Validity of Liability Waivers/Releases – Kansas

1. Controlling Law

1. Equine Liability Statute. Kan. Stat. Ann. § 60-4001 to 4004. (1994).

2. Waiver Requirements

The intention to waive liability for negligence must be expressed in clear and unequivocal language. *Belger Cartage Serv., Inc. v. Holland Const. Co.*, 582 P.2d 1111, 1119 (1978). While the terms of an exculpatory agreement do not cover situations not plainly within the language employed, an agreement need not contain specific or express language covering each act of possible negligence. *See Talley v. Skelly Oil Co.*, 199 Kan. 767, 433 P.2d 425 (1967) (Injuries sustained by plaintiff when overhead heater fell within the scope of broad exculpatory agreement because it "happened in connection with his use and occupancy of the premises."). The court examines if the intention to exculpate the party from liability clearly appears from the contract, the surrounding circumstances and the purposes and objects of the parties. *Belger Cartage Serv., Inc. v. Holland Const. Co.*, 582 P.2d 1111, 1119 (1978).

In *Fee v. Steve Snyder Enterprises*, 1986 U.S. Dist. LEXIS 28158 (Kansas 1986), a man was killed skydiving when the automatic parachute opener made by the manufacturer and sold by the facility failed to operate. An agreement specifically released the facility from liability for injuries or death arising out of the ownership, operator, use, maintenance or control, but failed to mention the sale of any product to the parachuter. The court strictly construed the agreement, but it held the agreement should not exempt the facility from using due care in furnishing safe equipment or allow it to sell a product in a defective condition which is unreasonably dangerous to the parachuter. To do so would impermissibly extend the terms of the agreement to situations not plainly within its language. Therefore, the court denied summary judgment for the facility that sold the parachute.

"Parties cannot stipulate for the protection against liability for negligence in the performance of a legal duty or a duty of public service, or where the public interest is involved or a public duty owed, or when the duty owed is a private one where the public interest requires the performance thereof." *Hunter v. Am. Rentals, Inc.*, 371 P.2d 131, 133 (Kan. 1962) (holding that trailer rental company contract provision which exempted trailer company from liability for its own negligence was absolutely void as against public policy because (1) the state legislature had established safety standards in towing vehicles, which the defendant had violated; and (2) a business engaged in renting trailers to be driven on public highways owed a duty to plaintiff and the general public to comply with the law regulating towing safety).

General language or all-inclusive language exempting a party from liability is insufficient. *Johnson v. Bd. of County Comm'rs*, 913 P.2d 119, 136 (Kan.1996) (quoting *Butters v. Consol. Transfer & Warehouse Co.*, 510 P.2d 1269, 1273-74 (Kan.1973). The court should consider whether any limitation on liability is fairly and honestly negotiated and understandingly entered into, and may consider the totality of the circumstances surrounding the formation of the contract. *Belger Cartage Serv., Inc. v. Holland Const. Co.*, 582 P.2d 1111, 1119 (1978). One consideration may be whether the non-drafting party had knowledge of the exculpatory clauses

by having them pointed out to him or the clauses themselves being conspicuous in the contract, but failure to read an agreement is not an excuse for failing to comply with the agreement. *Id; Ki Ron Ko v. Bally Total Fitness Corp.*, CIV.A. 02-2360GTV, 2003 WL 22466193 (D. Kan. Sept. 16, 2003) (holding plaintiff cannot claim that the contract was not fairly and honestly negotiated and understandingly entered into because he chose not to obtain a copy of the contract or read the back of his membership card, which explicitly referenced a liability waiver). In *Ki Ron Ko v. Bally Total Fitness Corp.*, CIV.A. 02-2360GTV, 2003 WL 22466193 (D. Kan. Sept. 16, 2003), Mr. Hansen signed a retail installment contract, which contained a waiver and release of liability, and served as his membership with Defendant. Mr. Hansen later assigned the membership to Plaintiff. Plaintiff neither saw the retail installment contract signed by Mr. Hansen nor obtained or signed his own retail installment contract. Nevertheless, the court upheld the liability waiver against negligence claims by plaintiff after he was burned by hot water coming out of the hose in a sauna at the facility.

Liability waivers have been upheld against claims of ordinary negligence in automobile races by drivers, *see Wolfgang v. Mid-Am. Motorsports, Inc.*, 898 F. Supp. 783, 788-90 (D. Kan. 1995), *aff'd*, 111 F.3d 1515 (10th Cir. 1997); *Wagner v. SFX Motor Sports, Inc.*, 460 F. Supp. 2d 1263 (D. Kan. 2006), as well as by racing spectators injured in pit and infield areas, *see Lloyd v. Topeka Racing Assn,* Case No. 80–CV–764 (Shawnee Co. Dist. Ct.) (Bullock, J.), *aff'd,* Case No. 54,140 (Kan. Ct. App. 1982) (unpublished); *Runyan v. Topeka Raceway,* Case No. 85–CV–780 (Shawnee Co. Dist. Ct. 1987) (Vickers, J.).

Voluntary sporting competitions are not matters of important public interest, as that term is used in considering which matters may not be the subject of exculpatory agreements. *Walton v. Oz Bicycle Club of Wichita*, 90-1597-K, 1991 WL 257088 (D. Kan. Nov. 22, 1991) *aff'd,* 977 F.2d 597 (10th Cir. 1992)

Exculpatory agreements are void where they are contrary to established public interests. *Hunter v. American Rentals,* 189 Kan. 615, 371 P.2d 131 (1962); *In re Estate of Shirk,* 186 Kan. 311, 350 P.2d 1 (1960); *Walton v. Oz Bicycle Club of Wichita*, 90-1597-K, 1991 WL 257088 (D. Kan. Nov. 22, 1991) *aff'd,* 977 F.2d 597 (10th Cir. 1992)

3. Waiver of Minors' Prospective Claims

There is insufficient information to predict whether Kansas courts will permit parents to waive minors' prospective claims.

4. Willingness of Courts to Enforce Waivers

There is insufficient information to predict whether Kansas courts will uphold liability waivers. However, a Kansas district court implied that such liability waivers will be upheld:

> [Exculpatory] agreements have a vital role to play in allowing the individual to participate in activities of his own choice. If the individual has entered into an exculpatory clause freely and knowingly, and the application of the clause violates no aspect of fundamental public policy, the individual's free choice must be respected. Here, public policy supports, rather than detracts from, the application of the exculpatory

clause. "Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction."

Walton v. Oz Bicycle Club of Wichita, 90-1597-K, 1991 WL 257088 (D. Kan. Nov. 22, 1991) *aff'd,* 977 F.2d 597 (10th Cir. 1992) (citations omitted).

5. Defenses to Liability Waivers

1. The release violates the recreational use statute. A Kansas court held that a hill on campus used for sledding was open space for recreational purposes and fell within the immunity protection of the state's recreational use statute (*Boaldin v. University of Kansas*, 747 P.2d 811 (1987).

2. The waiver language is not conspicuous within the document. *See Wagner v. SFX Motor Sports, Inc.*, 460 F.Supp.2d 1263 (D. Kan. 2006) (upholding waiver partly because it was capitalized to stand out from the rest of the text).

3. Plaintiffs have argued that the invalid portion of a release clause should not be severed from the remainder of the release clause, and thus the entire release clause should be void. *Wolfgang v. Mid-Am. Motorsports, Inc.*, 898 F. Supp. 783, 788 (D. Kan. 1995) (holding the release was not entirely void simply because it attempted to relieve liability for gross negligence or wanton conduct, but rather that the unlawful portion of the release was simply unenforceable).

