

GREG KISHBAUGH, Individually and as
Personal Representative of the ESTATE OF
DONNA KISHBAUGH,
Plaintiff,

vs.

BOTTOMS UP SCUBA INDY LLC,
BOTTOMS UP SCUBA, LLC, and HARVEST
TIME, INC. d/b/a HIDDEN PARADISE
CAMPGROUND,
Defendants,

IN THE MARION SUPERIOR COURT
CIVIL DIVISION 6
CAUSE NO. 49D06-2012-CT-042405

**BOTTOMS UP SCUBA INDY, LLC'S ANSWER
AND DEFENSES TO PLAINTIFFS' COMPLAINT**

Defendant, Bottoms Up Scuba Indy, LLC ("BUSI"), by counsel, and for *Bottoms*

Up Scuba Indy, LLC's Answer and Defenses to Plaintiffs' Complaint, states:¹

First Defense: Admissions and Denials

1. Plaintiff, Greg Kishbaugh, is the surviving lawful husband of Donna Kishbaugh, now deceased, and is a citizen of the State of Indiana, presently domiciled in Westfield, Hamilton County, Indiana.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 1 of Plaintiffs' Complaint and, therefore, denies the same.

2. Donna Kishbaugh died on October 12, 2020 and was survived by her husband of 29 years, Greg, and two (2) biological adult children, Dagan, a 27-year-old son, and Bronwyn, a 21-year-old daughter.

¹ Defendant restates the allegations in Plaintiffs' *Complaint for Wrongful Death Damages* ("Complaint") for the convenience of the reader and by restating the allegations Defendant does not concede the allegations nor waive any rights thereto.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 2 of Plaintiffs' Complaint and, therefore, denies the same.

3. At the time of her death, Donna Kishbaugh was a resident of Westfield, Indiana in Hamilton County.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 3 of Plaintiffs' Complaint and, therefore, denies the same.

4. At all times relevant hereto, Defendants, Bottoms Up Scuba Indy LLC and Bottoms Up Scuba, LLC (hereafter referred to as "Bottoms Up"), is and was an Indiana corporation with its principal place of business located at its dive shop located at 8915 South Keystone Avenue, Suite A, in Indianapolis, Marion County, Indiana, doing business for profit in the State of Indiana, offering scuba diving training certification services to the public.

ANSWER: BUSI admits that it is and was an Indiana corporation with its principal place of business located at its dive shop located at 8915 South Keystone Avenue, Suite A, in Indianapolis, Marion County, Indiana, and was and is doing business for profit in the State of Indiana, offering scuba diving training certification services to the public, but it lacks information sufficient to admit or deny the remaining allegations contained in Paragraph 4 of Plaintiffs' Complaint and, therefore, denies the same.

5. At all times relevant hereto, Defendant, Harvest Time, Inc. d/b/a Hidden Paradise Campground (hereafter referred to as "Hidden Paradise"), is and was an Indiana corporation with its principal place of business located in St. Paul, Decatur County, Indiana, doing business for profit in the State of Indiana.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 5 of Plaintiffs' Complaint and, therefore, denies the same.

6. At all times relevant hereto, Defendant Bottoms Up entered into a written contractual agreement with Plaintiff and his wife, Donna, and their two adult children, which was duly executed at its dive shop in Marion County, Indiana, whereby Bottoms Up was paid \$1,000 to provide scuba diving training so that the family could obtain certification by Bottoms Up staff and instructors.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 6 of Plaintiffs' Complaint and, therefore, denies the same. BUSI is a separate and distinct entity from Bottoms Up Scuba, LLC and lacks information sufficient to admit or deny allegations relating to Bottoms Up Scuba, LLC and, therefore, denies the same.

7. At all times relevant hereto, Defendant Bottoms Up represented on its corporate website: "We are a Dive Shop and Scuba instruction facility with multiple locations in Indiana and Florida. We teach Scuba Diving classes weekly. At Bottoms Up Scuba, you are part of the family! We offer all-inclusive diver courses which means there are no hidden costs or equipment you have to buy! We give you everything you will need to be a Certified Diver and will work at your pace to make sure you are comfortable."

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 7 of Plaintiffs' Complaint and, therefore, denies the same. BUSI is a separate and distinct entity from Bottoms Up Scuba, LLC and lacks information sufficient to admit or deny allegations relating to Bottoms Up Scuba, LLC and, therefore, denies the same.

8. In addition, as it related specifically to identify its scuba diving staff, Defendant Bottoms Up's corporate website represented that it employed Clay St. John as a "Course Instructor / Indy Shop Manager".

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 8 of Plaintiffs' Complaint and, therefore, denies the same.

