

THE THREE “L”s
LAWSUITS
LEGAL ISSUES
LESSONS LEARNED



A PRESENTATION BY
JILL PENWARDEN
AND
WILMA J. GRAY

Outline



- 1) Who gets sued and why?
- 2) Causes of action
- 3) Available defenses
- 4) Use of releases
- 5) Third party contractors
- 6) Insurance
- 7) Staffing
- 8) Safety measures
- 9) Post incident action or inaction
- 11) Standards, such as reasonable care
- 12) Social media issues
- 13) Documents to defend the Wilderness Organization.

Who gets sued and why?



Wilderness Company

Owner

Field Staff/Employees

Third Party Contractor

Sponsors

Lawsuit



Causes of action alleged

- Negligence
 - Duty, Breach, Causation and Damages
- Premises Liability
- Product Liability
- Failure to warn
- Negligent hiring, training or supervision
- Breach of Contract

Available Defenses

- Release/Waiver
- Assumption of Risk
- Inherent Risk
- Defeat elements of Negligence
- Comparative Fault (Potential Reduction of Damages)

TOUGH MUDDER 2013



Case Summary – Sengupta v. Tough Mudder

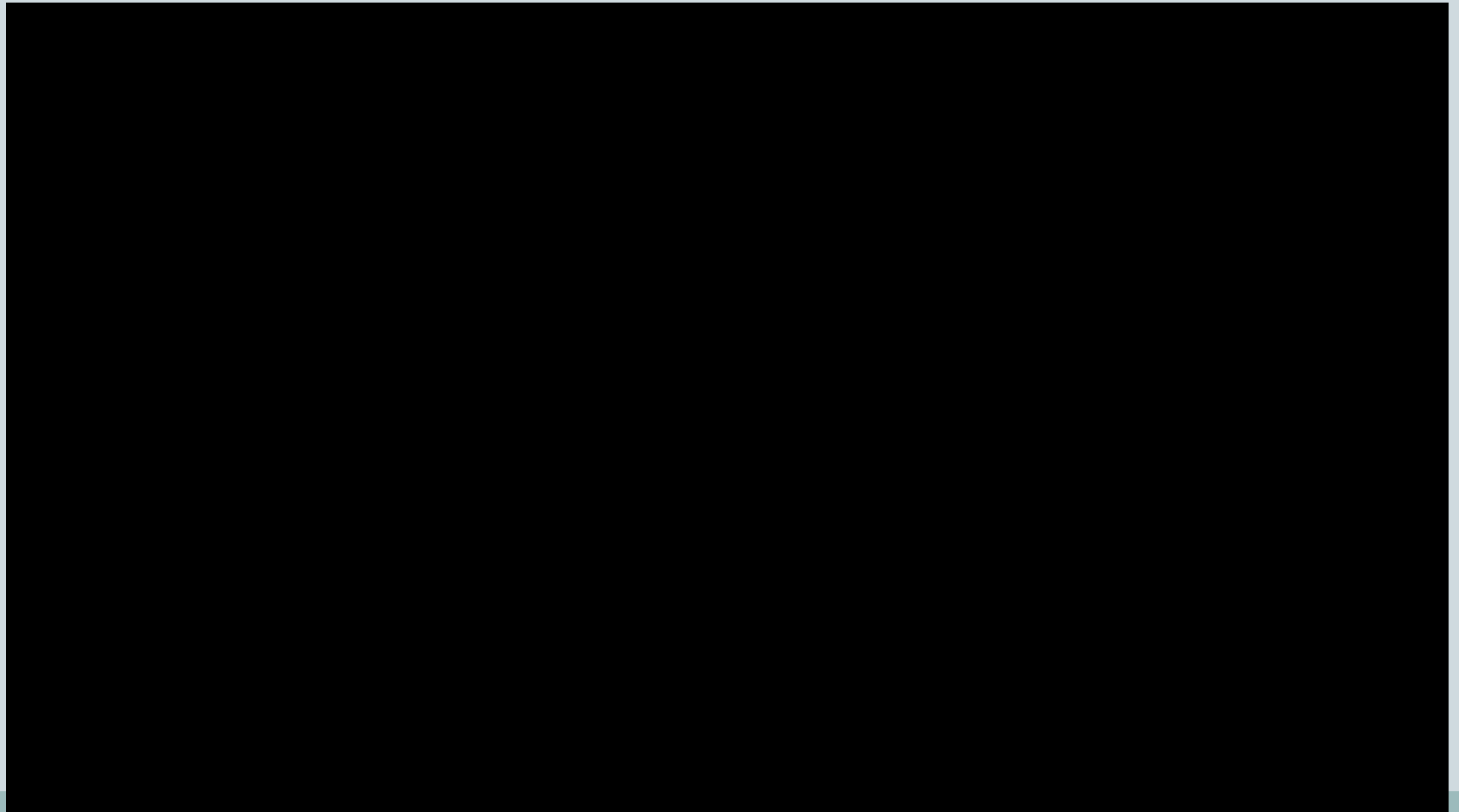


- 2013 Mid-Atlantic Tough Mudder race in West Virginia. Sponsored by General Mills.
- Sengupta jumped from the Walk the Plank obstacle into muddy water below
- Failed to surface.
- Teammates tried to alert rescue diver.
- Sengupta not pulled from the water until more than 8 minutes after he jumped.
- Sengupta died the following day.
- Video posted on YouTube that afternoon.

Participant Video Posted to YouTube



- 2013 Tough Mudder Video



Third Party Contractor



- Tough Mudder had contracted with Amphibious Medics to provide rescue divers.
- The rescue diver's response was delayed.