6. Other Issues

The status of the doctrine of assumption of risk is not clear under present Kansas law--the state courts have not considered the impact of the adoption of comparative fault in relation to the continued validity of the doctrine of assumption of risk. *Walton v. Oz Bicycle Club of Wichita*, 90-1597-K, 1991 WL 257088 (D. Kan. Nov. 22, 1991) *aff'd,* 977 F.2d 597 (10th Cir. 1992); *cf. Tuley v. Kansas City Power & Light Co.*, 843 P.2d 248, 251 (Kan. 1992) ("In Kansas, the common-law assumption of risk doctrine is restricted to cases involving employer-employee relationships.") (citations omitted).

KENTUCKY

1. Is there a statute that applies or only case law?

There are three (3) applicable statutes.

a. KRS§411.190 recreational use statute.
b. KRS§433.883 cave protection statute.
c. KRS§247.4027 farm animal activity statute.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

The only statute that addresses specific language is KRS§247.4027. The statute sets forth a "warning notice" that must be posted at the site of the activity and included in every written contract for participation, rental, and instruction:

"WARNING

Under Kentucky law, a farm animal activity sponsor, farm animal professional, or other person does not have the duty to eliminate all risks of injury of participation in farm animal activities. There are inherent risks of injury that you voluntarily accept if you participate in farm animal activities."

Hargis v. Baize, 168 S.W. 3d 36 (Ky. 2005) cites with approval the requirements set forth in 57A Am. Jur. 2d. Negligence §53 to uphold a pre-injury release:

a. it must explicitly express an intention to exonerate by using the word "negligence"; or
b. it must clearly and specifically indicate an intent to release a party from liability for a personal injury caused by that party's own conduct; or
c. protection against negligence is the only reasonable construction of the contract language; or
d. the hazard experienced was clearly within the contemplation of the provision.

3. May an adult sign for a child? I.e., is the waiver effective as to minors?

Once again, only KRS§247.4027 addresses this issue. If a parent or guardian of a minor signs the contract containing the warning language, "the waiver shall be binding upon the participant, except as regards acts of negligence by a farm animal professional, . . . sponsor . . . or any other person (who provided the equipment, animal, land, etc.)."

4. Are the courts reluctant to uphold the waiver?

Under longstanding principles of contract law in Kentucky, exculpatory clauses exempting future liability for negligence must be enforced as part of an arm's-length transaction between sophisticated parties with equal bargaining power.

Cumberland Valley Contractors, Inc. v. Bell County Coal Corp., 238 S.W. 3d 644, 650 (Ky. 2007). However, the courts disfavor such contracts and construe them strictly against the party relying on them.

5. How does one defeat the waiver?

- By showing the release is not truly voluntary; e.g., the party is compelled or encouraged to participate under unfavorable conditions.
- By showing a violation of public policy. In Coughlin v. T.M.H. Intern. Attractions, Inc. 895 F. Supp. 159 (W.D. Ky. 1995) the Court found that there was no public interest in encouraging commercial caving activities. Rather, the public interest in the "physical safety and legal protection of our citizens" trumps the release signed by the participant.
- By showing unequal bargaining power between the parties. In the Coughlin case, the Court emphasized that the participant was inexperienced, relied entirely on the tour guide and cave operators, and that the release was more akin to an enticement than a warning of specific risks.

6. Other issues regarding waivers particular to Kentucky?

The only two areas of case law with specific exceptions for recreational activity waivers are competitive auto and bicycle racing. In Dunn v. Paducah Intern. Raceway, 599 F. Supp. 612 (W.D. Ky. 1984), the Court found that the release signed by the race car driver was voluntary, involved purely private interests, and actually promoted the public interest in sport competition, since without releases no one would be willing to sponsor events. See also Donegon v. Beech Bend Raceway Park, Inc., 894 F. 2d 205 (6th Cir. 1990).

As for competitive bicycling, the release form signed by the participant exempted liability for negligence, not intentional conduct, and did not violate public policy. The plaintiff was unable to prove wanton or willful conduct, and the release was held to be sufficient. Estate of Peters v. U.S. Cycling Federation, 779 F. Supp. 853 (E.D. Ky. 1991).

LOUISIANA

LOUISIANA

Are releases enforceable? No.

Can a parent execute a release for a minor? No.

MARYLAND

MARYLAND

1. Is there a state statute that applies or only case law. There are no statutes that deal with exculpatory clauses in recreational activities. The case law in Maryland establishes that the exculpatory contractual clauses are generally valid, with three exceptions. See Adloo v. H.T. Brown Real Estate, 344 Md. 254, 259-260 (Md. 1996); Boucher v. Riner, 68 Md. App. 539, 548-549 (Md. Ct. Spec. App. 1986); Winterstein v. Wilcom, 16 Md. App. 130, 135-137 (Md. Ct. Spec. App. 1972). Those exceptions are "when a party to the contract attempts to avoid liability for intentional conduct or harm caused by reckless, wanton, or gross behavior; when the contract results from grossly unequal bargaining power; and when the transaction is one adversely affecting the public interest." Adloo, 344 Md. at 260. The "last exception includes the performance of a public service obligation, e.g., public utilities, common carriers, innkeepers, and public warehousemen. It also includes those transactions, not readily susceptible to definition or broad categorization, that are so important to the public good that an exculpatory clause would be "patently offensive," such that "' the common sense of the entire community would pronounce it' invalid." Id.

2. What does the statute or case law say with respect to what language needs to be in the waiver. Maryland does not require specific language in the exculpatory clause of a contract. However, Maryland requires "that contracts will not be construed to indemnify a person against his own negligence unless an intention so to do is expressed in those very words or in other unequivocal terms." Crockett v. Crothers, 264 Md. 222, 227 (Md. 1972); see also Blockston v. United States, 278 F. Supp. 576, 591 (D. Md.).

3. Can an adult sign for a child, i.e. is the waiver effective as to minors. Maryland does not have direct case law on this issue.

4. Are the courts reluctant to uphold the waiver. Courts are not reluctant to uphold said waivers, so long as it does not fall under statute or one of the three exceptions stated above.

5. How does one try to defeat the waiver. As seen in Adloo and Winterstein, above, plaintiff would need to establish that the conduct fell into one of the three exceptions, the most notable being that the conduct amounted to gross negligence. In the alternative, Plaintiff can follow Crockett and try to establish that the clause was not unequivocal.

6. Other issues re: waivers particular to your state. In addition to Maryland courts generally upholding exculpatory clauses in contracts, if a waiver was not signed in a present case, but had been signed in the past, Maryland will allow those as evidence towards an assumption of risk defense, showing that the participant was aware of the dangers involved in the activity. Am. Powerlifting Ass'n v. Cotillo, 401 Md. 658, 669 (Md. 2007)

MICHIGAN

IS THERE A STATE STATUTE THAT APPLIES OR ONLY CASE LAW?

Common law controls the validity of waivers and releases in Michigan. *Woodman v Kera*, LLC, 280 Mich App 125, 760 NW2d 641 (2008) *aff'd, Woodman ex rel. Woodman v. Kera, LLC*, 486 Mich 228, 785 Mich NW2d 1 (2010).

