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NO. 67773-0-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

CHELSEY M. KVIGNE,

Appellant,

vs.

L.A. Fitness International, LLC; and
UNKNOWN JOHN DOES,

Respondents.

BRIEF OF RESPONDENT

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 COURT OF APPEALS
 STATE OF WASHINGTON
 DIV 1
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I. INTRODUCTION

This is an appeal from entry of summary judgment in a personal injury action based on a contractual release and waiver clause, similar to those commonly used with respect to adult participation in sports activities. In response to the summary judgment motion, plaintiff/appellant had argued that the exculpatory clause was inconspicuous and that the defendant/respondent was in any case liable for gross negligence.

The trial court ruled that the contractual release and waiver clause, which was in a box, in bold type, with a heading in capital letters, and which the appellant specifically recalled paying attention to, was conspicuous and the contract was not signed unwittingly. The court also ruled that the plaintiff/appellant had not shown there was substantial evidence of serious negligence, as required to raise a jury issue on gross negligence.

Plaintiff/appellant Chelsea Kvigne appeals the entry of summary judgment, raising the same two issues she argued below and adding a new argument on appeal that the exculpatory clause violates public policy. Also, while she does not assign error to the trial court's ruling on the admissibility of her expert's opinions, she argues that the rejected opinions created issues of fact, indicating that perhaps she does wish to appeal that ruling.

II. STATEMENT OF ISSUES

1. Should summary judgment dismissing a claim for gross negligence be affirmed where the plaintiff failed to submit substantial admissible evidence sufficient to create a jury issue?

2. Did the trial court properly exercise its discretion in considering only the admissible portions of the declaration of plaintiff's expert and disregarding improper opinions offered on the ultimate issue of gross negligence?

3. Should this court refuse to consider an argument presented for the first time on appeal?

4. Should summary judgment enforcing an exculpatory clause be affirmed, where it comports with long-standing precedent holding that exculpatory clauses in contracts for adult participation in fitness clubs and other sports activities do not violate public policy?

5. Should summary judgment enforcing an exculpatory clause in a fitness club contract be affirmed, where the plaintiff admits reading the contract and to paying extra attention to the box marked "Important" containing the clause, and where the clause is set off in a separate box, in larger bold type, with a heading in all capital letters, and is specifically reference above the signature line for the contract?

III. STATEMENT OF THE CASE

Appellant Chelsey Kvigne was injured when working with a trainer in the weight room at a facility owned by Respondent L.A. Fitness International, LLC (hereinafter “LA Fitness”). (CP 21.) The membership agreement she signed upon joining the facility contained a liability release provision, similar to those commonly used in conjunction with adult sports activities. The release, located on the second page of the agreement, is in bold type and completely enclosed in a large box. This is the only language on the page that is boxed-in or in bold type. The type inside the box is in a font larger than the surrounding paragraphs. Inside the box, the provision begins with the statement: **“IMPORTANT: RELEASE AND WAIVER OF LIABILITY AND INDEMNITY”** in bold capital letters. The title is thereafter followed with a bold-typed explanation of the waiver. (CP 33.)

Further, directly above the signature line on the first page, there are two sections in bold print. One contains the “Buyer’s Right to Cancel” and the other begins as follows:

By signing this Agreement, Buyer acknowledges that Buyer is of legal age, has received a filled-in and completed copy of this Agreement identifying the membership type and services purchased, *has read and understands* the entire Agreement including, but not limited to the “EFT/CC Request (If applicable), *the Release and Waiver of Liability and Indemnity*, all other Additional Terms and Conditions on the reverse side hereof....

(CP 32) (emphasis added).

Before Ms. Kvigne signed the membership agreement, she read through the entire agreement. (CP 44-45.) She specifically recalls reading the “Buyer’s Right to Cancel” provision on the first page and the “Important: Release and Waiver of Liability and Indemnity” provision on the second page. (CP 45.) When scanning the agreement at her deposition, she quickly identified these two sections as those she specifically noted when first presented with the agreement. (CP 29-30.)

