

Article

***579 RELEASES: IS THERE STILL A PLACE FOR THEIR USE BY COLLEGES AND
UNIVERSITIES?**

Mary Ann Connell [FNa1]
Frederick G. Savage [FNaal]

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Mary Ann Connell, Frederick G. Savage

I. INTRODUCTION [FN1]

For years colleges and universities have prepared releases and required students and others to sign these documents before allowing them to participate in intramural and club sports, school trips, study abroad programs, externships, internships, summer camps and various other curricular and extracurricular activities. [FN2] Some courts have enforced liability releases in the higher education context, [FN3] while others have refused to do so. [FN4] In light of the increasing reluctance of courts to enforce releases in the college and university setting, is there still a place for their use? This article discusses the circumstances under which courts have upheld the validity of written releases and provides practical advice to higher education lawyers and administrators as they evaluate the utility of releases and seek to maximize their benefit.

Courts use a plethora of terms in referring to written documents by which a party seeks to be excused from future liability, such as "anticipatory release," "general liability release," "waiver," "exculpatory agreement," "indemnity agreement," "hold harmless agreement" and "covenant not to sue." [FN5] *580 The most commonly used term is "release," which has been defined as a contract in which one party agrees to release or exculpate [FN6] another from potential tort liability for future conduct covered in the agreement. [FN7] The authors use the terms "release" and "exculpatory agreement" interchangeably in this article.

In determining whether to enforce a release, a court is asked to reconcile an inherent tension between the law of torts and the law of contracts. [FN8] A basic premise of tort law holds a party responsible for his or her own negligence or intentional misconduct that causes harm to another. An equally fundamental tenet of contract law provides that a competent party has the freedom to construct his or her own bargains and agreements. The Colorado Supreme Court has described a release as standing "at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts." [FN9] The clash of these competing tort and contract principles has produced significant confusion and uncertainty over when and under what circumstances exculpatory agreements or releases will be enforced. [FN10]

Most courts have attempted to resolve this tort/contract conflict by imposing barriers or limitations upon the enforcement of releases. When a release is used in conjunction with an activity that is of great importance to the public, that cannot be obtained elsewhere and that involves a significant disparity in the bargaining ability of the parties, courts will seldom enforce the release. Using a number of legal theories to reach this result, courts will not enforce a *581 release if the

agreement: (A) affects the public interest; [FN11] (B) results from a significant disparity of bargaining power; [FN12] (C) seeks to avoid liability for willful or grossly negligent acts or intentional torts; [FN13] or (D) expresses the exculpatory intent in ambiguous and inconspicuous language. [FN14]

A. The public interest

Courts consistently refuse to enforce releases on public policy grounds when the agreement adversely affects the public interest. [FN15] Determining exactly which activities affect the public interest is the challenge. The concept of public policy or the public interest has been the subject of great debate over the course of the development of the common law. It has proven impossible to articulate a precise definition because the "social forces that have led to such characterization are volatile and dynamic." [FN16]

Although the concepts of public policy and public interest are difficult to define, determining whether some activity or rule of law is supportive of or contrary to the public interest is best understood as an analysis of competing values and determining which are more important to society and the community. One court has declared that the "determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations." [FN17]

Tunkl v. Regents of the University of California [FN18] is the seminal case setting the standard by which many, [FN19] but not all, [FN20] courts will evaluate a release to *582 determine if it violates the public interest. Tunkl involved a liability release Hugo Tunkl was required to sign as a condition for his admission as a patient to a charitable research hospital. The crucial condition read as follows:

Release: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees. [FN21]

Tunkl claimed that he was injured as a result of negligent treatment provided by physicians at the U.C.L.A. Medical Center. [FN22] He further asserted that when he signed the release required for his admission he was in great pain, under sedation and unable to understand the effect of the release. [FN23] The jury, however, determined that he knew or should have known the significance of the release. [FN24] Thus, the appeal raised the sole question of whether the release could stand as a matter of law. [FN25]

In beginning its analysis, the California Supreme Court noted section 1668 of the California Civil Code, which states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." [FN26] The court then noted that the cases interpreting section 1668 "have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest,'" [FN27] and that this view represents the majority holding in the United States. [FN28]

Since an exculpatory clause which affects the public interest cannot stand, it becomes imperative to "ascertain those factors or characteristics which *583 constitute the public interest." [FN29] The Tunkl court established a six-factor test for determining when an exculpatory clause violates the public interest and is invalid:

1. When the activity at issue "concerns a business of a type generally thought suitable for public regulation;" [FN30]
2. When the party seeking to enforce the release and be relieved of liability 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;" [\[FN31\]](#)

3. When "[t]he party holds himself out as willing to perform this service for any member of the public who seeks it;" [\[FN32\]](#)

4. When as a result of the essential nature of the service, the party seeking exculpation holds "a decisive advantage of bargaining strength against any member of the public who seeks his services;" [\[FN33\]](#)

5. When "[i]n exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation [with no provision for payment of additional fees to] obtain protection against negligence;" [\[FN34\]](#)

6. When "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." [\[FN35\]](#)

The court then turned to a consideration of the arguments the defendant put forward to save the exculpatory clause. The defendant first contended that, while the public interest may possibly invalidate the exculpatory provision as to a paying patient, it could not do so as to a charity patient. The court disagreed: "[W]e see no distinction in the hospital's duty of due care between the paying and nonpaying patient." [\[FN36\]](#) Next, the defendant argued that even if the hospital could not obtain exemption from its "own" negligence, it should be able to obtain exemption from the negligence of its employees. The court found the defendant's effort to differentiate between its own and vicarious liability unacceptable, noting that the hospital is basically a corporation acting through agents for whose negligent conduct it is responsible. [\[FN37\]](#)

***584** Finding both arguments of the defendant unpersuasive, the court declared the release Tunkl was required to sign invalid because it violated the public interest. [\[FN38\]](#) Relying heavily on the six-factor Tunkl test, the West Virginia Supreme Court of Appeals in *Kyriazis v. University of West Virginia* [\[FN39\]](#) addressed a required anticipatory release Jeffrey Kyriazis signed as a condition of participating in rugby with the West Virginia University Rugby Club. [\[FN40\]](#) The University contended that the release [\[FN41\]](#) was an absolute bar to Kyriazis' suit for damages as a result of injuries he sustained playing in a match held by the Club. The court disagreed and held that the release violated public policy and the equal protection guarantee under the West Virginia constitution. [\[FN42\]](#)

In analyzing the public policy issue, the court reiterated that under West Virginia law an exculpatory clause exempting a party from liability is unenforceable on public policy grounds if the clause "exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed." [\[FN43\]](#) The court then turned to decide what constitutes a "public service" and whether West Virginia University was engaged in providing such a "public service" through its Rugby Club.

The University argued that the Rugby Club was a recreational activity and did not constitute an essential or public service. It also argued that Kyriazis freely entered into the exculpatory agreement. Neither argument impressed ***585** the court. "When a state university provides recreational activities to its students," the court wrote, "it fulfills its educational mission, and performs a public service." [\[FN44\]](#) The court reiterated its long-held opinion that "athletics are integral and important elements of the education mission at West Virginia University" [\[FN45\]](#) and noted particularly that the University demonstrated the importance of athletics to its mission by providing the rugby team with money, playing facilities and a coach/faculty advisor. [\[FN46\]](#)

In assessing whether the release was an agreement freely and fairly made between parties in an equal bargaining position, the court noted that the release was prepared by the University's legal counsel while Kyriazis did not have the benefit of counsel. The court also observed that if Kyriazis wished to play club rugby for the University he had no choice but to sign the release. [\[FN47\]](#) Because of the "public service" nature of the activity and the decisive bargaining advantage the University held over the student when he signed the release, the court held that the anticipatory release signed by Kyriazis was void as a matter of public policy. [\[FN48\]](#)

In contrast to the release signed by Kyriazis are forms signed by parents as a condition of their children being permitted to participate in activities such as sports, summer camps or field trips. These "permission slips" or "consent to participate" forms are basically acknowledgment forms in which parents give written permission for their children to take part in an activity. Many of these forms also contain language purporting to release the school or sponsoring entity from liability, as was the situation in the following cases. [FN49]

The Tunkl criteria were applied to public school districts in *Wagenblast v. Odessa School District No. 105-157-166J*. [FN50] In a unanimous decision, the Washington Supreme Court held that standardized releases required by the school districts in order for students to participate in interscholastic sports were invalid because they violated public policy. [FN51]

***586** The court, in reaching its decision, sought to establish a consistent and clear rationale for determining when exculpatory clauses should be enforced. [FN52] To reach this result, the court adopted the Tunkl analysis. Applying the six Tunkl criteria, the *Wagenblast* court concluded that: (1) interscholastic sports in public schools are a fit subject for public regulation and are regulated extensively by the Washington Interscholastic Activities Association; (2) interscholastic sports in public schools are of great importance in each school district as is reflected in the time, effort and money expended on athletics programs by the school systems and the public at large; (3) interscholastic sports programs are open to all students who meet certain skill and eligibility requirements; (4) school districts possess a clear and disparate bargaining strength when they insist that a waiver be signed as a condition of participation in athletic activities; (5) both school districts rejected attempts by the parents to modify the release language; and (6) by subjecting themselves to the extensive control of a coach, the students undertook the risk that the school district or its agent would breach its duty to employ ordinary care and to anticipate reasonably foreseeable dangers for their protection. [FN53] In addition to rejecting the waivers on public policy grounds, the court also declined to uphold them on the ground that they constituted an express assumption of risk, [FN54] saying: "[T]o the extent that the release portions of these forms represent a consent to relieve the school districts of their duty of care, ***587** they are invalid whether they are termed releases or express assumptions of risk." [FN55]

There have been numerous cases, however, in which courts have found that there was no public interest that prohibited the enforcement of a release. These cases arise mainly in the recreational sports area. [FN56] For example, courts have found no public interest in the participation of a plaintiff in a scuba diving class, [FN57] in using rented skis, [FN58] in triathlon competition, [FN59] in downhill ski racing, [FN60] in parachuting [FN61] or in automobile racing. [FN62] In all of these cases, the courts ruled that because it was not necessary for the plaintiffs to engage in the particular activities, the releases did not implicate the public interest. Similarly, in *Clanton v. United Skates of America*, [FN63] an Indiana appellate court upheld a liability release signed by a skater who sued the owner of a roller skating rink for injuries he sustained when he was struck by another skater. The court said that it had repeatedly upheld the validity of exculpatory releases in recreational activities, even though injured parties were prevented from recovering for their damages, since the releasors were engaged in activities for purely personal enjoyment which did not involve the public interest. [FN64]

Likewise, a California court in *Buchan v. United States Cycling Federation, Inc.* [FN65] upheld a release signed by a participant who was injured in a bicycling race, stating: "This court has not been apprised of any case in which the California Supreme Court or the Courts of Appeal have voided a release on the ground of 'public interest' as defined by *Tunkl v. Regents of the University of California* in the sports and recreation field." [FN66] According to the *Buchan* court, it is well-settled law that the "public interest" concept has no applicability to sports activities. [FN67] In another case involving injuries in a bicycle race, ***588** a California court determined that the *Hermosa Beach Grand Prix* race did not rise to the level of public interest necessary to void a release signed by an adult participant, saying: "Measured against the public interest in hospitals and

hospitalization, escrow transactions, banking transactions and common carriers, this transaction is not one of great public importance." [FN68]

In *Boucher v. Riner*, [FN69] the Maryland Court of Special Appeals considered a suit by a student who was injured while participating in the United States Naval Academy Parachuting Club, a voluntary extracurricular activity for students. [FN70] The club had an agreement with Parachutes Are Fun, Inc., for the use of Parachutes' drop zone as a training ground for club members. [FN71] The agreement provided that the club would provide its own equipment and be able to use the drop zone at a reduced rate. [FN72]

Prior to Boucher's first jump, he signed a release exempting Parachutes from any and all liability, even from its own negligence. [FN73] Boucher then went up in a plane and jumped. [FN74] While being guided down by a jumpmaster employed by Parachutes, Boucher collided with nearby power lines and was seriously injured. [FN75] He sued Parachutes and others. [FN76] Parachutes defended by presenting the release. [FN77] Boucher argued that the release was unenforceable because he was at an unfair bargaining disadvantage and because the agreement was in violation of public policy. [FN78] The court did not agree, finding that Boucher was under no compulsion to make a parachute jump that he did so merely because he wanted to, and that he was not at a bargaining disadvantage. [FN79] He could have even paid an additional fee of \$300 to nullify the waiver of the release. [FN80] The court further determined that Parachutes was not performing an essential service or one of great importance to the public and held that the exculpatory clause signed by Boucher was not void as against public policy. [FN81]

While in a minority position, there are courts that have declared releases involving recreational activities void as violative of the public interest. Both the Vermont and Virginia Supreme Courts have struck pre-injury liability releases *589 as contrary to public policy. In *Dalury v. S-K-I, Limited*, [FN82] a unanimous Vermont Supreme Court declined to enforce a release which purported to absolve a ski area operator from liability for its own negligence. In particular, the release form signed by the skier released the operator "from any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, operations of the ski area, [and] actions or omissions of employees or agents of the ski area" [FN83] The skier sustained serious injuries when he collided with a metal pole that formed part of the control maze for a ski lift line. He sued, alleging negligent design, construction, and placement of the pole. [FN84]

In seeking to ascertain the scope of the public policy exception to the validity of exculpatory agreements, the court rejected various tests articulated by other courts, specifically including the Tunkl test and the four-part inquiry developed by the Colorado Supreme Court. [FN85] The Vermont court stated that determining whether or not the service being provided was an "essential public service" does not resolve the public policy question in the recreational sports context. [FN86] The court focused instead on what it declared to be the major public policy implications underlying the law of premises liability and wrote: "The policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible." [FN87] The court concluded that the pre-injury liability release executed by the skier implicated a legitimate public concern and was not enforceable. [FN88]

