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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.

HB

275

HOUSE COMMITTEE REPOR

(7)

Date Referred to Committee: April 1, 2004 **FURTHER REFERRALS:** Finance

Date of Committee Action: April 16, 2004

The JUDICIARY Committee considered: **HB 275**

HOUSE BILL NO. 275 **VETERINARIANS AND ANIMALS**

"An Act relating to veterinarians and animals."

Recommends it be replaced with [ ] HCS *or* [X] CS for HB 275 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [X] Same Title [ ] 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
DEC				✓
DPS				✓
ADM			✓	

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	SAMUELS			X	
	Polen			✓	
	Brownberg	✓			
			✓		
Chair:	McGuire	✓			
Chair:					

HOUSE COMMITTEE REPORT

3-31-04

(9)

Date Referred to Committee: April 1, 2004

FURTHER REFERRALS:

Jud, FIN 4-1-04 added

Date of Committee Action: _____

The RESOURCES Committee considered: **HB 275**

HOUSE BILL NO. 275 **VETERINARIANS AND ANIMALS**

"An Act relating to veterinarians and animals."

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.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
IISS
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

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

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

b

HOUSE COMMITTEE REPORT

4.1.04

(7)

Date Referred to Committee: April 17, 2003

FURTHER REFERRALS: Resources

RESources waived-3.31.04

Date of Committee Action: March 29, 2004

Jud
Fin
ref. Added

~~TO Rules~~

The LABOR AND COMMERCE Committee considered:

HB 275

HOUSE BILL NO. 275

VETERINARIANS AND ANIMALS

"An Act relating to veterinarians and animals."

Recommends it be replaced with [ ] HCS *or* [X] CS for HB 275 (L&C)

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
DEC	2	X		
LAW	1			X

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

Signing with recommendations	Printed Last Name	DP (3)	DNP	NR (2)	AM (1)
Stanley P Crawford for DPMA	CRAWFORD	X			
	LYN N	X			
Tom Rokeberg	ROKEBERG			X	
Mary Dahlstrom for DPMA	DAHLSTROM			X	
	GUTTENBERG				X
Chair: Tom Anderson	ANDERSON	X			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB275-CS-LC-EC-EH-04-02-04
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Environmental Conservation
Title: Veterinarians and animals
RDU: Environmental Health
Component: Laboratory Services
Sponsor: Representative Mike Chenault
Requester: House Judiciary Committee
Component No.: 2065

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
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	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

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

This bill will have no known fiscal impact upon the department.

Prepared by: Kristin Ryan, Director — Phone (907) 269-7645
Division: Environmental Health — Date/Time 4/2/04 1:34 PM
Approved by: Kurt Fredriksson, Deputy Commissioner — Date 4/2/2004
Agency: Environmental Conservation

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB275CS-DPS-ASTD-3-31-04
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: Act Relating to Care and Cruelty of Animals
RDU: Alaska State Troopers
Component: AST Detachments
Sponsor: Rep. Chenault
Requester: H. Labor & Commerce
Component No.: 2325

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 establishes standards of care for animals and processes for investigating complaints of animal cruelty. It also creates the crimes of Cruelty to Animals in the First Degree, a class A misdemeanor, and Cruelty to Animals in the Second Degree, a class B misdemeanor.

The bill also requires that those officers involved in the investigation of cruelty to animal complaints must report child abuse or neglect if such is detected in the course of their investigation.

This is no expected fiscal impact to the Department of Public Safety.

Prepared by: Lt. Al Storey
Phone 907-269-4532
Division: Alaska State Troopers
Date/Time 4/1/04 8:31 AM
Approved by: Commissioner William Tandeske
Date 4/1/2004
Agency: Department of Public Safety

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB275(L & C)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to animals
BRU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Reps. Chenault, Gruenberg,...
Requester: (H) Judiciary
Component No.: 1631

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	*	*	*	*	*	*
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	*	*	*	*	*	*

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 would likely have some fiscal impact on the operations of the Public Defender Agency, because in Sections 2 and 3 it criminalizes conduct that does not currently qualify for the crime of cruelty to animals. The bill breaks down the crime of cruelty to animals into two levels of misdemeanor offenses. Criminalizing conduct that is not currently a crime will likely increase the caseload of the Agency. The Agency does not currently handle a significant number of cruelty to animal offenses, but would expect to handle many more if this bill were enacted, but it is impossible to predict the impact with any accuracy. There may also be a fiscal impact to the Agency from Section 4 that adds an aggravator for consideration at sentencing for deliberate cruelty to an animal or exposing an animal to a threat of serious physical injury.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 4/5/04 12:00 AM
Approved by: Ray Matlashowski, Deputy Commissioner
Date 4/5/2004
Agency: Administration

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Gerry Luckhaupt, Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 17, 2004

Re: CS Request

Hi Gerry,

Hope you had a good weekend. I received the work draft CS for HB 275, work order # 23-LS0940\W and after reviewing it, would now like to request a final draft House Judiciary Committee Substitute with just one small change regarding Amendment #6, Page 3, Lines 6-7. (Also, thanks for realizing that the amendment said AS 03.55.110(b) and correctly amending AS 03.55.120(b)!). You incorporated the amendment as it was drafted perfectly, but after reading it, I think it would sound better by deleting on Page 6 "a reference to" so that it reads, "(b) The peace officer shall immediately notify the animal's owner in writing of the seizure and removal of the animal and (of?) the owner's right to petition the court under AS 03.55.130." If you agree, please make the change and zip me off the final draft hopefully in time to be read across at session on Monday , 4/19 at 11 a.m. The bill was passed out of committee on 4/14. I'll attach a copy of Amendment #6 again just to refresh your memory. All the other amendments look perfecto by the way.

