legal document.").

sign-in sheet is not deprived of her day in court.[6]

OTL and Maupin's counterarguments are unpersuasive. OTL and Maupin are correct that, without more, Thompson's "alleged failure to read the document [would] not create a genuine issue of material fact as to the enforceability of the [R]elease," OTL Br. 13, because "[a]cceptance is measured not by the parties' subjective intent, but rather by their outward expressions of assent," *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 222 (3d Cir. 2008). But even a clear "outward expression[] of assent" may be ineffective when, as here, there is evidence that the offeror "misrepresented the contents of the agreement" or "tried to hide" key provisions therein. *See id.* at 221, 223. The case law invoked by OTL and Maupin is not to the contrary. *See, e.g., Delponte v. Coral World V.I., Inc.*, 48 V.I. 386, 387–88 (D.V.I. 2006), *aff'd,* 233 F. App'x 178 (3d Cir. 2007) (liability waiver upheld where plaintiff "concede[d] that he [signed] with an intent to be bound"); *Nicole Morgan v. Water Toy Shop, Inc.*, No.

---

[6] A Virgin Islands court declined to enforce a liability waiver for similar reasons in near identical circumstances. See generally Leach v. Cruise Ship Excursions, Inc., No. ST-16- CV-506, 2019 WL 3814399 (V.I. Super. Aug. 12, 2019). In Leach, the "release form comprised two sides of a clip board," the back page had a release-related title that the plaintiffs "did not recall seeing," and the rest of the back page had lines for names and signatures, which the court concluded "might suggest to some that the form was a sign-in sheet." *Id.* at *7. Because it was "quite possible that a person signing the form might not have been alerted to the fact that waiver and release clauses appeared on the reverse side of the clip board," the court held that the Release was unenforceable. *Id.*

16-cv-2540, 2018 WL 1725550, at *10 (D.P.R. Mar. 30, 2018) (liability waiver upheld where "there [was] no evidence . . . that [plaintiffs] [signed] by mistake, thinking they were signing something else").

In sum, we conclude that the District Court erred by resolving Thompson's negligence claims at summary judgment based on the Release. While we do not deem the Release unenforceable as a matter of law, we hold that there are genuine disputes of material fact as to the Release's enforceability that should have been left to the factfinder.

IV.

For the foregoing reasons, we will reverse the District Court's order granting summary judgment in favor of OTL and Maupin and remand the case for further proceedings consistent with this opinion.

APPENDIX B

District Court of the Virgin Islands
District of the Virgin Islands

Notice of Electronic Filing

The following transaction was entered on 11/14/2023 at 8:31 AM AST and filed on 11/14/2023

Case Name:	Thompson v. Over the Line VI, LLC et al
Case Number:	3:21-cv-00070-RAM-RM
Filer:	
Document Number:	225(No document attached)

Docket Text:

ORDER (RAM) For the reasons stated on the record, Defendants' Motion for Summary Judgment, ECF[121], is GRANTED, in part, and DENIED, in part. As stated on the record on November 9, 2023, Defendants' motion for summary judgment as to Counts I, II, and III alleging negligence is GRANTED. All Counts asserting a cause of action for negligence are DISMISSED. As stated on the record on November 13, 2023, Defendants' motion for summary judgment on Count IV alleging gross negligence is DENIED. (This is a TEXT-ONLY entry. There is no PDF document associated with this entry.) (SZ)

3:21-cv-00070-RAM-RM Notice has been electronically mailed to:

Joel H. Holt holtvi@aol.com, jerrifarrante@gmail.com, law@holtvi.com

Matthew J. Duensing mduensing@vilawyers.com, aremeselnik@vilawyers.com, chonaker@vilawyers.com, dschmeiske@vilawyers.com, jsauerwein@vilawyers.com, legalassistant@vilawyers.com, mjd_sdcd@yahoo.com, sduensing@vilawyers.com

Robin Seila robin.joelholtpc@gmail.com

Joseph D. Sauerwein jsauerwein@vilawyers.com, mduensing@vilawyers.com, sduensing@vilawyers.com, swalsh@vilawyers.com

John P. Fischer john@yourchampions.com, usviservice@yourchampions.com

3:21-cv-00070-RAM-RM Notice will be delivered by other means to:

* * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3110

CHRISTINE THOMPSON,
Appellant

v.

OVER THE LINE VI, LLC; JORDAN MAUPIN

On Appeal from the District Court of the Virgin Islands

(D.C. No. 3:21-cv-00070)

SUR PETITION FOR PANEL REHEARING

Present: CHAGARES, Chief Judge, MONTGOMERY-REEVES and FISHER, Circuit Judges.

The petition for rehearing filed by Jordan Maupin and Over the Line VI LLC, Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby

O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/Michael A. Chagares
Chief Judge

Dated: February 20, 2025
Sb/cc: All Counsel of Record

APPENDIX D

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

CHRISTINE THOMPSON,
Plaintiff,

vs. CASE NO. 21-CV-70

OVER THE LINE VI, LLC, et al.,
Defendants.

COURT REPORTER'S TRANSCRIPT
[EXCERPTS]

TELEPHONIC STATUS CONFERENCE HEARING

THURSDAY, MARCH 6, 2025

BEFORE:
THE HONORABLE ROBERT A. MOLLOY,
Chief Judge

APPEARANCES:
LAW OFFICES OF JOEL H. HOLT
BY: JOEL H. HOLT, ESQ.
2132 Company Street, Suite 2
Christiansted, Virgin Islands 00820

FISCHER LAW FIRM, PLLC
BY: JOHN P. FISCHER, ESQ.

15-B Norre Gade
St. Thomas, Virgin Islands 00804

(For the Plaintiff)

COURT REPORTER:
PERSHA STOUTT-WARNER, RPR, RMR
Official Court Reporter
Virgin Islands District Court
St. Thomas, Virgin Islands

* * *

wait? Or is there an issue as to whether the District Court has jurisdiction since the time for a petition for a rehearing is still outstanding?

MR. DUENSING: I mean, we would -- with all due respect, Judge, we would question whether the Court has jurisdiction to proceed at this point once we've indicated our intent to proceed with the certiorari petition.

THE COURT: Okay.

MR. HOLT: Your Honor, if I may. This is Attorney Holt.

THE COURT: Yes.

MR. HOLT: First, they would have to get a stay. The mandate has been issued. It's back in your court. The issue they are talking about, the Supreme Court is never going to hear. And they keep trying to recast

this as a fraud claim. The question was, is it a valid release. The release has to be something knowingly signed. And the Court found on that, looking at the back of the page, it wasn't.

And by the way, in finding so, they actually cited another case from the Superior Court of the Virgin Islands on identical facts where Attorney Duensing was in the case, with the -- words on the back, and the Superior Court Judge held that it was a question for the jury, a case they didn't cite to the Court and a case we did not find.

It's not a novel case. It's a simple case. And it can all be tried together. We did this entire case in, I think, three days, plus the fourth day, maybe some jury deliberations. And there is no need to bifurcate it. It just needs to be set for trial.

This case has gone on for a long time. This woman is badly injured. She is disabled. She's on Social Security. And there is no reason to delay this case.

THE COURT: Okay. Well, I am not fully informed on the law with regards to jurisdiction, especially if the Defendants have the right to file for a petition for writ of certiorari to the Supreme Court.

I do recognize that the Third Circuit has issued a mandate. And, Attorney Holt, perhaps you could be right that the Defendants would have to request a stay. But I think -- once the petition is filed, I think I would have to withhold any further proceedings in this

case until the Supreme Court has ruled on that.

But again, I'm not fully informed on that, on the law as to that. I have to brush up myself on appellate jurisdiction.

So, Attorney Holt, it's your recommendation that we set a trial date and if it's stayed -- if the petition is granted, then that would necessarily require us to hold off on any proceedings at this level.

Is that what you're suggesting?

MR. HOLT: Yes, Your Honor. And that's partly because you have a congested calendar and trial dates are difficult. We'd rather have a trial date to work with while they explore the things they think they can spend money on and delay it further.

THE COURT: Okay. And just to be clear, the trial would be only on the issue of negligence.

MR. HOLT: Correct.

THE COURT: The Third Circuit didn't touch the jury's verdict as to gross negligence, correct?

MR. HOLT: Right. That wasn't even an issue on appeal. Correct.

THE COURT: Right. And the issue as to whether, you know, there is a release for fraud in the inducement of the signing of the release, that would go towards any affirmative defenses and what have you?

MR. HOLT: Your Honor, once you look at the pleading there is no issue of fraud. The question is whether or not they have a valid release, that they fully informed us. There is nothing about fraud. I mean, they are trying to inject a new issue into this case that's not in this case.

THE COURT: Well, the Third Circuit, that was their basis for reversing my opinion on the summary judgment.

MR. DUENSING: Exactly, Judge.

MR. HOLT: They found there was a question of --

THE COURT: Hold on. I think it's fraud in the presenting -- any issues of fraud in the presenting of the release to Ms. Thompson. You're saying that's not an issue?

MR. HOLT: Your Honor, the issue is whether or not she signed a knowing waiver. What did she know? The issue is what she knew, not what they did. And by the fact that they had put it -- the way they presented it, she was unaware of it. That's what the finding was.

MR. DUENSING: Your Honor, you quoted the Third Circuit's decision verbatim almost. It's exactly what they said, the jury should have to decide whether there was fraud in the inducement. That's exactly what they said.

THE COURT: I think it's more fraud in the execution. And I'm reading from page 7 of the Third

Circuit's Opinion, "Thompson's argument is, in substance, quote, "A claim of excusable ignorance of the contents of the writing signed, also known as, quote, "fraud in the execution" or "fraud in the factum".

And it cites to Restatement (Second) of Contracts, 163. "This defense to contract formation applies when an offerer procures a party's signature to an instrument without the signatory's knowledge of its true nature or content rendering the manifestation of assent invalid and the contract void. The offerer need not act with an affirmative intent to defraud, but the objective circumstances must nonetheless establish that the signatory's ignorance was reasonable."

So, Attorney Holt, if this matter were to proceed to trial, would the Plaintiff be presenting evidence with regards to fraud in the execution of the release?

MR. HOLT: Okay. So, Your Honor, we're going to get caught up in all these legal terms that are going to even confuse the jury. We're going to argue that they were negligent. They want to try to prove, as their affirmative defense, that she signed a waiver. That's their burden. They may have to show that she signed a waiver that she knowingly was aware of. We're going to argue factually she wasn't aware of it because it was on the back of the release.

So we all get caught up in using all these different terms of fraud, but in the end it's just a simple factual determination for the jury, was she aware of what was on the back of the pages she signed.

And so we're going to get caught up in the legalese instead of what's the base of the case. We're going to put on a claim for negligence; they're going to introduce the release; we're going to argue that she didn't knowingly signed it.

And all of that other language is just going to confuse the jury because it really comes down to a simple thing, did she know or have reason to know that that was on the back of the page.

THE COURT: You're saying "legalese," Attorney Holt, but at some point the Court is going to have to instruct the jury on the law that they must apply to the facts of the case. And the central holding of the Third Circuit's Opinion was that there are genuine issues of material fact in dispute surrounding Ms. Thompson's signing of the release, primarily based on the fraud and the execution principles. That's the basis of the reversal.