Likewise, the Virginia Supreme Court in *Hiatt v. Lake Barcroft Community Association, Inc.*, [FN89] refused to uphold an exculpatory release in a recreational activity case. In *Hiatt*, the plaintiff sustained an injury which rendered him a quadriplegic while participating in the "Teflon Man Triathlon," an event sponsored by the Lake Barcroft Community Association. [FN90] Prior to the event, Hiatt signed a release form in which he agreed to "release and forever discharge any and all rights and claims for damages which I may have *590 or m[ay] hereafter accrue to me against the organizers and sponsors ... for any and all injuries suffered by me in said event." [FN91]

The sole issue on appeal before the Virginia court was whether the release language constituted a valid and enforceable contract or whether the attempt by the

defendants to exempt themselves from liability was void and against public policy. [FN92] The court held that the release was void and stated that it had been well-settled law in the Commonwealth over the past one hundred years that "an agreement entered into prior to any injury, releasing a tortfeasor from liability for negligence resulting in personal injury, is void because it violates public policy." [FN93]

B. Disparity in bargaining power of the parties

Courts weigh carefully the respective bargaining power of the parties in determining the validity of an exculpatory agreement. [FN94] If they do not stand on equal footing and one party is compelled to relieve the other from liability for future negligent conduct, courts will likely hold the exculpatory clause invalid. [FN95]

As was discussed in the preceding section, before beginning an analysis of unequal bargaining power in a given situation, courts ask whether the services being provided are essential to the public interest. [FN96] If the services are essential, a release will not be upheld. Courts have held that public transportation, public utilities, telegraph companies, banking, medical care, public housing, professional bailees, and innkeepers constitute essential services and have declined to enforce exculpatory agreements when those services were involved. [FN97]

***591** Where services are not essential, courts have considered a number of factors when determining whether bargaining power is so disparate that an exculpatory agreement is invalid. Among those factors are whether there was an opportunity for negotiation; [FN98] whether the activity was voluntary as opposed to required; [FN99] and whether minors were involved. [FN100]

1. Opportunity for negotiation

The Mississippi Supreme Court has placed great emphasis on whether the terms of a release were "fairly and honestly negotiated and understood by both parties." [FN101] In *Quinn v. Mississippi State University*, [FN102] a twelve-year-old baseball camp attendee and his parents sued the University for injuries the minor received when he was hit in the mouth with a baseball bat by a coach while demonstrating how to hit baseballs off a tee. Prior to participating in the baseball camp, both the father and the minor signed a release, which stated:

The undersigned applicant and parent/guardian understand that the applicant will be engaging in physical activity during the program which contains an inherent risk of physical injury and the undersigned assumes the risk, indemnifies, and releases Mississippi State Baseball Camp, its officers, Directors, Agents, and Employees from any and all liability for personal injury arising out of the applicant's participation in the Camp program. [FN103]

The court noted that the release did not mention acts of an instructor, leaving open the question as to whether such acts of negligence were contemplated by the parties when they signed the release. [FN104] According to the court, the University used a broad anticipatory release in an attempt to prevent a ***592** camper from recovering from any possible injury sustained while attending the baseball camp. [FN105] But the court found that giving such broad effect to the release would overreach and allow unanticipated tortious acts to go without a remedy. [FN106] Reversing summary judgment for the University, the court held that a jury should have been allowed to determine what reasonable interpretations and contemplations the parties had when they signed the release. [FN107]

The court left little doubt about its inclination to construe a release drafted by a university harshly against the institution, especially when a minor invitee is involved. The court stated: "Even if the release was not ambiguous, the university would not be relieved of liability. Clauses that limit liability are given strict scrutiny by this Court and are not to be enforced unless the limitation is fairly

and honestly negotiated and understood by both parties." [FN108] Further suggesting hostility toward enforcing such a release, the court stated: "A party can not use an anticipatory release to escape liability for tortious acts." [FN109]

An appellate court in Wisconsin expressed similar concern over the lack of meaningful negotiation in *Eder v. Lake Geneva Raceway, Inc.* [FN110] In reversing summary judgment for Raceway, the court considered the circumstances under which the exculpatory contract in question was signed by the plaintiffs and noted that the document had been given to spectators as they entered the raceway in their automobiles; that there was no opportunity for them to read or ask questions about the release; and that there was no evidence that Raceway was willing to discuss the terms of the release or to engage in any discussion at all with the plaintiffs. [FN111]

The court concluded that there was not a "'bargain freely and voluntarily made through a process which has integrity,'" [FN112] and said: "[T]he plaintiff's lack of opportunity for discussing and negotiating the contract is significant when considered with the breadth of the release." [FN113] While recognizing that negotiating the terms of the standardized contract used in this situation might *593 have been logistically unrealistic, the court held that, at a minimum, the plaintiffs should have had an opportunity to read and ask questions about the terms releasing liability. [FN114]

In some cases, courts find an unequal disparity between the parties where there is use of a printed, form contract and there is no opportunity for negotiation. [FN115] These form agreements are commonly referred to as contracts of adhesion and require one party to acquiesce to pre-drafted and sometimes unfair terms without meaningful discussion, negotiation or bargaining. [FN116]

Other courts, however, have held that the mere fact that a contract is offered on a take it or leave it basis does not, standing alone, make the agreement an invalid contract of adhesion. [FN117] For example, the Colorado Supreme Court in *Jones v. Dressel* [FN118] determined that a contract containing an exemption from liability signed by a student with Free Flight Sport Aviation, Inc., was not a contract of adhesion. The court concluded that nothing in the record established a disparity in bargaining power and that the student could have obtained the flight services elsewhere. [FN119]

Likewise, the Minnesota Supreme Court held that an exculpatory clause contained in a membership contract signed by Sandra Schlobohm with a health spa was enforceable and that the agreement between the parties was not a contract of adhesion. [FN120] The court defined a contract of adhesion as being one drafted unilaterally by a business enterprise and forced upon an unwilling and unknowing public for essential services that cannot readily be *594 obtained elsewhere. [FN121] The court found that there was no disparity in bargaining power between Schlobohm and Spa Petite since she voluntarily applied for membership and made no showing that the services of the spa were necessary or that they could not have been obtained elsewhere. [FN122] The court held that the contract was not one of adhesion. [FN123]

The New Mexico Court of Appeals used a similar rationale in upholding the validity of an exculpatory clause in *Lynch v. Santa Fe National Bank*, [FN124] a case brought by purchasers against their escrow agent. The court acknowledged that the exculpatory clause in question was part of a standard printed form agreement prepared by defendant's attorney, that the defendant did not negotiate the agreement with the plaintiff but presented it in a take it or leave it basis, and that the only basis on which defendant would provide the escrow services was set forth in the conditions contained in the printed form. [FN125] However, the plaintiff was not required to use defendant's escrow services and there was no evidence of an absence of alternatives in the marketplace. [FN126] Thus, the court found no basis for applying the superior bargaining concept and rendering the exculpatory agreement invalid. [FN127]

In a case involving a college student, Jace Reed sued the University of North Dakota (UND) and the North Dakota Association for the Disabled (NDAD) for damage to

his liver and kidneys as a result of severe dehydration he experienced running in a ten kilometer charity road race, which was required as a part of the university's pre-season hockey conditioning program. [FN128] According to Reed, the UND coaches presented him a race registration form before the race, which he had to sign in order to participate. [FN129] The registration form contained a release through which Reed agreed not to hold the race's sponsor responsible for any claims arising from his participation in the event. [FN130]

Reed contended that the release he had signed was not enforceable as a matter of public policy. [FN131] The court examined the release to determine if Reed lacked bargaining power to negotiate or alter its terms and if the services were essential public services. [FN132] Since the release was required by the organization sponsoring the race and not by UND, the court found that any *595 perceived mandatory requirement for Reed to participate in this race involved his relationship with UND's hockey program and not with the sponsoring organization. [FN133] The court said that although NDAD may not have allowed Reed to run in the race if he had not signed the registration form, he was not under any economic or other compulsion from NDAD to sign the release. [FN134] Under these circumstances, the court rejected Reed's argument that a difference in bargaining power between the sponsor and him rendered the release invalid. [FN135]

2. Required as opposed to voluntary activity

Courts will not uphold releases signed by persons who have no choice in the matter. [FN136] This principle is applied in the school setting when the activity at issue is required as opposed to elective and when there is no alternative program of organized competition, as in sports activities. [FN137] One group of authors has written that releases are seldom considered legally valid in absolving a defendant of responsibility for school-related programs. [FN138]

Exculpatory agreements cannot be compelled as a condition of enrollment in required courses, especially when the courses, such as physical education, vocational education and science classes, expose the student to certain risks. [FN139] In several cases where releases have been mandated before a student was permitted to enroll or to participate in a required activity, courts have held the releases to be invalid as against public policy. [FN140]

In *Whittington v. Sowela Technical Institute*, [FN141] a college required a senior nursing student, Wanda Whittington, to execute a release before participating in a field trip to M.D. Anderson Hospital in Houston, Texas. [FN142] After signing the required release, Whittington, fifteen other students, and two *596 Sowela faculty members were traveling to Houston in a fifteen-passenger van being driven by a member of the nursing class when the driver of the van lost control and the van overturned. [FN143] Whittington and another student were killed. [FN144]

Whittington's husband sued Sowela and numerous other parties on behalf of himself and a minor child. [FN145] He then moved in limine to exclude evidence concerning the releases that had been signed by all the nursing students, including Whittington. [FN146] The trial court granted the motion. The jury rendered a verdict for the plaintiffs, and defendants appealed, asserting that the trial court erred by excluding evidence of the releases. [FN147]

The appellate court first cited a Louisiana statute that declared that where a contract is not contrary to public order or good morals, an individual has the right to waive personal rights the law has established in his or her favor. [FN148] The court then noted that a release is viewed as a contract and, [FN149] in order to have legal validity, it must possess the essential elements of any other contract, [FN150] specifically including consent which must be "a free and deliberate exercise of the contracting party's will." [FN151]

The court then examined the circumstances surrounding the execution of the release by Whittington and concluded that the release was not freely and voluntarily given and was, hence, invalid as against public policy. [FN152] The court gave several

reasons for its conclusion: Sowela sponsored the trip for senior nursing students annually and distributed to all of the students form releases for their signatures; Sowela awarded twelve credit hours to a nursing student for participating in the field trip (double the amount given during a normal day); Sowela did not offer alternative classes for any student who chose not to participate in the field trip; Sowela required the students to travel in a group and did not permit them to use their private vehicles; and Sowela dictated the terms of the purported release that attempted to release the school from any and all liability for a reasonably foreseeable danger. [FN153]

***597** Likewise emphasizing the importance of the voluntary, as opposed to the required, nature of the activity in question, the Massachusetts Supreme Court recently upheld the validity of a release signed by the father of a high school student who was injured while participating in a cheerleading practice. [FN154] The court first recognized that it is not against the public policy of the Commonwealth to place the risk of negligently caused injury on a person as a condition of that person's voluntary choice to engage in a potentially dangerous activity. [FN155] The court then upheld the release saying: "In this case, Merav's [the plaintiff] participation in the city's extracurricular activity of cheerleading was neither compelled nor essential, and we conclude that the public policy of the Commonwealth is not offended by requiring a release as a prerequisite to that participation." [FN156]

Also emphasizing the elective nature of the activity, an Indiana court upheld liability waivers signed by a student as a condition of enrollment in a motorcycle training and safety course taught by Indiana State University. In so doing, the court noted that the activity was not an essential service to the public; that the university did not require the student to take the course; that she could have obtained such instruction elsewhere; and that there was no inequality of bargaining power between the parties. [FN157] In a similar case, the Alaska Supreme Court found a release executed by a student in an all terrain vehicle ("ATV") safety course not violative of public policy because the safety course was not an essential service, those offering the course did not have a decisive advantage in bargaining strength, and the student had a genuine choice whether to take the course or not. [FN158]

***598** In most cases involving recreational sports, courts have placed significant emphasis on the voluntary nature of the activity, determining that sports activities are not essential services. Where the services are not essential, neither public policy nor unequal bargaining power provide a basis for declaring liability releases invalid. [FN159] Courts have focused on the voluntary nature of the activity when upholding liability releases in a wide range of cases involving recreational activities, such as parachuting, [FN160] scuba diving, [FN161] ice skating, [FN162] running, [FN163] bicycling, [FN164] skiing, [FN165] exercising at health clubs, [FN166] horseback riding [FN167] and snowmobiling, [FN168] among others. A review of these cases establishes clearly that releases executed as a condition of voluntary participation in a recreational activity will be enforced if the language of the release meets the "clear and conspicuous" test and if the releasing party is an adult. [FN169]

3. Minors

Courts carefully scrutinize exculpatory agreements executed by minors [FN170] and almost always hold that such agreements are invalid or are voidable at ***599** the option of the minor. [FN171] A minor holds the power to disaffirm or set aside any agreement during minority and within a reasonable time after reaching majority. [FN172] Courts have held that this power of disaffirmance or avoidance extends to releases, including those in the recreational activity field. [FN173]

Since most jurisdictions recognize that releases executed by minors are per se voidable, if not invalid, it is important to determine who is a minor. The age of majority varies from state to state. In most states it is 18; [FN174] however, in a few it is 21. [FN175] Even though a student is in college, he or she may still be a minor, depending upon the age of majority in the state in which the student attends

school. In such a situation, a release executed by the student may be voidable at the option of the student because of his or her minority. [FN176]

Many states have statutes authorizing all persons eighteen years of age or older to enter into binding contracts in matters affecting personal property. [FN177] Some courts have interpreted such statutes to effectively remove the disability of minority for the purpose of contracting for personal property, including the right to execute a contract to settle a claim for personal injuries. [FN178]