If you have any questions, please call me at 4990. Thank you very, very much as always!

Subject: Vanessa Tondini, House Judiciary Committee Aide
Date: Tue, 06 Apr 2004 12:06:17 -0800
From: "Elise Hsieh" <Elise_Hsieh@law.state.ak.us>
To: <vanessa_tondini@legis.state.ak.us>
CC: <kristin_ryan@dec.state.ak.us>, <Melanie_Lesh@dec.state.ak.us>, "David Marquez" <David_Marquez@law.state.ak.us>, "Deborah Behr" <Deborah_Behr@law.state.ak.us>

Hello Vanessa,

I have only recently received the committee substitute of this bill. The lead AAG on the bill, Anne Carpeneti, is out of town and I will take her place in today's hearing. The following are friendly amendments which should improve the bill's clarity and effectiveness. I am working with version U. I hope these comments are helpful and I will testifying today at 1:00 on these suggestions. Will you please distribute this email amongst the members of the Judiciary Committee to assist their understanding of my testimony? Thank you.

A#2 RESCINDED PASSED Page 1, AS 03.55.100(a): add letter "s" to "include" in line 6.

A#3 PASSED Page 1, AS 03.55.100(a)(1): delete the word "daily" and" from line 8. "Daily" suggests water offered to an animal only once a day which is probably not sufficient.

NO Page 1, AS 03.55.100(a)(2): This phrase is very awkward. To clean it up, revise to read: "(2) shelter; indoor shelter must be . . . ; outdoor shelter must . . . . "

(Add a semi-colon after "shelter", delete "provided an animal indoors that is", add "outdoor" in front of "shelter" on line 11 and delete "provided an animal outdoors.")

A#4 PASSED Page 2, AS 03.55.100(a)(5): In order to clarify the standards expected from the state vet, add "for the health and safety of animals" after standards on line 9.

NO Page 2, AS 03.55.100(b): The state vet should be the final arbiter of any disagreement under this paragraph. Vets may disagree about treatment of animals, or have a biased interest in a particular animal. The state vet serves the public (and animal) good and thus should be able to provide a final professional opinion, if needed. To effectuate this, add to the end of paragraph (b) at line 14: "In the event of disagreement under this paragraph, the State Veterinarian will provide the professional opinion needed under this paragraph."

A#5 PASSED Page 2, AS 03.55.100: DEC does not have authority under this bill to adopt regulations regarding sufficiency of care under AS 03.55.100(b). In order to allow DEC and the state vet to promolgate such regulations, add a new subsection to AS 03.55.100: "(c) The department of environmental conservation may adopt regulations to implement this section."

NO Page 2, AS 03.55.110(a): The discretion to enforce against animal abusers should be with DPS and not an unnamed, possibly private organization that may or may not "wish" to act. To effectuate this, remove "on which it wishes to take action" in line 19.

A#6 PASSED Page 3, AS 03.55.120(b): Custodians may be unwilling to have their location known; private home shelters and vet offices probably don't want the former animal owner/possessor showing up at their home or office, demanding their animal back. The animal

owner/former possessor doesn't need to know where the animal is; more helpful would be a reference to the statutes and regs they can look to for how to petition the court to get their animal back. Thus, remove "and under whose custody the animal is to be sheltered and cared for" from lines 3-4. If desired, add "and a reference to their right to petition the court under AS 03.55.130" to line 3.

A#7 PASSED Page 3, AS 03.55.120(d), line 10: Delete "every" and replace with "a."

A#8 PASSED Page 3, AS 03.55.130(c), line 24: To make the language clearer, replace "warranted by" with "reasonable under."

A#9 PASSED Page 4, AS 11.61.138(a)(6): delete "a herd, collection, or kennel" from line 30. It is an unnecessary phrase and complicates enforcement.

A#10-PASSED [redacted] P.4, L.30 Delete "10 or more animals" and Insert "more than one animal"

NO Page 5, AS 11.61.138(a)(7): Regarding line 2 "with elements similar to a crime under this section" can the drafter be more specific? Perhaps a reference to child abuse statutes or whatever other statutes the drafters intended.

A#11 PASSED Page 5, AS 11.61.138(b): This paragraph is very awkward. To clarify it, revise to read: "Each animal that is subject to cruelty to animals under (a)(1) -(5) and (7) of this section shall constitute a separate offense."

(Delete "In (a)(1)-(5) and (7) of this section," in line 4, capitalize "E" in "each" and add "under (a)(1)-(5) and (7) of this section" after "animals" in line 5.)

23-LS0940\W
Luckhaupt
4/16/04

CS FOR HOUSE BILL NO. 275(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES CHENAULT, Crawford, Gruenberg, Heinze, Foster, Seaton, Masek, Kerttula, McGuire, Stoltze, Meyer, Kott

A BILL

FOR AN ACT ENTITLED

"An Act relating to animals; and to the care of and to cruelty to animals."

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

*** Section 1.** AS 03.55 is amended by adding new sections to read:

Article 1A. Care of Animals.

