

1995

Jeannie Harrison v. Free Spirit Recreation, Inc. : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 950706 CA

IN THE UTAH COURT OF APPEALS

JEANNIE HARRISON,

Plaintiff and Appellant,

vs.

FREE SPIRIT RECREATION,
INC.,

Defendant and Appellee.

:
:
:
:
: District Court No. 950901694
:
: Court of Appeals No. 950706-CA
:
: Priority No. 15
:

BRIEF OF APPELLEE

Appeal from the Order
Granting Defendant's Motion to Dismiss of the
Third Judicial District Court of Salt Lake County, State of Utah
Honorable Sandra N. Peuler

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JEANNIE HARRISON,	:	
	:	
Plaintiff and Appellant,	:	
	:	
vs.	:	District Court No. 950901694
	:	
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IN THE UTAH COURT OF APPEALS

JEANNIE HARRISON,	:
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Plaintiff and Appellant,	:
	:
vs.	: District Court No. 950901694
	:
FREE SPIRIT RECREATION,	: Court of Appeals No. 950706-CA
INC.,	:
	: Priority No. 15
Defendant and Appellee.	:

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1995).

STATEMENT OF THE ISSUES

I.

ISSUE ON APPEAL

Whether the trial court correctly determined as a matter of law that the Assumption of Risk and Release of Liability Agreement signed by Appellant operated as a complete bar against the claims brought by Appellant against Appellee.

II.

STANDARD OF REVIEW

A. Standard of Review for a Motion to Dismiss Under Rule 12(b)(6) of Utah Rules of Civil Procedure

When determining whether a trial court properly granted a rule 12(b)(6) motion to dismiss, the appellate court accepts the factual allegations in the complaint as true and considers them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff. The propriety of a Rule 12(b)(6) dismissal is a question of law, and the appellate court gives the trial court's ruling no deference and reviews it under a correctness standard. Prows v. State, 822 P.2d 764 (Utah 1991); St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991); Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990); Wright v. Univ. of Utah, 876 P.2d 380 (Utah Ct. App. 1994); Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 742 (Utah Ct. App. 1992), cert. denied, 853 P.2d 897 (Utah 1993).

B. Standard of Review for the Interpretation of a Contract

The interpretation of a written contract is a question of law determined by the words of the agreement. Republic Group, Inc. v. Won-

Door Corp., 883 P.2d 285 (Utah Ct. App. 1994). In construing a contract, the trial court must give effect to the intentions of the parties, and where possible, the intentions of the parties should be derived from an examination of the text of the contract. Id. In other words, the court must first look to the four corners of the document to determine the intent of the parties. Anesthesiologists Associates of Ogden v. St. Benedict's Hosp., 852 P.2d 1030 (Utah Ct. App. 1993). When interpreting a contract, the court looks at the contract as a whole to determine the parties' intent, and will accord common, accepted meanings to the words and phrases whenever possible. Gordon v. CRS Consulting Eng'g, Inc., 820 P.2d 492 (Utah Ct. App. 1991). If the court concludes that a contract is ambiguous from its text, extrinsic evidence should be considered by the trial court to ascertain the parties' intent. Id.; Kimball v. Campbell, 699 P.2d 714 (Utah 1985).

If a trial court interprets a contract without considering extrinsic evidence, its decision will be accorded no particular weight and will be reviewed under a correctness standard. Kimball, 699 P.2d 714. If the contract is ambiguous and the trial court proceeds to consider extrinsic

evidence respecting the intentions of the parties, then the appellate court review is strictly limited. Id.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Rule 12(b)(6) of the Utah Rules of Civil Procedure. Rule 12(b)(6) is attached in Addendum as Exhibit "A."

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

This case arose from an injury allegedly sustained as the result of the participation of Plaintiff and Appellant, Jeannie Harrison ("Harrison"), in shock cord jumping (commonly referred to as "bungee jumping") at a shock cord tower operated by Defendant and Appellee, Free Spirit Recreation, Inc. ("Free Spirit"), on July 21, 1994. (Memorandum in Support of Defendant's Motion to Dismiss at 1; R. 17). The subject shock cord jumping facility is located in Salt Lake County, State of Utah (Id.).

II.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

On or about March 8, 1995, Harrison filed her Complaint in the Third Judicial District Court, Civil No. 950901694 PI. (Complaint at 3; R. 3). On or about April 10, 1995, Free Spirit filed its Motion to Dismiss Plaintiff's Complaint and Memorandum in Support of Motion. (Motion to Dismiss Plaintiff's Complaint at 2; R. 16; Memorandum in Support of Motion to Dismiss at 7; R. 23). On or about April 20, 1995, Harrison filed her Memorandum in Opposition to Defendant's Motion to Dismiss. (Memorandum in Opposition to Defendant's Motion to Dismiss at 4; R. 31). On or about May 10, 1995, Free Spirit filed its Reply Memorandum. (Reply Memorandum at 10; R. 44).

The trial court ruled that Free Spirit's Motion to Dismiss should be granted. (Minute Entry at 1, attached in Addendum as Exhibit "B"; R. 51; Order at 2, attached in Addendum as Exhibit "C"; R. 58-59). The trial court ruled that the Release of Liability Agreement signed by Harrison operated as a bar to Harrison's claim against Free Spirit. (*Id.*). This appeal followed. (Notice of Appeal; R. 61-62).