2. WHAT DOES THE STATUE OR CASE LAW SAY WITH RESPECT TO WHAT LANGUAGE NEEDS TO BE IN THE WAIVER?

A Release is a contract between the parties and there is no specific language that courts require to be included in the Release. In Michigan, as with other contracts, the validity of a Contract of Release turns on the intent of the parties. *Trongo v Trongo*, 124 Mich App 432, 435, 335 NW2d 60 (1983). A Release must be written with sufficient clarity to put a person on notice that any right to bring a claim for liability for injury or damages arising out of participation in the event is being waived. *Dombrowski v City of Omer*, 199 Mich App 705, 502 NW2d 707 (1993). In addition to the language, courts will also look to the size of the font, whether the language is in all caps, whether the language is double spaced and whether there is a caption proceeding the release language that says "Release" or "Waiver of Liability." The language in the waiver clause should also be clear and understandable. *Paterek v 6600 LTD.*, 186 Mich App 445, 448-449, 465 NW2d 342 (1990).

CAN AN ADULT SIGN FOR A CHILD, I.E. IS THE WAVIER EFFECTIVE AS TO MINORS?

No. "In Michigan a parent has no authority merely by virtual of the parental relation to waive, release, or compromise claims of his or her child. *Woodman v Kera*, LLC, 280 Mich App 125, 760 NW2d 641 (2008) *aff'd, Woodman ex rel. Woodman v. Kera, LLC*, 486 Mich 228, 785 Mich NW2d 1 (2010). Generally speaking, the natural guardian has no authority to do an act which is detrimental to the child. *Tuer v Nieodoliwka*, 92 Mich App 694, 698-699, 285 NW2d 424 (1979). This rule reflects a public policy of the State of Michigan which favors a protection of the contractual rights of minors consistent with the common law limitations placed on parental authority to compromise claims belonging to their children. *Woodman v Kera*, LLC, 280 Mich App 125, 760 NW2d 641 (2008) *aff'd, Woodman ex rel. Woodman v. Kera, LLC*, 486 Mich 228, 785 Mich NW2d 1 (2010). Therefore, "pre-injury waivers effectuated by parents on behalf of their minor children are not presumptively enforceable." *Id* at 150.

4. ARE THE COURTS RELUCTANT TO UPHOLD THE WAIVER?

No. "It is not contrary to the State's public policy for a party to contract against liability for damages caused by ordinary negligence". *Paterek v 660 LTD.*, 186 Mich App 445, 448-449, 465 NW2d 342 (1990). However, it is contrary to public policy for parties to sign the Releases against liability for gross negligence or recklessness and such releases are not upheld. *Xu v. gay*, 257 Mich App 263, 668 NW2d 166 (2003).

HOW DOES ONE TRY TO DEFEAT THE WAIVER?

Because a Release is a contract, virtually any defense to the validity of a contract will apply in Michigan to the validity of a Release. As with other contracts, the validity of a contract of Release turns on the intent of the parties. *Trongo v Trongo*, 124 Mich App 432, 435, 335 NW2d 60 (1983). To be valid, Release must be fairly knowingly made. *Denton v Utley*, 350 Mich 332, 886 NW2d 537 (1957). A Release is not fairly made and is invalid if (1) the Releasing party was in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented or (3) there was other fraudulent or overreaching conduct. *Theisen v Kroger Co.*, 107 Mich App 580, 582-583, 309 NW2d 676 (1981). Likewise, mutual mistake is a valid defense to a contract of a Release, however, unilateral mistake is not. *Dombrowski*, 199 Mich App 705, 502 NW2d 707 (1993). However, failure to read the release is not a defense unless that failure was a result of a trick by the parties seeking to enforce a contract. *Christensen v Christensen*, 126 Mich App 640, 645, 337 NW2d 611 (1983).

6. OTHER ISSUES REGARDING WAIVER PARTICULAR TO YOUR STATE?

In Michigan, less can be more. For example in the case of *Dombrowski v City of Omer*, cited above, the defendants asked the plaintiff-event-goers to sign a Release with the following language:

> "In consideration of the possible injuries [sic] which could occur in this event, I hereby release all participating groups and persons officially connected with this event from any and all liability for injury or damages whatsoever arising from any participation in this event".

Based on this language, the Court held that the defendants, City of Omar and Arenac County Road Commission were entitled to summary disposition. Significantly, this decision was made entirely on the basis of the release language and the Court specifically declined to address issues of governmental immunity, finding such analysis to be unnecessary given the Release.

MINNESOTA

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Re: Waiver/Release Project IALDA

"It is settled Minnesota law that, under certain circumstances, parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence." *Anderson v. McOskar Enters., Inc.*, 712 N.W.2d 796, 799–800 (Minn.App.2006) (quotation omitted). These agreements are generally viewed as being in the nature of a contractual or express assumption of risk. *Bunia v. Knight Ridder*, 544 N.W.2d 60, 62–63 (Minn.App.1996). Waivers or releases are governed by case law and not by statute.

While there are no magical words that are required to be in the waiver or release, the waiver or release must be unambiguous and must not release the benefitted party from liability for intentional, willful or wanton acts. The clause must not violate public policy measured by 1) whether there is a disparity in bargaining power between the parties and 2) whether the type of service being offered or provided is a public or essential service. Disparity in bargaining power is determined by the necessity of the services that could not be obtained elsewhere and the courts have stated that "recreational activities do not fall within any of the categories where the public interest is involved."

Parents or natural guardians of a minor can sign a clause on behalf of said minor to release a party from any and all liability to the minor for claims which the minor may now have or may in the future have for any injuries in relation to an activity.
In Minnesota, releases of liability are not favored by the law and are strictly construed against the benefited party. "If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." These two areas seem to be the areas one will concentrate on in Minnesota to defeat a waiver or release.

MISSISSIPPI

MISSISSIPPI

A. QUESTIONS PRESENTED

1. Is there a state statute that applies to liability waivers, or only case law?

Answer

The issue of the enforceability of liability waivers Is governed by case law.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

Answer

While the courts do not require the agreement to contain specific language, Mississippi courts interpret release agreements under the rule that every person must be presumed to know the law, and in the absence of some misrepresentation, or illegal concealment of facts, the person must abide the consequences of his contracts and actions. *Farragut v. Massey*, 612 So.2d 325, 329 (Miss. 1992) (citing *McCorkle v. Hiughes*, 244 So.2d 3286 (Miss. 1971)).

3. Can an adult sign for a child, i.e., is the waiver effective as to minors?

Answer

Minors cannot legally enter into contracts. *Clemons v. State*, 733 So.2d 266, 275 (Miss. 1999). Accordingly, any waiver should be executed by a parent or by both the parent and minor child.

4. Are the courts reluctant to uphold the waiver?

Answer

No, liability waivers are generally enforceable.

5. How does one defeat the waiver?

Answer

Given the strict scrutiny applied by the courts, a party seeking to defeat a release should be able to do so by demonstrating a lack of the requisite intent, by extrinsic evidence is the document is ambiguous.