Sec. 03.55.100. Minimum standards of care for animals. (a) The minimum standards of care for animals include

(1) food and water sufficient to maintain each animal in good health; if potable water is not provided to an animal at all times, it must be provided in sufficient quantity to maintain the good health of the animal;

(2) shelter provided an animal indoors that is maintained at a temperature compatible with the good health of the animal; shelter provided an animal outdoors must

(A) provide sufficient shade to protect the animal from sunlight likely to cause heat exhaustion of the animal;

(B) protect the animal from inclement weather to an extent

sufficient to maintain the animal in good health; and

(C) be structurally sound and maintained in good repair to protect the animal from injury and to contain the animal;

(3) sanitation of indoor or outdoor enclosures or shelters that includes periodic removal of animal waste material, dirt, and trash sufficient to maintain the animal in good health;

(4) medical care must be provided an animal at times and to the extent necessary to maintain the animal in good health;

(5) other standards for the health and safety of animals as set by the state veterinarian by regulation.

(b) Determinations as to the sufficiency of food, water, shelter, space, sanitation, ventilation, rest, medical care, or good health; the extent of injury or disease; and whether methods of destruction or euthanization are humane, as used in this chapter, shall be based on the professional opinion of a veterinarian licensed under AS 08.98.

(c) The Department of Environmental Conservation may adopt regulations to implement this section.

Sec. 03.55.110. Investigation of cruelty to animals complaints. (a) A person who believes that cruelty to animals has taken place or is taking place may file a complaint with a public or private animal control agency, humane animal treatment shelter or organization, the department, or with a peace officer. An agency or organization that receives a complaint on which it wishes to take action shall refer the complaint to a peace officer.

(b) A peace officer who receives a complaint of animal cruelty may apply for a search warrant under AS 12.35 to the judicial officer in the district in which the alleged violation has taken place or is taking place. If the court finds that probable cause exists, the court shall issue a search warrant directing a peace officer to proceed immediately to the location of the alleged violation, to search the place designated in the warrant, and to take into custody the property, including animals, specified in the warrant. The warrant shall be executed by the peace officer and returned to the court.

Sec. 03.55.120. Seizure of animals. (a) A peace officer who seizes and

removes an animal may deliver the animal to a veterinarian licensed under AS 08.98 or to a person, a public or private animal control agency, humane animal treatment shelter or organization, or other custodial agency to be sheltered, cared for, and provided medical attention.

(b) The peace officer shall immediately notify the animal's owner in writing of the seizure and removal of the animal and a reference to the owner's right to petition the court under AS 03.55.130. Notification may be posted at the owner's residence or may be mailed to the owner.

delete "a reference to"

(c) If the animal's owner is unknown and cannot be ascertained with reasonable effort, the animal shall be considered a stray or abandoned.

(d) The state, a municipality, a person, or another entity that supplies shelter, care, veterinary attention or medical treatment for an animal seized under this section shall make a reasonable effort to locate the owner.

Sec. 03.55.130. Destruction and adoption of animals. (a) If a determination is made by a veterinarian licensed under AS 08.98 or by a peace officer alone or in consultation with a veterinarian licensed under AS 08.98 that an animal seized under AS 03.55.100 - 03.55.190 is injured or diseased to such an extent that, in the opinion of the veterinarian, it is probable the animal cannot recover, the veterinarian or the peace officer alone or at the direction of the veterinarian, may humanely destroy the animal or arrange for the animal's humane destruction.

(b) Upon diagnosis and recommendation of a veterinarian licensed under AS 08.98, a public or private animal control agency, humane animal treatment shelter or organization, or other custodial agency may euthanize a severely injured, diseased, or suffering animal at any time.

(c) An owner of an animal destroyed under this section may not recover damages for the destruction of the animal unless the owner shows that the destruction was not reasonable under the facts as known to the veterinarian or the peace officer.

(d) Except as provided in (a) or (b) of this section, the person or entity having custody of an animal may not adopt, provide for the adoption of, or euthanize the animal within 10 business days after the animal is taken into custody. An owner may prevent the animal's adoption or destruction by

(1) petitioning the court of the judicial district in which the animal was seized for the animal's immediate return, subject, if appropriate, to court-imposed conditions; or

(2) posting a bond or security with the court of the judicial district in which the animal was seized in an amount determined by the court to be sufficient to provide for the animal's care for a minimum of 30 days from the date the animal was seized.

(e) If the custodial agency still has custody of the animal when the bond or security posted under (d)(2) of this section expires, the animal becomes the agency's property unless the court orders an alternative disposition. If a court order prevents the agency from assuming ownership and the agency continues to care for the animal, the court shall require the owner of the animal to renew the bond or security for the agency's continuing costs for the animal's care.

(f) The state may not be required to reimburse a person, a public or private animal control agency, humane animal treatment shelter or organization, or other custodial agency that voluntarily assists with a seizure or receives custody of an animal seized under this section, for costs of shelter, care, veterinary assistance, or medical treatment rendered to the animal.

Sec. 03.55.190. Definition. In AS 03.55.100 - 03.55.190, "animal" means a vertebrate living creature not a human being, but does not include fish.

* **Sec. 2.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.138. Cruelty to animals in the first degree. (a) A person commits cruelty to animals in the first degree if the person

(1) knowingly inflicts severe and prolonged physical pain or suffering on an animal;

(2) kills or injures an animal by the use of a decompression chamber;

(3) kills a dog or cat for the purpose of preparing or serving the animal for human consumption except for the emergency survival of a human being;

(4) kills or injures a domestic animal by the use of poison;

(5) with criminal negligence, fails to care for an animal and, as a result, causes the death of the animal or causes severe physical pain or prolonged suffering to

the animal;

(6) violates AS 11.61.140(a)(1), but the violation is committed against more than one animal; or

(7) violates AS 11.61.140 and the person has been previously convicted of a crime under this section, AS 11.61.140, or a law or ordinance of another jurisdiction with elements similar to a crime under this section or AS 11.61.140.

