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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WILMA FREEMAN, personally, and as Personal Representative for the Estate of John Barrow, Plaintiff, vs. THE CHURCH OF SCIENTOLOGY, And John and Jane Does A-D, and Corporations 1-9, and Partnerships I-X Defendants.	**CASE NO: CV 97-00750** **PLAINTIFF'S MOTION FOR RECONSIDERATION OF DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable B. Michael Dann)

Plaintiff WILMA FREEMAN (hereinafter referred to as "FREEMAN"), by and through her counsel undersigned, hereby respectfully requests that the Court reconsider its Minute Entry dated April 3, 2000 and filed April 14, 2000 (the "April Minute Entry"), and grant Plaintiff's Motion for Summary Judgment and deny Defendant's Cross-Motion for Summary Judgment.

This Motion is more fully supported by the attached Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In its April Minute Entry, the Court stated:

> A disputed issue of fact remains concerning whether the parties intended to modify the release provision by agreeing to a full refund of all tuition paid by the decedent.

April Minute Entry, at 1. (Emphasis added).

In other words, the Court denied Plaintiff's Motion for Summary Judgment, finding that the applicability of the Release Clause was a factual issue not appropriately decided as a matter of law. However, Arizona law clearly establishes that contract clauses which prospectively release a party from liability are invalid. Consequently, the Court can appropriately rule as a matter of law that the Release Clause cannot apply to the promise of a refund. If the Release Clause is inapplicable as a matter of law, then there is no factual issue to preclude the granting of Plaintiff's Motion for Summary Judgment.

II. The Release Clause is Invalid As a Matter of Law.

Throughout this case, the Court has given great weight to the fact that the "Enrollment Agreement between Barrow and the Church contained a broadly worded release and hold harmless agreement." See Minute Entry dated July 24, 1997. However, the Court should also realize that Barrow signed the "Enrollment Agreement" at the outset of his dealings with the Church--some time prior to receiving any of the services for which he bargained. The timing of the Release is important, because Arizona Courts have repeatedly held such prospective releases to be invalid.

The Court has found Hall v. Schulte, 172 Ariz. 279, 836 P.2d

989 (App. 1992) to be instructive on the issue of prospective releases. However, a careful review of that case will demonstrate that it is distinguishable and ought not to be applied to the facts before the Court.

The Hall court was dealing with a settlement agreement. As such, any release language contained therein was (i) bargained for and (ii) made with full knowledge of facts which had already transpired. Conversely, the Release Clause at issue in this case was not in the context of settlement, but was instead the Church's attempt to prospectively negate any and all liability of the Church, including any liability it might otherwise face for the breach of the very contract which contained the release. Such a release ignores the fact that each party is justifiably relying on the other party to perform as it is agreeing to perform.

In Parrish v. United Bank of Arizona, 164 Ariz. 18, 790 P.2d 304 (Ariz.App 1990),the Court stated:

> The rule in Arizona is that a general release can be avoided on the ground of mutual mistake. Arizona also recognizes that a unilateral mistake induced by misrepresentations or contractual ambiguities may constitute grounds for avoiding a release. (Emphasis added) (Internal citations omitted).

In Parrish, the Court found there was a "unilateral mistake" and permitted Mr. Parrish to avoid the consequences of the release. Although there is no allegation of unilateral mistake in this case, the very existence of the release clause within the contract gives rise to the "contractual ambiguities" envisioned by the Parrish court. The contract is ambiguous because the Release Clause makes it unclear exactly what Defendant's obligations were. Therefore, there is adequate grounds for avoiding the release.

A more recent Arizona Court of Appeals decision is also on point with regard to the concept of "prospective" releases. In Morganteen v. Cowboy Adventures, Inc., 190 Ariz. 463, 949 P.2d 552 (App.1997), the trial court had ruled that the plaintiff's execution of a "preprinted exculpatory covenant" amounted to a waiver of claims against defendant. The appellate court reversed, relying in part upon the principle that "prospective exculpatory covenants, if enforceable, are strictly construed against the enforcing party . . .." 949 P.2d at 553.

