

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

SHALON GIBBS, individually and as,)	CIVIL ACTION NO.: 3:06-1056
Personal Representative of the Estate of)	
WESLEY RANDALL GIBBS, Deceased,)	JUDGE: CHAMBERS
)	
Plaintiff,)	ANSWER AND AFFIRMATIVE
)	DEFENSES OF DEFENDANT
v.)	PADI WORLDWIDE CORP.
)	
COCO VIEW RESORT,)	
CARL MIDKIFF,)	
ELIZABETH MIDKIFF,)	
PADI WORLDWIDE CORP., and)	
DOES 1 through 40, inclusive,)	
)	
Defendants.)	
)	

Defendant PADI Worldwide Corp. ("PADI") by and through its undersigned counsel presents the following in support of its Answer and Affirmative Defenses:

ANSWER

1. The matters set forth in Paragraph 1 of the Plaintiff's Complaint constitute conclusions of law that are solely for determination by the Court and, as such, require no response by this Defendant. To the extent there are any allegations of fact contained therein, the same are denied and strict proof thereof is demanded if material at the time of trial.

2. This Defendant is without knowledge as to the allegations contained in paragraph 2 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

3. This Defendant is without knowledge as to the allegations contained in paragraph 3 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

4. This Defendant is without knowledge as to the allegations contained in paragraphs 4 (a), (b) and (d) of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial. As to the allegations in 4(c) of Plaintiff's Complaint, the same are admitted by this Defendant.

5. The matters contained in paragraph 5 of Plaintiff's Complaint are conclusions of law and, as such, no response is required thereto. To the extent there are any allegations of fact contained therein, the same are denied and strict proof thereof is demanded if material at the time of trial.

6. This Defendant is without knowledge as to the allegations contained in paragraph 6 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

7. This Defendant is without knowledge as to the allegations contained in paragraph 7, including each subparagraph, of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

8. This Defendant is without knowledge as to the allegations contained in paragraph 8 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

9. This Defendant is without knowledge as to the allegations contained in paragraph 9 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

10. The matters set forth in Paragraph 10 of the Plaintiff's Complaint constitute conclusions of law that are solely for determination by the Court and, as such, require no

response by this Defendant. To the extent there are any allegations of fact contained therein, the same are denied and strict proof thereof is demanded if material at the time of trial.

11. The question of venue is solely for determination by the Court and, accordingly, no response by this Defendant is required to the assertion in Paragraph 11 of the Plaintiff's Complaint that venue is proper before this Court. As to the allegations set forth in paragraph 11, this Defendant admits that it does business within the southern judicial district of West Virginia, but is without knowledge as to the remainder of those allegations.

12. The matters contained in paragraph 12 (a) through (c) of Plaintiff's Complaint are conclusions of law and as such no response is required thereto. To the extent there are any allegations of fact contained therein the same are denied and strict proof thereof is demanded if material at the time of trial.

13. The matters contained in paragraph 13 of Plaintiff's Complaint are conclusions of law and as such no response is required thereto. To the extent there are any allegations of fact contained therein the same are denied and strict proof thereof is demanded if material at the time of trial.

14. Upon information and belief, this Defendant admits the allegations set forth in paragraph 14 of the Plaintiff's Complaint.

15. Upon information and belief, this Defendant admits the allegations set forth in paragraph 15 of the Plaintiff's Complaint.

16. Upon information and belief, the Defendant admits the specific allegations set forth in paragraph 16 of the Plaintiff, but is without knowledge as to the allegations concerning Does 1 through 40, inclusive, and, therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

17. Upon information and belief, the Defendant admits the specific allegations set forth in paragraph 17 of the Plaintiff, but is without knowledge as to the allegations concerning Does 1 through 40, inclusive, and, therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

18. Upon information and belief, this Defendant admits the allegations set forth in paragraph 18 of the Plaintiff's Complaint.

19. This Defendant is without knowledge as to the allegations contained in paragraph 19 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

20. This Defendant denies the allegations set forth in paragraph 20 of the Plaintiff's Complaint.

21. This Defendant is without knowledge as to the allegations contained in paragraph 21 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

22. This Defendant is without knowledge as to the allegations contained in paragraph 22 of Plaintiff's Complaint; therefore, the same are denied and strict proof thereof is demanded if material at the time of trial.