9. At all times relevant hereto, Defendant Bottoms Up's scuba diving instructor, Clay St. John, was acting as an agent and/or in the course and scope of his employment with one or more of the Defendants when he was involved in a scuba diving training incident that proximately caused the tragic drowning death of Donna Kishbaugh.

ANSWER: BUSI denies the allegations contained in Paragraph 9 of Plaintiffs' Complaint.

10. At all times relevant hereto, Defendant Hidden Paradise's corporate website represented that: "Scuba Diving in the 15 acre, spring fed, Dream Lake is a great experience!"

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 10 of Plaintiffs' Complaint and, therefore, denies the same.

11. In addition, as it related specifically to its scuba diving offerings that required people to pay \$20 per day for access, Defendant Hidden Paradise's website stated: "Certified Divers are required to present their c-card when registering. *All divers must be certified.* For your safety, all Divers are required to have a dive buddy. Divers must be out of the water by midnight. The Quarry is open 365 days per year. Experience our paradise from below. Dream lake is a 15 acre spring fed rock quarry with an average depth of 25 feet. The deepest point in Dream Lake is a sump hole 18 feet in diameter and drops to 35 feet in depth. The visibility will vary but generally you will see 7-10 foot visibility and occasionally up to 20-25 foot."

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 11 of Plaintiffs' Complaint and, therefore, denies the same.

12. On November 30, 2020, in the Hamilton County Superior Court under Cause Number 29-D01-2011-EU-536, Greg Kishbaugh was duly appointed as the personal representative of the Estate of Donna Kishbaugh for the limited purpose of pursuing this wrongful death action.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 12 of Plaintiffs' Complaint and, therefore, denies the same.

13. The diver-training incident that forms the basis of this action occurred in St. Paul, Indiana, in Decatur County, in the "Dream Lake" water-filled quarry located on the premises of Hidden Paradise Campground.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 13 of Plaintiffs' Complaint and, therefore, denies the same.

14. On Monday, October 12, 2020, Donna Kishbaugh was at the lake to complete the final skills test in order to obtain her scuba diving certification.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 14 of Plaintiffs' Complaint and, therefore, denies the same.

15. On said date, Donna paid the required \$20 diving fee to Hidden Paradise and then went into the water for training with her instructor from Bottoms Up, Clay St. John.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 15 of Plaintiffs' Complaint and, therefore, denies the same.

16. During the training process, and while in the water, Donna mentioned having difficulty descending in the water, at which point Clay St. John negligently switched his buoyancy control device "BCD" and gave it to Donna so she could use his.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 16 of Plaintiffs' Complaint and, therefore, denies the same.

17. Due to Clay St. John's negligence, Donna descended under the water and was unable to ascend causing her tragic drowning death.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 17 of Plaintiffs' Complaint and, therefore, denies the same.

18. Donna's husband, Greg was watching the entire episode while standing on the dock and personally witnessed the tragedy unfold.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 18 of Plaintiffs' Complaint and, therefore, denies the same.

19. Plaintiff, Greg Kishbaugh, suffered extreme emotional anguish and distress as a direct result of witnessing his wife's death.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 19 of Plaintiffs' Complaint and, therefore, denies the same.

20. Defendant Bottoms Up is liable for the actions and negligence of the instructor, Clay St. John, under the doctrine of respondeat superior and pursuant to the agency relationship that existed as Mr. St. John was acting as their agent, servant or representative.

ANSWER: BUSI denies the allegations contained in Paragraph 20 of Plaintiffs' Complaint. BUSI is a separate and distinct entity from Bottoms Up Scuba, LLC and lacks information sufficient to admit or deny allegations relating to Bottoms Up Scuba, LLC and, therefore, denies the same.

21. As the premises owner, maintainer, controller and operator of the quarry lake, Defendant Hidden Paradise owed Donna Kishbaugh, as a public invitee, a duty to exercise reasonable care in maintaining its premises in a safe condition and warning the public of unsafe conditions, including but not limited to, dangerously murky water that restricted visibility, a lack of equipment to assist inexperienced scuba divers, and a lack of safety or rescue equipment.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 21 of Plaintiffs' Complaint and, therefore, denies the same.

22. Defendants were negligent in their operation, management, supervision, and/or control of the lake quarry and the training process.

ANSWER: BUSI denies the allegations contained in Paragraph 22 of Plaintiffs' Complaint.

23. Defendants each breached their paid contractual agreements with the Kishbaugh family members and failed to abide by their terms and conditions.

ANSWER: BUSI denies the allegations contained in Paragraph 23 of Plaintiffs' Complaint.

