

## STAC 2019 Clarifications

### **Editor's Note:**

In addition to the questions answered below, the fact pattern has been updated to reflect the following changes:

- The rules have been updated to the correct witnesses.
- Line numbering has been added to all depositions.  
A new stipulation, stipulation 10, has been added. It says: Please see new stipulation 10, which states: Steelton statutory law provides that as the owner of the company providing tours of the land, Bobby had the same responsibility of an owner of land. All stipulations after have been renumbered.
- The date of Chase Quinn's deposition has been updated to April 15, 2018.
- Kerry Dornburg's CV has been updated with the date of his/her Ph.D.
- A signature has been added to Exhibit A.
- The date range on Exhibit E has been updated to February-April 2017.
- Supplemental jury instructions have been added at STAC 69 to address the affirmative defenses.
- A verdict form has been added at STAC 71.

### **Answers to Team Questions**

1. Exhibit D is a statute. Does this need to be entered as an exhibit or is it merely included so that it can be used as a demonstrative? Our understanding is that if it is law it doesn't need to be introduced.

**Answer: Exhibit D is included so it can be used as a demonstrative.**

2. Page 12 of the official rules states "Witnesses will not be sequestered." Does this mean that parties may not invoke rule 615, or that the rule may be invoked, but the witnesses will not be forced to leave the room when they are not testifying?

**Answer: Rule 615 cannot be invoked. Witnesses will not be sequestered.**

3. Does the rule "no additional instructions may be tendered or will be given" apply only to jury instructions and not to evidence issues under FRE 105 or other applicable law or rule?

**Answer: This rule is limited to jury instructions and not to Rule 105.**

4. Confirm a witness commits no violation of the rules if he or she, while on cross-examination, invents a material fact, provided that the material fact does not contradict the witness's affidavit or report and is also responsive to the question asked?

**Answer: Yes, this is correct. See the pertinent rule below.**

**Cross-examination: On cross-examination, a witness commits no violation when he or she testifies to material facts not included in his or her affidavit as long as the witness's answer is responsive to the question posed. Attorneys who ask questions to which the witness's affidavit does not provide an answer risk receiving an unfavorable answer in trial. Notwithstanding the preceding rules, nothing in this section is intended to prevent attorneys from attempting to challenge a witness's credibility by demonstrating an omission through use of the witness's affidavit.**

5. In looking at the affirmative defense that the plaintiff is barred from recovery, is the jurisdiction a 50/50 or a 49/51 modified comparative negligence jurisdiction?

**Answer: The jurisdiction is a 50/50 jurisdiction. Please see the verdict form at STAC 71 for further information.**

6. Procedurally how are we to handle unavailable witnesses? Are they being constructively read onto the record, are we supposed to take the stand and read the testimony onto the record, or are we just supposed to have one advocate stand up and read it onto the record solo?

**Answer: You may either take the stand and read the testimony or one advocate may read it into the record solo.**

7. The rules regarding jury instructions state: "The instructions provided in the fact pattern are the only instructions that will be given. The instructions are the only statements of the applicable substantive law. Instructions will not be eliminated or modified. No additional instructions may be tendered or will be given." However, Defendant raises a number of affirmative defenses in the responsive pleading that do not have corresponding jury instructions (e.g. superseding/intervening acts, assumption of risk, and act of God). May teams argue the affirmative defenses without the corresponding JI's?

**Answer: Please see the supplemental jury instructions that have been added at STAC 69 to address this question.**

8. Page 12 of the competition rules states: "A lay witness can only attest to his or her deposition and related exhibits." Does this mean that only exhibits that were identified by the lay witness at his/her deposition may be discussed?

**Answer: Lay witnesses may only attest to exhibits related to their deposition testimony. This is not limited to exhibits identified in a particular deposition.**

9. The rules state that no pre-trial motions are allowed, does this include motions in limine?

**Answer: Yes, this includes motions in limine.**

10. Are the exhibits automatically admissible without objection?

**Answer: Exhibits are not automatically admissible and are subject to objection.**

11. Are we permitted to introduce the expert reports or CVs, subject to appropriate objections, even though they are not marked as exhibits?

**Answer: Yes, you may introduce expert reports and CVs.**

12. STAC 66 in the jury instructions there is a portion to show the extent of damages (c) caused by the Defendant's negligence. Should this be here since the trial is bifurcated?

**Answer: This is the set of jury instructions. The case is bifurcated and we are only trying the liability phase.**

13. On Exhibit A, there are no signatures present in any of the signature lines (STAC 53-54).

**Answer: The signature has been added to Exhibit A.**

14. On STAC 4, it lists Bobby Daley as Max's coach. However, later in the fact pattern Bobby Daley is heavily portrayed as the owner of COBE, not Max's coach. Is denoting Bobby as the coach on STAC 4 a typo?

**Answer: Yes, this has been corrected to reflect Mike Streib as the coach.**

15. On STAC page 33-34 of Bobby Daley's deposition Bobby states "Well, I may not know much about cave exploring, but I did not my homework on the local area . . ." Is this a typo that should read "but I did my homework on the local area . . ." or was this intentional?

**Answer: This was a typo and it has been corrected to "I did my homework on the local area."**

16. STAC 42 refers to the show's name as "Cave Treasure!" and STAC 46 refers to it as "Cave In." What is the actual title?

**Answer: The title of the show is "Cave Treasure." Cris Cross' CV has been updated to reflect this.**

17. Answers #8 states COBE'S knowledge, there have not been any landslides of significance in the area of the COB subsequent to 2007- is this supposed to be 2017?

**Answer: This was supposed to be 2017. The Answer has been updated to reflect this.**

18. Did Max Petunia injure both of legs or just one leg because on STAC 27, line 12 Petunia states "my leg got pulled," but on STAC 5, paragraph 20 states Max Petunia "sustain[ed] two broken legs?"

**Answer: Max suffered two broken legs. Max's deposition has been updated to say "my legs got pulled."**

19. Numbered paragraph 12 of the Complaint references an entity called CBL. What does CBL stand for?

**Answer: This should be COBE. The complaint has been updated to reflect the change.**

20. STAC 41 says "you are aware that it was the wettest winters in spring in recent history..." Does it mean "You are aware that it was the wettest winter" or "you are aware that it was the wettest spring..."?

**Answer: This has been updated to reflect that "it was the wettest winter and spring in recent history."**

21. Did Cindy mention the possibility of the cave in or not? It appears that the plaintiff contradicts himself in his deposition by saying they did not mention a cave in, but later admits that Cindy mentioned it during her briefing.

**Answer: No further information will be provided regarding this question.**

22. There is a typo in rules where last year's witness names are used.

**Answer: This has been corrected to reflect this year's witnesses.**

23. Does X mark the location of the Cave of Breezes on the NOAA Regional Precipitation Chart?

**Answer: The X on the NOAA Regional Precipitation Chart is in the general area of the cave but is not the exact location.**

24. The date on Exhibit E is May 5. That date seems to be an irrelevant date for purposes of this case. Is that date purposeful or a mistake?

**Answer: May 5 is the date when the information was made public by NOAA.**

25. Both experts use “landslide” and “mudslide” at some point in their explanations--are these words meant to be interchangeable?

**Answer: Yes, they are interchangeable for purposes of this fact pattern.**

26. In Bobby Daley's depo he says that Chase Quinn died when he was shot into space, but then Chase Quinn was deposed a month later. Is the date on Chase Quinn's deposition incorrect?

**Answer: Yes, the date on Chase Quinn's deposition is incorrect and has been updated to an earlier date, April 15, 2018.**

27. Exhibit E has two different date ranges listed: February-April 2017, and 1895-2017. What period does the exhibit actually reflect?

**Answer: The date range for Exhibit E is February-April 2017. The Exhibit has been updated to reflect this change.**

28. On the Pretrial Order (STAC 11) in paragraph 2: the last sentence seems to be unfinished and potentially substantively relevant. Can we get a clarification on this sentence?

**Answer: Please see the supplemental jury instructions on page STAC 69 for further information.**

29. Is Exhibit C-1, the picture of the cave entrance, pre- or post-landslide?

**Answer: This image is of the cave post-landslide.**

30. On page 20 of the case file, the plaintiff states that the team left for the cave the night before the landslide, on a drive of about three hours. Would the competition committee kindly clarify when, then, the team arrived at the cave and the time that their tour began?

**Answer: The team arrived in the area of the cave the night before the tour, April 29, 2017, and arrived at the cave 30 minutes prior to their scheduled tour. The tour was an early morning tour.**

31. On page 39 of the case file, Chase Quinn states that s/he was listening to Cindy Cooney's safety briefing -- which, per the plaintiff, occurred inside the cave. Would the competition committee kindly clarify how, factually, this would be possible, when neither the plaintiff nor Quinn him-/herself place Quinn inside the cave with the tour?

**Answer: No further information will be provided regarding this question.**

32. When did Bobby Daley buy COBE? Was it before or after the last inspection in 2016?

**Answer: Bobby Daley bought COBE after the last inspection in 2016.**

33. The jury instructions include definitions for both an invitee and a licensee, and the duty owed to each. Did Bobby Daley own the Cave of the Breezes, or did he simply own the cave exploration company (Cave of the Breezes Expeditions (Enterprises? - referenced in STAC 27), LLC (or Inc. - as referenced in STAC 46)), with permission to conduct guided tours from the owner of the land?

**Answer: Bobby owns the cave exploration company but not the land. Please see new stipulation 10, which states: Steelton statutory law provides that as the owner of the company providing tours of the land, Bobby had the same responsibility of an owner of land.**

34. How long was Plaintiff stuck in the cave? (Compare Compl. 22 [saying injuries sustained on 4/30] with STAC 26 [noting rescued on 3rd day])

**Answer: The plaintiff was stuck in the cave for three days. The complaint has been updated to say "harm and injuries sustained by Plaintiff during the April 30 Cave of the Breezes tour."**

35. The curriculum vitae of Dr. Cross's expert opinion mentions that he/she went to the Cave of Breezes and was trapped in the cave and could not be rescued. However, the footnote in the actual opinion mentions that he/she was not able to visit the site. How was he/she trapped and was he/she actually at Cave of Breezes or was there a different cave?

**Answer: Dr. Cross was trapped in Cave of the Breezes prior to the April 30, 2017 landslide. The footnote has been updated to clarify that Dr. Cross was unable to visit the site after April 30, 2017.**

36. What is the definition of gross negligence and intentional misconduct, as included in the waiver agreement?

**Answer: Please see the supplemental jury instructions on page STAC 69.**

37. What do the numbers on the actual map mean in Exhibit E? The problem indicates that the rainfall was at "190%" but the map indicates a measurement of 94 for "Steelton". Are these numbers supposed to be the same? If not, what is the measurement on Exhibit E?

**Answer: 94 inches was 190% greater than normal.**

38. Did the defendant's expert visit the site in their investigation?

**Answer: Yes, Kerry Dornburg did visit the site of the landslide.**

39. When did Doctor Dornburg get his/her PHD?

**Answer: Dr. Dornburg received a Ph.D. in 1996.**

40. Did COBE or the hockey team cancel the trip the year prior to April 2017?

**Answer: No further information will be provided regarding this question.**

41. Did Howard Scent have a contract/agreement with COBE with respect to the rescue?

**Answer: No, Howard Scent did not have an agreement with COBE.**

42. Who contacted whom with respect to Howard Scent and Cave of the Breezes Expeditions regarding the rescue efforts?

**Answer: Howard Scent volunteered his robot for the rescue.**

43. Can Cris Cross's CV provide dates for the "You can't surf a slide!" and "trapped!" episodes from his television show?

**Answer: No further information will be provided regarding this question.**

44. Page 47: Cris Cross's Show has the episode getting trapped in the cave – is the show fact or fiction (i.e., scripted or not)?

**Answer: Cris Cross' show is scripted as to the educational portions, however, there is an element of reality as the show is filmed in an environment that can be unpredictable.**

45. In what subject does Kerry Dornburg have a Ph.D.?

**Answer: Kerry Dornburg's Ph.D. is in geophysics. The CV has been updated to reflect this.**

46. Do we have a name for the prior owner of Cave of the Breezes?

**Answer: There is no name provided for the previous owner of Cave of the Breezes.**

47. Did the experts review each others' reports?

**Answer: The experts reviewed each others' reports prior to trial.**

48. How is owner defined? The statute is unclear.

**Answer. Please see new stipulation 10, which states: Steelton statutory law provides that as the owner of the company providing tours of the land, Bobby had the same responsibility of an owner of land.**

49. Page 14, paragraph 6 provides: "It took a total of thirty-seven days to reopen the main point of egress and ingress to the Cave of the Breezes." To clarify, this is thirty-seven days after the incident? What does "reopen" mean - was it reopened to the public or simply cleared of the debris?

**Answer: This is thirty-seven days after the incident and the main egress and ingress point was reopened to the public at that time.**

50. Exactly what time did the tour begin and how soon after was the mudslide? Also, how long after Cindy left to get her pack did the landslide occur?

**Answer: No further information will be provided on this question.**

51. Was there a storm on April 30, 2017? The Complaint alleges that a storm was predicted to occur and did occur on April 30, 2017 (pages 4-5 of the record, paragraphs 14-15 of the complaint), but there is no evidence or stipulation that in fact any storm did occur on that date, and Bobby Daley only testifies about a rumbling (page 33 of the record).

**Answer: No further information will be provided regarding this question.**



52. On page 8, in COBE's answer to the complaint, COBE states "there are multiple entrances and exits throughout the system that can be accessed with proper guidance." Were these other entrances or exists also completely covered by the mudslide?

**Answer: These other entrances or exits were not accessible by the Plaintiff at the time of the mudslide.**

53. What day was Max Petunia rescued?

**Answer: Max was rescued on May 2, 2017.**

54. Did the defendant or Bobby Daley have at the time this incident took place any ownership interest in the cave premises, and if so, what was the nature of the interest exactly?

**Answer: No further information will be provided regarding this question.**

55. STAC Page 14 Paragraph 9. States that both parents do not recall whether they actually signed the Agreement. Therefore, is it stipulated that they were both familiar with the agreement prior to April 30, 2017?

**Answer: It will not be stipulated that they were both familiar with the agreement prior to April 30, 2017.**

56. Stipulation 3 states there was no point of ingress or egress available for the hockey team to utilize to leave the cave nor for rescue teams to enter the cave. Answer #8 to the complaint states that there are multiple entrances and exits through the system that can be accessed with proper guidance. Are we permitted to utilize the answer #8 in our argument?

**Answer: We have updated the Answer paragraph 8, to the following: COBE denies the averments of Paragraph 8 of Plaintiff's Complaint as stated. There is one readily accessible means of entry and exit to the cave system, and other entrances and exits exist throughout the system, but these entrances and exits were unavailable during the landslide. Further, to COBE's knowledge, there have not been any landslides of significance in the area of the Cave of the Breezes subsequent to 2017.**

**You may use this answer in your argument.**

57. Are "cave-in" and "landslides" to be treated as the same thing for the purposes of this case, despite the fact that they are two different geological events in reality?

**Answer: For the purposes of this case, treat "cave-in" and "landslide" as the same.**

58. Is Exhibit E a "public record," as that term is used in Federal Rule of Evidence 803(8), and if so, will additional information be provided to lay appropriate foundation to that effect, or is the NOAA seal sufficient?

**Answer: Exhibit E is a public record as the term is used in FRE 803(8), and the NOAA seal is sufficient to deem it so for purposes of this case.**

59. Will a verdict form be provided including elements of a negligence claim (liability only) (i.e. duty, breach, and causation), including a distinction between invitee, licensee, and trespasser?

**Answer: Please see the verdict form on page STAC 71.**

60. What is the historically recorded rainfall for COBE and immediately surrounding area pertaining to stipulation 5?

**Answer: No further information will be provided regarding this question.**

61. Is that Daley is aware of the Release a reasonable inference?

**Answer: This is a reasonable inference since it is Bobby's company.**

62. Can we assume that Exhibit B is only an excerpt of the policies and procedures, based on Daley's deposition testimony?