Releases involving minors can be separated into two distinct categories: those signed by minors themselves ("minor waivers") and those signed by *600 parents ("parental waivers"). [FN179] While it is clearly established that a release entered into by a minor can be set aside, it is also well-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. [FN180] The Mississippi Supreme Court expressed this rule in broad terms: "Minors can waive nothing. In the law they are helpless, so much so that their representatives can waive nothing for them." [FN181]

The Washington Supreme Court in *Scott v. Pacific West Mountain Resort* [FN182] addressed the validity of parental waivers and held that a waiver signed by a mother, with knowledge and acquiescence of the child's father, was invalid to release a cause of action belonging to their minor child. Prior to 12-year-old Justin Scott taking ski lessons at Pacific West Mountain Resort, his mother signed an application for the school which included Justin's name, grade in school, years skied, and also contained the following language:

For and in consideration of the instruction of skiing, 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. [FN183]

*601 Justin was seriously injured when he crashed while attempting to ski on a slalom race course which had been laid out by the ski school owner. [FN184] The ski school moved for summary judgment on the ground that the exculpatory clause in the application relieved the school from any liability for its own negligence. [FN185] After finding that the language in the purported exculpatory clause was sufficiently clear and unambiguous, the court addressed the parents' authority to release not only their own claims but also a potential future claim of their child. [FN186] The court noted that under Washington law parents may not settle or release a child's post-injury claim without prior court approval. "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 any injury." [FN187] Deciding that the release signed by the mother was invalid, the court said: "We hold 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." [FN188]

Both the Colorado and Utah Supreme Courts addressed this issue shortly thereafter and reached the same conclusion as the Scott court. Relying extensively on Scott, both courts agreed that a parent or guardian may not release a minor's prospective claim for negligence and may not indemnify a tortfeasor for negligence committed against his minor child since to do so would violate the public policy of both states and would create an unacceptable conflict of interest between a minor and his parent or guardian. [FN189]

Other courts have reached the same conclusion but have based their reasoning on contract principles rather than on the public interest. For example, in *Childress v. Madison County*, [FN190] the mother of a mentally retarded twenty-*602 year-old signed a waiver purporting to release the county and Special Olympics from all liability for damage to her son as a precondition to the child's participation in training for the Special Olympics in the Y.M.C.A. swimming pool. Neither the father nor the child signed the waiver. [FN191]

Near the end of a training session, Todd Childress slipped into the deep end of

the pool and went unnoticed for an undetermined length of time before being pulled from the pool and resuscitated. [FN192] He sustained injuries as a result of the incident and sued for damages. [FN193] The defendants argued that even if they were negligent in failing to properly supervise Todd, the action was barred by the release executed by the mother individually and on behalf of her son. [FN194] The Tennessee court disagreed, holding that the mother could not execute a valid release or exculpatory clause as to the rights of her son and "to the extent the parties to the release attempted and intended to do so, the release is void." [FN195]

Although parents generally cannot waive the right of their minor child to bring suit, they may, in most states, waive their own right to sue. [FN196] In an unusual case in New York, however, the court held that neither a minor nor his father was bound by a release signed by the father, which purported to exempt the city and hockey league from liability for injuries the child sustained while attending an ice hockey clinic. [FN197] The court said that since the father's cause of action was derivative and draws its life from the existence of the cause of action which inures to the benefit of the infant, it should be reinstated. [FN198]

Although in the minority, some states permit parents and guardians to sign legally binding releases on behalf of their minor children which the minors may not thereafter disaffirm. The Massachusetts Supreme Court recently took this position in *Sharon v. City of Newton* [FN199] and held that the father of a child injured in cheerleading practice had authority to bind the child to an *603 exculpatory release. Likewise, the Ohio Supreme Court in *Zivich v. Mentor Soccer Club, Inc.*, [FN200] upheld an exculpatory agreement signed by a parent on a minor child's behalf in order to encourage youth sports and promote volunteer services. [FN201] California courts have reached similar results. [FN202]

Even if a release is not violative of the public interest and is not the result of a significant disparity in bargaining power, there are additional hurdles that must be overcome before courts will enforce the release. [FN203]

C. Willful misconduct, gross negligence, and intentional torts.

Courts generally agree that one may not exonerate himself or herself from liability for willful or wanton misconduct, for gross negligence, or for intentional torts, even if there is broad exculpatory language. [FN204] Exculpatory *604 agreements covering acts beyond negligence may be invalidated under either of two analytical approaches. [FN205] First, a court may find that the scope of a particular agreement simply does not include specific types of serious misconduct. Second, and more common, courts may hold that agreements attempting to preclude liability for some types of serious misconduct are, as a matter of public policy, simply unenforceable because there is a strong public interest in discouraging aggravated wrongs. [FN206] The rationale supporting this view is that society gains no benefit from permitting or encouraging intentionally harmful activity. Most courts agree. [FN207] The interest in protecting society from aggravated wrongs outweighs the rights of parties to absolve themselves contractually from harm caused by extremely egregious conduct. [FN208]

For example, in *New Light Co. v. Wells Fargo Alarm Services*, [FN209] the Supreme Court of Nebraska analyzed the public policy considerations involving *605 releases from liability for gross negligence. [FN210] Wells Fargo and New Light entered into an agreement which provided that Wells Fargo would install a fire alarm system in a restaurant owned by New Light. [FN211] The agreement included a clause releasing Wells Fargo from any damage caused "by negligent acts or omissions of Wells Fargo Alarm, its agents or employees." [FN212] While installing the system, Wells Fargo failed to install a certain fire detection device which caused the system to be ineffective when a fire broke out in the restaurant. New Light sued Wells Fargo alleging that Wells Fargo had been grossly negligent in installing the alarm system. [FN213] Although the release provision specified "negligence" as the only cause of action to be released, Wells Fargo claimed that the release provision in the contract also relieved it of any liability due to its negligence or gross negligence. [FN214]

The court disagreed and created a public policy balancing test in which it weighed the right of parties to contract as they pleased against the public interest in protection from injurious conduct. [FN215] The court reasoned that the greater the threat to the general safety of society, the greater the public interest in restricting a party's freedom to contract away or limit the party's possible liability. Applying the balancing test to the facts of this case, the court held that an agreement allowing Wells Fargo to insulate itself from damages caused by its own gross negligence would be injurious to the public because the potential risk to human life and property was so high. [FN216] This rationale for refusing to enforce a release as to gross negligence or willful misconduct has been widely accepted. [FN217]

D. Ambiguous and inconspicuous language

Although courts will enforce contracts intended to exculpate parties from consequences of their own negligence, courts subject such agreements to close judicial scrutiny and strictly construe the agreements against the parties *606 seeking to be released. [FN218] By interpreting releases strictly, courts attempt to ease the tension between the freedom to contract and the tort law concept that a person should be held responsible for his negligence that causes harm to another. [FN219]

The New York Court of Appeals set forth a widely followed and exacting standard by which it would construe exculpatory language in *Gross v. Sweet*, [FN220] saying: "[U]nless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts." [FN221] This "stringent standard" not only requires that the "drafter of such an agreement make its terms unambiguous, but it mandates that the terms be understandable as well." [FN222] One court explained the requirement this way: "The wording of such an agreement must be so clear and understandable that an ordinary and knowledgeable party to it will know what he is contracting away." [FN223] If a reasonable signor could not have understood what the waiver language meant, then that person cannot later be said to have voluntarily consented to the waiver's terms. [FN224]

Although no particular form or "magic words" are necessary in order to create a valid release, the words used must manifest in clear, explicit, and unequivocal language the releasor's intent to discharge the liability of another. [FN225] As one court has put it: "'If an express agreement exempting the *607 defendant from liability for his negligence is to be sustained, it must appear that its terms were brought home to the plaintiff'" [FN226] Missouri courts require that the intent to release one from his or her own negligence must be clearly and expressly stated "in plain terms." [FN227] The language must be basic enough to be understood by the average reader, while at the same time technical enough to explain adequately the legal rights being relinquished. [FN228] One commentator has said: "The most significant aspect of a release is its wording." [FN229]

Illustrative of the courts' focus on clear, simple, and specific language is a California court's opinion in *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* [FN230] In that case, the court held that the release in question did not clearly and explicitly indicate to an ordinary person untrained in the law that the intent of the document was to release his claims for personal injuries. In stark, critical language, the court said:

The only time the word "release" appears in the entire document is in its title. Thereafter, the only language which could possibly be construed as exculpatory, releasing or indemnifying appears in a convoluted 147 word sentence. Although over 55 percent the length of Lincoln's entire Gettysburg Address, that sentence in the document contains no releasing language. It never mentions words such as "release," "remise," "discharge," "waive," or the like. [FN231]

While the law demands that releases be clear, coherent, and explicit, just how much specificity is enough is something about which courts disagree. In *Zavras v.*

Capeway Rovers Motorcycle Club, Inc., [FN232] the court held that a release which provided that "I agree to ... hold blameless" the race track owner, and "to assume all responsibility for ... any loss or injury to me ..." was enforceable. [FN233] This clear but general language would not suffice for other courts, which insist that the release identify with specificity the activity *608 from which the injury arose. [FN234] For example, in Dobratz v. Thomson, [FN235] the Supreme Court of Wisconsin held that a release signed by a decedent who was killed in a waterski show when he was struck by a boat towing other skiers was unenforceable because it failed to contain a sufficient description of the activity in question. The agreement purported to release the sponsoring ski club from "all liability ... [and] claims ... arising in connection with this event ... whether arising while engaged in competition or in practice or preparation therefore, or while upon entering or departing from said premises, from any cause whatsoever." [FN236] The court emphasized that the agreement did not specify the nature of the activity, the particular skiing stunts that were to be performed, their level of difficulty and dangerousness, or the locations covered, and that it did not specifically mention "ski shows," as opposed to competition, practice, or preparation. [FN237]

Because courts generally disapprove of parties avoiding liability for harm caused by their actions, courts strictly construe releases to prevent parties from transferring liability in vague, deceptive, or confusing ways. [FN238] The Texas Supreme Court, in an effort to cut through the ambiguity and circumvention of many release and indemnity agreements, adopted the express negligence doctrine, which requires that the intent to release or indemnify a party from liability for its own negligence must be expressed in specific terms in the contract language. [FN239]

Other states, while not formally adopting the express negligence doctrine, apply a similar strict standard and require that, in order to create a valid exculpatory clause, the word "negligence," "fault," or their equivalent be used in the contract language. [FN240] For example, the Missouri Supreme Court *609 examined an exculpatory clause that purported to shield a health club from "liability for any damages," "any ... injuries" and "any and all claims, demands, damages, rights of action, present or future ... resulting from or arising out of the Member's ... use ... of said gymnasium or the facilities and equipment thereof." [FN241] The court, holding that the clause was ambiguous because it did not specifically state that a member was releasing the health club for its own future negligence, said: "The words 'negligence' or 'fault' or their equivalents must be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs." [FN242]

Other courts have not required specific mention of the words "negligence" or "fault," although they have still required that the release be clear and conspicuous. [FN243] Still other courts have focused on the intent of the parties and have held that the term "negligence" is not required to be used if the intent of the parties to preclude such liability is clearly set forth. [FN244]

In O'Connell v. Walt Disney World Company, [FN245] a Florida court said that unless a release "clearly and unequivocally provides for indemnification for *610 the indemnitee's own negligence, that obligation will not be inferred." [FN246] In this often-cited case, a father, after paying an admission fee, signed a release form for his nine-year-old son, that said, in pertinent part:

I consent to the renting of a horse from Walt Disney World Co. by Frankie, a minor, and to his/her assumption of the risks inherent in horseback riding. I agree, personally and on his/her behalf, to waive any claims or causes of action which he/she or I may now or hereafter have against Walt Disney World Co. arising out of any injuries he/she may sustain as a result of that horseback riding, and I will hold Walt Disney World Co. harmless against any and all claims resulting from such injuries. [FN247]

During the ride, the horses stampeded and the child was thrown from his horse, with the child suffering severe injuries. [FN248] The father sued. [FN249] Disney defended by raising the release as a complete bar to suit. [FN250] The court held, however, that the release did not bar recovery because there was a total absence of any language indicating the intent to either release or indemnify the defendant for its own negligence, and that the court would not read that language into the

release. [FN251] The court further stated: "In order to be enforceable, the agreement must unambiguously indicate which risks are assumed and will not be interpreted to include losses resulting from the defendant's negligence unless it is clear that the plaintiff so intended." [FN252]

To be enforceable, courts also require that a release be signed knowingly and willingly. "Knowingly" means the party who signed the release understood its contents, and "willingly" means the release was not signed under duress. [FN253] Most courts hold that a person is presumed to understand a document that he or she signs and will not be released from a contract for failing to read it. [FN254]

*611 In addition to the requirement of specificity in describing what is being waived, courts also require that waiver language be conspicuously displayed in order to be valid. [FN255] Whether language is conspicuous depends on where and how it appears in the document. Generally, courts find waiver clauses to be conspicuous when they are somehow "set off" in a manner that draws attention to the reader, such as when the clauses are in bold and/or capital letters, appear beneath a clearly labeled heading, stand out from surrounding print in a larger font size, have contrasting type or color, or appear as the only text on the page. [FN256] The Texas Supreme Court, in adopting the conspicuousness standards set forth in the Texas Business and Commerce Code, said: "When a reasonable person against whom a clause is to operate ought to have noticed it, the clause is conspicuous." [FN257]

A Washington court reviewed a release signed by a skier, who contended that the release was inconspicuous and, therefore, invalid. [FN258] The release was entitled "LIABILITY RELEASE & PROMISE NOT TO SUE. PLEASE READ CAREFULLY!" [FN259] The words "RELEASE" and "HOLD HARMLESS AND INDEMNIFY" were set off in capital letters throughout the agreement, and the release contained the following language just above the signature line: "Please Read and Sign: I have read, understood, and accepted the conditions of the Liability Release printed above." [FN260] The court concluded that the release was sufficiently conspicuous and upheld the liability waiver. [FN261]