But I agree with you that the burden of proof and the burden of persuasion, with regards to the cause of action of negligence, is on the Plaintiff. Then if there is an affirmative defense, the burden of persuasion would be on the Defense to demonstrate the release and the elements of the release. And then, I

* * *

person.

MR. DUENSING: Okay. Great.

But nothing further, Judge. No.

THE COURT: All right. Thank you, everyone. The parties can expect to receive an order memorializing this status conference.

Hearing nothing further, this matter is adjourned. Everyone have a wonderful day.

Thank you.

MR. HOLT: Thank you, Your Honor.

MR. DUENSING: Thank you, Judge.

[Court adjourned at 11:44 a.m.]

- - -

REPORTER'S CERTIFICATE

* * *

This transcript is hereby certified to be a true and correct transcript of the foregoing proceedings held on this 8th day of March, 2025.

/s/*Persha Stoutt-Warner*
PERSHA STOUTT-WARNER, RPR, RMR
Official Court Reporter

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ORAL ARGUMENTS:

December 9, 2024

Case Numbers:
23-3110 & 23-3111
(Christine Thompson v. Over The Line VI LLC, et al) & (Kristin Flowers v. Over The Line VI LLC, et al)

JOEL H. HOLT, ESQUIRE P.C.
2132 Company Street
Christiansted,
St. Croix USVI, 00820
BY: Joel H. Holt, Esquire

LAW OFFICES OF DUENSING & CASNER
9800 Buccaneer Mall, Building 2, Suite 9
P.O. Box 6785
St. Thomas, Virgin Islands 00804
BY: Matthew J. Duensing, Esquire

JUDGES PRESENT:
CHIEF JUDGE, MICHAEL A. CHAGARES
CIRCUIT JUDGE, TAMIKA MONTGOMERY-REEVES
CIRCUIT JUDGE, D. MICHAEL FISHER

* * *

Transcribed by:
Casmus A. Caines
Certified Reporter
P.O. Box 503094
St. Thomas, V.I.
(340) 643-2879

* * *

And by the way, there is not one, there are six statements. And three of those statements are college kids. And, you know, for me, you know, because they did, the family went there, they are all there at the same time, their testimony is consistent. It has credibility.

Again, a jury could reject that. I understand that. But we respectfully submit that those would be issues for the jury, not the court.

CHIEF JUDGE CHAGARES: A summary judgment.

ATTORNEY HOLT: Right.

CHIEF JUDGE CHAGARES: Right.

ATTORNEY HOLT: And, again, first of all, where the summary judgment standards on the inferences and if this is Plaintiff --

CHIEF JUDGE CHAGARES: So, you seem to be

arguing that there is some sort of excusable ignorance or fraud in the execution of whatever this waiver was; right?

ATTORNEY HOLT: No. I think the captain didn't do his job. I think the captain handed them a clipboard, and they signed it and went on and start getting the boat ready, not making them understand what this was. And I think they --

CHIEF JUDGE CHAGARES: Well, I am saying on your part. Your argument would be then there is some sort of excusable negligence about signing a waiver; right, or fraud in the execution of this waiver 'cause your clients didn't know what it was. It's a softball.

ATTORNEY HOLT: I get it. I guess that would be a way of telling that.

CHIEF JUDGE CHAGARES: Alright. Okay.

ATTORNEY HOLT: And so -- I mean, me -- you all can again tell me, but I think the issue is crystal clear. I don't think any argument that I can make one way or the other adds to it, except, for two things.

And one is, they explained carefully that that clip covered that paper. And while we have pictures of the release of the boat that the captain took, we now know that that release is not the first thing he took a

* * *

CERTIFICATE OF REPORTER

I, **CASMUS A. CAINES**, Stenographer, District of St. Thomas, United States Virgin Islands, Do Hereby Certify, that I transcribed the proceedings set forth herein, and the foregoing pages are a true and correct transcription to the best of my ability.

I, **FURTHER CERTIFY**, that I am neither employed by nor related to any of the parties or attorneys in this matter, and that I have no interest whatsoever in the final disposition of this matter.

IN WITNESS WHEREOF, I have subscribed my hand the April 16, 2025.

/s/
CASMUS A. CAINES

APPENDIX F

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

CHRISTINE THOMPSON,
Plaintiffs,

vs. Case No. 3:21-cv-070

OVER THE LINE VI, LLC and JORDAN MAUPIN,
Defendants.

KRISTIN FLOWERS,
Plaintiffs,

vs. Case No. 3:21cv070

OVER THE LINE VI, LLC and JORDAN MAUPIN,
Defendants.

P R O C E E D I N G S

BEFORE: Robert A. Molloy, President Judge
DATE: November 13, 2023

APPEARANCES:

ATTORNEYS FOR THE PLAINTIFFS:
Joel Holt, Esq.
John Fischer, Esq.

ATTORNEYS FOR THE DEFENDANTS:
Matthew Duensing, Esq.
Joseph Sauerwein, Esq.

Reported by:

DESIREE D. HILL
Registered Merit Reporter
Hill's Reporting Services
P.O. Box 307501
St. Thomas, Virgin Islands
(340) 777-6466

P R O C E E D I N G S

[Proceedings: Summary Judgment motions in Chambers]

* * *

DEPUTY CLERK: Christine Thompson versus Over the Line VI, LLC and Jordan Maupin, Civil No. 2021-70.

Kristin Flowers versus Over the Line, LLC and Jordan Maupin, Civil No. 32-33.

THE COURT: Good morning, Counsel. Appearances, please.

MR. HOLT: Good morning. Joel Holt for the plaintiffs.

MR. FISCHER: Good morning, Your Honor. John

Fischer, on behalf of the plaintiffs.

MR. DUENSING: Good morning, Your Honor. Matt Duensing for the defendants.

MR. SAUERWEIN: Morning, Your Honor. Joe Sauerwein here for the defendants.

THE COURT: Okay, Counsel. Good morning, once again. There are some preliminary issues I wanted to address. First thing, I'm going to rule on the waiver issue.

The defendants filed a motion for summary judgment on the four counts. I already ruled that Count 4, that that will go to the jury, which is the gross negligence claim. Counts 1, 2 and 3, sounding negligence, the Court finds upon reviewing the record that the defendants -- the Court will grant summary judgment in favor of the defendant on Counts 1, 2 and 3. The Court finds that the waiver was valid. The Court finds that the waiver was clear and unambiguous. The waiver was a two-page document. The release was on one full page titled to "General Release of all Claims" with the heading, the language of the release was in bold print, and in summary read that the releasor releases, waives and forever discharges any and all claims that releasor may have or ever had or will have against Over the Line VI, LLC and others, including the boat owner and their president, former members, agents, employees, officers, directors, et cetera, including, but not limited to any and all claims for personal injury, property damage or wrongful death arising out of or relating to

the boating activities, or to the Charter Agreement between releasee and releasor dated June 13, 2021 in the use, operation, condition of the vessel, equipment, covered by such agreement.

There is no dispute that both plaintiffs signed the second page indicating their name, their address, and their name in print and in cursive.

There's no dispute that plaintiffs had an opportunity to read the waiver. They chose not to do so.

There is also no dispute -- no genuine issue of material fact in dispute that plaintiffs had the opportunity to ask questions. They chose not to do so.

There is also no general issue, material fact in dispute that plaintiffs had the opportunity to remove the clip covering the second page to see what they were signing, and the top of that had the general release continued language on it.

The Court finds that there is no genuine issue material fact that would preclude summary judgment on Counts 1, 2 and 3 in favor of the defendants. So with that said, the Court will proceed to trial on Count 4.

I'm going to rule on the diversity jurisdiction issue at a later time. I want to

* * *

C-E-R-T-I-F-I-C-A-T-E

I, DESIREE D. HILL, a Registered Merit Reporter and Notary Public for the U.S. Virgin Islands, Charlotte Amalie, St. Thomas, do hereby certify that the above transcript is a true and accurate representation of the proceedings to the best of my knowledge.

I further certify that I am not counsel, attorney or relative of either party, nor financially or otherwise interested in the event of this suit.

IN WITNESS WHEREOF, I have hereunto set my hand as such Certified Court Reporter on this the 13th day of November, 2023, at Charlotte Amalie, St. Thomas, United States Virgin Islands.

/s/
Desiree D. Hill, RMR

APPENDIX G

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

CHRISTINE THOMPSON,
Plaintiff,

v.

OVER THE LINE VI, LLC and JORDAN MAUPIN,
Defendants.

KRISTIN FLOWERS,
Plaintiff,

v.

OVER THE LINE VI, LLC and JORDAN MAUPIN,
Defendants.

Case No.: 3:21-cv-00070

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

Case No.: 3:22-cv-00033

PLAINTIFFS' OPPOSITION TO DEFENDANT'S RULE 56 MOTION

For the reasons set forth herein, it is respectfully submitted that Defendants' Rule 56 motion can be summarily denied once this Court has reviewed the facts, which confirm the Plaintiffs, as well as all of the other passengers on the charter in question, were never presented with a release. Instead, they were only asked to put their names and contact information on a paper attached to clipboard that had no release language as follows (hereinafter referred to as "The Photo"):

[CLIPBOARD GRAPHIC OMITTED]

With this brief comment in mind, the Plaintiffs will discuss the relevant facts.

I. Factual Background

The Plaintiffs have filed a response to Defendants' Rule 56.1 Statement of Facts, with supporting exhibits where a fact was not admitted. Thereafter, the Plaintiffs submitted the following counterstatement of facts with exhibits referencing the record, pointing out as follows (without the exhibit references, which are in Plaintiffs' Rule 56. 1 filing):

> 1. As she testified in her deposition (Exhibit 1, pp. 25-30), Christine Thompson was never shown any document that included the release language the Defendant claims she willingly agreed to,

as all she was asked to sign was a blank page on a clipboard, as shown in The Photo above, so that she never was shown any such waiver language or release. She also testified that Captain Maupin did not show any release language to her or discuss it with her. *Id.* at 29. She also testified as follows at pp. 26-27:

> Q. Okay. And at the top of this document, what is that? What does it say here?
>
> A. It says, general release of all claims, continued. That wasn't - - **that was covered up by the clipboard. As you will notice, the first two lines are empty, that because the clip was holding it on the clipboard covered up that portion.** So , when the clipboard was handed to my brother Dan, he signed the first spot available, as you can see the third spot down. And then we all just went from there. (Emphasis added).

Indeed, her interrogatory response asking about this document was the same as her sworn deposition testimony, answering Interrogatory 5 as follows (See Exhibit 7):

> 5. Describe the circumstances surrounding the execution of the subject Release Waiver, including whether You signed the

Release Waiver, where and when it was provided to you for signature and by whom, whether you read and/or had time to read said Release Waiver, and what your understanding of the Release/Waiver was at the time You signed.

Answer: I have never signed a Release Waiver, nor was I asked to do so, I did sign my name on a sheet of paper that was on a clip board which the Captain passed to us and asked that we put our contact information on the clip board. The top part of the paper was under the clip so my brother who signed first had to sign several lines down and the other passengers then followed the lead, with each of us putting our information on the next available line. There was no explanation for asking us to do that I heard, **but I assumed the Captain needed to know who was on the boat.** (Emphasis added).