STATEMENT OF FACTS

1. This case arose as the result of an injury allegedly sustained by Harrison while participating in bungee jumping at a bungee jumping tower operated by Free Spirit, located in Salt Lake County, State of Utah. (Memorandum in Support of Defendant's Motion to Dismiss at 1; R. 17). The incident occurred on July 21, 1994. (Id.).

2. On or about March 8, 1995, Harrison filed a Complaint for injuries arising out of the bungee jumping occurrence of July 21, 1994. (Complaint at 3; R. 3). The case was assigned to the Honorable Sandra N. Peuler of the Third Judicial District Court in and for Salt Lake County, Civil No. 950901694. (Id. at 1-3; R. 1-3).

3. In her Complaint, Harrison alleged against Free Spirit that its employee improperly instructed her on where to put her hands during the jump, and, as a result, she received permanent damage to her finger. (Complaint at 1-2; R. 1-2). Harrison did not plead a cause of action for willful and wanton misconduct or gross negligence against Free Spirit. (Id. at 1-3; R. 1-3).

4. Prior to participating in bungee jumping on the date of the alleged injury, Harrison signed an agreement entitled "Assumption of Risk and Release of Liability." (Assumption of Risk and Release of Liability, attached in Addendum as Exhibit "D"; R. 25). Harrison signed the Assumption of Risk and Release of Liability Agreement on the line identified as applicant's signature, and initialled the Agreement in seven other spaces on the Agreement. (Id., Exhibit "D").

5. Free Spirit filed its Motion to Dismiss Plaintiff's Complaint on April 10, 1995. (Motion to Dismiss Plaintiff's Complaint at 2; R. 15-16; Memorandum in Support of Motion to Dismiss at 7; R. 17-23). Free Spirit argued that under the law, a patron who signs an agreement exempting a recreational or amusement facility from liability for negligence will be bound by that agreement and cannot thereafter recover for personal injuries sustained while participating in the amusement or recreational activity. (Memorandum in Support of Motion to Dismiss at 2-7; R. 18-23). On or about April 20, 1995, Harrison filed her Memorandum in Opposition to Defendant's Motion to Dismiss, and Free Spirit subsequently filed its Reply Memorandum. (Memorandum in

Opposition to Defendant's Motion to Dismiss at 4; R. 31; Reply Memorandum at 10; R. 44).

6. After reviewing the pleadings, Judge Peuler ruled that Free Spirit's Motion to Dismiss should be granted. (Minute Entry at 1, Exhibit "B"; R. 51; Order at 1-2, Exhibit "C"; R. 58-59). The trial court ruled that the Assumption of Risk and Release of Liability Agreement signed by Harrison operated as a complete bar to Harrison's claim against Free Spirit. (Id.). Harrison appeals from that ruling. (Notice of Appeal; R. 61-62).

SUMMARY OF THE ARGUMENT

I. Judicial authority has held that release of liability agreements entered into by patrons of recreational facilities are valid and enforceable. The law in Utah is consistent in providing that one may contract to protect himself against losses sustained by his own negligence. The trial court correctly concluded upon an examination of the words of the Assumption of Risk and Release of Liability Agreement that it clearly and unambiguously operates as a complete bar to Harrison's claim of injuries sustained during the bungee jumping activity.

II. Harrison incorrectly asserts that the trial court's dismissal of her action was premature and that she should be able to conduct discovery. A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. Because the trial court accepted the allegations in Harrison's Complaint as true, there is no need to conduct further discovery to test the truthfulness of the allegations.

In addition, the interpretation of the Release Agreement is a question of law to be determined by the words of the Agreement. The trial court considered the pleadings and determined from the four corners of the Agreement that it precluded Harrison from bringing an action.

Furthermore, Harrison is not entitled to conduct discovery on the application of governmental standards or whether Free Spirit employees acted with willful and wanton negligence because these allegations were not pled in the Complaint, and further, the Plaintiff cannot support any such allegations in light of the facts alleged in the Complaint. Harrison cannot save her Complaint from being dismissed through speculative

allegations that are neither alleged in the Complaint nor supported by the facts.

III. The alleged negligence of Free Spirit's employees and the injury to Harrison's hands are hazards encompassed within the purview of the Assumption of Risk and Release of Liability signed by Harrison. The language of the Release Agreement at issue in the present case could not be more clear: It releases Free Spirit from liability for negligence of its employees and for any and all injuries and damages suffered by Harrison as a result of her participation in bungee jumping. In order for the Release Agreement to be enforceable, it is not necessary that the releasing party have specific knowledge of every injury that may occur from the activity, or every means by which the injury may occur. Because Harrison agreed to assume the risk of all injury however caused, and agreed to release Free Spirit from any and all injury even if it resulted through the negligence of Free Spirit's employees, the Release Agreement operates as a complete bar to Harrison's claims against Free Spirit.

IV. Judicial Authority has held that agreements releasing one from his or her negligence are not unconscionable. The intent to release Free

Spirit from liability is clearly expressed and easily comprehended, and Harrison's multiple signatures on the Agreement indicate she carefully read and comprehended the Agreement before signing it. There is no evidence that Harrison was induced into signing the Agreement in an unconscionable manner or that the Agreement is otherwise invalid.

