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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARILYN ROTHMAN,

Plaintiff and Appellant,

v.

HEART CONSCIOUSNESS CHURCH, INC., et al.,

Defendants and Respondents.

A128138

(Lake County
Super. Ct. No. CV 406092)

Plaintiff Marilyn Rothman has taken this appeal from a judgment entered upon an order that granted defendants' motion for summary judgment and dismissed her action for negligence and premises liability. Plaintiff argues that the trial court erred by finding her action barred by the defense of express assumption of the risk. We conclude that plaintiff expressly released defendants from liability, and affirm the order and judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff visited the Harbin Hot Springs (Harbin) resort in March of 2007, with a reservation to stay for four nights. The Harbin resort is a nonprofit retreat and workshop center located on rural, undeveloped land in Lake County which is owned and operated by the Heart Consciousness Church (HCC). Guests of the Harbin resort are offered the use of natural spring pools, along with activities that include yoga, dance, bodywork, meditation, massages, holistic meals, workshops and hiking on the grounds. Lodging is provided to visitors in a variety of accommodations.

When plaintiff registered at the office she was required, as are all visitors to the Harbin resort, to sign a one-page "Visit Pass" as a condition of her entry onto the premises. The Visit Pass states the guest's name, address, vehicle model and license plate number, and reservation information. A release from liability (the Release) is stated in a separate paragraph of the document, which acknowledges that the resort is located in a rustic, hilly and wild area, and provides: "I and my assignees, heirs, personal and legal representatives, release from liability, hold harmless & will not make any claims (present and future) against HCC DBA Harbin Springs, or any of its staff, agents, contractors, guests or volunteers for any physical or emotional injury, including death, that may occur to me & accompanying children at Harbin Springs; including but not limited to, slipping and falling, use of any pools including infections or drowning & use of any of the trails; including but not limited to, any loss of personal property from theft including articles left in my room or vehicle or damage of any kind to my property or vehicle, whether resulting from my own acts, the acts of others, acts of God or from acts of any HCC staff, agents, contractors or volunteers. Harbin is a private, member's only organization & reserves the right to serve or terminate the tenancy of a guest for reasons the former shall deem objectionable."

Plaintiff testified at her deposition that she did not read the Release provision before she signed the Visit Pass. The Harbin staff did not discuss the Release with plaintiff, but she was given an opportunity to review the terms of the Visit Pass before she signed it. Plaintiff acknowledged that she understood the language of the Release.

After plaintiff signed the Visit Pass she drove her car to her room, then returned to the parking lot. Plaintiff noticed an outdoor vendor "tent at the left side of the room" and walked there to look at the silk clothing in a store called Heaven on Earth. Defendant Regina Cohen operated the Heaven on Earth store as a vendor in a space she rented monthly on the Harbin resort premises pursuant to an annually renewed "Vendors Agreement" with HCC. The Heaven on Earth store consisted of a canvas tent situated in "booth number 1" on the "vendor lawn" of the Harbin resort, a flat gravel or dirt area

adjacent to the main, paved road through the premises. Other vendors with larger stores were located nearby.

The clothing inside the Heaven on Earth store was hung on rather high rolling racks. The clothing racks continued on a horizontal pole outside the front of the tent. The floor of the Heaven on Earth store was covered with an outdoor carpet or mat. The carpet extended slightly outside the entrance to the store. Seven feet from the entry into the tent was a cement ditch, approximately two to six inches deep and just less than a foot across, situated immediately in front of the road. Cohen cleaned the ditch regularly with a broom and shovel, although the ditch was located on the Harbin property rather than the premises rented by Cohen. The store carpet and the ditch were separated by gravel and grass.

According to plaintiff's deposition testimony she entered the tent to look at the clothing, then proceeded to the outside of the tent, where "more clothes" were hanging from a "high pole" or horizontal rack. She continued to the end of the clothing rack near the road. Plaintiff was looking up at the clothes when her foot turned in the curve of the ditch and she fell to the ground.

Plaintiff filed an action against HCC for negligence and premises liability on December 19, 2008, and included Cohen as a defendant in her third amended complaint filed on August 6, 2009. Defendants separately filed summary judgment motions, both based on the claim that the Release signed by plaintiff barred the action against them. After a hearing the trial court found that the Release was valid, and precluded plaintiff's action against both defendants. A judgment was subsequently entered in favor of defendants. This appeal followed.

DISCUSSION

Plaintiff argues that the trial court erred by granting defendants' motions for summary judgment on the ground that the express Release she signed negated the element of duty. She claims that the Release was not adequately clear and conspicuous, and did not "cover the risk of injury" to her from defendants' acts of negligence.

