MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Selena Besner, as administrator of the Estate of Michael Besner,

Appellant-Plaintiff,

v.

Terra Adventures, Inc., d/b/a Badlands Off-Road Park and Crossroads Racing Series LLC, d/b/a IXCR Cross Country Racing,

Appellees-Defendants

May 25, 2022

Court of Appeals Case No. 21A-CT-2715

Appeal from the Fountain Circuit Court

The Honorable Steven P. Meyer, Special Judge

Trial Court Cause No. 23C01-2004-CT-137

Vaidik, Judge.

Case Summary

[1] While attending an off-road racing event, Michael Besner was struck and killed by a motorcycle that accidentally left a racecourse. His widow, Selena Besner, filed suit against the owner of the racecourse and the promoter of the event. The defendants moved for summary judgment based on a release Michael had signed to enter the event. The trial court granted the motion, and Selena appeals. We reverse.

Facts and Procedural History

[2] On March 1, 2020, Michael went to a racing event called "Battle at the Badlands" ("the Event") at Badlands Off Road Park ("the Park") near Attica, Indiana. The Park is a 1,400-acre property with several racecourses and a public entrance gate on County Road 1000 North. To enter the Park for the Event, all participants and spectators had to pay an entrance fee and sign a Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement ("the Release"). The Release provides, in relevant part:

> IN CONSIDERATION of being permitted to compete, officiate, observe, work, or participate in any way in the EVENT(S) or being permitted to enter for any purpose any RESTRICTED AREA (defined as any area requiring special authorization, credentials, or permission to enter or any area to which admission by the general public is restricted or prohibited), EACH OF THE UNDERSIGNED, for himself, his personal representatives, heirs, and next of kin:

1. Acknowledges, agrees, and represents that he has or will immediately upon entering any of such RESTRICTED AREAS, and will continuously thereafter, inspect the RESTRICTED AREAS which he enters, and he further agrees and warrants that, if at any time, he is in or about RESTRICTED AREAS and he feels anything to be unsafe, he will immediately advise the officials of such and if necessary will leave the RESTRICTED AREAS and/or refuse to participate further in the EVENT(S).

2. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, competition vehicle owners, drivers, pit crews, rescue personnel, any persons in any RESTRICTED AREA, promoters, sponsors, advertisers, owners and leassees [sic] of premises used to conduct the EVENT(S), premises and event inspectors, surveyors, underwriters, consultants and others who give recommendations, directions, or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(S) and each of them, their directors, officers, agents and employees, all for purposes herein referred to as "Releasees," FROM ALL LIABILITY TO THE UNDERSIGNED, his personal representatives, assigns, heirs, and next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFOR ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S), WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.

Appellant's App. Vol. III p. 69. Individuals who wanted to "access" a racecourse then had to register and pay a separate registration fee and "were given a special sticker and equipment to distinguish them from spectators and other unauthorized individuals." Appellant's App. Vol. II p. 15.

[3] Michael attended the Event "as a spectator and to take photos[.]" *Id.* After signing the Release, he was inside the Park watching a motorcycle race. Concrete barriers and ropes separated the racecourse "from parking and where everyone walks." *Id.* Michael was standing "in the spectator/parking area," that is, "in the area inside the admission gate but not within the racecourse area." *Id.* at 15, 16. One of the motorcycles in the race "went airborne over the racecourse boundary" and struck Michael. *Id.* at 15. He died of blunt force trauma to his head, neck, and chest.

[4] Selena sued the owner of the Park, Terra Adventures Inc., and the promoter of the Event, Crossroads Racing Series LLC (collectively, "the Racetrack"). The Racetrack moved for summary judgment based on the Release. It argued the Release applies because Michael (1) was at the Park to "observe" the race and (2) was in a "RESTRICTED AREA" when he was struck by the motorcycle. The trial court granted the Racetrack's motion on the first ground and therefore did not reach the second ground.

[5] Selena now appeals.

Discussion and Decision

[6] Selena contends the trial court erred by granting the Racetrack's motion for summary judgment. We review such motions de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[7] "A release, as with any contract, should be interpreted according to the standard rules of contract law." *Huffman v. Monroe Cnty. Cmty. Sch. Corp.*, 588 N.E.2d 1264, 1267 (Ind. 1992). We must first determine whether the language at issue is ambiguous. *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 752 (Ind. 2018). If it isn't, "we give it its plain and ordinary meaning in view of the whole contract, without substitution or addition." *Id.* If the language is ambiguous, our task is to determine the meaning intended by the parties when they made the agreement. *Id.*

I. "Observe"

[8] Selena first argues the trial court erred by finding that Michael was at the Park to "observe" the Event, as that term is used in the Release. Again, the first clause of the Release provides that the Release applies to all those permitted to "compete, officiate, observe, work, or participate in any way" in the Event. Initially, Selena contends the word "observe" is ambiguous in this setting, and

therefore subject to judicial interpretation, because it could refer to a "mere spectator" but is also regularly used to describe a person monitoring a race in an "official capacity" to ensure compliance with rules. Appellant's Br. p. 15. She cites news articles that use the word "observe" in this latter sense. *See id.* at n.4. The Racetrack does not dispute that the word is used this way in the racing context. As an example, in Indiana horse racing, a "patrol judge" is responsible for "**observing** the race and reporting information concerning the race to the judges." 71 Ind. Admin. Code 3-10-1 (emphasis added). We agree with Selena that, at least in the racing world, the word "observe" could have two meanings and is therefore ambiguous.

