FEBRUARY 2010

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

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OCHOA v. CMH

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LAW OFFICES OF CASTRO AND RUZ
713 Pasado
Vista, Columbia

MEMORANDUM

To: Applicant

From: Kristina Castro

Date: February 23, 2010

Re: ***Ochoa v. CMH* Early Neutral Evaluation Proceedings**

I was asked by the court to serve as the evaluator in the pending action of *Ochoa v. CMH*, a wrongful death case. Early Neutral Evaluation (ENE) is one of our court's alternative dispute resolution procedures in which the parties and their counsel receive a nonbinding evaluation by an experienced lawyer.

It turns out that the dispositive issue is the enforceability of a waiver of liability the plaintiff's deceased husband signed. If the waiver is unenforceable, the case could approach the $10 million plaintiff seeks. If not, the defendant may not even pay 1% of that. Mr. Ochoa, the plaintiff's deceased husband, was a successful businessman from Mexico, but he was neither fluent in, nor could he read, English.

At the conclusion of the ENE session, both parties agreed that, pursuant to ENE Rule 5-2(c), I should provide them with a written opinion on the enforceability of the waiver. I have concluded that the waiver is enforceable in view of its validity and scope, whether or not Mr. Ochoa read or understood the waiver.

Please prepare my opinion for the parties consistent with ENE Rule 5-2(c). To be effective the ENE opinion must persuade the parties that it reflects the probable outcome if the case were to proceed through discovery and to trial. An opinion that says "on the one hand this and the other hand that" and that does not reach a conclusion will not lead the parties to appraise their chances realistically and negotiate sensibly.

5. EARLY NEUTRAL EVALUATION RULES

5-1. Description.

In Early Neutral Evaluation (ENE) the parties and their counsel make compact presentations of their claims and defenses, including key evidence, and receive a nonbinding evaluation by an experienced neutral lawyer with subject matter expertise.

5-2. The ENE Session.

(a) At least ten days before the ENE session, each party shall file an ENE Statement that describes briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence.

(b) At the ENE session, the evaluator shall:

> (1) permit each party, orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;
>
> (2) help the parties identify areas of agreement and, where feasible, enter stipulations;
>
> (3) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain carefully the reasoning that supports these assessments.

(c) If requested by one or more of the parties, within 10 days after the session, the evaluator shall provide a written opinion that:

> (1) includes a statement of facts that carefully selects only the facts pertinent to the legal and factual issues evaluated in the opinion;
>
> (2) states the legal and factual issues presented to the evaluator;

(3) assesses the relative strengths and weaknesses of the parties' contentions and evidence, and explains carefully the reasoning that supports the evaluator's assessments; and

(4) draws a conclusion as to the likely outcome in the pending litigation on each legal and factual issue presented to the evaluator and requested to be addressed in the opinion.

(d) The ENE session shall be informal. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses.

5-3. Confidentiality. The court, the evaluator, all counsel and parties, and any other persons attending the ENE session shall treat as "confidential information" the contents of the written ENE Statements, anything that happened or was said, any position taken, any view of the merits of the case formed by any participant in connection with any ENE session, and any opinion or assessment of the evaluator.

Richard Penniman, Esq.
BOISELLE & PENNIMAN
1980 Armando Avenue
Wilson, Columbia
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF COLUMBIA
COUNTY OF GALENA

Louise Oddo Ochoa,)
Plaintiff,)
vs.) **Case No. 03031955 KRB**
Columbia Mountain Heli-ski, LLC,) **PLAINTIFF'S EARLY NEUTRAL**
Defendant) **EVALUATION STATEMENT**
_________________________________)

SUMMARY STATEMENT OF CASE

This action is for damages ($10,000,000) arising from the negligence of the defendant that resulted in the death of Alfredo Ochoa. The Plaintiff is the widow of Alfredo Ochoa. Mr. Ochoa was killed along with eight other people by an avalanche after the defendant helicopter skiing company Columbia Mountain Heli-ski, LLC (CMH) decided to take clients onto an avalanche path known as Bay Street in the Sierra Sonora, Columbia. The events leading up to the avalanche and its aftermath are described in the Coroner's Report.

LEGAL AND FACTUAL ISSUES

This is an action for negligence, arising from an accident which occurred while highly trained professionals were responsible for the lives of their clients. The accident occurred because CMH failed in that responsibility. The issue is: Was that failure the result of an unreasonable error of judgment or lack of skill?

CMH's Answer alleges that this action is precluded because Mr. Ochoa signed a liability and claim waiver before he participated in defendant's heli-ski operation. Contrary to CMH's allegations, the waiver is not valid or enforceable on several grounds:

(1) The validity and scope of the waiver are legally deficient.

(2) Waivers are void as to hazardous activities.

(3) Mr. Ochoa's signature was not effective because he could not and did not understand the document. Defendant was aware that Mr. Ochoa could not read English when he signed the waiver.

At the evaluation session, we will present the Plaintiff, Louise Oddo Ochoa, Mr. Ochoa's surviving wife.

Dated: February 1, 2010

Respectfully submitted,
BOISELLE & PENNIMAN

by: Richard Penniman

Richard Penniman, Esq.
Attorneys for Plaintiff

1 David Chemichen, Esq.
2 CHEMICHEN, STRAND & LUTZ
3 11819 Kiowa Street
4 Angeles, Columbia
5 Attorneys for Defendant

6 **IN THE SUPERIOR COURT OF COLUMBIA**

7 **COUNTY OF GALENA**

8

9 Louise Oddo Ochoa, Plaintiff,	)	
10 vs.	)	**Case No. 03031955 KRB**
11 Columbia Mountain Heli-ski, LLC,	)	**DEFENDANT'S EARLY**
12 Defendant	)	**NEUTRAL EVALUATION**
13 ______________________________	)	**STATEMENT**

14 **SUMMARY STATEMENT OF CASE**

15 The Coroner's Report referred to in plaintiff's Early Neutral Evaluation (ENE) is
16 an acceptable summary of the incident for the ENE proceeding.