2. As she testified in her deposition (Exhibit 2, pp. 16-21), Kristin Flowers was never shown any document that included the release language the Defendant claims she willingly agreed to, as all she was asked to sign was a blank page on a clip board, as depicted in The Photo above, so that she never was shown any such waiver language or release. She also testified that Captain Maupin did not show any release language to her or discuss it with her. *Id.*

at 19. Her sworn deposition testimony was consistent with her interrogatory response when questioned about this document, where she stated in response to Interrogatory 5 as follows (See Exhibit 8):

> 5. Describe the circumstances surrounding the execution of the subject Release Waiver, including whether You signed the Release Waiver, where and when it was provided to you for signature and by whom, whether you read and/or had time to read said Release Waiver, and what your understanding of the Release/Waiver was at the time You signed.
>
> Response: There was no Release/Waiver presented to us. I was asked to write down my name, address, phone number, email address and to sign the blank sheet with lines.

3. As he testified in his deposition (Exhibit 3), Dan Hartranft, who was a passenger on the same charter trip as the Plaintiffs, was also never shown a document that included the release language the Defendant claims he willingly agreed to, as all he was asked to sign was a blank page on a clipboard, as shown in The Photo above. Indeed, as he stated on page 19 of his deposition (Exhibit 3):

> Q. And what did you believe or what was your understanding about this paper was and why they were asking for this information?
>
> A. I assumed it was he wanted our contact information, you know, sending us something you know a mail or you know saying like they are clients for future business is what my first initial thought was.

Hartranft also testified as follows on page 19 of his deposition:

> Q. Okay. Were you able to see this title at the top, the general release of all claims, continued?
>
> A. I was not. You can see that I wrote on the third line down. **There was a large clip across the top of the clipboard that covered those - - that top portion of the page**, that's why I started on the third line. (Emphasis added).

4. The other three passengers on the same charter as the Plaintiffs, who were not deposed, have each provided sworn declarations stating as follows (See Exhibit 4 at ¶ 8, Exhibit 5 at ¶ 8 and Exhibit 6 at ¶ 9):

> When we boarded the boat earlier that morning, the Captain passed around a clip board asking us to give our names and contact information, but he never told us why, much less explain that it was suppose to be some type of release. This is the page I signed, which is the only piece of paper I saw, as he never turned it over or told us there was more writing on the back:
>
> [CLIPBOARD GRAPHIC OMITTED]

5. Captain Maupin, who was just hired by OTL on May 20, 2021, had never taken the vessel involved in this June 13, 2021, incident out on a charter prior to this charter. He claims he did take it out for a test drive by himself several days earlier, although he could not recall the date or where he went. Moreover, when he got on the boat the day of the charter, he had to ask his boss at OTL multiple questions, such as whether certain gauges and other items worked, suggesting he was not familiar with the vessel. See Exhibit 9.

6. Indeed, one passenger, Dan Hartranft, pointed out in his deposition that the Captain appeared totally unfamiliar with the vessel when he first got on the boat that day (See Exhibit 3), as did Thompson. See Exhibit 1.

7. In this regard, the Plaintiff's expert, Gary Manning, noted Maupin's lack of experience on pp. 3 and 11 of his report, attached as Exhibit L to Defendant's SOF, stating as follows:

> Captain Maupin claims he took it out by himself at some point before the charter, although he could not recall the date or exactly where he went. No one else, including the owner of OTP, Garth Hudson, was on board for this test drive. . . .
>
> Indeed, his texts before the trip began confirms he was not familiar with the boat before he took it out, as he asked very basic questions about its gauges and other matters he would have already known about if he had in fact conducted an appropriate sea trial.

8. Captain Manning also found Maupin's lack of experience with this vessel to be problematic, stating in part on pp. 10-11 of this report (Exhibit L):

> First, OTL should have had someone go out with Captain Maupin on the sea trial that Captain Maupin says he took. In this regard, the vessel is a Deep Impact 399 Sport boat, which has three 400 Mercury engines. It has "muscle," as it is designed to go

fast. As an on-line website selling Deep Impact 399 boats states (under the heading "FEEL THE POWER") (vesselvendor.com-Deep Impact 399 Sport Boat Review//Deep Impact Boats for Sale//Read Boat Reviews):

> The most notable feature of any boat is the motors that power it across the water. Some boats rely on merely one or two motors, but when speed is of the utmost importance, just a few motors will not be sufficient. The Deep impact 399 Sport boat is among the fastest boats on the market today due to the available triple or quadruple motor capacity.

The Outta Line had 3 Mercury 400 engines, with 1200hp, which are engines that are designed to go fast quickly according to Mercury's website. . . .

Moreover, while Hudson stated that he vetted Maupin before he hired him, he admitted in his deposition that he only confirmed Maupin had a Coast Guard license to operate vessels of this size. Being legally permitted to operate a vessel does not mean the captain has been properly trained or vetted on a particular charter vessel. In this case, based on the facts provided to me, OTL knew or should have

known that Maupin had not yet been properly vetted to take the Hartranft family out on such a charter. . . .

In short, allowing a captain to take out a boat for the first time on a sea trial by himself is not appropriate for deciding whether the captain can handle the boat with passengers. Indeed, the sea trial should have had at least one other seasoned captain, as well as some crew to serve as passengers, like the sea trial done by the marine surveyor in Florida before issuing his survey report. In short, it is important to be familiar with handling the boat with weight on it before taking out charter guests.

Indeed, not only is this boat is a high-performance boat with very powerful engines that should not be driven without experienced personnel overseeing the sea trial, it has a unique helm, as noted by the website of a Deep Impact dealer, under the heading "AT THE HELM":

> The captain of the boat has to be in full control at all times and on board the Deep Impact 399 Sport the captain is king. The helm design was essential in making the vessel easy to use with integrated large navigation screens as well as an overall ergonomic design. Unlike other helm

designs on the market today, the Deep Impact 399 Sport boat was designed with a recessed dashboard.

Clearly this type of helm requires a new captain to get used to it, which cannot be done in one sea trial. In fact, it appears Captain Maupin was distracted at the time of the incident while he was getting used to operating this vessel, as he throttled up too quickly and admits he did not see the incoming wave that struck the vessel, which at least one of the passengers saw.

9. Regarding the conduct of the Defendants, the report of Gary Manning (attached as Exhibit L to the Defendant's SOF) includes both his opinions and the facts he relies upon in reaching his opinions, which clearly provide ample support for a jury to find gross negligence as to each Defendant. In this regard, after discussing the relevant facts in detail in his report, which are incorporated herein by reference, Captain Manning concludes in part as follows:

- As to Defendant Maupin (on page 9), Captain Manning found:

  - Captain Maupin was unfamiliar with the vessel and was not properly vetted to operate the vessel at the time of the charter

that day;

- Captain Maupin did not maintain control of the vessel as he transitioned from the no-wake zone to the deeper part of the channel;

- Captain Maupin was speeding;

- Captain Maupin was not paying proper attention to the incoming waves, which he should have known could increase as he moved into the deeper water after leaving the no wake zone.

- Captain Maupin failed to avoid hitting a wave (seen by at least one passenger) while traveling at a high rate of speed.

He then concluded as follows on page 9 of this report as to Maupin:

The foregoing negligent acts all contributed to the vessel striking an incoming wave at a high rate of speed, raising the bow up abruptly and throwing the passengers into the air, which resulted in the injuries that occurred during this incident.

In summary, had Maupin operated

the vessel as required in this area when charter guests are on board, this incident would not have occurred. In short, boats do not jump out of the water for no reason—here, it was the captain's mishandling of the vessel that caused this incident. **Indeed, even Maupin admitted in a text that "it was his own fault."** (Emphasis added).

- As to Defendant OTL, Captain Manning found on page 12 of his report (Exhibit L) that OTL entrusted Outta Line to a captain it knew or should have known was not yet properly vetted to take this boat out with charter guests, pointing out the facts that support this finding on pages 10-12 of his report, which included these facts:

    - OTL had just purchased this used vessel for $328,000 in Miami and shipped it to St. Thomas, where it had just arrived a few days before this incident. It is hard to believe OTL's owner, Hudson, would even let Maupin take this vessel out without him on board, **especially since Maupin was just hired by OTL on May 22, 2021,** less than a month before

this alleged test drive and just three weeks before its first charter with the Hartranft party. (Emphasis added).

- Moreover, while Hudson stated that he vetted Maupin before he hired him, he admitted in his deposition that he only confirmed Maupin had a Coast Guard license to operate vessels of this size. Being legally permitted to operate a vessel does not mean the captain has been properly trained or vetted on a particular charter vessel.

- OTL should have had someone go out with Captain Maupin on the sea trial that Captain Maupin says he took. In this regard, the vessel is a Deep Impact 399 Sport boat , which has three 400 Mercury engines. It has "muscle," as it is designed to go fast.

- Allowing a captain to take out a boat for the first time on a sea trial by himself is not appropriate for deciding whether the captain can handle the boat with passengers. **Indeed, the sea trial should have had at least one other seasoned**

captain, as well as some crew to serve as passengers, like the sea trial done by the marine surveyor in Florida before issuing his survey report. In short, it is important to be familiar with handling the boat with weight on it before taking out charter guests. (Emphasis added).

- This type of helm requires a new captain to get used to it, which cannot be done in one sea trial. In fact, it appears Captain Maupin was distracted at the time of the incident while he was getting used to operating this vessel, as he throttled up too quickly and admits he did not see the incoming wave that struck the vessel, which at least one of the passengers saw.

With these facts in mind, it is now appropriate to review the applicable law.

II. Summary Judgment Standard

The Rule 56 standard is well known to this Court. As a general rule, a movant is entitled to summary judgment when they "show that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A factual dispute is "genuine" only if the

"evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of proving that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,323 (1986).

When the moving party has met that burden, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In assessing whether a non-movant has met their burden only those facts about which there is a "genuine" dispute must be viewed in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing Fed. R. Civ. P. 56(c)). Moreover, Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

In making this determination, the court must draw all reasonable inferences in favor of the non-moving party. *See Bd. of Educ. v. Earls,* 536 U.S. 822, 850, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). Once a genuine issue of fact is shown to exist, the Rule 56 motion must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

With this standard in mind, the arguments raised Defendant's Rule 56 motion can now be addressed.

III. Applicable Law/Argument

Plaintiffs do not dispute that federal law governs the issues raised by Defendants, which are all admiralty issues, eliminating the need to address that portion of Defendants' motion. With that preliminary comment in mind, Defendants have raised two issues in their Rule 56 motion, which will be addressed separately for the sake of clarity.

A. There are factual issues in dispute as to whether Plaintiffs were ever presented with a release, as they were only given a blank piece of paper to sign.

At the outset, it must be noted that the Supreme Court of the United States invalidated an exculpatory clause releasing a party from all negligence liability on public policy grounds in *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955). As noted in *Piché v. Stockdale Holdings, LLC,* 51 V.I. 657, 665-666 (D.V.I.2009):

> Since *Bisso,* there has been no clear consensus among circuit courts of appeal as to how *Bisso* should be read, and the United States Court of Appeals for the Third Circuit has not addressed the issue.

Thus, the waivers in question would appear to be void as a matter of law. However, in *Piché,* Judge Gomez went on to hold that the better view is that such waivers are valid. *Id.*

In this case, it is respectfully submitted that this Court need not reach that global determination, as no release was ever given to the Plaintiffs, nor did they sign one. Thus, whether such releases are valid under maritime law will not be addressed further at this juncture, although this objection is preserved in the event this Court finds there were signed releases in this case.