**Answer: Yes, Exhibit B is only an excerpt of the policies and procedures.**

63. Will line numbers be added to the depositions?

**Answer: Line numbers have been added to the depositions.**

64. What is the age of majority in Steelton? 18 or 19?

**Answer: The age of majority in Steelton is 18.**

65. Who operated the rescue robot? Howard Scent and/or his employee/agent?

**Answer: Howard Scent operated the rescue robot.**

66. Is Assumption of the Risk a full defense?

**Answer: Please see the supplemental jury instructions on page STAC 69.**

67. Is the rescue team affiliated with the cave in any way?

**Answer: No, the rescue team was a group of volunteers.**

68. Is the Cave of Breezes public land, or open to the public?

**Answer: Cave of the Breezes is public land, but individuals are permitted to be there only with a licensed tour group like COBE or a sufficiently trained guide.**

69. Can we create a demonstrative that shows what a mudslide looks like based on the pictures and testimony provided?

**Answer: Per the competition rules, demonstratives must be identical enlargements of the Exhibits provided unless they are drawings or charts made during the segment of trial in which they are being used.**

**The use of demonstrative evidence is limited to that which is provided in the fact pattern, but participants are free to enlarge any diagram, statement, exhibit, or portion of the fact pattern if it is identical to the item enlarged, or if any changes provide no advantage to the party intending to use it. Participants must clear all such demonstrative evidence with the regional or national coordinator, as applicable, at the coaches' meeting preceding the competition.**

**In addition, subject to rulings of the court, counsel and witnesses may draw or make simple charts or drawings during examination, opening or closing, but not in advance of the trial, for the purpose of illustrating testimony or argument. These materials may not be written or drawn in advance of the segment during which they are being used.**

70. On page 48, Dornburg states that the USGS has an "experimental" landslide warning system. What is meant by the word "experimental" in regard to the USGS technology?

**Answer: No further information will be provided regarding this question.**

71. The problem does not discuss any mention of agency laws; do the laws of agency apply to the guide's actions in that COBE is liable for her actions?

**Answer: Please see the supplemental jury instructions on page STAC 69.**

72. Number paragraphs 9-12 of the Answer deny the averments in paragraphs 9-11 of the Complaint. Does the Defendant also deny the averments in numbered paragraph 12 of the Complaint?

**Answer: Defendant also denies the averments in numbered paragraph 12. The Answer has been updated to reflect this.**



AMERICAN  
ASSOCIATION *for*  
**JUSTICE**

**STAC**  
STUDENT TRIAL  
ADVOCACY  
COMPETITION

**2019 NATIONAL  
STUDENT TRIAL ADVOCACY  
COMPETITION  
(STAC)**

**OFFICIAL RULES**

**and**

**FACT PATTERN**

**Endowed by Baldwin & Baldwin, LLP**

## **Important Dates:**

Requests for fact pattern clarification due: January 9, 2019  
Team Participant Registration due (students must be AAJ members): January 31, 2019  
Regional Competitions: February 28 – March 3, 2019  
National Final Competition: April 11 – April 14, 2019

AAJ's 2019 Fact Pattern is authored by A. Michael Gianantonio of Pittsburgh, PA. AAJ extends its thanks and appreciation to Mr. Gianantonio for developing the 2019 Fact Pattern. AAJ also extends its thanks and appreciation to our STAC co-chairs Lauren Barnes, Maria Glorioso, and Fred Schultz.

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### **Please note:**

Information regarding the 2019 Student Trial Advocacy Competition is available at [www.justice.org/STAC](http://www.justice.org/STAC) and will be updated frequently.

### **All questions and correspondence should be addressed to:**

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## **GENERAL INFORMATION**

One of AAJ's goals is to inspire excellence in trial advocacy through training and education for both law students and practicing attorneys. One way AAJ accomplishes this goal is by sponsoring a national student mock trial competition. This is an exceptional opportunity for law students to develop and practice their trial advocacy skills before distinguished members of the bar and bench.

Because the purpose of this competition is to give law students the opportunity to develop their trial skills, the actual merits of the plaintiff's case and the defendant's case presented are irrelevant to this purpose. Competition rounds are decided not on the merits of a team's side but on the quality of a team's advocacy.

### **Requests for Clarification**

Requests for clarifications of the rules or fact pattern must be submitted via an online survey no later than 5:30 p.m. (EST) on January 9, 2019. A link to the survey will be posted online at [www.justice.org/STAC](http://www.justice.org/STAC) after the fact pattern is released. *Each school is limited to five (5) questions.* No school, regardless of the number of teams it has in the competition, may submit more than five questions. Each subpart of a question is counted as a question.

## **RULE VIOLATION AND FILING OF COMPLAINTS**

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A competitor or coach violating any of the rules governing the national Student Trial Advocacy Competition may be penalized or disqualified. If a team wants to file a complaint under the rules, the team's coach should immediately notify the regional coordinator at a regional competition or the final round coordinator at the final competition. The coordinator will review the complaint and make a ruling, which shall be binding for that round of competition. The coordinator's rulings will be governed by the rules of the competition and the objectives of the program.

Complaints after a regional competition or after the national competition must be filed in writing with Kara Yoh at the address on page 2 no later than the seven (7) days following the last day of the regional or final round, as appropriate. The AAJ Law Student Services Committee will promptly consider and rule on any such complaints.

## **LAW SCHOOL AND STUDENT ELIGIBILITY**

The competition is open to all law schools nationwide. A law school may enter up to two teams. Each team shall be comprised of four law students. A school's selection method of its trial team(s) is left for the school to determine. However, for a student to be eligible, he or she must be enrolled for a J.D. degree and be a law student member of AAJ.



Students who graduate in December 2018 are eligible to participate only if the competition counts toward their credits for graduation and they will not be admitted to practice prior to March 2019.

*Each student participant must be an AAJ student member by January 31, 2019 in order to participate.*

## **REGISTRATION PROCEDURES**

### **Refund Policy**

Requests for a refund of a school's registration fee were due in writing before November 9, 2018. It is inevitable that a few teams drop out of the competition in the months leading up to the regionals. Teams placed on the waiting list because the competition is full will be contacted for participation in the order that their registrations were received. Teams on the waiting list will also be issued a refund check if it is determined that the team will not be competing. Schools that registered two teams but are only able to enter one team because the competition is full will receive a refund of the registration fee for the second team.

### **AAJ Law Student Membership and Student Team Registration**

Student team members must be AAJ members by January 31, 2019 in order to participate. This year, all students must verify their membership and register for their respective team online at [www.justice.org/STACParticipantRegistration](http://www.justice.org/STACParticipantRegistration). AAJ Law Student membership dues are \$15. If you have any questions about AAJ's law student membership, or if you have any trouble becoming a member online, please call AAJ's member hotline at (202) 965-3500, ext. 8611. If you have any questions about registering as a STAC team member, please call Kara Yoh, STAC Manager, ext. 3502.

### **Coach Registration**

AAJ must receive the names of the coach for each team. A coach must accompany each team to the regional competitions. A coach may be a law student, but may not be a student who is competing in the competition. Coaches do not need to be members of AAJ, and should not register for the STAC event. Coaches, and other administrators traveling with the team, must complete an online survey listing the team coach that will be travelling with the team by January 31, 2019. This is the information that will be sent to the regional coordinators to communicate logistics onsite.

### **Student Substitution Policy**

Substitution of team members after January 31, 2019 is not permitted except in the case of personal emergencies. Requests for substitution after the January 31 deadline must be made in writing with an explanation of why the substitution is needed and sent to Kara Yoh at AAJ for consideration. These requests can be made to [STAC@justice.org](mailto:STAC@justice.org).

## **REGIONAL AND FINAL COMPETITION ASSIGNMENTS**

Entering teams will be assigned to one of 14 regional competitions based on geographical convenience *to the extent possible*. Teams from the same law school will be assigned to the same region. If a school's second team is waitlisted, there is no guarantee that second team will be sent to the same region as the first team. Teams will be notified of any date changes when regional assignments are made. Please remember that a school's second team will not be officially registered until one team from each law school has entered the mock trial competition. Then the second teams will be registered on a first-come, first-served basis until all the team slots are filled. If you paid for two teams and only one team is able to participate, you will receive a refund for the second team.

In order to officially compete in the competition, a team **must** receive its regional assignment. If a team is not informed by AAJ that it is able to compete, that team is not registered for the competition.

### **Coaches**

A coach must accompany each team to the regional and the final competitions. The coach for a team that goes to the final competition does not have to be the person who coached the team at the regional competition.

A coach may be a law student, but may not be a student who is competing in the competition.

*Only team coaches are permitted to attend the coaches' meeting.* If a coach is unable to attend, he or she must notify AAJ and the regional coordinator. Only then can students be permitted to attend in the coach's absence.

### **Team Expenses**

Travel expenses for the regional and final competitions are the responsibility of the participants. Teams competing in past competitions have obtained funds from law school deans and alumni associations, members of the local legal community, state and local trial associations, and AAJ law school chapters.

## **COMPETITION FORMAT**

This is a trial skills competition. There is no motion or trial brief writing component. Each team will consist of four law students. Two students will be advocates and two students will play the witnesses for their side in each round. Advocates and witnesses may change their roles from round to round, but roles must remain consistent throughout each individual trial.

**In the regional competitions:**

- Each team will compete in three qualifying rounds
- The top four teams from the qualifying rounds will advance to a single elimination semifinal round
- The top two teams from the semifinal round will advance to a single elimination final round to determine which one team will advance to the National Final Competition

**In the final competition:**

- Each team will compete in three qualifying rounds
- The top eight teams from the qualifying rounds will advance to a single elimination quarter-final round
- The top four teams from the quarter-final round will advance to a single elimination semifinal round
- The top two teams from the semifinal round will advance to a single elimination final round

**Regional Team Pairings in Qualifying Rounds**

Pairing of teams in the qualifying rounds will be at random and conducted during the coaches' meeting prior to each competition. Teams may also be pre-assigned by the regional coordinator prior to the coaches' meeting; this practice is at the discretion of the regional coordinator. Each team will represent both plaintiff and defendant in the first two rounds. No two teams shall compete against each other more than once in the qualifying rounds. Teams from the same school will not compete against each other during any of the rounds of the regional competition or in the qualifying rounds of the national final competitions.

**Team Rankings in All Other Rounds**

In the semifinal round, the first-ranked team will meet the fourth-ranked team, and the second-ranked team will meet the third-ranked team.

***Regional semifinal round*** (Normal pairings: 1 v. 4; 2 v. 3)

Situation 1: Teams ranked 1 and 4 are from the same school

New pairings: 1 v. 3; 2 v. 4

Situation 2: Teams ranked 2 and 3 are from the same school

New pairings: 1 v. 3; 2 v. 4

The ranking of teams to determine the semifinalists and finalists will be determined by the following factors (in this order):

1. Win/loss record
2. Number of winning votes
3. Number of total points awarded to the team

Each succeeding criterion above will be used only if the prior criterion does not fully rank the teams, and will be used only to break ties created by the use of the prior criterion. In the event that all three of these criterion are tied, the regional coordinator will announce a tie-breaker.

If paired regional semifinal teams have met in the qualifying rounds, they will each represent different sides than in the previous meeting. If they have not yet met, each team will take the side they represented only once in qualifying rounds. If matched teams represented the same side only once, the winner of a coin toss will choose sides.

In the regional finals, the teams will represent a different side than in the semifinal round. If two opposing teams each represented the same side in the semifinal round, the winner of a coin toss will choose sides. The two regional finals teams will represent a different side than in the semifinal round. If matched teams in the final round represented the same side in the semifinal round, the winner of a coin toss will choose sides.

When an odd number of teams compete at a regional competition, one randomly chosen team will receive a “bye” in each qualifying round. For ranking purposes, a bye will count as a win and the team with the bye will be deemed to have had three votes and the points equal to the average of the team’s points from the two other qualifying rounds.

### ***NATIONAL FINALS***

#### ***Quarter-final round*** (Normal pairings: 1 v. 8; 2 v. 7; 3 v. 6; 4 v. 5)

Situation 1: Teams ranked 1 and 8 are from the same school

New pairings: 1 v. 7; 2 v. 8; 3 v. 6; 4 v. 5

Situation 2: Teams ranked 2 and 7 are from the same school

New pairings: 1 v. 7; 2 v. 8; 3 v. 6; 4 v. 5

Situation 3: Teams ranked 3 and 6 are from the same school

New pairings: 1 v. 8; 2 v. 7; 3 v. 5; 4 v. 6

Situation 4: Teams ranked 4 and 5 are from the same school

New pairings: 1 v. 8; 2 v. 7; 3 v. 5; 4 v. 6

#### ***Semifinal round*** (Normal pairings: 1 v. 4; 2 v. 3)

Situation 1: Teams ranked 1 and 4 are from the same school

New pairings: 1 v. 3; 2 v. 4

Situation 2: Teams ranked 2 and 3 are from the same school

New pairings: 1 v. 3; 2 v. 4

If teams from the same school are matched to compete based on rank in the semifinal and final rounds of a regional competition, regional hosts will re-pair teams according to the following scenarios:

## **Determination of Team Representation**

If the four national and regional semifinal teams have already met in the qualifying rounds, they will represent different sides from the previous confrontation. If they have not yet met, each team will take the side they represented only once in qualifying rounds. If matched teams represented the same side only once, the winner of a coin toss will choose sides.

The national finals semifinal teams will represent a different side than in the quarter-final round. If matched teams represented the same side in the quarter-final round, the winner of a coin toss will choose sides. The two national final teams will represent a different side than in the semifinal round. If matched teams represented the same side in the semifinal round, the winner of a coin toss will choose sides.

## **THE TRIAL**

The competition this year involves the trial of a civil lawsuit. The same fact pattern will be used in the regional and final competitions. The trial judge previously ruled that the case would be bifurcated, and the case being tried in the competition is the first phase of the case—the liability phase. Only evidence relevant to the liability issue will be received. There are no pending third-party claims.

The Federal Rules of Evidence (FRE) and Federal Rules of Civil Procedure (FRCP) are the applicable rules of evidence and civil procedure. Only these rules, and the law provided in the fact pattern, shall be used in argument. Specifically, no statutory, regulatory, or case law shall be cited unless such law is provided in the fact pattern.

Students may argue based upon the comments or advisory notes to the Federal Rules of Evidence but may not cite the cases contained therein. No written briefs, motions, or trial notebooks, may be presented to the judge hearing a case. Advocates may show the judge part of the fact pattern that the judge is asked to rule on, but only at the time the judge is asked to rule on it.

No pretrial motions of any kind are allowed.

Motions for a judgment as a matter of law and evidentiary objections are permitted.

The trial will consist of the following phases by each team in this order:

- Opening statements for plaintiff followed by defendant
- Plaintiff's case-in-chief
  - Plaintiff's direct of plaintiff's witness #1
  - Defendant's cross of witness
  - Plaintiff's redirect of witness
  - Similar for plaintiff's witness #2
- Defendant's case-in-chief
  - Defendant's direct of defendant's witness #1
  - Plaintiff's cross of witness

- Plaintiff's redirect of witness
- Similar for defendant's witness #2
- Closing argument
  - Plaintiff's closing
  - Defendant's closing
  - Plaintiff's rebuttal closing

Each side is limited to two live witnesses whom they may call in any order.

- Plaintiff must call Max Petunia and Cris Cross, B.S., M.S., Ph.D.
- Defendant must call Bobby Daley and Kerry Dornburg, B.S., M.S., Ph.D.

The trial has six (6) major advocacy opportunities for each team: opening statement; direct/redirect examinations (2); cross-examinations (2); and closing argument. Each attorney member of a team must handle three of the six opportunities. Opening statement and closing argument may not be done by the same person, and may not be split between team members. Each team member must do a direct and cross. Each team member does not need to play an attorney role.

During the competition, each team will represent both parties. Pairing in the qualifying rounds will be at random, with each team representing both plaintiff and defendant at least once in the three rounds.

Except in the final round, the courtrooms will be off-limits to all team members, coaches, friends, and family members who are not associated with either team competing, unless their team has already been eliminated from the competition.

No team may receive any coaching from anyone in any form during a round, including any recesses or breaks. The regional or national coordinator, as applicable, has the authority to punish any violation of this rule by disqualifying the team from the remainder of the competition.