17 **ISSUES OF FACT AND LAW**

18 This case will be resolved on the basis of the attached Release of Liability,
19 Waiver of Claims, and Assumption of Risks signed by Mr. Ochoa. It is settled law in
20 Columbia that waivers in sports and recreational activities do not violate Civil Code
21 section 1668. The waiver is clear and unambiguous.

22 **DISCOVERY, SETTLEMENT, AND ENE PROCEEDING**

23 Before considering the difficult, time-consuming, and contentious issues in this
24 case, the ENE should focus exclusively on whether the waiver precludes further
25 proceedings.

26

27 Dated: February 3, 2010 Respectfully submitted,
28 CHEMICHEN, STRAND & LUTZ
29 by: David Chemichen ____________
30 David Chemichen, Esq.
31 Attorneys for Defendant

COLUMBIA MOUNTAIN HELI-SKI, LLC (CMH)

RELEASE OF LIABILITY, WAIVER OF CLAIMS, AND ASSUMPTION OF RISKS. PLEASE READ CAREFULLY. BY SIGNING THIS DOCUMENT, YOU WILL WAIVE YOUR LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE.

ASSUMPTION OF RISKS AND COVENANT NOT TO SUE: I am aware helicopter skiing has, in addition to the usual dangers and risks inherent in skiing, certain additional dangers and risks, some of which include:

1. AVALANCHES - which can frequently occur in the mountain terrain used for helicopter skiing and may be caused by natural forces including steepness of slopes, snow depth, instability of the snowpack or changing weather conditions, or by skiers, the helicopter, or the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur;
2. MOUNTAINOUS AND STEEP TERRAIN - where a fall may cause injury or death. The areas used by CMH have steep or vertical slopes, overhangs, and cornices that in their natural state are inherently dangerous.
3. WEATHER - which can be extreme and change rapidly, without warning.
4. HELICOPTER - additional risks are posed by mechanized travel due to mechanical failure, operational error or changeable weather.

I understand that the risks from helicopter skiing are varied and difficult to anticipate. I intend this release of liability, waiver of claims, and assumption of risks to include ALL RISKS, even if the risks or cause of injury are not identified in this document or known to me at the time of signing.

I AM AWARE OF THE RISKS ASSOCIATED WITH HELICOPTER SKIING ("HELI-SKIING") AND I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS, AND HAZARDS. I AGREE NOT TO SUE FOR ANY INJURY RESULTING FROM RISKS OF HELICOPTER SKIING.

RELEASE OF LIABILITY: In consideration of allowing me to participate in helicopter skiing activities, I hereby agree as follows:

I WAIVE ANY AND ALL CLAIMS I MAY HAVE AGAINST, RELEASE FROM ALL LIABILITY, AND AGREE NOT TO SUE CMH, ITS SKIING GUIDES AND EMPLOYEES FOR ANY PERSONAL INJURY, DEATH, PROPERTY DAMAGE OR LOSS SUSTAINED BY ME AS A RESULT OF MY PARTICIPATION IN ANY HELI-SKIING TRIP WITH CMH DUE TO ANY CAUSE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, NEGLIGENCE ON THE PART OF CMH OR ITS STAFF.

I HAVE READ AND UNDERSTAND THIS RELEASE AND WAIVER.

Signed this __*10th*________ day of __*January*__________ , _*2009*______ .

__*Miguel Mendez*__________________ __*Alfredo Ochoa*__________________

Witness Signature of Participant

GALENA COUNTY CORONER
Coroner's Report
Judgment of Inquiry
Department of Public Safety
Into the Death of ALFREDO OCHOA

SUMMARY OF EVENTS:

On March 12, 2009, at approximately 1630 hours, the Galena County Sheriff Detachment was advised that there had been an avalanche in the Torre Mountain area of the Sierra Sonora, and that there were numerous burials and losses of life. Search and rescue efforts had been underway since 1600 hours. When outside help arrived the rescue effort was almost complete.

Those involved in the avalanche accident were guides and clients of Columbia Mountain Heli-ski, LLC (CMH). Ten people had been descending a steep ski run on the mountainside when they triggered an avalanche. All ten people were involved in the avalanche; nine died of asphyxiation before they could be rescued.

CMH is a lodge-based backcountry heli-skiing company located in the Sierra Sonora Mountain range. The company caters to experienced clientele who want a physically challenging skiing experience. The area is accessible only by helicopter.

INVESTIGATIVE FINDINGS:

1. Alfredo Ochoa, age 48 years, of Medina, Mexico, was killed along with 8 other people by a large avalanche while heli-skiing in the Sierra Sonora. The accident occurred on March 12, 2009 on a run known as Bay Street. Nine skiers and their guide, Joyce Long, were beginning the last run of the March 12 afternoon.
2. CMH ski guides Hans Moser and Joyce Long put together two groups of skiers of twelve and ten respectively for the last ski descent of the day. Mr. Moser's group of twelve was flown to the top of Bay Street. Bay Street is a 2500 foot run on Torre Mountain.
3. Bay Street is made up of three bowl shaped features, converging about midway down the slope into one large pathway to the bottom. All three bowls have been skied in the past. CMH had not skied the run this season. Mr. Moser led his group of guests down the run. He found the run to be excellent skiing.