(b) Each animal that is subject to cruelty to animals under (a)(1) - (5) and (7) of this section shall constitute a separate offense.

(c) It is a defense to a prosecution under this section that the conduct of the defendant

(1) constituted the humane destruction of an animal for just cause;

(2) conformed to accepted veterinary or animal husbandry practices;

(3) was necessarily incidental to lawful fishing, hunting or trapping activities.

(d) In (a)(5) of this section, failure to provide the minimum standards of care for an animal under AS 03.55.100 is prime facie evidence of failure to care for an animal.

(e) In this section, "animal" has the meaning given in AS 11.61.140.

(f) Cruelty to animals in the first degree is a class A misdemeanor. The court may also

(1) require forfeiture of any animal affected to the state, or to a municipality, person, or other entity that supplies shelter, care, or medical treatment for the animal;

(2) require the defendant to reimburse the state, or a municipality, person, or other entity for all reasonable costs incurred in providing necessary care, shelter, veterinary attention or medical treatment for any animal affected;

(3) prohibit or limit the defendant's ownership, possession, or custody of animals for any period of time.

* **Sec. 3.** AS 11.61.140 is repealed and reenacted to read:

Sec. 11.61.140. Cruelty to animals in the second degree. (a) A person

commits the crime of cruelty to animals in the second degree if the person

(1) recklessly abandons a domestic animal on a highway, railroad, or in another place where it may suffer injury, hunger, or exposure, or become a public charge;

(2) while operating a propelled vehicle, knowingly strikes and injures a domestic animal and fails to

(A) stop as close as possible to the scene of the accident; and

(B) notify

(i) the owner of the animal if the owner of the animal can be reasonably discovered; and

(ii) the appropriate law enforcement agency;

(3) sets a steel jaw, leg-hold, snare, spring, or similar trap that has the capacity to injure or kill an animal;

(4) while operating a pickup truck or other open motor vehicle, fails to secure an animal riding in the open area of the vehicle.

(b) It is a defense to a prosecution under (a)(3) of this section that the conduct of the defendant in setting the trap was

(1) for a commercially reasonable purpose; or

(2) necessarily incidental to lawful hunting or trapping activities.

(c) Proof that an animal has been left unattended or without food or water for 72 hours or more is prima facie evidence that the animal has been abandoned under (a)(1) of this section.

(d) In this section, each animal that is subject to cruelty to animals, constitutes a separate offense.

(e) In this section, "animal" means a vertebrate living creature not a human being, but does not include fish.

(f) Cruelty to animals is a class B misdemeanor. The court may also

(1) require forfeiture of any animal affected to the state, or to a municipality, person, or other entity that supplies shelter, care, or medical treatment for the animal;

(2) require the defendant to reimburse the state, or a municipality,

person, or other entity for all reasonable costs incurred in providing necessary care, shelter, veterinary attention or medical treatment for any animal affected;

(3) prohibit or limit the defendant's ownership, possession, or custody of animals for any period of time.

* **Sec. 4.** AS 12.55.155(c) is amended by adding new paragraphs to read:

(31) the defendant's conduct during the commission of the offense manifested deliberate cruelty to an animal or exposed an animal to the threat of serious physical injury; in this paragraph, "animal" has the meaning given in AS 11.61.140;

(32) the defendant is convicted of an offense specified in AS 11.46.360 or 11.46.365 and an animal was present in the propelled vehicle at the time of the offense; in this paragraph, "animal" has the meaning given in AS 11.61.140.

* **Sec. 5.** AS 47.17.020(a) is amended to read:

(a) The following persons who, in the performance of their occupational duties, or with respect to (8) of this subsection, in the performance of their appointed duties, have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;

(2) school teachers and school administrative staff members of public and private schools;

(3) peace officers and officers of the Department of Corrections;

(4) administrative officers of institutions;

(5) child care providers;

(6) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.990;

(7) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol;

(8) members of a child fatality review team established under AS 12.65.015(e) or 12.65.120 or the multidisciplinary child protection team created under AS 47.14.300;

(9) a person who has a duty under state law or municipal

ordinance to investigate animal cruelty, abuse, or neglect.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Gerry Luckhaupt, Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 15, 2004

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS0940\U, HB 275, incorporating the attached eleven amendments (# 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13). The bill was passed out of committee yesterday.

If you have any questions, please call me at 4990. Thank you so much! You're the best ☺

23-LS0940\U.1
Luckhaupt
4/7/04

AMENDMENT #12 - PASSED

OFFERED IN THE HOUSE BY REPRESENTATIVE MCGUIRE

TO: CSHB 275(L&C)

Page 6, line 29:

Delete "a new paragraph"

Insert "new paragraphs"

Page 7, line 1, following "AS 11.61.140":

Insert ";

(32) the defendant is convicted of an offense specified in AS 11.46.360 or 11.46.365 and an animal was present in the propelled vehicle at the time of the offense; in this paragraph, "animal" has the meaning given in AS 11.61.140"

AMENDMENT #13 - PASSED
by Rep. Gruenberg

OFFERED IN THE HOUSE

TO: CSHB 275(L&C)

Page 4, lines 27 - 28:

Delete all material ~~in~~ insert

"(5) with criminal negligence fails to care for an animal and, as a result, causes the death of the animal or causes severe physical pain or prolonged suffering to the animal;"

Page 5, after line 12:

Insert the following:

"(e) In (a)(5) of this section, failure to provide the minimum standards of care for an animal under AS 03.55.100 is prima facie evidence of failure to care for an animal."