 - Took time to put on equipment
 - Other participants instructed to get out of the water
 - Family claims diver didn't comply with Red Cross, U.S. Lifeguard Association, and West Virginia law for rescue divers
- Certification was not current.

Post Incident Plan



- NO Emergency Action Plan
- No training on Plan for potential drowning.
- Adequate Staffing?
 - Staff
 - Contractors
 - Volunteers

Discussion Topics



- **Who are the Potential defendants in this case?**
- **What steps could Tough Mudder have taken prior to race to reduce likelihood of accident?**
- **WHAT steps COULD TOUGH MUDDER HAVE TAKEN PRIOR TO RACE to reduce liability in event of accident?**
- **WHAT investigation WOULD YOU CONDUCT post incident and what documents WOULD YOU COLLECT?**

Social Media Issues



- Find video immediately and download
- Use social media to identify witnesses
- Should you correct misinformation?
- Keep privacy in mind.

Insurance Issues



- For a contract with Third Party Contractor:
- Have contractor name you as Additional Insured on its insurance policy
- Make sure contractor has ADEQUATE insurance; beware of exclusions



Case Summary – Urban Pioneer Experiential Academy



- Robby and Mikhail (17 years old)
- UPEA - Charter School in San Francisco
- Academic and experiential program for students with drug and alcohol issues

- Challenge Class with Wilderness Expedition - required
- Class consisted of wilderness training & community service
- 2 months training in class

- Discussion - alcohol or drugs in wilderness forbidden
- Signed Wilderness Expedition Contract “I will not use alcohol or drugs”.