"The standards applicable to our review of a summary judgment motion are well settled. Summary judgment is properly granted if there is no triable issue of material fact and the issues raised by the pleadings may be decided as a matter of law." (*Garofalo v. Princess Cruises, Inc*. (2000) 85 Cal.App.4th 1060, 1068.) " 'A defendant may do so as to a particular cause of action by establishing, as a matter of undisputed fact, either (1) that one of the necessary elements of that cause of action does not exist, or (2) that it has a complete defense to that cause of action. . . .' [Citation.]" (*Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 528.) "We review a summary judgment de novo, to determine whether triable issues of material fact exist." (*Domenghini v. Evans* (1998) 61 Cal.App.4th 118, 121; see also *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, 1257.)

"Primary assumption of risk operates to foreclose any duty owed by the defendant to the plaintiff, and thus is a defense that is generally 'amenable to resolution by summary judgment.' [Citations.]" (*Vine v. Bear Valley Ski Co*. (2004) 118 Cal.App.4th 577, 591.) An action for negligence "may be barred when the plaintiff has signed an express contractual assumption of risk before he was injured. [Citations.] Express assumption of risk is an agreement made in advance of an activity by which a party takes upon himself or herself the chance of a 'known risk' arising from what the other party does or leaves undone." (*Sweat v. Big Time Auto Racing, Inc.* (2004) 117 Cal.App.4th 1301, 1304 (*Sweat*).) " ' " 'The result is that . . . being under no duty, [the defendant] cannot be charged with negligence.' " [Citations.]' [Citation.]" (*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 755 (*Paralift*), quoting *Saenz v. Whitewater Voyages, Inc*. (1990) 226 Cal.App.3d 758, 764.)

I. The Validity of the Release.

We first consider plaintiff's assertion that the Release is invalid for lack of the requisite conspicuousness and clarity. She complains that the Release is indistinguishable from the remainder of the Visit Pass document, and its language is fatally ambiguous.

"A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release 'must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.' [Citation.] The release need not achieve perfection." (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356 (*Benedek*).) " 'An express release is not enforceable if it is not easily readable.' [Citation.] 'Furthermore, the important operative language should be placed in a position which compels notice and must be distinguished from other sections of the document. A [layperson] should not be required to muddle through complex language to know that valuable, legal rights are being relinquished.' [Citation.] An exculpatory clause is unenforceable if not distinguished from other sections, if printed in the same typeface as the remainder of the document, and if not likely to attract attention because it is placed in the middle of a document." (*Leon v. Family Fitness Center* (*#107*)*, Inc*. (1998) 61 Cal.App.4th 1227, 1232.) Express releases from future liability "must be easily readable and conspicuous. [Citation.] This means that the exculpatory clause must be differentiated from other text, cannot appear in the same typeface as the rest of the document, must attract the reader's attention and cannot 'be buried in a lengthy document, hidden among other verbiage, or so encumbered with other provisions as to be difficult to find. . . .' [Citation.]" (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 217; see also *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.) "Additionally, the operative language should be placed in a position which compels notice and must be distinguished from other sections of the document." (*Westlye v. Look Sports, Inc*. (1993) 17 Cal.App.4th 1715, 1731 (*Westlye*).)

We find that the Release provision was adequately conspicuous to provide plaintiff with notice of its existence and essential nature. While the Release does not have a separate heading or bold type to attract the reader's attention, the exculpatory clause is part of an uncomplicated, single-page document which has no other provisions. The remainder of the Visit Pass consists of an invoice that contains nothing more than identification and reservation information stated in columns. The Release is the only paragraph within the document, and is set forth in differentiated print size. Plaintiff's

signature is placed immediately under the Release paragraph rather than at the bottom of the page of the Visit Pass. The Release is obvious and noticeable, despite plaintiff's failure to read it.

We turn to an examination of the clarity of the Release. "Because of the harsh results, a liability-limiting agreement to be effective must be 'clear, explicit and comprehensible in each of its essential details.' [Citation.]" (*Westlye, supra*, 17 Cal.App.4th 1715, 1731; see also *Huverserian v. Catalina Scuba LUV, Inc.* (2010) 184 Cal.App.4th 1462, 1469.) "Where a two-party contract purportedly releases one side from liability to the other [citation], courts must look for clear, unambiguous and explicit language not to hold the released party liable." (*Queen Villas Homeowners Assn. v. TCB Property Management* (2007) 149 Cal.App.4th 1, 5 (*Queen Villas*).) " ' " ' "Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement." ' " ' [Citations.]" (*Leon v. Family Fitness Center (#107), Inc., supra,* 61 Cal.App.4th 1227, 1233.) Also, a limitation on liability must be stated understandably, in words that are part of the working vocabulary of the average layperson. (See *Haynes v. Farmers Ins. Exchange, supra,* 32 Cal.4th 1198, 1204.) However, " ' "a release need not achieve perfection. . . ." [Citation.] Thus, "[a]s long as the release constitutes a clear and unequivocal waiver with specific reference to a defendant's negligence, it will be sufficient. [Citations.] For it to be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties. . . . [Citation.]" [Citation.]' [Citation.]" (*Allabach v. Santa Clara County Fair Assn*. (1996) 46 Cal.App.4th 1007, 1015.)