B. SUMMARY OF THE CURRENT STATE OF THE LAW IN MASSACHUSETTS

Clauses that limit liability are given strict scrutiny, and a release must be fairly and honestly negotiated and understood by both parties. *Farragut v. Massey*, 612 So.2d 325, 330 (Miss. 1992); *Rigsby v. Sugar's Fitness and Activity Center*, 803 So.2d 497 (Miss. App. 2002). In addition, a party may not use an anticipatory lease to escape liability for tortious acts. *Farragut*, 612 So.2d at 330. **Like any contract, a release is** contrued agaisnt the party who drafted it. *Quinn v. Miss. State University*, 720 So.2d 843, 851 (Miss. 1998) (citing *Leach v. Tingle*, 586 So.2d 799, 801 9Miss. 1991)). If the terms of the release are ambiguous, the court shoiuld not construe it without the aid of extrinsic evidence of intent. *Farragut*, 612 So.2d at 329. A jury is allowed to decide the issue of whether a release was obtained in good faith and with the full understanding on the plaintiff's part of his legal rights. *Smith v. Sneed*, 638 So.2d 1252, 1261 (Miss. 1994).

MISSOURI

RE: Liability Waivers Related to Recreational Activities in Missouri

The information below is meant to provide general information for educational purposes only. Please note that the laws and cases cited below are described in a summary manner with a focus on liability waivers related to recreational activities, and are not meant to describe any other aspects of the laws or the cases mentioned. Please also note that changes to the relevant laws and/or additional case law may have occurred since the information was compiled. For specific legal information and advice for any particular matter, you should consult a licensed attorney.

A. QUESTIONS PRESENTED

1. Is there a state statute that applies to liability waivers, or only case law?

<u>Answer</u>

There is no Missouri statute bearing directly on the validity of agreements in advance to waive a party's liability for negligence. However, Missouri courts have long held that such releases are valid and enforceable. *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330, 334 (Mo. Banc 1996).

2. What does the statute or case law say with respect to what language needs to be in the waiver?

<u>Answer</u>

While such contract terms are not against public policy, they are disfavored. *Warren v. Paragon Technologies Group*, 950 S.W.2d 844, 845 (Mo. Banc 1997). As a result, courts will only enforce such language where it is clear, conspicuous and understandable, particularly where the parties are in unequal bargaining positions. *Alack*, 923 S.W.2d at 337. In the case of consumer contracts, courts have held that the words "negligence" or "fault" or their equivalents must be used in the release language. *Id.* at 337.

Court's have refused to enforce release language where the word "negligence" was not used. *Handwerker v. T.K.D. Kid, Inc.*, 924 S.W.2d 621 (Mo. App. E.D. 1996). In fact, the court in *Milligan v. Chesterfield Village GP, LLC*, 239 S.W.3d 613 (Mo. App. S.D. 2007) called inclusion of words such as "negligence" or "fault" a "bright-line" test for enforceability. *Id.* at 618. Note, however, that while the words "negligence" and "fault" are required, they may not be sufficient alone to render release language enforceable. In *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388 (Mo. App. W.D. 1999), the court refused for a number of reasons to enforce release language that used the word "negligence." The court criticized the release language because it

purported to release "any and all" liability even though liability for assault may not be release in advance in Missouri. The court explained: "Here, the Rental Form purports to relieve Respondent of all liability but does not do so. Thus, it is duplicitous, indistinct and uncertain" *Id.* at 394. The court also noted that clause containing the release did not indicate that it was a release, but instead was titled "Snow Creek Ski Area Rental Form." The court also criticized the small point size of the release language and the fact that the plaintiff was required to sign the release while waiting in line to rent ski equipment.

3. Can an adult sign for a child, i.e., is the waiver effective as to minors?

Answer

Releases of future negligence liability probably are not effective as to minors. Although no court has specifically addressed this issue in the context of release of a party for future negligence, at least one court has held that a parent may not, absent court appointment, sign away a child's right of action for past wrongs. In *Y.W. v. National Super Markets, Inc.*, 876 S.W.2d 785 (Mo.App. E.D. 1994), the plaintiff was a child who was caught shoplifting at a grocery store. While detained by the store's managers, the child's mother signed a release of claims against the store in exchange for the store's promise not to press criminal action. Citing the state's statute governing the settlement of minors' claims, the court held "that a parent cannot bargain away a minor's right to bring a civil action against an alleged tortfeasor without being duly appointed." *Id.* at 789. The court also held that the child's own signature on the release was ineffective, since, as a minor, the child's agreement was voidable. *Id.* at 787.

4. Are the courts reluctant to uphold the waiver?

Answer

Waivers of future negligence are not against public policy, but they are disfavored. Nevertheless, courts will enforce such waivers as long as they meet the requirements set out in case law.

5. How does one defeat the waiver?

Answer

A waiver may be defeated by showing that it does not use the words "negligence" or "fault" or their equivalents or that the waiver language was otherwise ambiguous, unclear or unlikely to draw the signer's attention to the fact that tort liability is being waived.

MONTANA

VALIDITY OF LIABILITY WAIVERS/RELEASES – MONTANA

1. Controlling Law

There are both statute and case law that explicitly ***in***validate pre-injury releases.

2. Waiver Requirements

Montana law explicitly prohibits contractual provisions that attempt to exonerate liability arising out of actions that violate the law, whether willful or negligent. **M.C.A. § 28-2-702** ("All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law."); ***Miller v. Fallon Cty.***, 212 Mont. 214, 721 P.2d 342 (1986); ***Spath v. Dillon Enters., Inc.***, 97 F.Supp.2d 1215 (D.Mont. 1999) (in wrongful-death action, contractual release was unenforceable against estate of customer of whitewater rafting outfitter). Therefore, any waiver by which an entity seeks to contractually exculpate itself from liability arising out of negligent violations of legal duties, whether those duties are rooted in case law or statutes, is invalid and unenforceable. A prospective release from liability for negligence – a violation of law – is against the policy of the law and illegal, despite being a private contract between two persons without significant public implications. ***Miller***, 721 P.2d 342; *accord* ***McDermott v. Carie, LLC***, 329 Mont. 295, 124 P.3d 168 (2005).

The Montana legislature has enacted statutes, such as the Ski Safety Statute, **M.C.A. §§ 23-2-731,** ***et seq.***, Equine Activities Act, **M.C.A. §§ 27-1-725,** ***et seq.***, and Recreation Responsibility Act, **M.C.A. §§ 27-1-751,** ***et seq.***, that limit some recreation providers' liability by requiring that participants assume the inherent risks in the particular recreation activity. Nevertheless, the statutes do not preclude actions based on negligence (or willful, wanton, or intentional conduct) if the damages are not the result of an inherent risk. *See, e.g.*, ***McDermott***, 124 P.3d 168, 174 (portion of release agreement that noted that plaintiff had notice of inherent risks posed by unpredictable nature of horses was properly allowed, as long as trial court redacted "illegal" pre-tort exculpatory language from exhibit).

3. Waiver of Minors' Prospective Claims

No such waivers available.

4. Willingness of Courts to Enforce Waivers

As stated above, Montana's courts are unwilling to enforce waivers and the Montana Supreme Court has explicitly determined that a prospective release from liability for negligence is invalid, illegal, and unenforceable. ***McDermott***, 124 P.3d 168; ***Miller***, 721 P.2d 342; *see* ***Spath***, 97 F.Supp.2d 1215.

5. Defenses to Liability Waivers

As stated above, Montana law explicitly invalidates liability waivers.

6. Other Issues

None are really applicable at this time.

NEBRASKA

VALIDITY OF LIABILITY WAIVERS/RELEASES – NEBRASKA

1. Controlling Law

There is applicable case law, but no statute.