24. As a direct and proximate result of Defendants' negligence, Donna Kishbaugh tragically drown and died.

ANSWER: BUSI denies the allegations contained in Paragraph 24 of Plaintiffs' Complaint.

25. As a direct and proximate result of Defendants' negligence, Plaintiff Greg Kishbaugh has suffered extreme emotional distress which is permanent in nature.

ANSWER: BUSI denies the allegations contained in Paragraph 25 of Plaintiffs' Complaint.

26. As a direct and proximate result of Defendants' negligence, Plaintiff seeks all damages permitted by the Indiana Wrongful Death Act on behalf of the Estate of Donna Kishbaugh and her family, including all intangible damages, loss of past and future income, loss of love, care and affection, last medical, funeral and burial expenses, plus all costs and fees associated with administering the Estate.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 26 of Plaintiffs' Complaint and, therefore, denies the same.

27. As a direct and proximate result of the Defendants' negligence, Plaintiff, Greg Kishbaugh, the lawful husband of Donna Kishbaugh, sustained a lifetime loss of his wife's love, care, and affection, as well as a substantial loss of income and emotional and financial support.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 27 of Plaintiffs' Complaint and, therefore, denies the same.

28. As a direct and proximate result of the Defendants' negligence, Plaintiff, Greg Kishbaugh, as Personal Representative of the Estate of Donna Kishbaugh, has been otherwise damaged and hereby demands all damages pursuant to Indiana law.

ANSWER: BUSI lacks information sufficient to admit or deny the allegations contained in Paragraph 28 of Plaintiffs' Complaint and, therefore, denies the same.

WHEREFORE, the Plaintiff, Greg Kishbaugh, Individually and as Personal Representative of the Estate of Donna Kishbaugh, prays for judgment against Defendants in an amount commensurate with the Estate's damages, for the costs of this action, for pre judgment interest, for trial by jury, and for all other just and proper relief in the premises.

PRAYER: WHEREFORE, BUSI requests judgment in BUSI's favor, that Plaintiffs take nothing by way of their Complaint, and for all other just and proper relief.

SECOND DEFENSE: FAILURE TO STATE A CLAIM

Plaintiffs have failed to state a claim against BUSI upon which relief may be granted and failed to allege facts sufficient to support a claim for relief.

THIRD DEFENSE: INCURRED RISK

Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' incurred risk. Plaintiffs' allegations are the result of Plaintiffs' conscious and deliberate course of conduct with knowledge of circumstances.

FOURTH DEFENSE: LACK OF RESPONDEAT SUPERIOR LIABILITY

Plaintiffs' claims are barred, in whole, or in part, because BUSI cannot be held vicariously liable.

FIFTH DEFENSE: CONTRIBUTORY NEGLIGENCE

Plaintiffs' damages are the result of acts or omissions committed by Plaintiffs.

SIXTH DEFENSE: COMPARATIVE FAULT

Plaintiffs' damages are the result of acts or omissions committed by the other parties over whom BUSI has no responsibility or control.

SEVENTH DEFENSE: NON-PARTY DEFENSE

Plaintiffs' damages are the result of acts or omissions committed by non-parties to this action over whom BUSI has no responsibility or control.

EIGHTH DEFENSE: RESERVATION OF RIGHTS

BUSI reserves the right to assert additional defenses as may become apparent through additional investigation and discovery.

WHEREFORE, Defendant, Bottoms Up Scuba Indy, LLC, by counsel, denies that Plaintiffs are entitled to judgment or to any of the relief sought, and respectfully requests that judgment be entered in Bottoms Up Scuba Indy, LLC's favor and against Plaintiffs on all counts set forth in Plaintiffs' Complaint, and that Bottoms Up Scuba Indy, LLC, be awarded its costs incurred in defending this action, along with such other relief as this Court deems equitable and just.

Respectfully submitted,

By: /s/James J. Ammeen, Jr.
James J. Ammeen, Jr. (Atty. No. 18519-49)
Attorney for Bottoms Up Scuba Indy, LLC

AMMEEN VALENZUELA ASSOCIATES LLP
Barrister Building, Suite 750
155 E. Market St.
Indianapolis, IN 46204-3253
317-423-7505 (voice) | 317-423-7506 (fax)
jamesa@avalawin.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on March 12, 2021. The same day, all counsel of record were served via the Court's ECF system.

By: /s/James J. Ammeen, Jr.
James J. Ammeen, Jr. (Atty. No. 18519-49)
Attorney for Bottoms Up Scuba Indy, LLC

AMMEEN VALENZUELA ASSOCIATES LLP
Barrister Building, Suite 750
155 E. Market St.
Indianapolis, IN 46204-3253
317-423-7505 (voice) | 317-423-7506 (fax)
jamesa@avalawin.com