HB

273

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: February 16, 2004 FURTHER REFERRALS:

Date of Committee Action: March 22, 2004

The JUDICIARY Committee considered: SSHB 273

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 273 LIABILITY:RECREATIONAL ACTIVITY

"An Act relating to the right of a parent to waive a child's claim of negligence against a provider of sports or recreational activities."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* SSHB 273 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [ ] Same Title [X] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				✓

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	SAMUELS	✓			
	Holm	✓			
	Greenberg			✓	
	Ogg	✓			
Chair:	McGuire	✓			
Chair:					

HOUSE COMMITTEE REPORT

5-7-03

(7)

Date Referred to Committee: April 16, 2003 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: _____

The TRANSPORTATION Committee considered: **HB 273**

HOUSE BILL NO. 273 **LIABILITY:RECREATIONAL ACTIVITY/BOATS/AIR**

"An Act relating to civil liability for boat owners, for commercial recreational activities, and for guest passengers on an aircraft or watercraft; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

waived

List of Abbrev for Depts.:
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UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Chair:					
Chair:					

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: HB273-LAW-T&WC-3-21
Bill Version: HB273
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the rights of a parent to waive a child's claim of negligence against a provider of sports..."
RDU CIVIL
Component Torts & Workers' Compensation
Sponsor Representative McGuire
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill allows a parent to waive prospective claims of negligence by a child against providers of sports or recreational activities in Alaska. It excepts cases that allege willful, wanton, reckless, or grossly negligent acts or omissions.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-3673
Division Administrative Services
Date/Time 3/21/04 10:58 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 3/21/2004
Agency Department of Law

(Revised 12/2003 OMB)

Alaska State Legislature

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Juneau, Alaska 99801-1182
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Fax 9907) 269-0249

Chair, Judiciary Committee

Vice-Chair, House Committee on
Economic Development,
Trade and Tourism

Member
Oil & Gas Committee

Representative Lesil McGuire

House District 28

Sponsor Statement
SSHB 273

"An Act relating to the right of a parent to waive a child's claim of negligence against a provider of sports or recreational activities."

Children in the State of Alaska should enjoy the maximum opportunity to participate in sports or recreational activities, despite the presence of risk in such activities. Public, private, and nonprofit entities that provide sports or recreational activities to children need and deserve a measure of protection against lawsuits, and without that measure of protection, may be unwilling or unable to provide such activities. Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children. The law has long presumed that parents are in the best position to determine what is in the best interests of their children. Parents are accustomed to making conscious choices on behalf of their children every day regarding the benefits and risks of various activities available to their children. Such parental choices, when made voluntarily upon consideration of appropriate information, should not be ignored, but rather should be afforded the same dignity and legal effect as other parental choices, including choices regarding education and medical treatment. SSHB 273 furthers these truisms and encourages the availability and affordability of sports and recreational activities to children by recognizing the right of a parent to choose to release, on behalf of his or her child, prospective negligence-based claims that the child may accrue against the provider of such activities.

As a result of a recent Colorado Supreme Court case, Cooper v. Aspen Skiing Co., wherein the Court refused to uphold or recognize the mother of a seventeen year old skier's signature on a release document used in a juvenile race camp program, the outdoor industry has been trying to respond to the myriad problems and potentially severe ramifications created by this holding. The faulty rationale behind Colorado and other western states' decisions has been the legal premise that, since a minor is not capable of releasing his or her own rights to sue because a minor is not legally competent to contract and release documents that are contractual in nature, that a parent should not be capable of releasing on behalf of the minor child.

This erroneous rationale is contrary to a body of authority derived from Midwestern and Eastern states, which find that parents do specifically have the legally binding right to sign release documents on behalf of their minor children. In these states, the courts have articulately stated that prohibiting a parent's right to release or waive on behalf of a minor child would detrimentally chill school, scouting, athletic, and similar type programs from being able to offer

athletic, recreational, and other extra-curricular programs. There exists a well-settled legal history of recognizing parental rights regarding making decisions on behalf of minor children regarding education and medical treatment. To not extend the same logic to recreational activities in Alaska would be legally illogical and unfair.

The practical consequences of not recognizing this parental authority are profound. If an outdoor recreation company is found to have been operating without a valid release/waiver document, either insurance coverage will not be offered or will be voided. Very few programs will stay in business without proper insurance in place. As an outdoor recreation-oriented and supported state, Alaska simply cannot stand by and watch this type of result. The Alaska Supreme Court has gone in the direction of requiring pre-recreational release/waiver documents to be clearly and unambiguously drafted and has expressed concerns over the specificity of the language used in those documents. Given the Court's careful focus on this subject, along with the developing line of authority in the western states, it is important that the legislature address this matter before the court system is called upon to rule on whether it is legal for a parent or legal guardian to sign a release document on behalf of a minor child.

In addition, it is important to note that HB 273 would not defeat in any way a parent or guardian's right to sue an operator that is not providing a safe service or program. An ordinary release/waiver document provides only a release to causes of action sounding in negligence. Claims of gross negligence, reckless, or intentional misconduct are never released in a release/waiver document. It is also crucial to remember that, with respect to pre-recreation releases, these documents regard activities that are totally voluntary in nature; they are activities that regard personal choice for the participant. As such, participants and parents of participants should have the freedom to decide which sports or recreational activities they want to participate in or that they want to have their children participate in and should have the freedom to contract regarding these activities. That fundamental right to make choices regarding a child's activities is what is being protected here; the bill does not negate a parent's rights, it in fact strengthens them.

23-LS0966\I
Bullock
3/19/04

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 273( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MCGUIRE

A BILL

FOR AN ACT ENTITLED

"An Act relating to the right of a parent to waive a child's claim of negligence against a provider of sports or recreational activities."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

FINDINGS AND INTENT. (a) The legislature finds that

(1) children of this state should enjoy the maximum opportunity to participate in sports or recreational activities despite the presence of risk in those activities;

(2) public, private, and nonprofit entities that provide sports or recreational activities to children of the state need and deserve a measure of protection against lawsuits and, without that measure of protection, may be unwilling or unable to provide the activities;

(3) parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children;

(4) the law has long presumed that parents are in the best position to determine

what is in the best interests of their children;

(5) parents are accustomed to making conscious choices on behalf of their children every day regarding the benefits and risk of various activities available to their children; and

(6) parental choices, when made voluntarily upon consideration of appropriate information, should not be ignored, but should be afforded the same dignity and legal effect as other parental choices, including choices regarding education and medical treatment.

(b) It is the intent of this Act to

(1) encourage the availability and affordability of sports or recreational activities to children in this state by recognizing the right of a parent to choose to release, on behalf of the parent's child, prospective negligence-based claims that the child may accrue against the provider of a sports or recreational activity;

(2) encourage the broad construction of the Act to shield providers of sports or recreational activities from liability for the negligence-based claims of a child that were released through a waiver or release-style document executed by the child's parent;

(3) ensure that this Act is not construed to permit a parent to release or waive claims of a child against a provider of a sports or recreational activity that allege wilful, wanton, reckless, or grossly negligent acts or omissions.

*** Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.292. Parental waiver of child's negligence claim against provider of sports or recreational activity. (a) Except as provided in (b) of this section, a parent may, on behalf of the parent's minor child, release or waive the child's prospective claim for negligence against the provider of a sports or recreational activity in which the child participates. The release or waiver must be in writing and shall be signed by the child's parent.

(b) A parent may not release or waive a minor child's prospective claim against a provider of a sports or recreational activity for wilful, wanton, reckless, or grossly negligent acts or omissions.

(c) In this section,

(1) "parent" means

(A) the child's natural or adoptive parent;

(B) the child's guardian;

(C) a person who is acting in the place of the child's natural or adoptive parent, including a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare;

(D) the child's surrogate parent who has been appointed under AS 14.30.325; or

(E) a representative of the Department of Health and Social Services if the child is in the legal custody of the state;

(2) "provider" has the meaning given in AS 09.65.290;

(3) "sports or recreational activity" has the meaning given in AS 09.65.290.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to acts or omissions that occur on or after the effective date of sec. 2 of this Act.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: HB273-LAW-T&WC-3-21
Bill Version: HB273
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
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Component Torts & Workers' Compensation
Sponsor Representative McGuire
Requester House Judiciary
Component No.

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1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill allows a parent to waive prospective claims of negligence by a child against providers of sports or recreational activities in Alaska. It excepts cases that allege willful, wanton, reckless, or grossly negligent acts or omissions.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughhetee, Director
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Date/Time 3/21/04 10:58 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 3/21/2004
Agency Department of Law

(Revised 12/2003 OMB)

1 of 1 DOCUMENT

Amanda Osborn, Joan Osborn, and Richard Osborn, Plaintiffs-Appellants, Unity Health Plans and Wisconsin Physicians Service Insurance Corp., Subrogated-Plaintiffs, v. Cascade Mountain, Inc. and American Home Assurance Company, Defendants-Respondents.

Appeal No. 01-3461

COURT OF APPEALS OF WISCONSIN, DISTRICT FOUR

2003 WI App 1; 259 Wis. 2d 481; 655 N.W.2d 546; 2002 Wisc. App. LEXIS 1216

November 7, 2002, Decided
November 7, 2002, Filed

NOTICE: [*1] PURSUANT TO WIS. STAT. RULE 809.23(3) OF APPELLATE PROCEDURE, AN UNPUBLISHED OPINION IS OF NO PRECEDENTIAL VALUE AND FOR THIS REASON MAY NOT BE CITED IN ANY COURT OF THIS STATE AS PRECEDENT OR AUTHORITY EXCEPT TO SUPPORT A CLAIM OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE.

PRIOR HISTORY: APPEAL from a judgment of the circuit court for Columbia County: JAMES O. MILLER, Judge. Cir. Ct. No. 99-CV-252.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a child and her parents, sued defendants, a ski resort and its insurer, when the child was injured while skiing at the resort; they alleged that defective equipment rented from the resort caused the child's injuries. Finding that a signed release form rendered the resort immune from liability, the Circuit Court for Columbia County, Wisconsin, granted the resort's motion for summary judgment. The child and her parents appealed.

OVERVIEW: Before the child's ski trip, her mother signed a rental agreement and release of liability form. On review, the child and her parents contended the release was void on contract principles and public policy grounds. Applying the Richards test, the appellate court found the release was enforceable as: the release's two purposes were clearly and unmistakably identified in its title; the release was not unduly broad or all-inclusive as it expressly and unmistakably restricted itself to those using the resort's equipment; and it could not be said that the agreement offered little or no opportunity for negotiation or free and voluntary bargaining. The liability release was also enforceable under the Yauger test as: it clearly, unambiguously, and unmistakably informed the child and her parents that they were agreeing not to pursue a claim against the resort for injuries resulting from the use of rented equipment; and the title of the release, if nothing else, clearly informed the them of what they were signing. Although a second release that the child signed was invalid because she was a minor, the issue was irrelevant as the first release signed by the mother remained in effect.

OUTCOME: The judgment was affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses
[HN1] A parent may waive a child's claim.

Torts > Negligence > Defenses > Exculpatory ClausesCivil Procedure > Appeals > Standards of Review > Standards Generally
[HN2] An exculpatory contract may be void on public policy grounds or under rules governing contracts. In either case, the issue is one of law. In deciding it, the appellate court owes no deference to the trial court.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN3] The Rogers three-part public policy test to determine the validity of a liability release asks: (1) whether it serves two purposes, neither clearly identified nor distinguished; (2) whether it is extremely broad and all-inclusive; and (3) whether it is a standardized form offering little or no opportunity for negotiation or free and voluntary bargaining. None of these factors alone necessarily invalidates the release; however, taken together they demand the conclusion that the contract is void as against public policy.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN4] The two-part Yauger test for determining the validity of a liability release asks: (1) whether the release clearly, unambiguously, and unmistakably informed the signer of what was waived; and (2) whether the form in its entirety alerted the signer to the nature and significance of what was being signed.

JUDGES: Before Vergeront, P.J., Dykman and Deininger, JJ.

OPINION: P1. PER CURIAM. Amanda Osborn and her parents, Joan and Richard Osborn, appeal from a summary judgment dismissing their personal injury action against Cascade Mountain, Inc., and its insurer. The Osborns sued for injuries Amanda, then age twelve, received while skiing at Cascade Mountain. The dispositive issue is whether the Osborns' claim is subject to an enforceable release of liability agreement signed by Joan Osborn. We conclude that it is, and therefore affirm.

P2. The Osborns allege that a defective ski-boot-binding system, on ski equipment rented from Cascade Mountain, caused the injury to Amanda. However, before Amanda's ski trip, Joan signed a document entitled "Rental Permission Agreement and Release of Liability." That document provided:

> I understand and am aware that skiing is a **HAZARDOUS** activity. I understand that the sport of skiing and the **[*2]** use of this ski equipment involve a risk of injury to any and all parts of my child's body. I hereby agree to freely and expressly assume and accept any and all risks of injury or death to the user of this equipment while skiing.
>
> I understand that the ski equipment being furnished forms a part of or all of a ski-boot-binding system which will **NOT RELEASE** at all times or under all circumstances, and that it is not possible to predict every situation in which it will or will not release, and that its use cannot guarantee my child's safety or freedom from injury while skiing. I further agree and understand that this ski-boot-binding system may reduce but does not eliminate the risk of injuries to the bottom one-third of my child's lower leg. However, I agree and understand that this ski-boot-binding system does **NOT** reduce the risk of injuries to my child's knee or any other part of my child's body.
>
> I agree that I will release Cascade Mountain from any and all responsibility or liability for injuries or damages to the user of the equipment listed on this form, or to any other person. I agree **NOT** to make a claim against or sue Cascade Mountain for injuries or damages **[*3]** relating to skiing and/or the use of this equipment. I agree to release Cascade Mountain from any such responsibility, whether it results from the use of this equipment by the user, or whether it arises from any **NEGLIGENCE** or other liability arising out of the maintenance, selection, mounting or adjustment of this ski equipment.
>
> ...
>
> I have carefully read this agreement and release of liability and fully understand its contents. I am aware that this is a release of liability and a contract between my child, myself and Cascade Mountain and I sign it of my own free will.

P3. Amanda fell twice while skiing. Amanda had signed a second release agreement similar to the one previously signed by her mother. The second fall caused her injuries.

P4. Cascade Mountain moved for summary judgment, alleging that the above-quoted release rendered it immune from liability. The trial court agreed and granted summary judgment. On appeal, the Osborns contend that the release is void on contract principles and public policy grounds. n1

n1 It is recognized that [HN1] a parent may waive a child's claim, ***Fire Ins. Exch. v. Cincinnati Ins. Co.***, *2000 WI App 82, P24, 234 Wis. 2d 314, 610 N.W.2d 98*, and the Osborns do not claim otherwise here.

[*4]

P5. [HN2] An exculpatory contract may be void on public policy grounds or under rules governing contracts. *See* ***Werdehoff v. General Star Indem. Co.***, *229 Wis. 2d 489, 499-500, 600 N.W.2d 214 (Ct. App. 1999).* In either case, the issue is one of law. ***Yauger v. Skiing Enters., Inc.***, *206 Wis. 2d 76, 80, 557 N.W.2d 60 (1996).* In deciding it, we owe no deference to the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, *195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).*

P6. In ***Richards v. Richards***, *181 Wis. 2d 1007, 1011, 513 N.W.2d 118 (1994),* [HN3] the supreme court applied a three-part public policy test to determine the validity of a liability release: first, whether it serves two purposes, neither clearly identified nor distinguished; second, whether it is extremely broad and all-inclusive; and third, whether it is a standardized form offering little or no opportunity for negotiation or free and voluntary bargaining. "None of these factors alone would necessarily invalidate the release; however, taken together they demand the conclusion that the contract is void as against public [*5] policy." ***Id.***

P7. In ***Yauger***, [HN4] the court applied a two-part test: first, examining whether the release clearly, unambiguously, and unmistakably informed the signer of what was waived; and second, whether the form in its entirety alerted the signer to the nature and significance of what was being signed. ***Yauger***, *206 Wis. 2d at 84.* Here, the Osborns contend that Cascade Mountain's liability release must be deemed void under both the ***Richards*** and the ***Yauger*** tests.

P8. Cascade Mountain's liability release is not void under the ***Richards*** test. The release's two purposes are clearly and unmistakably identified in its title, "Rental Permission Agreement and Release of Liability." That clear enunciation of purpose is not remotely confusing. Second, the release is not unduly broad or all-inclusive. It expressly and unmistakably restricts itself to those using its equipment: "I agree to release Cascade Mountain from [liability], whether it results from the *use of this equipment by the user*, or whether it arises from any NEGLIGENCE or other *liability arising out of the maintenance, selection, mounting or adjustment* [*6] *of this ski equipment.*" (Emphasis added.) Under any reasonable view, that language does not present an overly or unduly broad and all-inclusive release of liability. Third, it cannot be said that the agreement offered little or no opportunity for negotiation or free and voluntary bargaining. The release applied only to those who rented equipment from Cascade Mountain. Amanda, or any other skier, was permitted to ski at Cascade Mountain without signing the release if the person chose to obtain equipment elsewhere.

P9. The liability release is also enforceable under the ***Yauger*** test. The release clearly, unambiguously, and unmistakably informed the Osborns that they were agreeing not to pursue a claim against Cascade Mountain for injuries resulting from the use of rented Cascade Mountain ski equipment. Second, the title of the release, if nothing else, clearly informed the Osborns of what they were signing. In ***Yauger***, the court held a liability release void in significant part because it was titled "APPLICATION." *See* ***Yauger***, *206 Wis. 2d at 86-87.* The release here, unambiguously entitled a "Release of Liability," removed that problem. Also [*7] in ***Yauger***, only part of the release document actually dealt with the subject of liability. *See* ***id.*** *206 Wis. 2d at 79.* Here, virtually every sentence of the release plainly and unmistakably addresses the issues of injury and liability for injury. Again, the facts are far removed from those that persuaded the court in ***Yauger*** to declare the release void. Additionally, although the Osborns argue otherwise, the reference to "Cascade Mountain" as the released party is not ambiguous. No one reading the release form could reasonably understand it as referring to anything other than Cascade Mountain, Inc.

P10. The Osborns also contend that the release Amanda signed was not valid because she was a minor. That is true, but irrelevant. The first release, signed by Joan, remained in effect.

By the Court.-Judgment affirmed.

This opinion will not be published. Wis. Stat. Rule 809.23(1)(b)5 (1999-2000).

1 of 4 DOCUMENTS

ZIVICH ET AL., APPELLANTS, v. MENTOR SOCCER CLUB, INC., APPELLEE, ET AL.

No. 97-1128

SUPREME COURT OF OHIO

82 Ohio St. 3d 367; 1998 Ohio 389; 696 N.E.2d 201; 1998 Ohio LEXIS 1832

April 21, 1998, Submitted
June 29, 1998, Decided

PRIOR HISTORY: [*1]**

APPEAL from the Court of Appeals for Lake County, No. 95-L-184.

In May 1993, appellant Pamela Zivich registered her seven-year-old son, appellant Bryan Zivich, for soccer with Mentor Soccer Club, Inc. ("Club"), appellee, for the 1993-1994 season. The Club is a nonprofit organization that provides children in the greater Mentor area with the opportunity to learn and play soccer. The Club is primarily composed of parents and other volunteers who provide their time and talents to help fulfill the Club's mission. The Club's registration form, signed by Mrs. Zivich, contained the following language:

"Recognizing the possibility of physical injury associated with soccer and for the Mentor Soccer Club, and the USYSA [United States Youth Soccer Association] accepting the registrant for its soccer programs and activities, I hereby release, discharge and/or otherwise indemnify the Mentor Soccer Club and the USYSA, its affiliated organizations and sponsors, their employees, and associated personnel, including the owners of the fields and facilities utilized by the Soccer Club, against any claim by or on behalf of the registrant as a result of the registrant's participation in the Soccer [***2] Club ***.".

On October 7, 1993, Bryan attended soccer practice. During practice, the boys participated in an intrasquad scrimmage. Bryan's team won. After the scrimmage, Bryan ran to his father, who was standing on the sidelines and talking with the coach. Excited about the win, Bryan, unsupervised, jumped on the goal and swung back and forth on it. The goal, which was not anchored down, tipped backward. Bryan fell, and the goal came down on his chest, breaking three of his ribs and collarbone, and severely bruising his lungs.

In January 1995, Bryan's parents, Philip and Pamela Zivich, appellants, sued the Club n1 for injuries sustained by Bryan. The complaint alleged negligence and reckless misconduct. n2 The Club moved for summary judgment on the ground that the release executed by Bryan's mother barred the claims. The trial court agreed and granted the Club's summary judgment motion.

n1 Appellants also sued the city of Mentor, which owned the park where practice was held. The city settled with appellants and this court dismissed it from the lawsuit in December 1997. *80 Ohio St. 3d 1474, 687 N.E.2d 471.*

n2 Other claims were asserted, but they are not at issue here. [***3]

The court of appeals affirmed, albeit partly on different grounds. In Judge Nader's majority opinion, in which Judge Christley "reluctantly" joined, he said that the exculpatory agreement was effective against Mr. and Mrs. Zivich, but not against Bryan. Thus, while the trial court was correct to grant summary judgment, Bryan still had a cause of action which a guardian could bring on his behalf or which he could assert once he gained the age of majority. Judge Nader

acknowledged the public policy in favor of enforcing the agreement against Bryan, but found that that decision was best left to the General Assembly or this court. Additionally, Judge Nader's majority opinion found no evidence to support the willful and wanton misconduct claim. Concurring in the result only, Judge Ford opined that the public policy of Ohio favors enforcement of the agreement against Bryan as well as his parents. Judge Christley "wholehearted[ly] endorse[d]" the policy advocated by Judge Ford, but agreed with Judge Nader that the issue should be resolved by the General Assembly or this court.

The cause is now before this court pursuant to the allowance of a discretionary appeal.

DISPOSITION:

Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, parents of injured minor child, appealed a judgment from the Court of Appeals for Lake County (Ohio), which affirmed the grant of summary judgment to defendant soccer club, on the ground that the release executed by plaintiff mother barred the claims for negligence and reckless misconduct in a personal injury action.

OVERVIEW: The parents of injured minor child, challenged the appellate court's judgment, which affirmed the grant summary judgment to the soccer club, on the ground that the release executed by the child's mother barred the claims for negligence and reckless misconduct in a personal injury action. The appellate court's judgment was affirmed. The court held that the injury was a natural incident of the minor child's participation in soccer practice and fell within the ambit of the release. The court ruled that the exculpatory agreement executed by plaintiff mother on behalf of her minor son released the soccer club from liability for the minor child's claims and plaintiffs' claims as a matter of law. Summary judgment was appropriately entered in the soccer club's favor. Further, plaintiffs had the authority to bind their minor child to exculpatory agreements and the agreement could not be disaffirmed by the minor child on whose behalf it was executed.

OUTCOME: The court affirmed the appellate court's decision affirming the grant of summary judgment in favor of the soccer club.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Summary Judgment > Burdens of Production & ProofCivil Procedure > Summary Judgment > Summary Judgment Standard
[HN1] Pursuant to *Fed. R. Civ. P. 56*, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN2] The general rule is that releases from liability for injuries caused by negligent acts arising in the context of recreational activities are enforceable.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN3] Parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed.

Torts > Negligence > Defenses > Exculpatory Clauses

[HN4] Parents may release their own claims arising out of the injury to their minor children.

SYLLABUS: [***4]

1. Parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed.

2. Parents may release their own claims arising out of injury to their minor children.

COUNSEL: Svete, McGee & Carrabine Co., L.P.A., and James W. Reardon, for appellants.

Reminger & Reminger Co., L.P.A., George S. Coakley, Laura M. Sullivan and Brian D. Sullivan, for appellee.

JUDGES: FRANCIS E. SWEENEY, SR., J. MOYER, C.J., RESNICK, COOK and LUNDBERG STRATTON, JJ., concur. DOUGLAS and PFEIFER, JJ., concur in judgment only. COOK, J., concurring.

OPINIONBY: FRANCIS E. SWEENEY

OPINION:

[*369] [203] FRANCIS E. SWEENEY, SR., J.** We are asked to decide whether the exculpatory agreement n3 executed by Mrs. Zivich on behalf of her minor son released the Club from liability for the minor child's claims and the parents' claims as a matter of law. We find that the exculpatory agreement is valid as to all claims. Summary judgment was appropriately entered in the **[**204]** Club's favor. The judgment of the court of appeals is affirmed. [***5]

n3 The words "release," "waiver" and "exculpatory agreement" have been used interchangeably by the courts. These defenses are based on contract principles. "Exculpatory agreements, also called 'releases' or 'waivers,' are basically written documents in which one party agrees to release, or 'exculpate,' another from potential tort liability for future conduct covered in the agreement." King, Exculpatory Agreements for Volunteers in Youth Activities -- The Alternative to "Nerf" Tiddlywinks (1992), *53 Ohio St. L.J. 683.*

[HN1] Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have **[*370]** the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp. (1995), 73 Ohio St. 3d 679, 653 N.E.2d 1196,* paragraph three of the syllabus. The party moving **[***6]** for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt (1996), 75 Ohio St. 3d 280, 292-293, 662 N.E.2d 264, 273-274.*

Appellants argue that since practice had concluded, the injury occurred outside the scope of the exculpatory agreement. We find this contention meritless. We quote, with approval, Judge Nader's majority opinion rejecting this argument: "It should not come as any great surprise for a parent to learn that, during a period of inactivity at a soccer practice, his or her child fiddled with loose equipment, climbed on nearby bleachers, or scaled the goal. It should be equally clear that coaches supervising the practices will not be able to completely prevent such unauthorized activity, as some degree of bedlam is unavoidable, when children of tender years are brought together to play a game, and when their emotions are aroused. The risk of a seven[-]year[-]old child climbing on a goal shortly after winning an intrasquad scrimmage is, therefore, a natural incident of his participation in soccer practice. Thus, Bryan's injuries fall within the ambit of the **[***7]** release."