Bungee jumping does not involve an essential activity where Harrison had no alternative but to participate. Contrary to Harrison's arguments, the Agreement is valid, and the trial court correctly determined that the Agreement bars Harrison's claims against Free Spirit.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY RULED THAT THE ASSUMPTION OF RISK AND RELEASE OF LIABILITY AGREEMENT SIGNED BY HARRISON OPERATED AS A COMPLETE BAR TO HARRISON'S CLAIM OF INJURY AGAINST FREE SPIRIT.

Prior to engaging in the bungee jumping activity that gave rise to the present suit, Harrison signed an agreement entitled "Assumption of Risk and Release of Liability." Assumption of Risk and Release of Liability, Exhibit "D"; R. 25. This Agreement provides in part as follows:

I am hereby aware that shock cord jumping (commonly referred to as "Bungee Jumping") is a hazardous activity and I am voluntarily participating in this activity with full knowledge of the danger involved and hereby agree to accept any and all risk of injury or death.

Id., Exhibit "D"; R. 25. The Agreement further states:

As lawful consideration for being permitted by Free Spirit Recreation to participate in these activities and rent their equipment, I hereby agree that I, my heirs, distributes, guardians, legal representatives, and assigned shall not make a claim against, sue, attach the property of, or prosecute Free Spirit Recreation for injury or damage resulting from the negligence or other acts however caused by any employees, agent, or contractor of Free Spirit Recreation as a result of my participation in shock cord jumping. In addition, I hereby release and discharge the company from all actions, claims, or demands that I, my heirs, distributes, guardians, legal representatives, or assigned now have or may here after have for injury or damage resulting from my participation in shock cord jumping activities.

Id. Exhibit "D"; R. 25.

Judicial authority has held that a patron who signs an agreement exempting a recreational or amusement facility from liability for negligence will be bound by that agreement and cannot thereafter recover for personal injuries sustained while participating in the amusement or recreational activity. The law in Utah has long

held that "one may contract to protect himself against liability for loss caused by his negligence." Walker Bank & Trust Co. v. First Sec. Corp., 341 P.2d 944, 947 (Utah 1959); Freund v. Utah Power & Light Co., 793 P.2d 362 (Utah 1990); Healey v. J.B. Sheet Metal, Inc., 892 P.2d 1047 (Utah Ct. App. 1995). The Washington State Court of Appeals recently held that a release of liability contract entered into by the injured party bars that party from recovery against defendant for personal injuries or death allegedly caused by the negligence of the defendant. Boyce v. West, 862 P.2d 592 (Wash. Ct. App. 1993). The Boyce case involved a wrongful death action brought by the plaintiff on behalf of her son who died during a scuba diving accident while taking scuba lessons.¹

The Supreme Court of Wyoming has held that "agreements absolving participants and proprietors from negligence liability

¹ See also Hewitt v. Miller, 521 P.2d 244, 248 (Wash. Ct. App. 1974) (This case also involved an action against scuba diving instructors for the death of a scuba diving student who signed a release of liability in favor of the instructors. The court held: "Based upon the undisputed facts in the record and upon our review of the law of this state, we hold that the release in question is valid and therefore the trial court correctly determined that it operates as a complete bar to appellant's lawsuit based upon allegations of negligence.")

during hazardous recreational activities are enforceable"

Schutkowski v. Carey, 725 P.2d 1057, 1059 (Wyo. 1986); see also

Milligan v. Big Valley Corp, 754 P.2d 1063 (Wyo. 1988). In

Schutkowski v. Carey, the plaintiff, a sky diving student, filed a complaint against her sky diving instructors for injuries she allegedly sustained during her first sky diving jump. Plaintiff's complaint alleged that the sky diving instructors were negligent in failing to adequately instruct plaintiff on proper sky diving procedures.

The trial court in Carey found that a "Release and Indemnity Agreement" signed by plaintiff excused the instructors. Carey, at 1062. The trial court granted defendants' motion for summary judgment based on the release agreement, and the Wyoming Supreme Court affirmed. In arriving at its decision, the Wyoming Court referred to an Ohio state court opinion which reads as follows: "A participant in recreational activity is free to contract with the proprietor of such activity so as to relieve the proprietor of responsibility for damages or injuries to the participant caused by the negligence of the proprietor" Id. at 1060 (quoting Cain v.

Cleveland Parachute Training Center, 457 N.E.2d 1185, 1187 (Ohio 1983)).

Many jurisdictions from around the country have taken the same position as the Wyoming and Washington courts with respect to the enforceability of release of liability agreements as applied to recreational activities. Owen v. Vic Tanny's Enterprises, 199 N.E.2d 280 (Ill. 1964); Lee v. Allied Sports Associates, Inc., 209 A.2d 329 (Mass. 1965); Moss v. Fortune, 340 S.W.2d 902 (Tenn. 1960); Lee v. Sun Valley Co., 695 P.2d 361 (Idaho 1984); Jones v. Dressel, 623 P.2d 370 (Colo. 1981); Skotak v. Vic Tanny Int'l, Inc., 513 N.W.2d 5 (Mich. Ct. App. 1994); LaFrenz v. Lake County Fair Bd., 360 N.E.2d 605 (Ind. Ct. App. 1977); DeBoer v. Florida Offroaders Driver's Ass'n, Inc., 622 So.2d 1134 (Fla. Dist. Ct. App. 1993); Szczotka v. Snowridge, Inc., 869 F. Supp 247 (D. VT. 1994) (interpreting Vermont state law); Bertotti v. Charlotte Motor Speedway, 893 F. Supp. 565 (W.D.N.C. 1995) (interpreting North Carolina state law); Haines v. St. Charles Speedway, Inc., 874 F.2d 572 (8th Cir. 1989) (interpreting Missouri state law).