A team may record its trial if: (1) no additional lighting is required; (2) recording of the trial does not interfere with or delay its conduct; and, (3) all participants of the round, including the presiding and scoring judges and the regional or national coordinator, as applicable, agree. All recordings are subject to the local courthouse policy and discretion.

### **Timing of the Trial**

- Each team will have 80 minutes to complete its argument; time will be stopped during objections.
- The time limit will be strictly enforced, although it is not necessary that all time allotted be used.
- There will be no time limits for specific aspects of the trial.
- Time on cross-examination is charged against the team conducting the cross-examination.
- Time will be stopped for objections and responses to objections.
- Performance at trial will be evaluated by a panel of judges and/or attorneys, one of whom will preside over the trial as Judge, making rulings as necessary, and the remainder (up to three) of whom will act as the jury.

## Facts Outside the Record

Advocates must confine the questions, and witnesses must confine their answers, to the facts provided in the fact pattern and reasonable inferences which may be drawn therefrom.

1. Definition: A fact outside the record is (1) any instance on direct examination, cross-examination, or re-direct, in which a witness introduces testimony contradictory to his or her affidavit; and/or (2) any instance on direct or re-direct examination in which an attorney offers, through witness testimony, material facts not included in or reasonably inferred from a witness's affidavit.
2. Cross-examination: On cross-examination, a witness commits no violation when he or she testifies to material facts not included in his or her affidavit as long as the witness's answer is responsive to the question posed. Attorneys who ask questions to which the witness's affidavit does not provide an answer risk receiving an unfavorable answer in trial. Notwithstanding the preceding rules, nothing in this section is intended to prevent attorneys from attempting to challenge a witness's credibility by demonstrating an omission through use of the witness's affidavit.
3. Material facts: No inferred fact may be material, which is defined (a) as a fact that changes the merits of either side of the case or (b) that bears on the credibility of any witness or litigant. The latter is defined to include any background information about a witness or litigant.
4. Reasonable inference: A witness's answer does not qualify as a reasonable inference merely because it is consistent with statements in the witness's affidavit. A reasonable inference must be a conclusion that a reasonable person would draw from a particular fact or set of facts contained in the fact pattern documents.
5. Affidavit: An affidavit includes not only a witness's sworn statement, but any document in which the witness has stated his or her beliefs, knowledge, opinions or conclusions or a document which a witness relied upon to form his or her conclusions.

Except during closing argument, no party may make an objection that the opposing team is going outside the record. Instead, a party may address instances of testimony outside the record by means of impeachment of the offending witness or by contradiction using another witness or document.

When true and if asked, witnesses must admit that the "facts" they have testified to are not in their deposition or otherwise in the record: "yes, I did not say that in my deposition." Witnesses may not qualify this response; for example, a witness may not say he or she was not asked about the issue at deposition or that the facts were contained in some portion of the deposition omitted from the record.

Like all officers of the court, who are bound by the Rules of Professional Conduct prohibiting deceit, dishonesty, or misrepresentation, coaches and team members must play fairly and ethically. Invention and use of a material fact outside the record is considered cheating and will result in judges reflecting this in their scoring.

This is a competition about trial advocacy skills—doing what you can with the facts provided and the witnesses in the courtroom. The coordinators will instruct the judges on the significance of facts outside the record and impeachment efforts, and that judges should reflect a violation of this rule in their scoring.

### **Witnesses**

Any witness may be played by a person of either gender. Before the opening statement, each team should notify the other team of the gender of each witness they intend to call and any witness they could call but are choosing not to call.

Expert witnesses are assumed to have access to and have read all documents in the fact pattern. A lay witness can only attest to his or her deposition and related exhibits.

All depositions are signed and sworn. The same attorney conducting direct examination of a witness shall also conduct any redirect examination.

The only lawyer who may object during witness testimony is the lawyer who will be examining that witness.

Witnesses may not be recalled. Witnesses will not be sequestered.

### **JURY INSTRUCTIONS**

The instructions provided in the fact pattern are the only instructions that will be given. The instructions are the only statements of the applicable substantive law. Instructions will not be eliminated or modified. No additional instructions may be tendered or will be given.

### **EXHIBITS**

The use of demonstrative evidence is limited to that which is provided in the fact pattern, but participants are free to enlarge any diagram, statement, exhibit, or portion of the fact pattern if it is identical to the item enlarged, or if any changes provide no advantage to the party intending to use it. Participants must clear all such demonstrative evidence with the regional or national coordinator, as applicable, at the coaches' meeting preceding the competition.

In addition, subject to rulings of the court, counsel and witnesses may draw or make simple charts or drawings during examination, opening or closing, but not in advance of the trial, for the purpose of illustrating testimony or argument. These materials may not be written or drawn in advance of the segment during which they are being used.

No demonstrative evidence, including charts or drawings, may reflect facts outside the record.

All exhibits are stipulated as authentic and genuine for purposes of trial.

### **Use of Technology**

The use of computers, projectors, and other electronic equipment for demonstrative purposes



is prohibited during the trial.

### **SCORING CRITERIA**

Performances at trial will be evaluated by a panel of three judges and/or attorneys, one of whom will preside as the trial judge, with the others sitting as jurors. The trial judge will rule on any objections or motions for judgment as a matter of law.

Each member of the jury may award up to ten points in each phase of trial for each party. A sample score sheet is attached.

If at the end of the trial, an evaluator awards the same number of points to both the plaintiff and the defendant, the evaluator will award one additional point to either the plaintiff or the defendant for effectiveness of objections and/or overall case presentation in order to break the tie.

Evaluators have been instructed not to score teams on the merits of the case.

The following criteria for scoring trial performances are set forth to assist both judges and student advocates. Evaluators are not limited to these criteria and may consider other aspects of strategy, technique, and so forth, which they view as important.

#### **Evaluator Shortage**

For each match, there must be three votes from evaluators. In the event that, due to circumstances beyond AAJ's control, there are not three evaluators in a particular match, "ghost" evaluator(s) will be used to score the round. The vote of a ghost evaluator is determined by calculating the average of all other evaluators in the session.

### **Suggested Evaluation Criteria**

#### **OPENING STATEMENT**

##### **Did Counsel:**

1. Generally confine statement to an outline of the evidence that would be presented?
2. Clearly present counsel's theory of the case?
3. Persuasively present counsel's theory of the case?
4. Personalize self and client?
5. Allow opposing attorney to make argument during opening statement?
6. Make unnecessary objections?

#### **EXAMINATION OF WITNESSES**

##### **Did Counsel:**

1. Ask questions that generated minimal valid objections?
2. Make/fail to make objections with tactical or substantial merit?
3. Respond appropriately to objections?
4. Know the rules of evidence and express that knowledge clearly?
5. Develop rapport with the witness?
6. Maintain appropriate general attitude and demeanor?
7. Address the court and others appropriately?

8. Demonstrate awareness of ethical considerations?

Did Direct-Examiner:

9. Use leading questions unnecessarily?
10. Develop testimony in an interesting and coherent fashion?
11. Follow up on witness' answers?
12. Present the witness in the most favorable light?

Did Cross-Examiner:

13. Appropriately use leading questions?
14. Control witness?
15. Follow up on answers and elicit helpful testimony?
16. Use impeachment opportunities?

## **CLOSING ARGUMENT**

Did Counsel:

1. Present a cohesive theory of the case, pulling all the positive arguments together?
2. Deal effectively with the weakness(es) in his or her own case?
3. Make an argument that was persuasive?
4. Have an effective style of presentation?
5. Utilize the law effectively in the argument?
6. Inappropriately interrupt the argument of the opposing counsel?
7. Properly confine rebuttal to rebuttal matters?
8. Effectively counter the opponent's speech in rebuttal

### **Discrepancies in Remaining Match Time**

Often, bailiffs are unavailable to keep time for rounds. In such cases, one or more judges in each match should be instructed to keep time according to the timekeeping rules. Additionally, judges may ask the respective teams to assist with this process. Teams may also keep track of time used for their own purposes. They may not, however, report their time used or that of an opposing team to the bailiff or judge for any purpose, unless they were instructed to do so. Moreover, time use improperly reported by any team may not be considered or used by a bailiff or judge for any purpose.

Notwithstanding this limitation, in the event that the match judge or judges declare the time remaining as less than the team requires for closing or other parts of the trial, the coach or team member (whoever records the time discrepancy<sup>1</sup>) should immediately consult with the Regional Coordinator during the break, who should then evaluate the circumstances and decide the amount of time remaining. Neither the team coach nor the team member should discuss the discrepancy with the match judge. Should the team be unable to consult with the Regional Coordinator before completion of the trial and the team requires additional time to complete the trial, the team may elect to complete the trial beyond the time allotted. When the trial is complete, the time will be evaluated by the Regional Coordinator. The team will lose two points from the number of total overall points for that round (as tallied on the 'Trial Score Sheet') for every five minutes—or fraction thereof—of time in excess of its allotment.

---

<sup>1</sup>Note that coaches and team members may not communicate during rounds

## **Viewing of Score Sheets by Teams**

Viewing of the score sheets is done at the discretion of the Regional Coordinator. Each team will have the right to view their score sheets for each round. Team coaches may only view score sheets once the third round has commenced. This should be done one team at a time. Participating students should be unaware of how they were scored until the qualifying rounds are completed, and the semi-final teams are announced. Teams are not allowed to take score sheets with them or make any markings to the score sheets. Teams may view score sheets only in the presence of the Regional Coordinator. If team coaches require a copy of their score sheets, they should notify the Regional Coordinator and email AAJ staff.



**2019 STUDENT TRIAL ADVOCACY COMPETITION (STAC)  
JUDGE'S SCORE SHEET**

Teams are to be scored on their trial skills only, NOT on the merits of the case.

**Do not give half-points. Do not tie teams. There must be a winner.**

**Do not write your name on this score sheet, and do not share your score with the participating students or coaches.**

**ROUND:**

REGIONAL LOCATION: \_\_\_\_\_

**TEAM \_\_\_\_\_ -- PLAINTIFF**

	<b>Good</b>			<b>Average</b>				<b>Poor</b>		
Opening Statement	10	9	8	7	6	5	4	3	2	1
Direct Exam of Plaintiff's Lay Witness	10	9	8	7	6	5	4	3	2	1
Direct Exam of Plaintiff's Expert Witness	10	9	8	7	6	5	4	3	2	1
Cross Exam of Defendant's Lay Witness	10	9	8	7	6	5	4	3	2	1
Cross Exam of Defendant's Expert Witness	10	9	8	7	6	5	4	3	2	1
Summation	10	9	8	7	6	5	4	3	2	1

Total points awarded to PLAINTIFF \_\_\_\_\_

**TEAM \_\_\_\_\_ -- DEFENDANT**

	<b>Good</b>			<b>Average</b>				<b>Poor</b>		
Opening Statement	10	9	8	7	6	5	4	3	2	1
Cross Exam of Plaintiff's Lay Witness	10	9	8	7	6	5	4	3	2	1
Cross Exam of Plaintiff's Expert Witness	10	9	8	7	6	5	4	3	2	1
Direct Exam of Defendant's Lay Witness	10	9	8	7	6	5	4	3	2	1
Direct Exam of Defendant's Expert Witness	10	9	8	7	6	5	4	3	2	1
Summation	10	9	8	7	6	5	4	3	2	1

Total points awarded to DEFENDANT \_\_\_\_\_



## **AMERICAN ASSOCIATION FOR JUSTICE**

### **MISSION**

*The Mission of the American Association for Justice is to promote a fair and effective justice system—and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America’s courtrooms, even when taking on the most powerful interests.*

### **ABOUT TRIAL LAWYERS**

Trial lawyers ensure access to the civil justice system for the powerless in America: working families, individual workers, and consumers who often lack the resources to take their grievances to court.

Trial lawyers play a valuable role in protecting the rights of American families. They champion the cause of those who deserve redress for injury to person or property; they promote the public good through their efforts to secure safer products, a safe workplace, a clean environment and quality health care; they uphold the rule of law and protect the rights of the accused; and they preserve the constitutional right to trial by jury and seek justice for all.

Some of the types of cases our attorneys handle include:

- A child paralyzed after being struck by a drunk driver;
- A young woman unable to have children because of a medical mistake;
- A person denied a promotion due to racial discrimination;
- An elderly man injured in a nursing home; and,
- A community whose water was made toxic by a local manufacturer.

### **ABOUT AAJ**

As one of the world’s largest trial bars, AAJ promotes justice and fairness for injured persons, safeguards victims’ rights—particularly the right to trial by jury—and strengthens the civil justice system through education and disclosure of information critical to public health and safety. With members worldwide, and a network of U.S. and Canadian affiliates involved in diverse areas of trial advocacy, AAJ provides lawyers with the information and professional assistance needed to serve clients successfully and protect the democratic values inherent in the civil justice system.

# Six Benefits

to American Association for Justice Law Student Membership You Can Put to Work Today!

## 1.

Network with America's premier trial lawyers through **AAJ's Membership Directory**.

## 2.

**Trial magazine's** digital version gives you the latest developments in civil litigation, current tort and consumer law verdicts, and other career-enhancing information.

## 3.

AAJ's annual **Student Trial Advocacy Competition (STAC)** gives you the opportunity to participate in the nation's premier mock trial before sitting judges and practicing trial lawyers.

## 4.

**AAJ Annual and Winter Conventions** allow you to attend information-packed workshops and Continuing Legal Education (CLE)-approved education sessions on all aspects of trial law from those at the top of their field. You will have the opportunity to attend social events and meet attorneys in all stages of their professional careers. Visit [www.justice.org/convention](http://www.justice.org/convention) to learn more.

## 5.

Attend select **AAJ Continuing Legal Education** courses for only the price of the reference materials. AAJ Education seminars and teleseminars will give you insight into different practice areas, how to be an effective advocate, and prepare you for life after law school.

## 6.

**AAJ Law Student Member scholarships and awards** help you pay down student loans. Start laying the groundwork today for the successful career you look forward to tomorrow. Visit [www.justice.org/lawstudents](http://www.justice.org/lawstudents) for information on law school scholarships and networking opportunities.

For just **\$15 a year**, you can invest in an American Association for Justice, formerly the Association of Trial Lawyers of America (ATLA®), Law Student Membership. That's a small price to pay for the kind of trial lawyer contacts, educational opportunities, and access to information you'll enjoy as a member of the world's largest trial lawyer bar.



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# American Association for Justice Law Student Member Scholarships and Awards

## **The Richard D. Hailey Law Student Scholarship**

AAJ's Minority Caucus awards \$5,000 scholarships to first-, second-, and third-year African American, Hispanic, Asian American, Native American, and Biracial Law Student Members.

## **Trial Advocacy Scholarship**

Open to all second- and third-year AAJ Law Student Members, this \$3,000 scholarship is awarded to the applicant who best demonstrates the following: commitment to AAJ and its mission; a desire to represent victims; interest and skill in trial advocacy; and financial need.

## **Leesfield Scholarship**

Sponsored by AAJ and AAJ member Ira Leesfield, this scholarship awards \$2,500 to a Law Student Member to subsidize attendance at AAJ's Annual Convention. Available to first- and second-year AAJ Law Student Members.

## **Mike Eidson Scholarship**

The Mike Eidson Scholarship Fund was established by the AAJ Women for Justice Education Fund in 2008, in honor of AAJ Past President Mike Eidson, whose vision and generosity inspired it. The Scholarship awards \$5,000 annually to a female student entering their third year of law school (the student can be enrolled in a three-year day program or four-year night program) who has demonstrated a commitment to a career as a trial lawyer, along with dedication to upholding and defending the principles of the Constitution, and to the concept of a fair trial, the adversary system, and a just result for the injured, the accused, and those whose rights are jeopardized.

Visit [www.justice.org/lawstudents](http://www.justice.org/lawstudents) for more information on law school scholarships.



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# **2019 AAJ Fact Pattern**

MAX PETUNIA

v.

CAVE OF THE BREEZES EXPEDITIONS, LLC

**Prepared by A. Michael Gianantonio  
of Robert Peirce & Associates**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF STEELTON

MAX PETUNIA;

Plaintiff,

GD No.: 18-01081977

v.