2. Waiver Requirements

The language of a particular exculpatory clause in a contract must be clear and unambiguous. A pre-injury release should include language that the participant had a reasonable opportunity to and indeed read the agreement. A release should also include language that the participant inspected the premises and satisfied himself as to the safety of the premises, including its design and maintenance. It should also include language that the participant acknowledges the inherent and dangerous risks and agrees to assume these risks. One should be as detailed as possible, without unnecessarily narrowing or limiting the language of the waiver. ***Mayer v. Howard***, 370 N.W.2d 93 (Neb. 1985).

The Nebraska legislature has enacted statutes, such as the Equine Activity Liability Statute, **N.R.S. §§ 25-21,249, *et seq.***, that limit the liability for ordinary negligence of some recreation activity providers by requiring that the participants assume the inherent risks of those activities.

3. Waiver of Minors' Prospective Claims

Nebraska has no case law or statute directly on point. However, based on case law regarding general contract law, and **N.R.S. § 43-2101**, which determines the age of majority in Nebraska (18), an adult may not sign for a minor. An infant may disaffirm or avoid his personal contracts on the ground of infancy during minority, as well as after he or she attains majority. This rule applies generally to all contracts, whether executory or executed. ***Smith v. Wade***, 100 N.W.2d 770 (Neb. 1960) (mortgage executed by a wife of legal age and her minor husband was held void where the minor husband subsequently and during his minority repudiated and rescinded mortgage).

4. Willingness of Courts to Enforce Waivers

As noted above, Nebraska's state courts are not reluctant to uphold waivers that comply with case-law requirements and relevant statutory restrictions. *See* ***Hearst-Argyle Props., Inc. v. Entrex Comm. Servs., Inc.***, 778 N.W.2d 465 (Neb. 2010) (waiver provision within contract should not be declared void as contrary to public policy unless it is quite clearly and unmistakably repugnant to public interest).

5. Defenses to Liability Waivers

Courts may void an exculpatory clause in a contract if it is contrary to public policy. In determining whether a particular exculpatory clause is void as against public policy, a court must

consider the particular facts and circumstances of the agreement and the parties involved. The greater the risk to human life and property, the stronger the argument in favor of voiding attempts by a party to insulate itself from damages. Public policy prevents a defendant from limiting its damages for gross negligence or willful and wanton misconduct. Gross negligence is defined as "great and excessive negligence . . . negligence in a very high degree. It indicates the absence of slight care in the performance of a duty." Willful and wanton misconduct "exists where a defendant had actual knowledge that because of its actions, a danger existed to the plaintiff and the defendant intentionally failed to act to prevent a harm that was reasonably likely to result." ***New Light Co., Inc. v. Wells Fargo Alarm Servs.***, 525 N.W.2d 25 (Neb. 1994).

6. Other Issues

None are really applicable at this time.

NEVADA

Validity of Liability Waivers/Releases – Nevada

1. Controlling Law

1. Skiing. Nev. Rev. Stat. § 455A.010-.190 (1999).
2. Amusement rides. Nev. Rev. Stat. § 455B.010-100 (1999).
3. Nev. Rev. Stat. § 41.141. Jury instructions are given to explain situations in which comparative negligence is not a bar to recovery.

2. Waiver Requirements

In *Renaud v. 200 Convention Ctr.*, 728 P.2d 445 (Nev. 1986), the court held that the plaintiff may not have knowingly and voluntarily assumed the risks associated with using a free-fall simulator. The facility had required that plaintiff sign a liability release that purportedly exculpated the facility of any liability for negligence that might occur while plaintiff was on its premises, but the court denied summary judgment for the defendant since the plaintiff might not have knowingly and voluntarily assumed the risk. The court underscored that when addressing a liability waiver, "it is necessary to evaluate all the circumstances as they existed at the time the release was obtained." [Such circumstances] include (but are not limited to) the following: the nature and extent of the injuries, the haste or lack thereof with which the release was obtained, and the understandings and expectations of the parties at the time of signing." *Id.* at 446.

3. Waiver of Minors' Prospective Claims

There is insufficient information to predict whether a parent may waive his child's prospective claim for negligence

4. Willingness of Courts to Enforce Waivers

There is insufficient information to predict whether Nevada courts will uphold liability waivers.

5. Defenses to Liability Waivers

1. Defendant did not breach any duty of care to Plaintiffs to protect them from harm. *Turner v. Mandalay Sports Entm't, LLC*, 180 P.3d 1172, 1176 (Nev. 2008)

2. The source of the plaintiff's injury was a known and obvious risk. *Turner v. Mandalay Sports Entm't, LLC*, 180 P.3d 1172, 1176 (Nev. 2008) (finding risk known and obvious when spectator, who was injured when foul ball struck her in the face as she sat in the baseball stadium's concession area, which had no protective screen surrounding it, brought negligence and emotional distress claims against minor league baseball team).

6. Other Issues

None.

Validity of Liability Waivers/Releases – New Mexico

1. Controlling Law

1. Equine Liability Act. New Mex. Stat. Ann. § 42-13-1 - § 42-13-5 (Michie Supp. 1999). The Equine Liability Act prohibits the use of waivers for equine activities. *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003) (holding release signed by guest prior to riding horse was unenforceable).

2. Ski Safety Act. New Mex. Stat. Ann. § 24-15-1 - § 24-15-14 (Michie 2000).

2. Waiver Requirements

New Mexico appellate courts have generally held that agreements that exculpate one party from liability for negligence will be enforced, unless they are "violative of law or contrary to some rule of public policy." *Sw. Pub. Serv. Co. v. Artesia Alfalfa Growers" Ass"n*, 353 P.2d 62, 69 (N.M. 1960); *accord Lynch v. Santa Fe Nat'l Bank*, 627 P.2d 1247, 1251 (N.M. Ct. App. 1981).

A provision in a contract seeking to relieve a party to the contract from liability for his own negligence is void and unenforceable, if the provision is violative of law or contrary to some rule of public policy. *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003). An exculpatory clause is not void merely because defendants failed to incorporate certain statutorily-required language in an exact and verbatim manner. *Id.* However, in determining the validity of a liability release for personal injury, it is important that the release at issue in any particular case contain specific language informing the patron of the types of risks being assumed, regardless of whether the patron is well-versed in legal terms of art or not. *Id.* Standing alone, "assumption of risk" is one of those legal phrases that one would not expect a lay person to understand, and would not be sufficient on its own to uphold the release. But, considered together with the language in the body of a document, the phrase is a helpful signal. *Id.*

In addition to the language of the release itself, courts look to the placement of that language within the document to determine whether it is conspicuous enough. *See Lynch*, 97 N.M. at 557, 627 P.2d at 1250. "When a reasonable person against whom a clause is to operate ought to have noticed it, the clause is conspicuous." *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003) (quoting *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993) (finding release clause conspicuous because "indemnity language [is] sufficiently conspicuous to afford fair notice of its existence when the entire contract appear[s] on one page and the language [is] on the front side of the contract, not hidden under a separate heading or surrounded by unrelated terms." *Id.* at 510.)) Courts also examine whether the defendant made some effort to bring the release to the plaintiffs' attention before the plaintiffs signed it. *Id.*

3. Waiver of Minors' Prospective Claims

There is insufficient information to predict whether a parent may waive his child's prospective claim for negligence

4. Willingness of Courts to Enforce Waivers

Courts will likely uphold liability waivers.