We next consider whether the release is valid. With respect to adult participants, [HN2] the general rule is that releases from liability for injuries caused by negligent acts arising in the context of recreational activities are enforceable. *Bowen v. Kil-Kare, Inc. (1992), 63 Ohio St. 3d 84, 90, 585 N.E.2d 384, 390; Simmons v. Am. Motorcyclist Assn., Inc. (1990), 69 Ohio App. 3d 844, 846 591 N.E.2d 1322, 1324; Cain v. Cleveland Parachute Training Ctr.*

(1983), 9 Ohio App. 3d 27, 9 Ohio B. Rep. 28, 457 N.E.2d 1185. These holdings recognize the importance of individual autonomy and freedom of contract. Here, however, the exculpatory agreement was executed by a parent on behalf of the minor child.

Appellants contend that the release is invalid on public policy grounds. In support of their argument, they refer to the general principle that contracts entered into by a minor, unless for "necessaries," are voidable by the minor, once the age of majority is reached, or shortly thereafter. *Restatement of the Law 2d, Contracts (1979), Sections 7*, 12 and 14, and Comment *f* to Section 12. Appellants urge us to apply the seminal case of *Wagenblast v. Odessa School Dist. No. 105-157-166 J* [***8] (1988), 110 *Wash. 2d 845, 851-852, 758 P.2d 968, 971*, where the Washington Supreme Court relied upon *Tunkl v. Regents of Univ. of California (1963), 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441*, and set forth a six-part test to determine whether a particular release violates public policy. The Club, however, argues that the proper focus is not whether the release violates public policy; but rather that public policy itself justifies the enforcement of this agreement. [*371] This is also the position advocated by Judge Ford in his concurring opinion. We agree with the Club and Judge Ford. n4

n4 The majority opinion stated that an intermediate appellate court was not the appropriate forum to decide public policy. However, in a common-law system, a judicial decision declaring the rights of the parties can be based on several grounds, one of which is public policy. Hopkins, Public Policy and the Formation of a Rule of Law, *37 Brooklyn L.Rev. (1971) 323, 330.* Therefore, public policy is an appropriate device to be used by an appellate court to decide a case.

[***9]

The General Assembly has enacted statutes designed to encourage landowners to open their land to public use for recreational activities without fear of liability. *Moss v. Dept. of Natural Resources (1980), 62 Ohio St. 2d 138, 142, 16 Ohio Op. 3d 161, 164, 404 N.E.2d 742, 745.* See *R.C. 1533.18* and 1533.181, which together provide that private [**205] entities that hold land open for recreational use without charge are immune from tort liability for any injury caused by a recreational user. Then, in 1996, *R.C. 2305.381* and 2305.382 n5 were enacted, effective January 27, 1997. Together, these statutes accord qualified immunity to unpaid athletic coaches and sponsors of athletic events Hence, the General Assembly has articulated its intent of encouraging the sponsorship of sports activities and protecting volunteers. However, *R.C. 2305.381* and 2305.382 were enacted after this cause of action arose. Thus, our role is to render a decision that fills the gap left open before the effective date of the statutory enactments.

n5 Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867, 3931. Our statutory law is in line with the many "volunteer statutes" passed by other states. See McCaskey and Biedzynski, A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries (1996), 6 Seton Hall J. of Sport L. 7, 62-63 (citing statutes).

[***10]

It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills. Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost. In fact, the American Youth Soccer Organization pays only nineteen of its four hundred thousand staff members. The Little League pays only seventy of its 2.5 million members. See King, Exculpatory Agreements for Volunteers in Youth Activities -- The Alternative to "Nerf" Tiddlywinks (1992), *53 Ohio St.L.J. 683, 739, fns. 208 and 209.* Clearly, without the work of its volunteers, these nonprofit organizations could not exist and scores of children would be without the benefit and enjoyment of organized sports. Yet, the threat of liability strongly deters many individuals from volunteering for nonprofit organizations. Developments in the Law -- Nonprofit Corporations -- Special [***11] Treatment and Tort Law (1992), *105 Harv. L. Rev. 1667, 1682.* Insurance for the organizations is not the answer, because individual volunteers [*372] may still find themselves potentially liable when an injury occurs. Markoff, Liability Threat Looms: A Volunteer's Thankless Task (Sept. 19, 1988), 11 Natl.L.J. 1, 40. Thus, although volunteers offer their services without receiving any financial return, they place their personal assets at risk. See Developments, *supra, 105 Harv.L.Rev. at 1692.*

Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations.

Therefore, we conclude that although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements. Because of this agreement, the Club was able to offer affordable recreation and to continue to do [***12] so without the risks and overwhelming costs of litigation. Bryan's parents agreed to shoulder the risk. Public policy does not forbid such an agreement. In fact, public policy supports it. See *Hohe v. San Diego Unified School Dist. (1990), 224 Cal. App. 3d 1559, 1564, 274 Cal. Rptr. 647, 649.* Accordingly, we believe that public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children. We also believe that the enforcement of these agreements may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities. See King, *supra, 53 Ohio St. L.J. at 709.*

Another related concern is the importance of parental authority. Judge Ford's concurring opinion also embraces this notion. Citing *In re Perales (1977), 52 Ohio St. 2d 89, 96, 6 Ohio Op. 3d 293, 296-297, 369 N.E.2d 1047, 1051, fn. 9; In re Murray (1990), 52 Ohio St. 3d 155, 157, 556 N.E.2d 1169, 1171;* and [**206] *State ex rel. Heller v. Miller (1980), 61 Ohio St. 2d 6, 8, 15 Ohio Op. 3d 3, 4-5, 399 N.E.2d 66, 67,* Judge Ford found that the right of a parent to raise his or her child is a natural [***13] right subject to the protections of due process. Additionally, parents have a fundamental liberty interest in the care, custody and management of their offspring. Further, the existence of a fundamental, privacy-oriented right of personal choice in family matters has been recognized under the Due Process Clause by the United States Supreme Court. See *Meyer v. Nebraska (1923), 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; Santosky v. Kramer (1982), 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599.*

Based upon these protections, Judge Ford believes that many decisions made by parents "fall within the penumbra of parental authority, *e.g.*, the school that the child will attend, the religion that the child will practice, the medical care that [*373] the child will receive, and the manner in which the child will be disciplined." He found it notable that the law empowers a parent to consent to medical procedures for a minor child, *R.C. 2317.54(C),* gives a parent the general authority to decide to decline medical treatment for the child, and destroys the child's cause of action for battery when consent is given. See *Lacey v. Laird (1956), 166 Ohio St. 12, 19, 1 Ohio Op. 2d 158, 161,* [***14] *139 N.E.2d 25, 30* (Hart, J., concurring). Thus, Judge Ford believes that invalidating the release as to the minor's claim is inconsistent with conferring other powers on parents to make important life choices for their children.

Nor is it appropriate to equate a preinjury release with a postinjury release. As one commentator aptly explains:

"The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.

"A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.

"A parent who dishonestly or maliciously [***15] signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.

"Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue." Purdy, *Scott v. Pacific West Mountain Resort:* Erroneously Invalidating Parental Releases of a Minor's Future Claim (1993), *68 Wash.L.Rev. 457, 474.*

These comments were made in a law review article criticizing the Washington Supreme Court's decision in *Scott* [***16] *v. Pacific W. Mountain Resort (1992), 119 Wash. 2d 484, 834 P.2d 6.* In that case, the court found that a

release, signed by [*374] the mother so that her son could take ski-racing lessons, was invalid as to the minor's claim. In *Scott*, the court had reasoned that it made no sense to treat a child's preinjury and postinjury property rights differently. *Id. at 494, 834 P.2d at 11-12.* The article criticized this decision, noting that when the mother signed the release, she gave her son the opportunity to ski. She gained no financial advantage for herself, nor did she suffer from fraud or collusion. She was under no financial or [**207] emotional pressure when she signed. The article states that "while she may have misjudged the risk to her son, Mrs. Scott did not mismanage or misappropriate Justin's property. She did her best to protect Justin's interests, and the court need not step in to do so." *Id., 68 Wash.L.Rev. at 474-475.*

We agree with Judge Ford's concurring opinion and the reasoning contained in the foregoing law review article. When Mrs. Zivich signed the release she did so because she wanted Bryan to play soccer. She made an important family decision and she assumed the risk of [***17] physical injury on behalf of her child and the financial risk on behalf of the family as a whole. Thus, her decision to release a volunteer on behalf of her child simply shifted the cost of injury to the parents. Apparently, she made a decision that the benefits to her child outweighed the risk of physical injury. Mrs. Zivich did her best to protect Bryan's interests and we will not disturb her judgment. In fact, the situation is more analogous to Ohio's informed consent law than to the law governing children's property rights. See *R.C. 2317.54(C)*, which gives parents the authority to consent to medical procedures on a child's behalf. In both cases, the parent weighs the risks of physical injury to the child and the attendant costs to herself against the benefits of a particular activity.

Therefore, we hold that [HN3] parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed.

Having upheld the release agreement against Bryan's claims, we find it also valid as to Mr. [***18] and Mrs. Zivich's claims for loss of consortium. Mrs. Zivich, the signatory on the agreement, acknowledged that she had read its contents and did not ask any questions about it. Parents may release their own claims growing out of injury to their minor children. See, *e.g., Simmons v. Parkette Natl. Gymnastic Training Ctr. (E.D. Pa. 1987), 670 F. Supp. 140, 142, Childress v. Madison Cty. (Tenn. App. 1989), 777 S.W.2d 1, 6; Scott, supra, 119 Wash. 2d 484, 834 P.2d 6.* We adopt this rule of law, finding it consistent with principles of freedom of contract. Thus, we hold that [HN4] parents may release their own claims arising out of the injury to their minor children. Accordingly, we find that Mrs. Zivich is barred from recovery as to her claims.

[*375] We further find that Philip Zivich's n6 loss of consortium claim is also barred as a matter of law. Although Mr. Zivich did not personally sign the release agreement, he accepted and enjoyed the benefits of the contract. In fact, when the injury occurred, Mr. Zivich was the parent who was at the practice field that evening. Thus, Mr. Zivich's conduct conveys an intention to enjoy the benefits of his wife's agreement and be bound by it. Under [***19] the doctrine of estoppel by acquiescence, Mr. Zivich may not assert his rights against the Club. *Natl. Football League v. Rondor, Inc. (N.D. Ohio 1993), 840 F. Supp. 1160, 1167.*

n6 In the court of appeals, Mr. Zivich also argued that summary judgment was improper as to his claim for negligent infliction of emotional distress. However, he does not raise this claim here. Accordingly, we do not address this issue.

As a separate ground for recovery, appellants also contend that the injury was caused by the Club's willful and wanton misconduct. In *McKinney v. Hartz & Restle Realtors, Inc. (1987), 31 Ohio St. 3d 244, 246, 31 Ohio B. Rep. 449, 451, 510 N.E.2d 386, 388-389*, this court defined "willful" misconduct as conduct involving "'an intent, purpose or design to injure.'" *Id.*, quoting *Denzer v. Terpstra (1934), 129 Ohio St. 1, 1 Ohio Op. 303, 193 N.E. 647*, paragraph two of the syllabus. "Wanton" misconduct was defined as conduct where one "'falls to exercise any care whatsoever toward those to whom he owes [***20] a duty of care, and this failure occurs under circumstances in which there is a great probability that harm will result.'" *McKinney, 31 Ohio St. 3d at 246, 31 Ohio B. Rep. at 451, 510 N.E.2d at 388-389*, quoting *Hawkins v. Ivy (1977), 50 Ohio St. 2d 114, 4 Ohio Op. 3d 243, 363 N.E.2d 367*, syllabus. We have held that while a participant in recreational activities can contract [**208] with the proprietor to relieve the proprietor from any damages or injuries he may negligently cause, the release is invalid as to willful and wanton misconduct. *Bowen, supra, 63 Ohio St. 3d at 90, 585 N.E.2d at 390.*

To support this claim, appellants assert that the Club's former president, David Bolsen, attended a seminar just before his term of office ended. It was at the seminar that he learned of the need to anchor the goals and to post warning

labels on them. Bolsen testified that because his term expired two weeks later, he only had time to relay the information to a few persons. However, no action was taken to secure the goals.

Appellants argue that Bolsen's failure to take more affirmative steps to ensure that the Club and the city implemented the safety recommendations amounts to willful and wanton misconduct. **[***21]** Like the court of appeals, we reject this argument.

There is no evidence that the former president intended that Bryan should be injured. Nor did the former president utterly fail to exercise any care whatsoever. Even accepting as true the appellants' claim that club officials knew about **[*376]** the safety problems but failed to act, this action does not amount to willful and wanton misconduct. As noted by the appellate court, "Park officials testified that the City never had anchored the goals in the past, and, apparently, of the thousands of young boys and girls playing soccer in the youth league throughout the years, no other child had been injured in this manner." Thus, reasonable minds could not conclude that the risk posed by the unanchored goal was so great as to require immediate remedial action.

Moreover, the evidence established that the city, not the Club, was responsible for the upkeep of the soccer fields and the purchase, storage, maintenance and placement of the soccer goals.

We find that appellants failed to produce sufficient evidence to present a jury question on the claim of willful and wanton misconduct.

Accordingly, we affirm the court of appeals' judgment, albeit **[***22]** on somewhat different grounds. We uphold its decision that the release is valid as to the parents' claims. However, we hold that the release is also valid as to the minor child's claim.

Judgment affirmed.

MOYER, C.J., RESNICK, COOK and LUNDBERG STRATTON, JJ., concur.

DOUGLAS and PFEIFER, JJ., concur in judgment only.

COOK, J., concurring.

CONCURBY: COOK

CONCUR:

COOK, J., concurring. I join in the well-reasoned majority opinion. I write separately only to point out that today's decision is firmly grounded in the public policy of the General Assembly, as evinced by the legislative enactments cited by the majority.

1 of 1 DOCUMENT

MERAV SHARON vs. CITY OF NEWTON.

SJC-08671

SUPREME JUDICIAL COURT OF MASSACHUSETTS

437 Mass. 99; 769 N.E.2d 738; 2002 Mass. LEXIS 384

April 2, 2002, Argued
June 10, 2002, Decided

PRIOR HISTORY: [***1] Middlesex. Civil action commenced in the Superior Court Department on November 5, 1998. A motion to amend answer was heard by Martha B. Sosman, J., and the case was heard by Leila R. Kern, J., on a motion for summary judgment. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff student was injured while participating in a cheerleading practice. The student sued defendant city, alleging negligence. The city filed a motion for summary judgment raising a signed release as a defense. The Middlesex Superior Court Department (Massachusetts) granted summary judgment in favor of the city. The student appealed. The state supreme court on its own initiative transferred the case from the Appeals Court.

OVERVIEW: On appeal, the issue was the validity of the release signed by the student's father for the purpose of permitting her to engage in public school extra-curricular sports activities. The state supreme court concluded that the student's father had the authority to bind her to an exculpatory release that was a proper condition of her voluntary participation in extracurricular sports activities offered by the city. Both the student and her father had ample opportunity to read and understand the release before signing it, and they were therefore deemed to have understood it. The student's participation in the city's extracurricular activity of cheerleading was neither compelled nor essential, and the public policy of the commonwealth was not offended by requiring a release as a prerequisite to that participation. The enforcement of the release was consistent with the commonwealth's policy of encouraging athletic programs for youth and did not contravene the responsibility that schools had to protect their students. The benefit bargained for, the student's participation in the cheerleading program, was adequate consideration for the release.

OUTCOME: The state supreme court affirmed the grant of summary judgment in favor of the city.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Pleading & Practice > Pleadings > Amended PleadingsCivil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative DefensesCivil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Waiver & Preservation
[HN1] It is well established that the defense of a release must be raised as an affirmative defense and that the omission of an affirmative defense from an answer generally constitutes a waiver of that defense. Mass. R. Civ. P. 8(c). It is

equally well settled that a party may amend its pleading by leave of court and that such leave shall be freely given when justice so requires. Mass. R. Civ. P. 15(a).

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses
[HN2] When a release is raised in defense of a negligence claim, the plaintiff bears the burden of proving that it is not a valid bar to her suit.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses
[HN3] It is a rule in the Commonwealth of Massachusetts that the failure to read or to understand the contents of a release, in the absence of fraud or duress, does not avoid its effects.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative Defenses
[HN4] Massachusetts law favors the enforcement of releases. A party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence. There can be no doubt that under the law of Massachusetts in the absence of fraud a person may make a valid contract exempting himself from any liability to another which he may in the future incur as a result of his negligence or that of his agents or employees acting on his behalf. Whether such contracts be called releases, covenants not to sue, or indemnification agreements, they represent a practice Massachusetts courts have long found acceptable.

Contracts Law > Formation > Capacity of PartiesContracts Law > Remedies > Ratification
[HN5] Under Massachusetts common law, any contract, except one for necessaries, entered into by an unemancipated minor could be disaffirmed by him before he reached the age of 18 or within a reasonable time thereafter. This long-standing principle has been applied to releases executed by a minor. While the common-law rule has been narrowed somewhat by statute, it remains Massachusetts law that the contract of a minor is generally voidable when she reaches the age of majority.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Affirmative DefensesTorts > Public Entity Liability > Liability
[HN6] The Massachusetts Tort Claims Act, Mass. Gen. Laws ch. 258, does not create any new theory of liability for a municipality, but rather, specifically provides that they are liable in the same manner and to the same extent as a private individual under like circumstances. *Mass. Gen. Laws ch. 258, § 2.* Outside of the procedural limitations and exceptions contained within the Act, cities and towns are afforded the same defenses as private parties in tort claims. Because releases of liability for ordinary negligence involving private parties are valid as a general proposition in the Commonwealth of Massachusetts, it is not contrary to the purposes of the Act to allow municipalities to use releases as a precondition for the participation in voluntary, nonessential activities they may sponsor.

COUNSEL: Jeffrey Petrucelly for the plaintiff.

Richard G. Chmielinski, Assistant City Solicitor, for the defendant.

The following submitted briefs for amici curiae: Thomas J. Urbelis for Massachusetts City Solicitors and Town Counsel Association.

Michael K. Gillis & John J. D'Andre for The Massachusetts Academy of Trial Attorneys.

Leonard H. Kesten & Patricia M. Manese for Massachusetts Municipal Association.

JUDGES: Present (Sitting at Barnstable): Marshall, C.J., Greaney, Ireland, Spina, & Cordy, JJ.

OPINIONBY: CORDY

OPINION: [741]**

[*100] CORDY, J. In this case, we consider the question of the validity of a release signed by the parent of a minor child for the purpose of permitting her to engage in public school extra-curricular sports activities. The question is one of first impression in the Commonwealth.

A. Background.

On November 8, 1995, sixteen year old Merav Sharon [***2] was injured while participating in a cheerleading practice at Newton North High School. Merav fell from a teammate's shoulders while rehearsing a pyramid formation cheer and sustained a serious compound fracture to her left arm that required surgery. n1 At the time of her injury, Merav had had four seasons of cheerleading experience at the high school level.

n1 Merav Sharon's injury occurred during a cheerleading squad practice in the school's dance studio that was equipped with one-inch thick mats on the floor. The team used members of the squad as spotters while performing difficult stunts or cheers. While such spotters were in place at the time of Merav's injury, her spotter was not able to catch her or break her fall from the top of the pyramid.

On November 5, 1998, having reached the age of majority, Merav filed suit against the city of Newton, alleging negligence (Count I) and the negligent hiring and retention of the cheerleading coach (Count II). n2 The city filed its answer on December 24, 1998. In late [***3] October, 1999, during the course of discovery, the city came across a document entitled "Parental Consent, Release from Liability and Indemnity Agreement" signed by Merav and her father in August, 1995, approximately three months prior to the injury. The relevant part of the release reads as follows:

"[I] the undersigned [father] . . . of Merav Sharon, a [*101] minor, do hereby consent to [her] participation in voluntary athletic programs and do forever RELEASE, acquit, discharge, and covenant to hold harmless the City of Newton . . . from any and all actions, causes of action, [and] claims . . . on account of, or in any way growing out of, directly or indirectly, all known and unknown personal injuries or property damage which [I] may now or hereafter have as the parent . . . of said minor, and also all claims or right of action for damages which said minor has or hereafter may acquire, either before or after [she] has reached [her] majority resulting . . . from [her] participation in the Newton Public Schools Physical Education Department's athletic programs . . . ."

The city filed a motion for summary judgment raising the signed release as a defense.

n2 The negligence claims were brought against the city of Newton pursuant to the Massachusetts Tort Claims Act, G. L. c. 258.

[***4]

Merav filed an opposition to the city's motion for summary judgment in which she argued that, because the release had not been raised as an affirmative defense in the city's answer, it should be deemed waived. Shortly thereafter, the city filed a motion to amend its answer in order to add the release as an affirmative defense. One judge in the Superior Court allowed the city's motion to amend on June 30, 2000, and a second judge subsequently allowed the city's motion for summary judgment based on the validity of the release. n3 [**742] In her ruling, the judge concluded that "[a] contrary ruling would detrimentally chill a school's ability to offer voluntary athletic and other extra-curricular programs."

n3 The city also filed a motion to implead Merav's father as a third-party defendant based on the release. This motion was granted but the third-party complaint was subsequently dismissed as moot.

Merav filed a timely appeal claiming that (1) the motion judge abused her discretion by allowing the city to amend its [***5] answer late; (2) the grant of summary judgment was inappropriate because genuine issues of material fact remained in dispute; and (3) the release signed by Merav and her father was invalid because (a) she disavowed it on attaining her majority n4; (b) the release violates public policy; (c) the release is contrary to the [*102] Massachusetts Tort Claims Act, *G. L. c. 258, § 2*; and (d) the release is invalid for lack of consideration. We transferred the case here on our own motion and now affirm the grant of summary judgment in favor of the city. n5

n4 The city concedes that minors may ratify or disaffirm their own contracts on reaching the age of majority. It prevailed below on the theory that Merav's father could effectively waive her claim by signing the release.

n5 We acknowledge amicus briefs of the Massachusetts City Solicitors and Town Counsel Association, the Massachusetts Municipal Association, and The Massachusetts Academy of Trial Attorneys.

B. Discussion.

1. Amendment [***6] of the city's answer. Merav claims that the allowance of the city's untimely motion to amend its answer was prejudicial error and that, because the city failed to raise the release as an affirmative defense in its original answer, the defense should be deemed waived.

[HN1] It is well established that the defense of a release must be raised as an affirmative defense and that the omission of an affirmative defense from an answer generally constitutes a waiver of that defense. See *Mass. R. Civ. P. 8 (c), 365 Mass. 749 (1974); Leahy v. Local 1526, Am. Fed'n of State, County & Mun. Employees, 399 Mass. 341, 351, 504 N.E.2d 602-352 (1987)*, citing J.W. Smith & H.B. Zobel, Rules Practice § 8.6, at 797-798 (1974 & Supp. 1986); *Coastal Oil New England, Inc. v. Citizens Fuels Corp., 38 Mass. App. Ct. 26, 29 n.3, 644 N.E.2d 258 (1995)*. It is equally well settled that a party may amend its pleading by leave of court and that such leave "shall be freely given when justice so requires." *Mass. R. Civ. P. 15 (a), 365 Mass. 761 (1974)*. See *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)* (interpreting identical language [***7] in Federal rule and stating mandate that leave to amend "shall be freely given when justice so requires" is to be heeded).

Merav contends that the combination of undue delay and prejudice to her case should have led the judge to deny the city's motion to amend. While we have often upheld a judge's discretion to deny leave to amend based in part on undue delay, such denials have generally been coupled with consideration of other factors such as imminence of trial and futility of the claim sought to be added. See, e.g., *Leonard v. Brimfield, 423 Mass. 152, 157, 666 N.E.2d 1300 (1996); Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264, 565 N.E.2d 1180 (1991); Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 292, 361 N.E.2d 1264 (1977)*. Given that the amendment in this [*103] case did not raise a new issue on the eve of trial and could not be considered futile or irrelevant to the city's defense, the judge did not abuse her discretion in granting the motion to amend the city's answer.

2.

Summary Judgment.

By proffering the release signed by Merav and her father releasing the city [**743] from any claims that Merav [***8] might acquire from her participation in the city's athletic program, the city has met its initial burden of demonstrating that Merav's negligence claim is likely to be precluded at trial. n6 In response, Merav contends both that there are issues of material fact in dispute regarding the validity of the release, and that it is unenforceable as a matter of law and public policy. We conclude that the facts Merav contends are in dispute are not material, enforcement of the release is consistent with our law and public policy, and Newton is entitled to judgment as a matter of law.

n6 [HN2] When a release is raised in defense of such a claim, the plaintiff bears the burden of proving that it is not a valid bar to her suit. See *Gannett v. Lowell, 16 Mass. App. Ct. 325, 327, 450 N.E.2d 1121 (1983)*.

a. Merav's factual contentions. Merav first argues that there are disputed issues of material fact regarding her understanding of the release and its voluntariness. She contends that neither she nor her father [***9] realized that by signing the release they were waiving their future claims against the school, and that their understanding of what they signed is a matter of fact to be decided by a jury. As the motion judge properly noted, [HN3] "it is a rule in this Commonwealth that the failure to read or to understand the contents of a release, in the absence of fraud or duress, does not avoid its effects." *Lee v. Allied Sports Assocs., Inc., 349 Mass. 544, 550, 209 N.E.2d 329-551 (1965)*. The undisputed evidence supports the conclusion that both Merav and her father had ample opportunity to read and understand the release before signing it, and they are therefore deemed to have understood it. *Cormier v. Central Mass. Chapter of the Nat'l Safety Council, 416 Mass. 286, 289, 620 N.E.2d 784 (1993)*.