The UPEA Wilderness Trip



- Ventana Wilderness, California
- Late winter

- 3 Patrol Solo groups – 9 students each
- Base Camp 3 miles away – all teachers

- No cell phones/no SAT phones
- Moonless night

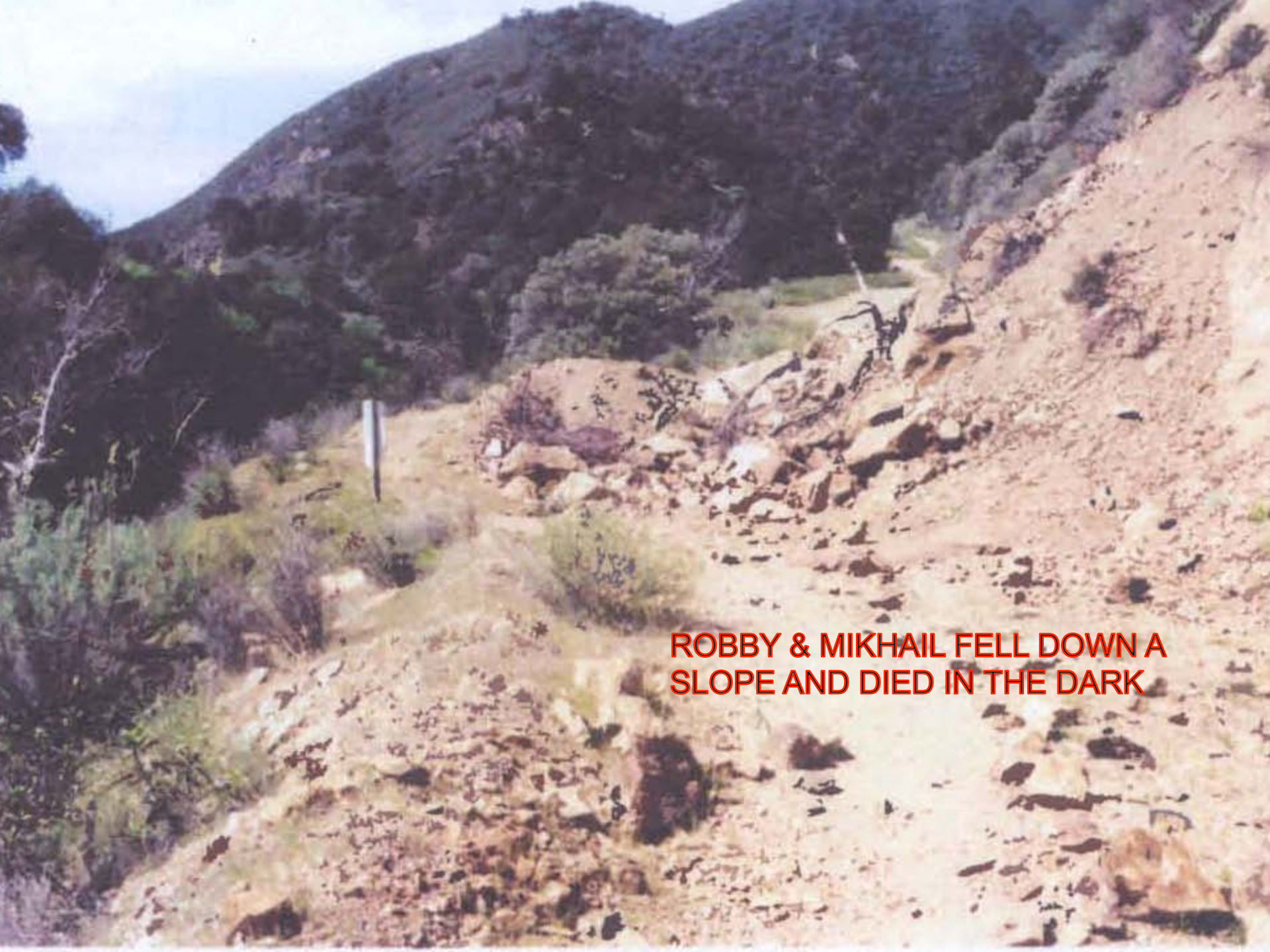
What Happened for UPEA



- Patrol Solo at Horse Bridge campsite
- Other patrols visited (against the rules)

- 2 Intruders (Age 23) entered Horse Bridge
- Intruders offered alcohol
- UPEA students drank alcohol

- Altercation between students and Intruders.
- Robby and Mikhail left to hike to Base Camp
- No flashlights



**ROBBY & MIKHAIL FELL DOWN A
SLOPE AND DIED IN THE DARK**

Discussion Topics



- **Who are the Potential defendants in this case?**
- **What steps could Urban Pioneer have taken prior to race to reduce likelihood of accident?**
- **Steps to reduce liability in event of accident?**
- **What Investigation WOULD YOU CONDUCT post incident and what documents WOULD YOU COLLECT?**

Standard of Care



- Reasonable Care
 - Industry Standards
 - Occupational Standards
 - Training Standards
 - Etc.
-
- Expert Witness Opinions