Ms. Kvigne was injured while working with an LA Fitness personal trainer in the free weight area of the club. (CP 21.) She was struck in the nose by one end of a barbell while lying on a bench press. (CP 49-50.) According to Ms. Kvigne’s testimony at her deposition, the accident occurred about 30 minutes into an hour-long session with the trainer and about 10 minutes after they began working in the weight room. Prior to the accident, the trainer had been lifting other weights without difficulty. (CP 52-53.) Ms. Kvigne testified that the trainer appeared strong enough to hold the weights and he did not appear distracted. (CP 53, 55.) Prior to the accident, the trainer had lifted the barbell above where Ms. Kvigne lay on a bench press in order to hand it to her, but Ms. Kvigne did not actually see the bar before it hit her in the face. (CP 67.) In response to deposition questioning by her own attorney, she stated that the trainer apologized after the accident. She testified: “He told me, because he wanted to rearrange his grip. And then it slipped, his hand slipped.” When later asked if the trainer had said anything else, she

replied: “No. He had just said ‘My’ --- you know, ‘My hands’ --- ‘I tried to switch grips, and it slipped,’ and ‘I’m really sorry.’” (CP 54-55.)

Ms. Kvigne filed this personal injury action against LA Fitness. LA Fitness moved for summary judgment, contending that Ms. Kvigne’s claim was contractually barred by the release and waiver clause in the membership agreement that Ms. Kvigne had signed. In support of the motion, LA Fitness submitted a copy of the membership agreement and portions of Ms. Kvigne’s deposition testimony. (CP 13-55.) In response, Ms. Kvigne filed her own declaration, a declaration concerning the size of the typeface in the membership agreement, and the declaration of an “expert” fitness trainer. (CP 66-75.) LA Fitness moved to strike the declaration of the “expert” fitness trainer. The trial court denied the motion to strike, but ruled that the expert’s conclusory opinions on the conspicuousness of the exculpatory clause and on the legal issue of gross negligence were not helpful and would not be considered by the court. (RP 4-5).

The trial court granted the motion for summary judgment dismissing Ms. Kvigne’s claims, finding that there were no genuine issues of material fact, that the release and waiver clause was conspicuous, and that the evidence was not sufficient to raise an issue of gross negligence. (CP 116-17.) Ms. Kvigne filed this appeal.

IV. ARGUMENT

A. Standard of Review.

This Court recently reiterated the standard for review of an order granting summary judgment in *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn.App. 449, 266 P.3d 881 (2011):

A trial court must grant a motion for summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant who meets the initial burden, *then the inquiry shifts to the party with the burden of proof at trial. If that party fails to make a showing sufficient to establish an element essential to its case, and on which that party bears the burden of proof at trial, then the trial court should grant the motion.*

...

This court reviews a motion for summary judgment de novo, construing all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. This court may affirm summary judgment on any grounds supported by the record.

163 Wn.App. at 453 (footnotes omitted) (emphasis added).

Throughout her brief, appellant Kvigne repeatedly states that the declaration of her expert is “uncontroverted” and that her testimony is “undisputed.” Such assertions suggest that appellant does not understand her burden in responding to a defense motion for summary judgment. There is no requirement for the defendant, as moving party, to controvert or dispute the plaintiff’s evidence. Rather, to defeat a defense motion for summary judgment, the plaintiff must submit admissible evidence sufficient to take her case to the jury. Since all evidence and the inferences therefrom are to be viewed in the light most favorable to the

plaintiff, it does not matter, for summary judgment purposes, what evidence the defendant/moving party may or may not controvert.

B. The Trial Court Correctly Ruled That Ms. Kvigne Had Not Presented Substantial Evidence Sufficient to Create a Jury Issue on Gross Negligence.