The release is a clearly labeled, two-sided document, which Merav brought home from school for her parents to review. Merav and her father both signed the front of the release, which they indicated was for the sport of "cheerleading." In addition, **[*104]** they filled out the back of the release that called for information regarding Merav's address, date of birth, health insurance provider, and emergency **[***10]** contacts, and which provided for the purchase of optional student accident insurance through the school (an option which they explicitly declined on the form). Her father also signed the back of the release giving parental consent to a physical examination of Merav prior to her participation in the cheerleading program. In these respects, the circumstances differ substantially from the so-called "baggage check" or "ticket" cases relied on by Merav in which a customer merely purchases a ticket or receives a receipt that contains release language. See *Lee v. Allied Sports Assocs., Inc., supra; O'Brien v. Freeman, 299 Mass. 20, 11 N.E.2d 582 (1937); Kushner v. McGinnis, 289 Mass. 326, 194 N.E. 106 (1935).*

In these "baggage check" and "ticket" cases, we have ruled that the "type of document which the patron receives and the circumstances under which he receives it are not such that a person of ordinary intelligence would assume that the ticket limits the proprietor's liability unless the patron becomes actually aware of that limitation." *Lee v. Allied Sports Assocs., Inc., supra at 549-550.* Therefore, we have **[***11]** held in those cases that actual notice of the limitation of liability may be a question of fact properly submitted to the jury. This is not such a case. The release at issue here was clearly labeled as such and was filled out and signed by Merav and her father for the purpose of ensuring that she would be permitted to **[**744]** participate in an ongoing extracurricular activity. These are not circumstances likely to mislead a person of ordinary intelligence as to whether a limitation of liability might be included in the type of document being executed. There is no dispute that Merav and her father had ample opportunity to review and understand the release. Their failure to do so does not avoid its effects as a matter of law. Id. *Cormier v. Central Mass. Chapter of the Nat'l Safety Council, supra.*

Merav further argues that a jury should consider whether the release was signed under duress because, had she refused to sign it, she would not have been allowed to participate in cheerleading. This argument was not made to the motion judge, and is waived. But see *Minassian v. Ogden Suffolk Downs, Inc.,* **[*105]** *400 Mass. 490, 492, 509 N.E.2d 1190 (1987)* ("take it **[***12]** or leave it" release as condition of voluntary participation enforceable).

b. Public policy. Merav next contends that enforcement of the release against her claims would constitute a gross violation of public policy. This argument encompasses at least three separate public policy contentions: first, that it is contrary to public policy to permit schools to require students to sign exculpatory agreements as a prerequisite to participation in extracurricular school sports; second, that public policy prohibits a parent from contracting away a minor child's right to sue for a future harm; and third, that the enforcement of this release would undermine the duty of care that public schools owe their students.

In weighing and analyzing Merav's public policy arguments, we must also consider other important public policies of the Commonwealth implicated in the resolution of this issue, including policies favoring the enforcement of releases, and the encouragement of extracurricular athletic programs for school-aged children.

(1) Releases. [HN4] Massachusetts law favors the enforcement of releases. *Lee v. Allied Sports Assocs., Inc., 349 Mass. 544, 550 (1965),* citing *MacFarlane's Case, 330 Mass. 573, 576, 115 N.E.2d 925 (1953);* **[***13]** *Clarke v. Ames, 267 Mass. 44, 47, 165 N.E. 696 (1929).* A party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence. See, e.g., *Lee v. Allied Sports Assocs., Inc., supra at 550; Barrett v. Conragan, 302 Mass. 33, 18 N.E.2d 369 (1938); Ortolano v. U-Dryvit Auto Rental Co., 296 Mass. 439, 6 N.E.2d 346 (1937).* See also J.W. Smith & H.B. Zobel, Rules Practice § 8.18 (1974). "There can be no doubt . . . that under the law of Massachusetts . . . in the absence of fraud a person may make a valid contract exempting himself from any liability to another which he may in the future incur as a result of his negligence or that of his agents or employees acting on his behalf." *Schell v. Ford, 270 F.2d 384, 386 (1st Cir. 1959).* Whether such contracts be called releases, covenants not to sue, or indemnification agreements, they represent "a practice our courts have long found acceptable." *Minassian v. Ogden Suffolk Downs, Inc., supra at 493.* See *Shea v. Bay State Gas Co., 383 Mass. 218, 223-224, 418 N.E.2d 597 (1981);* **[***14]** *Clarke v. Ames, supra at 47.*

[*106] The context in which such agreements have been upheld range beyond the purely commercial. In *Lee v. Allied Sports Assocs., Inc., supra,* we upheld a release signed as a prerequisite to a spectator entering the pit area of an automobile race, and in *Cormier v. Central Mass. Chapter of the Nat'l Safety Council, 416 Mass. 286, 620 N.E.2d 784 (1993),* we similarly **[**745]** upheld a release signed by a beginner rider as a condition of her enrollment in a motorcycle safety class. In both cases, the plaintiffs were subsequently injured by the allegedly negligent acts of the other party to the release. In the Lee case, supra, we concluded that the denial of the defendant's motion for a directed

verdict was error on the basis of the validity of the release. In the Cormier case, supra, we upheld the granting of summary judgment on the same basis, holding that "placing the risk of negligently caused injury on a person as a condition of that person's voluntary choice to engage in a potentially dangerous activity ordinarily contravenes no public policy of the Commonwealth." *Id. at 289.* **[***15]** There is little that distinguishes the activity in the present case from those in the Lee and the Cormier cases.

Although Merav has suggested that, if the release at issue here is valid, there is nothing to prevent cities or towns from requiring releases for "simply allowing a child to attend school," such a conclusion does not necessarily follow. We have not had occasion to rule on the validity of releases required in the context of a compelled activity or as a condition for the receipt of essential services (e.g., public education, medical attention, housing, public utilities), and the enforceability of mandatory releases in such circumstances might well offend public policy. See *Cormier v. Central Mass. Chapter of the Nat'l Safety Council, supra at 289 n.1,* citing *Gonsalves v. Commonwealth, 27 Mass. App. Ct. 606, 608, 541 N.E.2d 366 (1989)* (exacting release of liability for negligence from public employee who was under compulsion to enroll in training course might offend public policy). See also Recent Case, *102 Harv. L. Rev. 729, 734 (1989)* (importance of service to public should be paramount factor in deciding whether **[***16]** to invalidate exculpatory release on public policy grounds). In this case, Merav's participation in the city's extracurricular activity of cheerleading was neither compelled nor essential, and we conclude that **[*107]** the public policy of the Commonwealth is not offended by requiring a release as a prerequisite to that participation.

(2) Parent's waiver of a minor's claim. Merav contends that a parent cannot waive, compromise, or release a minor child's cause of action, and that enforcement of such a release against the child would violate public policy. She relies on a series of decisions from other jurisdictions. n7 The city on the other hand relies on a series of cases holding to the contrary. n8 While these cases are instructive and emblematic of the difficulty in balancing **[**746]** the important interests and policies at stake, we first look to our own law.

n7 See *Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 21 Conn. Supp. 38, 143 A.2d 466 (1958)* (release signed by parent waiving child's future claims violates public policy); *Meyer v. Naperville Manner, Inc., 262 Ill. App. 3d 141, 146, 199 Ill. Dec. 572, 634 N.E.2d 411 (1994)* (parent cannot waive, compromise, or release minor child's cause of action); *Doyle v. Bowdoin College, 403 A.2d 1206, 1208 n.3 (Me. 1979)* (release signed by parent before son's hockey injury void as to child's cause of action); *Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989)* (release signed by mother void as to son's rights but valid as to mother's); *Scott v. Pacific W. Mountain Resort, 119 Wn. 2d 484, 494, 834 P.2d 6 (1992)* (en banc) (preinjury release signed by parent does not bar child's cause of action). **[***17]**

n8 See *Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 274 Cal. Rptr. 647 (1990)* (parent may execute release on behalf of minor child); *Cooper v. United States Ski Ass'n, 32 P.3d 502,* 29 Colo. Law. No. 10 166 (Colo. Ct. App. 2000) (mother's release of minor child's claims for negligence valid and enforceable); *Zivich v. Mentor Soccer Club, Inc., 82 Ohio St. 3d 367, 696 N.E.2d 201 (1998)* (mother had authority to bind minor child to exculpatory agreement).

[HN5] Under our common law, "any contract, except one for necessaries, entered into by an unemancipated minor could be disaffirmed by him before he reached the age of [eighteen] or within a reasonable time thereafter." *Slaney v. Westwood Auto, Inc., 366 Mass. 688, 692, 322 N.E.2d 768 (1975).* This long-standing principle has been applied to releases executed by a minor as far back as 1292. See 5 S. Williston, Contracts § 9.2, at 5 (4th ed. 1993), citing *Y.B. 20 and 21 Edw. at 318 (1292)* (release by minor "would not bar him from suing when he came of age"). While the common-law rule **[***18]** has been narrowed somewhat by statute, n9 it remains our law that the contract of a minor is generally **[*108]** voidable when she reaches the age of majority. Merav unequivocally repudiated the release (to the extent it might be deemed a contract executed by her) by filing suit against the city. See *G.E.B. v. S.R.W., 422 Mass. 158, 164, 661 N.E.2d 646 (1996)* (minor's filing of suit is direct repudiation of contract not to sue signed by minor). The city concedes that Merav effectively disaffirmed the release, but contends that insofar as the release is signed by the parent and purports to release the school from any claim that might accrue to the minor, it remains valid because the parent can do what the minor cannot.

n9 See, e.g., *G. L. c. 167E, § 10* (student under eighteen years of age admitted to institution of higher learning has full legal capacity to act on her own behalf in contracts and other transactions regarding financing of education); *G. L. c. 175, § 128* (certain contracts for life or endowment insurance may not be voided by minor over fifteen years of age); *G. L. c. 175, § 113K* (minor over sixteen years of age permitted to contract for motor vehicle liability insurance); *G. L. c. 112, § 12E* (minor over twelve years of age found to be drug dependent may consent to treatment for dependency); *G. L. c. 112, § 12F* (minor may consent to medical or dental treatment if she meets criteria outlined in statute).

[***19]

The purpose of the policy permitting minors to void their contracts is "to afford protection to minors from their own improvidence and want of sound judgment." *Frye v. Yasi, 327 Mass. 724, 728, 101 N.E.2d 128 (1951).* This purpose comports with common sense and experience and is not defeated by permitting parents to exercise their own providence and sound judgment on behalf of their minor children. *Parham v. J.R., 442 U.S. 584, 602, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979)* ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions"). See 1 W. Blackstone Commentaries 452 (9th ed. 1783) (minor's consent to marriage void unless accompanied by parental consent; one of many means by which parents can protect children "from the snares of artful and designing persons"). Moreover, our law presumes that fit parents act in furtherance of the welfare and best interests of their children, Petition of the Dep't of Pub. Welfare to Dispense with *Consent to Adoption, 383 Mass. 573, 587-589, 421 N.E.2d 28 (1981); Sayre v. Aisner, 51 Mass. App. Ct. 794, 799 n.8, 748 N.E.2d 1013 (2001),* [***20] and with respect to matters relating to their care, custody, and upbringing have a fundamental right to make those decisions for them. See *Parham v. J.R., supra at 603* (parents can and must make judgments and decisions regarding risks to their children).

In the instant case, Merav's father signed the release in his [*109] capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons. He made an important family decision cognizant of the risk of physical injury to his [**747] child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts. n10

n10 Our conclusion that parents may execute an enforceable preinjury release on behalf of their minor children is not inconsistent with our policy regarding discretionary court approval of settlement releases signed by minors. See *G. L. c. 231, § 140C* 1/2 (allowing judge to approve settlement for damages stemming from personal injury to minor where parties have petitioned for such approval). This statute applies only to postinjury releases, and the policy considerations underlying it are distinct from those at issue in the preinjury context. A parent asked to sign a preinjury release has no financial motivation to comply and is not subject to the types of conflicts and financial pressures that may arise in the postinjury settlement context, when simultaneously coping with an injured child. Such pressure can create the potential for parental action contrary to the child's ultimate best interests. In short, in the preinjury context, there is little risk that a parent will mismanage or misappropriate his child's property. See *Zivich v. Mentor Soccer Club, Inc., 82 Ohio St. 3d 367, 373, 696 N.E.2d 201 (1998).*

[***21]

c. The encouragement of athletic activities for minors. Our views with respect to the permissibility of requiring releases as a condition of voluntary participation in extracurricular sports activities, and the enforceability of releases signed by parents on behalf of their children for those purposes, are also consistent with and further the public policy of encouraging athletic programs for the Commonwealth's youth. This policy is most clearly embodied in statutes that exempt from liability for negligence: nonprofit organizations and volunteer managers and coaches who offer and run sports programs for children under eighteen years of age (*G. L. c. 231, § 85V*), and owners of land (including municipalities) who permit the public to use their land for recreational purposes without imposing a fee (*G. L. c. 21, § 17C*). See *Anderson v. Springfield, 406 Mass. 632, 549 N.E.2d 1127 (1990)* (city not liable for injuries to softball player resulting from negligently caused defect in city-owned baseball field).

To hold that releases of the type in question here are [*110] unenforceable would expose public schools, who offer [***22] many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs. n11 It would also create the anomaly of a minor who participates in a program sponsored and managed by a nonprofit organization not having a cause of action for negligence that she would have had had she participated in the same program sponsored as an extracurricular activity by the local public school. This distinction seems unwarranted, inevitably destructive to school-sponsored programs, and contrary to public interest.

n11 The fact that *G. L. c. 258, § 2*, limits the financial exposure of municipalities to $ 100,000 an occurrence (plus defense costs) does not insulate them from the deleterious impact of inherently unquantifiable financial risk. Public schools are not required by State law to offer voluntary extracurricular sports programs. Compare *G. L. c. 71, § 3* ("physical education shall be taught as a required subject in all grades for all students in the public schools . . ." [emphasis added]) with *G. L. c. 71, § 47* (cities and towns "may appropriate" money for employment of coaches and for support of extracurricular activities). Consequently, in times of fiscal constraint, those programs are often the targets of budget reductions. A decision exposing school systems to further financial costs and risk for undertaking such programs cannot help but accelerate their curtailment.

[***23] [**748]

Merav contends that to enforce the release would convey the message that public school programs can be run negligently, in contravention of the well-established responsibility of schools to protect their students. We disagree. There are many reasons aside from potential tort liability why public schools will continue to take steps to ensure well-run and safe extracurricular programs -- not the least of which is their ownership by, and accountability to, the citizens of the cities and towns they serve. Moreover, the Legislature has already made the judgment that the elimination of liability for negligence in nonprofit sports programs is necessary to the encouragement and survival of such programs. It can hardly be contended that the enactment of *G. L. c. 231, § 85V*, was an endorsement by the Legislature of the negligent operation of nonprofit programs or an act likely to encourage the proliferation of negligence. School extracurricular programs are similarly situated. n12 The enforcement of the release is consistent with the Commonwealth's policy of [*111] encouraging athletic programs for youth and does not contravene the responsibility that schools have to protect [***24] their students.

n12 Our holding is not intended to abrogate or qualify the special relationship that exists between a school and its students recognized in prior decisions, but not involving the validity of an exculpatory release required for participation in an extracurricular activity. See, e.g., *Whitney v. Worcester, 373 Mass. 208, 366 N.E.2d 1210 (1977)* (sight-impaired student injured by defective door during school hours); *Alter v. Newton, 35 Mass. App. Ct. 142, 617 N.E.2d 656 (1993)* (student hit in eye by lacrosse ball while waiting in school yard for parent).

It is also limited to the claims before us -- and those claims concern ordinary negligence. The city specifically disavows any contention that the release here would relieve it from liability for gross negligence or reckless or intentional conduct. See *Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 18-19, 687 N.E.2d 1263 (1997)*, citing *Gillespie v. Papale, 541 F. Supp. 1042, 1046 (D. Mass. 1982)* (releases effective against liability for ordinary negligence but substantial outside authority holds same not true for gross negligence). Commentators have readily distinguished the public policy implications of exculpatory releases whose only effect is relief from ordinary negligence from those intended to relieve a party from gross negligence, or reckless or intentional conduct. See *Restatement (Second) of Contracts § 195(1)* (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"); 6A A. Corbin, Contracts § 1472, at 596-597 (1962) ("such an exemption [from liability] is always invalid if it applies to harm wilfully inflicted or caused by gross or wanton negligence"); W.L. Prosser & W.P. Keeton, Torts § 68, at 484 (5th ed. 1984) ("such agreements generally are not construed to cover the more extreme forms of negligence, described as willful, wanton, reckless or gross").

[***25]

d. Massachusetts Tort Claims Act. Merav's reliance on *G. L. c. 258, § 2*, to support her claim that cities and towns should not be permitted to require or enforce releases regarding their negligent conduct, is misplaced. While the purpose

of the Act may be to provide a remedy for persons injured as a result of the negligence of government entities, see *Vasys v. Metropolitan Dist. Comm'n, 387 Mass. 51, 55, 438 N.E.2d 836 (1982)*, it does so by abrogating sovereign immunity only within a narrow statutory framework. [HN6] The Act does "not create any new theory of liability for a municipality," *Dinsky v. Framingham, 386 Mass. 801, 804, 438 N.E.2d 51 (1982)*, but rather, specifically provides that they are liable "in the same manner and to the same extent as a private individual under like circumstances." *G. L. c. 258, § 2*. Outside of the procedural limitations and exceptions contained within the Act, cities and towns are afforded the same defenses as private parties in tort claims. See *Dinsky v. Framingham, supra.* **[**749]** Because releases of liability for ordinary negligence involving private **[***26]** parties are valid as a general proposition in the Commonwealth, **[*112]** it is not contrary to the purposes of the Act to allow municipalities to use releases as a precondition for the participation in voluntary, nonessential activities they may sponsor.

e. Consideration. Merav last argues that the release she signed is void because it was not supported by proper consideration. The motion judge properly concluded that the benefit bargained for, in this case Merav's participation in the cheerleading program, was adequate consideration for the release. See *Restatement (Second) of Torts § 496B* (1965) (not essential that agreements to assume risk of negligence be for consideration. Consent by participation in activity may be sufficient).

C. Conclusion.

For the reasons set forth above, we conclude that Merav's father had the authority to bind his minor child to an exculpatory release that was a proper condition of her voluntary participation in extracurricular sports activities offered by the city. Summary judgment for the city that was entered on the basis of the validity of that release is therefore affirmed.

So ordered.

1 of 1 DOCUMENT

Gabriel Fischer et al. v. Paul Rivest et al.

X03CV000509627S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN

2002 Conn. Super. LEXIS 2778

August 15, 2002, Decided
August 15, 2002, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

DISPOSITION: Summary judgment entered in favor of the defendants Paul Rivest, USA Hockey, Inc., Connecticut Hockey Conference, Inc. and City of Norwich on Counts One, Three, Four, Five and Six of the Complaint. Count Two of the Complaint against Gregory Haney who was not a party to the Motion for Summary Judgment under consideration here, court makes no ruling with respect to Count Two.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff teen-aged hockey player sued defendants, the coach, the hockey associations, and the city for personal injury resulting from negligence. The hockey player also sued an opponent for personal injury resulting from the opponent's reckless misconduct. The coach, the hockey associations, and the city moved for summary judgment.

OVERVIEW: Because of the hockey player's youth, his father signed a waiver and release so that the hockey player could play in the hockey associations. During a game, the hockey player was hit in the back by the opponent. This blow caused the hockey player to collide with a corner of an open doorway in the boards surrounding the ice. The hockey player's leg was amputated, because of the injury the hockey player suffered. The coach, the associations, and the city claimed that the waiver and release that the hockey player's father signed barred the suit against them. The trial court found that the waiver and release did not violate the public policy of Connecticut and was enforceable. The claim that the hockey player and his father did not read the release did not save them from it effects. Because the waiver and release was valid and enforceable and applied to the coach, the hockey associations, and the city, it was a bar to the negligence claims against the coach, the hockey associations, and the city. Further, the hockey player presented no evidence of reckless conduct by any of the parties that he sued.

OUTCOME: The motion for summary judgment was granted in favor of the coach, the hockey associations, and the city.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN1] Conn. Gen. Prac. Book, R. Super. Ct. § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof
[HN2] Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact; a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact, together with the evidence disclosing the existence of such an issue. Conn. Gen. Prac. Book, R. Super. Ct. § § 17-45, 17-46.

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN3] In deciding a motion for summary judgment, a trial court must view the evidence in the light most favorable to the nonmoving party. The test is whether a party would be entitled to a directed verdict on the same facts.

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN4] Summary judgment should only be granted if the pleadings, affidavits, and other proof submitted demonstrate that there is no genuine issue as to any material fact. Summary judgment is designed to eliminate the delay and expense of litigating an issue where there is no real issue to be tried.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN5] The interpretation of an exculpatory contract is colored by two diametrically opposed legal principles: the first, that it is against public policy to contract away one's liability for negligent acts in advance and the second, that a court will enforce agreements of the parties made with consideration.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN6] Six factors are to be considered in determining whether or not an exculpatory contract violates public policy. The six factors are: (1) does the release concern an activity generally thought suitable for public regulation; (2) is the party seeking exculpation engaged in performing a service of great importance to the public; (3) is the service open to any member of the public; (4) is the nature of the service essential; (5) does the party seeking exculpation have superior bargaining power, raising the issue of whether or not the release constitutes an adhesion contract; and (6) does the release place one party under the control of the other.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN7] It is general policy that parties may not stipulate for protection against liability for negligence in the performance of a duty imposed by law or where public interest requires performance.

Torts > Negligence > Duty > Duty Generally
[HN8] Participants in a team athletic contest involving contact as part of the sport owe a duty of care to refrain only from reckless or intentional conduct toward other participants and one who is injured by negligent conduct alone may not recover for their injuries.

Torts > Negligence > Duty > Duty Generally
[HN9] In an athletic activity, where a plaintiff's injury was a foreseeable consequence of a defendant's actions, courts need to determine as a matter of policy the extent of the legal duty to be imposed upon the defendant. In order to determine the extent of the defendant's responsibility, courts consider: (1) the normal expectations of participants in the sport in which the plaintiff and the defendant were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.

Torts > Negligence > Duty > Duty Generally
[HN10] The normal expectations of participants in contact team sports counsel the adoption of a reckless or intentional conduct duty of care standard for those participants.

Torts > Negligence > Negligence GenerallyTorts > Negligence > Duty > Duty Generally
[HN11] Adult participants in an athletic activity cannot sue for conduct that is merely negligent.

Contracts Law > Formation > AcceptanceTorts > Negligence > Defenses > Exculpatory Clauses
[HN12] Where a person who is of mature years and who can read and write, signs or accepts a formal written contract affecting his pecuniary interests, it is that person's duty to read it and notice of its contents will be imputed to that person if that person negligently fails to do so.

Torts > Negligence > Negligence Generally
[HN13] A violation of the rules of a sport in question is not sufficient to constitute reckless conduct. In games, particularly those played by teams and involving some degree of physical contact, it is reasonable to assume that the competitive spirit of the participants will result in some rules violations and injuries. That is why there are penalty boxes, foul shots, free kicks, and yellow cards.

Torts > Negligence > Negligence Generally
[HN14] A mere rules violation of a competitive sport does not constitute actionable conduct.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem
[HN15] Any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. A court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN16] The law does not require that a release be perfect.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN17] To be effective, a release need not achieve perfection. It suffices that a release be clear, unambiguous and explicit, and that it express an agreement not to hold the released party liable for negligence.

JUDGES: Aurigemma, J.

OPINIONBY: Aurigemma

OPINION: MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT

The defendants Paul Rivest, USA Hockey, Inc., Connecticut Hockey Conference, Inc. and City of Norwich have moved for Summary Judgment on Counts One, Three, Four, Five and Six of the Complaint on the grounds that they are entitled to judgment as a matter of law.

Statement of Facts

In this action the minor plaintiff, Gabriel Fischer, and his father, Jerome Fischer, seek damages for injuries sustained by Gabriel Fischer during a hockey game on September 22, 1998 at an ice rink owned by the City of Norwich. On that date, Gabriel was playing for the Norwich [*2] Ice Breakers in a game against the Western Mass. Predators. The Norwich Ice Breakers was a member team of the Connecticut Hockey Conference and both teams were members of U.S.A. Hockey, Inc. The plaintiff n1 alleges that as he "skated towards the front of the Western Mass. Predators' bench, the door in the boards was opened and the plaintiff was checked from behind or pushed by defendant, Richard Roe, into the corner of the open door." On October 9, 2001 the plaintiffs moved to substitute Gregory Haney of Ludlow, Massachusetts for Richard Roe. That motion was granted and service was made on Mr. Haney on November 29, 2001.

n1 The minor plaintiff, Gabriel Fischer, is the only plaintiff in the first five counts of the complaint. Therefore, unless otherwise specified "plaintiff" refers to Gabriel Fischer.

The accident occurred while the Western Massachusetts team was going for a line change. It is common for fresh players coming onto the ice to simply climb over the rail and jump onto the ice. It is also common [*3] for players coming off the ice during a line change to use the team door because they are usually tired and the line change is

performed more quickly with them using the door. The incident occurred when Gabriel Fischer, who had just released the hockey puck down the ice towards the goal, was checked by Greg Haney, a team member from the Western Massachusetts Predators. As both the plaintiff and Haney had been skating in the general direction of the side of the rink, the plaintiff was checked and contacted the boards leading into the Western Massachusetts Predators' team box just as the door was opening for a line change.

The plaintiffs do not contest the foregoing. The defendants have also presented evidence that the contact between the plaintiff and the Western Massachusetts Predators' players was a "clean hit." Neither official at the hockey game called a penalty on the part of Greg Haney.

While the plaintiffs do not claim that a penalty was called on the Predators' player, Gregory Haney, they claim, essentially, that a penalty should have been called. The plaintiffs have presented the affidavit of Gabriel Fischer, which provides, in pertinent part:

2. On September 20, 1998, I [*4] was playing hockey for the Ice Breakers Team associated with USA Hockey.

3. I was a substitute on the team and was 15 years old at the time.

4. This was my second season with the Ice Breakers.

5. Previously I played for the Sea Hawks team in the Southeastern Connecticut Youth Hockey League.

6. The Sea Hawks was not as good a team as the Ice Breakers and the competition was not as good as with the Ice Breakers.