In this case, the Release Agreement signed by Harrison clearly and unambiguously releases Free Spirit from any liability as a result of Harrison's participation in the bungee jumping activity, including injuries resulting from Free Spirit's alleged negligence. In addition to signing the Release Agreement on the line identified as applicant's signature, Harrison initialled the agreement in seven other spaces on the Agreement. Assumption of Risk and Release of Liability, Exhibit "D"; R. 25. The Release Agreement clearly demonstrates that Harrison had a fair opportunity to review its contents and carefully consider the risks she was assuming before signing the document and participating in the bungee jump.

The trial court found from its examination of the four corners of the Agreement that the parties intended to release Free Spirit from liability for Plaintiff's injuries. Based on the facts of this case and the governing legal authority, the trial court correctly interpreted the Release Agreement entered into by Harrison to operate as a complete bar to Harrison's claim against Free Spirit.

II.

THE VALIDITY OF THE RELEASE AGREEMENT IS A LEGAL QUESTION DECIDED BY AN EXAMINATION OF THE DOCUMENT.

In bringing this appeal, Harrison argues that Free Spirit's Motion to Dismiss was premature and that she should be able to obtain discovery showing that the actions of Free Spirit's employees and the injury she received fall outside the purview of the Release Agreement. Brief of Appellant at 4. The Utah Supreme Court has explained Rule 12(b)(6) as follows: "A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts." St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991). As the trial court had to accept all facts in the Complaint as being true, there is no need to conduct discovery to test the truthfulness of the allegations.

Free Spirit brought its Motion to Dismiss on the basis that, even if Harrison's allegations were accepted as true, the Release Agreement entered into by Harrison operates as a complete bar to

her claims for relief. The question of whether Harrison is prohibited from recovery pursuant to the Release Agreement is a legal question. The Supreme Court of Wyoming held as follows: "Exculpatory agreements, also referred to as releases, are contractual in nature. Interpretation and construction of contractual agreements are questions of law for the court to decide." Milligan v. Big Valley Corp., 754 P.2d 1063, 1065 (Wyo. 1988) (citations omitted); Jones v. Dressel, 623 P.2d 370 (Colo. 1981). The Utah Supreme Court has consistently held that the interpretation of a written contract is a question of law determined by the words of the agreement. Kimball v. Campbell, 699 P.2d 714 (Utah 1985); Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285 (Utah Ct. App. 1994). Accordingly, the trial judge considered the pleadings and determined as a matter of law that the Release Agreement was unambiguous and that it evidenced an intent of the parties to operate as a bar to Harrison's claims against Free Spirit. Minute Entry at 1, Exhibit "B"; R. 51. In her Complaint, Harrison failed to allege any factual

scenario under which she would be able to prevail against Free Spirit, therefore the trial court's ruling was proper.

Harrison also argues on appeal that whether Free Spirit's bungee jumping facility and equipment met governmental standards is a question that requires further discovery. Brief of Appellant at 4. Harrison then acknowledges that violation of governmental standards was not pled, purportedly because of lack of information, and asserts that she is entitled to discovery to determine if any such regulations were in fact violated. *Id.* These arguments, however, are insufficient to vacate the dismissal of Harrison's complaint. Harrison did not allege in her Complaint that the bungee cord was in violation of any governmental standards, nor did she name the governmental standards that may have been violated. Complaint 1-3; R. 1-3. Furthermore, Harrison has no support that a governmental regulation would set the standard of care, or that the violation of a statute or regulation would operate to void a release of liability agreement. Harrison's arguments are nothing more than speculation and conjecture asserted to save the Complaint from dismissal.

The courts have consistently held that a plaintiff cannot save a complaint from dismissal "by merely restating the conclusory allegations contained in his complaint, and amplifying them only with speculation about what discovery might uncover." Bryant v. O'Connor, 848 F.2d 1064, 1067 (10th Cir. 1988) (quoting Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981)). Harrison's speculative allegations must also fail on appeal.

In addition, Harrison seeks to circumvent the effect of the Release Agreement by claiming that the Agreement does not bar a claim based on gross negligence or willful and wanton misconduct on the part of Free Spirit's employee. Brief of Appellant at 7-8. Harrison argues that many of the cases cited by Free Spirit in its memoranda in support of its Motion to Dismiss "conditioned the imposition of the release 'subject to willful misconduct limitations.'" Brief of Appellant at 8. In other words, willful or wanton misconduct by the defendant's employees renders a release of liability invalid.

This argument is immaterial in the present case because Harrison did not allege in her Complaint that Free Spirit's conduct was willful or wanton. Complaint 1-3; R. 1-3. Harrison merely asserted in her Complaint that the instruction from Free Spirit's employee on where to hold her hands was improper. Id. Because willful and wanton misconduct was never pled, Harrison can not make those speculative allegations on appeal to reverse the decision of the trial court.

Furthermore, Harrison cannot support a claim of willful and wanton misconduct in light of the facts alleged in her Complaint. Harrison alleges in her Complaint that when she asked a Free Spirit employee where to place her hands during the bungee jumping activity, that she was improperly instructed on where to place her hands during the jump. Complaint 1-3; R. 1-3. Even assuming the truthfulness of these allegations, this alleged wrongful conduct does not rise to the level of willful or wanton. Harrison may not now attempt to bolster her Complaint with speculative allegations in order to vacate the dismissal of her Complaint.