In this regard, Defendants argue that Plaintiffs claims are barred as they signed waiver forms with exculpatory clauses that released the Defendants from any liability for Plaintiffs' injuries. As this Court held in *Piché v. Stockdale Holdings, LLC,* 51 V.I. 657, 662 (D.V.I.2009), in order for such a waiver to be effective, the exculpatory clauses must be clear, holding:

> Under admiralty law, "it is universally agreed that exculpatory clauses ... **must 'be clearly and unequivocally expressed.'** " *Sander v. Alexander Richardson Investments,* 334 F.3d 712, 715 (8th Cir.2004) (quoting *Randall v. Chevron U.S.A., Inc.,* 13 F.3d 888, 905 (5th Cir.1994)). (Emphasis added).

The court in *Piché* then went on to hold, *id.* at 667:

> While not *per se* unenforceable, **to be valid, the Release must: (1) clearly and unequivocally indicate the intentions of the parties**, and (2) not be inflicted by a monopoly, or a party with excessive bargaining power. (Emphasis added).

These concepts are just common sense.

When applied to the facts in this case, construing them in favor of the Plaintiffs, it is clear a jury could find that Plaintiffs never agreed to any waiver language of any kind, as they were only presented with a clip board that had blank lines for each Plaintiff (as well as all other passengers) to simply sign their name and provide their contact information. In short, signing this document, without more, does not support a finding that Plaintiffs knowingly and willing waived any rights against the Defendants:

[CLIPBOARD GRAPHIC OMITTED]

A review of this document shows there are no exculpatory clauses on it. Likewise, there is no indication that this is the second page of any longer release document, nor did the captain ever explain otherwise to the Plaintiffs based on their sworn statements.

Indeed, construing the facts in a light most favorable to Plaintiffs, there was never any indication by the captain that this document was intended to release Defendants from liability, much less that there was supposedly some release language on the back side of the document they were asked to sign. Indeed, the passengers, including Plaintiffs, thought they were just providing their names and contact information for the charter company's use, such as further marketing or just simply knowing who was on the charter.

Moreover, the fact that they were never shown

the release language Defendants rely upon completely distinguishes the cases cited by Defendants, as the Plaintiffs in those cases did not argue that the page they signed had no release terms. *See, e.g., Matter of Carpe Diem 1969 LLC*, No. CV 2017-56, 2019 WL 3413841, at *6 (D.V.I. July 29, 2019)(plaintiff claimed she was told by the captain that the release did not apply to the charter, not that the page she signed had no release language on it); *DelPonte v. Coral World Virgin Islands, Inc.*, 233 F. App'x 178, 180–81 (3d Cir. 2007)(plaintiff claimed he did not read the release as he was in a hurry, not that the page she signed had no release language on it).

In short, if a person is not shown the release language or told it existed on the back page of the paper, there is no reason to find they are bound by that language. Indeed, as Captain Manning pointed out on page 3 of his report, attached as Exhibit L to Defendants' SOF:

> The charter guests state they were handed a clipboard with a paper they needed to sign, which they understood was to provide the Captain or OTL with their names and contact information, while the Captain says it was a release of liability waiver form. Photos of the clipboard show that the waiver was on one side of a piece of paper, with the signature lines on the other side. The signatures start several lines down, as the clip at the top of the board blocked the language at the top of the form, as well as the first few lines as follows:

[**NOTE**: Manning's Report inserts The Photo here]

> **Best practices would have had the guests initial the other side of this page to ensure that they did read it, which they all claimed they did not do, as they were unaware that any such language was on the other side, or that this was a purported release/waiver of any kind.** (Emphasis added).

Likewise, Defendants' assertion that the language at the top of the page "GENERAL RELEASE OF CLAIMS (continued) is somehow dispositive is incorrect, as that language is covered by the clip on the top of the clipboard, as noted by Captain Manning, as shown in The Photo, and as pointed out by both Thompson and Hartranft in their respective deposition. At best, there is also a factual issue as to whether this language was even visible, much less should have put the Plaintiffs on notice that other release language might exist.

As such, summary judgment must be denied on this issue, as there are genuine issues of fact in dispute as to what Plaintiffs were told and what they thought they were signing.

B. There are factual issues as to whether the Defendants' conduct constitutes gross negligence.

One preliminary comment is needed here. The Plaintiffs will not be seeking punitive damages at trial

due the lack of any real net worth of either defendant, among other reasons. As such, that portion of Defendants' Rule 56 motion is moot and need not be addressed further.

Thus, the only issue the Court needs to address here is whether there is sufficient evidence to create a genuine issue of fact regarding Defendants' gross negligence. In this regard, as also noted in *Piché v. Stockdale Holdings, LLC,* 51 V.I. 657, 662 (D.V.I.2009):

> It is also clear that an exculpatory clause may not exempt a party from liability for gross negligence. *See Broadley v. Mashpee Neck Marina, Inc.,* 471 F.3d 272, 275 n. 4 (1st Cir.2006); *Royal Ins. Co. of Am. v. S.W. Marine,* 194 F.3d 1009, 1016 (9th Cir.1999).

Accord, Jerome v. Water Sports Adventure Rentals and Equipment, Inc., d/b/a/ Island Flight Adventures, 2013 WL 692471 at *5 (D.V.I. 2013). In short, the issue of gross negligence is only relevant to defeating the effect of the two releases **IF** this Court (or a jury) finds they are in fact enforceable waivers.

In *Jerome,* id. at *9, the court defined gross negligence as follows:

> "Gross negligence, then, is conduct that presents 'an unreasonable risk of physical harm to another ... that ... is *substantially greater* than that which is necessary to make the conduct negligent.' " *Id.* at

385–86 (original emphasis, citations omitted).

The court in *Jerome,* id. at *10, then went on to hold that such questions generally create factual issues for the jury to resolve where the testimony is in dispute, holding:

> The Court may not resolve these genuine disputes of material facts at the summary judgment stage. Instead, it must view the facts in the light most favorable to Plaintiff, the nonmoving party. *Scott,* 550 U.S. at 380. The Court, therefore, will accept as true Plaintiff's account of the accident for purposes of determining whether the evidence supports a gross negligence claim.
>
> Accordingly, the Court must determine whether any "rational trier of fact[,]" *Matsushita,* 475 U.S. at 587, could conclude that a tour guide, while operating his jet ski under power and in violation of the established rules for the operation of the jet ski, was grossly negligent in colliding with a member of his own tour while she was swimming back to her jet ski following a snorkeling tour. The Court finds that a rational trier of fact could reach such a conclusion, determining that operating a jet ski in that fashion created an unreasonable risk of physical injury that is substantially greater than the risk of harm

> associated with ordinary negligence. *Thomas,* 780 F.Supp.2d 376 at 385–86.
>
> Because a rational trier of fact could conclude that IFA was grossly negligent, the Court will deny IFA's Motion to the extent it seeks summary judgment on that claim.

It is respectfully submitted that the same conclusion should be reached in this case.

In this regard, the report of the Plaintiff's expert, Captain Manning, sets forth conduct that a jury could find meets the gross negligence standard for both Defendants. See Exhibit L to Defendants SOF, as well as Plaintiffs' summary of that report in SOF ¶ 6 to ¶ 10. They are summarized below as follows:

- Captain Maupin was unfamiliar with the vessel and was not properly vetted to operate the vessel at the time of the charter that day;

- Captain Maupin did not maintain control of the vessel as he transitioned from the no-wake zone to the deeper part of the channel;

- Captain Maupin was speeding;

- Captain Maupin was not paying proper attention to the incoming waves, which he should have known could increase as he moved into the deeper water after leaving

the no wake zone.

- Captain Maupin failed to avoid hitting a wave (seen by at least one passenger) while traveling at a high rate of speed.

While Defendants contest these facts, that dispute is not a basis for granting summary judgement.

Moreover, the fact that Captain Manning did not use the term "gross negligence" is of no significance, as this Court, not a maritime expert, will explain this standard to the jury, who will thereafter weigh the facts as presented, including those in Captain Manning's report. In short, a plaintiff is not required to have an expert utilize this term in order to defeat a Rule 56 motion. As such, summary judgment is not appropriate on this issue either, as the evidence at this juncture simply creates a dispute for the jury to resolve.

IV. Conclusion

For the reasons set forth herein, it is respectfully submitted that Defendants' Rule 56 should be denied, as there are genuine issues of fact in dispute as to whether Plaintiffs were ever shown, much less informed about, any waiver or release language. Likewise, the issue of gross negligence is for the jury to resolve (if needed).

Dated: August 28, 2023

/s/ Joel H. Holt

Joel H. Holt, VI Bar No. 6
Law Office of Joel H. Holt, Esq. P.C.
2132 Company Street
Christiansted, VI 00820
T: (340) 773-8709 / F: (340) 773-8677
holtvi@aol.com/joelholtpc@gmail.com

John P. Fischer
15-B Norre Gade
P.O. Box 1197
Charlotte Amalie, St. Thomas
U.S. Virgin Islands 00804
Telephone: (340) 715-5297
Fax: (888) 519-7138 / (305) 520-0323
John@frtriallawyers.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of August, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Matthew J. Duensing, Esq
Joseph D. Sauerwein, Esq.
Law Offices of Duensing & Casner
9800 Buccaneer Mall, Bldg. 2, Suite 9
P.O. Box 6785 St Thomas, VI 00804
mduensing@vilawyers.com
jsauerwein@vilawyers.com

/s/ Joel H. Holt

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED
PETITION NO. 23-3110 AND 23-3111

CHRISTINE THOMPSON,
Appellant,

v.

OVER THE LINE VI, LLC AND JORDON MAUPIN,
Appellees.

KRISTIN FLOWERS,
Appellant,

v.

OVER THE LINE VI, LLC AND JORDON MAUPIN,
Appellees.

BRIEF OF APPELLANTS
[EXCERPT]

On Appeal from the United States District Court
of the Virgin Islands,
St. Croix Division
Civil Nos. 3:21-cv-00070 and 3:22-cv-00033
(Hon. Robert A. Molloy, Chief Judge)

Attorney for Appellants

Joel H. Holt
Law Office of Joel H. Holt, Esq., P.C.
2132 Company Street
Christiansted USVI 00820
T: (340) 773-8709
E: holtvi@aol.com /
joelholtpc@gmail.com

* * *

The case then proceeded to trial on the gross negligence claims. JA 3-10. Both parties called multiple witnesses, including maritime experts, at trial. Thompson also put on extensive evidence about her medical treatment, including her subsequent back surgery, her significant $1,720,430 in economic damages (that were not contested at trial) and her resulting total disability by Social Security JA 632-636.

Flowers also had back surgery subsequent to the excursion. JA 636-637. At trial, she attempted to call one of her treating physicians, Dr. Steinke, on causation, but the court granted the motion in limine to exclude his testimony, as will also be discussed in further detail below, with appropriate cites to the Joint Appendix. As a result, her case was dismissed pursuant to Rule 50 after a proffer as to her expected testimony. JA 11-28.

The jury then returned a verdict in favor of the Appellees that found no gross negligence, resulting in the dismissal of Thompson's claim as well. After the Judgments were entered, this appeal ensued.

SUMMARY OF ARGUMENT

The district court granted summary judgment on the three negligence counts of each Appellant, finding that the language on the back of a blank page attached to a clipboard that each was asked to sign had waiver language that barred their negligence claims.