Courts have sustained challenges to releases on the grounds of lack of conspicuousness where the waiver language was hidden in a nondescript paragraph in the middle of a document. [FN262] In *Leon v. Family Fitness Center*, [FN263] the court held that a liability release in a health club membership contract was not enforceable because the release clause was in the middle of the document in the same, smaller eight-point font used in most of the agreement; the clause was not prefaced by a heading; and, the title of the agreement gave no indication that it contained liability release language. [FN264] The Texas Supreme Court determined that a release signed by a participant who suffered fatal *612 injuries in a motorcycle race was unenforceable where the language in the release was smaller than other language used in the document and had no contrasting color or type. [FN265] In a negligence action brought by spectators who were injured when a motorcycle left a race track, a Wisconsin appellate court found that standard form releases signed by racetrack patrons as they entered the site were void since the fine-printed forms were presented to patrons in line waiting for admission, without time to read, understand, and accept the terms of the release. [FN266]

II. THE DRAFTING OF RELEASES

The cases discussed in this article provide both general and specific guidance for drafting releases. Since courts will subject these documents to close scrutiny and will interpret them in a manner most favorable to the injured party, [FN267] the drafter should use great care in preparing exculpatory agreements. [FN268]

One preparing a release should use language that is clear, unambiguous, understandable, and conspicuous. Words used in the release must express unequivocally the intent of the releasor to release the other party from its own negligence. They must also describe with particularity the activities intended to be included within the scope of the release. [FN269] As one commentator has stated: "Drafters of exculpatory agreements must be sufficiently specific to release for

certain conduct yet be broad enough to encompass other related acts and conduct that may result in liability." [FN270] A California appeals court similarly observed:

Drafters of releases always face the problem of steering between the Scylla of simplicity and the Charybdis of completeness. Apparently, no release is immune from attack ... [but to] be effective, a release need not achieve perfection; only on Draftsman's Olympus is it feasible 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 [FN271]

***613** Courts have invalidated releases by finding that the exculpatory provisions were not conspicuous and readily apparent to the releasing party. [FN272] Reasons given by courts for invalidating releases for lack of conspicuousness range from the type size being inadequate to the absence of the word "release" in the text of the document. [FN273] On the other hand, when the language of a release is fashioned in a manner that draws attention to the reader of the exculpatory language, it has been persuasive in convincing the court of the intent of a party to release his or her claims for negligence. [FN274]

The following suggestions for drafting releases are based on a review of the cases and law review articles cited in this paper. Although using these suggestions will not cause a court to enforce a release violative of the public interest or one in which a significant disparity in bargaining power exists, these drafting tips will at least help a drafter prepare a document that clearly expresses the intent of the parties.

(1) Use language that is clear, unambiguous, and understandable.

As indicated earlier, courts insist that in order to create an enforceable release the words used must manifest in clear, explicit, and unequivocal language the intent of the releasor to discharge the liability of another. [FN275] Whether actually required in a particular jurisdiction or not, the drafter should use the word "negligence" to indicate that the person signing the document is releasing the college or university from its own future negligence, if that is the intent of the parties. [FN276]

Likewise, the drafter should avoid using weak language stating that the party is not "assuming" or "accepting" responsibility for injuries that he or she might cause another. These words can be interpreted as merely indicating an unwillingness to shoulder any additional responsibility which the party does not already bear. Similarly, a drafter should not attempt to release responsibility for any "accidents" because this term is vague and ambiguous. A reasonable interpretation of the word "accident" precludes negligence because an accident is something which could not have been prevented by exercise of due care. [FN277]

(2) Do not use legal jargon.

Use plain, simple words that clearly indicate to an ordinary person untrained in the law that the document waives any claims for future personal ***614** injuries. Do not use "legalese" or legal jargon. [FN278] After setting forth the release language in a formal manner, restate it in simple, layman's terms, such as: "In other words, I agree that I cannot sue or recover anything from Releasees if anything happens to me or to my property as a result of Releasees' past or future negligence or while preparing for or participating in this particular activity or trip."

(3) Specify with particularity conduct the parties intend to be covered by the release.

Drafters of exculpatory clauses must be sufficiently specific to release liability for conduct the parties intend to be covered by the release, yet broad enough to encompass other related acts that might result in liability. It is important to make

clear whether the exculpatory language is for all risks that might occur. Otherwise, courts may limit the release to known risks or risks that are inherent in the activity. [\[FN279\]](#)

Releases containing general phrases such as a release "[from] any and all responsibility or liability of any nature whatsoever for any loss of property or personal injury" [\[FN280\]](#) or "to hold [drafter] harmless on account of any injury incurred" [\[FN281\]](#) are often unenforceable because their meanings are unclear. [\[FN282\]](#) In a Wisconsin case, a member of a water ski stunt team was killed when struck by a boat during a performance. [\[FN283\]](#) The release the skier had signed was broad and released essentially everyone from liability for any injuries occurring "in connection with this event" or "upon said premises." [\[FN284\]](#) The release did not define "this event" or "said premises." Although the court held that the release did not violate the public interest, it held the agreement was void for vagueness. [\[FN285\]](#)

***615** (4) Make the release language conspicuous.

Drafters should take care to make the releasing language appear obvious to the signer by using various techniques, such as bold-face type, increased type size, underlining, all capital letters, different colored type, putting a box around the provision, or a combination of these techniques. [\[FN286\]](#) DRAW ATTENTION TO THE EXCULPATORY LANGUAGE. [\[FN287\]](#)

Place the exculpatory clause where it is easy to find, preferably in the first or last section of the document so that it is in plain view of the signer. Do not place the releasing language on one page and the signature line on another. To further bring the clause to the signer's attention, require that he or she separately sign or initial the sentence or paragraph containing the exculpatory language. [\[FN288\]](#) The collective effect of these proposals will add clarity and conspicuousness to an exculpatory clause and may persuade a court that the releasing party understood the nature and consequences of signing the document. [\[FN289\]](#)

Be careful, however, not to overuse the conspicuousness technique. If too much of the document is placed in capital or bold letters, the exculpatory language may not be noticed. On the other hand, do not seek to make the exculpatory language noticeable by merely using a smaller font size, italics, or a lighter-colored type. Such attempts make the release more difficult to read and may make a court interpret their use as a means to hide the provision. [\[FN290\]](#)

(5) Negotiate the release, explain its terms, and provide alternative through increased fee.

In holding a release invalid, some courts focus on the fact that the release was not bargained for or negotiated. [\[FN291\]](#) While it may be unrealistic in a large setting for a university to engage in bargaining or negotiating the terms of a release with a student or participant, the institution could state in the release that a designated university employee is available to answer and discuss questions about the release. [\[FN292\]](#) As further evidence of negotiating or bargaining over the terms of the release, draft the document to provide an opportunity for the contracting party to pay a higher fee if he or she does not want to release the institution from liability for its future negligence. [\[FN293\]](#)

***616** (6) Label the document "General Release and Covenant Not to Sue" or "Unconditional and Full General Release and Covenant Not to Sue."

If it is the intent of the parties to have the document serve as an unconditional release without any limitations or exclusions, label it a "General Release" or "Unconditional and Full General Release" instead of simply "Release." These words emphasize the unqualified nature of the document. [\[FN294\]](#) In addition to the

exculpatory language, add a statement that the releasing party agrees not to sue the university on any claims arising out of the specific activity.

(7) Use a separate release document for each releasing party.

When requiring releases from a number of individuals engaged in the same activity, use a separate document for each individual.

(8) Include declaration of age, of having read and understood release, of voluntary nature of activity, and of shared responsibility for safety.

Insert a statement in the release through which the person signing the document declares that he or she is eighteen years of age or older, is competent to read and sign the release, has read the entire agreement, and understands that he or she is releasing legal rights. Also, provide a statement that the releasing party understands that he or she may have an attorney review the release before it is signed.

If the activity is a purely voluntary one, have the releasing party state that he or she is participating freely and voluntarily, and that the activity is not required by the university.

Have the participant acknowledge his or her responsibility for self-education on the legal, political, governmental, and religious systems in countries when they are quite different from those in the United States and for obeying the laws of the country being visited in a study abroad situation. Also have the participant commit to obey university rules and the laws of the country being visited.

(9) Give releasing party sufficient time and place for reading and signing agreement.

Provide the releasing party time and space for considering the document. Courts are more likely to enforce a release if the releasing party had sufficient time and an appropriate place for reading and signing the document. [FN295]

***617** (10) Draft release to be informational and educational.

Draft the release so that it contains information about the risks involved in the activity and provides evidence that the releasing party fully understood and assumed reasonably foreseeable risks.

III. CONCLUSION

This article began with the question: Is there still a place for the use of releases by colleges and universities? After review of many cases and commentaries, the answer remains a tentative "yes."

The law surrounding releases is state--and oftentimes activity--specific. Therefore, there is great discrepancy in decisions regarding the enforceability of releases. Some courts emphasize the public interest in holding releases invalid when the service or activity is essential and cannot be obtained elsewhere, while others focus on the bargaining power of the respective parties. Some courts enforce releases containing broad, general language; others do not. Some courts require that the word "negligence" be used to release a party from its own negligence; others do not. Some demand evidence that the release was "negotiated" and "bargained for," while other courts place no emphasis on this requirement. Most courts uphold clearly expressed releases in situations where the activity at question is voluntary, but not all do so.

What lessons can be learned from this Brunswick stew of legal theories and precedents? First, even a well-crafted release may not exculpate an institution from liability for its own negligence, so higher education attorneys should clearly advise their clients of the questionable utility of a release's exculpatory provisions. Next, courts are reluctant to enforce releases where the service or activity involved is essential to the public, is not available elsewhere, and the bargaining strength of the parties is not substantially equal.

Finally, even if a release may not exculpate a college or university from its own negligence, a clearly drafted release that sets forth in detail the risks inherent in the activity will inform the participant of the risks involved, provide evidence of the university's fulfillment of its duty to warn, serve as a written acknowledgment of the participant's understanding of and assumption of risks inherent in the activity, and, on occasion, act as a deterrent to suit. For these reasons, there is still a place for the use of releases.

[FNal]. B.A., University of Mississippi; M.A., University of Mississippi; MLSci., University of Mississippi; J.D., University of Mississippi; LL.M., Harvard Law School. Ms. Connell is General Counsel of the University of Mississippi and is former president of the National Association of College and University Attorneys.

[FNaa1]. B.A., Princeton University; J.D., Georgetown University Law Center. Mr. Savage is Deputy General Counsel, Johns Hopkins University, and is a former member of the Board of Directors of the National Association of College and University Attorneys.

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[FN2]. For a good overview of the use of releases and waivers by colleges and universities, see WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING § § 2.5.2.3, 2.5.2.4 (3d ed. 2000).

[FN3]. See, e.g., Terry v. Ind. State Univ., 666 N.E.2d 87 (Ind. Ct. App. 1996).

[FN4]. See, e.g., Kyriazis v. Univ. of W. Va., 450 S.E.2d 649 (W. Va. 1994).

[FN5]. Although many courts, commentators and businesses treat indemnity agreements as releases, there is a distinction between the terms. An indemnity agreement is an insurance contract by which one party (the indemnitor) gives to the other party (the indemnitee) assurance that the indemnitor will compensate the indemnitee for any loss, damage or liability sustained by the indemnitee arising from the risks specified in the agreement. See generally, Cathleen M. Devlin, Comment, Indemnity and Exculpation: Circle of Confusion in the Courts, 33 EMORY L.J. 135, 141 (1984) (discussing enforceability of indemnity and exculpatory agreements in lease contracts and distinctions between the two types of agreements).

[FN6]. An exculpatory clause is defined as "[a] contractual provision relieving a

party from any liability resulting from a negligent or wrongful act." BLACK'S LAW DICTIONARY 588 (7th ed. 1999).

[FN7]. 66 AM. JUR. 2D Release § 1 (2001).

[FN8]. See Mark Seiberling, "Icing" on the Cake: Allowing Amateur Athletic Promoters to Escape Liability In Mohney v. USA Hockey, Inc., 9 VILL. SPORTS & ENT. L.J. 417, 428 (2002) ("Exculpatory agreements place the established principle of freedom to contract in tension with the basic principle that a party should bear the responsibility for its own negligence."); Keith Bruett, Can Wisconsin Businesses Safely Rely Upon Exculpatory Contracts to Limit Their Liability? 81 MARQ. L. REV. 1081, 1083 (1998) ("Courts assessing the validity of exculpatory clauses attempt to balance 'the tension between the principles of contract and tort law that are inherent in such [] agreement[s]'" (quoting Richards v. Richards, 513 N.W.2d 118, 121 (Wis. 1994))).

[FN9]. Heil Valley Ranch v. Simkin, 784 P.2d 781, 784 (Colo. 1989).

[FN10]. See generally Joseph H. King, Jr., Exculpatory Agreements for Volunteers in Youth Activities-The Alternative to "NERF (R)" Tiddlywinks, 53 OHIO ST. L.J. 683, 710 (1992) (describing judicial attitudes toward exculpatory agreements as being "characterized by ambiguity and unpredictability"); SPORTS AND LAW: CONTEMPORARY ISSUES § 2.3(C), at 34 (Herb Appenzeller ed., 1985) (commenting that conflict between fundamental tenet of contract law, that all persons have freedom to contract as they wish, and fundamental tenet of tort law, that one is responsible for negligent acts which cause injury to another, has resulted in confusion regarding validity of waivers).

[FN11]. See Restatement (Second) of Torts § 496B (1979) ("A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.").

[FN12]. See, e.g., Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 558 (N.J. Super. Ct. Law Div. 1970) (stating that liability provisions are invalid when parties do not stand on equal footing).

[FN13]. See, e.g., Wolf v. Ford, 644 A.2d 522, 525 (Md. 1994) (reiterating rule that party will not be permitted to excuse its liability for intentional harms or for reckless, wanton or gross negligence).