Renumber remaining subsections accordingly.

Amendment No. 14 - HB 275 - ~~PASSED~~ RESCINDED
by Rep. Gruenberg

Page 3, line 10: Amend subsection (d) as follows:

(d) The state, a municipality, a person, or another entity that supplies shelter, care, veterinary attention or medical treatment for an animal seized under this section shall [MAKE EVERY REASONABLE EFFORT TO LOCATE THE OWNER] **have a lien** under AS 34.35.220 (4) (see A. #15) ~~**on the animal for the costs of shelter, care, veterinary attention, or medical treatment**~~.

AMENDMENT NO. 15 - withdrawn

OFFERED TO CSHB 275 (L&C)

BY REPRESENTATIVE GRUENBERG

Page 5, line 2: Insert new bill section 5 and renumber bill sections accordingly:

Sec. 5. AS 34.35.220 is amended to read:

Sec. 34.35.220. Persons entitled to carrier, warehouse, [AND] livestock **and animal** liens. The following persons shall have liens upon personal property for their just and reasonable charges for the labor, care, and attention bestowed and the food furnished, and may retain possession of the property until the charges are paid:

(1) a person who is a common carrier, or who, at the request of the owner or lawful possessor of personal property, carries, conveys, or transports the property from one place to another;

(2) a person who safely keeps or stores grain, wares, merchandise, and personal property at the request of the owner or lawful possessor of the property; [AND]

(3) a person who pastures or feeds horses, cattle, hogs, sheep, or other livestock, or bestows labor, care, or attention upon the livestock at the request of the owner or lawful possessor of the livestock**; and**

(4) the state, a municipality or another person who provides feed, shelter, care, veterinary attention or medical treatment to an animal seized pursuant to AS 03.55.120.

Subject: HB 275 Amendment requested from Rep. Gatto
Date: Wed, 14 Apr 2004 09:16:31 -0800
From: Colleen Sullivan-Leonard <Colleen_Sullivan-Leonard@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

Hi Vanessa,
I can tell by your voice mail that you were in pretty late last night and I appreciate your call back to me at such a late hour. Regarding HB 275.....I have been working with Tracy Audette with regard to Animal Care and her licensure under Animal Husbandry. Her scope of practice far out ways what is defined under the statute for Animal Husbandry. She is asked to take care of various pure breed, race horses and show horses all over the states but is not allowed to assist horses here due to how the statute currently reads. What we would like to do is ask for the following amendment to HB 275 which in no way will change the intent of this bill with regard to Animal Cruelty but will expand a bit more broadly the intent to allow not only Veterinarians to care for these animals that are brutally treated but would also allow other animal practitioners to assist in this process as well. John Torgerson is supportive of this and was willing to testify today as was Tracy Audette but as I understand from your message, the public testimony is done. Here is the following amendment that Representative Gatt has requested for this bill and if Lesil has any questions she may call him.

Amendment requested:

1. Page 2 line 9 thru 14 to be deleted.

2. Page 2 line 9 thru 12 add (5) "Other standard practices commonly performed on farm or domestic animals in the course of routine farming, or animal husbandry, or animal care, or treatment when performed by the owner, the owner's employee, or the owner's agent acting with the owners approval or at the request of a state agency."

Thanks Vanessa, call me if you have any further questions, xt3768.
Colleen

FairHaven
Tracie and Louis Audette
P.O. Box 2032
Palmer, Alaska 99645
(907) 745-1151
(907) 745-1150 fax

TO: Rep Lesil McGuire **DATE:** 8 April 04

COMPANY: _____

FAX NUMBER: 465-1592

FROM: Tracie Audette

NUMBER OF PAGES INCLUDING COVER: 3

RE: HB275 Additions/Concerns for Cruelty legislation.

Requested information is on page 2 about halfway down

Thanks,
Tracie

PO Box 2032
Palmer, Alaska 99645

April 8, 2004

Re: House Bill 275

To Whom It May Concern:

Thank you for the opportunity to testify regarding House Bill 275 on April 7 during the Judiciary Committee Hearing. Having been out of state for work most of the winter, I have not been able to keep up with the progress of this bill.

I am involved in animal related industries and own close to twenty animals on our farm in Palmer. While in general, I am supportive of any legislation that prevents suffering of animals; I have a few concerns and questions regarding House Bill 275. Especially after listening to the committee hearing yesterday.

First and foremost being the expanding of the powers of the veterinarian from caregiver to law enforcement official; and the complete absence of protection the owners' rights to his or her property.
A veterinarian in private practice should not be able to, nor made to enforce cruelty statutes. (Page 2 lines 10 through 14) This power should remain with a state official.

Animals are by definition property in this state and cautions should be added to the scope of this bill to ensure protection of the owner in the event the alleged abuses were not intentional or the real owner was helpless to prevent it (i.e. out of state, incapacitated in some fashion, or feel sufficient care is being given.) An example of this would be my belief as a physical therapist/rehabilitation specialist for animals that keeping horses confined in stalls with deep bedding is not good care. To me, this is no different than animals being locked up in zoos. They are a grazing animal and require miles of walking room daily for optimum health, especially for hoof health. Others would contend that leaving them turned out with simple shelters is cruelty. The same would be true in differences in how farm animals, livestock, and sled dogs are cared for as compared to the family pet.

I feel some of the language is based on the assumption that animals in Alaska have civil rights rather than property status. I understand that we all have an interest in preventing cruelty to animals, but not to the extent that owners' rights are forgotten. I feel animals should be treated as if they have the same rights as humans, but I also know you cannot legislate morality. I am in favor of having some laws in place to prosecute true offenders, but feel this legislation goes too far without regard to the fact that animals are chattel.