7. I had hoped to play competitive hockey in college and understood that college Scouts would sometimes come to the Ice Breaker games.

8. I had tried out for the Ice Breakers at the beginning of the 1997-1998 season and was accepted at age 14.

9. In the game in which I was injured on September 20, 1998, I was in the opposite corner of the ice when the puck went toward the middle of the ice near the Predators' bench.

10. I skated towards the puck into the middle of the ice near the boards by the Predators' bench.

11. As I was skating toward the puck and the other team's bench, I was suddenly pushed from behind and I think I was pushed a second time as I was going down.

12. I believe this is known as board checking or charging and [*5] is a violation of the Rules.

13. The push was so sudden and hard that I was pushed into the corner of the open doorway to the opposing team's bench. My abdomen, which is not protected by pads, hit the exposed corner of the boards.

The injury to Gabriel Fischer resulted in the amputation of his leg.

The plaintiffs have presented no evidence of any specific rule violation by Haney, and do not contest the defendants' evidence that neither of the officials at the game found any violation of the rules or imposed a penalty on Haney. Rather, in their Memorandum in Opposition to Summary Judgment dated January 25, 2002, the plaintiffs' attorney states:

Gregory Haney performed an illegal hit, which constituted reckless behavior, unnecessarily rough play, and unsportsmanlike conduct, all of which are violations of the Rules. (Rule 601, 607 and 640, Official Rules of USA Hockey Ex. 6)

While the plaintiffs have referenced Rule 601, 607 and 640, they have presented only Rule 607 in their opposition to summary judgment. That Rule provides that certain penalties should be imposed on a player who body checks or pushes an opponent from behind.

The defendants have presented [*6] evidence, uncontested by the plaintiffs, that the facilities at the Norwich rink were in good condition and well maintained and the ice was well maintained and in good condition on the date of the accident. Neither Coach Rivest, his assistant coaches nor players had experienced any trouble or noticed any problem associated with the subject door or door latching mechanism at any time prior to the moment of the plaintiff's injury.

The officials working the game, as well as the coach of the Massachusetts team, determined that the physical contact between the Massachusetts team player and the plaintiff was "clean" and within the rules of play. These determinations were made by individuals experienced with the rules of hockey. Andy Mann, one of the officials, has officiated hockey games for sixteen years. Mark Arriola has worked as an official with children's ice hockey teams for fifteen years, and has worked as a linesman officiating both high school and college hockey games for ten years. Paul Rivest has coached hockey since 1985.

In order to play in the USA Hockey program, the plaintiff was required to be a member of USA Hockey. The plaintiff had been a member of USA Hockey [*7] for eight consecutive seasons: 1990-91; 1991-92; 1992-93; 1993-94; 1994-95; 1995-96; 1996-97 and 1997-98. The plaintiff and his parent and/or guardian signed a waiver and release for each of these seasons. Both the plaintiff and his father, Jerome Fischer, signed a "Waiver of Liability, Release Assumption of Risk & Indemnity Agreement" ("Waiver & Release") on August 17, 1998 for the 1998-99 season. The plaintiffs admit that they signed the Waiver & Release, which provided in pertinent part:

For and in consideration of participant's registration with USA Hockey, Inc . . . and being allowed to participate in USAH events and member team activities, the parent(s) or legal guardian(s) of participants relinquish any and all liability for and cause of action for personal injury, property damage or wrongful death occurring to participant arising out of participation in USAH events, member team activities, the sport of ice hockey, and/or activities incidental thereto, whenever or however they occur . . . and by this agreement any such claims, rights, and causes of action that participant may have are hereby relinquished . . .

Participant and/or participant's parent(s)/guardian(s) [*8] acknowledge, understand and assume all risks inherent in ice hockey and any member team activities, and understand that said sport and activities involve risks to participant's person including bodily injury, partial or total disability, paralysis, and death, and damages which may arise therefrom and that I/we have full knowledge of said risks. These risks and dangers may be caused by the negligence of the participant or the negligence of others including the "releasees" identified below. It is further acknowledged that there may be risks and dangers not known to us or are not reasonable foreseeable at this time . . .

Participant and/or participant's parent(s)/guardian(s) acknowledge, understand and assume the risks, if any, arising from the conditions and use of ice hockey rinks and related premises and acknowledges and understands that included within the scope of this waiver and release is any cause of action arising from the performance, or failure to perform maintenance, inspection, supervision or control of said areas and for the failure to warn of dangerous conditions existing at said rinks, for negligent selection of certain releasees, or negligent supervision or instruction [*9] by releasees.

It is the purpose of this agreement to exempt, waive and relieve releasees from liability for personal injury, property damage, and wrongful death caused by negligence, including the negligence, if any, of releasees. "Releasees" include USA Hockey, Inc., its Affiliate Associations, Local Associations, Member teams, event hosts, other participants, coaches, officials, sponsors, advertisers, owners and operators of the premises used to conduct any event and each of them, their officers, directors, agents and employees.

Participant and/or participant's parent(s)/guardian(s) acknowledge that they have been provided and have read the above paragraphs and have not relied upon any representations of releasees, that they are fully advised of the potential dangers of ice hockey and understand these waivers and releases are necessary to allow amateur ice hockey to exist in its present form . . .

In Count One, the plaintiffs allege that the City of Norwich was negligent. Count Two alleges that Richard Roe's (now Gregory Haney) actions were "done with reckless misconduct" in that:

a. he checked and pushed the plaintiff from behind;

b. he engaged in unnecessarily [*10] rough play;

c. he checked and pushed the plaintiff from behind while the defendant team's door was open; and d. he engaged in unsportsmanlike conduct.

Count Three is directed against Paul Rivest, the coach of the Western Mass. Predators team. The gravamen of the plaintiffs' claim against Coach Rivest is that he, as a participant coach in the game, acted negligently. There is no claim that Coach Rivest acted recklessly, willfully or wantonly.

In Counts Four and Five, the plaintiff alleges negligence by the defendants, USA Hockey, Inc. and Connecticut Hockey Conference. In Count Six, the plaintiff, Jerome Fischer, seeks to recover medical expenses he incurred in the care and treatment of his son, Gabriel Fischer.

Discussion of the Law and Ruling

[HN1] Practice Book § 17-49 (formerly § 384) provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Connecticut Bank & Trust Co. v. Carriage Lane Associates, 219 Conn. 772, 780-81, 595 A.2d 334 (1991); Lees v. Middlesex Ins. Co., 219 Conn. 644, 650, 594 A.2d 952 (1991).* [*11] [HN2] Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact; *D.H.R. Construction Co. v. Donnelly, 180 Conn. 430, 434, 429 A.2d 908 (1980);* a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact, together with the evidence disclosing the existence of such an issue. Practice Book § § 17-45, 17-46; *Burns v. Hartford Hospital, 192 Conn. 451, 455, 472 A.2d 1257 (1984).* [HN3] In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. *Town Bank & Trust Co. v. Benson, 176 Conn. 304, 309, 407 A.2d 971 (1978); Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 317, 477 A.2d 1005 (1984).* The test is whether a party would be entitled to a directed verdict on the same facts. *Batick v. Seymour, 186 Conn. 632, 647, 443 A.2d 471 (1982); New Milford Savings Bank v. Roina, 38 Conn.App. 240, 243-44, 659 A.2d 1226 (1995).*

[HN4] Summary judgment should only be granted if the pleadings, affidavits and other proof submitted [*12] demonstrate that there is no genuine issue as to any material fact. *Scinto v. Stamm, 224 Conn. 524, 530, 620 A.2d 99,* cert. denied, *510 U.S. 861, 114 S. Ct. 176, 126 L. Ed. 2d 136 (1993); Connell v. Colwell, 214 Conn. 242, 246, 571 A.2d 116 (1991).* Summary judgment is "designed to eliminate the delay and expense of litigating an issue where there is no real issue to be tried." *Wilson v. City of New Haven, 213 Conn. 277, 279, 567 A.2d 829 (1989).*

The issue of the enforceability of an exculpatory contract such as the Waiver & Release has not been considered by any appellate court in this state. However, Appellate courts of other states have considered the issue. In *Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 82 OhioSt.3d 367, 370 (1998),* the minor plaintiff was injured following a scrimmage during soccer practice. Excited about winning, the boy jumped on one of the goals and swung back and forth. The goal was not anchored to the ground and fell over on the plaintiff. Prior to her seven-year-old's participation with the defendant soccer club, the minor plaintiff's mother had signed an agreement [*13] releasing the defendants "against any claim by or on behalf of the registrant as a result of the registrant's participation in the soccer club . . ." The Court held that the exculpatory agreement was valid as to all claims against the defendants.

The Court in *Zivich* reasoned that "the proper focus is not whether the release violates public policy but rather that public policy itself justifies the enforcement of this agreement." *82 OhioSt.3d at 370.* The Court then explained the manner in which public policy favored the enforcement of such agreements:

It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure . . . Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost . . . Clearly, without the work of its volunteers, these nonprofit organizations could not exist, and scores of children would be without the benefit and enjoyment of organized [*14] sports. Yet the threat of liability strongly deters many individuals from volunteering for nonprofit organizations. Developments in the Law-Nonprofit Corporations-Special Treatment and Tort Law (1992), *105 Harv.L.Rev. 1578, 1667,1682 . . .*

Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated service of volunteers and their sponsoring organizations.

Therefore, we conclude that although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements. Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation.

Id. 82 OhioSt.3d at 371-72.

The *Zivich* Court also held that parents have the authority to enter into these types of binding agreements on behalf of their minor children. [*15] *Id.* The Court noted that the law empowers a parent to make many important life choices for his or her children. In rendering its decision, the court specifically refused to equate a pre-injury release with a post-injury release, which some courts have found unenforceable. *Id.* The court explained that "a parent who signs a release before her child participates in a recreational activity . . ., has no financial motivation to sign the release"; is unlikely to maliciously sign such a release in deliberate derogation of her child's best interest; and is less vulnerable to coercion and fraud than a parent in the position of disposing of a child's existing claim. *Id.*

In *Cooper v. US Ski Assn.*, No. 97CV107 (Colo.App.Ct. Aug. 17, 2000), the seventeen-year-old plaintiff was involved in a skiing accident. Prior to his accident, both the plaintiff and his mother signed a release of any and all claims against the defendants. The critical issue before the Court was whether a parent could release the claims of her minor child for possible future injuries. *Id.* The court considered decisions of both the Washington Supreme Court in *Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992),* [*16] and the Ohio Supreme Court in *Zivich* on this issue. In *Scott* the Washington Supreme Court relied on precedent concerning a parent's post-injury release signed on behalf of a child in determining that a parent did not have a legal authority to release a child's claims for personal injuries as a matter of public policy. Conversely, in *Zivich*, the Ohio Supreme Court held that Ohio public policy justified enforcement of the exculpatory agreement.

The Colorado Court of Appeals agreed with the *Zivich* decision, and adopted the same conclusion. The Court refused to distinguish *Zivich* on the basis that the *Zivich* Court addressed liability in a non-paid, volunteer situation. Rather it upheld the parental release on the basis of the fundamental right of parents under the due process clause to make decisions concerning the care, custody, and control of their children. *Id., citing, Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).* The Court also noted that the minor plaintiff and his mother had executed releases in the past and that the minor plaintiff had participated in the ski club's activities for approximately nine [*17] years. *Cooper, supra.*

In *Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 274 Cal.Rptr. 647 (1990),* the fifteen-year-old plaintiff and her father signed a release before the minor plaintiff's participation in a hypnotism show at her high school. During the show, the minor plaintiff slid from her chair and fell to the floor approximately 6 times. The plaintiff argued that the signed releases were contrary to public policy. The Court of Appeals of California disagreed.

No public policy opposes private, voluntary transactions in which one party, for consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.

Hohe, supra, quoting *Tunkl v. Regents of University of California, 60 Cal.2d 92, 101, 32 Cal.Rptr. 33, 383 P.2d 441 (1963).* The court found that there was no essential service or good being withheld by the defendant in this case. *Hohe, supra.* As in *Zivich*, the court also noted the benefit which recreational and sports activities provide to children. The court stated:

Thousands of children benefit from the availability of recreational and sports activities. **[*18]** Those options are steadily decreasing--victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risks. In this instance, *Hohe* agreed to shoulder the risks. No public policy forbids the shifting of that burden.

Therefore, the Court held that the minor plaintiff could not disaffirm the release because she was a minor.

Similarly, in *Brooks v. Timberline Tours, Inc., 941 F. Supp. 959 (D.Colo. 1996),* the United States District Court for the District of Colorado addressed the enforceability of a release signed by a parent on behalf of his minor child. In *Brooks*, Mrs. Brooks was injured and the Brooks' minor son was killed in a snow mobile accident. The court held that the exculpatory agreement signed by the Brooks on behalf of their minor son was valid. *Id.*

In *Aaris v Las Virgenes Unified School District, 64 Cal.App.4th 1112, 75 Cal. Rptr. 2d 801 (1998),* a minor plaintiff cheerleader brought suit against a school district for injuries sustained while participating in cheerleading practice. Citing *Hohe*, the court affirmed the lower court's grant of summary judgment in favor **[*19]** of the school district based upon the well-established California rule that a parent may execute a release on behalf of his/her child. *Id. at 1122.*

In *Randas v. YMCA of Metropolitan Los Angeles, 17 Cal.App.4th. 158, 21 Cal.Rptr.2d 245 (1993),* the plaintiff, who was literate in Greek but not in English, signed a release as a condition of enrolling in a swimming class at the local YMCA. That same day, she slipped and fell on the wet poolside tile. The court specifically declined to invalidate the release on public interest grounds. The court noted that "swimming, like other athletic or recreational activities, however enjoyable or beneficial, is not 'essential' . . ." The court found that there was good reason to validate such releases.

The public as a whole receives the benefit of such waivers so that groups such as boys' and girls' scouts, little league, and parent-teacher associations are able to continue without the risk and sometimes overwhelming cost of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing--victims of decreasing financial and tax support **[*20]** for other than the bare essentials of an education. Every learning experience involves risks . . . No public policy forbids the shifting of that burden.

Randas, quoting *Hohe, 4 Cal. App. 3d at 1564.*

[HN5] The interpretation of an exculpatory contract is colored by two diametrically opposed legal principles: the first, that it is against public policy to contract away one's liability for negligent acts in advance and the second, that the court will enforce agreements of the parties made with consideration. A seminal case in the area of waivers of liability is *Tunkl v. Regents of University of California, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963),* where the California Supreme Court held that public policy prevented the enforcement of exculpatory contracts for services provided in the public interest, such as the hospital services provided to the plaintiff. The Court invalidated an exculpatory contract which the hospital required the plaintiff to sign before providing medical services, and set forth [HN6] six factors to consider in determining whether or not an exculpatory contract violates public policy. The six factors are (1) does the release **[*21]** concern an activity generally thought suitable for public regulation; (2) is the party seeking exculpation engaged in performing a service of great importance to the public; (3) is the service open to any member of the public; (4) is the nature of the service essential; (5) does the party seeking exculpation have superior bargaining power, raising the issue of whether or not the release constitutes an adhesion contract; and (6) does the release place one party under the control of the other.

In *Okura v. United States Cycling Federation, 186 Cal. App. 3d 1462, 231 Cal.Rptr. 429 (1986),* the plaintiff was injured in a bicycle race known as the Hermosa Beach Grand Prix. He fell when his bicycle hit loose debris along the course. The Court applied the six factor test set forth in *Tunkl* and held that the release signed by the plaintiff prior to participation in the bicycle race did not violate public policy. First, the court concluded that organized racing of bicycles

was not subject to public regulation. Second, although the bicycle race was a public service, it did not measure up to the public importance necessary to void a release. Third, the service provided [*22] was not essential such as the provision of food, transportation, hospital services, etc. Fourth, there was a voluntary relationship between the parties and no evidence of an adhesion contract. Fifth, the plaintiff did not place himself in exclusive control of the defendants. The plaintiff "retained complete control of himself and his bicycle and at any time could have dropped out of the race." The court did find that the service was open to any member of the public, but concluded that that fact alone was insufficient to preclude the enforceability of the release.

As in *Okura*, the *Tunkl* factors favor the enforceability of the Waiver & Release signed by Gabriel and Jerome Fischer. First, organized hockey at this level is not the subject of public regulation. Second, the defendants do not provide a public service like transportation, food, or medical care. Third, although the rink is open to any member of the public, the opportunity to play hockey for the Norwich Ice Breakers was not available to any member of the public. At this level of hockey, players were skilled and either tried out or were invited to play. Fourth, the service provided was not essential. Fifth, the relationship [*23] between these parties was voluntary. Gabriel Fischer decided to play hockey and signed a release on more than eight occasions in order to do so. Sixth, the plaintiff did not place himself in exclusive control of the defendants, as the plaintiff in *Tunkl*, who, as a patient was under the control of the defendant hospital. At anytime during his years of hockey, or more specifically during any of the games, Gabriel Fischer could have stopped playing.

Several Connecticut trial courts have considered the enforceability of exculpatory contracts similar to the one at question in this case. In *Connors v. Reel Ice, Inc.*, No. CV9805799935 (Conn.Super.Ct., July 24, 2000) (27 Conn. L. Rptr. 610), Judge Wagner granted the defendants' motion for summary judgment in a case similar to this case. The court found that the release was sufficient to bar the plaintiff's claims because it explicitly released the defendants from liability for injuries caused by the negligence of the releasees. The court also noted that the plaintiff had played in seven previous hockey leagues, and that "there was no inequity of bargaining power between plaintiff and rink owner because the plaintiff was free to [*24] play at another rink or not to play at all." The court held that the athlete's signed wavier and release was enforceable against the athlete.

In *Lombardo v. McGuire Group, Inc.*, No. CV96077767 (Conn.Super.Ct., June 6, 1997) (Arena, J.), the plaintiff was injured when he collided with a chain link fence while playing in a softball game. Prior to participating in the game, the plaintiff signed a liability waiver that provided:

To the fullest extent permitted by law I agree to indemnify and hold harmless the City of Middletown and its [sic] employees from any injuries or damages caused by or resulting from participation in this program.

The plaintiff brought an action against the City alleging negligence and public nuisance. The City moved for summary judgment based on the above release of liability signed by the plaintiff. The court enforced the waiver provision against the plaintiff and concluded that such a waiver was not violative of public policy:

[HN7] It is general policy that "parties may not stipulate for protection against liability for negligence in the performance of a duty imposed by law or where public interest requires performance." *Fedor v. Mauwehu Council, 21 Conn.Supp. 38, 39;* [*25] see 6 Williston, Contracts (Rev. Ed.) § 1751C. It cannot be said that, under the present set of facts, the City's waiver seeks this type of immunity. Accordingly, the court finds that the present case does not warrant a finding that the enforcement of the waiver would be against public policy.

In *Howroyd v. Clifford*, 20 Conn. L. Rptr. No. 6, 214 (Conn.Super.Ct., Oct. 27, 1997) (Sullivan, J.), the court examined a liability waiver signed by a minor. In *Howroyd*, the defendant asserted, by way of special defense, that the minor plaintiff and his parent had signed a general release waiver form as a prerequisite to participation in a police department "Ride-A-Long" program for youths. The plaintiff moved to strike the special defense claiming that the waiver was contrary to public policy. The court denied the plaintiff's motion to strike and distinguished the Superior Court's much earlier decision in *Fedor v. Mauwehu Council, 21 Conn.Supp. 38, 143 A.2d 466 (1958),* on the basis that *Fedor* involved "the potential deprivation, on the basis of economic poverty, of children to attend summer camp, a traditional youth activity . . ." On the contrary, the court [*26] found that the waiver in the instant case was "required to participate in a special program which [was] not thought to be the type of general educational program which forms a traditional part of the curriculum required by state law or regulation."

The plaintiffs argue that the Waiver & Release violates public policy because it allows the defendants to contract away their liability for negligence. However, in light of the Supreme Court's decision in *Jaworski v. Kiernan, 241 Conn. 399, 696 A.2d 332 (1997)*, there is a significant doubt as to whether the defendants have any liability for negligent conduct in this case. In *Jaworski* the Court held that [HN8] participants in a team athletic contest involving contact as part of the sport owe a duty of care to refrain only from reckless or intentional conduct toward other participants and one who is injured by negligent conduct alone may not recover for their injuries. While *Jaworski* involved adult participants, its analysis of the public policy considerations is quite applicable to the conduct at issue in this case:

[HN9] Having concluded that the plaintiff's injury was a foreseeable consequence of the defendant's **[*27]** actions, we need to determine as a matter of policy the extent of the legal duty to be imposed upon the defendant. In order to determine the extent of the defendant's responsibility, we consider: (1) the normal expectations of participants in the sport in which the plaintiff and the defendant were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions. See, e.g., *Maloney v. Conroy, 208 Conn. 392, 400-01, 545 A.2d 1059* (looking beyond foreseeability to other pragmatic concerns to limit liability).

In athletic competitions, the object obviously is to win. In games, particularly those played by teams and involving some degree of physical contact, it is reasonable to assume that the competitive spirit of the participants will result in some rules violations and injuries. *That is why there are penalty boxes, foul shots, free kicks, and yellow cards. Indeed, the specific rules applicable to this game demonstrate that rules violations were expected in the normal course of the game.* **[*28]** See footnote 1. *Some injuries may result from such violations, but such violations are nonetheless an accepted part of any competition.* Simply put, when competitive sports are played, we expect that a participant's main objective is to be a winner, and we expect that the players will pursue that objective enthusiastically. We also anticipate that players in their enthusiasm will commit inadvertent rules violations from which injuries may result. The normal expectations of participants in contact team sports include the potential for injuries resulting from conduct that violates the rules of the sport. These expectations, in turn, inform the question of the extent of the duty owed by one participant to another. We conclude that [HN10] the normal expectations of participants in contact team sports counsel the adoption of a reckless or intentional conduct duty of care standard for those participants.

241 Conn. at 407-08. Emphasis added.

In *Hotak v. Seno*, No. CV000072461S (Conn.Super.Ct., June 12, 2001, Arnold, J.) (29 Conn. L. Rptr. 609), the plaintiff, a minor, filed an action against another minor who had been a student in the plaintiff's school gym class. **[*29]** The plaintiff alleged that the defendant was negligent and careless when, while playing baseball, he struck the plaintiff in the head with a baseball bat. The defendant moved to strike the plaintiff's claim on the basis that there was no cause of action for mere negligence so as to permit recovery for any injury sustained in a team sport. The defendant cited *Jaworski* in support of its motion.

The court granted the defendant's motion to strike, relying upon *Jaworski* as well as two New Jersey Supreme Court decisions that have extended the standard of care of recklessness or intentional conduct to the sport of golf. Drawing on the reasoning of *Schick v Ferolito, 167 N.J. 7, 767 A.2d 962 (2001)*, and *Crawn v. Campo, 136 N.J. 494, 643 A.2d 600 (1994)*, the court cited the March 12, 2001 ruling of the New Jersey Supreme Court:

The court perceives no persuasive reason to distinguish between contact and non-contact sports. *Risk of injury is a common and inherent aspect of athletic effort generally.* It may arise from the physical nature of the athletic endeavor, creating a possibility or likelihood of direct physical contact with another **[*30]** player or with a ball. The risk of injury is just as real when it arises from an instrument used in a game, such as swinging a golf club or the small hard ball the club propels at a very high rate of speed. Even for an experienced golfer, the course a golf ball takes is often unpredictable through no conscious fault of the golfer.

167 N.J. at 18. Emphasis added.

The public policy considerations discussed in *Jaworski* and *Schick* are also present in this case. Skating, sliding, speed, contact and injury are all part of the sport of competitive ice hockey. The normal expectation of the participants in a

contact sport such as hockey is that there will be injuries which result from playing the game. *Jaworski* has dictated that [HN11] adult participants cannot sue for conduct that is merely negligent. Other courts, particularly *Zivich*, have persuasively supported the public policy reasons for upholding an exculpatory contract involving minors such as the Waiver & Release signed by the plaintiffs in this case. Therefore, the Waiver & Release does not violate the public policy of this state and is enforceable.

The plaintiffs seek to escape the Waiver & Release [*31] into which they voluntarily entered by averring that they did not read it. The minor plaintiff played hockey for many years prior to the unfortunate accident at issue in this case. The plaintiffs do not dispute the defendants' evidence that they were required to sign a Waiver and Release for the following years: 1990-1991; 1991-1992; 1992-1993; 1993-1994; 1994-1995; 1995-1996; and 1996-1997. The general rule in our state is that [HN12] where a person who is of mature years and who can read and write, signs or accepts a formal written contract affecting his pecuniary interests, it is that person's duty to read it and notice of its contents will be imputed to that person if that person negligently fails to do so. *Phoenix Leasing, Inc. v. Kosinski, 47 Conn.App. 650, 654, 707 A.2d 314 (1998)*, quoting *First Charter National Bank v. Ross, 29 Conn.App. 667, 671, 617 A.2d 909 (1992)*. Therefore, the plaintiffs' claim that they did not read the release does not save them from it effects.

Since the Waiver & Release is valid and enforceable, and applies to "USA Hockey, Inc., its Affiliate Associations, Local Associations, Member teams, event hosts, other participants, [*32] coaches, officials, sponsors, advertisers, owners and operators of the premises used to conduct any event and each of them, their officers, directors, agents and employees," it is a bar to the plaintiffs' negligence claims against all defendants. However, the Waiver & Release does not bar the plaintiffs' claims for reckless conduct. Although the plaintiffs have alleged reckless conduct on the part of Gregory Haney, the opposing hockey player, they have presented no evidence to establish that Haney's conduct was reckless. The affidavit of Gabriel Rivest indicates that he was hit hard from behind and that such conduct was "a violation of the rules." There is no other competent evidence that any rules were violated or even indicates which rules were violated, and neither official present at the time found any rule violation.