CAVE OF THE BREEZES  
EXPEDITIONS, LLC;

Defendant.

**COMPLAINT**

AND NOW, comes Plaintiff, Max Petunia, and files the within Complaint, the following of which is a statement:

**I. PARTIES**

1. Plaintiff, Max Petunia, is an adult individual residing at 269 Tosh Street, Penns Woods, in the District of Steelton.

2. However, during the time period referenced in the within Complaint, Max Petunia was a minor according to the laws of the District of Steelton.

3. Defendant, Cave of the Breezes Expeditions, LLC (COBE), is a District of Steelton limited liability company with a business address of 2500 Cave of the Breezes Way, Penns Woods, in the District of Steelton.

4. At all times relevant hereto, COBE acted through its employees, agents, contractors, or subcontractors.

## II. FACTS

5. On April 30, 2017, Plaintiff, along with ten other individuals and their coach, Mike Streib, as part of a team building exercise, attended a cave exploring trip at the Cave of the Breezes.

6. The cave exploring trip was offered and conducted by COBE.

7. The Cave of the Breezes is located in Western Steelton and is considered to be a more advanced cave system, meaning that it is not meant for first time cave explorers.

8. Further, the Cave of the Breezes has only one entrance and exit, that, from time to time in the past, has been prone to landslide activity.

9. On April 29, 2017, and through April 30, 2017, weather forecasters predicted high probabilities of strong, sudden rains that had the potential to cause landslides.

10. Despite the fact that the weather forecast indicated a high probability of sudden downpours, COBE continued to operate tours from April 29, 2017,

11. One such storm occurred on April 29, 2017, during which over three inches of rain fell in less than one hour.

12. Nevertheless, COBE did not perform any investigation to determine if it was safe to continue offering tours into the Cave of the Breezes.

13. On April 30, 2017, Plaintiff, who has never explored a cave before, attempted to enter the Cave of the Breezes on a tour guided by COBE.

14. Immediately before Plaintiff entered the Cave of the Breezes, weather forecasts demonstrated that a severe storm was approaching the Cave of the Breezes.

15. While undertaking the tour, as forecasted, a significant, severe storm occurred and caused a landslide, trapping Plaintiff and the rest of the team inside.

16. Due to the fact that the tour was only to last two to three hours, COBE did not provide any food or water for Plaintiff.

17. Despite mobilization of excavation equipment and rescue teams, it was anticipated that it would take at least one week to reach Plaintiff and the other stranded individuals.

18. With hope for a successful rescue dwindling, more radical ideas were explored to rescue Plaintiff.

19. Finally, rescue teams settled on an offer from eccentric billionaire and industry mogul Howard Scent to utilize Mr. Scent's new autonomous digging and rescue robot.

20. While the robot was successful in extracting all trapped individuals, Plaintiff, the last individual rescued, suffered severe injuries when the robot malfunctioned and caused Plaintiff to sustain two broken legs and a broken arm.

21. But for COBE's negligence in permitting inexperienced cave explorers to enter the cave when a landslide was possible, Plaintiff would not have been injured.

22. For the reasons described herein, Defendant is liable to Plaintiff for the harm and injuries sustained by Plaintiff during the April 30 Cave of the Breezes tour.

**COUNT I**  
**Negligence**

23. Plaintiff incorporates by reference all previous Paragraphs of the Complaint as if set forth in their entirety herein.

24. Defendant knew, or should have known, that novice explorers such as Max

should not have been permitted to explore the Cave of the Breezes.

25. Defendant knew, or should have known, that operating tours in a cave system with only one entrance and exit was dangerous and could have caused harm to individuals such as Max.

26. Defendant knew, or should have known, that landslides posed a danger to individuals, such as Max, who were exploring the caves.

27. Defendant knew, or should have known, that inclement weather, such as the weather present in the area on April 29-30, 2017, could have caused landslides.

28. Defendant knew, or should have known, that it did not properly account for weather, such as the weather present on April 29-30, 2017, that could cause landslides.

29. Defendant did not properly train, supervise, and/or terminate its employees, who acted as guides for cave tours.

30. Defendant's negligence caused Plaintiff to suffer great harm as pled above.

31. As a direct and proximate result of Defendant's negligence, Plaintiff sustained and will continue to sustain injuries and damages.

WHEREFORE, Plaintiff demands judgment against Defendant, in an amount in excess of the prevailing arbitration limits, exclusive of prejudgment interest, post-judgment interest and costs; for punitive damages; and for such other relief as this Court seems fit to award.

**A JURY TRIAL IS DEMANDED**

Respectfully submitted

/s/ Lizzie Chia  
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF STEELTON

MAX PETUNIA;

Plaintiff,

GD No.: 18-01081977

v.

CAVE OF THE BREEZES  
EXPEDITIONS, LLC;

Defendant.

**ANSWER AND AFFIRMATIVE DEFENSES**

AND NOW, comes Defendant, Cave of the Breezes Expeditions, LLC (COBE), and files the within Answer and Affirmative Defenses, the following of which is a statement:

**ANSWER**

1. The averments of Paragraph 1 of Plaintiff's Complaint are admitted.
2. As to the averments of Paragraph 2 of Plaintiff's Complaint, COBE lacks knowledge or information sufficient to form a belief about the truth of these allegations. As such, the averments are denied. By way of further response, in order to enter the Cave of the Breezes, COBE requires all individuals and groups entering the Cave of the Breezes to sign a form assuming the risk of the dangers alleged to have been encountered and harm alleged to have been sustained by Plaintiff. A true and correct copy of COBE's Conditions of Participation Contract (CPC) is attached hereto as Exhibit A.
3. The averments of Paragraph 3 of Plaintiff's Complaint are admitted.
4. As the averments of Paragraph 4 of Plaintiff's Complaint constitute conclusions of law, no responsive pleading is required.

5. The averments of Paragraph 5 of Plaintiff's Complaint are admitted in part. It is admitted that Plaintiff was at the Cave of the Breezes on April 30, 2017. As to the remaining of Paragraph 5, COBE lacks knowledge or information sufficient to form a belief about the truth of these allegations. As such, the averments are denied.

6. The averments of Paragraph 6 of Plaintiff's Complaint are admitted only to the extent that COBE offered a cave exploring trip on April 30, 2017 and Plaintiff was a part of that tour group.

7. COBE denies the averments of Paragraph 7 of Plaintiff's Complaint. While the Cave of the Breezes is considered by some to be a complex cave system, it, as with any cave system, can be explored regardless of level of experience so long as an appropriate guide, like that offered to Plaintiff in the present instance, is present on the tour.

8. COBE denies the averments of Paragraph 8 of Plaintiff's Complaint as stated. There is one readily accessible means of entry and exit to the cave system, and other entrances and exits exist throughout the system, but these entrances and exits were unavailable during the landslide. Further, to COBE's knowledge, there have not been any landslides of significance in the area of the Cave of the Breezes subsequent to 2017.

9-12. As the averments of Paragraphs 9-12 of Plaintiff's Complaint reference an unnamed and/or documented weather forecast, those averments are denied as stated. By way of further response, COBE tracks the weather on an hourly basis during times of operation to assess any threats to caving activities.

13. COBE admits in part the averments of Paragraph 13 of Plaintiff's Complaint. It is admitted that Plaintiff entered the Cave of the Breezes on April 30, 2017. As to the remainder of the allegations of this Paragraph, COBE lacks knowledge or

information sufficient to form a belief about the truth of these allegations. As such, the averments are denied.

14. COBE denies the allegations of Paragraph 14 of Plaintiff's Complaint.

15. COBE admits in part the averments of Paragraph 15 of Plaintiff's Complaint. It is admitted that an unpredictable landslide occurred at the Cave of the Breezes on April 30, 2017. As to the remainder of the allegations of this Paragraph, COBE lacks knowledge or information sufficient to form a belief about the truth of these allegations. As such, the averments are denied.

16. COBE denies the allegations of Paragraph 16 of Plaintiff's Complaint only to the extent that implies COBE had a duty to provide food and/or water to tour participants.

17-19. COBE admits in part the averments of Paragraphs 17-19 in that Howard Scent's rescue robot was utilized in rescue efforts. COBE lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraphs 17-19 of Plaintiff's. As such, the averments are denied.

20. COBE lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 20 of Plaintiff's. As such, the averments are denied.

21-22. As the averments of Paragraphs 21-22 of Plaintiff's Complaint constitute conclusions of law, no responsive pleading is required.

23. As the averments of Paragraph 23 of Plaintiff's Complaint are merely an incorporation paragraph, no responsive pleading is required.

24-31. As the averments of Paragraphs 24-31 of Plaintiff's Complaint constitute conclusions of law, no responsive pleading is required.



## **AFFIRMATIVE DEFENSES**

1. Plaintiff's Complaint fails to set forth a cause of action upon which relief may be granted.
2. Plaintiff's Complaint is barred by Plaintiff's own negligence.
3. Plaintiff's claims were caused or contributed by the superseding and intervening acts of persons, entities or circumstances beyond the control of Defendant.
4. Defendant owed no duty to Plaintiff.
5. Plaintiff's Complaint is barred by the terms and provisions of the CAVE OF THE BREEZES EXPEDITIONS, LLC's Agreement for Assumption of Risk, Indemnification, Release, and Consent for Emergency Treatment agreement, which is attached hereto as Exhibit A.
6. Plaintiff's Complaint is barred by the doctrine of assumption of the risk.
7. The events that occurred on April 30, 2017, were an act of God for which no responsibility may be placed on Defendant.

WHEREFORE, Defendant, Cave of the Breezes Expeditions, LLC, respectfully requests that this Honorable Court enter judgment against Plaintiff and dismiss Plaintiff's Complaint in its entirety.

**A JURY TRIAL IS DEMANDED**

Respectfully submitted

/s/ Mark Trojan  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF STEELTON

MAX PETUNIA;

Plaintiff,

GD No.: 18-01081977

v.

CAVE OF THE BREEZES  
EXPEDITIONS, LLC;

Defendant.

**PRETRIAL ORDER**

AND NOW, this 8<sup>th</sup> day of February, 2019, upon consideration of the Pretrial Conference between counsel held in these chambers on February 1<sup>st</sup>, 2019, the Court issues the following Order:

1. Upon consideration of Defendant's Motion for Reconsideration of this Court's ruling with respect to Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), that Motion is DENIED. This Court finds that the "Binding Arbitration" agreement contained within Defendant's Agreement for Assumption of Risk, Indemnification, Release, and Consent for Emergency Treatment is contrary to public policy and therefore Void.
2. Upon consideration of Defendant's Motion for Summary Judgment, that Motion is DENIED, it appearing to this Court that there is genuine issue of material fact as to the validity and enforceability of Defendant's Agreement for Assumption of Risk, Indemnification, Release, and Consent for Emergency Treatment. However, Defendant shall be permitted to argue at trial that the Agreement for Assumption of Risk, Indemnification, Release, and Consent for Emergency Treatment and/or

that Plaintiff voluntarily assumed the risk, and the jury shall be so instructed should Defendant present sufficient facts to warrant the same.

BY: \_\_\_\_\_  
The Honorable Krista A. Fullen

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF STEELTON

MAX PETUNIA;

Plaintiff,

GD No.: 18-01081977

v.

CAVE OF THE BREEZES  
EXPEDITIONS, LLC;

Defendant.

**STIPULATIONS**

AND NOW come the parties to this matter, and file the within Stipulations to be used at Trial, which shall have the binding effect of being taken as established facts if so offered:

1. On April 30, 2017, a landslide occurred on the hilltops located above the entrance of the Cave of the Breezes.
2. The landslide blocked the main point of ingress and egress to the Cave of the Breezes.
3. There was no other point of ingress or egress available for the hockey team to utilize to leave the cave nor for rescue teams to enter the cave.
4. The United States Geological Service (USGS) has never issued a landslide advisory for the area surrounding immediately surrounding the Cave of the Breezes.
5. The area immediately surrounding the Cave of the Breezes had excessive rainfall during a sixty-day period prior to April 30, 2017. The rainfall was estimated by

the National Oceanic and Atmospheric Administration the (NOAA) to have exceeded 190% of normal, historically recorded rainfall for the area.

6. It took a total of thirty-seven days to reopen the main point of egress and ingress to the Cave of the Breezes.

7. Chase Quinn was deposed but is unavailable for trial after dying tragically while testing a hyperloop to the moon transportation system. The parties agree that Mr. Quinn is unavailable to testify, as that term is defined by the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

8. The parties agree that Chase Quinn's deposition may be used at trial and the deposition testimony itself is not subject to a hearsay objection. As such, the deposition testimony may be used for any purpose so long as the intended use is otherwise admissible under the Federal Rules of Evidence.

9. Sam Petunia and Max Petunia, parents of Plaintiff Max Petunia, do not recall if they actually signed COBE's Agreement for Assumption of Risk, Indemnification, Release, and Consent for Emergency Treatment.

10. Steelton statutory law provides that as the owner of the company providing tours of the land, Bobby had the same responsibility of an owner of land.

11. The District Court for the District of Steelton follows the Federal Rules of Evidence.

12. The District Court for the District of Steelton follows the Federal Rules of Civil Procedure.

13. The depositions are signed and sworn to by each respective deponent as being accurate and authentic.

14. The expert reports were produced by the parties simultaneously before trial. Experts have reviewed all documents contained within this case file and may testify to the same; however, the expert's testimony is limited by the applicable rules of Civil Procedure.

15. The expert reports have been prepared and signed by each respective expert.

15. Plaintiff must call Max Petunia and Cris Cross as witnesses.

16. Defendant must call Bobby Daley and Kerry Dornburg, as witnesses.

17. This case has been bifurcated into a liability phase and a damages phase.

For purposes of this trial, the parties will try the liability phase only.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF STEELTON

MAX PETUNIA;

Plaintiff,

GD No.: 18-01081977

v.

CAVE OF THE BREEZES  
EXPEDITIONS, LLC;

Defendant.

**JOINT EXHIBIT LIST**

AND NOW come the parties to this matter, by and through their respective counsel, and submit the following proposed joint exhibit list. The parties agree the identified exhibits are authentic and admissible subject to objection on grounds that the proposed exhibit is otherwise inadmissible under the pertinent rules of evidence.

1. Release Agreement;
2. Pertinent Policies and Procedures for COBE;
3. Photographs of landslide;
4. Steelton statute 8771.81; and
5. NOAA Regional Precipitation Rank Map for February-April 2017

1 **Deposition of Max Petunia**

2 And now, this 6<sup>th</sup> day of June, 2018, Max Petunia, being duly sworn by the  
3 undersigned appeared at the offices of Kickem and Strait, for the purposes of  
4 deposition by oral questioning.

5 (Questioning by Mark Trojan)

6 Q. Good morning. We met earlier today before your deposition, but for purposes of  
7 the record, can you please state your name?

8 A. Sure, my name is Max Petunia.

9 Q. How old are you?

10 A. I am 19 years old.

11 Q. And where do you live?

12 A. Right now I live in housing provided by the Pitt Bulls.

13 Q. The Pitt Bulls?

14 A. The hockey team that I play for. We live in housing as a team because the season  
15 is so long. Even though my parents live here in Steelton, I stay with the team. It's  
16 better for team bonding.

17 Q. Okay, so what is the address where you live?

18 A. It is 1 Pitt Bull Way.

19 Q. And that's in Steelton?

20 A. Yes. Over by the arena.

21 Q. And your parent is the same Max Petunia that played for the Philtown Flyers?

22 A. Yes.



1 Q. How does he feel about you playing for the Pitt Bulls? Aren't those two teams  
2 bitter rivals?

3 A. They are, but after hockey, my dad moved here to take a job in management with  
4 the Pitt Bulls. I think my parents are just glad I'm playing somewhere.

5 Q. Speaking of your parents, what is their address?

6 A. 269 Tosh Way in Penns Woods.

7 Q. Do you know why you listed that as your address in your Complaint?

8 A. I am not sure, I think my lawyer did that just because that would be my permanent  
9 address if I were not playing hockey.

10 Q. Max, did you graduate from high school?

11 A. Yes, in 2017.

12 Q. How old were you when you graduated from high school?

13 A. I was 18.

14 Q. I want to come back to that in a second, but I still have some background questions  
15 that I would like to ask you.

