

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

WILLIAM MAGRUDER, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 99-0077-B  
 )  
 ANTHONY SAWYER, )  
 )  
 Defendant )

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CHRISTINE ANDERSON, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 99-0088-B  
 )  
 WILLIAM MAGRUDER, )  
 )  
 Defendant )

***RECOMMENDED DECISION***

This action arose after Anthony Sawyer and his fiancée, Christine Anderson, paid to attend a party held on property owned by William Magruder. During the party, it is alleged that Anderson was physically assaulted by other party goers, and Magruder himself, and that Sawyer witnessed the assaults and ultimately intervened to prevent further injury to Anderson.

Plaintiff Christine Anderson moves to strike Defendant William Magruder's fifth affirmative defense and to dismiss Counts I and II of Magruder's counterclaim. For the

foregoing reasons, I hereby recommend the Motion to Strike and/or Dismiss be DENIED.

Anderson moves to strike Magruder's fifth affirmative defense and to dismiss Count II of the counterclaim on the grounds that the document Magruder asserts is a release and indemnification agreement should not be so construed in this instance.<sup>1</sup> Anderson acknowledges that analysis of this question requires a factual investigation to determine the intent of the contracting parties. Pltf. Mem. at 5 (quoting *Buckley v. Basford*, 184 F. Supp. 870 (D. Me. 1960)). Further evidence that additional development of the facts is necessary is found in Anderson's assertion that "it will become evident" through discovery that "there was no discussion regarding negligence or indemnification," Pltf. Mem. at 6, and Anderson's "allegation of Defendant'[s] misrepresentation in obtaining the release." Pltf. Mem. at 7. Anderson has also indicated that she "is in the process of initiating discovery and she expects at some point that a properly filed Motion for Summary Judgment will be submitted to the Court." Pltf. Mem. at 9. I recommend the question of the validity of the release and indemnification agreement be addressed in that context, and that this Motion to Strike Affirmative Defense Number 5, and Dismiss Count II of the Counterclaim, be DENIED.

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<sup>1</sup> In the alternative, Anderson argues that the Maine Law Court would find the document imposes a mutual duty to release and indemnify. There is no need to address this argument at this time.

Anderson next argues that Magruder fails to state a claim in Count I of the Counterclaim. Anderson reads Count I as asserting claims for battery, intentional and negligent infliction of emotional distress, and punitive damages. Magruder responds that Count I was intended only to state a claim for battery.

Anderson asserts Magruder has failed to state a claim for battery because there is no allegation that the contact was without consent. Pltf. Mem. at 9 (citations omitted). Although the Court agrees that the standard in Maine provides that “consent vitiates the tort” of battery, DONALD N. ZILLMAN, ET AL., MAINE TORT LAW, § 1.03, at 1-6 (1994), Anderson has cited no authority for the proposition that Magruder’s failure to explicitly plead lack of consent is fatal to his claim at this stage of the litigation. If, indeed, the evidence could lead a factfinder to find that Magruder consented to the alleged contact, Anderson will be entitled to an appropriate jury instruction covering the consent issue.

Magruder does not object to Anderson’s Motion to Dismiss Magruder’s claim for punitive damages. In this District, a failure to object amounts to a waiver of objection. D. Me. R. 7(b). Further, the Court agrees that Magruder’s allegation that Anderson kicked him during his attempt to break up a fight between Anderson and another woman, even intentionally, is an insufficient basis upon which to find either express or implied malice toward Magruder. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

### *Conclusion*

For the foregoing reasons, I hereby recommend Plaintiff Anderson's Motion to Strike Affirmative Defense Number Five and Dismiss Count II of Defendant Magruder's Counterclaim be DENIED, and that the Motion to Dismiss Count I of the Counterclaim be DENIED AS TO PLAINTIFF'S CLAIM FOR BATTERY AND GRANTED AS TO PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES.

### NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on: December 13, 1999