4. Ms. Long arrived at the helicopter landing and instructed her group to follow her into Bay Street, and to ski down and regroup about ten turns down. She stopped about 100 yards down the slope.

5. Ms. Long testified that as she was watching and waiting for the last skiers to join the group she suddenly felt the snow move under her skis. There was no warning sound. There was no time to even move and ski out. The snow enveloped Ms. Long. She, along with the nine other skiers, was swept down the slope. Ms. Long was the sole survivor. In the circumstances, her survival with only very minor injuries defied all odds.

6. A textbook rescue was undertaken within moments. All of the nine skiers' bodies were located within 45 minutes. It was clear from the way in which they were found that the impact of the snow and obstacles and suffocation had killed them.

7. The history of the winter snow pack in the Sierra Sonora Mountains is an important aspect of the accident. In mid to late November 2008 a rain storm created a weak layer in the snow pack that remained throughout the winter. This November rain crust layer was seen as a serious threat throughout the ski industry. The Columbia Avalanche Association issued a Bulletin on February 17, 2009, that warned of "a complex and unusual snow pack for the mountains of Columbia. Be vigilant about avoiding those big steep alpine faces. Any avalanche triggered on the older weaknesses may propagate extensively into a large and dangerous avalanche event."

8. Investigation of the site after the avalanche found that the November rain crust layer was the cause of the avalanche.

9. CMH was well aware of the February 17, 2009 avalanche warning. However, as a result of its own assessment of the snow stability, the CMH guides were confident that there was no deep layer instability as a result of the November rain crust in the Torre Mountain area as of March 12, 2009.

10. Hans Moser, the leader of the first group to ski Bay Street, is the owner of Columbia Mountain Heli-ski. He is a heli-skiing guide with 25 years of experience, skiing and guiding almost every day from December to May on every slope that has ever been skied in the Torre Mountain area. Ms. Long, the guide of Mr. Ochoa's group, has worked as a heli-ski guide in the Sierra Sonora for 10 years for CMH. Ms. Long holds the highest certification of "Alpine Guide" issued by the International Federation of Mountain Guides Association (IFMGA). All CMH guides have taken every course on avalanche analysis and prediction offered by the Columbia Avalanche Association and hold Emergency First Responder Certification (First Aid) from the Columbia Red Cross.

CONCLUSION

I find that ALFREDO OCHOA died on March 12, 2009, in the area known as Torre Mountain, Columbia. The cause of death was determined to be asphyxiation, due to being buried in snow following an avalanche. I classify this death as accidental.

Dated this 23rd day of September 2009.

Charles H. Purse

Charles H. Purse, Coroner
Galena County, Columbia

LAW OFFICES OF CASTRO AND RUZ
713 Pasado
Vista, Columbia

KRISTINA CASTRO'S NOTES FROM OCHOA v. CMH ENE SESSION OF FEBRUARY 22, 2010

9:15 am. I opened by stating ground rules: no cross-exam; questions/arguments addressed to evaluator, not opposing counsel; no transcript; all evidence, arguments, concessions stay here and may not be used later in case. Informed counsel that first I wanted to hear positions on the waiver Alfredo Ochoa signed.

OPENING STATEMENTS

For Plaintiff:

Plaintiff is aware that the defendant will attempt to avoid responsibility for its negligence because of the waiver. Plaintiff does not dispute that Alfredo Ochoa signed a waiver for his heli-ski trip in March of 2009. However, the signed waiver is a sham. The waiver is not binding on several grounds:

(1) Waiver is unenforceable because not valid and its scope is ambiguous and inadequate:

> -It is contrary to Civil Code §1668, which provides that contracts intended to exempt anyone from responsibility for injury to another person "whether willful or negligent, are against the policy of law."
>
> -Waiver is ineffective because a reasonable person would not understand the word "negligence" to mean that it absolves defendant from failing to take measures available and understood to be necessary for safety of its clients, which was purpose of hiring CMH and its professional heli-ski guides.

(2) Even if waivers in beneficial recreational activities may not violate Civil Code §1668, a waiver cannot exempt responsibility for negligence in ultra-dangerous activities such as helicopter skiing. A defendant who intentionally and for profit places others, who are in its care, at great risk does not deserve absolute legal shield from its own negligence.

(3) Most important, a waiver cannot bind someone who could not read it. CMH has overreached, and Alfredo Ochoa is excused from the waiver's terms because CMH knew that Ochoa was neither fluent nor literate in English, and knowing that Ochoa did

not read English, no one from CMH bothered to translate the waiver for Ochoa or to have any of the people available to CMH translate the waiver for Ochoa. One fact is not disputable, and it is determinative: Mr. Ochoa could not understand the waiver.

For Defendant:

Alfredo Ochoa and his estate are bound by the waiver. The validity of waivers, even as to risky recreational activities, is not open to question. CMH's waiver is simple and clear.

Ochoa knew or had every reason to know that the waiver he signed on January 10, 2009, affected his legal rights. He well knew the risks of heli-skiing. Absent fraud or excusable neglect, one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.

Ochoa heli-skied with CMH in the Sierra Sonora three times, in 2007, 2008, and 2009. Each time he went he was asked to sign a waiver of liability in essentially the same terms. He complied each year. If Ochoa could not read it, he could have had it read or explained to him. Contents of the waiver were either known or immaterial to him. The evidence will show that either way, he was prepared to be bound by it.