Under *Jaworski*, [HN13] a violation of the rules of the sport in question is not sufficient to constitute reckless conduct. The Court expected that:

In games, particularly those played by teams and involving some degree of physical contact, it is reasonable to assume that the competitive spirit of the participants will result in some rules violations and injuries. [*33] That is why there are penalty boxes, foul shots, free kicks, and yellow cards. Indeed, the specific rules applicable to this game demonstrate that rules violations were expected in the normal course of the game.

241 Conn. at 407-08.

Under *Jaworski* [HN14] a mere rules violation does not constitute actionable conduct. In this case there is undisputed evidence that the officials present at the time found no rules violation by Haney. The plaintiffs have presented Gabriel Fischer's opinion that Haney's conduct constituted a rules violation. While there is, therefore, an issue of fact as to whether or not there was a rules violation by Haney, it appears clear that there is no evidence of an egregious violation which would rise to the level of reckless conduct. Since the plaintiffs presented no other evidence of reckless conduct by Haney they have not presented sufficient evidence of reckless conduct to defeat the present summary judgment motion. See *Buell Industries v. Greater New York Mutual Ins., 259 Conn. 527, 556, 557, 791 A.2d 489 (2002)* (mere conclusory statement in affidavit not sufficient to create issue of material fact and defeat summary judgment). [*34]

The Waiver & Release signed by the plaintiffs is clear and unambiguous. It is axiomatic that [HN15] "any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." *Levine v. Massey, 232 Conn. 272, 279, 654 A.2d 737 (1995)*. "The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity." *232 Conn. at 279*. In the instant case, the ordinary meaning of the words leaves no room for ambiguity.

The Waiver & Release states, in pertinent part, that:

Participant and/or participant's parent(s)/guardian(s) acknowledge, understand and assume all risks inherent in ice hockey and any member team activities, and understand that said sport and activities involve risks to participant's

person *including bodily injury, partial or total disability, paralysis, and death, and damages which may arise therefrom and that I/we have full knowledge of said risks.* These risks and dangers may be caused by the negligence of the participant or the negligence of others including the "releasees" identified below. It is further acknowledged that there [*35] may be risks and dangers not known to us or are not reasonably foreseeable at this time . . .

Participant and/or participant's parent(s)/guardian(s) acknowledge, understand and assume the risks, if any, arising from the conditions and use of ice hockey rinks and related premises and acknowledges and understands that included within the scope of this waiver and release is any cause of action arising from the performance, or failure to perform maintenance, inspection, supervision or control of said areas and for the failure to warn of dangerous conditions existing at said rinks, for negligent selection of certain releasees, or negligent supervision or instruction by releasees.

It is the purpose of this agreement to exempt, waive and relieve releasees from liability for personal injury, property damage, and wrongful death caused by negligence, including the negligence, if any, of releasees. "Releasees" include USA Hockey, Inc., its Affiliate Associations, Local Associations, Member teams, event hosts, other participants, coaches, officials, sponsors, advertisers, owners and operators of the premises used to conduct any event and each of them, their officers, directors, agents [*36] and employees.

Participant and/or participant's parent(s)/guardian(s) acknowledge that they have been provided and have read the above paragraphs and have not relied upon any representations of releasees, that they are fully advised of the potential dangers of ice hockey and understand these waivers and releases are necessary to allow amateur ice hockey to exist in its present form . . .

Emphasis added.

It is difficult to imagine how the dangers or causes of potential injury could be more clearly set forth than they are in the Waiver & Release. It is also difficult to imagine what more USA Hockey could have done to advise the Fischers of the dangers or to obtain the Fischers' acknowledgment that they understood the dangers of hockey.

The plaintiffs also argue that the Waiver & Release is ambiguous because it does not state that risks may be caused by flagrant rules violations. This argument is without merit because, as stated above, the plaintiffs have presented no evidence of any flagrant rule violation, and scant evidence of any rule violation at all.

[HN16] The law does not require that a release be perfect. "Apparently [however] no release is immune from attack. [*37] " *National and Int'l Brotherhood of Street Racers, Inc. v. Superior Court, 215 Cal. App. 3d 934, 937, 264 Cal. Rptr. 44 (1989).* In *National and Int'l Brotherhood*, the Court noted:

If short and to the point, a release would be challenged as failing to mention the particular risks which caused a plaintiff's injury or as insufficiently comprehensive . . . If the drafter avoids the shortcomings by adding details and illustrations, the plaintiff invokes the doctrine *expressio unius exclusio alterius est* and characterizes the causative hazard as one not found among those 'isted in the release, but if the list ends with an inclusive term "and all other risks not specifically enumerated" it will be argued, under the principle *ejusdem generis*, that the risk encountered is nonetheless not assumed, because its nature is different from those listed. If the drafter strives to be comprehensive, the release is attacked as unduly lengthy, but if he fits it onto a single page, the type size will be criticized as inadequate. (Internal citations omitted.)

In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats [*38] the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.

215 Cal. App. 3d at 937-38. [HN17] "To be effective, a release need not achieve perfection . . . It suffices that a release be clear, unambiguous and explicit, and that it express an agreement not to hold the released party liable for negligence." *215 Cal. App. at 938.* The release signed by Gabriel and Jerome Fischer meets this standard.

This court agrees with the Courts in *Zivich*, Cooper, and *Hohe, supra*, that the public policy of this state supports the enforcement of the Waiver & Release. The injuries sustained by Gabriel Fischer were tragic. However, if courts did not enforce this type of exculpatory contract, organizations such as USA Hockey, Inc., little league and youth soccer, and the individuals who volunteer their time as coaches could well decide that the risks of large legal fees and potential judgments are too significant to justify their existence or participation. **[*39]** Thousands of children would then be deprived of the valuable opportunity to play organized sports.

For the reasons set forth above, summary judgment may enter in favor of the defendants Paul Rivest, USA Hockey, Inc., Connecticut Hockey Conference, Inc. and City of Norwich on Counts One, Three, Four, Five and Six of the Complaint. Count Two of the Complaint is against Gregory Haney who was not a party to the Motion for Summary Judgment under consideration here, and therefore, the court makes no ruling with respect to Count Two.

By the Court

Aurigemma, J.

1 of 5 DOCUMENTS

Petitioners: DAVID COOPER and MICHAEL COOPER, v. Respondents: THE ASPEN SKIING COMPANY; THE ASPEN VALLEY SKI CLUB; JOHN MCBRIDE, JR.; and THE UNITED STATES SKI ASSOCIATION.

Case No. 00SC885

SUPREME COURT OF COLORADO

48 P.3d 1229; 2002 Colo. LEXIS 528

June 24, 2002, Decided

PRIOR HISTORY: [**1] Certiorari to the Colorado Court of Appeals. Court of Appeals Case No. 99CA187.

Cooper v. United States Ski Ass'n, 32 P.3d 502, 2000 Colo. App. LEXIS 1448 (Ct. App. 2000).

DISPOSITION: Reversed and remanded with instructions to the court of appeals to return the case to the trial court.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, a minor, his mother, and his father, filed an action against respondents, a ski club and a ski coach, alleging negligence. The Colorado Court of Appeals affirmed the trial court's order and held that a release signed by the minor and the mother prior to the injury was enforceable. Certiorari was granted to determine whether the state's public policy allowed a parent to validate exculpatory provisions on behalf of a child.

OVERVIEW: The minor was a member of a ski team. During training for a high speed race, the minor fell and collided with a tree, causing him severe injury and blindness. The trial court held, and the appellate court agreed, that a release signed by the minor and the mother prior to the injury, which barred all claims of negligence, was enforceable against the minor. The supreme court held that the public policy of Colorado afforded minors significant protections that precluded a parent or a guardian from releasing a minor's own prospective claim for negligence. The supreme court reasoned that because a parent was generally unable to release a child's cause of action after an injury, it made little sense to find that a parent had the authority to release a child's cause of action prior to the injury. The supreme court also held that an indemnity provision that shifted the source of compensation for negligence from the tortfeasor to the minor's parent or guardian created an unacceptable conflict of interest and violated the state's public policy to protect minors. The effect of a parental indemnity agreement undermined a parent's duty to protect the child's best interests.

OUTCOME: The supreme court reversed the appellate court's decision that the release was enforceable against the minor. The supreme court held that a parent was precluded from releasing his or her child's own prospective negligence claim.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN1] Appellate courts review a trial court's order granting or denying a motion for summary judgment de novo. This is because such judgments are rulings of law in the sense that they may not rest on the resolution of disputed facts.

Contracts Law > Remedies > Rescission & Redhibition
[HN2] A minor during his minority, and acting timely on reaching his majority. may disaffirm any contract that he may have entered into during his minority.

Torts > Negligence > Defenses > Exculpatory ClausesContracts Law > Formation > Formation Generally
[HN3] While the court traditionally recognizes a strong policy of freedom of contract, the court also recognizes that exculpatory agreements have long been disfavored. Indeed, exculpatory clauses stand at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts.

Contracts Law > Defenses > Public Policy ViolationsFamily Law > Parental Duties & Rights > Care & Control of ChildrenTorts > Negligence > Defenses > Exculpatory Clauses
[HN4] There are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract. Accordingly, Colorado's public policy affords minors significant protections which preclude parents or guardians from releasing a minor's own prospective claim for negligence.

Family Law > Guardians & ConservatorsFamily Law > Parental Duties & Rights > Care & Control of ChildrenTorts > Negligence > Defenses > Exculpatory Clauses
[HN5] Colorado laws do not allow a parent the unilateral right to foreclose a child's existing cause of action to recover for torts committed against him. Rather, the general assembly has granted minors a number of protections to safeguard their post-injury rights of recovery. Indeed, the Colorado Probate Code provides significant procedural protections for minors in the post-injury claim context. This legislation creates mechanisms for the appointment of a conservator to protect a minor's settlement rights. *Colo. Rev. Stat. § § 15-14-403*, 15-14-425(2)(t) (2001). It also provides minors important protections by creating means by which the court may ratify the settlement of a minor's claims. *Colo. Rev. Stat. § 15-14-412(1)(b)* (2001). Importantly, a parent may not act as a minor's conservator as a matter of right, but only when appointed by the court. *Colo. Rev. Stat. § 15-14-413* (2001).

Family Law > Guardians & Conservators
[HN6] Under *Colo. Rev. Stat. § 15-14-403(1)* (2001) of the Colorado Probate Code, the "person to be protected," *Colo. Rev. Stat. § 15-14-403(1)(a)* (2001) or "an individual interested in the estate, affairs, or welfare of the person to be protected," *Colo. Rev. Stat. § 15-14-403(1)(b)* (2001), may petition for the appointment of a conservator or for any other appropriate protective order. *Colo. Rev. Stat. § 15-14-403(1)*. Unless qualified or limited by the court, *Colo. Rev. Stat. § 15-14-425(1)* (2001), a conservator may pay or contest any claim, settle a claim by or against the estate of the protected person by compromise, arbitration, or otherwise. *Colo. Rev. Stat. § 15-14-425(2)(t)* (2001). Furthermore, if a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may, under *Colo. Rev. Stat. § 15-14-412(1)* (2001), authorize, direct, or ratify any other contract, trust, will or transaction relating to the protected person's property and business affairs, including a settlement of a claim, upon determining that it is in the best interest of the protected person. *Colo. Rev. Stat. § 15-14-412(1)(b)*. Moreover, a parent may only act as a minor's conservator when appointed by the court. *Colo. Rev. Stat. § 15-14-413* (2001).

Family Law > Guardians & ConservatorsGovernments > Courts > Authority to Adjudicate
[HN7] Courts are charged with the responsibility to take special care in protecting the rights of minor children.

Family Law > Parental Duties & Rights > Care & Control of ChildrenTorts > Negligence > Defenses > Exculpatory Clauses
[HN8] While the court certainly agrees that parents have a liberty interest in the care, custody and control of their children, the court does not believe that right encompasses a parent's decision to disclaim a minor's possible future recovery for injuries caused by negligence by signing a release on the minor's behalf. A parental release of liability on behalf of his child is not a decision that implicates such fundamental parental rights as the right to establish a home and bring up children and the right to direct the upbringing and education of children under their control.

Family Law > Parental Duties & Rights > Care & Control of Children
[HN9] The fundamental right to the care, custody, and control of one's child is not absolute. Indeed, acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school

attendance, regulating or prohibiting the child's labor and in many other ways. In fact, in order to protect a child's well-being, the state may restrict parental control.

Family Law > Parental Duties & Rights > Liability for Minor's ActionsTorts > Multiple Defendants > Contribution & Indemnity
[HN10] Parental indemnity provisions violate Colorado's public policy to protect minors and create an unacceptable conflict of interest between a minor and his parent or guardian.

COUNSEL: Freeman & Freeman, Martin H. Freeman, Aspen, Colorado, Klein-Zimet, P.C., Herbert S. Klein, Aspen, Colorado, Michele Nelson Bass, Aspen, Colorado, Attorneys for Petitioners.

Higgins, Hopkins, McLain & Roswell, LLC, Stephen Hopkins, David McLain, Geoffrey N. Blue, Lakewood, Colorado, Attorneys for Respondents The Aspen Skiing Company; The Aspen Valley Ski Club; and John McBride, Jr.

Rietz and Smith, LLC, Peter W. Rietz, Jere K. Smith, Dillon, Colorado, Attorneys for Respondent United States Ski Association.

Chalat Law Offices, P.C., James H. Chalat, Denver, Colorado, Attorney for Amicus Curiae Colorado Trial Lawyers Association.

JUDGES: JUSTICE RICE delivered the Opinion of the [**3] Court.

OPINIONBY: RICE

OPINION: [*1230]

EN BANC

JUSTICE RICE delivered the Opinion of the Court.

In 1995, petitioner David Cooper, then seventeen, suffered injuries, including blindness, when he lost control and crashed into a tree while training on a ski race course. David and his parents filed suit against the Aspen Valley Ski Club Inc. and David's coach, John McBride, Jr., (Defendants) alleging, among other claims, negligence. The trial court determined as a matter of law pursuant to C.R.C.P. 56(h) that a release signed by both David and his mother, Diane Cooper, before the injury occurred "should be enforced and act as a bar to claims of negligence against these defendants." (R. at v. VIII, p. 1984.) In addition, the trial court determined as a matter of law that "defendants' motion for determination of law should be denied in part in so far as the motion seeks to enforce the indemnity provisions of the agreement against plaintiff, Diane Cooper." (Id.) David appealed n1 the trial court's order, and in *Cooper v. Aspen Ski Ass'n, 32 P.3d 502,* 29 Colo. Law. No. 10 166 (Colo. App. 2000), the court of appeals affirmed, holding that the release signed by David's mother was enforceable against David, [**4] even though he was a minor both when the release was signed and when the accident occurred. n2

n1 David's mother, Diane Cooper, did not contest the trial court's order that the release barred her own claims against Defendants.

n2 On cross-appeal in Cooper, the Defendants argued that the trial court erred in determining that the indemnity provision in the release signed by David's mother was unenforceable. *Cooper, 32 P.3d at 511.* The court of appeals determined that the cross-appeal was moot, however, because it held that the release was enforceable against David, and this conclusion necessarily precluded a finding of liability against the Aspen Valley Ski Club. Id.

We granted certiorari to determine whether Colorado's public policy allows a parent to validate exculpatory provisions on [*1231] behalf of his minor child. n3 Specifically, we must resolve whether a parent may release the claims of a minor child for future injuries and whether a parent may enter into an indemnification agreement [**5] that shifts the source of compensation for a minor's claim from a tortfeasor to the parent. We hold that the public policy of

Colorado affords minors significant protections that preclude a parent or guardian from releasing a minor's own prospective claim for negligence. n4 We also hold that an indemnity provision that shifts the source of compensation for negligence from the tortfeasor to the minor's parent or guardian creates an unacceptable conflict of interest between a parent/guardian and a minor and violates Colorado's public policy to protect minors. Accordingly, we reverse the court of appeals' judgment and remand the case to that court with instructions to return the case to the trial court for further proceedings consistent with this opinion.

n3 We granted certiorari to consider: "Whether the public policy of Colorado allows a parent to release the claims of a minor child for possible future injuries from a recreational activity."

n4 However, section 13-21-116(2.5)(a), 5 C.R.S. (2001) protects "'persons,' be they individuals or entities who perform volunteer services" for designated types of organizations from liability. *Concerned Parents of Pueblo, Inc. v. Gilmore, 2002 Colo. LEXIS 311*, No. 00 SC950, 2002 Colo. LEXIS 311, at *3, *16 (Colo. April 22, 2002). Section 13-21-116(2.5)(a) does not, however, insulate the organization itself from liability. *Concerned Parents, 2002 Colo. LEXIS 311*, at *3. Our holding does not affect the applicability of section 13-21-116(2.5) or our decision in Concerned Parents; rather section 13-21-116(2.5)(a) would preclude liability against volunteer leaders, volunteer assistants, volunteer teachers, volunteer coaches, and volunteer trainers, with certain statutory limitations. § 13-21-116(2.5)(a).

We note, in addition, that risks other than a party's negligence may be present in a recreational activity. For example, a sport may present inherent dangers that can not be eliminated by the exercise of reasonable care. We do not consider this issue; nor do we rule on the assumption of risk and inherent risk provisions in legislative acts such as the Ski Safety Act of 1979.

Finally, we emphasize that our holding applies only to parental releases of liability for negligence and not to, for example, parental consent forms for medical services such as surgery and the like.

[**6]

FACTS AND PROCEDURAL HISTORY

In 1995, seventeen-year-old petitioner David Cooper had been a member of the Aspen Valley Ski Club, Inc. (the Ski Club), for about nine years and was actively involved in competitive ski racing. At the beginning of the 1995-1996 ski season, David and his mother signed a form titled "Aspen Valley Ski Club, Inc. Acknowledgment and Assumption of Risk and Release" (the Release).

The Release relieved the Ski Club from:

any liability, whether known or unknown, even though that liability may arise out of negligence or carelessness on the part of persons or entities mentioned above. The undersigned Participant and Parent or Guardian agree to accept all responsibility for the risks, conditions and hazards which may occur whether or not they are now known.

The Release further stated:

. . . the undersigned Participant and Parent or Guardian HEREBY AGREE TO WAIVE, RELEASE, DISCHARGE, INDEMNIFY AND HOLD HARMLESS any and all claims for damages for death, personal injury or property damage which they may have or which may hereafter accrue as a result of any participation in an Aspen Valley Ski Club, Inc. program and related activities and events . . . [**7] . The undersigned Participant and Parent or Guardian further agree to forever HOLD HARMLESS and IDEMNIFY all persons and entities identified above, generally and specifically, from any and all liability for death, personal injury or property damage resulting in any way from participating in the activities and events described above. By signing this Acknowledgement and Assumption of Risk and Release as the Parent or Guardian, I am consenting to the participant's participation in the Aspen Valley Ski Club, Inc. programs and related activities and acknowledge that I understand that all risk, whether known or unknown, is expressly assumed by me and all claims, whether known or unknown, are expressly waived in advance.

[*1232] On December 30, 1995, David was training for a competitive, high speed alpine race. The course had been set by David's coach, defendant McBride. During a training run, David fell and collided with a tree, sustaining severe injuries, including the loss of vision in both eyes.

The trial court ruled that Diane Cooper's signature on the release bound her son, David, to the terms of the release and barred his claims against the Ski Club and McBride. The court of appeals affirmed, [**8] holding that based on a parent's fundamental liberty interest in the care, custody, and control of her child, David's mother had the right to release David's claims for possible future injuries. *Cooper, 32 P.3d at 507.* We granted certiorari and now reverse.

II. STANDARD OF REVIEW

[HN1] Appellate courts review a trial court's order granting or denying a motion for summary judgment de novo. *Pierson v. Black Canyon Aggregates, 2002 Colo. LEXIS 424,* No. 01 SC161, 2002 Colo. LEXIS 424, at *12 (Colo. May 20, 2002). This is because such judgments "are rulings of law in the sense that they may not rest on the resolution of disputed facts." Id. (quoting *Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1250,* 26 Colo. Law. No. 1 230 (Colo. 1996)). Therefore, we decide today's issue de novo.

III. ANALYSIS

A. Validity of the Release

We must first determine whether Colorado's public policy allows parents to contractually release their child's future claims for injury caused by negligence. n5

n5 In *Jones v. Dressel, 623 P.2d 370 (Colo. 1981),* this court established a four-factor test to determine the validity of an exculpatory agreement. *Id. at 376.* However, because we rely on a public policy exception specifically relating to parental/guardian releases of a minor's claims to invalidate the exculpatory agreement, we need not consider the Jones factors to determine whether the exculpatory agreement in this case would have been valid under Jones.

[**9]

While it is a well-settled principle that [HN2] "[a] minor during his minority, and acting timely on reaching his majority, may disaffirm any contract that he may have entered into during his minority," *Nicholas v. People, 973 P.2d 1213, 1219,* 28 Colo. Law. No. 3 180 (Colo. 1999); *Doenges-Long Motors v. Gillen, 138 Colo. 31, 35-36, 328 P.2d 1077, 1080 (1958),* we have never specifically addressed whether a parent or guardian may release a child's cause of action on his behalf n6 or whether Colorado's public policy allows a parent or guardian to serve as indemnitor for his minor child's claims against an indemnitee. As such, the issue in this case presents a significant question regarding the junction of contract law, tort law, and public policy. n7

n6 In *Jones, 623 P.2d 370,* we noted that "the approval by a parent does not necessarily validate an infant child's contract." *Id. at 372 n.1.* However, we determined that Jones ratified the contract by accepting the benefits of it when he used the defendant's recreational skydiving facilities after reaching the age of majority, *Jones, 623 P.2d at 374,* and accordingly did not decide the issue we analyze today. [**10]

n7 [HN3] While we traditionally recognize a "strong policy of freedom of contract," *Allstate Ins. Co. v. Avis Rent-A-Car System, Inc., 947 P.2d 341, 346,* 27 Colo. Law. No. 1 155 (Colo. 1997), we also recognize that "exculpatory agreements have long been disfavored." *B & B Livery, Inc. v. Riehl, 960 P.2d 134, 136 (Colo. 1998).* Indeed, "[exculpatory clauses] stand at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts." Id.

Here, we agree with the Washington Supreme Court that [HN4] "there are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract." *Scott v. Pac. W. Mountain Resort, 119 Wash. 2d 484, 834 P.2d 6, 11, 12 (Wash. 1992)* (holding that "to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable"). Accordingly, we hold that Colorado's public policy affords minors significant

[**11] protections which preclude parents or guardians from releasing a minor's own prospective claim for negligence. We base our holding on our understanding of Colorado's public policy to protect children as reflected by legislation protecting minors as well as decisions from other jurisdictions, [*1233] which we find persuasive. However, we note that this question is a matter of legislative prerogative, and, of course, the General Assembly could choose to address it differently.

1. Colorado's Public Policy

The General Assembly has demonstrated an on-going commitment to afford minors significant safeguards from harm by passing numerous statutes designed to protect minor children. n8 Most significant of these for purposes of this case are the protections accorded minors in Colorado in the post-injury claim context. [HN5] Colorado laws do not allow a parent the unilateral right to foreclose a child's existing cause of action to recover for torts committed against him. n9 Rather, the General Assembly has granted minors a number of protections to safeguard their post-injury rights of recovery. Indeed, the Colorado Probate Code provides significant procedural protections for minors in the post-injury [**12] claim context. n10 This legislation creates mechanisms for the appointment of a conservator to protect a minor's settlement rights. *§ 15-14-403, 5 C.R.S.* (2001); *§ 15-14-425(2)(t), 5 C.R.S.* (2001). It also provides minors important protections by creating means by which the court may ratify the settlement of a minor's claims. *§ 15-14-412(1)(b), 5 C.R.S.* (2001). Importantly, a parent may not act as a minor's conservator as a matter of right, but only when appointed by the court. *§ 15-14-413, 5 C.R.S.* (2001).

n8 See generally, e.g., *§ 13-22-101, 5 C.R.S.* (2001) (eighteen is minimum age of competence for people to independently enter into contracts, manage estates, and sue and be sued); *§ 16-11-201(4)(a)(II), 6 C.R.S.* (2001) (possibility for increased criminal penalties for certain crimes committed against a child); § 17-22.5-405(5)(b) (same); § 17-27.9-103(1)(a) (same); *§ 18-3-412, 6 C.R.S.* (2001) (same); § § 26-6-101 to -307, 8 C.R.S. (2001) (comprehensive regulations in the Child Care Licensing Act); *§ 42-4-236, 11 C.R.S.* (2001) (unless exempted under subsection (3), mandatory use of child restraint systems in motor vehicles). [**13]

n9 See generally 67A C.J.S. Parent and Child § 114, at 469 (1978) ("In the absence of statutory or judicial authorization, the parent has no authority, merely because of the parental relation, to waive, release, or compromise claims by or against the child. This rule applies to a waiver, settlement, or release of the child's right of action for a personal injury or other tort.").

n10 For example, [HN6] under *section 15-14-403(1), 5 C.R.S.* (2001) of the Colorado Probate Code, the "person to be protected" (in this case the minor), *§ 15-14-403(1)(a), 5 C.R.S.* (2001) or "an individual interested in the estate, affairs, or welfare of the person to be protected," *§ 15-14-403(1)(b), 5 C.R.S.* (2001), "may petition for the appointment of a conservator or for any other appropriate protective order." § 15-14-403(1). Unless qualified or limited by the court, *§ 15-14-425(1), 5 C.R.S.* (2001), a conservator may "pay or contest any claim, settle a claim by or against the estate of the protected person by compromise, arbitration, or otherwise." *§ 15-14-425(2)(t), 5 C.R.S.* (2001). Furthermore, "if a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may," *§ 15-14-412(1), 5 C.R.S.* (2001), "authorize, direct, or ratify any other contract, trust, will or transaction relating to the protected person's property and business affairs, including a settlement of a claim, upon determining that it is in the best interest of the protected person." § 15-14-412(1)(b). Moreover, a parent may only act as a minor's conservator when appointed by the court. *§ 15-14-413, 5 C.R.S.* (2001) (listing parents sixth in prioritized list of eligibility for court appointment as conservator.)