5. Defenses to Liability Waivers

Public policy does not preclude enforcement of contractual provisions exculpating transactions in which the releasor faced a risk of economic loss. *See State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777 (N.M. Ct. App. 1991) (exculpating an investment advisor from liability for negligence in advising an investor to enter into a prohibited transaction); *Albuquerque Tire Co. v. Mountain States Tel. & Tel. Co.*, 697 P.2d 128 (N.M. Ct. App. 1985) (exculpating a telephone company for negligence in listing an incorrect number in a customer's yellow pages advertisement); *Lynch v. Santa Fe Nat'l Bank,* 627 P.2d 1247 (N.M. Ct. App. 1981) (exculpating a bank acting as an escrow agent for negligence in terminating escrows).

6. Other Issues

New Mexico courts adopt "a rebuttable presumption that a general release benefits only those persons specifically designated." *See Hansen v. Ford Motor Co.*, 900 P.2d 952, 960 (N.M. 1995).

NEW ENGLAND

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RE: **Liability Waivers Related to Recreational Activities in New England**

The information below is meant to provide general information for educational purposes only. Please note that the laws and cases cited below are described in a summary manner with a focus on liability waivers related to recreational activities, and are not meant to describe any other aspects of the laws or the cases mentioned. Please also note that changes to the relevant laws and/or additional case law may have occurred since the information was compiled. For specific legal information and advice for any particular matter, you should consult a licensed attorney.

I. MASSACHUSETTS

A. QUESTIONS PRESENTED

1. Is there a state statute that applies to liability waivers, or only case law?

Answer

The issue of the enforceability of liability waivers in Massachusetts is primarily a matter of case law. However, there is a Massachusetts statute that specifically prohibits the use of liability waivers in contracts for health club services, and a Massachusetts statute which protects equine professionals from liability for injuries to participants in equine activities resulting from the inherent risks of equine activities.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

Answer

There is no specific language that needs to be in a liability waiver. If a waiver or release is unambiguous, and the language is comprehensive enough to cover the claim asserted, it will normally bar the claim. However, any doubts

about the interpretation of a waiver or release must be resolved in the plaintiff's favor.

The statutory protections available to equine professionals can only be asserted if the equine professional uses contracts and posts signs that contain the warning language specified in the statute.

3. Can an adult sign for a child, i.e., is the waiver effective as to minors?

<u>Answer</u>

In the context of a public school or non-profit organization involved with youth sports programs, the answer is yes. With regard to a commercial enterprise, there are no appellate level cases that address the isssue. However, some trial courts have found that such waivers are enforceable even by commercial enterprises.

4. Are the courts reluctant to uphold the waiver?

<u>Answer</u>

No, liability waivers are generally enforceable.

5. How does one defeat the waiver?

<u>Answer</u>

A waiver may be defeated if it is ambiguous, signed due to fraud or under duress, or violates a statute or regulation. Also, gross negligence cannot be waived in Massachusetts. (See the exceptions below for futher information).

B. SUMMARY OF THE CURRENT STATE OF THE LAW IN MASSACHUSETTS

1. <u>A waiver of liability is generally valid in Massachusetts</u>

As a general proposition, releases of liability for ordinary negligence are valid in Massachusetts. *Vallone v. Donna, 49 Mass. App. Ct. 330, 331 (2000); Gonsalves v. Commonwealth, 27 Mass. App. Ct. 606, 608* & n. 2 (1989).

There is no rule of general application in Massachusetts that a person cannot contract for exemption from liability for his own negligence and that of his agents and servants, and the Massachusetts courts have found that a right which has not yet arisen may be made the subject of a covenant not to sue or may be released. *See e.g., MacFarlane's Case, 330 Mass. 573, 576* (1953). The Massachusetts courts have repeatedly recognized that, at least in the case of

ordinary negligence, the "allocation [of] risk by agreement is not contrary to public policy." *Cormier v. Central Mass. Chapter of the Natl. Safety Council, 416 Mass. at 289* & n.1 (1993). *Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 18 (1997).* Thus, it has long been the rule in Massachusetts that a party may validly exempt itself from liability which it might subsequently incur as a result of its own negligence. *See Cormier v. Central Mass.Chapter of the Natl. Safety Council, 416 Mass. 286 at 288; Lee v. Allied Sports Assocs., 349 Mass. 544, 550 (1965); Schell v. Ford Motor Co. 270 F.2d 384, 386 (1st Cir. 1959); Barrett v. Conragan, 302 Mass. 33(1938); Ortolano v. U-Dryvit Auto Rental Co. Inc. 296 Mass. 439 (1937).*

Any doubts about the interpretation of a waiver or release must be resolved in the plaintiff's favor. *Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 721 (1972).* However, if a waiver or release is unambiguous, and the language is comprehensive enough to cover the claim asserted, it will normally bar the claim. *Cormier v. Central Mass. Chapter of the Natl. Safety Council, 416 Mass. at 288.*

2. Waivers signed on behalf of minors

In Massachuetts, a waiver of liability signed by a parent on behalf of a minor child may be enforceable. *See, Sharon v. City of Newton, 437 Mass. 99 (2002).* However, in finding that a release signed by the father of a student who was injured while performing a school cheerleading routine was enforceable, the Massachusetts Supreme Judicial Court in *Sharon v. City of Newton* also took into consideration the public policy of encouraging school athletic programs for the Commonwealth's youth. The SJC found that said public policy was embodied in Massachusetts statutes that exempt from liability for negligence: nonprofit organizations and volunteer managers and coaches who offer and run sports programs for children under eighteen years of age (*G. L. c. 231, § 85V*), and owners of land (including municipalities) who permit the public to use their land for recreational purposes without imposing a fee (*G. L. c. 21, § 17C*). *Id. at 109.* These particular considerations would not be applicable to commercial enterprises. Reading between the lines, it appears that the SJC was being very careful to restrict its holding to schools and non-profit organizations.

However, although the holding in *Sharon v. Newton* was limited to its own particular facts, it could be argued that much of the Court's reasoning would also apply to commercial situations. For example, the Supreme Judicial Court found that the minor's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons, that he made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole, and that in the circumstance of a voluntary, nonessential activity, the Court should not disturb this parental judgment. The SJC went on to find that allowing the release to remain in effect comports with the fundamental liberty interest of

parents in the rearing of their children, and was not inconsistent with the purpose behind the Commonwealth's public policy permitting minors to void their contracts.

Although there have not been any appellate level cases since *Sharon v. Newton* that have examined the issue of the enforceability of a release signed by a parent on behalf of a minor, and although there is a real question as to whether the SJC would enforce a liability waiver protecting a commercial enterprise from liability for its own negligence; there are some recent cases at the trial court level that have cited to *Sharon v. Newton* for the proposition that liability waivers that prospectively release a private business from negligence "are clearly enforceable even when signed by a parent on behalf of their child." *Quirk v. Walker's Gymnastics, 16 Mass. L. Rep. 503 (Middlesex Superior Court 2003); see also, Vokes v. Ski Ward, Inc., 2005 Mass. Super. LEXIS 346 (Worcester Superior Court 2005).*

3. Exceptions to the general rule

a. "Baggage check" and "ticket" cases

In the so called "baggage check" or "ticket" cases wherein a defendant relies upon provisions on the stub limiting or excluding liability, the Massachusetts courts have held that the type of document which the patron receives and the circumstances under which he receives it are not such that a person of ordinary intelligence would assume that the ticket limits the proprietor's liability unless the patron becomes actually aware of that limitation. *See Lee v. Allied Sports Associates, Inc.*, 349 Mass. 544, 549-550 (1965). Therefore, in such situations, it is a question of fact whether the patron was aware of the limitation of liability and that the burden is upon the defendant to show that the patron was made aware of the limitation. *Id.* However, where a plaintiff signs a release after having the opportunity to read it, the release will generally be enforceable, in the absense of fraud or duress, even if the plaintiff failed to read or to understand its contents. *Id* at 550-551.

b. Ambiguity

As mentioned above, since "any doubts about the interpretation of [a] release must be resolved in the plaintiff's favor" (*Cormier, 416 Mass. at 288,* citing *Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 721, 277 N.E.2d 503 (1972),* a release or waiver that does not clearly and unambiguously release the defendant from the type of injury suffered by the plaintiff will probably not be enforced.