WITNESSES

Plaintiff Louise Ochoa: (General Comments) The death of Alfredo Ochoa left her without a husband, six children without a father, and the family without its only provider. Louise Ochoa experienced a devastating loss. Her marriage was an exceptionally good one. She shared most aspects of her husband's life, both business and pleasure. Mr. Ochoa was clearly closely involved with his children. He was a loving, giving parent who took pride in his children's accomplishments. He included his children and his wife as often as possible in his many activities. He cycled, sailed, skied, swam and socialized with an enthusiasm which was matched by his enthusiasm for business. He had plans for his children which included attending top universities and business careers. Ochoa himself did not attend high school or university. He was a self-made man, who appreciated the advantages of an education. His older children, though still young at his death, were in awe of their father, inspired by him and proud of him. When he died, the older children were left rudderless, no less so because they quickly moved from Mexico to Louise Ochoa's family's home in Santo Diego, Columbia. There was no

business left for them to grow into as had been planned by their father. Louise Ochoa has had to cope with the loss, not only of a beloved husband with whom she shared most of her activities in their life, but the rock on which her children's future was dependent. She is still a young, vibrant woman, but coping with six children, the three oldest boys who were adolescents at the time of their father's death, has been difficult. The children are traumatized by the loss of their father.

Ochoa was a highly resourceful, successful entrepreneur in the steel industry. He was among the top three in that industry in Mexico. His business expanded, primarily by his efforts, ranging from selling scrap steel from a bicycle at the age of 17, to owning a partnership with his brother and occasionally others, in a steel remanufacturing business, a steel distribution business, and other related businesses such as trucking. At the time of his death he was working on the construction of a steel mill costing over $100,000,000 in Guadalajara, Mexico. Ochoa's business interests took him all over the US and to Europe. He attended trade shows, conferences, and conventions relating to his business. He purchased large machinery and developed business relationships with U.S. companies.

Ochoa also vacationed frequently in the United States. In addition to visiting regularly in Santo Diego with his parents in-law and Louise Ochoa's brothers, he skied regularly at Vail, Aspen, and other popular ski resorts either with his family or with friends.

It is Ochoa's signature on the CMH waiver, dated 1/10/09, but Louise does not recall seeing it before. She is certain he never asked her to translate it for him. The witness signature is that of Miguel Mendez, Ochoa's bilingual secretary.

Q (by ENE EVALUATOR KRISTINA CASTRO): How would you describe Mr. Ochoa's English skills and understanding?

LOUISE OCHOA: He understood quite a lot of spoken, conversational English. He could understand most American TV, but he wouldn't go to English theatrical performances and would put on Spanish subtitles when we'd watch a movie at home.

Q: Did Mr. Ochoa ask you to translate documents that were in English?

LOUISE OCHOA: Sometimes, but not a complete document, just a specific phrase or sentence in a contract, something like that. He was very, very limited in reading English.

Q: Can you recall any business deal that Mr. Ochoa did not pursue because of his language limitation?

LOUISE OCHOA: No, never. He did whatever he had to, to get a deal done. By one means or another he understood others and made himself understood in order to participate fully. He'd seal deals with just a handshake, and have contracts sent to his office, where Mr. Mendez could review them.

Q: When in the US, could he shop or order in a restaurant?

LOUISE OCHOA: Oh, yes, even when we dined out, he never seemed to find his language limitations a barrier.

Q: What about recreational activities, any that he didn't participate in because of his limited English proficiency?

LOUISE OCHOA: No, he did everything he wanted.

Q: And that included vacation activities in the US, such as skiing, hunting, fly-fishing?

LOUISE OCHOA: Yes. A few years ago, Alfredo went big game hunting in Montana, and on other years, he'd go quail hunting in Texas.

Q: And he handled business negotiations and participation in hunting and skiing without any translation services?

LOUISE OCHOA: Almost everything except written English, yes.

* * *

Hans Moser: (General Comments) Owner of CMH. Heli-skiing in Sierra Sonora 25 years. Heli-skiing is an inherently dangerous sport. Even if everything possible is done to make it safe, significant risks remain. People who ski at this level are aware of the risk. Alfredo Ochoa was a highly skilled and experienced skier who was spending a week of guided skiing at CMH. He and the other clients would rely on the decisions made by their guide to give them the best skiing experience possible, balanced against the risk involved. At CMH no one skis, even gets taken on helicopter to lodge without signing the waiver. Waiver has changed, but it has been the same for the last 8 years.

Q (by KRISTINA CASTRO): What is your understanding of what waiver means?

MOSER: It protects us in case, despite our best efforts, we make a mistake.

Q: But what if, instead of a mistake, a CMH guide did not take the usual precautions that you follow for safety, say from risks such as avalanches, would you understand the waiver to protect CMH then?

MOSER: Certainly not. That would be reckless. We would never do that.

Q: But if a guide did, would you expect the waiver to cover that situation?

MOSER: I've never thought of that. I don't know, but every client has a right to believe that we will use our best judgment, experience and training to provide the safest experience possible.