[FN14]. See, e.g., O'Connell v. Walt Disney World Co., 413 So. 2d 444, 447 (Fl. Dist. Ct. App. 1982) (saying that unless release "clearly and unequivocally provides for indemnification for the indemnitee's own negligence, that obligation will not be inferred").

[FN15]. See generally 57A AM. JUR. 2D Negligence § § 59-63 (1989).

[FN16]. Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 444 (Cal. 1963) (en banc).

[FN17]. Wolf v. Ford, 644 A.2d 522, 527 (Md. 1994).

[FN18]. 383 P.2d 441 (Cal. 1963) (en banc). For a comprehensive discussion of Tunkl, see Daniel I. Reith, Contractual Exculpation from Tort Liability in California: The 'True Rule' Steps Forward, 52 CAL. L. REV. 350 (1964).

[FN19]. See, e.g., Morgan v. S. Cent. Bell Tel. Co., 466 So. 2d 107, 117 (Ala. 1985); Mun. of Anchorage v. Locker, 723 P.2d 1261, 1265 (Alaska 1986); La Frenz v. Lake County Fair Bd., 360 N.E.2d 605, 608-09 (Ind. Ct. App. 1977); Lynch v. Santa Fe Nat'l Bank, 627 P.2d 1247, 1251-52 (N.M. Ct. App. 1981); Lee v. Consol. Edison Co., 407 N.Y.S.2d 777, 787 (N.Y. Civ. Ct. 1978), rev'd on other grounds, 413 N.Y.S.2d 826 (N.Y. App. Term. 1978); Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977); Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 973 (Wash. 1988).

[FN20]. Some courts employ somewhat different variations on the public policy theme formulated in Tunkl. For example, the Colorado Supreme Court used a four-part inquiry focusing on (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. See Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981) (en banc). The Alabama Supreme Court developed a five-part test. See Lloyd v. Service Corp., 453 So. 2d 735, 737 (Ala. 1984). Some courts have expressly rejected the Tunkl analysis as a definitive public interest test. See, e.g., Wolf v. Ford, 644 A.2d 522, 527 (Md. 1994) (declining to adopt six-factor test set forth in Tunkl but acknowledging that factors listed could be considered in determining whether transaction affects public interest); Rawlings v. Layne & Bowler Pump Co., 465 P.2d 107, 111 (Idaho 1970) (banning exculpatory agreements only when they are product of unequal bargaining power or involve public duty, but not considering the remaining four Tunkl criteria).

[FN21]. Tunkl, 383 P.2d at 442.

[FN22]. Id.

[FN23]. Id. at 442 n.1.

[FN24]. Id.

[FN25]. Id.

[FN26]. Id. at 442. (quoting Cal. Civ. Code § 1668 (West 2003)).

[FN27]. Id. at 443.

[FN28]. Id. at 443 n.6.

[FN29]. Id. at 444.

[FN30]. Id. at 445.

[FN31]. Id.

[FN32]. Id.

[FN33]. Id. at 446.

[FN34]. Id.

[FN35]. Id. After establishing these guidelines, the California court found that even though it was not necessary that a contract of exculpation meet all six of these factors in order to be found violative of the public interest, the agreement between Tunkl and the hospital met them all. Id. at 447.

[FN36]. Id. at 448.

[FN37]. Id.

[FN38]. Id. at 442, 447. For other cases in which courts have refused to uphold exculpatory clauses where patients were undergoing treatment at a medical facility, see Emory Univ. v. Porubianski, 282 S.E.2d 903, 905 (Ga. 1981) ("We find that it is against the public policy of this state to allow one who procures a license to practice dentistry to relieve himself by contract of the duty to exercise reasonable care."); Smith v. Hosp. Auth. of Walker, Dade & Catoosa Counties, 287 S.E.2d 99, 102 (Ga. Ct. App. 1981) (holding that release should not relieve medical professional from duty of reasonable care); Meiman v. Rehab. Ctr., Inc., 444 S.W.2d 78, 79 (Ky. Ct. App. 1969) (stating that rehabilitation center could not introduce release into evidence since document signed by patient as condition of receiving therapy violates public policy); Cudnik v. William Beaumont Hosp., 525 N.W.2d 891, 896 (Mich. Ct. App. 1994) (holding that exculpatory agreement signed by patient before receiving surgery was unenforceable as against public policy); Ash v. N.Y. Univ. Dental Ctr., 564 N.Y.S.2d 308, 310 (N.Y. 1990) (declaring it against public policy to uphold exculpatory agreement between dental clinic and patient); Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1977) (adopting Tunkl criteria and declaring exculpatory contract signed by patient as condition of receiving medical treatment void).

[FN39]. 450 S.E.2d 649 (W. Va. 1994).

[FN40]. For a good briefing of this case, see John H. Robinson & Catherine Pieronek, The Law of Higher Education and the Courts: 1994 in Review, 22 J.C. & U.L. 367 (1996).

[FN41]. The release signed by Kyriazis read in part:

In consideration of my participation, I hereby release West Virginia University, The University of West Virginia Board of Trustees, The Sports Club Federation, The Rugby Club, and any of its instructors or agents from any present and future claims, including negligence, for property damage, personal injury, or wrongful death, arising from my participation in rugby club activities.
Kyriazis, 450 S.E.2d at 652, n.1.

[FN42]. Id. at 657-58. The court's finding of an equal protection violation was

based on the fact that the University required club sports participants to sign the release but did not require intramural sports participants to do the same.

[FN43]. Id. at 653 (quoting Murphy v. N. Am. River Runners, Inc., 412 S.E.2d 504, 509 (W. Va. 1991) (citing Restatement (Second) of Contracts § 195(2)(b)-(c) (1979)).

[FN44]. Id. at 655.

[FN45]. Id. (citing Glover v. Sims, 3 S.E.2d 612, 614 (W. Va. 1939) (stating that education "includes appropriate physical development as well as mental and moral"); City of Morgantown v. W. Va. Bd. of Regents, 354 S.E.2d 616, 618 (W. Va. 1987) (holding that athletic programs are proper and integral part of education provided by state universities); Kondos v. W. Va. Bd. of Regents, 318 F.Supp. 394 (S.D. W. Va. 1970) (holding that carrying on of athletic program is important and necessary element in educational process of institutions of higher learning)).

[FN46]. See Kyriazis, 450 S.E.2d at 651-52.

[FN47]. For an interesting argument that an educational institution engages in a form of duress when it does not permit a student-athlete to participate in sports unless he or she signs a waiver, see William H. Baker, Injuries to College Athletes: Rights & Responsibilities, 97 DICK. L. REV. 655, 669 (1993).

[FN48]. Id. at 655.

[FN49]. See Robert S. Nelson, The Theory of the Waiver Scale: An Argument Why Parents Should Be Able to Waive Their Children's Tort Liability Claims, 36 U.S.F. L. REV. 535, 539 n.30 (2002).

[FN50]. 758 P.2d 968 (Wash. 1988).

[FN51]. Id. at 970. For a detailed analysis of the court's application of the Tunkl factors to public school athletic release forms in Wagenblast, see Deborah Good Hander, Shifting Risks: Washington Blocks Student Athlete Releases, 25 GONZ. L. REV. 359 (1990).

[FN52]. The Wagenblast court noted that in previous decisions the court had not always been clear on what rationale it used to determine when a release violated public policy and that it seemed to have been much easier for the courts "to simply declare releases violative of public policy in a given situation than to state a principled basis for so holding." Tunkl, 758 P.2d at 971. One commentator has suggested, however, that by adopting the Tunkl test, the Wagenblast court has done little to make determinations of when public policy interests are violated any clearer or easier. "[T]he test's apparent simplicity is in the end confusing because it diverts the court's attention away from a complex, but crucial, policy determination about the practical importance to the public of a particular activity." Recent Case, Negligence-Exculpatory Clauses-School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics-Wagenblast v. Odessa School District, 102 HARV. L. REV. 729, 735 (1989).

[FN53]. Wagenblast, 758 P.2d at 972-73. While it is highly doubtful after Wagenblast that a court would enforce waiver provisions in a school setting, commentators argue persuasively that the forms do convey information about the inherent risks in various school-sponsored activities, serve as important evidence in arguing assumption of risk and provide a defense in responding to a claim of failure to warn. See Andrew Manno, A High Price to Compete: The Feasibility and Effect of Waivers Used to Protect Schools from Liability for Injuries to Athletes with High Medical Risks, 79 KY. L.J. 867, 971 (1991) ("Whether or not the waiver will be effective in protecting the school from liability, it is a method of informing the athlete of the dangers of participation in an athletic activity.").

[FN54]. Assumption of risk is an affirmative defense. This article does not address cases involving assertions of this defense. That subject has been extensively discussed in other articles. See, e.g., Seiberling, *supra* note 8, at 421-28 (providing good discussion of assumption of risk doctrine as background to commentary on releasing liability in recreation activities through use of exculpatory agreements); Eugene C. Bjorklun, *Assumption of Risk and Its Effect on School Liability for Athletic Injuries*, 55 EDUC. L. REP. 349, 358 (1989) (commenting that statement of risk forms serve as vehicle for giving participant full knowledge and appreciation of risks inherent in activity and may be helpful in raising assumption of risk defense).

[FN55]. Wagenblast, 758 P.2d at 972-73. See also DAN B. DOBBS, *THE LAW OF TORTS* 542 (2000) (questioning whether public schools should not be allowed to condition students' participation rights on general release of liability for negligence); but cf. King, *supra*, note 10, at 683 (favoring effective exculpatory agreements for volunteers and sponsoring entities in youth activities).

[FN56]. See Mario R. Arango & William R. Trueba, Jr., The Sports Chamber: Exculpatory Agreements Under Pressure, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 2-3 (1997) (presenting excellent overview of use of releases in recreational activity area and observing that since 1988 courts have been upholding exculpatory agreements in this area and basing their analysis on both sanctity of freedom to contract and voluntary nature of participant's involvement).

[FN57]. See Madison v. Superior Court, 250 Cal. Rptr. 299 (Cal. Ct. App. 1988).

[FN58]. See Bauer v. Aspen Highlands Skiing Corp., 788 F.Supp. 472 (D. Colo. 1992).

[FN59]. See Banfield v. Louis, 589 So. 2d 441 (Fla. Dist. Ct. App. 1991).

[FN60]. See Kotovsky v. Ski Liberty Operating Corp., 603 A.2d 663 (Pa. Super. Ct. 1992).

[FN61]. See Jones v. Dressel, 623 P.2d 370 (Colo. 1981) (en banc).

[FN62]. See Morrow v. Auto Championship Racing Ass'n, Inc., 291 N.E.2d 30 (Ill. App. Ct. 1972).

[FN63]. 686 N.E.2d 896 (Ind. Ct. App. 1997).

[FN64]. Id. at 900.

[FN65]. 277 Cal. Rptr. 887 (Cal. Ct. App. 1991).

[FN66]. Id. at 895 (internal citation omitted).

[FN67]. Id.

[FN68]. Okura v. United States Cycling Federation, 231 Cal. Rptr. 429, 431 (Cal. Ct. App. 1986).

[FN69]. 514 A.2d 485 (Md. Ct. Spec. App. 1986).

[FN70]. Id. at 486.

[FN71]. Id.

[FN72]. Id.

[FN73]. Id. at 486-87.

[FN74]. Id. at 487.

[FN75]. Id.

[FN76]. Id.

[FN77]. Id.

[FN78]. Id. at 490.

[FN79]. Id. at 490-91.

[FN80]. Id.

[FN81]. Id. at 491.

[FN82]. 670 A.2d 795 (Vt. 1995). For a good discussion of this case, see Beth Robinson, *Playing It Safe: Allocating the Risk of Harm on the Slopes*, 25- MAR. VT. B.J. & L. DIG... 15 (1999).

[FN83]. Dalury, 670 A.2d at 796.

[FN84]. Id.

[FN85]. Id. at 797-98. For discussion of the Colorado four-part test, see *supra* note 20 and accompanying text.

[FN86]. Id. at 799. The court did note, however, that Killington's ski areas were open to the public for the price of a ticket, that Killington advertised and invited skiers of every level of ability to their premises, and that thousands of people ride the lifts, buy services, and ski the trails, saying: "[W]hen a substantial number of such sales take place as a result of the seller's general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises." Id.

[FN87]. Id.

[FN88]. Id.

[FN89]. 418 S.E.2d 894 (Va. 1992).

[FN90]. Id. at 894-95.

[FN91]. Id. at 895.

[FN92]. Id. at 894.

[FN93]. Id. (quoting Johnson's Adm'x v. Richmond & Danville R.R. Co., 11 S.E. 829 (Va. 1890)). The decision of the Virginia court in *Hiatt* has been strongly criticized as significantly limiting the ability of parties to shift the risks of engaging in recreational activity, even when the parties are fully aware of the dangers likely to be encountered and stand in equal bargaining positions. See Karen M. Espaldon, Virginia's Rule of Non-Waiver of Liability for Negligent Acts: *Hiatt v. Lake Barcroft Cmty. Ass'n, Inc.*, 2 GEO. MASON L. REV. 27, 29 (1994) (arguing that the decision "represents an unwarranted intrusion into individual preferences for risk and the choice to engage in a risky activity").

[FN94]. See generally 57A AM. JUR. 2D Negligence § 61 (1989); see also Blake D. Morant, Contracts Limiting Liability: A Paradox with Tacit Solutions, 69 TUL. L. REV. 715, 735-37 (1995) (characterizing significant concerns shown by courts, legislatures, administrative agencies and other "decision makers" for perceived disadvantaged parties as "paternalistic").

[FN95]. See, e.g., Kansas City Power & Light Co. v. United Tel. Co. of Kan., 458 F.2d 177, 179 (10th Cir. 1972) (holding that exculpatory agreement that attempts to insulate party from liability for his own negligence is looked upon with disfavor by courts and will be enforced only where there is no vast disparity in bargaining power between parties); Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 558 (N.J. Super. Ct. Law Div. 1970) (stating that liability provisions are invalid when parties do not stand on equal footing).