This Court should affirm the entry of summary judgment dismissing this action, because plaintiff failed to submit substantial evidence sufficient to require a jury determination on gross negligence. What is required to submit a claim for gross negligence to the trier-of-fact was established by the Washington Supreme Court in *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965). There the court defined gross negligence as:

It means, therefore, gross or great negligence, that is, negligence substantially and appreciably greater than ordinary negligence. Its correlative, failure to exercise slight care, means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence.

67 Wn.2d at 331. The court then addressed when the issue of gross negligence may be submitted to a jury for determination:

Without suggesting the order or content of the instructions, we discern a few guidelines in determining when and how the issue of gross negligence ... may be submitted to the jury. *First*, there can be no issue of gross negligence unless there is substantial evidence of serious negligence. *If there is substantial evidence* of seriously negligent acts or omissions ..., then the issue of gross negligence should be resolved by the jury under proper instructions.

67 Wn.2d at 332 (emphasis added).

Under this standard, the trial court must make an initial ruling, as a matter of law, whether “substantial evidence of seriously negligent acts”

has been presented. In *Nist*, the court ruled, as a matter of law, that substantial evidence on which the defendant driver “could be held guilty of gross or great negligence” had been presented, and reversed a directed verdict for the defendant. *Id.* In other cases, Washington courts have ruled as a matter of law that the evidence presented was insufficient to create a jury issue on gross negligence. For example, in *O’Connell v. Scott Paper Co.*, 77 Wn.2d 186, 460 P.2d 282 (1969), the Washington Supreme Court upheld the trial court’s ruling that, as a matter of law, the defendant had not acted in a grossly negligent manner:

And, finally, we consider the court's ruling that the evidence, and reasonable inferences drawn from it, will not support a finding that Mr. Smith's operation of the car was grossly negligent, defined by us in *Nist v. Tudor*, 67 Wash. 2d 322, 407 P. 2d 798 (1965) as negligence substantially and appreciably greater than ordinary negligence. We agree with the trial court. Our examination of the record fails to disclose either direct or inferred evidence of a degree sufficient to meet that qualitative test.

77 Wn.2d at 189.

Another example is *Conradt v. Four Star Promotions, Inc.*, 45 Wn.App. 847, 728 P.2d 617 (1986), in which the court affirmed a summary judgment of dismissal based on an exculpatory release similar to the one involved in this case. After citing the *Nist* standard, the court held:

Given the facts in this case that are undisputed, the conduct was not so substantially and appreciably substandard that it rendered the release invalid.

45 Wn.App. at 852.

Here, the trial court properly concluded that plaintiff had not met the *Nist* standard of presenting “substantial evidence of seriously negligent

acts.” The only evidence of what occurred is the testimony of Appellant Kvigne herself. In her deposition she testified that the trainer had been working with her for about 30 minutes, 10 of those in the weight room, when the accident occurred. The trainer had been lifting other weights without dropping them, did not appear distracted and, from what she could tell, had the strength to handle the weights. She did not see the bar before it hit her face, but confirmed that only one end of the bar came down. Ms. Kvigne presented no eye-witness testimony of what occurred, but under questioning by her own attorney at her deposition, she testified to hearsay of what the trainer said after the accident: “He told me, because he wanted to rearrange his grip. And then it slipped, his hand slipped.” When later asked if the trainer had said anything else, she replied: “No. He had just said ‘My’ -- you know, ‘My hands’ -- ‘I tried to switch grips, and it slipped,’ and ‘I’m really sorry.’” (CP 54-55.)

Ms. Kvigne also submitted a declaration by an experienced trainer who provided evidence of the standard of care applicable to trainers. This expert speculated that Ms. Kvigne’s trainer had actually changed his grip and had let go completely with one hand to do so.¹ He testified that this did not comply with the standard of care. He then further stated his opinion that, essentially, the legal standards for gross negligence were

¹ Of course, Ms. Kvigne testified that her trainer only said he wanted to rearrange his grip, perhaps because he felt the bar slipping. Because she offered no other testimony from the trainer or any other eye witness, her expert’s testimony is speculative. “Such speculative testimony is not rendered less speculative or of more consequence to the jury’s determination simply because it comes from an expert.” *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007), *rev. denied*, 163 Wn.2d 1030 (2008).

met, using language likely provided by Ms. Kvigne's attorney. In denying LA Fitness's motion to strike the expert's declaration, the trial court stated:

I'm not going to strike Mr. Faaloo's declaration but I agree that his observations that are conclusory with regard to the conspicuousness of the language and whether it's grossly negligent or not are not helpful to the Court. And so I'm not really going to do anything with those.

