

## OCTOBER 1998, NRPA LAW REVIEW

### STATE HIGH COURT UPHOLDS WAIVER SIGNED BY PARENT ON CHILD'S BEHALF

Liability waivers or releases are contracts. In any contract, the parties agree to exchange promises or performance. In a liability waiver contract involving recreational activities, the participant generally agrees, in the event of any future injury, to forego any negligence claim against the provider of recreational opportunities. In exchange for this promise, the participant receives an opportunity to engage in such recreational or sport activities

Minors generally lack the legal capacity to enter into valid and enforceable contracts. As a result, the law has traditionally allowed children to disaffirm contracts they sign with adults, including waiver contracts, to protect minors from their own "improvidence." Moreover, a parent generally does not have the legal authority to waive a child's own future cause of action for personal injuries resulting from the negligence of the provider of recreational services.

At least one state court, however, has recognized the public policy benefits derived from allowing children to give up their right to sue for negligence in a liability waiver or release. (See March 1996 NRPA Law Review, "Liability Waivers & Releases Overview: Can You Say 'Exculpatory Agreement?") In the case of *Hohe v. San Diego School District*, 274 Cal.Rptr. 647 (1990), the California appeals court noted that such waivers would avoid the costs of litigation for alleged negligence by volunteers and thousands of children would benefit from volunteer sponsored sports and recreational activities. Accordingly, this particular court found that it was not necessarily against public policy to shift the burden of the risk from community volunteers to the participating children and their parents.

Citing *Hohe*, the Ohio supreme court, in the case of *Zivich v. Mentor Soccer Club, Inc.* (1998), No. 97-1128, \_\_\_ Ohio St.3d \_\_\_, similarly held "parents have authority to bind their minor children to exculpatory agreements [i.e., liability release or waiver] in favor of volunteers and sponsors of nonprofit sport activities." In so doing, the state supreme court refused to follow the traditional approach that such waivers signed by parents on behalf of their minor children are "invalid on public policy grounds." Only time will tell whether other jurisdictions adopt the reasoning of *Zivich* described below. In the meantime, many jurisdictions have already enacted statutes which provide limited immunity to volunteers. Generally, the immunity provided by these statutes has the same legal effect as a valid and enforceable waiver agreement, i.e., lowering the applicable standard of liability from ordinary negligence to gross negligence or willful/wanton misconduct.

### YOUTH SOCCER RELEASE

As a general rule of law, "contracts entered into by a minor, unless for 'necessaries,' are voidable by the

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minor, once the age of majority is reached, or shortly thereafter.” Restatement of the Law 2d, Contracts (1979), Sections 7, 12, and 14, and Comment f to Section 12. However, in upholding a waiver signed by a parent on her child’s behalf for participation in a nonprofit soccer program run by volunteers, the Ohio supreme court in *Zivich* found “the proper focus is not whether the release violates public policy but rather that public policy itself justifies the enforcement of this agreement.” The facts of the case were as follows:

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

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

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

Bryan's parents, Philip and Pamela Zivich, sued the Club for injuries sustained by Bryan, alleging negligence and reckless misconduct. Zivich also sued the city of Mentor, which owned the park where practice was held. The city, however, settled with Zivich and was dismissed from the lawsuit.

The Club moved for summary judgment on the ground that the release executed by Bryan's mother barred the claims. The trial court agreed and granted the Club's summary judgment motion. Zivich

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appealed. The appeals court found “Bryan still had a cause of action which a guardian could bring on his behalf or which he could assert once he gained the age of majority.” While acknowledging “the public policy in favor of enforcing the agreement against Bryan,” the appeals court found “that decision was best left to the General Assembly” or the state supreme court. The Ohio state supreme court agreed to review this determination.

### PUBLIC POLICY JUSTIFICATION?

The specific issue before the Ohio supreme court was “whether the exculpatory agreement executed by Mrs. Zivich on behalf of her minor son released the Club from liability for the minor child's claims and the parents' claims as a matter of law.” Zivich argued that “the injury occurred outside the scope of the exculpatory agreement” because the soccer “practice had concluded.” The state supreme court rejected this argument as “meritless”:

It should not come as any great surprise for a parent to learn that, during a period of inactivity at a soccer practice, his or her child fiddled with loose equipment, climbed on nearby bleachers, or scaled the goal. It should be equally clear that coaches supervising the practices will not be able to completely prevent such unauthorized activity, as some degree of bedlam is unavoidable, when children of tender years are brought together to play a game, and when their emotions are aroused. The risk of a seven-year-old child climbing on a goal shortly after winning an intra squad scrimmage is, therefore, a natural incident of his participation in soccer practice. Thus, Bryan's injuries fall within the ambit of the release.

The state supreme court then considered “whether the release is valid.” With respect to adult participants, the supreme court noted that “the general rule is that releases from liability for injuries caused by negligent acts arising in the context of recreational activities are enforceable.” Here, however, the supreme court had to determine the validity of an “exculpatory agreement was executed by a parent on behalf of the minor child.” Zivich contended that “the release is invalid on public policy grounds” because involved a contract entered into on behalf of a minor.