[**14]

Thus, we agree with the Utah Supreme Court and the Washington Supreme Court -both of which recently analyzed the same issue presented here -that "since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury." *Scott, 834 P.2d at 11-12;* accord *Hawkins v. Peart, 2001 UT 94, 37 P.3d 1062, 1066 (Utah 2001).*

Arguably, the differences between the two types of releases may weaken any comparison between them. See Angeline Purdy, Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of a Minor's Future Claim, *68 Wash. L. Rev. 457, 472 (1993)*(arguing that while existing tort claims are vulnerable to parental mismanagement because of the financial pressure to accept inadequate settlements, outright parental dishonesty, and the existence of indemnity provisions in settlements, parents who release future claims do not have the same financial motivation to sign a release because -by signing the release before injury -the [*1234] parent will ultimately be required to pay for medical [**15] care).

We do not find these distinctions meaningful or persuasive, however. It may be true that parents in the pre-injury setting have less financial motivation to sign a release than a parent in the post-injury setting who needs money to care for an injured child. Nonetheless, the protections accorded minors in the post-injury setting illustrate Colorado's overarching policy to protect minors, regardless of parental motivations, against actions by parents that effectively foreclose a minor's rights of recovery. Thus, while a parent's decision to sign a pre-injury release on his child's behalf may not be in "deliberate derogation of his child's best interests," Purdy, supra, at 474, the effect of a release on the child in either the pre-injury context or the post-injury one is the same. If parents are unwilling or unable to care for an injured child, he may be left with "no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur." *Scott, 834 P.2d at 12.* In addition, while pre-injury releases might be less vulnerable to mismanagement, children still must be protected [**16] against parental actions -perhaps rash and imprudent ones -that foreclose all of the minor's potential claims for injuries caused by another's negligence.

Thus, given our historical regard for the special needs of minors and the fact that both a pre-injury release and a post-injury one work to deprive a child of rights of recovery, the fact that a parent is not afforded unilateral power to foreclose a minor's rights in the post-injury context supports our holding that he may not do so in the pre-injury setting either.

Moreover, our case law firmly supports the proposition that Colorado's public policy works to protect minors from parental actions that foreclose a minor's rights to recovery. See, e.g., *Elgin v. Bartlett, 994 P.2d 411, 414,* 29 Colo. Law. No. 1 199-15 (Colo. 1999) (holding that the statute of limitations applicable to a minor's cause of action for medical negligence does not begin to run until the minor reaches the age of eighteen, unless the minor has a court-appointed legal representative, because the language of the applicable statutory sections reflects the General Assembly's policy choice to operate literally for the protection of the minor by not allowing parents [**17] to remove or waive a minor child's legal disability by instituting a next friends suit, and thereby refusing to penalize the minor for the parents' action); *Rojhani v. Arenson, 929 P.2d 23, 26,* 25 Colo. Law. No. 7 164, 20 Brief Times Rptr. 775 (Colo. App. 1996) (concluding that parents' failure as next friends to timely file notice of minor's injury did not preclude the minor's suit because the minor was not capable of appreciating his injury and because no guardian or personal representative was appointed); *Cintron v. City of Colo. Springs, 886 P.2d 291, 295 (Colo. App. 1994)* (concluding that although a parent may voluntarily undertake to aid the assertion of a child's claim by acting as a next friend, a minor may not be charged with the parents' failure, acting as next friends, to discover the minor's injury or to provide notice thereof on the parents behalf); cf., e.g., *In re Miller, 790 P.2d 890, 892-93 (Colo. App. 1990)* (reasoning that "the law and policy of this state is that the needs of the children are of paramount importance and cannot be altered by the parties" and holding that an agreement between parents regarding child support is not enough, in and of itself, to allow [**18] deviation from the child support guidelines and that a trial court must presume, unless rebutted, that child support obligations must be set in the amount specified in the statutory schedule).

To allow a parent or guardian to execute exculpatory provisions on his minor child's behalf would render meaningless for all practical purposes the special protections historically accorded minors. In the tort context especially, a minor should be afforded protection not only from his own improvident decision to release his possible prospective claims for injury based on another's negligence, but also from unwise decisions made on his behalf by parents who are routinely asked to release their child's claims for liability. In Colorado, it has long been the rule that courts owe a duty to "exercise a watchful and protecting care over [a minor's] interests, and not permit his rights to be waived, prejudiced or surrendered either by [*1235] his own acts, or by the admissions or pleadings of those who act for him." *Seaton v. Tohill, 11 Colo. App. 211, 216, 53 P. 170, 172 (1898).* Nearly one hundred years later we confirmed this steadfast principle: [HN7] "Courts are charged with the responsibility [**19] to take special care in protecting the rights of minor children." *Abrams v. Connolly, 781 P.2d 651, 658 (Colo. 1989).* Thus, a minor is accorded special protection, and to allow a parent to release a child's possible future claims for injury caused by negligence may as a practical matter

leave the minor in an unacceptably precarious position with no recourse, no parental support, and no method to support himself or care for his injury. n11

n11 The court of appeals based its holding that a parent may execute a pre-injury release on behalf of his minor child on parents' fundamental right under the Due Process Clause to make decisions "concerning the care, custody, and control of their children." *Cooper, 32 P.3d at 507* (citing *Troxel v. Granville, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000)).* [HN8] While we certainly agree that parents have a liberty interest in the "care, custody and control of their children," *Troxel v. Granville, 530 U.S. at 65,* we do not believe that right encompasses a parent's decision to disclaim a minor's possible future recovery for injuries caused by negligence by signing a release on the minor's behalf. A parental release of liability on behalf of his child is not a decision that implicates such fundamental parental rights as the right to "establish a home and bring up children," *Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923),* and the right "to direct the upbringing and education of children under their control," *Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35, 69 L. Ed. 1070, 45 S. Ct. 571 (1925).* Moreover, it does not implicate a parent's "traditional interest . . . with respect to the religious upbringing of their children," *Wisconsin v. Yoder, 406 U.S. 205, 214, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972),* or such medical decisions as a parent's right to "retain a substantial . . . role" in the decision to voluntary commit his child to a mental institution (with the caveat that the child's rights and the physician's independent judgment also plays a role), *Parham v. J.R., 442 U.S. 584, 604, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979);* rather a parental release on behalf of a child effectively eliminates a child's legal right to sue an allegedly negligent party for torts committed against him. It is, thus, not of the same character and quality as those rights recognized as implicating a parents' fundamental liberty interest in the "care, custody, and control" of their children.

Furthermore, even assuming arguendo, that a parental release on behalf of a minor child implicates a parent's fundamental right to the care, custody, and control of his child, [HN9] this right is not absolute. *Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944); People v. Shepard, 983 P.2d 1, 4,* 28 Colo. Law. No. 8 197 (Colo. 1999). Indeed, "acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944)* (footnotes omitted). In fact, "in order to protect a child's well-being, the state may restrict parental control." *Shepard, 983 P.2d at 4.*

[**20]

2. Other Jurisdictions

Our holding that parents may not release a minor's prospective claim for negligence comports with the vast majority of courts that have decided the issue. In fact, the highest courts of two of our sister states, Utah and Washington, recently analyzed the precise issue facing us today, and both concluded that a parent may not execute a release on behalf of his minor child for prospective claims sounding in negligence. In *Hawkins v. Peart, 2001 UT 94, 37 P.3d 1062 (Utah 2001),* eleven-year-old Jessica Hawkins was injured when she was thrown from a horse during a trail ride with her family. *37 P.3d at 1063.* Jessica's mother had signed a release containing a waiver of liability and an indemnity provision. n12 Id. Relying on a public policy exception specifically relating to releases of a minor's claims and reasoning that Utah's statutes and rules favored the protection of minors with respect to contractual obligations, the Utah Supreme Court held that a parent may not release a minor's prospective claim for negligence. *37 P.3d at 1065-66.*

n12 The Utah court's analysis of the parental indemnity provision is discussed in the next section of this opinion.

[**21]

In addition, the facts of *Scott v. Pacific West Mountain Resort, 119 Wash. 2d 484, 834 P.2d 6 (Wash. 1992),* are remarkably similar to those presented in this case. In Scott, twelve-year-old Justin Scott, a student of a ski school, sustained severe head injuries while skiing a slalom race course that had been set by the ski school's owner. *Scott, 834 P.2d at 8.* Prior to the injury, Justin's mother had signed a ski school application [*1236] that included an exculpatory

clause relieving the school from any liability for its own negligence. *834 P.2d at 8-9.* The Washington Supreme Court reasoned that "since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury." *834 P.2d at 11-12.* Accordingly, the court held, "to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable." *834 P.2d at 12.*

Finally, other courts across the nation that have considered the issue have determined that a parent may not release a **[**22]** minor's prospective cause of action. See, e.g., *Apicella v. Valley Forge Military Acad. & Junior Coll., 630 F. Supp. 20, 24 (E.D. Pa. 1985)* ("Under Pennsylvania law, parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship."); *Fedor v. Mauwehu Council, Boy Scouts of Am., 21 Conn. Supp. 38, 143 A.2d 466, 468 (Conn. Super. Ct. 1958)* (ruling that "it is doubtful that either the mother or father of this minor plaintiff had the power or authority to waive his rights against the defendant arising out of acts of negligence on the part of the defendant" and sustaining the demurrer of the plaintiff to the special defense that the waiver of all claims for damages absolved the defendant of liability); *Meyer v. Naperville Manner, Inc., 262 Ill. App. 3d 141, 634 N.E.2d 411, 415, 199 Ill. Dec. 572 (Ill. App. Ct. 1994)* ("Since the parent's waiver of liability was not authorized by any statute or judicial approval, it had no effect to bar the minor child's (future) cause of action . . . ."); *Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979)* **[**23]** (stating in dicta that "a parent, or guardian, cannot release the child's, or ward's, cause of action"); *Fitzgerald v. Newark Morning Ledger Co., 111 N.J. Super. 104, 267 A.2d 557, 559 (N.J. Super. Ct. Law Div. 1970)* (concluding that release and indemnity provision signed by father on behalf of his minor son was void as against public policy); *Alexander v. Kendall Cent. Sch. Dist., 221 A.D.2d 898, 634 N.Y.S.2d 318, 319 (N.Y. App. Div. 1995)* (stating in dicta that "a minor is not bound by a release executed by his parent"); *Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989)* (holding that mother could not execute a valid release or exculpatory clause on behalf of her minor son); *Munoz v. Il Jaz Inc., 863 S.W.2d 207, 209-10 (Tex. Ct. App. 1993)* ("We hold that section 12.04(7) of the Family Code, which empowers a parent to make legal decisions concerning their child, does not give parents the power to waive a child's cause of action for personal injuries. Such an interpretation of the statute would be against the public policy to protect minor children."); see also *Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 213, 113 L. Ed. 2d 158, 111 S. Ct. 1196 (1991)* **[**24]** (White, J., concurring) (stating the general rule that parents cannot waive causes of action on behalf of their children). But see *Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 274 Cal.Rptr. 647, 649-50 (Cal. Ct. App. 1990)* (holding that parent may contract for child and therefore release signed on child's behalf by parent is valid); n13 cf., *Zivich v. Mentor Soccer Club, Inc., 82 Ohio St. 3d 367, 696 N.E.2d 201, 207 (Ohio 1998)* (holding that "parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sports activities where the cause of action sounds in negligence"); n14 *Mohney v. USA Hockey, Inc., 77 F. Supp. 2d 859 (E.D. Ohio 1999)* (applying Zivich holding and ruling that "nothing in the Zivich opinion indicates that its holding should be limited to nonprofit sports organizations that are local in scope"), aff'd in part, rev'd in part on **[*1237]** other grounds, *Mohney v. USA Hockey, Inc., 248 F.3d 1150 (6th Cir. 2001).*

n13 However, the Hohe court relied on *Doyle v. Giuliucci, 62 Cal. 2d 606, 401 P.2d 1, 43 Cal. Rptr. 697 (Cal. 1965),* which only allowed a parent to bind a child to the arbitration forum. *Doyle, 401 P.2d at 2-3.* **[**25]**

n14 Although Ohio's General Assembly later enacted legislation affording "qualified immunity to unpaid athletic coaches and sponsors of athletic events," *Zivich, 696 N.E.2d at 205,* at the time the Zivich case arose, Ohio did not have legislation providing volunteers any immunity from liability. Subsequently, the Ohio legislature repealed these laws. See *Ohio Rev. Code Ann. § 2305.381* (Anderson 2002) (repealed 2001); *Ohio Rev. Code Ann. § 2305.382* (Anderson 2002) (repealed 2001).

Accordingly, in this case, Diane Cooper's execution of the release did not act as a release of the claims of her minor son David.

B. PARENTAL INDEMNITY PROVISIONS

Finally, we consider the validity of parental indemnity provisions. n15 As a practical matter, release and indemnity provisions in contracts signed by parents or guardians on behalf of their minor children go hand-in-hand: having

invalidated release provisions, it would be contradictory to then effectively undercut a minor's rights to sue by allowing indemnity clauses that [**26] make such suits for all realistic purposes unlikely.

n15 Though this issue was not specifically encompassed within the question on which we granted certiorari, given our holding that Diane Cooper could not contractually release David's future claims for injury caused by negligence, and to assist the court on remand, as well as to conserve scarce judicial resources, we address the validity of parental indemnification provisions.

Thus, we agree with the reasoning of those courts invalidating parental indemnity provisions that a minor child would be unlikely to pursue claims if his parent or guardian served as the ultimate source of compensation for the negligent party's torts, and that -if the child did bring a cause of action -family discord would likely result. See *Hawkins, 37 P.3d at 1067* (reasoning that "an indemnification from negligence that specifically makes a parent the ultimate source of compensation would likely result in inadequate compensation for the minor or family discord" and [**27] holding that parental indemnification provisions are invalid); see also, e.g., *Valdimer v. Mount Vernon Hebrew Camps, Inc., 9 N.Y.2d 21, 172 N.E.2d 283, 285, 210 N.Y.S.2d 520 (N.Y. 1961)* (concluding that post-injury parental indemnification agreements thwart state's protective policy by discouraging infant to bring claim or creating family disharmony if infant elects to press his claim); *Ohio Cas. Ins. Co. v. Mallison, 223 Ore. 406, 354 P.2d 800, 802-03 (Or. 1960)* (in post-injury parental indemnification setting, reasoning that a child would be unlikely to pursue claims if agreement required parent to indemnify defendant).

Moreover, the effect of a parental indemnity agreement -to assure that a negligent party will not be held financially responsible for that party's torts committed against a minor -undermines a parent's duty to protect the best interests of the child. Thus, we also agree with the Utah Supreme Court that parental indemnity provisions "can only serve to undermine the parent's fundamental obligations to the child." *Hawkins, 37 P.3d at 1067;* see also, e.g., *Fitzgerald, 267 A.2d at 559* (concluding [**28] that release and indemnity provision signed by father on behalf of his minor son was void as against public policy because the agreement may have conflicted with the father's duty to his son because the father may prevent infant from bringing suit since the father would ultimately be responsible under indemnity provision); *Childress, 777 S.W.2d at 7* (holding that "indemnification agreements executed by a parent or guardian in favor of tortfeasors, actual or potential, committing torts against an infant or incompetent, are invalid as they place the interests of the child or incompetent against those of the parent or guardian").

Therefore, we also hold that [HN10] parental indemnity provisions violate Colorado's public policy to protect minors and create an unacceptable conflict of interest between a minor and his parent or guardian.

IV. CONCLUSION

In summary, we hold that Colorado's public policy disallows a parent or guardian to execute exculpatory provisions on behalf of his minor child for a prospective claim based on negligence. Specifically, we hold that a parent or guardian may not release a minor's prospective claim for negligence and may not indemnify [**29] a tortfeasor for negligence committed against his minor child. Therefore, we reverse the court of appeals' judgment with instructions to that court to return the case to the trial court for further proceedings consistent with this opinion.

1 of 1 DOCUMENT

Justin Scott, et al, Appellants, v. Pacific West Mountain Resort, et al, Respondents

No. 57944-0

SUPREME COURT OF WASHINGTON

119 Wn.2d 484; 834 P.2d 6; 1992 Wash. LEXIS 205

July 30, 1992, Decided
July 30, 1992, Filed

PRIOR HISTORY: [*1]**
Superior Court: The Superior Court for King County, No. 89-2-17124-4, George T. Mattson and Carol A. Schapira, JJ., on January 11 and March 11, 1991, granted summary judgments in favor of the defendants.

DISPOSITION:

Holding that an exculpatory clause in the ski school application included negligence, but that the parent who signed the application lacked authority to waive the child's future right of action for personal injuries resulting from negligence, that the skier did not assume the risk of the ski resort's negligence, and that there remained unresolved issues of material fact regarding the ski resort's negligence and proximate cause, the court *reverses* the judgment except for the dismissal of the parents' cause of action against the ski school, which is *affirmed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff skier and parents filed a suit against defendant ski school and ski resort for injuries he suffered in a skiing accident. The ski school and ski resort filed motions for summary judgment. The Superior Court for King County granted the ski school's motion based upon an exculpatory clause in the ski school application and granted the ski resort's motion based upon a theory of implied assumption of risk. The skier and parents appealed.

OVERVIEW: The skier, a 12-year-old, was injured while skiing at the ski resort as a student of the ski school. The skier's parents had signed an application for the ski school which included an exculpatory provision. By signing the application, the parents agreed to hold the ski school harmless for all claims arising out of the instruction of skiing. The suit alleged that the racecourse on which the skier had been skiing had been improperly prepared and had been negligently placed too close to an unfenced towrope shack. The court held that the language of the purported exculpatory clause contained in the ski school application was sufficiently clear to give notice that the ski school was attempting to be released from liability. The court held, however, that the parents did not have legal authority to waive their child's own future cause of action for his personal injuries. However, the exculpatory clause served to bar the parents' cause of action based upon injury to their child. In addition, the court held that the trial court should not have applied the doctrine of primary implied assumption of risk as a complete bar to the skier's and parents' recovery against the ski resort operator.

OUTCOME: The court reversed the summary judgment in favor of the ski resort and remanded to the trial court for further proceedings consistent with the opinion. As to the summary judgment in favor of the ski school, the court

affirmed the dismissal of the parents' cause of action, but reversed and remanded with regard to the skier's own cause of action.

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts > Negligence > Defenses > Exculpatory Clauses
[HN1] Exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced. The sufficiency of the language to effect a release is generally a question of law.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN2] The word "negligence" is not essential to the effectiveness of an express release. Courts should use common sense in interpreting purported releases, and the language "hold harmless from all claims" logically includes negligent conduct. One does not have a "claim" to be "held harmless" from unless there is a basis for liability.

Torts > Multiple Defendants > Contribution & IndemnityTorts > Negligence > Defenses > Exculpatory Clauses
[HN3] Indemnity agreements are closely akin to releases. Although there is a distinction in definition between exculpatory clauses and indemnity clauses, in certain settings they both attempt to shift ultimate responsibility for negligence and so are generally construed by the same principles of law. An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing the injury. An indemnification clause attempts to shift responsibility for the payment of damages to someone other than the negligent party, usually back to the injured party, thus likely producing the same result as an exculpatory clause.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN4] A parent does not have legal authority to waive a child's own future cause of action for personal injuries resulting from a third party's negligence.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN5] The general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others or (3) they are inconspicuous.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN6] Under Washington law parents may not settle or release a child's claim without prior court approval. Further, in any settlement of a minor's claim, Washington law provides that a guardian ad litem must be appointed (unless independent counsel represents the child) and a hearing held to approve the settlement.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN7] Preinjury releases do not bar the child's cause of action for personal injuries.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN8] To the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable. However, an otherwise conspicuous and clear exculpatory clause can serve to bar the parents' cause of action based upon injury to their child.

Torts > Negligence > Defenses > Assumption of Risk
[HN9] Primary implied assumption of risk continues as a complete bar to recovery after the adoption of comparative negligence laws.

Torts > Negligence > Defenses > Assumption of Risk
[HN10] The assumption of risk doctrine is divided into four classifications: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable.

Torts > Negligence > Defenses > Assumption of Risk

[HN11] Express assumption occurs when parties agree in advance that one of them is under no obligation to use reasonable care for the benefit of the other and will not be liable for what would otherwise be negligence. When such a plaintiff is injured by one of the risks for which he or she has agreed to forgo suit, the claim will be barred because that risk was assumed by the plaintiff. The bar of express assumption is based on contract and survives the enactment of comparative negligence statutes. However, such assumption only bars a claim with regard to the risks actually assumed by the plaintiff.

Torts > Negligence > Defenses > Assumption of Risk
[HN12] Implied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks. It is important to carefully define the scope of the assumption, i.e., what risks were impliedly assumed and which remain as a potential basis for liability.

Torts > Negligence > Defenses > Assumption of Risk
[HN13] Primary implied assumption of the risk remains a complete bar to recovery. This is because primary assumption occurs when the plaintiff has impliedly consented to assume a duty. If the defendant does not have the duty, there can be no breach and hence no negligence. A classic example of primary assumption of risk occurs in sports cases. One who participates in sports "assumes the risks" which are inherent in the sport. To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence. Therefore, that type of assumption acts as a complete bar to recovery. The doctrine of primary implied assumption of the risk can perhaps more accurately be described as a way to define a defendant's duty. A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.

Torts > Negligence > Defenses > Assumption of Risk
[HN14] Since implied primary assumption of the risk negates duty, it acts as a bar to recovery when the injury results from one of the risks assumed.

Torts > Negligence > Defenses > Assumption of RiskTorts > Negligence > Defenses > Comparative & Contributory Negligence
[HN15] Primary implied assumption of risk should continue to be an absolute bar after the adoption of comparative fault because in this form it is a principle of "no duty" and hence no negligence, thus negating the existence of any underlying cause of action.

Torts > Negligence > Defenses > Assumption of RiskTorts > Negligence > Defenses > Comparative & Contributory Negligence
[HN16] Those who choose to participate in sports or amusements consent to being injured by the risks inherent in the activity, and that such conduct constitutes "primary" assumption of risk, which continues as a complete bar to recovery even after the adoption of comparative negligence. In contrast, implied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk.

Torts > Negligence > Negligence Generally
[HN17] A skier is a business invitee of the ski area operator. The operator owes a duty to a skier to discover dangerous conditions through reasonable inspection, and repair that condition or warn the invitees, unless it is known or obvious. *Wash. Rev. Code § 70.117* modifies but is generally consistent with the common law. This state's ski statute imposes certain duties on skiers and on ski operators but does not purport to relieve ski operators from all liability for their own negligence.

Torts > Negligence > Defenses > Assumption of Risk
[HN18] A skier does impliedly assume certain risks by engaging in the sport. Implied primary assumption of the risk means the plaintiff assumes the dangers that are inherent in and necessary to the particular sport or activity.

Torts > Negligence > Defenses > Assumption of Risk

[HN19] Primary assumption of the risk in a sports setting does not include the failure of the operator to provide reasonably safe facilities.

Civil Procedure > Summary Judgment > Supporting Papers & Affidavits
[HN20] Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Wash. Rev. Code § 56(c).* In such cases facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard.

Torts > Negligence > Defenses > Assumption of RiskTorts > Negligence > Defenses > Comparative & Contributory Negligence
[HN21] The doctrine of unreasonable assumption of the risk has been subsumed in comparative negligence law.

Torts > Negligence > Defenses > Comparative & Contributory NegligenceTorts > Negligence > Standards of Care
[HN22] The issue of contributory negligence for minors from 6 to 16 years of age is generally a question for the trier of fact. Washington recognizes a special standard of care applicable to children; a child's conduct is measured by the conduct of a reasonably careful child of the same age, intelligence, maturity, training and experience.

COUNSEL:

Law Offices of Christopher L. Otorowski, by *Christopher L. Otorowski*, for appellants.

Steven R. Meeks, for respondent Pacific West Mountain Resort.

Carney, Stephenson, Badley, Smith & Spellman, P.S., by *David W. Bever* and *Ruth Nielsen*, for respondents Connor, et al.

Bryan P. Harnetiaux, Gary N. Bloom, and *Daniel E. Huntington* on behalf of Washington State Trial Lawyers Association, amicus curiae for appellants.

Michael H. Runyan and *Linda E. Blohm* on behalf of Washington Defense Trial Lawyers, amicus curiae for respondents.

Christopher W. Moore on behalf of PNSAA, WSSI, PSIA/Northwest, PNSA-USSA, [***6] Seattle Ski Alliance, and PNSEF, amici curiae for respondents.

JUDGES:

En Banc. Andersen, J. Dore, C.J., and Brachtenbach, Dolliver, Durham, Smith, Guy, and Johnson, JJ., concur. Utter, J., did not participate in the disposition of this case.

OPINIONBY:

ANDERSEN

OPINION:

[*487] [**8] Facts of Case

Justin Scott and his parents appeal the dismissals of their tort claims against a ski resort and a ski school for injuries suffered by Justin in a skiing accident. The ski school's motion for summary judgment was granted based upon an exculpatory clause in the ski school application and the ski resort's motion for summary judgment was granted based upon a theory of implied assumption of risk.

[1] Since the trial courts dismissed the claims on summary judgment, the facts n1 and all reasonable inferences therefrom are considered in a light most favorable to the plaintiffs as the nonmoving parties. n2

n1 Although different facts were submitted during the two separate motions for summary judgment by the ski school and the ski resort, the facts have herein been combined for ease of reading. However, for purposes of legal analysis, only the facts that were before the respective trial courts were considered in the issues relating to the different defendants. [***7]

n2 *Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).*

On March 11, 1989, 12-year-old Justin Scott sustained severe head injuries while skiing at a commercial ski resort [*488] owned by Pacific West Mountain Resort (hereafter ski resort). Justin was a student of the privately owned Grayson Connor Ski School (hereafter ski school) which offered lessons at the ski resort.