Gross Negligence

A prospective release which purports to relieve a party from tort liability for gross negligence or reckless or intentional conduct is against public policy, and is not enforceable in Massachusetts. *See Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 18-19 (1997)*, citing *Gillespie v. Papale, 541 F. Supp. 1042, 1046 (D. Mass. 1982); CSX Transp., Inc. v. Mass. Bay Transp. Auth.*, 697 F. Supp. 2d 213, 226-228 (2010).

d. Fraud or Duress

A release, like any agreement, which is obtained through fraud or signed under duress is voidable. However, in the absense of fraud or duress, the failure to read or understand the provisions of a release, especially when it is clear that a party had time to do so, does not avoid its effects. *See Sharon v. City of Newton, 437 Mass. 99, 103 (2002); Lee v. Allied Sports Assocs., Inc., 349 Mass. 544, 550 (1965).* In the so called "baggage check" or "ticket" cases wherein a defendant relies upon provisions on the stub limiting or excluding liability, the Massachusetts courts have held that it is a question of fact whether the patron was aware of the limitation of liability, and that the burden is upon the defendant to show that the patron was made aware of the limitation. *Lee v. Allied Sports Assocs., Inc., 349 Mass. at 549.*

e. Violation of a State Statute or Regulation

Although releases of liability for ordinary negligence are generally valid, a release or waiver of liability may not shield a defendant from responsibility for violation of a statutory duty. *Vallone v. Donna, 49 Mass. App. Ct. 330, 331 (2000); Henry v. Mansfield Beauty Academy, Inc., 353 Mass. 507, 511, 233 N.E.2d 22 (1968)*; *Gonsalves v. Commonwealth, supra at 609 n.2.* The Massachusetts Supreme Judicial Court has held that "[a] statutory right may not be disclaimed if the waiver would do violence to the public policy underlying the legislative enactment." Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 378, 548 N.E.2d 182 (1990). For example, if the owner of a building or structure fails to maintain the building or structure in a safe and sanitary condition in violation of the Massachusetts State Building Code and/or the regulations related thereto, a release or waiver may be unenforceable if the risk that materialized was within the contemplation of the statute or regulation. *See Vallone v. Donna, 49 Mass. App. Ct. at 333.*

f. Violation of Section 9 of Chapter 93A

Under certain limited circumstances, a plaintiff may be able to assert a claim based on the statutory remedies available to consumers under Section 9 of Chapter 93A, even where the plaintiff's common law claims are barred by a valid waiver. In *Doe v. Cultural Care, Inc.*, 2011 U.S. Dist. LEXIS 28226, for example, the U.S. District Court for the District of Massachusetts found that even though a parent signed a waiver releasing an au pair services company from

liability, and even though the waiver barred the parent's negligence and negligent infliction of emotional distress claims, the parent's G.L. c. 93A, §9 claims were not barred. The court reasoned that Section 9 of Chapter 93A was adopted to provide an effective private remedy to consumers who have been injured by another person's use or employment of an unfair or deceptive act or practice; and that in situations where a 93A claim is not merely an alternative cause of action based on traditional breach of contract or negligence concepts, but is primarily based on conduct actionable under 93A, such as fraudulent representations made to a consumer, enforcement of the waiver to bar a 93A, Section 9 claim would violate public policy.

g. Health Club Exception

G.L. c. 93, §80 provides in relevant part as follows:

> . . . No contract for health club services may contain any provisions whereby the buyer agrees not to assert against the seller or any assignee or tranferee of the health club services contract any claim or defense arising out of the health club services contract or the buyer's activities at the health club. . . .

Furthermore, G.L. c. 93, §85 provides in relevant part that:

> Any contract for health club services which does not comply with the applicable provisions of this chapter shall be void and unenforceable as contrary to public policy. Any waiver by the buyer of the provisions of this chapter shall be deemed void and unenforceable by the seller as contrary to public policy.

h. Equine Activities

G.L. c. 128, §2D provides that an equine activity sponsor, an equine professional, or any other person shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities. However, the statute does not protect against liability where (1) an injury occurs due to the provision of faulty equipment or tack, and it was known or should have been known that the equipment or tack was faulty; (2) an equine is provided but there is a failure to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, and determine the ability of the participant to safely manage the particular equine based on the participant's representations of his or her ability; (3) injuries are caused by a known dangerous latent condition for which patrons have not been warned by adequate signage; (4) an injury occurs due to an act or omission that constitutes willful or wanton disregard for the safety of the participant; or (5) a participant is intentionally injured.

In order to take advantage of the protections offered by the statute, equine professionals must post and maintain conspicuous signs which set forth the warning notice specified in the statute, and must also provide the statutory warning in their contracts for the provision of professional services, instruction, or the rental of equipment or tack or an equine to a participant.

II. CONNECTICUT

A. QUESTIONS PRESENTED

1. Is there a state statute that applies to liability waivers, or only case law?

Answer

The issue of the enforceability of liability waivers in Connecticut is primarily a matter of case law.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

Answer

Even if a waiver is clearly and unambiguously drafted, the trend in the Connecticut cases is to rule that the waiver is void as against public policy where the defendant is an entity that operates facilities that provide popular recreational or sporting activities to the general public.

3. Can an adult sign for a child, i.e., is the waiver effective as to minors?

Answer

Probably not.

4. Are the courts reluctant to uphold the waiver?

Answer

Recent cases indicate a reluctance to uphold a waiver of liability especially in the area of recreational and sporting activities.

5. How does one defeat the waiver?

Answer

In general, a waiver may be defeated if it is ambiguous, signed due to fraud or under duress, or violates a statute or regulation. However, it appears that

a waiver will usually not be enforced where a business operates a facility that offers popular recreational and sporting activities to the public.