[FN96]. See Tunkl, 383 P.2d at 443.

[FN97]. See generally 57A AM. JUR. 2D Negligence § § 59-62 (1989 and Supp. 2002) and cases cited therein.

[FN98]. See Turnbough v. Ladner, 754 So. 2d 467, 469 (Miss. 1999) (refusing to enforce pre-printed release, in part, because agreement was not negotiated).

[FN99]. See Sharon v. City of Newton, 769 N.E.2d 738, 745 (Mass. 2002) (finding release signed by minor and parent enforceable and basing decision, in part, on fact that cheer-leading activity was neither compelled nor essential).

[FN100]. See Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1231 (Colo. 2002) (en banc) (declining to enforce release signed by parents of minor and noting significant protections afforded minors by Colorado's public policy).

[FN101]. See, e.g., Rigby v. Sugar's Fitness & Activity Ctr., 803 So. 2d 497, 499 (Miss. Ct. App. 2002) (reversing summary judgment granted defendant health club because no evidence in record that liability release signed by health club member had been negotiated or that member remembered having signed it); Turnbough v. Ladner, 754 So. 2d 467, 470 (Miss. 1999) (holding that pre-printed anticipatory release signed by scuba diving student was not negotiated and did not demonstrate intent of student to accept heightened exposure to injury caused by malfeasance of expert instructor); see also Keith A. Rowley, Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (And Everything in Between), 69 MISS. L.J. 73, 168-71, 186- 89 (1999) (discussing rigid scrutiny given anticipatory release and reluctance of courts to enforce unless document has been fairly negotiated and understandingly entered into).

[FN102]. 720 So. 2d 843 (Miss. 1998).

[FN103]. Id. at 845.

[FN104]. Id. at 851.

[FN105]. Id.

[FN106]. Id.

[FN107]. Id.

[FN108]. Id. (citing Farragut v. Massey, 612 So. 2d 325, 330 (Miss. 1992) ("Clauses limiting liability are given rigid scrutiny by the courts, and will not be enforced unless the limitation is fairly and honestly negotiated and understandingly entered into.")).

[FN109]. Id. (citing Farragut, 612 So. 2d at 330). Going even further in its skepticism about the release and the intent of the parties, the court asked:

Is it an inherent risk of a baseball camp that an instructor might hit a camper with a baseball bat? Hopefully not; yet, events occur, as here, and some remedy must exist for such events. Otherwise, it is doubtful parents would send their children to such camps, no matter how good the instruction might be. Id. at 851; see also Rowley, supra note 101, at 189 (arguing that Mississippi courts should not permit parties to use anticipatory releases as means to escape liability for their own tortious acts, particularly when those acts clearly exceed scope of activities contemplated in release).

[FN110]. 523 N.W.2d 429 (Wis. Ct. App. 1994).

[FN111]. Id. at 432.

[FN112]. Id. (quoting Merten v. Nathan, 321 N.W.2d 173, 178 (Wis. 1982)).

[FN113]. Id. (quoting Richards v. Richards, 513 N.W.2d 118, 123 (Wis. 1994)).

[FN114]. Id. One commentator has described the issue of bargaining as being "[o]ne of the most troublesome issues for organizations seeking to rely on exculpatory agreements ... [in] the real world ... it is difficult to understand how such bargaining can be offered practically." Alexander T. Pendleton, Enforceable Exculpatory Agreements, 70-NOV WIS. LAW. 10, 12-13 (1997).

[FN115]. See Broemmer v. Abortion Serv. of Phoenix, Ltd., 840 P.2d 1013, 1016 (Ariz. 1992) (holding that standardized form prepared by defendant and presented to plaintiff on take it or leave it basis as condition of treatment was adhesion contract and unenforceable). For a good discussion of contracts of adhesion, see Curtis J. Berger & Vivian Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 COLUM. L. REV. 289, 327-31 (1999).

[FN116]. The California Supreme Court has defined a contract of adhesion as:

[A] standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining and under such conditions that the "adherer" cannot obtain the desired product or service save by acquiescing in the form agreement. Steven v. Fid. & Cas. Co., 58 Cal. 2d 862, 882 (1962).

[FN117]. See King, supra note 10, at 720 (observing that some courts hold that mere fact that contract is offered on take it or leave it basis does not alone make contract invalid contract of adhesion); Arango & Trueba, supra note 56, at 4.

[FN118]. 623 P.2d 370 (Colo. 1981) (en banc).

[FN119]. The court relied on its earlier decision in Clinic Masters v. District Court of Puerto Rico, 556 P.2d 473, 475 (Colo. 1976), in which it had stated that even though a contract is on a printed form and offered on a take-it-or-leave-it basis, those facts alone do not cause it to be an adhesion contract.

[FN120]. Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 924-25 (Minn. 1982).

[FN121]. Id.

[FN122]. Id.

[FN123]. Id. at 925. The court noted particularly that Schlobohm "had the option of becoming a member in Spa Petite subject to the regulations and policies clearly set forth in the membership contract or not to do so, as she chose." Id.

[FN124]. 627 P.2d 1247 (N.M. Ct. App. 1981).

[FN125]. Id. at 1249.

[FN126]. Id. at 1250.

[FN127]. Id. The Lynch court went on to say that a position of superior bargaining power standing alone is not a sufficient basis for refusing to enforce an exculpatory clause in a contract. Id.

[FN128]. Reed v. Univ. of N.D., 589 N.W.2d 880, 882 (N.D. 1999).

[FN129]. Id. at 885

[FN130]. Id.

[FN131]. Id. at 887.

[FN132]. Id.

[FN133]. Id.

[FN134]. Id.

[FN135]. Id.

[FN136]. See Jordan v. City of Baton Rouge, 529 So. 2d 412, 415 (La. Ct. App. 1988) (holding release invalid when car owner whose vehicle had been towed and stored was given no alternative but to sign release in order to get his car back); see also Morant, supra note 94, at 754 ("A primary concern of decision makers regarding contracts limiting liability is the lack of choice on the part of the indemnitor.").

[FN137]. See Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 973 (1988) (finding that school district held near-monopoly power and decisive advantage in bargaining strength when it required that students and their parents sign releases as a

condition of students participating in sports activities).

[FN138]. See NEIL J. DOUGHERTY ET AL., SPORT, PHYSICAL ACTIVITY, AND THE LAW 237 (1994) (stating that releases are seldom considered legally valid for absolving a defendant of responsibility for school-related programs).

[FN139]. See Donald H. Henderson, Eugene L. Golanda & Robert E. Lee, The Use of Exculpatory Clauses and Consent Forms by Educational Institutions, 67 ED. L. REP. 13, 18 n.43 (1991).

[FN140]. See, e.g., Whittington v. Sowela Technical Inst., 438 So. 2d 236, 242 (La. Ct. App. 1983); Castro v. Los Angeles Bd. of Educ., 126 Cal. Rptr. 537, 539-40 (Cal. Ct. App. 1976).

[FN141]. 438 So. 2d 236 (La. 1983).

[FN142]. The release which the student was required to sign in order to participate in the trip said:

I, Wanda Whittington, voluntarily agree to participate in the following activity:

List activity-M.D. Anderson Senior Trip

Place _____ Houston, Texas

Date _____ 4-6-1979

and hereby relieve Sowela Technical Institute of any and all liability associated with the above.

Id. at 241.

[FN143]. Id. at 240.

[FN144]. Id.

[FN145]. Id. at 239.

[FN146]. Id. at 241.

[FN147]. Id. at 240.

[FN148]. Id. at 241 (citing La. Civ. Code Ann. art. 11 (2002)).

[FN149]. Id. at 242 (citing Branch v. Alexander, 91 So. 2d 767, 769 (1956)).

[FN150]. Id. (citing La. Civ. Code Ann. art. 1779, 1797 (2002)).

[FN151]. Id. (citing La. Civ. Code Ann. art. 1779, 1797, 1819 (2002)).

[FN152]. Id.

[FN153]. Id.; see also Prier v. Horace Mann Ins. Co., 351 So. 2d 265, 268 (La. Ct. App. 1977) (holding that greater degree of care must be exercised if students are required to engage in activity where it is reasonably foreseeable that injury may occur). Citing Sowela with approval, the Attorney General of Arizona opined that public policy forbids a school district from demanding that students execute a release in order to participate in school sports. The Attorney General said: "A student's comparative bargaining power is extremely small when the offer of a bargain by a school district amounts to 'sign or do not participate.'" 1986 Ariz. Op. Att'y Gen. 115 (1986). Using similar reasoning, the Attorney General of Tennessee stated that requiring students to sign an exculpatory agreement exempting school employees from liability as a condition of the students' participation in a cooperative vocational education program would be void as against public policy since there would be such a disadvantage in bargaining power that the students "would be practically compelled to submit to the exculpatory agreement." 1992 Tenn. Op. Att'y Gen. 82-494 (1982).

[FN154]. Sharon v. City of Newton, 769 N.E.2d 738, 745 (Mass. 2002).

[FN155]. Id. at 743.

[FN156]. Id. at 745.

[FN157]. See Terry v. Ind. St. Univ., 666 N.E.2d 87, 93 (Ind. Ct. App. 1996); but see Barnhart v. Cabrillo Cmty. Coll., 90 Cal. Rptr. 2d 709 (Cal. Ct. App. 1999) (declining to find importance in distinction between voluntary and required nature of participation on men's soccer team as that distinction might affect statutory waiver of liability for field trip injuries sustained by members of team while being transported to away game by coach); see also Robert D. Bickel, Tort-Accident Cases: Traditional Tort Rules in the College or University Setting, 24 J.C. & U.L. 187, 212 (1997) (commenting that in context of elective recreational courses, courts may uphold contract-based assumption of risk where terms of agreement are explicit and activity is non-essential).

[FN158]. See Moore v. Hartley Motors, Inc., 36 P.3d 628, 631-32 (Alaska 2001). Although it reversed summary judgment granted the defendant because of material facts in dispute regarding language used in the release, the court did not find the release to be contrary to public policy or the result of unequal bargaining power. See id.

[FN159]. See Arango & Trueba, supra note 56, at 14 (commenting that courts are upholding exculpatory agreements as not against public policy and focusing their analysis on both sanctity of freedom to contract and voluntary nature of participant's involvement).

[FN160]. See Boucher v. Riner, 514 A.2d 485 (Md. Ct. Spec. App. 1986) (noting that plaintiff joined parachuting club of his own volition, that his participation was not required, and that he was not compelled to sign release).

[FN161]. See Marshall v. Blue Springs Corp., 641 N.E.2d 96 (Ind. Ct. App. 1994) (finding that plaintiff chose to take scuba diving lessons and to participate in open dive test for his own personal enjoyment and that he was not under compulsion by outside source to do so).

[FN162]. See Clanton v. United Skates of Am., 686 N.E.2d 896, 899 (Ind. Ct. App. 1997) (upholding release signed by skater when he engaged in skating, not out of any economic or other need, but for his own personal pleasure).

[FN163]. See Reed v. Univ. of N. D., 589 N.W.2d 880, 887 (N.D. 1999) (upholding release and declaring that any perceived mandatory requirement for plaintiff to participate in race involved his relationship with University's hockey program and not with defendant).

[FN164]. See Okura v. U. S. Cycling Fed'n, 231 Cal. Rptr. 429, 432 (Cal. Ct. App. 1986) (noting that racer's participation was voluntary).

[FN165]. See Chauvlier v. Booth Creek Ski Holdings, Inc., 35 P.3d 383, 388 (Wash. Ct. App. 2001) (upholding release and finding recreational skiing to be private, nonessential activity).

[FN166]. See Shields v. Sta-Fit, Inc., 903 P.2d 525, 528 (Wash. Ct. App. 1995) (holding that exculpatory agreement was valid and declaring that health clubs are not indispensable necessity).

[FN167]. See B & B Livery, Inc. v. Riehl, 960 P.2d 134, 138 (Colo. 1998) (finding language unambiguous and upholding release).

[FN168]. See Brooks v. Timberline Tours, Inc., 127 F.3d 1273, 1275 (10th Cir. 1997) (finding intent of parties clearly expressed and release enforceable).

[FN169]. See generally Arango & Tureba, supra note 56, at 14 ("[In] the sports context, the courts are upholding exculpatory agreements as not against public policy focusing their analysis on both the sanctity of freedom to contract and the voluntary nature of the participant's involvement.").

[FN170]. See, e.g., Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 8 (Wash. 1992) (stating that exculpatory clauses are strictly construed); Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 558-59 (N.J. Super. Ct. Law Div. 1970) (commenting that contracts limiting liability for negligence should be construed strictly with every intentment against party seeking enforceability).

[FN171]. See generally Restatement (Second) of Contracts § § 7, 12 (1981) (stating that infants do not have capacity to incur contractual obligations by manifesting assent to transaction); Walter T. Champion, Jr., Sports Law 177-78 (1993) ("Generally when a minor is involved with a release, the law will not bind him to it. This is correct whether he signs it or whether it's signed by his parents or any combination thereof."); Henderson, supra note 139, at 26-29 (explaining that most courts take position that minor does not possess legal capacity to make binding agreements, thus his or her signature on release is not enforceable); Anthony S. McCaskey & Kenneth W. Biedzynski, A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries, 6 Seton Hall J. Sport L. 7, 60 (1996) (commenting that exculpatory agreements are not likely to be effective against minors); 42 Am. Jur. 2d Infants § 82 (2000) (noting that prevailing rule today is that contracts of infants are voidable).

[FN172]. See, e.g., Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1232 (Colo. 2002) (en banc) (repeating well-settled principle that "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") (quoting Nicholas v. People, 973 P.2d 1213, 1219 (Colo. 1999)).