However, there were genuine issues of fact in dispute as to whether the waiver language was "clearly and unequivocally" communicated, as neither Appellant knew this language existed, or saw it, as they were simply asked to sign the page presented to them without any explanation as to what it was or that there was language on the back of the clipped page that waived any of their rights. As such, there was no informed knowledge of voluntary waiver of any such claims.

The district court also barred the causation testimony of Flowers' then treating doctor. While the doctor had not been identified as an expert pursuant to Rule 26 (a)(2)(A) and (B), his testimony was not prejudicial to the Appellees, as he had been listed as a trial witness, his records had been produced, his causation opinion was identical to the IME opinion of Appellee's expert and defense counsel was able to fully cross-examine him on all issues. Hence, it was error to exclude it under F.R.Civ.P. 37(c)(1), as the failure to comply with Rule 26 was harmless.

ARGUMENT

I. The District Court Erred by Granting Summary Judgment as to the Waiver Issue, as there were genuine issues of fact that should have been resolved by the jury.

A. Standard of Review for Issue I:

This Court has plenary review over the District Court's decision to grant the Appellees' motion for

summary judgment. *See, e.g., Anglemeyer v. Ammons*, No. 22-2788, at *6, __F.4th __, 2024 WL 464016 at *1 (3d Cir. Feb. 7, 2024).

B. Argument

It is well established that a bona fide waiver will negate a claim for negligence in a boating incident, while the waiver will not bar a gross negligence claim. *See, e.g., Piché v. Stockdale Holdings, LLC,* 51 V.I. 657, 662 (D.V.I.2009). Thus, the issue in this case is whether the waiver in question was enforceable as a matter of law, as determined by the court, thus barring Appellants' multiple negligence counts. The evidence in the record regarding the waiver issue will be discussed first before setting forth the argument as to why the court erred in granting summary judgment on this issue.

(1) The Summary Judgment Evidence

OTL and Maupin moved for summary judgment (JA 175-197), filing a separate Rule 56.1 Statement of Facts. JA 198-319. In that filing, OTL attached a two page waiver document, along with the deposition testimony of Captain Maupin claiming the passengers understood they were signing a waiver form. JA 213-214.

Appellants filed an opposition (JA 320-324), along with their own Rule 56.1 Counterstatement of Fact. JA 335-439. As for the two page document submitted by Appellees that contained the express "waiver of claims" language, the passengers all stated

they did not see it, as they were only presented with a document *on a clipboard* with signatures lines, which they were told to sign and add their contact information. JA 340-341, 347-406, 418-433 After the incident, and hours after the document had been signed, Maupin took a screenshot of this page ("Maupin Photo"), which he sent by text to OTL's owner (JA 341):

[CLIPBOARD GRAPHIC OMITTED]

In their opposition to summary judgment, Thompson and Flowers filed a Rule 56.1 Counterstatement of Facts that set forth their facts in opposition to the Rule 56 motion, which are the precise facts the court had to consider in making its Rule 56 ruling, quoted here verbatim (except the photo above is deleted) (JA 340-342):

> 1. Christine Thompson testified under oath in her deposition that she was never shown any document that included the release language the Defendant claims she willingly agreed to, as all she was asked to sign was a blank page on a clipboard, seen on the second page of the text chain marked as Exhibit 5 in her deposition, identical to what is shown in response to DSOF #20 above, and that she never was shown any such waiver language as depicted in Exhibit 1 of her deposition. See Exhibit 1 attached hereto at p. 25-27, 27-28, 29-30. This testimony is consistent with her interrogatory response when

questioned about this document, where she stated in response to Interrogatory 5 as follows (See Exhibit 7):

> 5. Describe the circumstances surrounding the execution of the subject Release Waiver, including whether You signed the Release Waiver, where and when it was provided to you for signature and by whom, whether you read and/or had time to read said Release Waiver, and what your understanding of the Release/Waiver was at the time You signed.
>
> Answer: I have never signed a Release Waiver, nor was I asked to do so, I did sign my name on a sheet of paper that was on a clip board which the Captain passed to us and asked that we put our contact information on the clip board. The top part of the paper was under the clip so my brother who signed first had to sign several lines down and the other passengers then followed the lead, with each of us putting our information on the next available line. **There was no explanation for asking us to do that I heard, but I assumed the Captain needed to know who was on the boat.** (Emphasis added).

2. Kristin Flowers testified in her deposition that she was never shown any document that included the release language the Defendant claims she willingly agreed to, as all she was asked to sign was a blank page on a clip board, seen on the second page of the text chain marked as Exhibit 5 in her deposition, identical to what is shown in response to DSOF #20 above, and that she never was shown any such waiver language as depicted in Exhibit 1 of her deposition. See Exhibit 2 attached hereto at pp. 16-19, 22-23. This testimony is consistent with her interrogatory response on this issue, as follows (See Exhibit 8):

> 5. Describe the circumstances surrounding the execution of the subject Release Waiver, including whether You signed the Release Waiver, where and when it was provided to you for signature and by whom, whether you read and/or had time to read said Release Waiver, and what your understanding of the Release/Waiver was at the time You signed.
>
> Response: There was no Release/Waiver presented to us. I was asked to write down my name, address, phone number, email address and to sign the blank sheet with lines.

3. Dan Hartranft, a passenger on the same charter trip as the Plaintiffs, testified under oath in his deposition that he was never shown any document that included the release language the Defendants claim he willingly agreed to, as all he was asked to sign was a blank page on a clipboard, seen on the second page of the text chain marked as Exhibit 5 in his deposition, identical to what is shown in response to DSOF #20 above, and that he never was shown any such waiver language as depicted in Exhibit 1 of his deposition. See Exhibit 3 attached hereto at pp. 16-21, 44-45. As Hartranft testified on page 19:

> Q. And what did you believe or what was your understanding about this paper was and why they were asking for this information?
>
> A. I assumed it was he wanted our contact information, you know, sending us something you know a mail or you know saying like they are clients for future business is what my first initial thought was.

4. The other three passengers on the same charter as the Plaintiffs, who were not deposed, have each provided sworn declarations stating as follows (See Exhibit 4 at ¶ 8, Exhibit 5 at ¶ 8 and Exhibit 6 at ¶ 9, all attached hereto):

> When we boarded the boat earlier that morning, the Captain passed around a clip board asking us to give our names and contact information, but he never told us why, much less explain that it was suppose to be some type of release. This is the page I signed, which is the only piece of paper I saw, as he never turned it over or told us there was more writing on the back:

[**NOTE**: Declarations had the Maupin Photo inserted here]

5. Captain Manning, Plaintiffs' maritime expert, pointed out on page 3 of his report, attached as Exhibit L to Defendants' SOF:

> The charter guests state they were handed a clipboard with a paper they needed to sign, which they understood was to provide the Captain or OTL with their names and contact information, while the Captain says it was a release of liability waiver form. Photos of the clipboard show that the waiver was on one side of a piece of paper, with the signature lines on the other side. The signatures start several lines down, as the clip at the top of the board blocked the language at the top of the form, as well as the first few lines as follows:

[**NOTE**: Manning's Report had the Maupin Photo here]

> **Best practices would have had the guests initial the other side of this page to ensure that they did read it, which they all claimed they did not do, as they were unaware that any such language was on the other side, or that this was a purported release/waiver of any kind.** (Emphasis added).

As can be seen, each of these facts was supported by either sworn deposition testimony, verified interrogatory responses and/or sworn declarations of every passenger on the boat, including Thompson and Flowers, all of which was attached to their Rule 56.1 filing. JA 347-433.

In short, Thompson and Flowers established that they never saw the "waiver of claims" language, nor were they ever told by Maupin what the document was, or that there was additional language on the back of the document clipped to the clipboard, which every other passenger confirmed.

It should be noted that there are words within the clip shown in the photo taken by Maupin that say "GENERAL RELEASE OF ALL CLAIMS (continued)". However, Dan Hartranft, who was the first person who signed the document, stated in his deposition (submitted with the Rule 56.1 filing) as follows (JA 395-399, 405):

Q. Okay. And prior to leaving the dock, did he provide anything for you or the passengers to sign?

A. He gave us a clipboard and asked us to put our contact information on it.

Q. Okay. And who did he give the clipboard to first?

A. Me.

Q. And in providing that to you, did he give you any kind of indication about what it was?

A. He just said he needed our information. He says, I need your name, email, phone number, address.

…

Q. And what did you believe or what was your understanding about what this paper was and why they were asking for this information? A. I assumed it was -- he wanted our contact information, you know, sending us something you know a mail or you know saying that they are like clients for future business is what my first initial thought was.

…

Okay. Were you able to see this title at the top, the general release of all claims, continued?

A. I was not. You can see that I wrote on the third line down. **There was a large clip across the top of the clipboard that covered those – that top portion of the page, that's why I started on the third line**. …

Q. And I am going to show you page 2. Do you recognize the second picture on page 2 of Exhibit 5?

A. It's the document you just showed me with a -- yes.

Q. And is this how the document was presented to you on the day of the incident?

A. I don't believe so, no.

Q. You don't -- and what is different about how this is portrayed?

A. The clip that was on the front of it covered more of the lines, or I would have started writing up further. I believe it was one of those clipboards that has a large silver clip at the top of it.

Q. Okay. So, you believe that this is a different clipboard?

A. Yes, I do.

…

Q. Okay. Did you make any effort to look on any other side of it, or were you just -- you just signed it and passed it on?

A. I just basically put my information on it and passed it on. It was a blank piece of paper in my mind.

Q. I understand. Were you concerned --

A. There was nothing on --

Q. Sorry, what was that?

A. There was nothing on it. He didn't present us anything, other than please give us your information. (Emphasis added)

Thompson gave similar testimony in her deposition (submitted with the Rule 56.1 filing) as well (JA 354-357):

Q. Okay. And at the top of this document, what is that? What does it say here?

A. **It says, general release of all claims, continued. That wasn't -- that was**

covered up by the clipboard. As you will notice, the first two lines are empty, that's because the clip was holding it on the clipboard covered up that portion. So, when the clipboard was handed to my brother Dan, he signed the first spot available, as you can see the third spot down. And then we all just went from there.

Q. Okay. And I believe you said that you signed this because you thought it was just an itinerary of the people that were on the boat or some sort of promotional --

A. Yeah.

…

Q. Okay. I am going to show you, this is page 2 of Exhibit 5. Does this look like the clipboard from the day of the incident?

A. Okay. The part with the written typed out statement, no. We were never given that. We were never shown that. We never discussed that. The second part where there are signatures, it -- yeah, it was basically about it.

Q. Okay. But then this is the clip you contend was blocking everything?

A. I'm not sure if that was the exact

clipboard or not. I don't know for certain. (Emphasis added).

Flowers also gave similar deposition testimony(submitted with the Rule 56.1 filing) as follows (JA 373-378):

Q. Okay. Did he give you anything to sign?

A. The -- he did pass around, and I did receive a clipboard with lines on it and was asked to sign my name.

…

Q. Okay. I am going to scroll down to page -- the second page of this exhibit. And do you recognize this exhibit, this document?

A. Yes. This is -- I recognize the document, but it's not on a clipboard, so it does look different. …

Q. Okay. And at the top of the document it says, general release of all claims continued; correct?

A. Correct.

Q. Okay. And did you see that writing on the day of the incident?

A. No. Because it was -- the clipboard was at the top, so it was -- had the --

the -- it was on the clipboard, so it had the clip portion of it at the top.