Plaintiff submits that the Release in the present case is "virtually unintelligible." She characterizes the provision as "a ponderous 143 words in length," with "poorly formed sentences" and improper punctuation.

Poor grammar and punctuation aside, the Release provision is at least comprehensible. The Release has broad but intelligible language. Plaintiff agreed to "release from liability, hold harmless & . . . not make any claims (present and future)"

against HCC and any "staff, agents, contractors, guests or volunteers for any physical or emotional injury, including death," that may occur at Harbin Springs. The release from liability specifically included, but was "not limited to, slipping and falling, use of any pools including infections or drowning & use of any of the trails; including but not limited to, any loss of personal property from theft including articles left in my room or vehicle or damage of any kind to my property or vehicle, whether resulting from my own acts, the acts of others, acts of God or from acts of any HCC staff, agents, contractors or volunteers." Although the Release provision is not circumspectly drafted, the language when read as a whole notified plaintiff as the releasor of the effect of signing the agreement: she was thereby precluded from bringing any claims for liability against HCC or its contractor or agents for personal injuries sustained at Harbin Springs. Plaintiff testified at her deposition that she understood the language of the Release. (See *Perez v. Uline, Inc*. (2007) 157 Cal.App.4th 953, 959.) The Release agreement is sufficiently clear and specific to be enforceable. (*Sanchez v. Bally's Total Fitness Corp*. (1998) 68 Cal.App.4th 62, 69 (*Sanchez*); *Westlye, supra*, 17 Cal.App.4th 1715, 1733.)

II. The Scope of the Release.

Plaintiff also argues that the Release does not exculpate defendants from liability for her injuries "caused by their negligence." She claims that the language of the Release did not clearly and unequivocally inform her that defendants were discharged from the consequences of their negligent acts. Plaintiff further asserts that the Release consists of "two sections," the "first deals with <u>personal injury</u>, the second with <u>property damage</u> or loss." She points out that in the "<u>personal injury</u> section" the Release does not refer "to personal injury caused by its own acts, like negligence," whereas the following "<u>property damage</u> section" lists "property damage caused by its own acts (and acts of others, God) as being released." The distinction, plaintiff maintains, indicates an intent not to include in the release from liability "those physical injuries caused by its acts" of negligence.

Our determination of the scope of the Release "is governed by the same principles applicable to any other contractual agreement . . . ." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) " 'Contract principles apply when interpreting a release, and

"normally the meaning of contract language, including a release, is a legal question." [Citation.] "Where, as here, no conflicting parol evidence is introduced concerning the interpretation of the document, 'construction of the instrument is a question of law, and the appellate court will independently construe the writing.' " [Citation.] "It therefore follows that we must independently determine whether the release in this case negated the duty element of plaintiff['s] cause[] of action." [Citation.]' [Citation.]" (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1483.) " ' "It is manifest that it is the intent of the parties which the court seeks to ascertain and make effective. Where . . . the circumstances of the claimed wrongful conduct dictate that damages resulting therefrom were intended to be dealt with in the agreement, there is no room for construction of the agreement. It speaks for itself." [Citations.] Whether a release bars recovery against a negligent party "turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control." . . .' " (*Sanchez, supra,* 68 Cal.App.4th 62, 66–67, citing *Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559, 1567 (*Hohe*).)

" 'In order for the agreement to assume the risk to be effective, it must also appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm . . . . [W]here the agreement is drawn by the defendant and the plaintiff passively accepts it, its terms will ordinarily be construed strictly against the defendant.' [Citation.]" (*Sweat, supra,* 117 Cal.App.4th 1301, 1307; see also *Huverserian v. Catalina Scuba LUV, Inc., supra,* 184 Cal.App.4th 1462, 1467; *Queen Villas, supra,* 149 Cal.App.4th 1, 6.)