[9] As such, we must determine which meaning was intended in the Release. Selena argues that, for several reasons, it should be interpreted in the narrower sense of observing a race in an official capacity. Again, we agree.

[10] Selena begins by citing two general principles of contract interpretation. First, "[w]hen there is ambiguity in a contract, it is construed against its drafter." *MPACT Constr. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 910 (Ind. 2004). Second, a "self-exculpatory" release like the one at issue here—a release that shields a party from liability for its own negligence—"is to be construed strictly against the party protecting itself thereby." *U.S. Auto Club, Inc. v. Smith*, 717 N.E.2d 919, 925-26 (Ind. Ct. App. 1999), *trans. denied*.

[11] Selena then turns to the specific language of the Release. She argues that because the word "observe" appears alongside "a series of verbs that relate to

administering the Event"—"compete," "officiate," "work," and "participate"—it should be interpreted as such. Appellant's Br. p. 15. As our Supreme Court has repeatedly noted in recent years, the canon of construction *noscitur a sociis* ("it is known by its associates") provides that the meaning of a word in a list is informed by the other words in the list. *See Lake Cnty. Bd. of Comm'rs v. State*, 181 N.E.3d 960, 969 (Ind. 2022); *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1198 (Ind. 2016); *Mi.D. v. State*, 57 N.E.3d 809, 814 (Ind. 2016). This canon strongly supports Selena's contention that the Release refers to people observing the race in an official capacity.

[12] Finally, Selena correctly notes that if the word "observe" includes mere spectators, everyone at the Park would fall into the first category of persons covered by the Release—those "permitted to compete, officiate, observe, work, or participate in any way"—which would render superfluous the second category of persons covered by the Release—those "permitted to enter for any purpose any RESTRICTED AREA." That is, because anyone at the Park just to watch would be an "observer," and anyone at the Park to do anything other than just watch would fit into one of the other four groups in the first category (competitors, officials, workers, and participants), everyone at the Park would be subject to the Release regardless of whether they were in a "RESTRICTED AREA," making the latter clause meaningless. "We make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless." *Zawistoski v. Gene B. Glick Co.*, 727 N.E.2d 790, 794 (Ind. Ct. App. 2000).

[13] For all these reasons, we agree with Selena that the word "observe" in the Release should be interpreted to refer to those observing a race in an official capacity. And because Michael was a mere spectator, the trial court erred by granting the Racetrack summary judgment based on the word "observe."[1]

II. "RESTRICTED AREA"

[14] Selena also challenges the alternative ground advanced by the Racetrack in the trial court—that Michael was in a "RESTRICTED AREA" when he was killed. The Release defines "RESTRICTED AREA" as "any area requiring special authorization, credentials, or permission to enter or any area to which admission by the general public is restricted or prohibited." Selena contends that because Michael "was not on any racecourse or otherwise in an area requiring special permission to access, he was not in a Restricted Area as defined by the Release." Appellant's Br. p. 18.

[15] The Racetrack responds that the "RESTRICTED AREA" consists of "the entire park grounds past the park public entrance gate on County Road 1000." Appellees' Br. p. 21. It says the whole Park is restricted because "no one could gain access without paying a fee and signing the Release." *Id.* at 19. In support

[1] At one point in its order, the trial court referred to Michael as a "participant" in the Event, apparently because he was taking photographs. Appellant's App. Vol. II pp. 20-21. To the extent the court held Michael was participating in the event by virtue of his photography activity, we disagree. There is no evidence Michael was a sanctioned or official photographer for the Event or that the event organizers even knew he would be taking photos.

of this conclusion, the Racetrack relies largely on its own discovery responses. *See* Appellant's App. Vol. III pp. 131, 138, 144.

[16] We disagree with the Racetrack for three reasons. First, the discovery responses purporting to define "RESTRICTED AREA" as everything inside the main entrance conflict with the actual definition of the term in the Release, which says nothing about the main entrance and does not otherwise indicate that the entire Park is a restricted area. Second, if the Racetrack's intent was to make the Release applicable to every person who entered the Park, there would have been no need to use the term "RESTRICTED AREA," and certainly no need to define that term. The Release would have simply provided that it applied to every person entering the Park. Third, if the entire Park was a "RESTRICTED AREA," and every entrant was covered by that part of the Release, the first category of persons covered by the Release—those "permitted to compete, officiate, observe, work, or participate in any way"—would be superfluous. Again, we strive to avoid construing contract language in a way that renders any words, phrases, or terms "ineffective or meaningless." *Zawistoski*, 727 N.E.2d at 794. Therefore, we decline to read the term "RESTRICTED AREA" to mean the entire Park. And because there is no other evidence that the area in which Michael was standing was restricted, the Racetrack is not entitled to summary judgment based on this part of the Release.

[17] We reverse the trial court's grant of summary judgment to the Racetrack.

[18] Reversed.

Crone, J., and Altice, J., concur.