III.

THE ALLEGED NEGLIGENCE OF FREE SPIRIT'S EMPLOYEES AND THE INJURY TO PLAINTIFF'S HANDS ARE HAZARDS ENCOMPASSED BY THE ASSUMPTION OF RISK AND RELEASE OF LIABILITY AGREEMENT.

Harrison specifically contends in her Brief of Appellant that the Release Agreement signed by Plaintiff does not bar her claim against Defendant because the actions of Free Spirit Recreation's employees in negligently instructing Plaintiff on where to put her hands during the jump was not a foreseeable and known risk which Plaintiff assumed in signing the release. Brief of Appellant at 5. Plaintiff further contends that the injury to her hands was not a risk which she had knowledge of in executing the Release Agreement. Id.

Contrary to Harrison's contentions, the negligent acts of Free Spirit's employees and the injury to Harrison's hands are clearly hazards encompassed by the language of the Release Agreement. The first paragraph of the Agreement states as follows: "I am hereby aware that shock cord jumping . . . is a hazardous activity and I am voluntarily participating in this activity with full knowledge of the

danger involved and hereby agree to accept any and all risk of injury or death. (Please initial) [Harrison's initials]." Assumption of Risk and Release of Liability ¶ 1, Exhibit "D"; R. 25 (emphasis added). In the second paragraph, the Agreement states that the signer "shall not make a claim against, sue, attach the property of, or prosecute Free Spirit Recreation for injury or damage" Id. ¶ 2, Exhibit "D"; R. 25 (emphasis added). The second paragraph further provides that Harrison releases and discharges the company from all actions "for injury or damage resulting from my participation in shock cord jumping activities. (Please initial) [Harrison's initials]" Id., Exhibit "D"; R. 25 (emphasis added). The third paragraph of the Release Agreement states that Harrison will "HOLD HARMLESS the Christensen Corp. for any claims in the event of any injuries, or damages as a result of my participation in shock cord jumping activities." (Please initial) [Harrison's initials.]" Id. ¶ 3, Exhibit "D"; R. 25 (emphasis added).

Nowhere does the Release Agreement limit the assumed risks to only certain injuries as Harrison argues. To the contrary, the

above referenced language makes clear that there are many injuries that could result from bungee jumping and Free Spirit will be released from liability for any injury or damage arising from the activity. Id. ¶ 1, 2 and 3. Exhibit "D"; R. 25.

Harrison cites to paragraph 4 of the Release Agreement as support for her contention that the known risks of injury are limited to back or neck strain. Appellant's Brief at 6. This paragraph, however, is not intended to set forth a list of injuries that may result from bungee jumping. Rather, the provision in paragraph 4 requires the participant to acknowledge that he is in good physical condition and to notify Free Spirit of any physical impairments. Assumption of Risk and Release of Liability ¶ 4, Exhibit "D"; R. 25. As an example of some of the impairments which should be disclosed, the Agreement lists heart problems, back and neck problems, SI joint, pelvis, eye surgery, etc. Id., Exhibit "D"; R. 25. The "etc." signifies that this is not an exhaustive list and that there could be many more impairments to be concerned about in this type of hazardous activity. Paragraph 4 of the Release Agreement is

consistent with the rest of the release in notifying the signer that shock cord jumping is a hazardous activity, which requires the participant to be in good overall physical condition to participate.

In addition, the negligent acts of Free Spirit's employees is a risk that is expressly set forth in the Release Agreement. Paragraph 2 of the Agreement states in unambiguous terms that "I hereby agree that I . . . shall not make a claim against . . . Free Spirit Recreation for injury or damage resulting from the negligence or other acts however caused by any employees, agent, or contractor of Free Spirit Recreation as a result of my participation in shock cord jumping." Id. ¶ 2, Exhibit "D"; R. 25 (emphasis added). The language could not be more clear. The alleged negligence of Free Spirit's employees in instructing Harrison on where to put her hands during the jump is clearly within the scope of the Release Agreement. Harrison agreed to release Free Spirit for her injury however caused, including an injury caused by the negligent instruction of a patron by an employee in the use of the bungee jumping harness and cord. Id., Exhibit "D"; R. 25.

Harrison would have the Court believe that the Release Agreement is invalid unless it lists every injury that could possibly occur to a bungee jump participant and every conceivable means by which an injury could occur. Brief of Appellant at 5-6. Contrary to Harrison's arguments, it is not necessary that the releasing party have specific knowledge of every injury that may occur from the activity or every means by which the injury may occur in order for the release of liability to be enforceable. As the court of appeals in Florida recently held: "for a release to be effective, it is not necessary to list each possible class of releasor or each possible manner in which a releasor could be injured during an inherently dangerous event. The possibilities are endless." DeBoer v. Florida Offroaders Driver's Ass'n, Inc., 622 So.2d 1134, 1136 (Fla. Dist. Ct. App. 1993).

In the case of Boyce v. West, 862 P.2d 592 (Wash. Ct. App. 1993), an opinion cited earlier in this Brief, the plaintiff made the same arguments as Harrison makes in the present case in an attempt to void a release of liability agreement in favor of the defendants.