16 A. Sure.

17 Q. Did you go to college?

18 A. I did not. I decided to play hockey for the Pitt Bulls instead.

19 Q. Okay, so back in 2017, you would have been living at the Pitt Bulls housing.

20 A. Yes.

21 Q. Tell me about the team that you were playing for at that time.

22 A. In 2017, I was making the switch from the Pitt Bulls junior team to the senior team.  
23 That would have been occurring in the spring of 2017.

1 Q. Would that have been before or after the landslide?

2 A. Before. I can't remember exactly when, but it was pretty close in time.

3 Q. And it is my understanding that when you went to the Cave of the Breezes in in  
4 April 2017, that was part of a team building exercise. Is that correct?

5 A. Yes, it was. Apparently it is something the club does every year to help get the new  
6 folks acclimated with the existing team.

7 Q. So, to your knowledge, the Pitt Bulls have been doing this for some time?

8 A. Yes, or, at least that is what the coach told me. I really did not know what to expect.

9 Q. Do you know if the previous year's team went on this team building exercise?

10 A. I think they had to cancel, to be honest.

11 Q. Do you know why?

12 A. Well, coach told us that the weather was too bad or something. I think he said it  
13 snowed so the team could not go. I guess the cave people were afraid of water  
14 runoff or something.

15 Q. You say you guess. Is that something you heard?

16 A. Yes, from coach.

17 Q. Who is the coach you are talking about?

18 A. Mike Streib.

19 Q. Is Mike Streib still your coach?

20 A. No.

21 Q. Why not?

22 A. He was asked to leave by the club after we got stuck in the cave.

23 Q. Do you know why he was asked to leave?

1 A. Sorry, I do not.

2 Q. I want to talk to you about your incident in the cave.

3 A. Okay.

4 Q. How old were you at the time that it happened.

5 A. Well, the landslide actually happened on my 18<sup>th</sup> birthday.

6 Q. So you were born on April 30, 1999?

7 A. Yes I was.

8 Q. What do you recall about the trip?

9 A. As I mentioned, it was a team bonding experience. All of the new players and the  
10 existing players were heading out for it.

11 Q. Did you leave on April 30, or sometime before?

12 A. It is about a three-hour ride, so we left the day before.

13 Q. Now, do you recall if you had to sign an agreement to go into the cave?

14 A. Yes, there was a form. Because I was 17, I was supposed to get one of my parents  
15 to sign it for me.

16 Q. Do you know when the form was due to be submitted?

17 A. I think it was a week before we left.

18 Q. Do you know when you got the form to give to your parents?

19 A. I don't remember the exact date, but it would have been in early April.

20 Q. How do you know that?

21 A. Usually the team gives us forms about a month in advance so that we have time to  
22 get them signed.

23 Q. When you got the form, did you give it to your parents right away?

1 A. I did not. They were on vacation and they did not get back until about two days  
2 before the form was due.

3 Q. Did you have your parents sign the form?

4 A. I honestly don't remember. I know that I saw them when they got back from  
5 vacation, and we talked about the trip, but I don't remember my parents actually  
6 signing the form.

7 Q. Do you know if you signed the form?

8 A. I don't believe I did. At least not without permission.

9 Q. What do you mean by that?

10 A. Sometimes my parents give me permission to sign their names to permission slips  
11 and the like.

12 Q. And you are telling me that you don't know if you signed your parents' name to the  
13 form letting you go into the cave?

14 A. I truly don't remember. After you almost die, then get mangled by a robot,  
15 sometimes you forget things.

16 Q. I understand, but I am just trying to figure out who signed this form. Your parents  
17 don't remember and you say you don't remember. Can you at least look at the form  
18 for me and tell me if that is one of your parent's signatures?

19 WHEREUPON the release agreement was handed to the witness and marked as Exhibit A  
20 to the deposition.

21 Q. Are you familiar with your parents' signatures?

22 A. What do you mean?

23 Q. Have you seen them before?

1 A. Yes, I have seen my parents sign things before.

2 Q. Having reviewed this form, can you tell me, does this look like one of your parent's  
3 signatures?

4 A. I can say that it kind of looks like my mom's, but it is a little messier than usual.  
5 Perhaps she was just in a hurry to get it signed.

6 Q. Okay, now you mention that sometimes your parents give you permission to sign  
7 the forms sometimes, is that right?

8 A. Yes.

9 Q. After looking at this signature, does this look like you may have signed it?

10 A. I don't think so, but I guess it's possible.

11 Q. So you can't tell me with any certainty?

12 A. I cannot.

13 Q. Your dad, Max, was around at the time, right?

14 A. What do you mean around?

15 Q. Well, he was an administrator with team, correct?

16 A. Yes.

17 Q. And you don't specifically recall seeking Max out to get the paper signed?

18 A. Since he is my dad, some people think I am only here because of him, so I avoid  
19 him as much as possible.

20 Q. Understood, but that did not answer my question, you could have gone to Max to  
21 get the release form signed, correct?

22 A. Yes, I suppose, but I don't remember if I did or did not.

23 Q. Let's talk about the trip. I think you said you left on April 29. Is that right?

1 A. Yes.

2 Q. And the actual cave exploration was set to occur until the next day, your birthday,  
3 right?

4 A. Yes.

5 Q. Do you remember anything about those days?

6 A. It was raining pretty hard on the 29<sup>th</sup>. Not so much on the 30<sup>th</sup>.

7 Q. Do you remember if there had been a lot of rain and snow that particular spring?

8 A. I remember it was wet a lot. As to the amounts, I do not pay attention to that kind  
9 of stuff.

10 Q. When you went into the cave, did the team go in alone or was there a guide?

11 A. At first there was a guide.

12 Q. What do you mean at first?

13 A. Well, our group got together, met our guide who gave us all a 30-minute lecture on  
14 safety. We then had to get on those hard hats with the lights on them, like you see  
15 whenever they show miners in the movies or on TV.

16 Q. What was your guide's name?

17 A. Cindy Cooney.

18 Q. What can you tell me about Cindy?

19 A. She seemed new. There were a couple times she seemed to forget safety tips and  
20 parts of the speech. Then, after we got into the cave, she told us to stay put because  
21 she forgot her emergency pack and had to get it.

22 Q. How do you know that she forgot safety tips?

- 1 A. It was just the way she was explaining the cave and things to do. It seems like she  
2 was stumbling over some things.
- 3 Q. But you aren't sure if she actually forgot anything?
- 4 A. No.
- 5 Q. Do you remember any of the safety tips?
- 6 A. She told us to always wear our helmets and if something happened, not to leave  
7 each other.
- 8 Q. Did she mention anything about cave-ins?
- 9 A. No.
- 10 Q. At any time prior to going into the cave, did anybody warn you about cave-ins?
- 11 A. No.
- 12 Q. Did you know cave-ins were possible?
- 13 A. I mean, anything is possible.
- 14 Q. Okay, but with respect to the Cave of the Breezes, did anybody tell you that cave-  
15 ins were possible?
- 16 A. Not exactly.
- 17 Q. What do you mean by not exactly?
- 18 A. Well, I know from my grandparents that there was a cave-in at the Cave of Breezes  
19 fifty years ago. They told it me it was during one of the snowiest winters and  
20 wettest springs they remember.
- 21 Q. Do you know what was in Cindy's emergency pack?
- 22 A. I have no idea.
- 23 Q. What happened after Cindy left?

1 A. Nothing, for a while. We were just standing in the same spot. Coach Streib would  
2 not let us move. I guess he listened during the safety tips.

3 Q. Was anybody else in the cave at this time?

4 A. Not to my knowledge.

5 Q. The Cave of the Breezes is a pretty big tourist attraction, do you know why your  
6 team was the only group there?

7 A. I am not sure, but I overheard one of the employees saying they had a lot of  
8 cancellations due to the rain.

9 Q. So, did Cindy come back?

10 A. No.

11 Q. What happened?

12 A. After some time went by, we felt a small rumbling, and then all hell broke loose.  
13 We could see the opening of the cave from where we were, but then everything  
14 started shaking and the entrance was gone.

15 Q. What do you mean by gone?

16 A. I mean it no longer existed, it was dark. Apparently a good portion of the hill above  
17 fell over the entrance.

18 Q. What happened with the team?

19 A. At first everybody was terrified, but then we wanted to make sure we still had  
20 everybody. Thank goodness we did.

21 Q. Did you have any communication with the outside world?

22 A. No. Our cellphones did not work so we did not know what do to do. Fortunately,  
23 one of the things that Cindy did tell us is that if something happened and there was



1 a cave-in, we were supposed to stay put and wait for rescue. A lot of bad things  
2 could happen if you tried to look for your own way out because you could get lost,  
3 hurt or worse.

4 Q. Do you know why Cindy specifically mentioned cave-ins?

5 A. Actually, I do. One of the team members because a little nervous when she said it,  
6 but she explained that there was very little chance of it happening and that she  
7 wanted us to know it just case something happened. She did mention it was  
8 something they just started telling people that month.

9 Q. Was anybody hurt as a result of the cave-in?

10 A. No, but everybody was pretty shaken up.

11 Q. Do you know how long you were trapped?

12 A. It was a couple of days before we heard anything.

13 Q. Did you have any food or water?

14 A. Not really. Some folks brought drinks and maybe a candy bar or power bar, but we  
15 did not have much. We were concerned we going to have start eating bugs and then  
16 we figured we would have to find a water supply.

17 Q. Well, how did you get rescued?

18 A. On the third day, we were all starting to get pretty desperate and that is when we  
19 heard it.

20 Q. Heard what?

21 A. Well, it was a low humming at first, but then noise got louder, and all of sudden  
22 this machine emerged from the earth where the entrance used to be.

23 Q. What kind of machine?

1 A. You've heard of Howard Scent, right?

2 Q. Of course.

3 A. Well, apparently, he took one of the capsules from his hyperloop project and rigged  
4 it with a drilling device. He was able to fashion a machine that could dig to us and  
5 get us out one at a time.

6 Q. How did it get you?

7 A. We had to climb into the machine and lay flat. We placed our legs into these  
8 brackets and our arms to something that would hold us flat so that the lid could  
9 close.

10 Q. What happened when it was your turn to use the machine?

11 A. Halfway out, or at least what I thought was halfway, the brackets, which were  
12 autonomous, started to twist, at which point my legs got pulled significantly in the  
13 wrong direction, as did my arm. I was in pretty bad shape for a while.

14 Q. It seems like you have made a pretty good recovery.

15 A. Physically, yes, but mentally, I am a mess. I thought I was going to die, and I still  
16 have terrible fears about that. I have terrible anxiety and sometimes I have to take  
17 Xanax and Ativan.

18 Q. Did you take those medications today?

19 A. Yes.

20 Q. Do those medications have any effect on your ability to tell the truth?

21 A. No, they do not.

22 Q. Thank you. I have no further questions.

23 WHEREUPON the deposition was concluded

1 **Deposition of Bobby Daley**

2 And now, this 11<sup>th</sup> day of June, 2018, Bobby Daley, being duly sworn by the  
3 undersigned appeared at the offices of Chia, Chia, Petta and Associates, for the  
4 purposes of deposition by oral questioning.

5 (Questioning by Lizzie Chia)

6 Q. Bobby, it looks like we get to meet again. It seems like this is a yearly experience  
7 for you. How are you?

8 A. I feel like one of the people you hear about that hit the lottery and then their life  
9 gets turned upside down.

10 Q. I am sure you do. I know this is not your first rodeo, but I need to get some  
11 background information for the record. Can you please state your full name?

12 A. Bobby Daley.

13 Q. And where do you live?

14 A. I live at 6711 Breeze Way, in Steelton, out by the caves.

15 Q. I thought you were going to Spain?

16 A. Unfortunately plans change. My life was really busy, and I thought that moving  
17 out of the country and trying to start over was best for me. So, I packed my bags,  
18 quit my job and headed out here.

19 Q. And by out here you mean?

20 A. Out by the Cave of the Breezes.

21 Q. Why all the way out there?

1 A. I was looking for something new to do with my life. I learned from a friend that  
2 the previous owner of Cave of the Breezes Enterprises was looking to retire and  
3 interested in selling the business.

4 Q. What did you know about running a cave tour business?

5 A. Not much. At least with respect to the cave part. I did have a basic understanding  
6 of how to run a business. Growing up, I spent a lot of time helping my family with  
7 their local sporting goods business until the local Richard's Sporting Goods opened  
8 up nearby. At that time, my family decided to get out of the business, and, by  
9 default, so did I.

10 Q. Okay, so what experience do you have in running a business then?

11 A. I learned how to order inventory, balance our profit and loss sheets, and advertise.  
12 Pretty much could run that business soup to nuts if I had to do so.

13 Q. Which brings back to how did you expect that experience to translate to running a  
14 cave exploring business? You would agree that caves are a little more dangerous  
15 than sporting goods, right?

16 By Mr. Trojan:

17 Object to the form of the question. Seeks a legal conclusion. You can answer if  
18 you can.

19 By the witness:

20 A. Well, I am not sure about that. Ever been hit by a fast ball from an errant pitching  
21 machine?

22 Q. No, I have not, but before you purchased the business, what was your understanding  
23 of what COBE did?

1 A. They were one of the groups that provided tours within the Cave of the Breezes.

2 Q. And what do you know about spelunking or cave exploring?

3 A. Absolutely nothing. In fact, I am terrified of them. I am claustrophobic.

4 Q. So, have you ever actually been in a cave?

5 A. Not once.

6 Q. So I ask again, how did you expect to be able to run the business without any prior

7 experience in that area?

8 A. Easy. I focused on the business, and I kept the people in place that were there

9 before I purchased the business.

10 Q. When you say people, what do you mean?

11 A. I inherited Chase Quinn, who was considered one of the best of guides in the field.

12 Chase served as my head guide and head of operations before he took off to help

13 out Howard Scent with that stupid hyperloop to the moon project.

14 Q. What do you mean by that?

15 A. After the cave-in, Chase worked closely with Mr. Scent on rescue plans using that

16 awful robot. I guess Mr. Scent liked Chase so much he offered Chase a job. You

17 might remember that Mr. Scent was also trying to build a hyperloop to the moon.

18 Chase was testing it one day and ended up dying in an accident in the stratosphere.

19 They never found his body.

20 Q. That is truly awful.

21 A. Yes, it is.

22 Q. What about the rest of your staff?

1 A. Most were veterans of many seasons. We had a couple of new staffers come on  
2 that winter.

3 Q. Was Cindy Cooney one of those new guides?

4 A. Yes, she was.

5 Q. Do you know if she was trained?

6 A. Yes.

7 Q. Who trained her?

8 A. It would have been Chase. He handled all the training.

9 Q. Do you know how Chase trained the new guides?

10 A. I don't know everything. I do know he taught them how to make sure groups stayed  
11 together. Which part of the caves to avoid, and things like that. However, as far as  
12 the specifics, I did not know.

13 Q. I am going to hand you a copy of some of COBE's policies and procedures. Do  
14 these look familiar to you?

15 Whereupon the witness examined the policies and procedures

16 A. Yes, they do. These are some of our policies and procedures.

17 Q. Did you create these policies and procedures?

18 A. I did not.

19 Q. Do you know who did?

20 A. I believe Chase worked on most of them and we just kept them when I purchased  
21 the business.

22 Q. What do you know about cave-ins?

23 A. A lot, now.

1 Q. Okay, let me ask it to you this way, what did you know about cave-ins prior to the  
2 April 30, 2017 incident?

3 A. Not a whole lot. I mean, sometimes you would see in the news about that stuff  
4 happening in Buffalo-Niagara or Lone Star, but never here in Penns Woods or  
5 Steelton.

6 Q. Were you aware of the 1962 cave-in at the Cave of the Breezes?

7 A. Only from stories I heard. Not much from my own personal recollection.

8 Q. What about when you purchased COBE, did the previous owner tell you about it?

9 A. Only briefly and not very specifically. He said that he was here as a guide but was  
10 off that day. I understand that a lot of people died that day. They don't really talk  
11 much about it here, kind of like its bad luck. Almost as how you never say the word  
12 "seven" at a craps table.