At the time of his injury, Justin was attempting to ski on a slalom race course which had been laid out by the ski school owner, allegedly according to instructions from an agent of the ski resort.

Justin's mother, Barbara Scott, with Justin's father's knowledge and acquiescence, had filled out and signed an application for the ski school which included Justin's name, grade in school (sixth), years skied (2) and other personal information. She checked the boxes indicating Justin was an advanced skier and that he wished to purchase ski-racing lessons. The following language was included in the application:

> For and in consideration of the instruction of skiing, [***8] I hereby hold harmless Grayson Connor, and the Grayson Connor Ski School and any instructor or chaperon from all claims arising out of the instruction of skiing or in transit to or from the ski area. I accept full responsibility for the cost of treatment for any injury suffered while taking part in the program.

Witnesses to the accident agreed Justin was practicing on the racecourse and that he missed one of the gates n3 and left the course. One witness reported that as Justin left the course, he appeared to be turning uphill to avoid an unused tow-rope shack but was unable to do so and was ejected out of his skis and down into the depression under the shack. He was found unconscious underneath the shack wrapped around one of the shack's 12- by 12-inch supports, and had sustained severe head injuries.

n3 A gate is a lightweight pole or poles inserted into the snow around which a slalom skier must go in descending the race course.

The Scotts sued both the ski resort and the ski school alleging the racecourse had [***9] been improperly prepared and had been negligently placed too close to an unfenced towrope shack which was supported by exposed unpadded pillars. The exact distance between the shack and the racecourse [*489] is disputed but there was evidence the shack was approximately 40 feet from the closest gate. Pacific West noted in [**9] its memorandum in support of summary judgment that the distance between the shack and the nearest gate was a matter of dispute, as is the distance between the shack and where Justin left the ski course. These, of course, are factual dete.minations which cannot be resolved on summary judgment. One expert witness' declaration opined that Justin would have traveled the short distance between the racecourse and the shed in approximately 2 seconds.

There is evidence that the snow adjacent to the racecourse had not been packed and was wet and heavy and more difficult to ski in than the packed snow in the racecourse.

The ski school moved for summary judgment on the basis that the exculpatory clause in the ski school application, signed by Justin's mother, relieved the school from any liability for its own negligence. The trial judge granted that motion and [***10] dismissed the claims against the ski school.

The ski resort moved for summary judgment on the ground that Justin had "assumed the risk" and was thus barred from recovery in a negligence action against the ski resort. The trial judge granted that motion and dismissed the claims against the ski resort.

Petitions for direct review were granted by this court.

Issues Regarding Ski School's Dismissal

Issue One. Was the language of the purported exculpatory clause sufficiently clear to release the ski school for negligent conduct?

Issue Two. May a parent legally waive a child's future potential cause of action for personal injuries resulting from a third party's negligence?

Issues Regarding Ski Resort's Dismissal

Issue Three. Subsequent to the adoption of comparative negligence, does the doctrine of primary implied assumption of risk act to bar recovery or only to reduce damages?

[*490] Issue Four. Under the facts of this case, did the trial court properly apply the doctrine of primary implied assumption of risk as a complete bar to plaintiff's recovery?

Decision

Issue One.

Conclusion. We conclude that the language of the purported exculpatory clause contained in the ski school [***11] application was sufficiently clear to give notice that the ski school was attempting to be released from liability for its negligent conduct.

[2-5] [HN1] Exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced. n4 The sufficiency of the language to effect a release is generally a question of law. n5

n4 1 S. Speiser, C. Krause & A. Gans, *American Law of Torts* § 5:39, at 1101-03 (1983).

n5 1 S. Speiser, C. Krause & A. Gans, at 1102; *Blide v. Rainier Mountaineering, Inc., 30 Wn. App. 571, 574, 636 P.2d 492 (1981), review denied, 96 Wn.2d 1027 (1982).*

Some cases and commentators have declared that a clause will not be construed to include an exemption for negligence unless it includes the word "negligence" or language with similar import. n6 However, many courts have held that clear and unambiguous exculpatory language can eliminate negligence liability without expressly using the word [***12] "negligence". n7 [**10] Two Washington Court of Appeals cases have also held that [HN2] the word "negligence" is not essential to [*491] the effectiveness of an express release. n8 We agree. Courts should use common sense in interpreting purported releases, n9 and the language "hold harmless . . . from all claims" logically includes negligent conduct. One does not have a "claim" to be "held harmless" from unless there is a basis for liability. The language of the exculpatory clause shows the parties' intent to shift the risk of loss. The second sentence stating that the parents of the skier "accept full responsibility for the cost of treatment for any injury" supports this conclusion.

n6 *E.g.*, W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 68, at 484 (5th ed. 1984); *O'Connell v. Walt Disney World Co., 413 So. 2d 444, 447 (Fla. Dist. Ct. App. 1982); Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117, 1122 (10th Cir. 1978).*

n7 *See, e.g., Boehm v. Cody Country Chamber of Commerce, 748 P.2d 704, 711 (Wyo. 1987)* (the language "hold harmless and release . . . all claims" sufficient to release for negligence); *Weiner v. Mt. Airy Lodge, Inc., 719 F. Supp. 342, 345 (M.D. Pa. 1989)* ("[T]o say that negligent conduct is not included in '*any* liability' is patently incorrect."). 1 S. Speiser, C. Krause & A. Gans, *Torts* § 5:39, at 1089 (1983) (even though preinjury release does not refer to "negligence", where the hazard is within the contemplation of the release, the word is not essential). [***13]

n8 *Hewitt v. Miller, 11 Wn. App. 72, 79, 521 P 2d 244, review denied, 84 Wn.2d 1007 (1974); Blide, 30 Wn. App. at 574.*

n9 *Weiner, 719 F. Supp. at 345.*

Plaintiffs also argue that the hold harmless language is more "indemnity" language than "release" language and therefore should not be sufficient to serve as an exculpatory clause. However, [HN3] indemnity agreements are "closely akin" to releases. n10 The court in *O'Connell v. Walt Disney World Co., 413 So. 2d 444, 446 (Fla. Dist. Ct. App. 1982)* explained that although there is a distinction in definition between exculpatory clauses and indemnity clauses, in these settings they both attempt to shift ultimate responsibility for negligence and so are generally construed by the same principles of law. An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing the injury. An indemnification clause attempts to **[***14]** shift responsibility for the payment of damages to someone other than the negligent party, usually back to the injured party, thus likely producing the same result as an exculpatory clause.

n10 1 S. Speiser, C. Krause & A. Gans § 5:39, at 1103; *57A Am. Jur. 2d Negligence § 51*, at 108 (1989).

Thus, in this case the fact that the application uses the words "hold harmless" rather than the word "release" does not significantly impact the issue of whether the effect was to exculpate the ski school from liability for its own negligence.

[*492] Plaintiffs also argue that the claim was one not "arising out of the instruction of skiing" because it was caused by the ski instructor's placement of the racecourse too close to the shed. However, it is clear from the application form that these were ski racing lessons; a racecourse would therefore be an integral part of teaching ski racing. This argument is factually strained and unconvincing.

We conclude that to the extent the release is otherwise legally valid the language **[***15]** of the exculpatory clause was sufficiently clear to release the ski school from liability for negligent conduct. We therefore must reach the legal issue regarding parents' authority to release not only their own claims but also the potential future claim belonging to a child.

Issue Two.

Conclusion. [HN4] A parent does not have legal authority to waive a child's own future cause of action for personal injuries resulting from a third party's negligence.

[6] [HN5] The general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others or (3) they are inconspicuous. n11 In the present case, there is no allegation that the conduct fell below that of ordinary negligence or that the language was inconspicuous or unwittingly signed. The issue is whether this release violates public policy.

n11 *Wagenblast v. Odessa Sch. Dist. 105-157-166 J*, 110 *Wn.2d 845, 856, 758 P.2d 968, 85 A.L.R.4th 331 (1988); McCutcheon v. United Homes Corp., 79 Wn.2d 443, 486 P.2d 1093 (1971); Blide v. Rainier Mountaineering, Inc., supra; Shorter v. Drury, 103 Wn.2d 645, 695 P.2d 116, cert. denied, 474 U.S. 827 (1985); Baker v. Seattle, 79 Wn.2d 198, 484 P.2d 405 (1971).*

[*16]**

[11]** Whether exculpatory clauses signed by parents which bar a child's cause of action for injuries sustained due to negligence violate public policy is a question of first impression in Washington.

Washington cases have upheld exculpatory clauses in favor of private parties in various high risk sports-related situations. n12 However, in none of these cases did a release **[*493]** 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.

n12 *E.g., Conradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 728 P.2d 617 (1986); Blide v. Rainier Mountaineering, Inc., supra; Hewitt v. Miller, supra. See also Garretson v. United States, 456 F.2d 1017 (9th Cir. 1972).*

[*17]**

The ski school argues that our recent opinion in *Wagenblast v. Odessa Sch. Dist. 105-157-166 J*, 110 *Wn.2d 845, 758 P.2d 968, 85 A.L.R.4th 331 (1988)* impliedly holds that exculpatory releases can be enforced to bar a child's cause of action when a release is signed by a parent. That is incorrect. In *Wagenblast*, we decided that it violated public policy to enforce releases (signed by students and their parents) which released school districts from their negligence during public school athletics. Since the releases were struck down on other grounds, it was unnecessary in *Wagenblast* to answer the question whether parents have the authority to release a third party for future negligent injury to their child. Hence this issue was not decided, impliedly or otherwise, in *Wagenblast*. While upholding some exculpatory clauses, we have also held some kinds of exculpatory clauses to be violative of public policy and therefore unenforceable. n13 There are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract. n14 **[***18]** In deciding the particular issue before the courts, it is helpful to look to the analogous situation where parents seek to release their child's cause of action for injuries already sustained. The ski school argues that since Washington law allows a parent to sue on behalf of the child, it also should allow a parent to release a cause of action.

n13 *McCutcheon v. United Homes Corp., supra* (releases for negligence void in residential landlord-tenant setting); *Thomas v. Housing Auth., 71 Wn.2d 69, 426 P.2d 836 (1967)* (voiding provision exculpating a public housing authority from liability for negligence); *Wagenblast v. Odessa Sch. Dist. 105-157-166 J, supra* (invalidating exculpatory clauses releasing public schools for liability for injuries sustained by students in interscholastic athletics).

n14 *Wagenblast, 110 Wn.2d at 849.*

[*19]**

[*494] Contrary to the ski school's argument, it is settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release a cause of action belonging to their child. n15 Courts often hold that in a postinjury setting a parent's signature on a release is ineffective to bar a minor's claims against a negligent party. n16 Washington law is in accord. [HN5] Under Washington law parents may not settle or release a child's claim without prior court approval. n17 Further, in any settlement of a minor's claim, Washington law provides that a guardian ad litem must be appointed (unless independent counsel represents the child) and a hearing held to approve the settlement. n18

n15 *See 59 Am. Jur. 2d Parent and Child § 40*, at 183 (1987); 67A C.J.S. *Parent and Child* § 114, at 469 (1978).

n16 *See, e.g., Castro v. Boulevard Hosp., 106 A.D.2d 539, 483 N.Y.S.2d 65 (1984); Whitcomb v. Dancer, 140 Vt. 580, 443 A.2d 458 (1982); Colfer v. Royal Globe Ins. Co., 214 N.J. Super. 374, 519 A.2d 893 (1986).*
[*20]**

n17 SPR 98.16W; 4A L. Orland & K. Tegland, Wash. Prac., *Rules Practice* § 6081, at 53-57 (4th ed. 1990).

n18 SPR 98.16W.

[7] Since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's [**12] cause of action prior to an injury. In situations where parents are unwilling or unable to provide for a seriously injured child, the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur.

Numerous cases in other jurisdictions have considered the validity of preinjury releases signed by a parent and concluded that such [HN7] releases do not bar the *child's* cause of action for personal injuries. n19 We agree with this view.

n19 *Fedor v. Mauwehu Coun., Boy Scouts of Am., Inc., 21 Conn. Supp. 38, 143 A.2d 466 (1958)* (a release signed by a parent waiving future claims for injury violates public policy, and is ineffective to bar minor's negligence claim); *Childress v. Madison Cy., 777 S.W.2d 1 (Tenn. Ct. App. 1989)* (mother cannot execute a valid release or exculpatory clause as to the rights of her son and such release is void as to the son's rights although valid to waive the mother's claim). *Accord, Rogers v. Donelson-Hermitage Chamber of Commerce, 807 S.W.2d 242 (Tenn. Ct. App. 1990); Doyle v. Bowdoin College, 403 A.2d 1206, 1208 n.3 (Me. 1979)* (releases signed by parent prior to son being injured playing hockey were void as a parent cannot release a child's cause of action) (citing *Stockman v. South Portland, 147 Me. 376, 383, 87 A.2d 679 (1952)). See also International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 213, 113 L. Ed. 2d 158, 111 S. Ct. 1196, 1211 (1991)* (White, J., concurring) (stating the general rule that parents cannot waive causes of action on behalf of their children). *See Fitzgerald v. Newark Morning Ledger Co., 111 N.J. Super. 104, 267 A.2d 557 (1970). See also* R. Kaiser, *Liability and Law in Recreation, Parks, and Sports* 84 (1986) (releases are invalid when minors or their parents sign the release as it is generally accepted a parent can surrender his or her future tort claim, but may not surrender the independent claim of a minor child). *But see Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 1565, 274 Cal. Rptr. 647 (1990)* (parent can contract for a child). However, *Hohe* relies only on a case which allowed a parent to bind a child to the arbitration forum.

[***21]

[*495] Amici Washington Defense Trial Lawyers and various ski organizations argue that the invalidation of releases signed by parents to bar children's claims would make sports engaged in by minors prohibitively expensive due to insurance costs. While this is a valid concern, the same argument was made and rejected in *Wagenblast*. Indeed, the same argument can be made in many areas of tort law, *e.g.*, provision of medical or legal services. No legally sound reason is advanced for removing children's athletics from the normal tort system.

[8] We hold that to [HN8] the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable. However, an otherwise conspicuous and clear exculpatory clause can serve to bar the parents' cause of action based upon injury to their child. Therefore, we hold that Justin's parents' cause of action is barred by the release; Justin's own cause of action is not barred.

Issue Three.

Conclusion. [HN9] Primary implied assumption of risk continues as a complete bar to recovery after the adoption of comparative negligence laws.

[*496] The entire doctrine [***22] of "assumption of risk" is surrounded by much confusion, n20 and has been improperly applied in many ski accident cases. n21 This is partially because at common law both assumption of risk and contributory negligence operated as total bars to recovery. n22 Therefore, it was formerly not critical that the two concepts be carefully distinguished. With the enactment of the comparative negligence and comparative fault statutes, it became essential to separate the various kinds of assumption of risk to distinguish between the kinds that shift the defendant's duty to the plaintiff (and hence bar the claim) and the types which are essentially contributory negligence (and hence simply reduce damages).

n20 W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 68, at 480-84 (5th ed. 1984); *see* Annot., *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk, 16 A.L.R.4th 700 (1982).*

n21 Note, *Ski Operators and Skiers -- Responsibility and Liability*, 14 New Eng. L.R. 260, 262 (1978-1979).

n22 *ITT Rayonier, Inc. v. Puget Sound Freight Lines, 44 Wn. App. 368, 374, 722 P.2d 1310 (1986).*

[***23]

[**13] Under the traditional Prosser and Keeton analysis, [HN10] the assumption of risk doctrine is divided into four classifications: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable. *Shorter v. Drury, 103 Wn.2d 645, 655, 695 P.2d 116, cert. denied, 474 U.S. 827 (1985).*

[HN11] Express assumption occurs when parties agree in advance that one of them is under no obligation to use reasonable care for the benefit of the other and will not be liable for what would otherwise be negligence. When such a plaintiff is injured by one of the risks for which he or she has agreed to forgo suit, the claim will be barred because that risk was assumed by the plaintiff. n23 The bar of express assumption is based on contract and survives the enactment of comparative negligence statutes. n24 However, such [*497] assumption only bars a claim with regard to the risks actually assumed by the plaintiff. n25

n23 V. Schwartz, *Comparative Negligence* § 9.2, at 157-58 (2d ed. 1986); W. Keeton, D. Dobbs, R. Keeton & D. Owen § 68, at 482-84. [***24]

n24 *Shorter v. Drury, 103 Wn.2d 645, 656, 695 P.2d 116, cert. denied, 474 U.S. 827 (1985); Leyendecker v. Cousins, 53 Wn. App. 769, 773, 770 P.2d 675, review denied, 113 Wn.2d 1018 (1989);* W. Keeton, D. Dobbs, R. Keeton & D. Owen § 68, at 496; *ITT Rayonier, 44 Wn. App. at 376 n.5.*

n25 *See Shorter, 103 Wn.2d at 655-58.*

[9] [HN12] Implied *primary* assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks. n26 It is important to carefully define the *scope* of the assumption, *i.e.*, what risks were impliedly assumed and which remain as a potential basis for liability. It is this type of assumption of risk which was the basis for the grant of summary judgment in favor of the ski resort operator.

n26 *Kirk v. WSU, 109 Wn.2d 448, 453, 746 P.2d 285 (1987)* (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* 496 (5th ed. 1984)).

[***25]

As discussed in the next issue, the last two types of assumption of risk (which involve the plaintiff's voluntary choice to encounter a risk created by the defendant's negligence) retain no independent significance from contributory negligence after the adoption of comparative negligence.

Washington case law is somewhat confusing on the issue whether subsequent to the adoption of comparative negligence "primary implied assumption of risk" acts as a complete bar to recovery or only acts as a damage-reducing factor.

[10, 11] A number of Washington cases are in agreement with Dean Prosser, that [HN13] primary implied assumption of the risk remains a complete bar to recovery. n27 This is because primary assumption occurs when the plaintiff has impliedly consented to assume a duty. If the defendant does not have the duty, there can be no breach and hence no negligence. n28 [*498] A classic example of primary assumption of risk occurs in sports cases. One who participates in sports "assumes the risks" which are *inherent in the sport.* To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence. Therefore, [***26] that type of assumption acts as a complete bar to recovery. n29 The doctrine of primary implied assumption of the risk can perhaps

more accurately be described as a way to define a defendant's duty. n30 A defendant [**14] simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.

n27 *Ridge v. Kladnick, 42 Wn. App. 785, 788, 713 P.2d 1131, review denied, 106 Wn.2d 1011 (1986); ITT Rayonier, 44 Wn. App. at 376 n.5; Codd v. Stevens Pass, Inc., 45 Wn. App. 393, 402, 725 P.2d 1008 (1986), review denied, 107 Wn.2d 1020 (1987); Leyendecker, 53 Wn. App. at 774.*

n28 W. Keeton, D. Dobbs, R. Keeton & D. Owen § 68, at 496-97.

n29 *See, e.g., Ridge v. Kladnick, supra; ITT Rayonier, Inc. v. Puget Sound Freight Lines, supra; Codd v. Stevens Pass, Inc., supra; Leyendecker v. Cousins, supra.* [***27]

n30 4 F. Harper, F. James & O. Gray, *Torts* § 21.0, at 188-89 (2d ed. 1986) ("In its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk.").

In *Kirk v. WSU, 109 Wn.2d 448, 746 P.2d 285 (1987),* a college cheerleader sued her university to recover for injuries sustained while she was practicing cheerleading allegedly under dangerous conditions and without adequate supervision. The university argued her claim was barred because she had assumed the risks inherent in the sport. This court explained that the basis of both express and implied primary assumption of risk was the plaintiff's *consent* to the *negation of defendant's duty with regard to those risks assumed.* [HN14] Since implied primary assumption of the risk *negates duty*, it acts as a bar to recovery when the injury results from one of the risks assumed. As Dean Prosser explains, *[HN15] primary* implied assumption of risk should continue to be an absolute bar after the adoption of comparative fault [***28] because in this form it is a principle of "no duty" and hence no negligence, thus negating the existence of any underlying cause of action. n31

n31 W. Keeton, D. Dobbs, R. Keeton & D. Owen § 68, at 496.

Although the plaintiff in *Kirk* did assume the risks inherent in the sport of cheerleading, she did *not* assume the risks caused by the university's negligent provision of dangerous facilities or improper instruction or supervision. Those were [*499] not risks "inherent" in the sport. Hence, in a *primary* sense, she did not "assume the risk" and relieve defendants of *those* duties. However, to the extent she continued to practice (on a dangerous surface, without instruction), she may have "unreasonably assumed the risk" *i.e.*, have been contributorially negligent. This unreasonable assumption of the risk is assumption in the secondary sense which does not bar all recovery.

In *Leyendecker v. Cousins, 53 Wn. App. 769, 773-74, 770 P.2d 675, review denied* [***29] , *113 Wn.2d 1018 (1989),* the Court of Appeals correctly explained

> that [HN16] those who choose to participate in sports or amusements consent to being injured by the risks inherent in the activity, and that such conduct constitutes "primary" assumption of risk, which continues as a complete bar to recovery even after the adoption of comparative negligence. . . .
>
> . . .
>
> In contrast, implied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk.

(Citations omitted.)

We now apply these principles of law to the present case.

Issue Four.

Conclusion. Under the facts presented, the trial court should not have applied the doctrine of primary implied assumption of risk as a complete bar to plaintiff's recovery against the ski resort operator.

To reiterate, the two defendants obtained summary judgment in their [***30] favor based upon two different legal theories. As to the ski school, its dismissal was based upon the *express* release language in the application. However, with regard to the ski resort operator, there was no release (express assumption of the risk) and hence the question becomes what risks Justin *impliedly* assumed by choosing to engage in the sport of skiing.

[*500] To determine whether summary judgment was properly granted to the ski resort operator, it is essential to define what duties the ski resort owed to Justin and what risks were assumed by Justin.

[12] [HN17] A skier is a business invitee of the ski area operator. n32 The operator owes a duty to a skier to discover dangerous conditions [**15] through reasonable inspection, and repair that condition or warn the invitees, unless it is known or obvious. n33 Washington statutory law, RCW 70.117, modifies but is generally consistent with the common law. n34 This state's ski statute imposes certain duties on skiers and on ski operators but does not purport to relieve ski operators from all liability for their own negligence. n35

n32 *Codd, 45 Wn. App. at 396-97; Egede-Nissen v. Crystal Mt., Inc., 93 Wn.2d 127, 132, 606 P.2d 1214 (1980).* [***31]

n33 *Codd, 45 Wn. App. at 397; Egede-Nissen, 93 Wn.2d at 132.*

n34 *Codd, 45 Wn. App. at 397.*

n35 *RCW 70.117.040; RCW 70.117.020(4).*

The resort argues that it owed no duty to Justin because the shed was an obvious hazard. This issue cannot be decided on summary judgment as this factual inquiry is disputed. Justin has no recollection of the accident but there was evidence in a declaration from a witness that the proximity of the racecourse to the shed could not be determined at the start of the course, the transition from the packed snow of the racecourse to the wet, heavy, unpacked snow immediately adjacent to the course was not obvious and that one could not see or recognize the danger of the depression under the shack or the hazard it presented. An expert's declaration stated that from the top of the course Justin could not have appreciated the danger posed by the proximity of the course to the shed.

As in many sports settings, [HN18] a skier does impliedly [***32] assume certain risks by engaging in the sport. n36 Implied *primary* [*501] assumption of the risk means the plaintiff assumes the dangers that are *inherent in* and *necessary to* the particular sport or activity.

n36 *See, e.g., Codd, 45 Wn. App. at 401; Wagenblast v. Odessa Sch. Dist. 105-157-166 J, 110 Wn.2d 845, 857, 758 P.2d 968, 85 A.L.R.4th 331 (1988); Kirk, 109 Wn.2d at 456.*

Since Justin assumed the risks inherent in the sport of skiing, the issue is whether all the risks which caused his injuries were inherent in the sport.

[13] There are ski cases in other jurisdictions which reach differing results as to whether a skier assumes the risk of collision with a fixed object in the ski trail. n37 However, the evidence in the instant case was not just that Justin collided with an obvious stationary object because of difficult snow conditions. An accident [***33] resulting from such conditions would ordinarily be due to risks "inherent" in the sport of skiing. However, in this case, some of the evidence would support a conclusion that the racecourse was laid out in an unnecessarily dangerous manner that was not obvious to a young novice ski-racing student. While participants in sports are generally held to have impliedly assumed the risks inherent in the sport, such assumption of risk does not preclude a recovery for negligent acts which unduly enhance such risks. n38 Review of analogous cases is helpful in this situation.

n37 *Compare, e.g., Smith v. Seven Springs Farm, Inc., 716 F.2d 1002 (3d Cir. 1983) and Leopold v. Okemo Mt., Inc., 420 F. Supp. 781 (D. Vt. 1976) with Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117 (10th Cir. 1978) and Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978).*

n38 *Wood v. Postelthwaite, 6 Wn. App. 885, 896, 496 P.2d 988 (1972), aff'd, 82 Wn.2d 387, 510 P.2d 1109 (1973); Kirk v. WSU, 109 Wn.2d 448, 456, 746 P.2d 285 (1987); Ridge v. Kladnick, 42 Wn. App. 785, 788, 713 P.2d 1131, review denied, 106 Wn.2d 1011 (1986).*

[*34]**

In *Marietta v. Cliffs Ridge, Inc., 385 Mich. 364, 373, 189 N.W.2d 208 (1971),* the court held that it was a question of fact to be left to the jury whether a ski facility was negligent in using 1 1/2-inch sapling poles as slalom gate markers rather than bamboo or fiber glass poles.