The Boyce case involved a wrongful death action brought by the plaintiff on behalf of her son who died during a scuba diving accident while taking scuba lessons as part of a college course at Gonzaga University. The personal representative of the decedent alleged that the negligence of the diving instructor, James West, caused the wrongful death. Plaintiff named as defendants both Mr. West and Gonzaga University.

Before taking the scuba lessons, the decedent signed a release of liability and assumption of risk agreement.² The defendants in

² The release of liability and assumption of risk provisions at issue in Boyce read in part as follows:

I understand and agree that neither . . . Gonzaga University . . . nor [PADI] may be held liable in any way for any occurrence in connection with this diving class that may result in injury, death, or other damages to me or my family, heirs, or assigns, . . . and further to save and hold harmless said program and persons from any claim by me, or my family, estate, heirs, or assigns, arising out of my enrollment and participation in this course.

.
It is the intention of [Peter Boyce] by this instrument to exempt and release [Gonzaga University] and [PADI] from all liability whatsoever for personal injury, property damage or wrongful death caused by negligence.

(continued...)

Boyce moved for summary judgment on the basis that the release agreement precluded plaintiff from recovery. The trial court agreed and granted the summary judgment motion. On appeal, plaintiff argued, as Harrison does in her Brief of Appellant, that the release of liability agreement only barred recovery for injuries resulting from "known risks voluntarily assumed" and that in signing the release the decedent did not know or assume the risk of negligent instruction and supervision by the scuba instructor, Mr. West.

Boyce, 862 P.2d at 597.

In affirming the trial court's ruling on defendant's summary judgment motion, the Boyce Court held that "Mr. Boyce's express assumption of all risks associated with his enrollment in the scuba diving course bars a claim for recovery." Id. at 598 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on

2(...continued)

[I]n consideration of being allowed to enroll in this course, I hereby personally assume all risks in connection with said course, for any harm, injury or damage that may befall me while I am enrolled as a student of the course, including all risks connected therewith

Boyce, 862 P.2d 595 n. 2 & 3.

Torts § 68, at 484 (5th ed. 1984)). In arriving at its decision, the court reasoned that "knowledge of a particular risk is unnecessary when there is an express agreement to assume all risk; by express agreement a plaintiff may undertake to assume all of the risks of a particular . . . situation, whether they are known or unknown to him."'" Id. at 598 (quoting Madison v. Superior Court, 250 Cal. Rptr. 299 (Cal. 1988) (quoting Coates v. Newhall Land & Farming, Inc., 236 Cal. Rptr. 181 (Cal. 1987) (citations omitted) (emphasis in original))). The court then held:

[n]egligent instruction and supervision are clearly risks associated with being a student in a scuba diving course and are encompassed by the broad language of the contract. That Mr. Boyce [decedent] may not have specifically considered the possibility of instructor negligence when he signed the release does not invalidate his express assumption of all risks associated with his participation in the course.

Id. (emphasis in original).

The same is true in this case. It is not necessary that Harrison have knowledge of a particular act of negligence or a particular injury when she made an express agreement to assume all risks of injury or damage and release Free Spirit from all liability. In

executing the Release Agreement, Harrison agreed to assume "any and all risk of injury or death" associated with the shock cord jumping activity. Assumption of Risk and Release of Liability ¶ 1, Exhibit "D"; R. 25. The negligent acts of Free Spirit's employees and the injury to Harrison's hands are clearly hazards encompassed by the language of the Release Agreement. This Agreement operates as a complete bar to Harrison's claims against Free Spirit, and, accordingly, the trial court correctly dismissed Harrison's action against Free Spirit.

IV.

THE RELEASE AGREEMENT IS NOT UNCONSCIONABLE

A. Agreements Which Exempt a Recreational Facility from Liability for Its Own Negligence Are Valid and Enforceable Under the Law.

Harrison next contends in her Brief that the Release Agreement is unconscionable because it absolves Free Spirit of liability as a result of its own negligence. Brief of Appellant at 6-7. In making this argument, Harrison fails to cite to any legal authority in support

of her position and ignores the authority which holds that agreements purporting to limit one's liability for negligence are enforceable.

As mentioned previously, the Wyoming Supreme Court held that "[e]xculpatory agreements, releasing parties from negligence liability for damages or injury, are valid and enforceable"
Milligan, 754 P.2d at 1065. The Eighth Circuit Court of Appeals determined that "[i]n Missouri an agreement to exempt one from the consequences of negligence is not against public policy." Haines v. St. Charles Speedway, Inc., 874 F.2d 572, 575 (8th Cir. 1988). Other jurisdictions have arrived at this same conclusion. DeBoer, 622 So.2d 1134; Boyce, 862 P.2d 592; LaFrenz v. Lake County Fair Bd., 360 N.E.2d 605 (Ind. Ct. App. 1977).³

The Utah Appellate Courts have similarly held that agreements which obligate one party to assume responsibility for the negligence of another are enforceable. Walker Bank & Trust Co., 341 P.2d 944; Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187 (Utah 1983); Freund, 793 P.2d 362; Healey, 892 P.2d 1047.

³ See other opinions cited on page 15 of this Brief.

The Utah Supreme Court held that "an indemnity agreement which purports to make a party respond for the negligence of another" is enforceable when that intention is "'clearly and unequivocally expressed.'" Freund, 793 P.2d at 370 (quoting Shell Oil Co., 658 P.2d at 1189).