13 Q. Did you have any policies or procedures governing cave-ins?

14 A. Nothing in writing. They never really happen here, like I said.

15 Q. Well what about what we were just talking about?

16 A. That was over fifty years ago.

17 Q. Were you working on April 30, 2017?

18 A. Yes. In fact, I am here pretty much every day.

19 Q. Can you tell me what you remember from the cave-in?

20 A. Well, it was right about the start of business. I remember bumping into Cindy,  
21 because it was one of first times in the cave by herself. I asked what she was doing  
22 and she told me she had to come out for her emergency pack because she had a  
23 group in the cave.

1 Q. What happened next?

2 A. We felt a small rumbling at first, and then it got worse, much worse, and the hillside  
3 above the entrance gave way.

4 Q. What did you do?

5 A. I immediately called 9-1-1, and then I had Chase start getting the guides and guests  
6 accounted for.

7 Q. Did you have a plan in place if people were trapped in the cave?

8 A. We did, but not for this type of situation. Usually people got trapped if they got  
9 lost or broke a bone, but nobody could have expected this. In fact, there are three  
10 other caving expedition groups around here and all three were still open that day.

11 Q. Did those groups have anybody trapped inside the cave?

12 A. No.

13 Q. You mentioned that Cindy had to get her emergency pack. What is in it?

14 A. A spare radio, flares, some emergency rations and water, and a first aid kit.

15 Q. What was the weather like in the months before the cave-in?

16 A. I remember that winter we had a lot more snow than we usually had. Also, it was  
17 a very wet spring.

18 Q. Are you aware that extra precipitation can lead to cave-ins?

19 A. Yes, but there were no signs of a cave-in happening.

20 Q. How do you know that?

21 A. Well, I may not know much about cave exploring, but I did my homework on the  
22 local area and what to look for when the business could be in danger. Especially



1 because my insurance company wanted to me to look for signs of things that could  
2 potentially become a hazard.

3 Q. What types of things did your insurance company want you to look for?

4 A. They wanted me to check with the guides to see if anything in the caves changed  
5 noticeably. Also if any of the surrounding trees were falling over, things like that.

6 I also looked periodically for signs of earth movement at my house because I have  
7 a very large drop off behind my home.

8 Q. And did you ever notice any signs of earth movement, either in the area, or at your  
9 home.

10 A. Not a lot. A couple of trees above the entrance fell over during the winter, but they  
11 were so heavy with snow, that did not surprise me. I did not see any actual signs  
12 that they lost support from the ground.

13 Q. Did you actually go inspect those trees?

14 A. I take a lot of hikes with my dogs Ruby and Lola. We spend a lot of time on the  
15 paths above the entrance so I did see the trees personally.

16 Q. Do you have any education or training geology or earth sciences?

17 A. No. Just my common sense.

18 Q. Did you have any type of yearly inspection performed at the cave or the surrounding  
19 area to determine whether or not that it was possible for a landslide to occur?

20 A. Actually, no, we discontinued the yearly inspection. It was really expensive and  
21 the inspection people told us we could probably get by with every two years, maybe  
22 three if we were lucky.

1 Q. So do you know the last time that the area was inspected to determine if a landslide  
2 was possible?

3 A. I think it would have been sometime in 2016.

4 Q. Did you see that inspection?

5 A. Yes.

6 Q. Do you still have it?

7 A. No.

8 Q. Do you remember what it said?

9 A. Just that in all areas where there are slopes and a lot of earth, landslides were  
10 possible. It seemed kind of boilerplate. It did not specifically say that our location  
11 was at any particular or explicit risk.

12 Q. But we have to take your word on that because you don't have a copy, right?

13 A. I guess you could get one from the surveying company.

14 Q. We tried, but they had a large fire that resulted in a loss of physical and data records.

15 A. That's too bad.

16 Q. When was the next inspection due?

17 A. Not sure, though I think it may have been winter of 2019.

18 Q. So other than your own knowledge, you had no professional training in the cause  
19 or likelihood of a landslide occurring?

20 A. Nope, just what I know and see.

21 Thank you, that is all that I have.

22 WHEREUPON the deposition was concluded.

23

1

2 **Deposition of Chase Quinn**

3 And now, this 15<sup>th</sup> day of April, 2018, Chase Quinn, being duly sworn by the  
4 undersigned appeared at the offices of Kickem and Strait, for the purposes of  
5 deposition by oral questioning.

6 (Questioning by Mark Trojan)

7 Q. Good morning Chase. I am here to ask you some questions about your employment  
8 at the Cave of the Breezes Expeditions and the April 30, 2017 landslide. I am sure  
9 you remember that day?

10 A. I do.

11 Q. Okay, great, can you first state your full name for the record?

12 A. It is Chase Quinn.

13 Q. Chase, where do you live?

14 A. I live in Palo Alto, California.

15 Q. At the time of the landslide where did you live?

16 A. I lived here in Steelton.

17 Q. Okay, great. I am going to ask you some questions about Palo Alto, later, but first  
18 I want to talk to you about COBE. Do you understand when I say COBE that I am  
19 referring to Cave of the Breezes Expeditions?

20 A. Yes, I do. We called it that all the time.

21 Q. I already spoke with Bobby Daley. It is my understanding that you worked for  
22 Bobby at the time of the landslide?

23 A. I did.

24 Q. What was your title?

1 A. I was the head guide, although I did not actually do much guiding at that time.

2 Q. Well, you must have read my mind because I was going to ask you about what you  
3 did do. Can you tell me a little about that? And I am specifically asking you with  
4 respect to the time that Bobby Daley owned COBE.

5 A. Sure, I was essentially in charge of the operations for COBE. I trained all the guides  
6 and supervised them. If there was a problem and the guides were not doing their  
7 jobs, it was my responsibility to either fix it or make a personnel decision.

8 Q. What do you mean by personnel decision?

9 A. Whether or not that person had to be fired.

10 Q. Did you have to run that decision by Bobby?

11 A. No, Bobby generally gave me free reign over the decisions.

12 Q. Did you ever have to fire anybody?

13 A. Yes.

14 Q. Why would somebody be fired?

15 A. Generally, I would do my best to help teach guides how to do things the right way.  
16 For the most part, we are just babysitters when we go in the caves with a group.  
17 We are not doing any serious climbing or exploring. We stay to a pretty standard  
18 tour that takes about two hours. Sometimes, however, we get a real hot shot who  
19 thinks they are a real Floyd Collins.

20 Q. Who is Floyd Collins?

21 A. It's kind of a joke, but a really weird story. Google it sometime. Needless to say,  
22 we get the occasional hot dog and that does not sit well with me.

1 Q. During the time that you worked under Bobby, did you ever have to terminate an  
2 employee?

3 A. Only one.

4 Q. What for? Was that person a “hot dog?”

5 A. No, actually, the opposite. I had to fire Cindy Cooney.

6 Q. Isn't that the guide that was supposed to be with Max Petunia's tour group that day?

7 A. Yes.

8 Q. Is that why she was fired?

9 A. What do you mean?

10 Q. Sorry, that was a bad question. Was she fired because she abandoned her tour group  
11 on April 30, 2017?

12 A. Actually, not really. Cindy did what she was supposed to do that morning. She did  
13 not have her safety pack, and we always tell our guides never go into the cave  
14 without it.

15 Q. So why was she fired?

16 A. She never really got over what happened. She kept saying that it should have been  
17 her in there and not that hockey team. She knew she would have been trapped had  
18 she not forgotten her pack.

19 Q. Is there anything in her safety pack that would have helped the team when they  
20 were trapped?

21 A. What, you mean like a bulldozer? No, nothing. They may have had an extra day  
22 or two worth of water and food, but nothing that would have changed the fact that  
23 getting to them was an emergency before they ran out of supplies.

1 Q. Did you ever have to discipline Cindy, either before or after the accident?

2 A. Yes, probably about five or six times.

3 Q. What for?

4 A. She was late a lot.

5 Q. Do you know if she was late on April 30, 2017?

6 A. No, she was actually early. In fact, she was the only guide that was available for

7 the tour that morning. Some of my guides got caught when some trees fell over

8 blocking one of the main roads into our place.

9 Q. So you knew that some trees fell over that morning?

10 A. I knew that a tree fell over at one spot on a road. It is not unusual up here.

11 Q. Did you have a chance to observe Cindy Cooney with the group that morning?

12 A. I did. As I mentioned, she was one of the only guides there, and because she was

13 new, I was listening to her safety briefing.

14 Q. Did you have any problems with her briefing, or did she give it appropriately?

15 A. I had absolutely no problem with her briefing. She overly stressed the fact that if

16 something happened to the group, or if somebody got injured, that they were to wait

17 together for rescue. It probably saved some lives.

18 Q. Including your time working for Bobby, how long did you work at COBE?

19 A. About twenty-five years. I started when I was 16 doing various odd jobs around

20 the place. The owners liked me so much they kept me on and taught me the ropes.

21 Q. Other than Bobby and the people that hired you, have you worked for any other

22 owners of COBE?

23 A. No.

1 Q. What are you doing in Palo Alto?

2 A. I am working with Howard Scent on the hyperloop project.

3 Q. That is a bit different than caving, how did that happen?

4 A. Well, when Mr. Scent brought in the robot to save those team members, I worked  
5 closely with his people. I guess I made an impression and I was hired to work with  
6 him.

7 Those are all of the questions that I have.

8 By Attorney Chia

9 Q. Did Bobby change anything that the previous owners did?

10 A. No. Bobby was a bit of a better businessperson though.

11 Q. Do you think the cave should have been shut down on the morning of April 30,  
12 2017?

13 A. No, I did not see any reason.

14 Q. Why do you feel that way?

15 A. Again, I did not see anything that warranted danger, let alone that indicated a  
16 massive landslide was coming.

17 Q. Prior to April 30, 2017, had you ever witnessed a landslide before?

18 A. Once, about 15 years ago when I was hiking in the Pacific Northwest.

19 Q. What do you remember about the landslide?

20 A. I remember that it had been raining in that particular area for something like a week.  
21 I also remember my buddy telling me that the past couple of months had been  
22 particularly bad for rain, and it was the wettest in the history books. The path we  
23 were going to hike was actually covered when the mountain gave way.

1 Q. Do those conditions sound familiar?

2 A. No.

3 Q. Well, one of the things you are in charge of is safety, right?

4 A. Yes.

5 Q. Is monitoring weather conditions part of that job?

6 A. Yes, somewhat.

7 Q. What do you mean by somewhat?

8 A. Well, if it is going to snow or be a complete washout, sometimes we cancel a tour

9 or two.

10 Q. Had you been paying attention to the weather at the time of the landslide?

11 A. Yes.

12 Q. And you are aware it was raining heavy the week before the slide, right?

13 A. Yes.

14 Q. And you are aware that it was the wettest winter and spring in recent history at the

15 Cave of the Breezes, right?

16 A. Yes.

17 I have no further questions.

18 WHEREUPON the deposition was concluded.



November 19, 2018

Lizzie Chia, Esquire  
Chia, Chia & Petta, PC  
1919 Dark Tower Rd.  
District of Steelton, USA 12345

**Re: COBE Landslide**

Dear Ms. Chia:

Your office has retained me to review the facts surrounding the April 30, 2017 COBE landslide and, in conjunction therewith, to ascertain if COBE's actions were reasonable with respect to COBE's expectation of a slide, preparation in case of a slide, and slide response. Upon reviewing the information that you have provided to me, I have determined that COBE's actions were woefully inadequate in all three regards.

In summary, I believe COBE knew, or should have known, that a landslide was imminent and that COBE should have suspended operations until such time that it could ensure that the entrance to the Cave of the Breezes was not in danger from a slide. Second, COBE was unprepared in the event of a slide. The cave itself did not have a preplaced reserve of rations including food and water that could have sustained individuals, such as Max Petunia, in the event that a slide occurred until such time that a successful rescue was made. Finally, COBE did not have any emergency plan in place in the event of a slide such as the one that occurred and required the extraordinary response of Howard Scent to rescue the trapped hockey team.

You have provided me the following materials to aid in my preparation of forming my opinions: Plaintiff's Complaint; Defendant's Answer and Affirmative Defenses; Exhibits provided identified in the Joint Exhibit List; Stipulations of Counsel; Depositions of Max Petunia, Bobby Daley, and Chase Quinn.<sup>1</sup>

All my opinions set forth below are held within a reasonable degree of geological certainty.

**FACTUAL SUMMARY**

As you know, I am a world-renowned cave explorer and I have visited almost every major cavern in the continental United States and many in Europe as well. Although I have

<sup>1</sup> As you are aware, I was unable to visit the site personally after the April 30, 2017 event. While we made several arrangements to do so, my television taping schedule for my nationally syndicated children's educational show, "Cave Treasure!" interfered with my plan for attending. Although an actual site visit is always preferable, it is not absolutely necessary for me to form my opinions.

never personally inspected a landslide, as a scientifically trained geologist, I am more than aware of the science behind landslide.

From the materials that I have reviewed, the hockey team in question set out to the Cave of the Breezes for a team building exercise on April 29, 2017. The actual cave exploration occurred on April 30, 2017. The team was escorted into the cave by a relatively inexperienced COBE guide who was disciplined on multiple occasions for being tardy.

I further understand that this guide actually forgot her safety pack and had to leave the group unattended on the date of the slide. First, you should never leave inexperienced individuals alone inside of a cave. This was a poor decision, and had the guide taken the team with her, they would not have been stuck in the cave while she was safe on the outside. Second, possession of the guide's safety pack would have been crucial to the team's survival. Although the pack only had enough extra food and water for one to two days, these extra supplies may have been the separation between life and death in a rescue situation.

Based upon my review of the materials, the slide was massive and it would have taken several days, if not weeks, for rescue services to reach the hockey team. Without a guide, the team was forced to shelter in place and wait for rescue that fortunately came in the form of Howard Scent's rescue robot. Unfortunately for Max Petunia, Max sustained severe and crippling damages when being pulled from the cave by the robot.

## **OPINIONS**

### **A. The landslide was foreseeable**

Essentially, a landslide (or a mudslide) is the common term used to describe a large downward movement of rocks, dirt, earth, mud, trees, and many other items. Without sounding too elementary, the primary cause of a landslide is gravity, that being these materials no longer have the support to remain at rest and must go somewhere.

One of the most basic causes of sudden and tragic landslides, like the one that occurred on April 30, 2017, is the existence of a heavy rainfall. Although it is true that sometimes landslides are gradual events, rainfall can be a catalyst that gets things moving.

I have reviewed the available NOAA weather chart demonstrating that for April and the three months prior that Steelton, and in particular, the Cave of the Breezes, had experienced a higher than average rainfall. Water is capable of triggering landslides because it leads to slope instability. When the soils and earth on a slope become unstable that slope becomes more susceptible to gravity.

Also, there were signs available that a reasonable outfitter would have noticed that indicated imminent danger of a slide. Bobby Daley testified that over the winter and into the spring, Bobby was aware of downed trees and the fact that there had been above average

precipitation. A reasonable outfitter would have recognized the danger involved in those conditions and had a survey performed on the area surrounding the entrance of the cave to ensure that people would not be inside when an event like this incurred. As such, it was a violation of the standard of care for COBE not to further examine the obvious signs of danger. Moreover, it is not as if COBE was not aware that landslides could occur given that the COBE release specifically excludes suit on damages for injuries associated with rescue from a cave-in.

Also to that extent it was a violation of the standard of care for COBE to discontinue the yearly inspection of the cave. Waiting to do so every three years is simply too long. To that end, owning a business at the bottom of a hill imposed some duties on COBE. COBE and its employees should have become familiar with the land around it. I do not believe that they did so in this case. Further, COBE should have made an effort to learn whether debris flows have occurred in its area by contacting local officials, emergency management officials, state geological surveys or departments of natural resources, and university departments of geology. Slopes where debris flows have occurred in the past are likely to experience them in the future.

Clearly, COBE did not do this. While COBE was aware of a massive slide occurring over fifty years ago, I do not see that COBE made any efforts to adequately follow up on the safety of the area. Although, it is admitted that the slide that did occur on April 30, 2017, was unusual for its magnitude and speed. While this does not excuse COBE's actions, I do admit the slide was abnormal. However any diligence by COBE would have put them on notice that a slide was possible.