The Morganteen court drew a comparison to Maurer v. Cerkvenik-Anderson Travel, Inc., 181 Ariz. 294, 890 P.2d 69 (App. 1994), wherein the defendant attempted to absolve itself from its own negligence. In Maurer, the appellate court adopted the trial court's reasoning and held the prospective release covenant "too general" and stated it "failed to alert Plaintiff's . . . to the specific risks that she was supposedly waiving." 181 Ariz. at 298, 890 P.2d at 73.

In both Maurer and Sirek v. Fairfield Snowbowl, Inc., 166 Ariz. 183, 800 P.2d 1291 (App.1990), the appellate decisions were supported by reference to Salt River Project v. Westinghouse, 143 Ariz. 368, 694 P.2d 198 (1984), as it was the only case to date in which the Arizona Supreme Court had examined "prospective exculpatory covenants." Because of the commercial nature of the enterprise and highly sophisticated status of the parties, the decision in SRP was ruled an exception to the longstanding rule that a party may not immunize himself from the consequences of his own negligence. Therefore, SRP should not apply to this case.

III. Defendant's Exculpatory Clause Must Fail As A Matter of Law

Because It Did Not Satisfy Any of the Conditions for a Valid Exculpatory Clause.

The Morganteen Court stated:

> The SRP court placed three conditions upon the enforcement of a prospective exculpatory covenant: (1) that there "is no public policy impediment to the limitation"; (2) "that the parties did, in fact, bargain for the limitation"; and (3) that the limiting language be strictly construed against the party seeking to enforce it. Id. The court placed particular emphasis on the second factor in discussing the law of waiver, which requires "**an intentional relinquishment of a known right**."
>
> 949 P.2d at 554-55 (Emphasis added).

All three conditions must be met in order for the prospective exculpatory covenant to be enforceable. The absence of even one would nullify such a clause. In other words, the mere existence of an exculpatory covenant does not mean it should be enforced.

> We do not believe, however, that SRP permits the conclusion that one's signature on a preprinted release may be construed, as a matter of law, as an intentional relinquishment of a known right.
>
> 949 P.2d at 556.

Further analysis, using the three factors set forth by the SRP and Morganteen courts, is required.

As to the first factor, as a matter of public policy, those who provide services to the public should not be permitted to avoid responsibility for performance of their obligations by employing exculpatory language in their preprinted contracts. Such a principle would trample on the reasonable expectations of the unwary public, as they would find themselves unable to enforce their bargained for rights because of an imposed, unreasonable term which purports to excuse any and all performance by the other

party.

Second, there is no evidence in this case that Barrow and the Church bargained for the release language in the preprinted "Enrollment Agreement." In fact, the available evidence is that all consumers seeking the Church's auditing services were required to sign the preprinted Enrollment Agreement which contained the Release Clause.

Third, the language of the purported prospective exculpatory covenant ought to be construed most favorably for Mr. Barrow and Plaintiff herein. Such a construction would certainly result in a determination that Barrow did not intend to give the Church his money and get nothing in return. The only rights he had at the time the contract was executed was the right to receive the classes, materials, and auditing he paid for. Strict construction against the Church requires that the exculpatory language not be read to free the Church from its responsibilities under the contract to give Barrow the benefit of his bargain.

It is, therefore, clear that the prerequisites to enforcement of a prospective exculpatory covenant, as set forth by the SRP and Morganteen courts, have not been met. It violates public policy, it was not bargained for, and it would require an extremely liberal reading of the contract in favor of Defendant to find that Barrow expected nothing in return. Therefore, the Release clause is ineffective, and Barrow did not release any of his rights against the Church.