...
But simply his saying that either something is or is not gross negligence I don't think is --- is helpful. I think that's something that Court has to decide because that's --- that's a legal standard....

(RP at 4-5.)

The trial court ruled that the admissible evidence submitted, while possibly creating an issue of negligence, did not constitute the "substantial evidence of seriously negligent acts" required to submit the issue of gross negligence to the jury. This Court should affirm the entry of summary judgment on this ground.

C. The Trial Court Properly Exercised Its Discretion in Considering Only the Admissible Portions of the Declaration of Plaintiff's Expert

This Court should affirm the trial court's exercise of discretion in disregarding Ms. Kvigne's expert's declaration to the extent it attempted to state an opinion on the ultimate issue of gross negligence and on the legal issue of whether the evidence presented was sufficient to support a finding of gross negligence. Appellant Kvigne has not assigned error to this ruling, but her repeated assertions that the disregarded opinion of her expert creates an issue of fact suggest that she wishes to raise this issue on appeal.

A trial court's rejection of expert testimony is reviewed only for an abuse of discretion.

We review the trial court's admission or rejection of expert testimony for an abuse of discretion, which is a decision that is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wash.2d 668, 701, 715, 940 P.2d 1239 (1997).

Hall v. Sacred Heart Medical Center, 100 Wn.App. 53, 58, 995 P.2d 621 (2000), *rev. denied*, 141 Wn.2d 1022 (2000).

Expert testimony is admissible under ER 702 if (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact.

State v. Lewis, 141 Wn.App. 367, 389, 166 P.3d 786 (2007), *rev. denied*, 163 Wn.2d 1030 (2008).

In *Stenger v. State*, 104 Wn.App. 393, 16 P.3d 655 (2001), *rev. denied*, 144 Wn.2d 1006 (2001), the court affirmed the striking of expert deposition testimony that contained inadmissible legal conclusions, noting that: "Experts may not offer opinions of law in the guise of expert testimony." 100 Wn.App. at 407. The court further explained:

Expert opinion that consists solely of legal conclusions is not admissible under the Rules of Evidence and it cannot, by its very nature, create an issue of material fact when it only contains legal conclusions.

100 Wn.App. at 408-09.

When a trial court must determine whether there is sufficient evidence to submit an ultimate fact issue to a jury, that determination is a conclusion of law on which expert testimony is impermissible. In *Tortes v. King County*, 119 Wn.App. 1, 84 P.3d 252 (2003), *rev. denied*, 151 Wn.2d 1010 (2004), the issue before the trial court was whether there was

sufficient evidence to present the issue of the foreseeability of third party criminal conduct to a jury. In affirming the entry of summary judgment, this court upheld the striking of an expert's affidavit that stated an opinion on foreseeability. The court reasoned:

Under the facts of this case, foreseeability became the ultimate legal issue before the trial court at summary judgment. Because the statements of Wuorenma, struck by the trial court, consisted solely of legal conclusions the statements are not admissible and cannot by their nature create an issue of material fact.... The trial court did not abuse its discretion in excluding Wuorenma's opinion testimony that Cool's murder of the bus driver was foreseeable.