* * *

Jonathan Ripka: (General Comments) Investigator for CMH's insurer. Flew to the lodge day after March 12th accident. The ski clients were still at the lodge, and Ripka interviewed most of them. He summarized interviews of Tom Weaver, Oscar de la Pena, and Jaime Gomez:

Tom Weaver. CMH "greeter" and Galena contact person. The Mexican group comes every year, organized by one of them, Oscar de la Pena. Weaver's responsibilities include putting together a folder on each client, and assuring that each has filled out the application, made deposit and final payment, and that there is a signed/witnessed waiver from each. Waivers are usually sent to clients to be signed and returned with final payment. Weaver recalls Ochoa. Ochoa's first trip with group came about because someone else in the group canceled. Ochoa's total payment came in late and without application and waiver. CMH's practice is to list clients who had not returned a properly executed waiver and require them to sign the waiver at hotel and have it witnessed. Signing was a condition of going to lodge and skiing. Weaver recalls contacting Ochoa at the hotel in Galena on February 10, 2007 through de la Pena. De la Pena himself had executed such waivers on the previous 5 or 6 occasions he went skiing with CMH. He is fluent in both English and Spanish. In Weaver's presence, de la Pena asked Ochoa to sign the waiver and de la Pena witnessed it. De la Pena probably spoke in Spanish to Ochoa, since most of them in the Mexican group spoke Spanish among themselves. Weaver can "get by" in Spanish. He did not translate the waiver in Spanish for Ochoa or any of the Mexican group. Why not? Never thought that necessary. He can recall speaking to Ochoa and the others in

English. He had to make all of the arrangements for each of them for transportation to helicopter, often change flights home, help with lost bags, arrange rentals of anything they didn't have. He does not recall any problems communicating with Ochoa in English.

Oscar de la Pena. Organizer of Mexican group. De la Pena did not recall witnessing Mr. Ochoa sign the first waiver, dated February 10, 2007, although it is his signature as a witness. De la Pena had read the document or one similar to it in earlier years and he understood that when he signed it, he was waiving legal rights to risks of heli-skiing. His understanding did not seem to extend beyond this. He asked no questions and not only signed such documents himself regularly, but assisted in having others of his Mexican ski group sign them. De la Pena emphasized that since heli-skiing at CMH cost about $1,200 a day, each skier in the Mexican group is a successful business person with considerable contact with the English language in relation to either his education, his business, or his recreation.

At the end of the first week of skiing at CMH in 2007, Ochoa signed up for heli-skiing for the next year. On the last day at the lodge, February 18, 2007, Ochoa along with the other members of the Mexican ski group signed another waiver form which was witnessed by a fellow skier from Mexico who was fluent in English, Jaime Gomez.

Jaime Gomez. Was with the group again in 2009, and acknowledged his signature as the witness on the waiver that Ochoa signed on February 18, 2007. Gomez had no recollection of witnessing this document. He can read English and probably had read the big print in the waiver. Gomez is sure he didn't translate waiver to Spanish for Ochoa ("I would have remembered that"). As to Gomez' understanding of the waiver, he thought that he could not sue in case of an accident. As to why he signed, he said he thought he had to sign the document in order to participate in the activity. As with all vacation documents he does not bother to read them, he just signs them so he can enjoy his vacations.

Ripka said that this attitude of Gomez was typical among the Mexican group he interviewed. None of the Mexican group suggested that there was any time pressure or salesmanship applied by CMH to any of the Mexican group in order to obtain their signatures. Gomez and de la Pena said that Ochoa seemed to understand instructions

in English from the CMH guides and personnel, although both knew that Ochoa could not read English very well, if at all. Both also said that all the Mexicans, including Ochoa, talked in English with the other skiers at the lodge although sometimes one of them would ask another how to say a particular word or phrase.

The third waiver was signed by Ochoa at his place of business in Mexico. It was sent to him there by CMH, in a package with a request for final payment, a waiver form, and a trip cancellation insurance form for completion. This package was in English as was all correspondence sent to Mr. Ochoa by CMH. All the correspondence received back from Mr. Ochoa was likewise in English, possibly prepared and sent by Ochoa's bilingual secretary. CMH received the waiver, the final payment, the completed insurance form, and a completed and witnessed waiver.

Ripka interviewed others from the Mexican group at the lodge. All described Ochoa as self-confident, resourceful, and without inhibition in asking for and getting what he wanted.

Q (by KRISTINA CASTRO): Did you locate anyone at lodge or at CMH who said that CMH waiver was read or translated into Spanish for Ochoa at any time?

RIPKA: No, no one thought that was necessary.

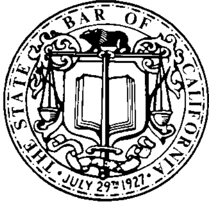
After leaving lodge, Ripka contacted Montana and Texas hunting and Jackson Hole fly fishing operations visited by Ochoa. Each required waiver of liability, and had on file waivers signed by Ochoa before he participated.

CLOSING CONFERENCE WITH COUNSEL

Plaintiff's counsel insists that the waiver is invalid. Plaintiff asserts even defendant's investigator could find no evidence of a knowing waiver. Further across-the-board-waivers should not absolve a tortfeasor in an activity that cannot be made safe. Liability will easily be established, and only real question is the amount of damages.

Defendant disagrees. However, both agreed that my conclusion on enforceability of waiver would move the case forward.

FEBRUARY 2010



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Performance Test A

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OCHOA v. CMH

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Allan v. Snow Summit, Inc. (Columbia Court of Appeal, 1999)……………………. 31

Pritikin v. Billy's Fitness Club and Spa (Columbia Court of Appeal, 2005)……... 35

Randas v. YMCA of City of Angeles

Columbia Court of Appeal (1998)

In this personal injury action, plaintiff-appellant appeals from an adverse summary judgment and contends the release she signed was invalid because it was against public interest and because she couldn't read it. The facts are simple and undisputed. The issue is one of law. As plaintiff implicitly concedes, if the release she signed is valid, summary judgment was properly awarded to defendant.