Rather than the nature of the contract, the supreme court, however, chose to focus on the public policy basis for enforcing such agreements. Specifically, the supreme court noted as follows that “the General Assembly has articulated its intent of encouraging the sponsorship of sports activities and protecting volunteers”:

The General Assembly has enacted statutes designed to encourage landowners to open their land to public use for recreational activities without fear of liability. See R.C.

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1533.18 and 1533.181, which together provide that private entities that hold land open for recreational use without charge are immune from tort liability for any injury caused by a recreational user. Then, in 1996, R.C. 2305.381 and 2305.382 were enacted, effective January 27, 1997. Together, these statutes accord qualified immunity to unpaid athletic coaches and sponsors of athletic events... However, R.C. 2305.381 and 2305.382 were enacted after this cause of action arose. Thus, our role is to render a decision that fills the gap left open before the effective date of the statutory enactments.

Consistent with the legislative intent of these statutes to encourage the sponsorship of sports activities and protecting volunteers, the state supreme court similarly found “public policy justifies giving parents authority to enter into these types of binding [exculpatory] agreements on behalf of their minor children.” Moreover, the court found “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”:

It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills. Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost. In fact, the American Youth Soccer Organization pays only nineteen of its four hundred thousand staff members. The Little League pays only seventy of its 2.5 million members.

Clearly, without the work of its volunteers, these nonprofit organizations could not exist, and scores of children would be without the benefit and enjoyment of organized sports. Yet the threat of liability strongly deters many individuals from volunteering for nonprofit organizations.

Insurance for the organizations is not the answer, because individual volunteers may still find themselves potentially liable when an injury occurs. Thus, although volunteers offer their services without receiving any financial return, they place their personal assets at risk.

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

volunteers and their sponsoring organizations. [Citations omitted.]

Therefore, the state supreme court concluded that “although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements.”

Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation. Bryan's parents agreed to shoulder the risk. Public policy does not forbid such an agreement. In fact, public policy supports it.

#### PARENTAL AUTHORITY

Further, the state supreme court held that “parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities.” Moreover, the court held “[t]hese agreements may not be disaffirmed by the child on whose behalf they were executed.”

When Mrs. Zivich signed the release she did so because she wanted Bryan to play soccer. She made an important family decision and she assumed the risk of physical injury on behalf of her child and the financial risk on behalf of the family as a whole. Thus, her decision to release a volunteer on behalf of her child simply shifted the cost of injury to the parents. Apparently, she made a decision that the benefits to her child outweighed the risk of physical injury. Mrs. Zivich did her best to protect Bryan's interests and we will not disturb her judgment.

In fact, the situation is more analogous to Ohio's informed consent law than to the law governing children's property rights. See R.C. 2317.54(C), which gives parents the authority to consent to medical procedures on a child's behalf. In both cases, the parent weighs the risks of physical injury to the child and the attendant costs to herself against the benefits of a particular activity... [I]nvalidating the release as to the minor's claim is inconsistent with conferring other powers on parents to make important life choices for their children.

Having upheld the release agreement against Bryan's claims, the state supreme court also found this release barred Mr. and Mrs. Zivich's negligence claims

Mrs. Zivich, the signatory on the agreement, acknowledged that she had read its contents and did not ask any questions about them. Parents may release their own

claims growing out of injury to their minor children.

We adopt this rule of law, finding it consistent with principles of freedom of contract. Thus, we hold that parents may release their own claims arising out of the injury to their minor children. Accordingly, we find that Mrs. Zivich is barred from recovery as to her claims...

Although Mr. Zivich did not personally sign the release agreement, he accepted and enjoyed the benefits of the contract. In fact, when the injury occurred, Mr. Zivich was the parent who was at the practice field that evening. Thus, Mr. Zivich's conduct conveys an intention to enjoy the benefits of his wife's agreement and be bound by it. Under the doctrine of estoppel by acquiescence, Mr. Zivich may not assert his rights against the Club.

#### WILLFUL/WANTON MISCONDUCT?

While the parents and child may have waived or released any liability for ordinary negligence, the court noted that a valid and enforceable exculpatory agreement would not bar liability for an injury caused by the Club's willful and wanton misconduct.

We have held that while a participant in recreational activities can contract with the proprietor to relieve the proprietor from any damages or injuries he may negligently cause, the release is invalid as to willful and wanton misconduct...

[T]his court defined "willful" misconduct as conduct involving "an intent, purpose or design to injure" "Wanton" misconduct was defined as conduct where one "fails to exercise any care whatsoever toward those to whom he owes a duty of care, and this failure occurs under circumstances in which there is a great probability that harm will result."

On appeal, Zivich argued that the Club's failure to implement the following safety recommendations amounted to willful and wanton misconduct.

[T]he Club's former president, David Bolsen, attended a seminar just before his term of office ended. It was at the seminar that he learned of the need to anchor the goals and to post warning labels on them. Bolsen testified that because his term expired two weeks later, he had time to relay the information only to a few persons. However, no action was taken to secure the goals.

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The state supreme court, however, found Zivich had “failed to produce sufficient evidence to present a jury question on the claim of willful and wanton misconduct”:

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

Accordingly, the state supreme court affirmed the summary judgment of the trial court which had held the release was valid as to the minor child’s claim, as well as the parents' claims.