I am also wondering how custodial care can be given to an animal without it conflicting with the veterinary statute (AS 08.98), which clearly states one must be a licensed veterinarian to change the physical or mental well being of an animal wild or domestic

living or dead. Or, be a licensed veterinary technician under the direct supervision of a licensed veterinarian.

I am currently under a Cease and Desist order from Occupational Licensing for this. I provide non-veterinary care for animals and have been shut down for over two years. (I have a business license for Animal Husbandry issued by the state of Alaska, only to find out that animal husbandry is listed in state statutes, but not legally defined. More on this below.)

How will the State legally allow for one group of custodial caregivers to operate with the possibility of reimbursement for their services (Page 4 line 11) and those of us in the private sector, with the owners permission, are breaking the law by doing so? Isn't preventing owners of animals the benefits of rehabilitative care in conjunction with veterinary care for their animals in itself abuse? What happens when injuries are sustained that are not repairable by traditional medical means and the owner chooses not to destroy his property? Is he then guilty of cruelty because he can't try rehabilitation and his animal continues to suffer?

One solution to this would be to add the following:

...other standard practices commonly performed on farm or domestic animals in the course of routine farming, or *animal husbandry, or animal care or treatment when performed by the owner, the owner's employee, or the owner's agent acting with the owners approval or at the request of a state agency.

This could be added on page one or two with the lists of requirements for minimum care.

*The following definition of animal husbandry is taken from the US Patent Office Classification System. "... provides for methods or apparatus for the propagation, rearing, training, exercising, amusing, feeding, milking, grooming, housing, controlling, handling, or general care of a living animal...

These two paragraphs would define the difference between farming and companion animals and the standards of care required, allow for more care and education to be provided before the state intervenes, protect the owners right to choose care they deem appropriate for their property, and allow individuals to care for animals when taken into custody by state agencies.

Thank you for your time and consideration. I look forward to your response.

Sincerely,

Tracie Audette

Tracie Audette, Owner
FairHaven
745-1151 (home)
373-8191 (cell)

Rep Chenaults Amendments House Bill 275 in Judiciary April 6, 2004

Page 1, AS 03.55.100(a): add letter "s" to "include" in line 6.

delete

delete

delete

Page 2, AS 03.55.100(a)(5): In order to clarify the standards expected from the state vet, add "for the health and safety of animals" after standards on line 9.

Delete

Page 2, AS 03.55.100: DEC does not have authority under this bill to adopt regulations regarding sufficiency of care under AS 03.55.100(b). In order to allow DEC and the state vet to promulgate such regulations, add a new subsection to AS 03.55.100: "(c) The department of environmental conservation may adopt regulations to implement this section."

Change following;
The state veterinarian, through the DEC shall establish regulations to implement this section.

deleted

Page 3, AS 03.55.110(b): Custodians may be unwilling to have their location known; private home shelters and vet offices probably don't want the former animal owner/possessor showing up at their home or office, demanding their animal back. The animal owner/former possessor doesn't need to know where the animal is; more helpful would be a reference to the statutes and regs they can look to for how to petition the court to get their animal back. Thus, remove "and under whose custody the animal is to be sheltered and cared for" from lines 3-4. If desired, add "and a reference to their right to petition the court under AS 03.55.130" to line 3.

Page 3, AS 03.55.120(d), line 10: Delete "every" and replace with "a."

Page 3, AS 03.55.130(c), line 24: To make the language clearer, replace "warranted by" with "reasonable under." (same meaning)

delete

Page 5, AS 11.61.138(a)(7): Regarding line 2 "with elements similar to a crime under this section" can the drafter be more specific? Perhaps a reference to child abuse statutes or whatever other statutes the drafters intended.

Page 5, AS 11.61.138(b): This paragraph is very awkward. To clarify it, revise to read: "Each animal that is subject to cruelty to animals under (a)(1) -(5) and (7) of this section shall constitute a separate offense."

(Delete "In (a)(1)-(5) and (7) of this section," in line 4, capitalize "E" in "each" and add "under (a)(1)-(5) and (7) of this section" after "animals" in line 5.)

Page 5 line 22 insert (f) The theft or forced possession of an animal shall be A misdemeanor in the first degree and an aggravating factor in the commission of a felony.

STATE OF ALASKA

REPRESENTATIVE
MIKE CHENAULT

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HOUSE OF REPRESENTATIVES

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SPONSOR STATEMENT

HB – VETERINARIANS AND ANIMALS

Two years ago in Sterling, State Troopers, animal rescuers, veterinarians and a member of my staff witnessed possibly the worst case of mass animal cruelty in Alaska. Dozens of dogs some frozen to the ground, but still alive, were found on a parcel of land in the Sterling area. Some were locked in an abandoned bus, some tied to trees and stakes. None had the bare margin of food, water, or humane shelter. The only bedding was canine feces or ice. *A video is available for viewing with the warning that is quite graphic and not for the faint of heart.*

A week ago, a police officer stopped a drunk driver who had his dog tied to the bumper of his truck. While the dog received emergency medical treatment, it was put down as a result of being dragged for several miles.

It is appalling to find any human being capable of such horror. In fact, many individuals who are later convicted of grave crimes to fellow humans are found to have seriously abused animals at some time in their lives.