Here, the intent to release Free Spirit from any liability as a result of Harrison's participation in the bungee jump activity is clearly expressed and easily comprehended in the Release Agreement. In addition to signing the Release Agreement, Harrison initialled the agreement in 7 other places signifying that she had read, comprehended, and agreed to the provisions. Assumption of Risk and Release of Liability, Exhibit "D"; R. 25.

B. The Release Agreement was Fairly Negotiated.

Harrison does not allege, nor can she assert, that the agreement was unfairly negotiated. As previously mentioned, the Release Agreement is comprehensible and Harrison signed and initialled the agreement in 8 different places. Assumption of Risk and Release of Liability, Exhibit "D"; R. 25. There is no evidence or allegation

that Harrison was pressured into signing the Agreement or that she didn't have adequate opportunity to review the Agreement. Harrison had the choice of whether to participate in the activity and could have chosen not to participate.⁴ Bungee jumping does not involve an essential activity such as contracting with a utility company or a hospital, where the plaintiff has no reasonable alternative but to use the product or service.⁵

Harrison otherwise fails to show that the Release Agreement is unconscionable and therefore unenforceable. Consequently, Harrison's argument in this regard must fail and the trial court's ruling should be affirmed.

⁴ See DeBoer, 622 So.2d at 1136 (there is no inequality of bargaining power in recreational settings where the releasor voluntarily participates in the activity).

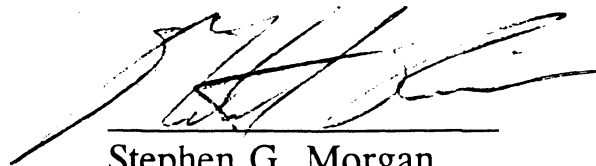
⁵ See Milligan, 754 P.2d at 1067 ("Grand Targhee [defendant] did not force Dean Griffin [decedent] to ski in the race. Griffin could have chosen not to race. Skiing in the race was not a matter of practical necessity for the public, and putting on the race was not an essential service. Nor was skiing in the race the only reasonable alternative. Thus, no decisive bargaining advantage or disadvantage existed. Further, no evidence suggests that the decedent was unfairly pressured into signing the agreement or that he was deprived of an opportunity to understand its implications.").

CONCLUSION

Based on the foregoing, Defendant and Appellee, Free Spirit Recreation, Inc., respectfully requests that the Order of the trial court granting Free Spirit's Motion to Dismiss be affirmed, the appeal of Harrison be dismissed, and Free Spirit be awarded its costs on appeal.

DATED this 24 day of January, 1996.

MORGAN & HANSEN

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Stephen G. Morgan

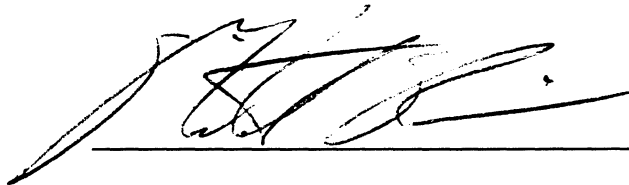
Mitchel T. Rice

Attorneys for Defendant and Appellee
Free Spirit Recreation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of January, 1996, I caused two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE** to be hand-delivered to the following:

Ronald E. Dalby, Esq.
GOICOECHEA LAW OFFICES
4516 South 700 East, Suite 280
Salt Lake City, Utah 84107

A handwritten signature in black ink, appearing to read 'R. Dalby', is written over a horizontal line.

CONTENTS OF THE ADDENDUM

Rule 12(b)(6) of the Utah Rules of Civil Procedure	Exhibit "A"
Minute Entry dated June 13, 1995	Exhibit "B"
Order dated July 10, 1995	Exhibit "C"
Assumption of Risk and Release of Liability Agreement	Exhibit "D"

Tab A

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the

court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended effective Sept. 4, 1985; April 1, 1990.)

Compiler's Notes. — This rule is substantially similar to Rule 12, F.R.C.P.

Cross-References. — Motions generally, U.R.C.P. 7.

NOTES TO DECISIONS

ANALYSIS

- | | |
|---|---|
| Jurisdiction over the person. | —Improper. |
| Motion for judgment on pleadings. | —Standard. |
| —Matters outside of pleadings. | —Standard of review. |
| —Answers to interrogatories. | Motion to dismiss for lack of venue. |
| —Rights of opposing party. | —Forum-selection clause in contract. |
| Motion for more definite statement. | Presentation of defenses. |
| —Bill of particulars. | —How presented. |
| —Criteria. | —Affirmative defenses. |
| —Motion to dismiss distinguished. | —Divorce. |
| —Purpose. | —Election of remedies. |
| —Delay. | —Failure to state claim upon which relief can be granted. |
| —Obtaining evidence. | —General and special appearances. |
| Motion to dismiss for failure to state a claim. | —Statute of frauds. |
| —Explained. | —Venue. |

Tab B

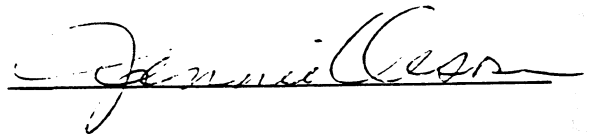
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry,
postage prepaid, to the following on this 13 day of June, 1995.