Plaintiff Lemonia Randas, literate in Greek but not English, enrolled in a swimming class at a local YMCA. She was provided a Release and Waiver of Liability and Indemnity Agreement that she signed. After her swimming class, she slipped and fell on the wet poolside tile, injuring herself.

1. THE RELEASE DOES NOT AFFECT THE PUBLIC INTEREST AND IS NOT INVALID UNDER CIVIL CODE SECTION 1668.

The section reads: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

If an exculpatory provision, such as the subject release, involves "the public interest" it is invalid under Civil Code section 1668. (*Tunkl v. University Regents*, Col. Sup. Ct., 1963). In *Tunkl*, the seminal case, the Columbia Supreme Court stated: "no definition of the concept of public interest can be contained within the four corners of a formula." *Tunkl* instead listed characteristics,[1] some or all of which characterize invalid

[1] "It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established

exculpatory provisions. It held that the hospital-patient contract clearly falls within the category of agreements affecting the public interest.

This court has not been apprised of any case, applying the *Tunkl* factors, that voided a release on public interest grounds in the sports and recreation field. For example, the following activities have been found *not* to involve a public interest: an international bicycle racing competition, “motocross” races, operating a dirt-bike park, and commercial river rafting. See generally *Buchan v. United States Cycling Federation*, Col. Ct. App., 1990. Swimming, like other athletic or recreational activities, however enjoyable or beneficial, is not "essential" as a hospital is to a patient or a repair garage is to a Columbia motorist. *Buchan, supra.*

Moreover, there is good reason *not* to invalidate such releases because the public as a whole receives the benefit of such waivers so that groups such as the YMCA, as well as the Boy and Girl Scouts, Little League, and parent-teacher associations, are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of adults and children benefit from the availability of recreational and sports activities. Those options are steadily decreasing -- victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. No public policy forbids the shifting of that burden.

We reject plaintiff’s attempt to distinguish the sports and recreational cases on the ground that they involved "death defying" activities. *Tunkl* fails to include dangerousness as a relevant characteristic, and releases have been upheld in

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standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Tunkl, supra*.)

moderate sports, such as bicycle riding and aerobics, as well as to hazardous activities, including skydiving, motorcycle races, and mountain climbing. See generally *Hulsey v. Elsinore Parachute Center*, Col. Ct. App., 1985.

2. THE RELEASE IS CLEAR AND UNAMBIGUOUS.

An agreement exculpating the drafter from liability for his or her own future negligence must clearly and explicitly express that this is the intent of the parties. We first note that whether a contract provision is clear and unambiguous is a question of law.

The subject release is captioned in bold lettering: "Release and Waiver of Liability and Indemnity Agreement." Its one-page text states: "The undersigned hereby releases the YMCA from all liability to the undersigned for any loss or damage on account of injury to the undersigned caused by the negligence of the YMCA . . . ." It further states: “The undersigned hereby assumes full responsibility for and risk of bodily injury due to the negligence of the YMCA."

We find the release neither unclear nor ambiguous.

3. THE RELEASE IS NOT INVALID EVEN THOUGH PLAINTIFF COULD NOT READ IT.

It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.

On the record here, there is no indication of fraud or overreaching by defendant. Nor did plaintiff claim that defendant had reason to suspect she did not or could not read the release she had signed and which in full captions above and below her signature stated: "I Have Read This Release."

Absent bad faith or misrepresentation, ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him. One who signs an instrument when for some reason, such as illiteracy or blindness, he cannot read it, will be bound by its terms in case the other party acts in good faith without trick or misrepresentation. The signer should have had the instrument read to him.

The judgment is affirmed.

Allan v. Snow Summit, Inc.

Columbia Court Of Appeal (1999)

Plaintiff Gary Allan sued defendant Snow Summit for injuries he allegedly suffered during a ski lesson. The trial court granted summary judgment in favor of Snow Summit on the basis of a release and waiver Allan had signed.

Allan paid for skiing lessons. Snow Summit gave Allan a card in connection with the skiing lessons. The first side of the card contained information about the date and times of the ski lessons. The second side contained a statement entitled "Agreement and Release of Liability." Although he averred he did not remember reading or signing the card, Allan acknowledged that he did print his name in the indicated blank and that it is his signature at the end. The second side reads as follows:

> Agreement and Release of Liability. I Gary Allan have voluntarily enrolled in a ski lesson offered by Snow Summit, Inc. I am aware that my participation in the ski lesson and the sport of skiing involves numerous risks of injury, including, but not limited to, falls, loss of control, collisions with other skiers and natural and man-made objects and I freely assume those risks.
>
> As lawful consideration for being permitted to enroll, I agree to release from any legal liability and agree not to sue Snow Summit, Inc., their owners, officers, directors, members, agents and employees, for any and all injuries caused by or resulting from any participation in the ski lesson or the sport of skiing whether or not such injury or death was caused by alleged negligence.
>
> I Am Aware That This Contract Is Legally Binding and That I Am Releasing Legal Rights by Signing It. Signed: Gary Allan.

Snow Summit assigned Shawn Oldt, a professional ski instructor, to conduct the lesson. Allan told Oldt that he was a novice skier. The lesson, which took place in the beginners' area, apparently went well. The next day, Allan returned for another lesson.

After a period of time in the beginners' area, Oldt told Allan that he was ready to go to the "top of the mountain." Allan was nervous and reluctant to leave the beginners' area. Oldt told Allan he could not ski on the beginners' slope forever, and that the only way to learn to ski properly was to be aggressive and "go after the challenge."