I have previously distributed animal cruelty information. I hope one of your staff had the opportunity to read it. The purpose of this memo is to appeal to your humane side and ask for your support to stop cruelty to animals. This is an issue decent human beings should never have to consider. Common sense and compassion dictates how we should treat animals, unfortunately we cannot depend on fellow human beings to be decent and provide basic food, water and shelter for animals. This is not an issue for partisan politics, as most of us have delightful memories of childhood pets.

Please join me in setting an example to stop abuse of animals. You and I have the opportunity to show our children how kind and compassionate animals can be while teaching responsibility of animal care.

My family has a dog-named Destiny that is a loving, mischievous companion to each of us. Although she has to be into what ever I am doing, be it painting or repairing the kitchen sink, the kids are learning the responsibility of caring and providing for another living being, and important part of becoming an adult.

Representative_Mike_Chenault@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 275(L&C)
(H) Publish Date: 4/1/04

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An act relating to veterinarians and animals."
RDU CIVIL
Component Environmental
Sponsor Representative Chenault
Requester House Labor and Commerce
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)*

Under this bill, veterinarians employed by the state would have responsibilities in addition to those outlined in AS 03-25.020, related chiefly to the well being of livestock and domestic animals . The bill also classifies crimes of cruelty to animals and criminal negligence. It adds persons who have a duty under state law or municipal ordinance to investigate animal cruelty, abuse or neglect to those who are required to report suspected harm arising from child abuse and neglect.

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 3/28/04 11:10 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 3/28/2004
Agency Department of Law

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB275-CS-LC-EC-EH-04-02-04
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Environmental Conservation
Title: Veterinarians and animals
RDU: Environmental Health
Component: Laboratory Services
Sponsor: Representative Mike Chenault
Requester: House Judiciary Committee
Component No.: 2065

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
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	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

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

This bill will have no known fiscal impact upon the department.

Prepared by: Kristin Ryan, Director
Phone: (907) 269-7645
Division: Environmental Health
Date/Time: 4/2/04 1:3[illegible] PM
Approved by: Kurt Fredriksson, Deputy Commissioner
Date: 4/2/2004
Agency: Environmental Conservation

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB275CS-DPS-ASTD-3-31-04
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: Act Relating to Care and Cruelty of Animals
RDU: Alaska State Troopers
Component: AST Detachments
Sponsor: Rep. Chenault
Requester: H. Labor & Commerce
Component No.: 2325

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 establishes standards of care for animals and processes for investigating complaints of animal cruelty. It also creates the crimes of Cruelty to Animals in the First Degree, a class A misdemeanor, and Cruelty to Animals in the Second Degree, a class B misdemeanor.

The bill also requires that those officers involved in the investigation of cruelty to animal complaints must report child abuse or neglect if such is detected in the course of their investigation.

This is no expected fiscal impact to the Department of Public Safety.

Prepared by: Lt. Al Storey
Phone 907-269-4532
Division: Alaska State Troopers
Date/Time 4/1/04 8:31 AM
Approved by: Commissioner William Tandeske
Date 4/1/2004
Agency: Department of Public Safety

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB275(L & C)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to animals
BRU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Reps. Chenault, Gruenberg,...
Requester: (H) Judiciary
Component No.: 1631

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	*	*	*	*	*	*
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	*	*	*	*	*	*

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 would likely have some fiscal impact on the operations of the Public Defender Agency, because in Sections 2 and 3 it criminalizes conduct that does not currently qualify for the crime of cruelty to animals. The bill breaks down the crime of cruelty to animals into two levels of misdemeanor offenses. Criminalizing conduct that is not currently a crime will likely increase the caseload of the Agency. The Agency does not currently handle a significant number of cruelty to animal offenses, but would expect to handle many more if this bill were enacted, but it is impossible to predict the impact with any accuracy. There may also be a fiscal impact to the Agency from Section 4 that adds an aggravator for consideration at sentencing for deliberate cruelty to an animal or exposing an animal to a threat of serious physical injury.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 4/5/04 12:00 AM
Approved by: Ray Matiashowski, Deputy Commissioner
Date 4/5/2004
Agency: Administration

Subject: [Fwd: HB 275]
Date: Mon, 05 Apr 2004 13:15:07 -0800
From: Ethel <donethel@gci.net>
To: Representative_Lesil_McGuire@legis.state.ak.us

Representative Lisel,

This is a hard copy of testimony for HB 275 which was canceled for today. Will try and schedule our time for Tuesday,.

Ethel C. Christensen

-------- Original Message --------
Subject: HB 275
Date: Mon, 05 Apr 2004 12:37:58 -0800
From: Ethel <donethel@gci.net>
To: donethel@gci.net <donethel@gci.net>

Alaska SPCA supports HB 275 but many have voiced concerns that we agree with and that is there is a need to address heinous crimes, such as the recent continued stabbing of a German Shepherd to death here in Anchorage. Past incidents of this nature was the killing and dismemberment of guard dogs at Brewsters Depart Store. Another when a bound couple had to watch when their small dogs were stomped to death by intruders For these heinous crimes, there should be a mandatory jail sentence

In other animal cruelty cases, there are mental and drug related problems that the law and courts are still dealing with . A stronger cruelty law would give both law enforcement and the courts more tools to work with..

It is well documented that persons who are cruel to animals are also cruel to children.