119 Wn.App. at 13.

Here the trial court did not exclude Ms. Kvigne's expert declaration. Instead, the trial court simply disregarded those portions which it found improper and unhelpful. This is exactly what the Washington Supreme Court directed in *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985), *cert. denied*, 486 U.S. 1022 (1988), a case relied on in *Stenger*. In *Orion*, the Supreme Court found no abuse of discretion in the admission of an affidavit by an attorney expert, but held that:

To the extent the affidavit contained legal conclusions it is to be disregarded but the rest of the affidavit can properly be considered. ... While the conclusions of law contained in the affidavit are improper, the court must be presumed to have ignored these conclusions. There were factual conclusions in the exhibit which the court could consider.

103 Wn.2d at 461-62.

The trial court here did not abuse its discretion in disregarding Ms. Kvigne's expert's opinions on the ultimate legal issues of gross negligence and conspicuousness.

D. Appellant's Public Policy Argument Fails, Both Because She Did Not Raise It Below and Because Washington Law is Well-Settled That Fitness Club Releases Do Not Contravene Public Policy.

1. A Party May Not Raise an Issue on Appeal That Was Not Presented to the Lower Court.

This court should not consider Ms. Kvigne's public policy argument, because she did not raise it in the trial court. In her Opposition to the motion for summary judgment, Ms. Kvigne did not contest LA Fitness's assertion that public policy did not prohibit requiring liability releases for fitness club members. Rather, she raised only two arguments: that the release was not conspicuous and that the trainer's conduct constituted gross negligence. Her appellate brief provides no justification for raising this new issue on appeal.

Rule of Appellate Procedure 2.5 clearly provides:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

The Washington courts have repeatedly applied this rule in refusing to consider arguments raised for the first time on appeal. *See, e.g. Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) ("An issue, theory or argument not presented at trial will not be considered on appeal."); *Van Vonno v. Hertz Corp.*, 120 Wn.2d 416, 426-27, 841 P.2d 1244 (1992) ("Hertz raises this argument for the first time on appeal, and therefore, we

will not consider it.”); *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007) (“Metropolitan did not raise this argument below and generally, we will not review an issue raised for the first time on appeal.”); *Bennett v. Smith Bunday Berman Britton, PS*, 156 Wn.App. 293, 312-13, 234 P.3d 236 (2010), *rev. granted*, 170 Wn.2d 1020 (2011) (“We decline to consider Clark’s rule-based argument to the extent that he is now citing rules that he did not bring to the trial court’s attention.”).

Because Appellant Kvigne did not argue to the trial court that the release violated public policy, this court should not consider that argument on this appeal.

2. Washington Law is Well-Settled That an Exculpatory Agreement Releasing a Fitness Club from Liability for Negligence is Not Void as against Public Policy.

Even if this Court considers Ms. Kvigne’s public policy argument, it should affirm summary judgment, because Washington law is well-settled that exculpatory clauses relating to adult participation in sports activities do not violate public policy. The Washington Supreme Court so stated in *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992). In ruling that a parent could not release a child’s future claim for injuries, the court reaffirmed that exculpatory clauses releasing liability for negligence are effective for adult sport participants:

Washington cases have upheld exculpatory clauses in favor of private parties in various high risk sports-related situations. ... However, in none of these cases did a release signed by a parent purport to release a potential defendant from liability for negligent injury to a child. Although *we adhere to prior Washington law that an adult sports*

participant can waive liability for another's negligence, we consider this a very different question than whether parents can release another for negligence which injures their child.

119 Wn.2d at 492-93 (footnotes omitted) (emphasis added). *See also Boyce v. West*, 71 Wn.App. 657, 665, 862 P.2d 592 (1993) (“We do not find a public interest in a private school offering scuba diving instruction to qualified students as an elective course. Upholding the release of Gonzaga does not violate public policy.”); *Blide v. Rainier Mountaineering, Inc.*, 30 Wn.App. 571, 574, 636 P.2d 492 (1981), *rev. denied*, 96 Wn.2d 1027 (1982) (“Although a popular sport in Washington, mountaineering, like scuba diving, does not involve public interest....”).