Allan went to the ski run at the top of the mountain. He found he could not turn as he could in the beginners' area. Each time he attempted to turn, he fell. The ski run was icy. The ice made it difficult to turn and felt hard. Allan fell numerous times during the run. Oldt continued to encourage Allan to get up and keep trying after each fall. When Allan finally reached the bottom of the run, Oldt remarked that the top portion of the mountain was frequently icy, and that many people jokingly referred to the icy conditions as "Summit Cement."

After he had finished skiing, Allan felt pain in his back. Allan sought treatment; he was informed he had sustained herniated discs in his lumbar spine.

Allan filed this action against Snow Summit and Oldt, apparently on the theory that, despite the Agreement and Release of Liability, Snow Summit continued to owe him a duty of care which Allan characterizes as a duty not to increase the risks inherent in the sport because of the instructor/pupil relationship.

Snow Summit successfully moved for summary judgment on grounds that (1) Allan expressly assumed the risk of injury from skiing, and (2) the release agreement expressly bound Allan not to sue, even if Snow Summit was negligent. The court based its ruling exclusively on the release and did not consider Allan's contentions that Snow Summit or Oldt had somehow increased the risks inherent in the sport of skiing.

On appeal after a summary judgment has been granted, we review the matter de novo to determine whether there are any triable issues of material fact.

It is undisputed that Allan signed the Agreement and Release of Liability as a condition to enrolling in the ski school. Allan stated he did not remember seeing or signing the document, although he acknowledged he received it and that it is his signature. He alleges there is a disputed issue of fact as to whether or not he agreed to its terms. However, it is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it. This principle has been extended even to cases where the person who signs the contract is illiterate -- in such cases, the individual has a responsibility to have the contract read to him. See *Randas v. YMCA*, Col. Ct. App., 1998.

Allan suggests that his neglect in not reading the contract was "excusable," since he was given the contract only a few moments before the lesson and therefore had no time to read it thoroughly. However, Allan could have taken the time to read it. Notably he does not say that he was precluded from taking the time to read it; and there is no evidence that he did not do so, only that he does not recall reading it. Also, Allan conceded that he had signed similar releases at his fitness gym, and when taking yoga classes, renting roller blades, and participating in recreational running races. Whether he read it or not, he knew or had every reason to know that the document affected his legal rights.

Allan contends that the ski instructor's misrepresentations concerning his abilities to ski from the summit constitute bad faith or misrepresentation. However, Allan misconstrues the court's decision in *Randas*. The fraud or misrepresentation must be as to the contents of the waiver.

The Agreement and Release of Liability states plainly on its face that skiing is a dangerous activity, and that in consideration of receiving ski lessons, the student must agree to hold Snow Summit and its employees harmless and not to sue for any injury caused by participation in the hazardous activity, even if Snow Summit or its employees were negligent.

Allan admits he signed the Agreement and Release of Liability, in which he agreed not to sue Snow Summit, or its employees, even if he suffered injury or death, and even if the injury or death was caused by Snow Summit's or Oldt's negligence. A release or waiver could hardly be more clear.

The general principle remains unaltered that there is no public policy which opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party. Only exculpatory clauses affecting the public interest are invalid (*Tunkl v. University Regents*, Col. Sup. Ct, 1963), and exculpatory agreements in the recreational sports context do not implicate the public interest. See generally, *Buchan v. United States Cycling Federation*, Col. Ct. App., 1990.

Allan here expressly agreed, for a consideration, to "shoulder the risk" that otherwise might have been placed on Snow Summit. The defendants' business was not generally thought to be suitable for public regulation; defendants did not perform a service of great importance to the public, and the business was not a matter of practical necessity for members of the public.

Here, the release provisions were prominent, including large, bold type. Allan had to look at the release agreement at least long enough to fill his name in the indicated blank and to sign at the end. Notification was plain and clear. The effect of an adequate notice, of course, is simply to alter preexisting expectations. Allan cannot avoid the effect of the notice on his reasonable expectations simply by not reading the contracts he is given to sign.

The summary judgment is affirmed.

Pritikin v. Billy's Fitness Club and Spa

Columbia Court of Appeal (2005)

Plaintiff and appellant Tom Pritikin was a member of a health club. Defendant Billy's purchased the health club and renamed it Billy's Fitness Club and Spa. Billy's required each existing member to sign a new membership agreement. Pritikin signed a two-page, single-spaced membership agreement. The membership agreement is comprised of eleven itemized paragraphs, and included subjects such as fees, right to change fees, transferability, and termination. In the introductory paragraph, Billy's offered members "[t]he use of its services and facilities in conformance with the terms and conditions set forth below." Paragraph 7 is entitled "Waiver of Liability." It contained three paragraphs in the same type and type size as the remainder of the agreement. In an initial paragraph on waiver, the member "acknowledges and understands that he/she is using the facilities and services of the club and spa at member's own risk." The next waiver paragraph was as follows: "[t]he club and spa and their owners, officers, employees, agents, contractors and affiliates shall not be liable, and the member hereby expressly waives any claim of liability, for personal/bodily injury or damages, which occur to any member, or any guest of any member, or for any loss of or injury to person or property. This waiver is intended to be a complete release of any responsibility for personal injuries and/or property loss/damage sustained by any member or any guest of any member while on the club and spa premises, whether using exercise equipment or not."

Pritikin was injured at the health club prior to beginning his regular workout. Pritikin intended to use an elliptical training machine that ordinarily faced a television set suspended on a rack above head level. The television set was facing away from the elliptical training machine. In an attempt to return the television set to its normal position, Pritikin touched the rack on which the television lay, and the television slid off the rack over Pritikin's head. Pritikin attempted to hold the television in place; however, he was unable to bear the weight of the television and injured his knee.