Ethel D. Christensen
Director Alaska SPCA
Founder 1966

Subject: HB275
Date: Fri, 2 Apr 2004 18:04:48 -0800 (PST)
From: Carol <busface1999@yahoo.com>
To: Representative_Lesil_McGuire@legis.state.ak.us, Representative_Tom_Anderson@legis.state.ak.us, Representative_Jim_Holm@legis.state.ak.us, Representative_Dan_Ogg@legis.state.ak.us, Representative_Ralph_Samuels@legis.state.ak.us, Representative_Les_Gara@legis.state.ak.us, Representative_Max_Gruenberg@legis.state.ak.us

4/2/04

Judiciary Committee:

I'm very upset that Representative Kott has decided to make it much more difficult for this long overdue, necessary and excellent bill to pass this session by adding two more committee referrals. I will take that up with him.
I'm asking that you move this bill out of committee RIGHT AWAY WITH NO AMENDMENTS.
Animal cruelty is rampant in Alaska. Our one sentence animal cruelty statute is vague, impossible to enforce, and a dismal joke. For every high-profile, horrific case of animal abuse that you hear about, there are hundreds more that go unreported or if reported, ignored. Prosecutors will not take up animal abuse cases because of all the loopholes, and troopers or other law enforcement officers won't take the time to efficiently and quickly investigate. This has to end and this bill is a good start.
Don't listen to Bush legislators who want to kill this bill to protect the continued abuse in their areas. Don't worry about this costing extra money. It won't, but even if it did, most of the public would gladly have money spent to rein in animal abuse.
Too many animals have suffered and died horrible, agonizing deaths! Republicans are known as heartless, cold politicians. This is your chance to try to change this image.

Thank you for your consideration and swift action.

Carol Jensen
4800 E. 112th Avenue
Anchorage, AK 99516
Email: busface1999@yahoo.com
Day phone: 907-244-1979

Debbie Moore

From: "Nancy Henricksen" <agroomer@ptialaska.net>
To: "Debbie Moore" <pathways@alaska.net>
Sent: Saturday, December 21, 2002 11:33 AM
Subject: FW: petition

We're the heart of Kenai

-----Original Message-----
From: Ethel [mailto:donethel@gci.net]
Sent: Wednesday, December 18, 2002 5:01 PM
Subject: petition

TO: 2003 STATE OF ALASKA LEGISLATORS
FROM: THE FOLLOWING ALASKANS AND OUTSIDE CITIZEN
REF: LACK OF ANIMAL CRUELTY LAWS AND ENFORCEMENT

WE/I STRONGLY URGE THE 2003 LEGISLATURE TO REVISE AND STRENGTHEN THE ANIMAL CRUELTY LAWS FOR THE STATE OF ALASKA. IN VIEW OF NUMEROUS AND INCREASING TRAGEDIES INVOLVING ANIMALS THIS SHOULD BE NUMBER ONE PRIORITY OF YOUR LEGISLATIVE BUSINESS THIS COMING SESSION. MANY PEOPLE HAVE DECIDED NOT TO INCLUDE ALASKA IN THEIR TRAVEL BECAUSE OF THESE HORRORS.

THE CURRENT STATE LAWS ARE TOTALLY INADEQUATE AND THEY PROMOTE THE MOVEMENT OF PEOPLE WHO ABUSE ANIMALS TO AVOID COMMUNITIES THAT HAVE LOCAL AND STRICT ANIMAL CRUELTY LAWS.

THERE ARE STRICT LAWS, BIG BUDGETS AND ENFORCEMENT OFFICERS TO PROTECT WILDLIFE BUT NOTHING FOR THE DOMESTIC ANIMALS, PARTICULARLY, DOGS, CATS AND HORSES.

WE ARE MOST SERIOUS IN THIS REQUEST.

PRINTED NAME	SIGNATURE	ADDRESS	DATE
Robin Sickel	Robin Sickel		12/26/02
Tom Weaver		P.O.Box 3913 Kenai	12-26-02
Sharon Traugh	Sharon Traugh	Box 2870 Nikiski	12-26-02

Printed Name	Signature	Address	Date
Jerry Abel	Jerry Abel	PO Box 1325 Kenai, AK 99611	12-26-02
Dale Hudson	Dale Hudson	P.O. Box 1325 Kenai, Ak 99611	12-26
Joe Trefren	Joe Trefren		12-26-02
Jim Hall	Jim Hall	Box 70	Nikiski
JESSICA TREFREN	Jessica Trefren	P.O. Box 3648 Kenai AK 99611	12/26/02
Debbie Boyle	Debbie Boyle	49729 DeBusk Dr Kenai, Ak 99611	12-26-02
Thomas Donohue	Thomas M Donohue		12-26-02
Erica Newton	Erica Newton		12-26-02
Nathan Wolf	Nathan Wolf		12-26-02
Brian Mayo	Brian Mayo	DO Box 1796 Kenai	12-26-02
Judith STOLZ	Judith Stolz	P.O. Box 8114 Nikiski	12-26-02
Phil Blythe	Phil Blythe	PO Box 8052 Nikiski	12/26/02
ED ASH	Edward W. Ash	P.O. Box 6894 NIKISKI	12/26/02
Glenn McCaughey	Glenn McCaughey	PO Box 8075	Nikiski 12.26.02
Krystal Mylewski	Krystal Mylewski	PO. Box 8305	Nikiski 12/26/02
Patrick Eichler	Patrick Eichler	P.O. Box 8081	Nikiski 99635 12-26-02
Brandy Eichler	Brandy Eichler	P.O. Box 8281	Nikiski 99635
Chris Chris	Chris Chris	P.O. Box 7995	Nikiski 99635
Donna Glover	Donna Glover	P.O Box 7067	Nikiski 99635
Father Goff	Father Goff	P O Box 8603	Nikiski AK 99635
Jeremy Goff	Jeremy Goff	P.O. Box 8603	Nikiski AK 99635