Documents to Defend



- Incident Report
- Witness Statements
- Photographs
- Release
- Letters
- Contract with third party
- Police Report
- Brochures
- Website
- Policies
- Training documents
- Employment records
- List of names, address and telephone numbers



Case Study - Expedition to Mt. Kilimanjaro



- Jason Jimenez (37 years old) & his mother, Sandra Jimenez
- Expedition to Mt. Kilimanjaro with travel outfitter
- Required to sign a Release (in English)
- Neither participant spoke English as their first language

- Letter from the travel company's president stated that "Our lawyers, insurance carriers and medical consultants give us no discretion. A signed, unmodified release form is required before any traveler may join one of our trips. Ultimately, we believe that you should choose your travel company based on its track record, not what you are asked to sign."

- **BOTH PARTICIPANTS SIGNED THE RELEASE**
- Jason died of altitude-related illness on the trip

Mt. Kilimanjaro Release Language Included:



- Release of all claims “to maximum extent of the law.”
- Waiver of right to a jury trial. Disputes must be resolved in an arbitration.
- Damages to an injured party would be limited to the cost of the expedition.
- Participant agreed to indemnify the travel company for the cost of defending any released claims; and
- Release bars “all negligence and gross negligence” of the travel outfitter.

Discussion Topics



- **WHAT ARE THE POTENTIAL ISSUES THAT MAY IMPACT THE EFFECTIVENESS OF THE RELEASE?**

RELEASE



USE AS FIRST LINE OF DEFENSE



Photo Credit: merfam (Common Creatives)



RELEASE

Acknowledge risks

Release negligence

(NOT gross negligence
& NOT willful
misconduct)

Waiver of right to sue

Choice of state law

Signature of adult

- Activities may include, but are not limited to: camping, outdoor cooking; hiking, backpacking, rock climbing (including belaying and rappelling), bouldering and peak ascents (all of which may include use of ropes, harnesses and/or other technical gear); solo experiences and independent student travel; wading and stream crossings; service learning projects; compass/map navigating and route finding; first aid skills instruction; use of any equipment, facilities or premises; travel in vans, buses or other vehicles to and from activities or otherwise (collectively referred to in this Document as “activities”).



RELEASE

Acknowledge risks

Release negligence

(NOT gross negligence
& NOT willful
misconduct)

Waiver of right to sue

Choice of state law

Signature of adult

- For myself and for and on behalf of my participating minor child) agree **to release and agree not to sue** with respect to any and all claims, liabilities, suits or expenses (including attorneys' fees and costs) for any injury, damage, death or other loss in any way connected with my/my child's enrollment or participation in these activities.



RELEASE

Acknowledge risks

Release negligence

(NOT gross negligence
& NOT willful
misconduct)

Waiver of right to sue

Choice of state law

Signature of adult

- I further agree **to defend and indemnify the company** with respect to any and all claims, for any injury, damage, death or other loss in any way connected with my or my child's enrollment or participation in these activities;

Insurance Issues



- Make sure your insurance coverage is ADEQUATE
- Verify Insurance Policy
- Additional Insured Certificates
- Exclusions
- Coverage for International trip?



RELEASE

Acknowledge risks

Release negligence

(NOT gross negligence
& NOT willful
misconduct)

Waiver of right to sue

Choice of state law

Signature of adult

- I understand that if legal action is brought, the appropriate state or federal trial court for the state in which the event is held has the sole and exclusive jurisdiction and that only the substantive laws of the State in which the event is held shall apply.

QUESTIONS about the 3 “L”s?



ACTION ITEMS:

- 1. Learned issues central to lawsuits against wilderness programs.**
- 2. Program leaders/Owners use information for preparation of plans and documents.**
- 3. Take away lessons specific to wilderness programs.**

THANK YOU



Jill Penwarden
RIMON, PC
Truckee, California
(530) 331-8770

Jill.penwarden@rimonlaw.com

Wilma J. Gray
McNamara, Ney, Beatty, Slattery, Borges &
Ambacher LLP
Walnut Creek, California
(925) 939-5330

wilma.gray@mcnameralaw.com