…

Q. Did you hear the captain say anything at all about this document or the clipboard itself?

A. No.

…

Q. Okay, Is this how the clipboard was presented to you?

A. I believe so. I don't know for a fact. You know because we did -- I don't know for sure but that's -- that's the document I signed.

Q. Okay. And was there --

A. I don't know if the paper was moved. (Emphasis added).

In fact, Captain Maupin testified that he submitted texts with multiple photos to OTL's owner, Garth Hudson (JA 436), which texts were submitted with Appellant's Rule 56.1 SOF. These photos show he took multiple pictures of other documents on the clipboard that day, with the first one being a photo of his handwritten statement on the clipboard (JA 409):

[GRAPHIC OMITTED]

He then took a photo of the typed page of the release and then a photo of the side with the signatures, as shown in the text chain (JA 410):

[GRAPHIC OMITTED]

Thus, Captain Maupin *moved* the pages on the clipboard when taking these photos, so that it is unknown what was actually visible at the top of the page signed by the passengers when they signed it. Moreover, even if the language at the top had been visible—a question of fact---what does "continued" mean? Continued where? The other side of the page? OTL's office? OTL's website?

In summary, Thompson and Flowers both testified in their respective depositions (submitted with the Rule 56.1 filing) that they never knew that there was any "waiver of claims" language on the back of the document, nor did they ever see it, as Maupin never told them about it or explained the document to them, as stated in their respective depositions (JA 354-357, 372-379) and in their respective verified interrogatory responses. JA 426-428, 429-433.

Finally, as noted, Thompson and Flowers submitted an opinion from a marine expert, who charters vessels, with their Rule 56.1 filing that stated in part, after noting the disputed testimony about the waiver in question, that it would have been best if Appellants had been asked to initial both pages to make sure they were aware of the waiver language on

the back side of the clipped document. JA 342 While there is no such *requirement*, there is also no legal requirement for someone to turn over a page on a clipboard if they have no understanding that there is language on the other side of the page, as the court found as a matter of law, rather than allowing the jury to weigh this argument. In fact, they thought putting their name and contact information on the page presented to them on the clipboard was all they were requested to do, negating any reason to turn the page over.

With this understanding of the evidence in the summary judgment record, it is now appropriate to first review the court's ruling before addressing the applicable law and facts in dispute.

(2) The Court's Ruling

The court did not write an opinion on its summary judgment ruling, but simply placed it on the record right before the trial began, stating in full (JA 3-9):

> THE COURT: Okay, Counsel. Good morning, once again. There are some preliminary issues I wanted to address. First thing, I'm going to rule on the waiver issue.
>
> The defendants filed a motion for summary judgment on the four counts. I already ruled that Count 4, that that will go to the jury, which is the gross negligence

claim. Counts 1, 2 and 3, sounding negligence, the Court finds upon reviewing the record that the defendants – the Court will grant summary judgment in favor of the defendant on Counts 1, 2 and 3. The Court finds that waiver was valid. The Court finds that waiver was clear and unambiguous. The waiver was a two-page document. The release was on one full page titled to "General Release of all Claims" with the heading. The language of the release was in bold print, and in summary read that the releasor releases, waives and forever discharges any and all claims that releasor may have or ever had or will have against Over the Line VI, LLC and others, including the boat owner and their president, former members, agents, employees, officers, directors, et cetera, including, but not limited to any and all claims for personal injury, property damage or wrongful death arising out of or relating to the boating activities, or to the Charter Agreement between releasee and releasor dated June 13, 2021 in the use, operation, condition of the vessel, equipment, covered by such agreement. There is no dispute that both plaintiffs signed the second page indicating their name, their address, and their name in print and in cursive. There's no dispute that plaintiffs had an opportunity to read the waiver. They chose not to do so.

> There is also no dispute -- no genuine issue of material fact in dispute that plaintiffs had the opportunity to ask questions. They chose not to so.
>
> There is also no general issue, material fact in dispute that plaintiffs had the opportunity to remove the clip covering the second page to see what they were signing, and the top of that had the general release continued language on it.
>
> The Court finds that there is no genuine issue material fact that would preclude summary judgment on Counts 1, 2 and 3 in favor of the defendants.

(3) Discussion

As noted by the Fifth Circuit, which has addressed the overwhelming majority of maritime cases, in *Randall v. Chevron U.S.A., Inc.,* 13 F.3d 888, 905 (5th Cir.1994) in admiralty law:

> [I]t is universally agreed that exculpatory clauses ... **must 'be clearly and unequivocally expressed.** (Emphasis added).

Accord, *Sander v. Alexander Richardson Investments,* 334 F.3d 712, 715 (8th Cir.2004); *Piché v. Stockdale*

Holdings, LLC, 51 V.I. 657, 662 (D.V.I.2009).[4]

Whether the facts of this case demonstrate as a matter of law that Thompson and Flowers signed a document that met this criteria must be viewed on appeal pursuant to this Court's Rule 56 standard. As stated in *In re Processed Egg Prods. Antitrust Litig.*, 881 F.3d 262, 267-68 (3d Cir. 2018):

> Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We evaluate the record "in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Burns v. Pa. Dep't of Corr.* , 642 F.3d 163, 170 (3d Cir. 2011) (internal quotation marks omitted).

Moreover, as was articulated years ago in *Armbruster v. Unisys Corp.,* 32 F.3d 768, 777 (3d Cir.1994) as follows:

---

[4] *Piche* also discussed whether such releases were enforceable in light of the U.S. Supreme Court holding in *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955), which several Circuits had subsequently distinguished in upholding such waivers, but also noting that the Third Circuit had not yet addressed this issue. *Id.* at 665-666. *Piche* did point out, however, that this Court had upheld such a release in another case arising from the Virgin Islands, *Delponte v. Coral World V.I., Inc.,* 233 Fed. Appx. 178 (3d Cir. May 16, 2007). *Id.* at 667.

> At the summary judgment stage, **a court may not weigh the evidence or make credibility determinations; these tasks are left to the factfinder.** (Emphasis added).

When applied to the facts in this case, it is respectfully submitted that the court erred in dismissing this case pursuant to this Rule 56 standard.

In this regard, it is clear a jury could find that neither Thompson nor Flowers ever knowingly agreed to any waiver language, as they were only presented with a clip board that had blank lines, without any exculpatory language on the document they signed, as existed in the release in *Delponte v. Coral World V.I., Inc.,* 233 Fed. Appx. 178, 180-181 (3d Cir. 2007).

Likewise, a jury could reasonably find that Thompson and Flowers thought the document was simply intended to provide the charterer with their name and contact information, or for marketing, as they testified to, which explains why they did not ask further about it or turn it over, without knowing there was language on the back of the page. *Compare, Chepkevich v. Hidden Vally Resort, L.P.,* 607 Pa. 1, 2 A. 3d 1174, 1176 (Pa.2010)(Release valid since it was on one single printed page).

Moreover, a jury could also find based on this record there is no readily visible indication that this is the second page of any longer release document, as Hartranft, Thompson and Flowers all testified that the language at the top of the page was covered up.

Indeed, Hartranft, Thompson and Flowers all disputed that Maupin's photo taken after the incident accurately showed the document as it existed on the clipboard when they signed it, since the photo appears to show language within the clip about a release. In fact, Hartranft questioned whether this was even the same clipboard.

Likewise, even if that language at the top of the page had been visible, a jury could reasonable conclude that it was insufficient to put Thompson and Flowers on notice that there was language on the back of the page or that they had just signed a waiver of their negligence claim.

Based on this record, a reasonable jury could certainly disagree with the Court's factual findings that Thompson and Flowers should have asked more questions, or removed the page so they could see the language at the top of the page and then turn the document over, as there is sufficient evidence in this record for the jury to conclude that there no reason for them to do so. To the contrary, a jury could find they neither Thompson nor Flowers had any reason to suspect they were being asked to do anything other than provide the charterer with their name and contact information, or for the charterer's marketing use, so that further inquiry into what they were signing was not needed.

In summary, construing the facts in a light most favorable to Thompson and Flowers, there was never any indication by the captain that this document was intended to release Defendants from liability, much

less that either Thompson or Flowers should have realized that there was any waiver language on the back side of the document clipped to a clipboard that was handed to them to sign. As such, it was error not to submit these factual issues for the jury to consider at trial, so they could weigh all of this evidence, as well as the credibility of the witnesses, rather than dismissing the negligence claims as a matter of law based on this record.

Dated: February 16, 2024

/s/ Joel H. Holt
Joel H. Holt, V.I. Bar #6
2132 Company Street
Christiansted, St. Croix
USVI, 00820
T: (3400 773-8709
F: 340-773-8677
holtvi@aol.com/joelholtpc@gmail.com

CERTIFICATE OF GOOD STANDING

I hereby verify that I have been admitted to the Third Circuit Bar and am a member in good standing.

/s/Joel H. Holt

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that the foregoing brief complies with the typed 13,000 word limitation set forth in Fed. R. App. P. 32 (a)(7)(B), as it consists of 7659 words,

exclusive of the items excludable under FRAP 32 (f).

I further certify that this document complies with the type face requirements of Fed. R. App. P. 32 (a)(5) and type style requirements of Fed. R. App. P. 32 (a)(6), because it has been typed in proportionally spaced type face using Microsoft word in 14 pt. size and Times New Roman font.

/s/ Joel H. Holt

CERTIFICATE OF COMPLIANCE WITH IDENTICAL TEXT AND VIRUS DETECTION PROGRAM

Pursuant to Third Circuit LAR 31.1(c), I hereby certify that the text in the electronic version of this brief are identical to the text in the paper copies of this brief and that a virus detection program was used, Avast Antivirus Version 240216-2, before electronically filing this document.

/s/ Joel H. Holt

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED
PETITION NO. 23-3110 AND 23-3111

CHRISTINE THOMPSON,
Appellant,

v.

OVER THE LINE VI, LLC AND JORDAN MAUPIN,
Appellees.

KRISTIN FLOWERS,
Appellant,

v.

OVER THE LINE VI, LLC AND JORDAN MAUPIN,
Appellees.

APPELLEES' BRIEF
[EXCERPT]

On Appeal from the United States District Court
of the Virgin Islands,
St. Thomas Division

Civil Nos. 3:21-cv-00070 and 3:22-cv-00033
(Hon. Robert A. Molloy, Chief Judge)

Attorney for Appellants

Joel H. Holt
Law Office of Joel H. Holt, Esq., P.C.
2132 Company Street
Christiansted USVI 00820
T: (340) 773-8709
E: holtvi@aol.com /
joelholtpc@gmail.com

Attorneys for Appellees

Matthew J. Duensing
Joseph Sauerwein
9800 Buccaneer Mall, Bldg. 2, Suite 9
P.O Box 6785
St. Thomas, Virgin Islands
(340) 774-6011
mduensing@vilawyers.com
jsauerwein@vilawyers.com

* * *

excursion leave Compass Point Marina. JA 202-203. Shortly after departure, the boat encountered a wave that caused Thompson to be displaced from her seat in the bow of the boat. JA 306. After stopping the boat to assist Ms. Thompson, Captain Maupin drove to a marina on the east end of St. Thomas where Thompson was helped out of the vessel and taken to the hospital via taxi. JA 306. The rest of the Charter Party, including Appellant Flowers, resumed their excursion with Captain Maupin and engaged in snorkeling and other activities without reporting any

injury to Appellees. JA 290. Only when she filed her lawsuit did OTL and Captain Maupin became aware of Flowers' alleged injury.