In a well-reasoned opinion, in *Shields v. Sta-Fit, Inc.*, 79 Wn.App. 584, 903 P.2d 525 (1995), *rev. denied*, 129 Wn.2d 1002 (1996), Division III of this court specifically found that a hold harmless agreement releasing a fitness club from liability for negligence did not violate public policy and was enforceable against a member injured while lifting weights. Appellant Kvigne now argues that this court should disregard this long-standing precedent, because she claims it is “fatally flawed” and conflicts with Washington Supreme Court precedent, an opinion clearly not shared by the Washington Supreme Court itself, which denied review in *Shields*. This court should follow the precedent established in *Scott* and *Shields*, and affirm that the release and waiver clause in Ms. Kvigne’s contract did not violate public policy.

E. The Trial Court Did Not Err in Holding That the Release and Waiver of Liability Clause Was Conspicuous as a Matter of Law.

This Court should affirm the entry of summary judgment, because the trial court correctly held that reasonable minds could not differ in finding the release and waiver clause conspicuous. The rule is that a release from liability provision will be enforced unless “the releasing language is so inconspicuous that reasonable persons could reach different conclusions as to whether the document was unwittingly signed.” *Stokes v. Bally’s Pacwest, Inc.*, 113 Wn.App. 442, 446, 54 P.3d 161 (2002), *rev. denied*, 149 Wn.2d 1007 (2003) (quoting *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn.App. 334, 341, 35 P.3d 383 (2001)).

Here, the clearest evidence that the release clause was conspicuous is Ms. Kvigne’s own testimony that she noticed, read and remembered the “Important” box that contained the release and waiver language:

Q. Okay. Do you remember specifically reading any of the bolded sections, or any other specific sections? Can you remember reading those?

A. Well, you know what? I don’t – I know I read this one, the right to cancel, that one. And then the “Important” box. And then the rules, too.

CP 45. This testimony alone shows that the document was not unwittingly signed.

Further, the release clause in LA Fitness’ membership agreement is distinguished in ways similar to the clauses held to be conspicuous as a matter of law in *Chauvlier* and *Stokes*. The release is in **bold type** and completely enclosed in a large box. This is the only language on the page that is boxed-in or in bold type. The bold type inside the box is in a font

larger than the surrounding paragraphs. Inside the box, the provision begins with the statement: “**IMPORTANT: RELEASE AND WAIVER OF LIABILITY AND INDEMNITY**” in bold capital letters. This title is followed with a **bold-typed** explanation of the waiver, the first sentence of which explains that the member assumes full responsibility for risks of injury. (CP 33.) Further, above the signature line on the first page is **bold type** stating that the signer “has read and understands the entire Agreement, including ... the Release and Waiver of Liability and Indemnity.” (CP 32.)

Appellant cannot create an issue of fact by submitting “expert” opinions on whether the clause is conspicuous, a matter not in need of expert explanation, as the court stated in ruling that these opinions would be disregarded. Ms. Kvigne did not assign error to the trial court’s decision to disregard these opinions, and in any case, the trial court did not abuse its discretion, as explained under heading C above.

This Court should affirm the entry of summary judgment, because the trial court properly found that the release and waiver clause in the membership agreement signed by Ms. Kvigne was conspicuous as a matter of law.

V. CONCLUSION

Because the trial court correctly ruled 1) that there was insufficient evidence to support appellant’s claim that LA Fitness’ trainer was guilty of gross negligence, and 2) that reasonable persons could not differ in finding that the release and waiver clause in the LA Fitness membership

agreement that Ms. Kvigne signed was conspicuous, this Court should affirm the granting of summary judgment, dismissing Ms. Kvigne's claims against LA Fitness as barred by that release and waiver.

DATED this 2nd day of May, 2012.

Respectfully submitted,

A handwritten signature in cursive script that reads "Joan L. Roth". The signature is written in black ink and is positioned above a horizontal line.

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DECLARATION OF SERVICE

On said day below I faxed, mailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Respondent in Court of Appeals Cause No. 67773-0-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 2, 2012 at Seattle, Washington.


Yamile Colque

DECLARATION