IV. If the Release is Upheld, The Contract Itself is Void For Lack of Consideration.

If the Release Clause is upheld in this case, any promise made

by Defendant is illusory, because Defendant suffers no legal detriment by making the promise. Arizona Courts have consistently held that any contract which purports to bind both parties while in reality binding only one of the parties is void.

In Shattuck v. Precision-Toyota, Inc., 115 Ariz. 586, 566 P.2d 1332 (Ariz.1977), the Arizona Supreme Court stated:

> [A]n illusory contract is unenforceable for lack of mutuality . . . an agreement which permits one party to withdraw at his pleasure is void . . . because to agree to do something and reserve the right to cancel the agreement at will is no agreement at all.

566 P.2d at 1334 (internal citations omitted).

Although the Shattuck court addressed the issue of lack of mutuality when one party has the right to cancel the contract, the underlying premise is the same as in the present case--specifically that where one party has purported to obligate itself by a contract, but the other party has no way of enforcing that obligation, then there "is no agreement at all," and the contract is void.

Similarly, in Carroll v. Lee, 148 Ariz. 10, 712 P.2d 923 (Ariz.1986), the Arizona Supreme Court again set forth the basic requirement that any valid contract must bind both parties.

> Mutuality of obligation is a requirement for a valid contract; however, mutuality is absent when only one of the contracting parties is bound to perform.

712 P.2d at 926.

Finally, in Shadron v. Cole, 101 Ariz. 122, 416 P.2d 554 (Ariz.1966), the Arizona Supreme Court stated:

> It is, of course, true that an illusory promise lacks mutuality of obligation, a nudum pactum, which is merely another way of stating that the particular promise is void because of lack of consideration.

416 P.2d at 556.

In this case, the Court has taken the position that a contract existed. In the July 24, 1997, the Court interpreted both the Release Clause and the Arbitration Clause of the Enrollment Agreement. The Court has clearly proceeded in this case on the premise that the Enrollment Agreement was a valid contract in need of interpretation and application to the facts presented. However, the only way the contract can be valid is if Defendant was in fact obligated to fulfill all the promises it made. Therefore, under Arizona law, the Court must either rule that the contract was void because the Release Clause made the entire contract illusory (in which case Plaintiff would be entitled to a refund of all monies paid), or the Court must rule that the Release language constituted an invalid, severable clause of the contract, and decide Plaintiff's Motion for Summary Judgment without giving any weight to the Release Clause. See, e.g., Valley Medical Specialists v. Farber, ____ Ariz. _____, 982 P.2d 1277, at ¶ H (holding that "grammatically severable, unreasonable provisions" of a contract may be eliminated under the "blue pencil rule"); see also Olliver/Pilcher Insurance, Inc. v. Daniels, 148 Ariz. 530, 715 P.2d 1218, 1221 (Ariz.1986). Any other result will be contrary to Arizona law.

V. Conclusion

The Release Clause is invalid as a matter of law because it violates the public policy of requiring parties to a contract to either perform as promised or be liable for contract damages. It is invalid as a matter of law because it was not bargained for. It is invalid as a matter of law because the law requires that the

Release clause be strictly construed against the Church, but only the most generous reading of the Release Clause in favor of the Church would lead to a finding that Barrow intended to give up the rights which the Church now claims he gave up.

Finally, because every contract must be supported by consideration, the Release Clause must be held invalid as a matter of law because a finding that it was valid effectively removes all consideration from the underlying contract. Therefore, the Release clause must be held invalid and severed from the contract, and Plaintiff's Motion for Summary Judgment must be decided without reference to the Release Clause.

DATED this 12 day of May, 2000.

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ORIGINAL filed and a **COPY** of the foregoing hand-delivered this 12 day of May, 2000, to:

The Honorable B. Michael Dann
MARICOPA COUNTY SUPERIOR COURT
201 West Jefferson
Phoenix, Arizona 85003

COPY of the foregoing mailed this 12 day of May, 2000, to:

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