#### **B. COBE was not adequately prepared for a landslide**

It is clear that COBE's training failed the team. As I discussed earlier, the team's fate was tethered to the hand of a rookie instructor who obviously was not ready for the task at hand. Her absence was absolutely critical in that the guide is the most important person on the trip. It is the guide's job to lead and give instruction, especially in the case of an emergency or a life-threatening event. That team is fortunate Max Petunia was the only injured party.

Further, there were no other means of egress or ingress into the cave. While I understand that this is not a man-made structure, there should always be an escape plan. And while I certainly would not expect the trapped to team to find the exit, getting in to rescue them would have been much easier. It is unclear what role an alternative means of egress or ingress would play into this scenario. It is my understanding that the slide covered a range of approximately 10 square miles, so it may not have been feasible to use one of the alternative means of entry. Unfortunately, we will never know because COBE never decided to ensure one (or better yet, multiple) existed.

All of my opinions have been rendered within a reasonable degree of scientific and geological certainty.

Very truly yours,

Cris Cross, B.S., M.S., Ph.D.

## CURRICULUM VITAE

**Cris Cross**  
**P22 Avenue**  
**Hollywood, CA**

### **Education**

2006 Penns Woods Tech

B.S. in Earth Sciences with a minor in theater

2008 University of Florida

M.S. in Geology

2015 Penns Woods Tech

Ph.D. in Meteorology

### **History**

2008-2010

Tour Guide at Mammoth Caverns

Tour leader for Mammoth Caverns. Responsible for leading groups into caves and explaining the geology of the area.

2010-present

Cave Treasure

I host a nationally syndicated children's educational show about caves, geological formations, and wildlife found inside cave systems. Each week I broadcast from a new and exciting locale around the world in order to teach today's youth about the Earth, how our surroundings were formed, and what goes on inside caves.

### **Relevant Episodes:**

*You Can't Surf a Slide!*

In this episode we explored several different types of landslides and how they can affect the world us.

*Trapped*

In an unexpected twist, me and my cameraman are trapped while exploring the Cave of the Breezes in a remote tunnel and the guides from the COBE are unable to get us out. We had to free ourselves.

2015-present

Weather Channel

Regular meteorology expert during large or unusual weather events.

### **Awards**

Daytime Emmy for best Children's Educational Program 2014, 2017

### **Prior Testimony**

I have testified in six prior lawsuits, all of which involved claims against a cave tour operator. All of my testimony has been for the Plaintiffs. My rate is \$500 per hour with a \$5000 flat fee for trial testimony since it often interferes with my filming schedule.

December 14, 2018

Mark Trojan, Esquire  
Kickem and Straight  
257 Wilderness Drive  
District of Steelton, USA 12345

**Re: Cave of the Breezes Landslide**

Dear Mr. Trojan:

Thank you for asking me to consult on behalf of your client, Cave of the Breezes Expeditions, Inc. (COBE) with respect to this most serious of matters. As you are aware, I have been researching and studying earth movement for the better part of the past twenty years. As part of my occupation and research, I am often required to travel underground into cave systems to deploy and inspect instrumentation. Caving is also a hobby of mine and I take approximately 20 caving trips a year. In that regard, I am the director of the Rochester Spelunkers, which is a local cave exploring organization in my home area.

Although my conclusions are set forth in detail below, I am of the opinion, which is held to a reasonable degree of scientific certainty, that COBE could have done nothing to predict, prepare for, or prevent the landslide that occurred on April 30, 2017, and while tragic, there was surely nothing to be done that could have prevented the hockey team from becoming stuck in the cave.

However, before discussing my opinions, it is first necessary to understand the science behind a landslide. To that end, the primary cause of a landslide is the influence of gravity acting on weakened materials that make up a sloping area of land. While some landslides occur slowly over time (e.g., land movement on the order of a few meters per month), the most destructive ones happen suddenly after a triggering event such as heavy rainfall or an earthquake.

Water can trigger landslides and mudslides because it alters the pressure within the slope, which leads to slope instability. Consequently, the heavy water-laden slope materials (soil, rock, etc.) will succumb to the forces of gravity. Excessive water is thought to be one of the most common triggers for landslides.

Other factors that weaken slope materials also contribute to the occurrence of landslides. These factors include both natural events, such as geological weathering, and erosion and human-related activities such as deforestation and changes made to the flow of groundwater. Destruction of vegetation by droughts, fires, and logging has been associated with increased risk for landslides.

However, it is important to remember that landslides occur throughout the world, under all climatic conditions and terrains, and that the presence of rain, precipitation or other wet conditions is not some sort of alarm bell that a mountain is going to fall over.

The particular type of landslide involved in this matter is what is referred to as a debris avalanche, which means a large, rapid flow that is formed when an unstable slope collapses. In some cases, snow and water can contribute to this type of landslide. One of the problems that made this landslide so difficult to handle was that there were no real signs of it occurring, and with a debris avalanche, materials can move as fast as 100 kilometers per hour.

It is important to remember that debris avalanches cannot be stopped or prevented by engineering means because the associated triggering mechanisms are not preventable. In fact, literature from the U.S. Geological Service demonstrates that these types of landslides are difficult to predict and that a “probabilistic recurrence period” might be established if there is evidence of a prior debris avalanche. My understanding is that the last avalanche that occurred in this area was over fifty years ago, so it is my opinion that predicting this slide was not possible. There is no way to scientifically correlate a slide occurring half a century ago as a predictor or alarm bell to put COBE on notice that this slide was imminent.

I think there is mention of some downed trees and excess precipitation in the record. I agree that these are some things that can precede a landslide, but what it appears that COBE and its personnel was aware of is simply not enough to put anybody on notice as to a potential slide of this magnitude. The USGS does have in place an experimental landslide warning system, but the research is conclusive that the USGS did not issue any landslide warning for the Cave of the Breezes and the surrounding areas during the relevant time period.

Again, this is what made this particular landslide so difficult to predict and manage. It occurred suddenly, without warning, and it moved very, very fast. Even though COBE only had the area surveyed for earth movement every three years, no amount of surveying could have predicted that a slide of this magnitude, power, and speed would have occurred.

Furthermore, there is no question that COBE adequately trained its staff. In fact, having the appropriate training and reliable equipment are the thrust of safety. While some fault the guide for leaving the hockey team in the cave to obtain her safety pack, this demonstrates excellent training that meets the standard of care. The guide forgot something that she needed to perform her job safely and she went to retrieve it.

According to Chase Quinn, he overheard the guide giving the team safety instructions. Although the guide was not with the team when the slide occurred, it is apparent to me that she performed her job in instructing the team in proper cave safety. The team stayed together and did not stray further into the cave. Ms. Cooney’s presence or absence in the cave after the slide was of no importance. Her emergency rations may have assisted the team to eke out an extra day or two, but it would not have mattered in the big picture had Mr. Scent’s rescue plan not come through.



By imparting this wisdom, it is apparent that Ms. Cooney probably saved lives as there are many dangers to be found in an unlit cave by those who are not experienced. As somebody who goes on caving expeditions as much as I do, these would be the same exact instructions I would offer to any novice that was on a trip with me.

Moreover, I have become aware that the Plaintiff is critical of the fact that there was one only one way in and one way out of the cave. There is nothing that having multiple means of egress or ingress could have done to alleviate rescue efforts. We are dealing with a cave, which is a structure created over eons. This is not a football stadium. Given the amount of earth that fell in the surrounding area, it is my opinion that having another entrance would not have assisted in the rescue efforts at all.

Therefore, in conclusion, it is my opinion, within a reasonable degree of scientific certainty, that this landslide could not have been predicted and that COBE did not breach the standard of care by not ceasing operations on April 30, 2017. Further, it is my opinion, within a reasonable degree of professional certainty, that COBE adequately trained its staff, and that there was nothing that COBE's staff could have done even if trapped with the hockey team to have assisted their earlier and safer exit from the cave.

Very truly yours,

Kerry Dornburg, B.S., M.S., Ph.D.

## **CURRICULUM VITAE**

**Kerry Dornburg**  
**178 Clay St.**  
**Rochester PA**

### **Education**

Steelton A & M 1988  
B.S. with a major in Geology

West Virginia University 1990  
M.S. in Geophysics and Hydrology

University of Colorado 1996  
Ph.D. in Geophysics with theses on Earth Movement and Landslides

### **Professional Registrations**

Registered Geotechnical Engineer in Buffalo-Niagara, State of Lone Star, Pennsylvania  
Washington, New Mexico and California

### **Work History**

1990 to 1995  
United States Geological Service.

Performed field work investigating causes of landslides and aftermath involving remediation and study of cause.

1995 to 2006  
University of Steelton

Served as the chair of the Geology department. Responsible for overseeing 10 full time faculty members and numerous adjunct professors and graduate assistants.

2006-Present

Environmental Consulting Company

Operate a multi-state consulting company involved in earth sciences. Typically assist in construction projects by performing site stability reviews, and often requested by USGS to explore and evaluate landslides.

**Hobbies**

Rochester Spelunkers  
2005-present

Presently chair of organization that performs approximately twenty caving trips per year on average. As part of my role as the chair, and as a member of the safety committee, I have attended numerous courses concerning cave safety and best practices for the hobby.

**Prior Testimony**

I have testified approximately fifty times before this trial. My work is split even between claimants and defendants, though a majority of my work involves construction disputes. I have not testified previously concerning cave safety. My hourly rate is \$400 per hour, with a \$5000 flat rate for trial testimony.

Exhibit A

CAVE OF THE BREEZES EXPEDITIONS, LLC's Agreement for Assumption  
of Risk, Indemnification, Release, and Consent for Emergency Treatment

Program: \_\_\_\_\_ Date \_\_\_\_\_

IN CONSIDERATION OF MY VOLUNTARY PARTICIPATION IN EXPLORING THE CAVE OF THE BREEZES on APRIL 30, 2017, I UNDERSTAND THAT I AM BEING ASKED TO CAREFULLY READ EACH OF THE FOLLOWING PARAGRAPHS. FURTHER, I UNDERSTAND THAT IF I AM UNDER THE AGE OF 18, MY PARENT OR LEGAL GUARDIAN MUST READ AND SIGN THESE FORMS FOR ME. I UNDERSTAND THAT IF I WISH TO DISCUSS ANY OF THE TERMS CONTAINED IN THIS AGREEMENT, I MAY CONTACT THE CAVE OF THE BREEZES EXPEDITIONS OFFICE OF RISK MANAGEMENT AT 412-123-4567.

**Assumption of Risks:**

I understand that cave exploring, by its very nature, includes certain inherent risks that cannot be eliminated regardless of the care taken to avoid injuries. Some of these involve minor bumps and bruises, superficial injuries or on rare occasions broken bones. The specific risks vary, but range from: 1) minor injuries such as bumps, bruises and cuts, to 2) major injuries such as broken bones and torn ligaments, to 3) catastrophic injuries including death. I understand and appreciate the risks that are inherent in the above-listed programs and activities. I hereby assert that my participation is voluntary and that I knowingly assume all such risks. I further understand that I am ultimately responsible for my own safety. To the extent that this form is being completed for a minor, I acknowledge these risks on behalf of the minor for which I am signing.

Signature:  Date: \_\_\_\_\_

**Hold Harmless, Indemnity and Release:**

In consideration of permission to participate in cave exploring, I agree, for myself, my heirs, personal representatives or assigns, to defend, hold harmless, indemnify, and release, the Cave of the Breezes Expeditions, LLC, its officers, employees, and agents, from and against any and all claims, demands, actions, or causes of action of any sort on account of damage to personal property, or personal injury, or death which may result from my participation in the above-listed activity. This release includes claims based on the negligence of any and all other potential parties and their officers, employees, agents, and volunteers, but expressly does not include claims based on their intentional misconduct or gross negligence. I understand that by agreeing to this clause I am releasing claims and giving up substantial rights, including my right to sue. To the extent that this form is being completed for a minor, I acknowledge these risks on behalf of the minor for which I am signing.

Signature:  Date: \_\_\_\_\_

Exhibit A

**Consent for Emergency Treatment and Rescue:**

I authorize Cave of the Breezes Expeditions and its designated representatives to consent, on my behalf, to any emergency medical/hospital care or treatment to be rendered upon the advice of any licensed physician. I agree to be responsible for all necessary charges incurred by any hospitalization or treatment rendered pursuant to this authorization. I understand that this coverage is not provided to me by the Cave of the Breezes Expeditions. I also consent to all emergency rescue efforts in the event of an unforeseen catastrophe such as a cave in, landslide or other such event. To the extent that this form is being completed for a minor, I acknowledge these risks on behalf of the minor for which I am signing.

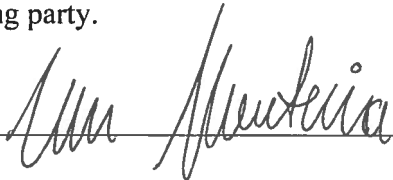
**AGREEMENT TO ARBITRATE ALL DISPUTES**

Any dispute, claim, or controversy arising out of or relating to this Agreement and/or the any incidents, accidents, or other occurrences in the Cave of the Breezes, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in the District of Steelton before three arbitrators.

Within 45 days after one of the parties makes a demand for arbitration, each party shall select one person to act as arbitrator, and the two so selected shall select a third arbitrator within 30 days of the commencement of the arbitration. All arbitrators shall serve as neutral, independent, and impartial arbitrators.

The arbitration shall be conducted in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The party initiating the arbitration shall be responsible for all costs associated with conducting the arbitration with the exception of attorneys' fees and costs borne by the opposing party.

Signature: \_\_\_\_\_

A handwritten signature in cursive script, appearing to read "Ann Muehlen", written over a horizontal line.

Date: \_\_\_\_\_

## Exhibit B

### **COBE POLICIES AND PROCEDURES**

#### **Guiding and Leading Tour Groups**

Remember, most tour groups are composed of mostly first-time cavers. Therefore, there are several safety instructions to remember for the safety of the group that should be discussed with the group before proceeding further into the cave.

1. Three points of contact should be exhibited when moving over uneven ground. This means having three points on your body supported on immovable objects. Whether it is your left foot, right shoulder, and knee; your left elbow, head, and right hip; or your right hand, bottom, and back.
2. The group needs to stay together. The only reasons not to have people stay together will involve either someone with an injury or an emergency. There is never any reason for you as a guide to separate from your group.
3. Always have your emergency pack. It could be the difference between life or death.
4. Do not leave trash behind (pick up others' trash), do not vandalize, and do not take souvenirs. Everyone should know the importance of cave conservation on the trip. The caver's motto: Take nothing but pictures, leave nothing but footprints, and kill nothing but time.
5. Have an emergency plan and discuss what will be done if something goes wrong. Everyone should know to wait for instructions from you unless you are in a life-threatening situation. The group must understand that you make the decisions in case of an emergency.