Ronald E. Dalby
GOICOECHEA LAW OFFICES
Attorney for Plaintiff
P. O. Box 17345
Salt Lake City, UT 84117-0345

Stephen G. Morgan
MORGAN & HANSEN
Attorney for Defendant Free Spirit
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Robert G. Gilchrist
RICHARDS, BRANDT, MILLER & NELSON
Attorney for Defendant 49th Street Galleria
P. O. Box 2465
Salt Lake City, UT 84110-2465

A handwritten signature in cursive script, appearing to read "J. Miller", is written over a horizontal line.

Tab C

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MORGAN & HANSEN
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Free Spirit Recreation, Inc.
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Telephone: (801) 531-7888
Fax: (801) 531-9732

JUL 10 1995

SALT LAKE COUNTY
BY L. Morgan

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JEANNIE HARRISON,

Plaintiff,

vs.

FREE SPIRIT RECREATION, INC.,
and THE 49TH STREET GALLERIA,

Defendants.

ORDER

Civil No. 950901694 PI

Judge Sandra N. Peuler

This matter came before the Court on Defendant Free Spirit Recreation, Inc.'s Motion to Dismiss Plaintiff's Complaint, with Ronald E. Dalby and Matthew J. Storey appearing as attorneys for Plaintiff, and Stephen G. Morgan and Mitchel T. Rice appearing as attorneys for Defendant Free Spirit Recreation, Inc.; and

After reading the Motion to Dismiss, the memoranda in support thereof, and the memoranda in opposition thereto,


IT IS ORDERED THAT:

1. The Motion to Dismiss Plaintiff's Complaint is hereby granted;

2. Plaintiff's Complaint against Defendant Free Spirit Recreation, Inc. is hereby dismissed with prejudice.

Dated this 10 day of ^{July}~~June~~, 1995.

BY THE COURT:


Judge Sandra N. Peuler



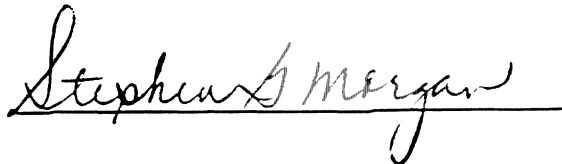
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of June, 1995, I caused a true and correct copy of the foregoing ORDER to be mailed via first-class mail, postage prepaid, to the following:

Ronald E. Dalby
Matthew J. Storey
GOICOECHEA LAW OFFICES
Attorneys for Plaintiff
4516 South 700 East, Suite 280
P.O. Box 17345
Salt Lake City, UT 84107

Stephen W. Rupp
McKAY, BURTON & THURMAN
Attorney for the Agents of
The 49th Street Galleria
10 East South Temple, Suite 600
Salt Lake City, UT 84133

Robert G. Gilchrist
RICHARDS, BRANDT, MILLER & NELSON
Attorney for Alan V. Funk, Receiver and
Liquidating Agent
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465

A handwritten signature in cursive script, reading "Stephen S. Morgan", is written over a horizontal line.

Tab D

ASSUMPTION OF RISK AND RELEASE OF LIABILITY

I am hereby aware that shock cord jumping (commonly referred to as "Bungee Jumping") is a hazardous activity and I am voluntarily participating in this activity with full knowledge of the danger involved and hereby agree to accept any and all risk of injury or death. (Please Initial) JS

As lawful consideration for being permitted by Free Spirit Recreation to participate in these activities and rent their equipment, I hereby agree that I, my heirs, distributees, guardians, legal representatives, and assigned shall not make a claim against, sue, attach the property of, or prosecute Free Spirit Recreation for injury or damage resulting from the negligence or other acts however caused by any employees, agent, or contractor of Free Spirit Recreation as a result of my participation in shock cord jumping. In addition, I hereby release and discharge the company from all actions, claims, or demands that I, my heirs, distributees, guardians, legal representatives, or assigned now have or may here after have for injury or damage resulting from my participation in shock cord jumping activities. (Please Initial) JS

I hereby state that I will **HOLD HARMLESS** the CHRISTENSEN CORP for any claims in the event of any injuries, or damages as a result of my participation in shock cord jumping activities. (Please Initial) JS

I am in good physical health or have notified Free Spirit Recreation of any physical impairments, or limitations (i.e.; history of any heart or back and neck problems, SI joint, pelvis, eye surgery, etc.) that may affect my physical and mental well being during or after shock cord jumping activities. (Please Initial) JS

I hereby declare that I am not under the influence of drugs or alcohol and am of sound mind. (Please Initial) JS

I hereby declare that I am 18 years of age or older. (Please initial) JS

AGE VERIFICATION

Drivers License/I.D. No. [REDACTED]

Date of Birth 9/29/43 Age 50

Verified by [REDACTED]

(Signature of Employee or Agent of Free Spirit Recreation)

I hereby declare that I am the legal parent/guardian of applicant and give my permission for his/her participation. I will assume full responsibility as stated in this contract.

Parent/Guardian Signature [REDACTED]

I have carefully read this agreement and fully understand its contents. I am also aware that this agreement is a release of liability and a contract between myself and Free Spirit Recreation. I am signing this waiver and agreement of my own free will. (Please Initial) JS

APPLICANT SIGNATURE: J C Harrison

WITNESS SIGNATURE: [REDACTED]

APPLICANT INFORMATION

NAME: J C Harrison PHONE #: 202-264-2646

ADDRESS: 4646 Avenue CITY: SEC

STATE: SC ZIP CODE: 29107

WT.: 200 AGE: 49 OCCUPATION: Self

REFERRED BY: SON

4.1

JUL 21 1994

THAT