[FN173]. See generally Richard B. Malamud & John E. Karayan, Contractual Waivers for Minors in Sports-Related Activities, 2 MARO. SPORTS L.J. 151 (1992) (providing good discussion of contract law as it affects enforceability of waivers where minors are involved).

[FN174]. See BLACK'S LAW DICTIONARY 516 (Abridged 5th ed. 1983) ("In most states, a person is no longer a minor after reaching the age of 18.").

[FN175]. See, e.g., Miss. Code Ann. § 1-3-27 (1998).

[FN176]. See Baker, supra note 47, at 669 (noting that minor who is college student is not bound by waiver because waiver, being contractual, is voidable at election of minor).

[FN177]. See generally 42 AM. JUR. 2D Infants § § 53, 58 (2000).

[FN178]. See, e.g., Garrett v. Gay, 394 So. 2d 321 (Miss. 1981) (holding that statute authorizing persons 18 or older to enter into binding contracts for personal property included right to contract concerning chose in action); see also 42 AM. JUR. 2D Infants § § 53, 58 (1969).

[FN179]. See Nelson, supra note 49, at 539 (categorizing waivers involving minors as either "minor waivers" or "parental waivers" and arguing that parents should be able to waive their children's tort claims through execution of exculpatory agreements).

[FN180]. See, e.g., Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 467-68 (Conn. Super. Ct. 1958) (expressing doubt that either parent of minor child had power or authority to waive his rights to future claims for injury); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979) (declaring release signed by parent prior to son being injured playing hockey ineffective because parent cannot release child's action); Lawrence v. Lawrence, 574 So. 2d 1376, 1381 (Miss. 1991) ("[P]arents cannot contract away rights vested in minor children."); Alexander v. Kendall Cent. Sch. Dist., 634 N.Y.S.2d 318, 310 (N.Y. App. Div. 1995) (holding that release executed by parents of wrestler who was injured while participating in youth wrestling tournament did not bind minor wrestler and bar his suit); Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 558 (N.J. Super. Ct. Law Div. 1970) (holding that parent has no authority, unless he has been appointed guardian, to compromise or release claims or causes of action belonging to child); Apicella v. Valley Forge Military Acad. and Junior Coll., 630 F.Supp. 20, 31 (E.D. Pa. 1985) (holding that minor's claims were not affected by release signed by his parents since under Pennsylvania law parents do not possess authority to release claims or potential claims of minor child merely because of the parental relationship); Childress v. Madison County, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989) (holding that mother could not execute valid release or exculpatory clause as to rights of her son); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11 (Wash. 1992) (en banc) (concluding that parents do not have legal authority to waive cause of action belonging to their child); 59 AM. JUR. 2D Parent and Child § 40 (1987) (declaring it to be settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release cause of action belonging to their

child); 42 AM. JUR. 2D Infants § 58 (2000).

[FN181]. Khoury v. Saik, 33 So. 2d 616, 618 (Miss. 1948).

[FN182]. 834 P.2d 6 (Wash. 1992) (en banc).

[FN183]. Id. at 8.

[FN184]. Id. at 7.

[FN185]. Id. at 8.

[FN186]. Id. at 10.

[FN187]. Id. at 11-12.

[FN188]. Id. at 12. One commentator has sharply criticized the Scott decision and has described it as being "flawed." She argues forcefully that if the court had correctly applied the Tunkl/Wagenblast analysis, it would have found that the majority of the factors identified by Wagenblast as being necessary for a finding of violation of public policy were absent in the Scott case. First, unlike public school athletic programs, private ski schools do not operate under an extensive network of state laws or regulations. Second, ski racing lessons are not matters of public necessity. Third, ski school operators do not possess vastly greater bargaining power than their patrons given the nonessential nature of the business and the large number of ski schools competing with each other in the Northwest. Fourth, the competitive nature of the business of ski instruction negates the possibility that the release constitutes a contract of adhesion. Unlike the students in Wagenblast who had to sign releases before they could participate in school athletics, the Scotts did not have to sign a release before Justin could ski because not all ski programs used releases. He had other choices. Fifth, the control ski operators have over their customers does not compare to the control coaches have over high school students. See Angeline Purdy, Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of a Minor's Future Claim, 68 WASH. L. REV. 457, 475 (1993).

[FN189]. See Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1237 (Colo. 2002) (en banc); Hawkins v. Pear, 37 P.3d 1061, 1065-66 (Utah 2001).

[FN190]. 777 S.W.2d 1 (Tenn. Ct. App. 1989).

[FN191]. Id. at 6.

[FN192]. Id. at 2.

[FN193]. Id.

[FN194]. Id. at 3.

[FN195]. Id. at 7. The Childress court cited with approval and followed the reasoning of the Supreme Court of Connecticut in holding that an agreement, signed by one of the parents of a minor as a condition to his being allowed to attend a camp, was ineffective to waive the rights of the minor against the camp. See Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 468 (Conn. Super. Ct. 1958). The Childress court also relied upon a decision of the Maine Supreme Court in which that court held that even if the document under consideration were a release, it would not be valid because a parent cannot release a child's cause of action. See Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979).

[FN196]. See, e.g., Meyer v. Naperville Manner, Inc., 634 N.E.2d 411, 415 (Ill. App. Ct. 1994) (holding that although parent's pre-injury waiver is ineffective to bar child's claim, it is effective to bar parent's own cause of action); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 12 (Wash. 1992) ("[A]n otherwise conspicuous and clear exculpatory clause can serve to bar the parents' cause of action based upon injury to their child.").

[FN197]. Santangelo v. City of New York, 411 N.Y.S.2d 666 (N.Y. App. Div. 1978).

[FN198]. Id. at 667 (quoting Kotary v. Spencer Speedway, 365 N.Y.S.2d 87, 90 (N.Y. App. Div. 1975)).

[FN199]. 769 N.E.2d 738, 749 (Mass. 2002).

[FN200]. 696 N.E.2d 201, 205 (Ohio 1998) ("[W]e believe that public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children ... [and] that the enforcement of these agreements may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities.").

[FN201]. See id. at 205; see also Melinda Smith, Tort Immunity for Volunteers in Ohio: Zivich v. Mentor Soccer Club, Inc., 32 AKRON L. REV. 699, 716 (1999) (exploring debate regarding decision to provide tort immunity for volunteers by permitting parents to waive their minor child's tort claims through pre-injury releases); Nelson, supra note 49, at 540-41 (arguing that longstanding common law rules against parental exculpatory agreements should be revoked); King, supra note 10, at 684 (arguing that parents should be able to execute enforceable exculpatory agreements on behalf of minors when releasing volunteers and sponsoring entities providing youth services on nonprofit basis); Howard P. Benard, Little League Fun, Big League Liability, 8 MARQ. SPORTS L.J. 93, 98 (1997) (advancing position that all states should provide statutory protection for volunteer coaches); but see Andrew F. Popper, A One-Term Tort Reform Tale: Victimized the Vulnerable, 35 HARV. J. ON LEGIS. 123, 135 (1998) (asserting that Volunteer Protection Act of 1997, granting tort immunities to volunteers working for charitable organizations, goes too far and harms those served by volunteers, such as students assisted in public and private schools, children engaged in organized activities, and others in need of help volunteers provide).

[FN202]. See Aaris v. Las Virgenes Unified Sch. Dist., 75 Cal. Rptr. 801, 805 (Cal. Ct. App. 1998) ("It is well established that a parent may execute a release on behalf of his or her child."); Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649 (Cal. Ct. App. 1990) ("A parent may contract on behalf of his or her children.").

[FN203]. For example, it is well-settled that liability for negligence imposed by state statute cannot be contracted away. See 57A AM. JUR. 2D Negligence § 56 (1989); see also, Alexander J. Drago, Assumption of Risk: An Age-old Definition Still Viable in Sports and Recreation Cases, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 583, 588 (2002) and cases cited therein (writing that release is void if it contravenes statute proscribing such agreement). For a very good analysis of Hawaii's recreational activity liability law, see Ammie I. Roseman-Orr, Recreational Activity Liability in Hawaii: Are Waivers Worth the Paper on Which They Are Written?, 21 U. HAW. L. REV. 715 (1999) (arguing that Hawaii's recreational activity statute is inconsistent with both case and statutory law nationwide and places recreational providers at significantly more risk than they had before enactment of statute).

[FN204]. See, e.g., Wheelock v. Sport Kites, Inc., 839 F.Supp. 730, 735 (D. Haw. 1993) (declaring public interest to be at stake when party attempts to exempt himself from gross negligence and holding agreement under consideration void to extent it attempts to relieve defendants of liability for gross negligence); Fuentes v. Owen, 310 So. 2d 458, 460 (Fla. Dist. Ct. App. 1975) (holding that attempt by contract to exempt one from liability for intentional tort generally void); Folknor v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941, 946 (Ill. App. Ct. 1989) ("Generally, agreements exculpating from the results of wilful and wanton misconduct are illegal."); Wolf v. Ford, 644 A.2d 522, 525 (Md. 1994) (reiterating rule that party will not be permitted to excuse its liability for intentional harms or for reckless, wanton, or gross negligence); Gross v. Sweet, 400 N.E.2d 306, 308 (N.Y. 1979) ("To the extent that agreements purport to grant exemption for liability for willful or grossly negligent acts they have been viewed as wholly void."); see also, W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 484 (5th ed. 1984) [hereinafter PROSSER AND KEETON] ("[Exculpatory] agreements generally are not construed to cover the more extreme forms of negligence, described as willful, wanton, reckless or gross, or to any conduct which constitutes an intentional tort."); Restatement (Second) 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."); 57A Am. Jur. 2d Negligence § 55 (1989) (stating that one may not exonerate himself from liability for intentional torts, for willful or wanton misconduct, or for gross negligence by use of exculpatory language).

[FN205]. See Boucher v. Riner, 514 A.2d 485, 488 (Md. Ct. Spec. App. 1986) (noting that Prosser explains ineffectiveness of waiver to shift risk of party's own willful, wanton, reckless, or gross conduct on alternative bases of common experience as to what is intended by contracting parties or of public policy to discourage aggravated wrongs) (citing PROSSER AND KEETON, supra note 204, at § 68).

[FN206]. See King, supra note 10, at 728; see also Kevin G. Hroblak, Adloo v. H. T. Brown Real Estate, Inc.: "Caveat Exculpator"--An Exculpatory Clause May Not Be Effective Under Maryland's Heightened Level of Scrutiny, 27 U. BALT. L. REV. 439, 444 (1998) (discussing circumstances in which exculpatory clauses may be held invalid and unenforceable, including those involving intentional harm or extreme forms of negligence).

[FN207]. See, e.g., Barnes v. Birmingham Int'l Raceway, Inc., 551 So.2d 929, 931 (Ala. 1989) (overturning earlier decision and holding that releases exculpating one from liability for wanton or willful conduct are invalid and against public policy); Winstertein v. Wilcom, 293 A.2d 821, 824-25 (Md. Ct. Spec. App. 1972) (holding that exculpatory agreements otherwise valid are not construed to cover extreme forms of negligence--willful, wanton, reckless or gross); Lee v. Beauchene, 337 N.W.2d 827, 829 (S.D. 1983) (stating that releases do not cover willful negligence or intentional torts).

[FN208]. For a good discussion of public policy arguments against the use of releases in situations of gross negligence, see Ryan S. Holcomb, The Validity and Effectiveness of Pre-injury Releases of Gross Negligence in Texas, 50 BAYLOR L. REV. 233, 249 (1998).

[FN209]. 525 N.W.2d 25 (Neb. 1994).

[FN210]. Id. at 27.

[FN211]. Id. at 28.

[FN212]. Id. at 27.

[FN213]. Id.

[FN214]. Id. at 28.

[FN215]. The Nebraska Supreme Court defined public policy as "[t]hat principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good The principles under which the freedom of contract or private dealings is restricted by law for the good of community." Id. at 30-31.

[FN216]. Id.

[FN217]. See, e.g., Wheelock v. Sport Kites, Inc., 839 F.Supp. 730, 736 (D. Haw. 1993) (predicting Hawaii law and finding agreement in instant case void to extent it attempts to relieve defendants of liability for gross negligence). In addition to court decisions, attorney generals have also opined that it is against the public interest for public officials and employees to enter into agreements containing terms which would exempt a party from tort liability for harm caused intentionally or recklessly. See, e.g., 1993 Miss. Op. Att'y Gen. (1993) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.") (quoting Restatement (second) of Contracts § 195 (1981)).

[FN218]. See, e.g., Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 334 (Mo. 1997) (stating that contract exonerating one from future negligence will be strictly construed against party claiming benefit of agreement).

[FN219]. See Julie Ann Springer, Releases: An Added Measure of Protection from Liability, 39 BAYLOR L. REV. 487, 489 (1987) (presenting excellent overview of tort/contract conflict and of requirements necessary for valid release).

[FN220]. 400 N.E.2d 306 (N.Y. 1979).

[FN221]. Id. at 309.

[FN222]. Id.; see also Philbin v. Matanuska-Susitna Borough, 991 P.2d 1263, 1266 (Alaska 1999) (stating that language of release must be evaluated according to what reasonable person would have understood release to mean); see also Nelson, *supra* note 49, at 546 (commenting that "[w]aiver language will be deemed unambiguous only if it is basic enough to be comprehended by the average reader, while at the same time technical enough to adequately explain the legal rights being relinquished.").

[FN223]. Fuentes v. Owen, 310 So. 2d 458, 459 (Fla. Dist. Ct. App. 1975) (quoting 57A AM JUR. 2D Negligence § 65 (1989)); see also Steven B. Lesser, How To Draft Exculpatory Clauses That Limit or Extinguish Liability, 75-NOV FLA. B.J. 10 (2001) (examining how Florida courts interpret exculpatory language in release and indemnification agreements and providing excellent checklist for drafting such agreements); see generally 57A AM. JUR. 2D Negligence § 65 (1989).

[FN224]. Nelson, *supra* note 49, at 546 (noting that waivers have traditionally been invalidated on drafting grounds when contract's "legalese" was not understandable).