Exhibit C-1

**MAIN ENTRANCE TO CAVE**





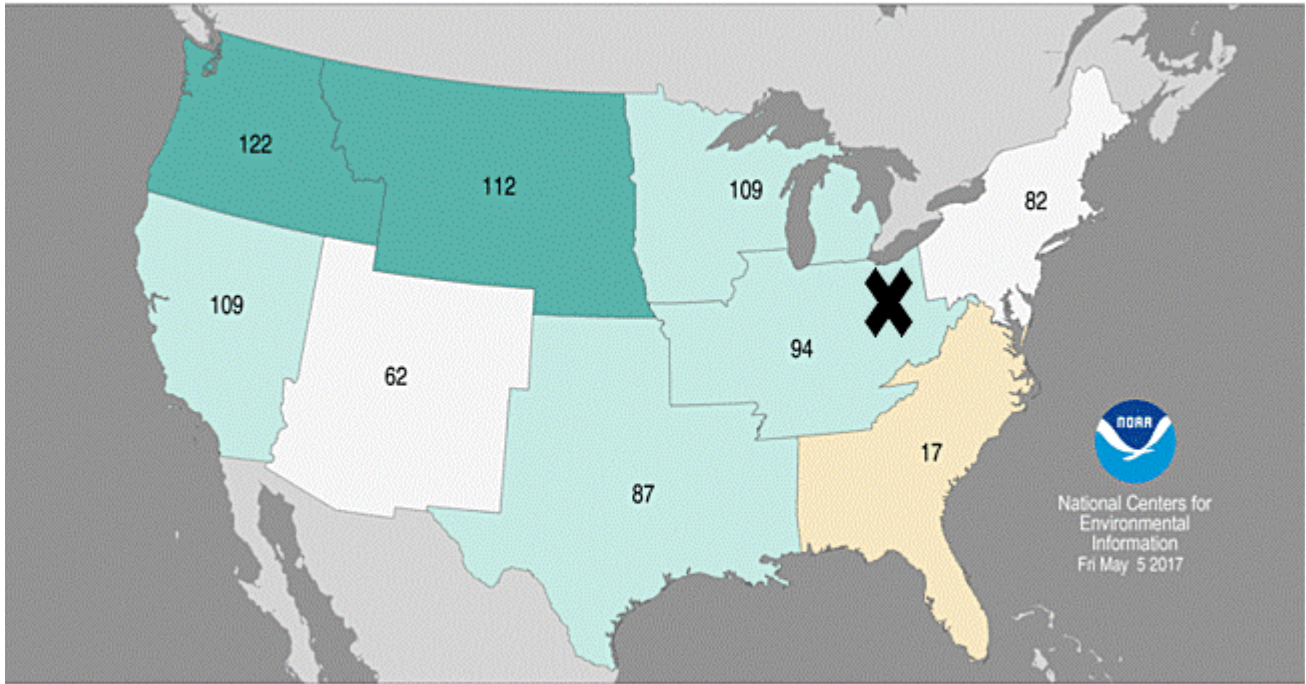


**Steelton Statute 8771.81**

Minors are deemed incapable of possessing the legal capacity to enter into binding contracts due to a recognized public policy of a minor's diminished capacity to appreciate risks to his own health and safety, and to make informed judgments about such risks. This includes a release or waiver of liability.

However, where a minor executes such a contract, the agreement is not "void," but rather, "voidable." After reaching the age of majority, the minor may disaffirm the contract, thereby rendering it a nullity. However, a minor may expressly or impliedly affirm the contract through his or her words or actions.

# Regional Precipitation Ranks February–April 2017



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF STEELTON

MAX PETUNIA;

Plaintiff,

GD No.: 18-01081977

v.

CAVE OF THE BREEZES  
EXPEDITIONS, LLC;

Defendant.

**JURY INSTRUCTIONS**

**BELIEVABILITY OF WITNESSES GENERALLY**

As judges of the facts, you decide the believability of the witnesses' testimony. This means that you decide the truthfulness and accuracy of each witness' testimony and decide whether to believe all, or part, or none of that witness' testimony. The following are some of the factors that you may and should consider when determining the believability of the witnesses and their testimony:

- a. How well could each witness see, hear, or know the things about which he or she testified?
- b. How well could the witness remember and describe those things?
- c. Was the ability of the witness to see, hear, know, remember, or describe those things affected by any physical, mental or intellectual deficiency?
- d. Did the witness testify in a convincing manner? How did the witness look, act, and speak while testifying?
- e. Was the testimony uncertain, confused, self-contradictory, or presented in an evasive manner?
- f. Did the witness have any interest in the outcome of the case, or any bias, or any prejudice, or any other motive that might

have affected his or her testimony?

g. Was a witness' testimony contradicted or supported by other witnesses' testimony or other evidence?

h. Does the testimony make sense to you?

i. If you believe some part of the testimony of a witness to be inaccurate, consider whether that inaccuracy cast doubt upon the rest of that same witness' testimony. This may depend on whether the inaccuracy is in an important matter or in a minor detail.

j. You should also consider any possible explanation for the inaccuracy. Did the witness make an honest mistake or simply forget, or was there a deliberate attempt to present false testimony?

k. If you find that a witness intentionally lied about a significant fact that may affect the outcome of the trial, you may, for that reason alone, choose to disbelieve the rest of that witness' testimony. But you are not required to do so.

l. As you decide the believability of each witness' testimony, you will at the same time decide the believability of other witnesses and other evidence in the case.

m. If there is a conflict in the testimony, you must decide which, if any, testimony you believe is true.

As the only judges of believability and facts in this case, you, the jurors, are responsible to give the testimony of every witness, and all the other evidence, whatever credibility and weight you think it is entitled to receive.

### **EXPERT TESTIMONY**

During the trial you have heard testimony from both *fact* witnesses and *expert* witnesses. To assist juries in deciding cases such as this one, involving scientific, technical or other specialized knowledge beyond that possessed by a layperson, the law allows an expert witness with special education and experience to present opinion testimony.

An expert witness gives his or her *opinion*, to a reasonable degree of professional

certainty, based upon the assumption of certain facts. You do not have to accept an expert's opinion just because he or she is considered an expert in his or her field.

In evaluating an expert witness' testimony and in resolving any conflicting expert witness' testimony, you should consider the following:

- a. The witness' knowledge, skill, experience, training and education;
- b. Whether you find that the facts the witness relied upon in reaching his or her opinion are accurate; and,
- c. All the believability factors I have given to you.

### **EXPERT OPINION—BASIS FOR OPINION GENERALLY**

In general, the opinion of an expert has value only when you accept the facts upon which it is based. This is true whether the facts are assumed hypothetically by the expert, or they come from the expert's personal knowledge, from some other proper source, or from some combination of these.

### **WEIGHING CONFLICTING EXPERT TESTIMONY**

In resolving any conflict that may exist in the testimony of expert witnesses, you are entitled to weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and reliability of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

### **CONFLICTING TESTIMONY**

You may find inconsistencies *within* the testimony of a single witness, or conflicts *between* the testimony of several witnesses. Conflicts or inconsistencies do not necessarily mean that a witness intentionally lied. Sometimes two or more persons witnessing the same incident see, hear, or remember it differently. Sometimes a witness remembers

incorrectly or forgets. If the testimony of a witness seems inconsistent within itself, or if the testimony given by several witnesses conflicts, you should try to *reconcile* the differences. If you cannot reconcile the differences, you must then decide which testimony, if any, you believe.

### **DIRECT AND CIRCUMSTANTIAL EVIDENCE**

The evidence presented to you may be either *direct* or *circumstantial evidence*. *Direct evidence* is testimony about what a witness personally saw, heard, or did. *Circumstantial evidence* is testimony about one or more facts that logically lead you to believe the truth of another fact. You should consider both *direct* and *circumstantial* evidence in reaching your verdict. You may decide the facts in this case based upon circumstantial evidence alone.

### **NEGLIGENCE—DEFINITION**

In this case you must decide whether the Defendant was negligent. I will now explain what negligence is. A person must act in a reasonably careful manner to avoid injuring others. The care required varies according to the circumstances and the degree of danger at a particular time. You must decide how a reasonably careful person would act under the circumstances established by the evidence in this case. A person who does something a reasonably careful person would not do under the circumstances is negligent. A person also can be negligent by failing to act. A person who fails to do something a reasonably careful person would do under the circumstances is negligent.

### **STANDARD OF CARE**

The standard or level of care owed by an owner of land to a person who entered the land depends on whether the person who entered was an invitee, a licensee, or a trespasser.

### **INVITEE DEFINED**

An invitee can be a public invitee or a business visitor.

### **PUBLIC INVITEE DEFINED**

A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

### **BUSINESS VISITOR DEFINED**

A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the owner of the land.

### **LICENSEE DEFINED**

A licensee is a person permitted to enter or remain on land with the owner's consent. This includes persons whose presence on the land is solely for their own purposes for which the owner or occupier has no interest. Generally, such licensees enter the land as a result of personal permission from the owner or occupier, or as a matter of general or local custom.

### **OWNER OF LAND'S DUTY TO INVITEES**

An owner of land is required to use reasonable care in the maintenance and use of the land, and to protect invitees from foreseeable harm. An owner of land is also required to inspect the premises and to discover dangerous conditions. An owner of land is liable for harm caused to invitees by a condition on the land if:

1. the owner knows or by using reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm, and
2. the owner should expect that the invitees will not discover or realize the danger, or will fail to protect themselves against it, and
3. the owner fails to use reasonable care to protect the invitees

against the danger.

An owner of land is liable to invitees for any harm that the owner should have anticipated, regardless of whether the danger is known or obvious.

### **OWNER OF LAND'S DUTY TO LICENSEES**

An owner of land is required to use reasonable care to make the land as safe as it appears, or to disclose to licensees the risks they will encounter. An owner of land is liable for harm caused to the licensees by a condition of the land, if

1. the owner of land knows or has reason to know of the condition, should realize that it involves an unreasonable risk of harm, and should expect that the licensees will not discover or realize the danger, and
2. the owner fails to use reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
3. the licensees do not know or have reason to know of the condition and the risk involved.

### **OWNER OF LAND'S DUTY TO TRESPASSERS**

If you find from the evidence that Plaintiff entered upon or remained on the premises of Defendant without permission, right, lawful authority, express or implied invitation, or consent, the legal status of Plaintiff then and there was that of a trespasser. In that event, if Defendant owner knew or had reason to know of Plaintiff trespasser's presence, Defendant's only duty to Plaintiff was to refrain from willful or reckless misconduct that would necessarily cause injury to Plaintiff.

### **BURDEN OF PROOF**

In civil cases, the Plaintiff has the burden of proving his claims.

The Plaintiff must prove his or her claims by a legal standard called "a



preponderance of the evidence.” Preponderance of the evidence means the claim is more likely true than not.

If, after considering all the evidence, you find the Plaintiff’s claims are more likely true than not, you must find for the Plaintiff.

Think about an ordinary balance scale with a pan on each side to hold objects. Imagine using the scale as you deliberate in the jury room. Place all the evidence favorable to the Plaintiff in one pan. Place all evidence favorable to the Defendant in the other. If the scales tip, even slightly, to the Plaintiff’s side, then, you must find for the Plaintiff. If, however, the scales tip even slightly on the Defendant’s side, or if the two sides balance, then you must find for the Defendant.

In this case, the Plaintiff has the burden of proving the following claims:

- a. The Defendant was negligent;
- b. The Defendant’s negligence was a factual cause in bringing about the harms/damages; and,
- c. The extent of damages caused by the Defendant’s negligence.

### **FACTUAL CAUSE**

In order for Plaintiff to recover in this case, Defendant’s negligent conduct must have been a factual cause in bringing about harm. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. To be a factual cause, the conduct must have been an actual, real factor in causing the harm, even if the result is unusual or unexpected. A factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm.

To be a factual cause, Defendant’s conduct need not be the only factual cause. The fact that some other causes concur with the negligence of the Defendant in producing

an injury does not relieve the defendant from liability as long as his or her own negligence is a factual cause of the injury.

### **CONCURRING CAUSES**

Sometimes a person's negligent conduct combines with other people's conduct to cause harm.

When a defendant's negligent conduct combines with the conduct of other persons, the defendant is legally responsible if his or her negligent conduct was one of the factual causes of the harm.

In such a case, Defendant is fully responsible for the harm suffered by Plaintiff regardless of the extent to which Defendant's conduct contributed to the harm.

### **COMPARATIVE NEGLIGENCE**

Defendant claims that Plaintiff was negligent and Plaintiff's negligence was a factual cause of Plaintiff's injury. Defendant has the burden of proving by a fair preponderance of the evidence that Plaintiff was negligent and that the Plaintiff's negligence was a factual cause of the plaintiff's harm. You must determine whether Defendant has proven that Plaintiff, under all the circumstances, failed to use reasonable care for his or her own protection.

### **ASSUMPTION OF THE RISK**

Assumption of the risk arises when a plaintiff consciously decides to tempt fate and face an appreciated danger. In order to prove the affirmative defense of assumption of the

risk, the defense must demonstrate that the plaintiff saw, understood, and voluntarily faced the risk that caused injury. Assumption of the risk may be express or implied.

### **DEPOSITION TESTIMONY**

The testimony of a witness, who for some proper reason cannot be present to testify in person, may be presented in this form. Such testimony is given under oath and in the presence of attorneys for the parties, who question the witness. A court reporter takes down everything that is said and then transcribes the testimony. The use of videotape permits you to see and hear the witness as he appeared and testified under questioning by counsel. This form of testimony is entitled to neither more nor less consideration by the jury because of the manner of its submission.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF STEELTON

MAX PETUNIA;

Plaintiff,

GD No.: 18-01081977

v.

CAVE OF THE BREEZES  
EXPEDITIONS, LLC;

Defendant.

**SUPPLEMENTAL JURY INSTRUCTIONS**

**GROSS NEGLIGENCE**

Plaintiff claims Defendant's conduct was not only negligent but was grossly negligent. Gross negligence is significantly worse than ordinary negligence.

To prove Defendant's conduct was grossly negligent, Plaintiff must prove Defendant's conduct significantly departed from how a reasonably careful person would act under the circumstances.

A person can be grossly negligent by acting or by failing to act.

**SUPERSEDING INTERVENING CAUSES**

An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's

negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

#### **ACT OF GOD**

An intervening operation of a force of nature without which the other's harm would not have resulted from the actor's negligent conduct prevents the actor from being liable for the harm, if

(a) the operation of the force of nature is extraordinary, and

(b) the harm resulting from it is of a kind different from that the likelihood of which made the actor's conduct negligent.

#### **ASSUMPTION OF THE RISK**

Assumption of the risk arises when a plaintiff consciously decides to tempt fate and face an appreciated danger. Assumption of the risk as a defense requires that the plaintiff saw, understood, and voluntarily faced the risk that caused injury.

#### **VICARIOUS LIABILITY**

A principal is legally responsible for an employee's negligent conduct.

In this case, COBE admits that Cindy Cooney was its employee and that Cindy Cooney's conduct was part of her job.

#### **INTENTIONAL MISCONDUCT**

Intentional misconduct lies on a fault continuum somewhere between ordinary negligence and an intentional tort. No intent to cause the injury is required. To establish willful misconduct, all that needs to be shown is that the actor was conscious of the risk of harm and that the risk was high either in degree or probability.

## VERDICT FORM

You must decide whether any party was negligent and whether that negligence was a factual cause of harm

I will now read you the questions on the verdict form that you must answer to arrive at a proper verdict:

### Question 1:

Was Defendant negligent? Please answer:

Yes\_\_\_ No\_\_\_

If you answer Question 1 “Yes,” go to Question 2.

If you answer Question 1 “No,” Plaintiff cannot recover and you should not answer any further questions. Tell the court officer you have reached a verdict.

### Question 2:

Was the negligence Defendant a factual cause of any harm to Plaintiff?

Yes\_\_\_ No\_\_\_

If you answer Question 2 “Yes,” go to Question 3.

If you answer Question 2 “No,” Plaintiff cannot recover and you should not answer any further questions. Please tell the court officer you have reached a verdict.

### Question 3:

Did Plaintiff assume the risk of the harm?

Yes\_\_\_ No\_\_\_

If you answer Question 3 “No,” go to Question 4.

If you answer Question 3 “Yes,” Plaintiff cannot recover and you should not answer any further questions. Please tell the court officer you have reached a verdict.

### Question 4:

Was Plaintiff negligent?

Yes\_\_\_ No\_\_\_

If you answer Question 4 “Yes,” go to Question 5.

If you answer Question 4 “No,” go to Question 6.

**Question 5:**

Was Plaintiff's negligence a factual cause of any harm to Plaintiff?

Yes\_\_\_ No\_\_\_

If you answer Question 5 "Yes," go to Question 6.

If you answer Question 5 "No," you are finished. Tell the Court officer you have reached a verdict.

**Question 6:**

Taking the combined negligence that was a factual cause of any harm to Plaintiff as 100 percent, what percentage of that negligence do you attribute to Plaintiff and what percentage do you attribute to Defendant?

Percentage of negligence attributable to Plaintiff:

\_\_\_\_\_ %

Percentage of negligence attributable to Defendant:

\_\_\_\_\_ %

Total 100%

If you have found Plaintiff's percentage is greater than 50 percent, Plaintiff cannot recover and you should not answer any other questions. Please tell the court officer you have reached a verdict.