SUMMARY OF ARGUMENT

Appellants first argue that a genuine issue of fact existed as to whether they had sufficient notice that the document they signed was a liability waiver. As determined by the District Court, this argument fails as a matter of law. It is undisputed that Captain Maupin gave Appellants the release waiver while the boat was still at the dock. It is further undisputed that there was sufficient time to read, review or question the release waiver before signing. Appellants both admit they signed the Waiver but allege they did so without reading or questioning it. Captain Maupin reasonably relied in good faith on the representation that by signing Appellants were aware of the terms and conditions before participating in the voluntary, recreational boating activity.

The release waiver is a two-sided document. The front contains full page text in standard font size under a bold and capitalized header, bearing: "**GENERAL RELEASE OF ALL CLAIMS**." The signature page is on the back of document with spaces for passengers to print and sign their name and enter their address. Clearly displayed at the top of the signature page in bold and capitalized text was the header: "**GENERAL RELEASE OF ALL CLAIMS (CONTINUED)**." Despite the clear and unambiguous language of the release waiver, Appellants now seek to escape the consequences of their voluntary action by

claiming they didn't know what they were signing. However, the law is clear that the failure to read a release waiver does not create a genuine issue of material fact preventing summary judgment on enforceability of the document.

On the second issue, Appellant Flowers argues that the District Court abused its discretion by precluding use at trial of the deposition testimony of Dr. Brian Steinke.[3] The Court determined that as a non-expert treating physician, Dr. Steinke was prevented from offering an opinion on causation. In support of this ruling, the Court cited Dr. Steinke's admission that he first treated Flowers almost two years after the boating incident. Moreover, the Court found that because Dr. Steinke only reviewed prior treatment records *for the first time* during the deposition, those records could not have been relied upon in his treatment of Flowers.

Flowers then asked Dr. Steinke in his deposition testimony to render an opinion on treatment by another doctor, Dr. Heim, and comment on the report of Appellees' medical expert, Dr. Orlando Fernandez. The District Court did not bar Dr. Steinke from testifying at trial either live or remotely via videoconference. Nor did the Court prevent Flowers from calling either Dr. Heim or Fernandez to testify at trial. After reviewing the proffered deposition testimony, the District Court properly ruled that it

---

[3] Dr. Steinke's deposition was taken on November 10, 2023, the Friday preceding the Monday trial.

was not admissible testimony from a treating doctor, because it did not arise from his treatment. Even if this evidentiary ruling were an improper abuse of discretion, it would be harmless error because jury found insufficient evidence to establish gross negligence in any event.

ARGUMENT

I. The Release Waiver is Enforceable as a Matter of Law

As Appellants concede, "a bona fide waiver will negate a claim for negligence in a boating accident." Appellants' Brief p. 11. The Release Waiver here is an enforceable maritime contract that is clear and unambiguous, consistent with public policy, and not an adhesion contract. It is undisputed that Appellants had ample time and opportunity to read and consider and question the release waiver before they voluntarily signed. Appellants' alleged failure to read before signing does not create a genuine issue of material fact or preclude enforceability of the waiver if they had as opportunity to do so. *In re Complaint of Carpe Diem 1969 LLC*, 2019 U.S. Dist. LEXIS 127744, 19-20 (D.V.I. 2019); *citing Delponte v. Coral World V.I., Inc.*, 233 Fed. Appx. 178, 180-181 (3d Cir. 2007).

A. *Admiralty Law Applies*

District Courts of the United States "have original jurisdiction . . . of [a]ny civil case of . . . maritime jurisdiction." *See* 28 U.S.C. § 1333(1). The Admiralty Clause of the U.S. Constitution brings such

cases within federal jurisdiction. *See Smolnikar v. Royal Caribbean Cruises, Ltd.*, 787 F. Supp. 2d 1308, 1315 (11th Cir. 2011) ("Federal maritime law applies to actions arising from alleged torts 'committed aboard a ship sailing in navigable waters.'"); *see also Piché v. Stockdale Holdings, LLC*, 51 V.I. 657, 662-63 (D.V.I. 2009) (holding that federal maritime law applied to plaintiff's claim that he was injured while a passenger on defendant's vessel). The Court applies substantive federal admiralty law to claims within the court's admiralty jurisdiction. *Interested Underwriters at Lloyd's v. Haulover Marine, Inc.*, 866 F. Supp. 235, 236-37, 30 V.I. 334, 30 V.I. 344 (D.V.I. 1994).

Federal admiralty common law recognizes the enforceability of liability waivers under certain circumstances. *In re Complaint of Carpe Diem 1969 LLC*, No. 2017-56, 2019 U.S. Dist. LEXIS 127744, at *11 (D.V.I. July 29, 2019). Specifically, admiralty law requires an exculpatory clause to be "(1) clear and unambiguous; (2) not inconsistent with public policy; and (3) not an adhesion contract" to be enforceable. *Id.,* citing *Olmo v. Atl. City Parasail, LLC*, 2016 U.S. Dist. LEXIS 56572, at *23 (D.N.J. 2016).

Concerning language of an exculpatory clause, the Courts have held "[a] maritime contract 'should be read as a whole and its words given their plain meaning unless the provision is ambiguous.'" *Piché v. Stockdale Holdings, LLC*, 51 V.I. 657, 667 (D.V.I. 2009) (quoting *Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 955 (5th Cir. 1984)). A liability waiver "must: (1) clearly and unequivocally indicate the intentions of the parties, and (2) not be inflicted by a monopoly, or a

party with excessive bargaining power" to be enforceable. *Piché*, 51 V.I. at 657 (citing, generally, *Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 274 (1st Cir. Mass. 2006); *Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 717 (8th Cir. Mo. 2003); and *Royal Ins. Co. of Am. V. Southwest Marine*, 194 F.3d 1009, 1014 (9th Cir. Cal. 1999)). Additionally, exculpatory clauses "should be construed to cover all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties…." *Piché*, 51 V.I. at 667 (quoting *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981)). Broad language exempting a party from "all…causes of action of whatever kind or nature…unambiguously evidences the parties' intent to exempt the defendants from liability." *Piché*, 51 V.I. at 668. Contracts must be viewed in their entirety: "all writings that are part of the same transaction are interpreted together." *In re Complaint of Carpe Diem*, 2019 U.S. Dist. LEXIS 127744 at *11.

Here, the release waiver is a provision of a maritime contract for a voluntary, recreational boating activity in the coastal waters of the U.S. Virgin Islands. *See In re Complaint of Carpe Diem 1969, LLC*, 2019 U.S. Dist. LEXIS 127744, at *9 (D.V.I. 2019). The front of the document contains the exculpatory language, while the back contains Appellants' signatures memorializing their assent to the exculpatory clause. The front and back are to be read together as one document, constituting the release waiver. The release waiver was signed while at the dock before Appellants' boat charter in navigable waters. Appellants' claims concern an incident that

occurred at sea. Therefore, admiralty law is the proper authority to determine enforceability of the release waiver.

B. *Appellants' Alleged Failure to Read the Waiver Does Not Create a Genuine Issue of Material Fact*

Appellants argue that Summary Judgment was improper, as Appellants "established that they never saw the 'waiver of claims' language, nor were they told by [Appellee Jordan] Maupin what the document was, or that there was additional language on the back of the document." Appellants' Brief, p. 15. Appellants' alleged failure to read the document does not create a genuine issue of material fact as to enforceability of the release waiver. A defendant is entitled to rely in good faith upon the reasonable appearance of consent that plaintiff creates. *Morgan v. Water Toy Shop, Inc.*, 2018 U.S. Dist. LEXIS 61546, 26 (D.P.R. 2018). This Honorable Court has consistently held that whether a plaintiff read the release waiver was irrelevant if they were given the opportunity to do so. *In re Complaint of Carpe Diem 1969 LLC*, 2019 U.S. Dist. LEXIS 127744, 19-20 (D.V.I. 2019); *citing Delponte v. Coral World V.I., Inc.*, 233 Fed. Appx. 178, 180-181 (3d Cir. 2007)

In re Complaint of Carpe Diem 1969 LLC, plaintiffs claimed they did not read the subject release before signing, asserting they had no reasonable opportunity to do so because they felt pressured to sign quickly, as the captain arrived late for the charter. 2019 U.S. Dist. LEXIS 127744, 19-20 (D.V.I. 2019). The District Court found the argument unpersuasive

because plaintiffs rented the boat, controlled their itinerary, and there was no evidence that they asked the captain for additional time to review the release or objected to signing. *Id*. at *20. The Court found there was ample time to read and question the release, but the plaintiffs chose not to do so. *Id*.

In *Delponte v. Coral World V.I., Inc.*, the District Court applied Virgin Islands law to enforce a release waiver despite plaintiff's claim that he did not read it and no employee from the defendant corporation had explained the waiver, causing confusion. 2006 U.S. Dist. LEXIS 59364, *13-14 (D.V.I. 2006). The Court expressly found that such an argument lacked support in the law, as it ignores the clear text of the waiver and attempts to find ambiguity based on the failure of a defendant to further explain the contract. *Id*. "When the text of a contract is clear and unambiguous, the Court need not consider extrinsic evidence of the parties' intent." *Id*. at *14.

This Honorable Court upheld the District Court's decision in *Delponte*. *See Delponte v. Coral World V.I., Inc*., 233 Fed. Appx. 178, 180-181 (3d Cir. 2007). On appeal, plaintiff argued that placement of the negligence provision in the eighth paragraph rendered the waiver ambiguous. *Id*., at 180. However, plaintiff admitted he did not read the waiver, despite having the opportunity to do so. *Id*. at 180-181 This Honorable Court found it inconsequential whether plaintiff read the agreement because it was "certainly provided for him to read," and he had the ability to read the agreement. *Id*. This Honorable Court upheld the District Court's ruling that the plain meaning rule

applied to interpretation of contracts, which assumes that the parties' intent in contracting is embodied in the writing itself. *Delponte*, 2006 U.S. Dist. LEXIS 59364, *4-5 (D.V.I. 2006). Further, when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement. *Id.*

Similarly in *Morgan*, plaintiffs claimed they did not read a release before participating in a voluntary recreational jet ski rental. *Morgan*, 2018 U.S. LEXIS 61546, 25-26 (D.P.R. 2018). The District Court of Puerto Rico enforced the release waiver and held that parties cannot escape the consequences of their voluntary decisions to bypass contracts they signed and avoid the legal consequences of their free choice without a showing of deceit or duress to coerce or wrongfully induce the party to sign. *Id.* at *26. The Puerto Rico Court held that failure to read or take time to understand the release waiver was not the fault of defendant, who is entitled to rely in good faith upon the reasonable appearance of consent that plaintiff created. *Id.*

Here, it is undisputed that Appellants voluntarily signed the release waiver while still at the dock. Appellants presented no evidence of undue duress or coercion by Captain Maupin or OTL to sign the Waiver, nor were they rushed to do so. As recognized by the District Court, Appellants had an opportunity to read the Waiver. JA 7. They chose not to. JA 7. Appellants had the opportunity to ask questions. JA 7. They chose not to. JA 7. Appellants had the ability to remove the clip they allege covered the language at the top of the Signature Page, as well

as the ability to turn the page over. JA 7. They failed to do so. JA 7. Captain Maupin reasonably relied in good faith on the appearance of consent before proceeding with the charter.