In *Ashcroft v. Calder Race Course, Inc., 492 So. 2d 1309 (Fla. 1986),* a jockey was injured when thrown from his horse which had veered across a racecourse out of control toward an exit gap, the negligent placement of which was **[*502]** found to be the cause of the accident. The court said the jockey's assumption of risk waived only risks inherent in the sport itself. Riding on a racetrack with a negligently placed exit gap was not an inherent risk in the sport and it was error for the judge to instruct the jury on assumption of risk.

In *Jessup v. Mt. Bachelor, Inc., 101 Or. App. 670, 792 P.2d 1232, review denied,* **[**16]** *310 Or. 475 (1990),* the Oregon court recently explained that a skier is barred from recovery from a ski area operator for injury caused **[***35]** solely by the inherent risks of skiing, but if the injury was caused by a combination of the inherent risks of skiing and operator negligence, the doctrine of comparative fault applies.

[14] These cases illustrate the proposition that [HN19] primary assumption of the risk in a sports setting does not include the failure of the operator to provide reasonably safe facilities. n39 Here, there is evidence that could support a finding that the racecourse for beginning racers was placed dangerously close to an unfenced, unpadded, abandoned shed. We therefore conclude that summary judgment was improperly granted.

n39 F. Harper, F. James & O. Gray, *Torts* § 21.0, at 435 (2d ed. Cum. Supp. No. 2, 1991); *Kirk v. WSU, supra. See also Hiibschman v. Valdez, 821 P.2d 1354 (Alaska 1991).*

[15, 16] [HN20] Summary judgment is appropriate only if:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **[***36]** show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). In such cases facts and all reasonable inferences therefrom must he considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. n40 The burden is on the **[*503]** moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard. n41 Since the plaintiff's evidence raised genuine issues of material fact with regard to whether the defendants acted negligently and whether such negligence, if any, was a proximate cause of the injuries, these issues are not properly decided on summary judgment.

n40 *Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); Glesener v. Batholm, 50 Wn. App. 1, 7, 747 P.2d 475 (1987).*

n41 *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).*

[*37]**

In sum, Justin did assume the risks inherent in the sport (primary assumption of risk) but he did not assume the alleged negligence of the operator. He may nonetheless have been contributorially negligent (*i.e.*, in the secondary sense he may have assumed some risk). However, [HN21] the doctrine of unreasonable assumption of the risk has been subsumed in comparative negligence law. n42 Any such contributory negligence would reduce, rather than bar, Justin's recovery; this issue remains to be resolved at trial. [HN22] The issue of contributory negligence for minors from 6 to 16 years of age is generally a question for the trier of fact. n43 Washington recognizes a special standard of care applicable to children; a child's conduct is measured by the conduct of a reasonably careful child of the same age, intelligence, maturity, training and experience. n44

n42 *Kirk, 109 Wn.2d at 454; Ridge, 42 Wn. App. at 787; Leyendecker v. Cousins, 53 Wn. App. 769, 774 n.2, 770 P.2d 675, review denied, 113 Wn.2d 1018 (1989); RCW 4.22.015* (unreasonable assumption of risk is included in the concept of fault). [***38]

n43 *Hansen v. Friend, 118 Wn.2d 476, 484, 824 P.2d 483 (1992); Bauman v. Crawford, 104 Wn.2d 241, 244, 704 P.2d 1181 (1985).*

n44 *Bauman, 104 Wn.2d at 244.*

Accordingly, we reverse the summary judgment in favor of the ski resort operator and remand to the trial court for further proceedings consistent with this opinion. As to the summary judgment in favor of the ski school, we affirm the [*504] dismissal of the parents' cause of action, but reverse and remand with regard to Justin's own cause of action.

1 of 1 DOCUMENT

Jessica Hawkins, by and through her guardians, Brian and Melinda Hawkins, Plaintiff, Appellant, and Cross-Appellee, v. Blair Peart, dba Navajo Trails, Defendant, Appellee, and Cross-Appellant.

No. 20000562

SUPREME COURT OF UTAH

2001 UT 94; 37 P.3d 1062; 433 Utah Adv. Rep. 19; 2001 Utah LEXIS 177

October 30, 2001, Filed

SUBSEQUENT HISTORY: [***1] As Corrected February 27, 2002. Released for Publication January 16, 2002. Rehearing Denied January 9, 2002.

PRIOR HISTORY: Sixth District, Kane County. The Honorable David L. Mower.

DISPOSITION: Affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant company required plaintiff minor's mother to sign a release form prior to allowing the minor to ride one of its horses. The release form contained a waiver of liability and an indemnity provision. The District Court Sixth District, Wayne County, Utah, invalidated the waiver provision, but upheld the indemnity provision. Both parties appealed.

OVERVIEW: The minor challenged the district court's indemnity ruling, and the company challenged the ruling as to the release. The supreme court agreed with the majority of courts that a parent may not release a minor's prospective claim for negligence. Since a parent generally may not release a child's cause of action after injury, it made little, if any, sense to conclude a parent had authority to release a child's cause of action prior to an injury. Utah law provided various checks on parental authority to ensure a child's interests were protected. Moreover, public policies favored protection of minors with respect to contractual obligations. The supreme court found that the minor's parent did not have the authority to release the minor's claims before an injury, holding that both the waiver provision and the indemnity provision were invalid. The court further held that the district court erred by holding valid the indemnity provision in the form contract provided by the company, and the enforcement of the agreement violated public policy in light of the rule voiding parental waivers.

OUTCOME: The ruling as to the release provision was affirmed, but the ruling as to the indemnity provision was reversed.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Appeals > Standards of Review > De Novo ReviewContracts Law > Contract Interpretation > Interpretation Generally

[HN1] The Supreme Court of Utah reviews a lower court's contractual interpretation of a release form for correctness, affording the district court no deference.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN2] Russ v. Woodside describes three general circumstances in which parties may obtain contractual releases from liability for negligent action: (1) where injuries have already occurred and one party releases the other from liability for those injuries; (2) where one party agrees to indemnify for liability for future injuries; and (3) where one party agrees to release the other from liability for future injuries. The second and third categories require a clear and unequivocal expression of the intent to indemnify or release.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN3] It is generally held that those who are not engaged in public service may properly bargain against liability for harm caused by their ordinary negligence in performance of contractual duty; but such an exemption is always invalid if it applies to harm willfully inflicted or caused by gross or wanton negligence. Thus, most courts allow release of liability for prospective negligence, except where there is a strong public interest in the services provided. Some courts have attempted to establish a more detailed list of criteria for determining public policy limitations on releases.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN4] Many states rely on the standards in relation to release of liability for prospective negligence. Those standards are as follows: The attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. (1) It concerns a business of a type generally thought suitable for public regulation. (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. (3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN5] In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.

Torts > Negligence > Defenses > Exculpatory Clauses
[HN6] A clear majority of courts treating the issue have held that a parent may not release a minor's prospective claim for negligence. Courts often hold that in a postinjury setting a parent's signature on a release is ineffective to bar a minor's claims against a negligent party. Based on this premise, since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has authority to release a child's cause of action prior to an injury.

Family Law > Parental Duties & Rights > Liability for Minor's Actions
[HN7] *Utah Code Ann. § 15-2-2* (1999) provides that minors may disaffirm contracts before or within a reasonable time after majority.

Family Law > Guardians & Conservators
[HN8] Utah R. Civ. P. 17(b) provides that a minor who is a party to any civil action must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending.

Torts > Negligence > Defenses > Exculpatory ClausesContracts Law > Contract Conditions & Provisions > Indemnity
[HN9] The law generally treats preinjury releases or indemnity provisions with greater suspicion than postinjury releases.

Contracts Law > Contract Conditions & Provisions > Indemnity
[HN10] In general, the common law disfavors agreements that indemnify parties against their own negligence because one might be careless of another's life and limb, if there is no penalty for carelessness. Because of this public safety concern, a reviewing court strictly construes indemnity agreements against negligence.

Contracts Law > Contract Conditions & Provisions > Indemnity
[HN11] Although the intent of the parties governs indemnity agreements against negligence, the presumption is against any such intention and it is not achieved by inference from general language.

Family Law > Parental Duties & Rights > Care & Control of Children
[HN12] Where a parent has a duty to protect the best interests of a child, an agreement to insure a third party against any consequences for that third party's negligent behavior toward the child can only serve to undermine the parent's fundamental obligations to the child.

Contracts Law > Contract Conditions & Provisions > Indemnity
[HN13] Several jurisdictions have invalidated agreements that require parents to indemnify a party against negligent acts that injure the parent's child. The Utah Supreme Court also concludes that public policy renders void such an indemnity agreement.

COUNSEL: Brian S. King, Salt Lake City, for plaintiff.

James W. Jensen, Matthew T. Graff, Salt Lake City, for defendant.

JUDGES: DURRANT, Justice. Chief Justice Howe, Associate Chief Justice Russon, Justice Durham, and Justice Wilkins concur in Justice Durrant's opinion.

OPINIONBY: DURRANT

OPINION: [**1063] DURRANT, Justice:

[*P1] Defendant Navajo Trails required plaintiff Jessica Hawkins's mother to sign a release form prior to allowing Hawkins to ride one of its horses. The release form contained a waiver of liability and an indemnity provision. The district court invalidated the waiver provision on public policy grounds, but upheld the indemnity provision. Hawkins appeals the district court's decision upholding the indemnity clause, and Navajo Trails cross-appeals the court's invalidation of the waiver provision. We conclude that both the waiver provision and the indemnity provision are invalid. Thus, we affirm the district court's ruling as to the release provision, but reverse as to the indemnity provision.

BACKGROUND

[*P2] In [***2] July 1997, eleven-year-old Hawkins went to Duck Creek, Utah, for a family reunion. As part of the reunion, members of the family arranged for Navajo Trails to provide horses and guides for a trail ride. As a condition of its service, Navajo Trails required Hawkins's mother to sign a "Release Form." In pertinent part, that form stated as follows:

Riding and handling horses can be DANGEROUS. This form must be completed and signed before you can ride . . . . By signing this form, you agree to ASSUME THE RISK of any injury, death, or loss, or damage which you or your child . . . may suffer . . . . In consideration for the rendering of trail riding . . . service by Navajo Trails . . . the undersigned on behalf of himself or for any person for whom he or she is a parent or legal guardian, does hereby indemnify (reimburse), release, and forever hold harmless, Navajo Trails . . . [for] any claims, demands, and actions or causes of action on account of death or injury or loss or damage which may occur from any cause, without regard to negligence, other than the gross negligence or willful misconduct of Navajo Trails . . . . If the undersigned is a parent or guardian, he or she further [***3] agrees to indemnify (reimburse) Navajo Trails or such persons for any damages paid by or assessed against Navajo Trails . . . as a result of injury to or death of a child . . . .

Hawkins's mother signed this form. n1

n1 Additionally, the form apparently contained spaces for the parent or guardian to list children going on the trip. Hawkins's brief asserts that Hawkins's mother "intentionally omitted the names of her children because she did not want the language in the Release Form to cover any of them." The district court based its decision on policy grounds and did not consider this allegation. It has not been addressed further by either party on appeal.

[*P3] During the trail ride, Hawkins's horse was spooked and threw her. Hawkins was injured. She filed suit against Navajo Trails, alleging that it had provided an insufficient number of guides, that its guides were [**1064] not adequately trained, and that its guides had failed to carry out properly their duties during the ride. In response, Navajo Trails [***4] denied that it was negligent and additionally defended on the ground that the "Release Form" precluded Hawkins's suit. Both parties moved for summary judgment on the issues of the legal effect and enforceability of the Release Form. The district court ruled that the indemnity provision was enforceable between Hawkins's mother and Navajo Trails but that the release of Hawkins's future claims for negligence was unenforceable as a matter of public policy. Hawkins appealed the indemnity ruling, and Navajo Trails cross-appealed the ruling as to the release. n2

n2 The district court certified its order as a final appealable order pursuant to rule 54(b) of the Utah Rules of Civil Procedure. However, this court determined that the district court erred in so doing because the issues still pending were based on substantially the same operative facts as the issues certified as final. See *Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1101-04 (Utah 1991).* It was therefore an interlocutory order and not a final order. This court nonetheless agreed to exercise its discretion under rule 5(a) of the Utah Rules of Appellate Procedure to hear the appeal and cross-appeal of that order.

[***5]

ANALYSIS

[*P4] [HN1] We review the lower court's contractual interpretation of the release form for correctness, affording the district court no deference. See *Aquagen Int'l, Inc. v. Calrae Trust, 972 P.2d 411, 413 (Utah 1998).*

[*P5] In assessing the validity of the release, the district court referred to *Russ v. Woodside, 905 P.2d 901, 905 (Utah Ct. App. 1995).* [HN2] Russ described three general circumstances in which parties may obtain contractual releases from liability for negligent action: (1) where injuries have already occurred and one party releases the other from liability for those injuries, (2) where one party agrees to indemnify for liability for future injuries, and (3) where one party agrees to release the other from liability for future injuries. See *Russ, 905 P.2d at 904- 05.* The second and third categories require a clear and unequivocal expression of the intent to indemnify or release according to Russ. See id.

[*P6] The district court concluded that the contractual language of the indemnity and the release provisions was clear and unequivocal as a matter of law. Accordingly, it held that, [***6] because the indemnity provision constituted a contract between an adult and a business, it was enforceable according to the general rule permitting such agreements. However, with respect to the release, the court held that the general rule permitting release of liability did not apply where a parent signs the contract on behalf of a minor.

[*P7] The court arrived at its decision by articulating a public policy for refusing to recognize contracts releasing individuals or entities from liability for future injuries to minors. In the absence of controlling statutes or case law, the court consulted general statements of policy found in statutes detailing the rights of minors and the responsibilities of guardians. The court referred to sections 15-2-2, 75-5-103, and 75-5-209 of the Utah Code, and rule 17 of the Utah Rules of Civil Procedure. Those provisions pertain, respectively, to a minor's ability to disaffirm contracts prior to attaining the age of majority, the power of a parent to delegate fundamental care and supervision responsibilities over a minor to another, the general powers of guardians of a minor, and the necessity of guardians or guardians ad litem when minors appear [***7] as parties to court proceedings. The court concluded that these provisions indicated a general protective intent that, on balance, militated in favor of precluding parents from contractually releasing others from liability for injuring minors.

[*P8] On appeal, Hawkins defends the district court's distinction between contracts involving adults and contracts where a guardian releases another from liability for harm to a minor. Alternatively, Hawkins argues that the general rule

permitting releases does not apply in this case. We will first address the general rule and then discuss the district court's application of a public policy exception to circumstances involving minors.

[*P9] The rule regarding releases, to which the district court and Russ referred, is stated as a general principle of the common law in 6A Arthur Linton Corbin, Corbin on Contracts, § 1472, at 596-97 (1962):

[**1065] [HN3] It is generally held that those who are not engaged in public service may properly bargain against liability for harm caused by their ordinary negligence in performance of contractual duty; but such an exemption is always invalid if it applies to harm wilfully inflicted or caused [***8] by gross or wanton negligence.

(Footnote omitted.) Thus, most courts allow release of liability for prospective negligence, except where there is a strong public interest in the services provided. But see *Hiett v. Lake Barcroft Cmty. Ass'n, 244 Va. 191, 418 S.E.2d 894, 896-97 (Va. 1992)* (invalidating all pre-injury releases as violative of public policy). Some courts have attempted to establish a more detailed list of criteria for determining public policy limitations on releases. [HN4] Many states rely on the standards propounded in *Tunkl v. Regents of the University of California, 60 Cal. 2d 92, 383 P.2d 441, 445-46, 32 Cal. Rptr. 33 (Cal. 1963)*, or *Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981)*. n3 See, e.g., *Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163, 167-68 (Ga. Ct. App. 1980)* (adopting Tunkl); *Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977)* (same); *Wagenblast v. Odessa Sch. Dist., 110 Wn.2d 845, 758 P.2d 968, 971 (Wash. 1988)* (same); *Kyriazis v. Univ. of W. Va., 192 W. Va. 60, 450 S.E.2d 649, 654-55 (W. Va. 1994)* (same); *Milligan v. Big Valley Corp., 754 P.2d 1063, 1066 (Wyo. 1988)* [***9] (noting earlier adoption of Jones); cf. *Dalury v. S-K-I, Ltd., 164 Vt. 329, 670 A.2d 795, 797-99 (Vt. 1995)* (noting existence of standards, but adopting ad hoc totality of the circumstances approach).

n3 Those standards are as follows:

> The attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.
>
> *Tunkl v. Regents of Univ. of California, 60 Cal. 2d 92, 383 P.2d 441, 445-46, 32 Cal. Rptr. 33 (Cal. 1963)* (footnotes omitted).
>
> [HN5] In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.
>
> *Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981)*. Jones additionally referenced the Tunkl standard for determining "the existence of a duty to the public." Id.

[***10]

[*P10] Tunkl and Jones set forth standards for determining whether the public interest in the activity at issue warrants an exception to the general rule allowing releases. However, we need not reach the question of whether to adopt the Tunkl or Jones standard, or any other standard generally relating to the public interest exception, because, in deciding the case before us, we rely on a public policy exception specifically relating to releases of a minor's claims. [HN6] A clear majority of courts treating the issue have held that a parent may not release a minor's prospective claim

for negligence. See, e.g., *Fedor v. Mauwehu Council, Boy Scouts of Am., 21 Conn. Supp. 38, 143 A.2d 466, 467-68 (Conn. Super. Ct. 1958); Meyer v. Naperville Manner, Inc., 262 Ill. App. 3d 141, 634 N.E.2d 411, 414-15, 199 Ill. Dec. 572 (Ill. App. Ct. 1994); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979); Fitzgerald v. Newark Morning Ledger Co., 111 N.J. Super. 104, 267 A.2d 557, 558-59 (N.J. Super. Ct. Law Div. 1970); Childress v. Madison County, 777 S.W.2d 1, 6-7 (Tenn. Ct. App. 1989); Munoz v. II Jaz Inc., 863 S.W.2d 207, 209-10 (Tex. App. 1993);* **[***11]** *Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 834 P.2d 6, 10-12 (Wash. 1992).* The rationale employed by these courts is aptly summarized in the Washington Supreme Court's holding in Scott. As stated by that case, "Courts often hold that in a postinjury setting a parent's signature on a release is ineffective to bar a minor's claims against a **[**1066]** negligent party." *Scott, 834 P.2d at 11;* see also *59 Am. Jur. 2d, Parent and Child § 40*, at 183 (1987) (noting that, absent court appointment, parents have no authority to release or compromise claims or causes of action belonging to minors). Based on this premise, Scott reasoned that "since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has authority to release a child's cause of action prior to an injury." *834 P.2d at 11-12.*

[*P11] We agree. First, Utah law is consistent with Scott's underlying premise. Navajo Trails has cited no source of law, and we are aware of none, granting parents in Utah a general unilateral right to compromise or release a child's existing causes of action without **[***12]** court approval or appointment to that effect. To the contrary, Utah law provides various checks on parental authority to ensure a child's interests are protected. Under the Uniform Probate Code, for example, when a minor has a cause of action, the minor or another person interested in the minor's welfare may petition for the appointment of a conservator. See *Utah Code Ann. § 75-5-404* (1993). Once appointed, a conservator "may act without court authorization or confirmation" to "settle a claim by or against the . . . protected [minor] by compromise, arbitration, or otherwise." Id. § 75-5-424(3), (3)(s) (1993); see also id. § 75-5-409(1) (1993) (allowing court to authorize, direct, or ratify transactions to protect the minor's interests when the situation does not require a full conservatorship). Significantly, a parent may act as a minor's conservator, not as a matter of right, but only when appointed by the court. See *Utah Code Ann. § 75-5-410(1)* (Supp. 2000) (listing parents seventh in prioritized list of those eligible for court appointment as a conservator).

[*P12] Moreover, the statutes and rules **[***13]** cited by the district court in this case are also indicative of public policies favoring protection of minors with respect to contractual obligations. Specifically, [HN7] section 15-2-2 of the Utah Code provides that minors may disaffirm contracts "before or within a reasonable time after . . . majority . . . ." *Utah Code Ann. § 15-2-2* (1999). Furthermore, [HN8] rule 17(b) of the Utah Rules of Civil Procedure provides that a "minor . . . who is a party [to any civil action] must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending." n4 Utah R. Civ. P. 17(b).

> n4 The court also cited sections 75-5-103 and 75-5-209 of Utah's Uniform Probate Code. While these sections deal generally with the powers and responsibilities of parents or guardians, we do not find them particularly pertinent to the issues raised by this case.

[*P13] Having thus agreed with Scott's premise that a parent may not unilaterally release a **[***14]** child's claims after a child's injury, we also agree with Scott's conclusion that a parent does not have the authority to release a child's claims before an injury. As in Scott, we see little reason to base the validity of a parent's contractual release of a minor's claim on the timing of an injury. Indeed, [HN9] the law generally treats preinjury releases or indemnity provisions with greater suspicion than postinjury releases. See *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 (Utah 1983).* An exculpatory clause that relieves a party from future liability may remove an important incentive to act with reasonable care. These clauses are also routinely imposed in a unilateral manner without any genuine bargaining or opportunity to pay a fee for insurance. The party demanding adherence to an exculpatory clause simply evades the necessity of liability coverage and then shifts the full burden of risk of harm to the other party. Compromise of an existing claim, however, relates to negligence that has already taken place and is subject to measurable damages. Such releases involve actual negotiations concerning ascertained rights and liabilities. **[***15]** Thus, if anything, the policies relating to restrictions on a parent's right to compromise an existing claim apply with even greater force in the preinjury, exculpatory clause scenario. We therefore adopt the majority posture on this question and affirm the district court.

[*P14] Turning now to the indemnity question, we conclude that the trial court erred in holding valid the indemnity provision in the form contract provided by Navajo Trails. [HN10] In general, the common law disfavors **[**1067]** agreements that indemnify parties against their own negligence because "one might be careless of another's

life and limb, if there is no penalty for carelessness." *Hyde v. Chevron U.S.A., 697 F.2d 614, 632 (5th. Cir. 1983).* Because of this public safety concern, we strictly construe indemnity agreements against negligence. See *Union Pac. R.R. v. Intermountain Farmers Ass'n, 568 P.2d 724*, 726 (Utah 1977) (holding that [HN11] although the intent of the parties governs indemnity agreements against negligence, "the presumption is against any such intention and it is not achieved by inference from general language").

[*P15] In rejecting parental indemnifications, a few **[***16]** courts have relied on the strict standards of clarity required of indemnity provisions generally, thereby avoiding the issue of whether public policy completely forbids agreements that shift financial responsibility from the negligent party to the parents of an injured minor. See, e.g., *O'Connell v. Walt Disney World Co., 413 So. 2d 444, 447 (Fla. Dist. Ct. App. 1982)* (finding it unnecessary to decide whether public policy permits a parent to indemnify an amusement park against negligence in conducting a horseback ride, since the contractual language did not clearly show an intent to indemnify).

[*P16] In the case at hand, however, it is undisputed that the indemnity agreement is clear and unequivocal. We therefore must decide whether enforcement of the agreement violates public policy in light of our newly announced rule voiding parental waivers. We conclude that it does. Having now adopted a rule intended to preserve a minor's right to recover damages caused by another's negligence, we cannot uphold an agreement that shifts the source of compensation from the negligent party to the minor's parent. Such an agreement creates an unacceptable conflict of interest **[***17]** between a parent and a minor, as perceptively noted by the New York Court of Appeals:

> We are extremely wary of a transaction that puts parent and child at cross-purposes and . . . tends to quiet the legitimate complaint of the minor child. Generally, we may regard the parent's contract of indemnity . . . as an instrument that motivates him to discourage the proper prosecution of the infant's claim . . . . The end result is either the outright thwarting of our protective policy, or, should the infant ultimately elect to ignore the settlement and to press his claim, disharmony within the family unit. Whatever the outcome, the policy of the State suffers.

Valdimer v. Mount Vernon Hebrew Camps, Inc., 9 N.Y.2d 21, 172 N.E.2d 283, 285, 210 N.Y.S.2d 520 (N.Y. 1961); see also *Ohio Cas. Ins. Co. v. Mallison, 223 Or. 406, 354 P.2d 800, 802-06 (Or. 1960)* (noting that a child would be unlikely to pursue claims if agreement required its parent to indemnify the defendant). In short, an indemnification from negligence that specifically makes a parent the ultimate source of compensation would likely result in inadequate compensation for the minor **[***18]** or family discord.

[*P17] In addition, the indemnity agreement at issue is inconsistent with a parent's duty to a child. Specifically, [HN12] where a parent has a duty to protect the best interests of a child, an agreement to insure a third party against any consequences for that third party's negligent behavior toward the child can only serve to undermine the parent's fundamental obligations to the child. See *Ohio Cas. Ins. Co., 354 P.2d at 802* (voiding an indemnity provision in a settlement agreement in part because a parent's duty to act "for the benefit of his child" is "not fully discharged where the parent enters into a bargain which gives rise to conflicting interests.").

[*P18] Based on similar policy judgments, [HN13] several other jurisdictions have invalidated agreements that required parents to indemnify a party against negligent acts that injure the parent's child. See generally *Valdimer, 172 N.E.2d at 285; Ohio Cas. Ins. Co., 354 P.2d at 804; Childress v. Madison Cty., 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989).* We, too, conclude that public policy renders void the indemnity agreement between Navajo Trails and **[***19]** Hawkins's mother. By shifting financial responsibility to a minor's parent, such indemnity provisions would allow negligent parties to circumvent our newly adopted rule voiding waivers signed on behalf of a minor. Although the indemnity contract theoretically binds only Hawkins's mother, as a practical matter, it could chill Hawkins's pursuit of her legal **[**1068]** claims against Navajo Trails since her mother, not Navajo Trails, would be the ultimate source of compensation.

[*P19] We affirm the court's ruling with respect to the waiver of liability, but reverse with respect to the indemnity provision. We remand for further proceedings consistent with this opinion.

[*P20] Chief Justice Howe, Associate Chief Justice Russon, Justice Durham, and Justice Wilkins concur in Justice Durrant's opinion.