We disagree with plaintiff's contention that without reference to negligence the Release does not apply to any negligent acts by defendants. Plaintiff explicitly agreed to "release from liability, hold harmless" and decline from pursuing "any claims" against HCC for physical injury. The expansive language of the Release encompassed all liability and bars any claims for plaintiff's physical injuries while at Harbin Springs, without any ambiguity or limitation. While no mention of the word "negligence" is made in the Release, " 'The presence or absence of the words 'negligence' or 'bodily injury' is

not dispositive. We look instead to the intention of the parties as it appears in the release forms before the court.' " (*Sanchez, supra*, 68 Cal.App.4th 62, 67, citing *Hohe, supra*, 224 Cal.App.3d 1559, 1567.) "The inclusion of the term 'negligence' is simply not required to validate an exculpatory clause." (*Sanchez, supra*, at p. 67.) " 'While it is true that the express terms of any release agreement must be applicable to the particular misconduct of the defendant [citation], that does not mean that every possible specific act of negligence of the defendant must be spelled out in the agreement or even discussed by the parties.' [Citation.]" (*Id*. at pp. 68–69.) "When a release expressly releases the defendant from any liability, it is not necessary that the plaintiff have had a specific knowledge of the particular risk that ultimately caused the injury. [Citation.] If a release of all liability is given, the release applies to any negligence of the defendant. ' "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." ' [Citation.]" (*Benedek, supra*, 104 Cal.App.4th 1351, 1357; see also *Paralift, supra*, 23 Cal.App.4th 748, 757.)

The obvious purpose of the Release signed by plaintiff was to authorize her to use and enjoy the entire Harbin Springs resort premises and facilities, and she was doing precisely that when she was injured. (See *Benedek, supra*, 104 Cal.App.4th 1351, 1358; *Paralift, supra*, 23 Cal.App.4th 748, 757.) Based on the record before us, the boutique operated by Cohen on the Harbin Springs property was a component of the amenities available to resort visitors, to the same extent as the natural spring pools, workshops and hiking trails. Nothing in the record suggests that plaintiff's Visit Pass to the Harbin Springs resort did not authorize her to have access to Cohen's tent-store. To the contrary, the evidence suggests that the stores along the "vendor lawn" of the premises were operated purposely for the benefit of the resort visitors.

Also, specifically included within the coverage of the Release were any injuries incurred as a result of "slipping and falling," which reinforces the view that the terms of the agreement were intended by both parties to apply to the particular conduct of the defendants— negligent maintenance of the property – which allegedly caused plaintiff's fall. Plaintiff offered no extrinsic evidence establishing the parties' intent to exclude her

claim from the Release agreement. (See *Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 304.) Given the unambiguous broad language, the Release reached all personal injuries suffered by plaintiff during her stay as a guest at the resort, including those that resulted from negligence associated with her fall at Cohen's Heaven on Earth store. (*Cohen v. Five Brooks Stable, supra,* 159 Cal.App.4th 1476, 1489; *Benedek, supra,* 104 Cal.App.4th 1351, 1358–1359; *Sanchez, supra,* 68 Cal.App.4th 62, 68; *Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738.)

Nor do we interpret the language of the Release, as plaintiff suggests, to create a distinct, two-pronged standard: one for loss of personal property, which expressly includes the acts of HCC or its agents and contractors; and another for physical injury which excludes defendants' "own acts" of negligence. Plaintiff's proposed interpretation is not semantically reasonable, and indeed is contrary to the express language of the release. (*Benedek, supra,* 104 Cal.App.4th 1351, 1358.) Following the general declaration that the releasor agrees to "release from liability, hold harmless" and "not make any claims" against HCC for "any physical or emotional injury," the Release mentions categories of more specific instances of harm that are included: slipping and falling, use of the pools, use of the trails, and property damage or theft. After the specific references to included harm, the Release further provides that liability is released "whether resulting from my own acts, the acts of others, acts of God or . . . acts of any HCC staff, agents, contractors or volunteers." As we read the language of the Release in its entirety, the explicit reference to property loss merely augments the prior, more general, expansive declaration of release from liability for other harm. The concluding phrase, "resulting from my own acts, the acts of others, acts of God or . . . acts of any HCC staff, agents, contractors or volunteers," alludes to the *entirety of the Release*, not just to property damage.

Finally, we conclude that the Release extends to insulate defendant Cohen from liability. By its terms the Release applies to HCC staff, agents, other guests, and *contractors*. The undisputed evidence presented by defendants established that Cohen was a contractor with HCC, and thus was entitled to the benefits of the Release. We

therefore conclude that pursuant to the unambiguous broad language of the Release, the unequivocal waiver of liability was contemplated by the parties to apply to the particular conduct of defendants which caused the harm to plaintiff. (*Cohen v. Five Brooks Stable, supra,* 159 Cal.App.4th 1476, 1489.) Therefore, plaintiff's cause of action is barred by the terms of the agreement, and the trial court properly granted defendants' motions for summary judgment. (*Sanchez, supra,* 68 Cal.App.4th 62, 69.)

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.