A party seeking to enforce the waiver must only prove, for the sake of this appeal, that the opposing party was afforded the reasonable opportunity to read the document's clear and unambiguous exculpatory language. *Delponte*, 2006 U.S. Dist. LEXIS 59364, *4-5 (D.V.I. 2006).

Despite choosing not to read or question the release waiver, Appellants signed and printed their names and addresses. JA 5-7, 241-244, and 266-268. The District Court properly found no genuine dispute of material fact that Appellants were given ample opportunity to review, manipulate, or question the release waiver before signing, but chose not to do so. JA 7. Therefore, exigent circumstances do not exist to render the Release Waiver unenforceable. Appellants cannot credibly claim ignorance and escape the consequences of their voluntary action in signing. The caselaw is clear that the alleged failure to read or question the terms of a waiver does not create a genuine issue of material fact concerning enforceability.

C. *The Language of the Release Waiver is Clear and Unambiguous*

"A waiver is clear and unambiguous if it specifically bars the plaintiff's negligence claim and explicitly exonerates all defendants in the lawsuit." *In*

re Complaint of Carpe, 2019 U.S. Dist. LEXIS 127744, at *11. In evaluating a contract, such as a waiver, the Court must first look to the intent of the parties as "objectively manifested by them and make a preliminary inquiry as to whether the contract is ambiguous." *Delponte v. Coral World V.I., Inc.*, 48 V.I. 386, 388-389 (D.V.I. 2006). (*citing Sunshine Shopping Ctr. V. Kmart Corp.*, 85 F. Supp. 2d 537, 540, 42 V.I. 397 (D.V.I. 2000). A contract is ambiguous when reasonable people in the parties' positions could think that the contract has two reasonably alternative interpretations. *Id.*; see also *In re Complaint of Carpe Diem*, 2019 U.S. Dist. LEXIS 127744, at *14 (D.V.I. 2019).

The District Court of the Virgin Islands identifies the proper method of determining the intent of the contracting parties:

> [T]he Third Circuit applies the 'plain meaning rule' of interpretation of contracts, which assumes that the intent of the parties to an instrument is 'embodied in the writing itself, and when the words are clear and unambiguous, the intent is to be discovered only from the express language of the agreement.'

Sunshine Shopping Ctr., 85 F. Supp. at 540; *see also In re Unisys Corp. Long-Term Disability Plan ERISA Litig.*, 97 F.3d 710, 715 (3d Cir. 1996) ("The strongest external sign of agreement between contracting parties is the words they use in their written contract." *(quoting Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*,

619 F.2d 1001, 1009 (3d Cir. 1980))).

The release waiver here is unambiguous. The title of the document is capitalized with bold text, disclosing the nature of the contract as "**GENERAL RELEASE OF ALL CLAIMS**." JA 6 and 274. The text of the release waiver is nearly a full page of standard-size font with key provisions highlighted in bold. JA 6 and 274. The document clearly describes "Releasees" as Over the Line VI LLC ("OTL"), and their present members, agents, employees and representatives. JA 274.

The release waiver identifies "Releasor" as the individuals signing, as well as their spouse, heirs and assigns. JA 274. The terms of the Release Waiver are broad, demonstrating clear intent to shift the risk of liability for all negligence claims. The Release Waiver expressly discloses that activities on the water can be dangerous, stating in bold text: "**Releasors are aware that Boating Activities are inherently dangerous activities and are voluntarily participating in these activities with knowledge of the danger involved.**" JA 274. Regarding Releasor's participation in these activities, the Release Waiver states:

> **The Releasor … hereby releases, waives and forever discharges any and all claims that Releasors may have or ever had or will have against Over the Line VI LLC,** …, and their present and former members, Agents, employees, officers, directors, shareholders, affiliates,

parent corporations, subsidiaries, representatives, attorneys, successors in interest, predecessors in interest, and assigns (collectively, Releasees"), … including, but not limited to, any and all claims for personal injury, property damage or wrongful death arising out of or relating to the Boating Activities. (emphasis in original).

***

Releasors hereby assume full responsibility for the risk of bodily injury, death or property damage arising out of or relating to the Boating Activities whether caused by the negligence of the Releasees or otherwise. (emphasis in original).

***

This Release, waiver, and discharge applies to any and all manner of actions and causes, suits, debts, obligations, choses in action, contract, covenants, warranties, claims, sums of money, judgments, demands, damages and rights whatsoever in law or in equity which have or may accrue in favor of any one or more of the Releasors against any one or more of the Releasees, by reason of any facts or circumstances, known or unknown, suspected or unsuspected, or which may

> hereafter arise as a result of the discovery of new and/or additional facts, including, without limitation, those arising out of, on account of, based upon, or in any way relating to the Boating Activities, the Agreement or the vessel or equipment covered by the Agreement. Releasors expressly waive any and all benefits that would otherwise be available under any statute, legal decision, or common law principle with respect to unknown or suspected claims.
>
> ***
>
> Releasors shall defend, indemnify, and hold Releasees harmless from any and all claims of any person or entity that arise out of or relate to the Boating Activities, the Agreement or the vessel or equipment covered by the Agreement.
>
> ***
>
> Releasors expressly agree that this release is intended to be broad and inclusive as permitted by the laws of the United States Virgin Islands and that if any portion is held invalid, the balance shall continue in full force and effect.

JA 274.

Similar language has been interpreted as

demonstrating the parties' intent to shift the risk of liability for all negligence claims from the Defendants to Plaintiffs. *See In re Carpe Diem*, 2019 U.S. Dist. LEXIS 127744, at *14-16; *see also, Piché*, 51 V.I. at *16-17; *see also, Oran v. Fair Wind Sailing, Inc.*, Civil Action No. 08- 0034, 2009 U.S. Dist. LEXIS 110350, at *26 (D.V.I. Nov. 23, 2009).

Appellants speciously argue in their brief that the signature space where they signed on the back of the document was blank without any exculpatory language. However, the signature section of the Release Waiver has a capitalized, bold header that states: "**GENERAL RELEASE OF CLAIM (CONTINUED)**." JA 275. Directly under this header are spaces for the passenger's signature, printed name, and address, placing Appellants on notice that they are releasing certain claims. JA 275. Likewise, the bold heading put Appellants on notice that the signature section is to be read as a continuation of the Release Waiver. *See In re Carpe Diem*, 2019 U.S. Dist. LEXIS 127744, at *11 (all writings that are part of the same transaction are interpreted together). Thus, both the Release Waiver and corresponding signature section are clear and unambiguous in their meaning and effect.

The clear and unambiguous release language applies not only to OTL, but also its "present and former members, Agents, employees, officers, directors, shareholders, affiliates, parent corporations, subsidiaries, representatives, attorneys, successors in interest, predecessors in interest, and assigns." JA 274. The parties stipulated that Captain Maupin was

an agent of OTL, and therefore covered by the express terms of the release waiver.

The unambiguous language of the release waiver applies to all ordinary negligence claims and is intended to be as "broad and inclusive as permitted by the laws of the United States Virgin Islands." JA 274. The release waiver is not rendered ambiguous simply because the principal exculpatory language is on the opposite side of the signature spaces, and Appellants provide no authority in support of this selfserving interpretation.

D. *The Release Waiver is Not Inconsistent with Public Policy and Is Not an Adhesion Contract.*

Under admiralty law, exculpatory clauses waiving liability for negligence are consistent with public policy. *Olmo*, 2016 U.S. Dist. LEXIS 56572, at *30 (citing *Cobb* v. *Aramark Sports & Entm't. Servs., LLC*, 933 F. Supp. 2d 1295, 1299 (D. Nev. 2013) (noting that an "express waiver [wa]s not inconsistent with public policy because waivers of liability on navigable waters do not contravene federal public policy")); *see also In re Aramark Sports & Entm't Servs., LLC*, No. 09-637, 2012 U.S. Dist. LEXIS 123786, 2012 WL 3776859, at *7 (D. Utah Aug. 29, 2012) (holding that an admiralty exculpatory clause disclaiming negligence was consistent with public policy and enforceable); *see also Morgan v. Water Toy Shop, Inc.*, 2018 U.S. Dist. LEXIS 61546, 20-29 (D.P.R. 2018) (upholding an exculpatory clause in a voluntary recreational water-based activity as consistent with

public policy in holding (1) that a plaintiff cannot escape the consequences of their voluntary decisions, bypassing the contract they signed to avoid legal consequences of their free choice, where there is no evidence of deceit, violence or intimidation; and (2) that waivers of liability for voluntary recreational pursuits are not adhesion contracts because the participant is free to decline to participate).

It is a well-established common law principle that liability waivers for voluntary recreational activities are not adhesive contracts. *Olmo*, 2016 U.S. Dist. LEXIS 56572, at *32 (*citing Olivelli v. Sappo Corp.*, 225 F. Supp. 2d 109, 119 (D.P.R. 2002) (holding that scuba diving is a "strictly voluntary recreational pursuit" and is not an "essential service[] such as medical care . . . where the court[] would be more likely to find that a contract of adhesion exists")); *see also Charnis v. Watersport Pro, LLC*, No. 07-0623, 2009 U.S. Dist. LEXIS 76022, 2009 WL 2581699, at *5 (D. Nev. May 1, 2009) (concluding that a liability waiver for the recreational activity of wakeboarding was not a contract of adhesion for the reasons explained in *Olivelli*); *see also Cobb*, 933 F. Supp. 2d at 1299 (observing that "[u]nder federal admiralty law, liability waivers for recreational sporting activities like parasailing are not contracts of adhesion because they are not essential services"); *see also Waggoner v. Nags Head Water Sports*, 1998 U.S. App. LEXIS 6972 (4th Cir. 1998) (applying admiralty principles to enforce the exculpatory clause in a voluntary recreational water-based activity because unlike services of a common carrier, recreational boat renting is not sufficiently important to justify an imposition on the freedom of

contract). The activity here was a voluntary, recreational boat charter in coastal seas and not an essential service. JA 200.

There is no evidence of any attempt to defraud, deceive or intimidate Appellants into signing the release waiver. It is undisputed that Appellants had ample opportunity to charter with a different company if they wanted to do so, regardless of the release waiver. The release waiver was not an adhesion contract, against public policy or signed under duress or threat of violence. Therefore, the release waiver is enforceable to bar the negligence claims as a matter of law and the District Court properly granted Appellee's summary judgment motion dismissing those claims.

II. The Trial Court Did Not Abuse Its Discretion in Limiting the Testimony of Dr. Brian Steinke

A. *Evidentiary Error, if Any, Was Harmless*

* * *

negligence. Consequently, the District Court's rulings on these issues should be upheld and the judgments in favor of Appellees should stand.

Dated: May 28, 2024

LAW OFFICES OF DUENSING & CASNER

By:/s/ *Matthew J. Duensing*

Matthew J Duensing, Esq.,
VI Bar 64
Joseph D Sauerwein, Esq.,
VI Bar R2030
9800 Buccaneer Mall, Bldg. 2, Suite 9
P.O. Box 6785
St. Thomas, U.S.V.I. 00804
Tel: (340) 774-6011
Fax: (340) 776-8520
mduensing@vilawyers.com
jsauerwein@vilawyers.com