[FN225]. See, e.g., Turnbough v. Ladner, 754 So. 2d 467, 469 (Miss. 1999) (stating that exculpatory agreements are subject to close judicial scrutiny and will not be upheld "unless the intention of the parties is expressed in clear and unmistakable language"); Alack v. Vic Tanny Intn'l of Mo., Inc., 923 S.W.2d 330, 337 (Mo. 1996) ("We are persuaded that the best policy is to follow our previous decisions and those of other states that require clear, unambiguous, unmistakable, and conspicuous language in order to release a party from his or her own future negligence."); Chauvlier v. Booth Creek Ski Holdings, Inc., 35 P.3d 383, 385 (Wash. Ct. App. 2001) ("Exculpatory clauses are strictly construed under Washington law and are enforceable only if their language is sufficiently clear."); see generally 66 AM. JUR. 2D Release § 8 (2001); 57A AM. JUR. 2D Negligence § 65 (1989).

[FN226]. Doyle v. Bowdoin Coll., 403 A.2d 1206, 1207 (Me. 1979) (quoting W. PROSSER, LAW OF TORTS § 68 (4th ed. 1971)).

[FN227]. See Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270, 272 (Mo. 1965); see also Karen A. Read, Public Policy Violations or Permitted Provisions?: The Validity of Exculpatory Provisions in Residential Leases, 62 MO. L. REV. 897, 898-901 (1997) (discussing requirement that exculpatory language be unambiguous, understandable, and expressly stated in "plain terms").

[FN228]. See Waid, 392 S.W.2d at 272; see also Read, *supra* note 227, at 898-901 (discussing language requirements for enforceable releases).

[FN229]. Walter T. Champion, Jr., "At the Ol' Ball Game" and Beyond: Spectators and the Potential for Liability, 14 AM. J. TRIAL ADVOC. 495, 517 (1991).

[FN230]. 195 Cal. Rptr. 90 (Cal. Ct. App. 1983).

[FN231]. Id. at 96.

[FN232]. 687 N.E.2d 1263 (Mass. App. Ct. 1997).

[FN233]. Id. at 1267 n.1.

[FN234]. See King, *supra* note 10, at 712 (discussing careful scrutiny given by courts to language in exculpatory agreements when deciding whether allegedly tortious conduct is within scope of agreement).

[FN235]. 468 N.W.2d 654 (Wis. 1991).

[FN236]. Id. at 657 n.1.

[FN237]. Id. at 662; but see King, *supra* note 10, at 711 (strongly criticizing Dobratz opinion as carrying requirement of identifying activity "to such an unobtainable extreme that one wonders whether an exculpatory agreement could ever be drafted with the level of particularity that would satisfy that court").

[FN238]. See Holcomb, *supra* note 208, at 236 (discussing express negligence and conspicuousness requirements imposed by Texas courts when upholding liability releases).

[FN239]. See Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987) ("Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract."); Dresser Indus. v. Page Petroleum, Inc., 853 S.W.2d 505, 509 (Tex. 1993) (extending express negligence doctrine to releases as well as to indemnification agreements); see also Hroblak, *supra* note 206, at 459 (discussing express negligence doctrine and its required use of term "negligence").

[FN240]. See, e.g., Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291, 1295 (Ariz. Ct. App. 1990) (requiring word "negligence" be used in exculpatory agreements to release potential tort claims); Blum v. Kauffman, 297 A.2d 48, 49 (Del. 1972) (holding that contract could not be clear and unequivocal expression of intent to exculpate party from its own negligence without using word "negligence"); Doyle v. Bowdoin Coll., 403 A.2d 1206 (Me. 1979) (finding that exculpatory clause not specifically referring to Bowdoin College's liability for its own negligence failed to meet court's specificity standard); Geise v. County of Niagara, 458 N.Y.S.2d 162, 164 (N.Y. Sup. Ct. 1983) (holding that words "fault" or "neglect" must be used to bar liability claim); Haugen v. Ford Motor Co., 219 N.W.2d 462, 470 (N.D. 1974) (saying that without reference to negligence, there is no "plain and precise" intent to limit liability); see also Drago, *supra* note 203, at 586 (stating that term "negligence" or comparable language generally must appear in exculpatory release).

[FN241]. Alack v. Vic Tanny Int'l of Mo., 923 S.W.2d 330, 337 (Mo. 1996).

[FN242]. Id.

[FN243]. See, e.g., Hardage Enters. v. Fidesys Corp., 570 So. 2d 436, 437 (Fla. Dist. Ct. App. 1990) (declaring that specific word "negligence" not needed and "any and all claims" language is sufficient); Neumann v. Gloria Marshall Figure Salon, 500 N.E.2d 1011, 1014 (Ill. App. Ct. 1986) (explaining that specific reference to "negligence" not required in exculpatory clause in order to bar suit); Audley v. Melton, 640 A.2d 777, 779 (N.H. 1994) (stating that although there is no requirement that term "negligence" or any other magic words appear in release, language used

must clearly and specifically indicate intent to release defendant from liability for his own negligence); Gross v. Sweet, 400 N.E.2d 306 (N.Y. 1979) (saying that while word "negligence" is not necessary, words conveying similar meaning must be included in release to bar claim); Swartzentruber v. Wee-K Corp., 690 N.E.2d 941, 945 (Ohio Ct. App. 1997) (stating that while better practice would be to expressly state word "negligence" somewhere in exculpatory agreement, absence of word does not automatically render provision fatally flawed); Colgan v. Agway, Inc., 553 A.2d 143, 146 (Vt. 1988) (although stating that specific reference to negligence liability is not essential, words conveying intent must appear); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10 (Wash. 1992) (en banc) (declaring that "the word 'negligence' is not essential to the effectiveness of an express release"); Schutkowski v. Care, 725 P.2d 1057, 1061 (Wyo. 1986) (holding that absence of term "negligence" not fatal if contract clearly shows intent to extinguish liability); see also 57A AM. JUR. 2D Negligence § 67 (1989); 66 AM. JUR. 2D Release § 8 (2001).

[FN244]. See, e.g., Krazek v. Mountain Rivers Tours, Inc., 884 F.2d 163, 166 (4th Cir. 1989) (applying West Virginia law and declining to create "magic words" requirement that releases must include words "negligence" or "negligent acts" to be valid); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 785 (Colo. 1989) (stating that use of specific term "negligence" not required if intent of parties to extinguish liability was clearly and unambiguously expressed); Milligan v. Big Valley Corp., 754 P.2d 1063, 1068 (Wyo. 1988) (finding that language in release focuses particular attention on unconditional nature of release even though it does not contain word "negligence").

[FN245]. 413 So. 2d 444 (Fl. Dist. Ct. App. 1982).

[FN246]. Id. at 447.

[FN247]. Id. at 445 n.2.

[FN248]. Id. at 445.

[FN249]. Id.

[FN250]. Id. at 446.

[FN251]. Id. at 447.

[FN252]. Id. (internal citations omitted); see also Jones v. Walt Disney World Co., 409 F.Supp. 526, 528 (W.D.N.Y. 1976) (applying Florida law and holding that exculpatory clause providing waiver of any claims against amusement park arising out of injury sustained while horseback riding, but which did not specifically use term "negligence," did not exempt park from liability when horse threw plaintiff to ground).

[FN253]. See Marshall v. Blue Springs Corp., 641 N.E.2d 92, 96 (Ind. Ct. App. 1994).

[FN254]. See, e.g., Clanton v. United Skates of Am., 686 N.E.2d 896, 899- 900 (Ind. Ct. App. 1997) ("Under Indiana law, a person is presumed to understand the documents which he signs and cannot be released from the terms of a contract due to his

failure to read it."); Shumate v. Lycan, 675 N.E.2d 749, 753 (Ind. Ct. App. 1997) (stating that a party's failure to read exculpatory release was attributable to his own neglect and did not render release unenforceable); see generally 17A AM. JUR. 2D Contracts § 225 (1991) (stating that courts are unanimous in holding that one who has capacity and opportunity to read contract cannot avoid contract on ground of mistake if he signs document without reading it); 66 AM. JUR. 2D Release § 17 (2001) (declaring that releasor cannot ordinarily avoid effect of release upon ground that at time he signed document, he did not read it).

[FN255]. See, e.g., Dresser Indus. v. Page Petroleum, 853 S.W.2d 505, 508 (Tex. 1993) ("[S]omething must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it").

[FN256]. See id. at 511 (finding that language in capital headings and in contrasting type or color is conspicuous).

[FN257]. Id.

[FN258]. See Chauvlier v. Booth Creek Ski Holdings, 35 P.3d 383 (Wash. Ct. App. 2001).

[FN259]. Id. at 386.

[FN260]. Id.

[FN261]. Id. at 385.

[FN262]. See, e.g., Ghionis v. Deer Valley Resort Co., 839 F.Supp. 789, 793 (D. Utah 1993) (holding that release term "as is" was not conspicuous since term was not set apart by quotation marks or typed in bold, but was "slipped into paragraph 1, without any indication to the average consumer that they are words of art with distinct legal meaning").

[FN263]. 71 Cal. Rptr. 2d 923 (Cal. Ct. App. 1998).

[FN264]. Id. at 926.

[FN265]. See Littlefield v. Schaefer, 955 S.W.2d 272, 274 (Tex. 1997).

[FN266]. See Eder v. Lake Geneva Raceway, 523 N.W.2d 429, 432 (Wis. Ct. App. 1994).

[FN267]. See Alack v. Vic Tanny Int'l of Mo., 923 S.W.2d 330, 334 (Mo. 1997) (stating that court will strictly construe contract purporting to release one from future negligence against party seeking relief from agreement).

[FN268]. See Malamud & Karayan, supra note 173, at 159 (noting that courts have focused on variety of drafting flaws when determining that participant did not knowingly and voluntarily waive rights when signing release); Pendleton, supra note

114, at 10 (cautioning drafters of exculpatory agreements to give careful consideration to language used and circumstances surrounding signing of such agreements).

[FN269]. See generally Trey D. Dayes, Drafting a Limited Liability Clause That Will Pass the Scrutiny of the Utah Courts, 10 BYU J. PUB. L. 51, 68 (1996) (presenting good discussion of various standards used by Utah courts in evaluating language in exculpatory clauses and providing advice for drafting valid clauses).

[FN270]. Lesser, *supra* note 223, at 12.

[FN271]. Nat'l & Int'l Bd. of Street Racers v. Superior Court, 264 Cal.Rptr. 44, 46-47 (Cal. Ct. App. 1989) (citations omitted).

[FN272]. See Lesser, *supra* note 223, at 12 ("At the heart of every analysis over enforcement of an exculpatory clause lies the issue of conspicuousness of the language employed.").

[FN273]. See Malamud & Karayan, *supra* note 173, at 160.

[FN274]. See Hroblak, *supra* note 206, at 472.

[FN275]. See Turnbough v. Ladner, 754 So. 2d 467, 469 (Miss. 1999).

[FN276]. See Hroblak, *supra* note 206, at 469 ("A risk adverse drafter should use the word 'negligence' in all exculpatory clauses dealing with negligence.").

[FN277]. See *id.*

[FN278]. See Yauger v. Skiing Enter., 557 N.W.2d 60, 64 (Wis. 1996) (citing Stephanie J. Greer & Hurlie H. Collier, The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas after Dresser Industries, Inc. v. Page Petroleum, Inc., 35 S. TEX. L. REV. 243, 265-70 (1994)).

[FN279]. See, e.g., Moore v. Hartley, 36 P.3d 628, 633 (Alaska 2001) (holding that release of liability for inherent risks of ATV riding include only those that are obvious and necessary to sport and do not include liability for negligence); see also Roseman-Orr, *supra* note 203, at 716-17 (criticizing Hawaii recreational activity statute for allowing only "inherent risks" to be waived and discussing difficulty of determining what constitute risks inherent to a sporting activity).

[FN280]. See Hroblak, *supra* note 206, at 471 (quoting Kaufman v. American Youth Hostels, 177 N.Y.S.2d 587, 592 (N.Y. App. Div. 1958)).

[FN281]. See *id.* (quoting Yauger, 557 N.W.2d at 61).

[FN282]. See *id.*; see also 57A AM. JUR. 2D Negligence § 66 (1989) (admonishing against use of broad and sweeping language such as "any and all responsibility or

liability of any nature whatsoever for any loss of personal injury occurring on this trip").

[FN283]. See Dobratz v. Thomson, 468 N.W.2d 654 (Wis. 1991).

[FN284]. Id. at 657.

[FN285]. Id. at 663.

[FN286]. See Greer & Collier, *supra* note 278, at 265-70 (reviewing status of releases in Texas after Texas Supreme Court casts doubt on their validity and providing drafting suggestions extracted from UCC cases that discuss the conspicuousness requirement).

[FN287]. See Lesser, *supra* note 223, at 16 (providing checklist for drafting enforceable exculpatory clauses).

[FN288]. See Greer & Collier, *supra* note 278, at 270 (stating that if parties initial exculpatory provision, conspicuousness is no longer issue due to actual knowledge rationale).

[FN289]. See Hroblak, *supra* note 206, at 472.

[FN290]. See Greer & Collier, *supra* note 278, at 265.

[FN291]. See, e.g., Rigby v. Sugar's Fitness & Activity Ctr., 803 So. 2d 497, 499 (Miss. Ct. App. 2002); Richards v. Richards, 513 N.W.2d 118, 123 (Wis. 1994).

[FN292]. See Pendleton, *supra* note 114, at 13.

[FN293]. See Lesser, *supra* note 223, at 17.

[FN294]. See *id.*

[FN295]. See Eder v. Lake Geneva Raceway, 523 N.W.2d 429, 432 (Wis. Ct. App. 1994) (finding defendant provided no meaningful opportunity for releasing parties to read agreements before signing them, to discuss their terms, or to engage in process through which they could form required intent to be bound).

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