The trial court granted summary judgment, concluding the written release clearly and unambiguously defeated Pritikin's lawsuit.

An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate cause of the injuries suffered by the plaintiff. A release may negate the duty element of a negligence action. Contract principles apply when interpreting a release, and normally the meaning of contract language, including a release, is a legal question. It therefore follows that we must independently determine whether the release in this case negated the duty element of plaintiff's cause of action.

To be effective, such a release must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties. The release need not achieve perfection. We note that the waiver of liability signed by Pritikin does not expressly include the term "negligence." Pritikin contends that the release is ineffective on this basis. However, the inclusion of the term "negligence" is simply not required to validate an exculpatory clause. Whether the exculpatory clause bars recovery against a negligent party is controlled by the intent of the parties as expressed in the written agreement. A waiver of liability in a health or fitness club membership agreement necessarily releases the health club from liability for its negligence, since there is no other liability to release.

The determination of whether a release contains ambiguities is a matter of contractual construction. An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. The circumstances under which a release is executed can give rise to an ambiguity that is not apparent on the face of the release. If an ambiguity as to the scope of the release exists, it should normally be construed against the drafter.

The scope of a release is determined by the express language of the release. The express terms of the release must be applicable to the particular negligence of the

defendant, but every possible specific act of negligence of the defendant need not be spelled out in the agreement. It is only necessary that the act of negligence, which results in injury to the releasor, be reasonably related to the object or purpose for which the release is given. The issue is not whether the particular risk of injury is inherent in the recreational activity to which the release applies, but rather the scope of the release.

An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release. Thus, a release given in connection with scuba diving activities was applicable to the death of a scuba diving student who was inadequately supervised and who drowned; similarly, releases given in connection with fitness activities were applicable to a slip and fall on a slide exercise mat during exercise class or while using weightlifting equipment under supervision of a personal trainer.

The release Pritikin signed was clear, unambiguous, and explicit. It released Billy's from liability for any personal injuries suffered while on Billy's premises, "whether using exercise equipment or not." Pritikin contends the release should be interpreted to apply only to injuries suffered while actively using Pritikin's exercise equipment. In this regard, Pritikin first contends the release cannot bar his action because, as a matter of law, a health club release is not effective to release claims for injuries arising out of circumstances unrelated to fitness. He argues that the negligence released must be reasonably related to the purpose of the release, i.e., fitness. This assertion is incorrect.

Pritikin's fitness-related argument is not a semantically reasonable interpretation of the release; indeed, it is contrary to the express language of the release. Given its unambiguous broad language, the release reached all personal injuries suffered by Pritikin on Billy's premises, including the injury Pritikin suffered because of the falling television.

In determining the purpose for which the release was signed, courts look at the language of the release and the agreement in which it is included, and not the inherent risks of the underlying recreational or sports activity. The release signed by Pritikin unambiguously, clearly, and explicitly released Billy's from liability for any injury suffered on the fitness club premises, whether using exercise equipment or not. The purpose of the release included access to and entry on Billy's facilities; the injury suffered by Pritikin was, therefore, reasonably related to the purpose of the release.

Thus, we conclude that the release would be effective to bar Pritikin's action, if it was executed and signed by Pritikin. Pritikin does not challenge that his membership form bears his signature. He now alleges, however, there is a disputed issue of material fact as to whether or not he agreed to all of its terms.

It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it. There is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. Where a party has signed a written agreement, it is immaterial to the question of whether he is bound by it that he has not read it and does not know its contents. In the usual commercial situation, there is no need for the party presenting the document to bring exclusions of liability or onerous terms to the attention of the signing party, nor need he advise him to read the document. In such situations, it is safe to assume that the party signing the contract intends to be bound by its terms.

However, limited situations may arise which suggest that the party does not intend to be bound by a term. In *Leon v. Sienna Resort Hotel*, Col. Ct. App., 1998, the plaintiff, who was injured when a sauna bench collapsed beneath him, had signed a 2-page admission form for a single day use of the defendant hotel's fitness room. The exculpatory clause was inconspicuously buried in small print on the reverse side of the admission form; defendant's employee watched plaintiff sign the form in a hasty,

informal way, without reading, let alone understanding, the document given its length and the amount of small print on its reverse side. The *Leon* court concluded that the exculpatory clause was not sufficiently conspicuous to be enforceable. In these special circumstances, there was a duty on defendant to take reasonable measures to bring the onerous exclusion clause in question to the plaintiff's attention.

Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important if it runs contrary to the party's normal expectations. Patrons of recreational facilities are accustomed to exculpatory clauses limiting liability for use of exercise equipment and are aware or should be aware signing releases affects their legal rights. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

The key is recognition of the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances, where the agreement has been induced by fraud, misrepresentation, or where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its items.

Here, Pritikin's claim is that he signed the form after Billy's acquired the fitness center as part of his membership renewal and that he was not aware of the new release terms. However, neither party presented evidence in the summary judgment proceeding of the circumstances concerning execution of the membership release form. For example, Pritikin never testified that he had not read the form, nor that he was not given time to

read the form. Billy's did not attempt to show that steps were taken to bring the release terms to the attention of Pritikin or other members.

The determination that a party who signs a waiver may be excused from its consequences requires a close examination on the totality of the circumstances surrounding the waiver's content, its execution, the parties' expectations, experience, and notice of the legal rights affected. However, there is simply no record before us, and on that basis we reverse the summary judgment and return the case for further proceeding on the issue.