23. This Defendant denies the allegations set forth in paragraph 23 of the Plaintiff's Complaint.

24. This Defendant denies the allegations set forth in paragraph 24 of the Plaintiff's Complaint.

25. This Defendant denies the allegations set forth in paragraph 25 of the Plaintiff's Complaint.

FIRST CAUSE OF ACTION

26-29. The allegations contained in paragraphs 26 through 29 of Plaintiff's Complaint are directed to other Defendants and, therefore, no response from this Defendant is required. To the extent there are any allegations of fact against this Defendant contained therein, however, then the same are denied and strict proof is demanded if material at the time of trial.

SECOND CAUSE OF ACTION

30-40. The allegations contained in paragraphs 30 through 40 of Plaintiff's Complaint are directed to other Defendants and, therefore, no response from this Defendant is required. To the extent there are any allegations of fact against this Defendant contained therein, however, then the same are denied and strict proof is demanded if material at the time of trial.

THIRD CAUSE OF ACTION

41-48. The allegations contained in paragraphs 41 through 48 of Plaintiff's Complaint are directed to other Defendants and, therefore, no response from this Defendant is required. To the extent there are any allegations of fact against this Defendant contained therein, however, then the same are denied and strict proof is demanded if material at the time of trial.

FOURTH CAUSE OF ACTION

49-54. The allegations contained in paragraphs 49 through 54 of Plaintiff's Complaint are directed to other Defendants and, therefore, no response from this Defendant is required. To

the extent there are any allegations of fact against this Defendant contained therein, however, then the same are denied and strict proof is demanded if material at the time of trial.

FIFTH CAUSE OF ACTION

55-60. The allegations contained in paragraphs 55 through 60 of Plaintiff's Complaint are directed to other Defendants and, therefore, no response from this Defendant is required. To the extent there are any allegations of fact against this Defendant contained therein, however, then the same are denied and strict proof is demanded if material at the time of trial.

SIXTH CAUSE OF ACTION

61-64. The allegations contained in paragraphs 61 through 64 of Plaintiff's Complaint are directed to other Defendants and, therefore, no response from this Defendant is required. To the extent there are any allegations of fact against this Defendant contained therein, however, then the same are denied and strict proof is demanded if material at the time of trial.

SEVENTH CAUSE OF ACTION

65-70. The allegations contained in paragraphs 65 through 70 of Plaintiff's Complaint are directed to other Defendants and, therefore, no response from this Defendant is required. To the extent there are any allegations of fact against this Defendant contained therein, however, then the same are denied and strict proof is demanded if material at the time of trial.

EIGHTH CAUSE OF ACTION

71. This Defendant incorporates herein by reference thereto its responses to paragraphs 1 through 70 of Plaintiff's Complaint as though herein fully set forth.

72. This Defendant denies the allegations set forth in paragraph 72, including all subparagraphs, of the Plaintiff's Complaint.

73. This Defendant denies the allegations set forth in paragraph 73 of the Plaintiff's Complaint.

74. This Defendant denies the allegations set forth in paragraph 74, including all subparagraphs, of the Plaintiff's Complaint.

75. This Defendant denies the allegations set forth in paragraph 75 of the Plaintiff's Complaint.

WHEREFORE, Defendant PADI Worldwide Corp. requests this Court to dismiss Plaintiff's Complaint with all costs to be borne by Plaintiff.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Plaintiff's Complaint fails to state a claim against this Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Although this Defendant denies any agency relationship with any of the other Defendants or their agents, servants or employees, to the extent it is determined otherwise, this Defendant pleads as an absolute and complete bar to Plaintiff's causes of action the Liability Release executed in favor of this Defendant's alleged agents, servants and/or employees by Plaintiff's decedent which is attached hereto and marked as Defendant's Exhibit A.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff's decedent, Wesley Randall Gibbs, by executing the Liability Release Agreement, hereinabove and hereinafter referred to as Exhibit 1, expressly assumed the risk of the scuba diving activity in question, and, as such, his estate survivors are barred from pursuing this action as a matter of law.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's injuries or damages complained of herein were caused or contributed to by the Plaintiff's decedent's own negligence and, therefore, any recovery must be reduced in whole or in part by the percentage of his comparative fault.

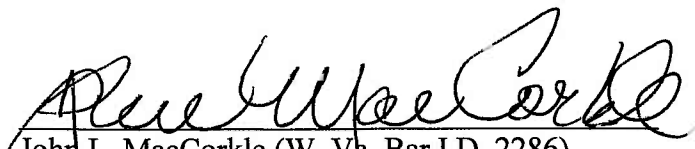
FIFTH AFFIRMATIVE DEFENSE

Plaintiff's injuries and damages complained of were the result of acts of independent third parties who were not the actual or apparent agents of this Defendant and over which this Defendant had no dominion or control and for which this Defendant has no vicarious liability.

WHEREFORE, Defendant PADI Worldwide Corp. moves this Court for an Order dismissing Plaintiff's Complaint and for such other and further relief as this Court deems just and proper.

A JURY TRIAL IS DEMANDED OF ALL ISSUES SO TRIABLE.

PADI WORLDWIDE CORP.
By Counsel



John L. MacCorkle (W. Va. Bar I.D. 2286)
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E-mail: jmaccorkle@mlclaw.com

Waiver, Release, and Indemnity Agreement

Please read carefully before signing:

I (print name) Wesley R. Gibbs hereby affirm that I am aware of the dangers of water activities such as scuba diving and snorkeling, and am competent to engage in those activities.

I understand and agree the purpose of diving is strictly recreational, and that it is not a function of CoCoView Resort (hereinafter CCV), Roatan Charter (hereinafter RC), and/or its Agents or Employees to serve as guardian of my safety.

I desire to participate in scuba diving activities with CCV, RC and/or its Agents or Employees. I understand that CCV, RC, and/or its Agents or Employees may provide advice or assistance to me, and I agree to hold harmless CCV, RC and/or its Agents or Employees for any of their actions in attempting to be of assistance to me. I agree to follow the instructions of the divemaster and to practice all safe diving rules. I agree to assume all risk involved.

By signing this document, I assume all responsibility for personal injury, property damage, and/or wrongful death which may occur, even if caused by negligence of others. I, the undersigned, do for him/herself, his/her heirs, Executors, and/or Administrators and Assigns, hereby release, waive, discharge, and relinquish any action or cause of action of aforesaid which may hereafter arise for him/herself and for his/her estate, and agree that under no circumstances will he/she or his/her heirs, Executors, Administrators and Assigns prosecute or present any claim against CCV, RC, or any of its Agents or Employees.

I understand and agree I am participating in these recreational Diving and Snorkeling activities voluntarily, I am aware of all risks involved and I agree to be completely responsible for my own actions.

The undersigned acknowledges that he/she has read all the foregoing, has been full and completely advised of the potential dangers incidental to engaging in the activity and instructing of scuba diving and is fully aware of the legal consequences of signing this instrument.

I hereby declare I am of legal age and am competent to sign this waiver and release agreement or that my parents or guardian will sign this document in my behalf if I am a minor.

Signed this 20 day of June, 2005, on the island of Roatan, in the country of Honduras, Central America.

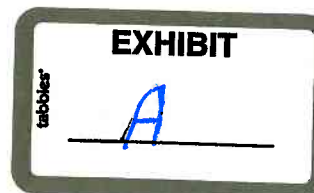
Signature of the participant:

Wesley R. Gibbs

Witness Signature:

[Signature]

Signature of Parent or legal Guardian:



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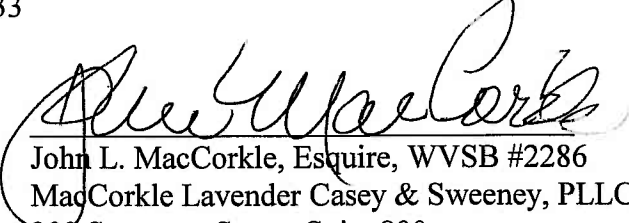
CERTIFICATE OF SERVICE

I, John L. MacCorkle, counsel for Defendant, PADI Worldwide Corp., do hereby certify that on this 23rd day of January, 2007, I served the attached **ANSWER AND AFFIRMATIVE DEFENSES** upon all counsel and parties of record by Electronically Filing and depositing true and exact copies of the same in the United States mail, first-class postage fully paid, addressed as follows:

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