B. SUMMARY OF THE CURRENT STATE OF THE LAW IN CONNECTICUT

Mike Amaro's compartive review of the state by state treatment of pre-event waivers and releases ("the "Amaro Memo") provides a detailed analyis of the state of the law in Connecticut, including a description of the leading case, *Hanks v. Powder Ridge Restaurant Corp.*, 276 Conn. 314 (2005). In addition, there has been a later case, *Reardon v. Windswept Farm, LLC*, 280 Conn. 153 (2006), which follows the holding in *Hanks v. Powder Ridge.*

In *Reardon v. Windswept Farm, LLC*, 280 Conn. 153 (2006), which involved injuries related to a fall from a horse, the Connecticut Supreme Court found that a liability waiver signed by the plaintiff in order to engage in the recreational activity of horseback riding was unenforceable. Similar to the analysis in *Hanks v. Powder Ridge Restaurant Corp.*, the court reasoned that since the defendants provided the facilities, the instructors, and the equipment for their patrons to engage in a popular recreational activity which was open to the general public regardless of an individual's ability level, there was a reasonable societal expectation that the recreational activity under the control of the provider would be reasonably safe. The court also found that just as in *Hanks*, the plaintiff lacked the knowledge, experience and authority to discern whether, much less ensure that, the defendants' facilities or equipment were maintained in a reasonably safe condition. In light of the above, the court found that it would be illogical to relieve the defendants, as the party with greater expertise and information concerning the dangers associated with engaging in horseback riding at their facility, from potential claims of negligence surrounding an alleged failure to administer properly the activity. Finally, the court found that the waiver at issue was a classic contract of adheasion.

In addition to the recreational activities at issue in *Hanks v. Powder Ridge* (snowtubing) and in *Reardon v. Windswept Farm* (horseback riding), Connecticut trial courts have recently voided liability waivers in cases involving claims for personal injuries against a health club (*McNamara v. Healthtrax International, Inc.*, 2009 Conn. Super. LEXIS 2693; *Schneeloch v. Glastonbury Fitness & Wellness, Inc.*, 2009 WL 416645 (Conn. Super. Ct. Feb. 2, 2009) and claims for personal injuries suffered by a high school athlete against town and school officials. *See Furlani v. Town of East Lyme*, 2010 WL 744995 (Conn. Super. Jan. 22, 2010). It should be noted that the Superior Court in *McNamara, supra,* did acknowledge that the Connecticut Supreme Court in *Hanks* left the door open to one possible narrow exception to the doctrine that waivers of liability for participation in sporting activities are unenforceable where the waiver is directed only to the inherent risks associated with a sport or activity, rather than releasing the operator for his own negligent conduct.

III. RHODE ISLAND

A. QUESTIONS PRESENTED

1. Is there a state statute that applies to liability waivers, or only case law?

   Answer

   The issue of the enforceability of liability waivers in Rhode Island is primarily a matter of case law. However, it should be noted that there is a Rhode Island statute that provides that a non-profit organization that sponsers sporting activities will not be liable for injuries related to those activities if the claimant has, or in the case of a minor, a parent or guardian of the minor has, signed a written waiver of liability of the corporation and acknowledgment of assumption of risk regarding the practicing for, or participating in, any contest or exhibition of an athletic or sports nature sponsored by the corporation.

2. What does the statute or case law say with respect to what language needs to be in the waiver?

   Answer

   In order to be enforced, the parties' intention to hold the defendant harmless must be clearly and unequivocally expressed in the contract.

3. Can an adult sign for a child, i.e., is the waiver effective as to minors?

   Answer

   It does not appear that a pre-event liability waiver signed by a parent could be used to bar a minor's claims.

4. Are the courts reluctant to uphold the waiver?

   Answer

   Yes; a contract will not be construed to indemnify the indemnitee against losses resulting from her own negligent acts unless the parties' intention to hold harmless is clearly and unequivocally expressed in the contract.

5. How does one defeat the waiver?

   Answer

   If the language of the waiver can be read in any way that indicates that the claims at issue are not covered by the waiver, it will probably not be enforced.

B. SUMMARY OF THE CURRENT STATE OF THE LAW IN RHODE ISLAND

1. Liability Waivers are Generally Enforceable

In Rhode Island, public policy is not violated when individuals limit liability for their own negligence through an exculpatory indemnification clause. However, a contract will not be construed to indemnify the indemnitee against losses resulting from her own negligent acts unless the parties' intention to hold harmless is clearly and unequivocally expressed in the contract. *Rhode Island Hospital Trust Nat'l Bank v. Dudley Service Corp.* 605 A.2d 1325, 1327 (R.I. 1992); *accord*, *Sansone v. Morton Machine Works*, 957 A.2d 386, 393 (R.I. 2008) (Applying the long-standing principle that indemnification provisions are to be strictly construed against the party asserting a right of indemnification.)

2. Signed Liability Waiver Required to Protect Non-Profit Sponsors

Pursuant to Rhode Island General Laws § 7-6-9(b):

Officers, directors, agents, servants, volunteers, and employees of a non-profit corporation are not liable for bodily injury to any person incurred while the person is practicing for, or participating in, any contest or exhibition of an athletic or sports nature sponsored by the corporation; provided, that the person has, or in the case of a minor, a parent or guardian of the minor has, signed a written waiver of liability of the corporation and acknowledgment of assumption of risk regarding the practicing for, or participating in, any contest or exhibition of an athletic or sports nature sponsored by the corporation.

III. MAINE

Nothing to add that is not covered in Amaro Memo

IV. NEW HAMPSHIRE

Nothing to add that is not covered in Amaro Memo.

V. VERMONT

Nothing to add that is not covered in Amaro Memo.

NEW YORK

The New York's *General Obligations Law Section 5-236,* provides as follow:

"Every . . . agreement . . . in connection with, or collateral to, any . . . ticket of admission . . . entered into between the owner or operator of any . . . place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator received a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly enforceable."

2. Under New York law, in order for a release from liability to be valid, the text of the release must be explicit in its terms.

A. An amorphous "any and all" clause in a release does not "exact the release of liability of a drafter's own negligent conduct." *Applbaum v. Golden Acres Farm and Ranch, 333 F. Supp. 2d 31 (N.D.N.Y. 2004.)*

3. A parent cannot waive the rights of a minor child and a minor child has no capacity to enter into such an agreement. *Franco v. Neglia, 3 Misc.3d 15, 776 N.Y.S.2d 690 (App. Term. 2004.)*

4. As a general rule, New York law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and though, with certain exception, they are enforceable, such agreements are subject to close judicial scrutiny. *Applbaum v. Golden Acres Farm and Ranch, 333 F. Supp. 2d 31 (N.D.N.Y. 2004.)*

5. However, in those instances where the activity engaged in is instructional and/or where there is no fee or other compensation for the use of the facility, a pre-accident waiver/release may be enforceable.

A. Case Law where release unenforceable:

1. In *Garnett v. Strike Holdings, LLC, 64 A.D.3d 419, 882 N.Y.S.2d 115 (1st Dept. 2009),* a customer at a go-kart recreational facility brought suit against the company which leased the go-carts, and others, to recover damages for injuries sustained while at the facility. The Court found **the pre-accident release/waiver signed by Plaintiff was unenforceable** as Plaintiff paid a fee to use the go-kart and the defendant was a recreational facility.
2. In *Rigney v. Ichaboc Crane Central School District, 59 A.D.3d 842, 874 N.Y.S.2d 280 (3rd Dept. 2009),* a participant in the school district's adult education program brought suit against the district for compensation for injuries she sustained when several weighted bars fell on her back during aerobics class. The District moved for summary judgment based on, among other things, a pre-accident waiver/release signed by Plaintiff. The Appellate Division found

the release was unenforceable as it did not "plainly and precisely state" that the limitation of liability extended to negligence or fault of the District.

3. In *Debell v. Wellbridge Club Management, Inc. 40 A.D.3d 248, 835 N.Y.S.2d 170 (1st Dept. 2007)*, a health spa patron brought suit against the spa and trainer to recover damages for injuries sustained in a complimentary one-hour training session. Defendant moved for summary judgment based on the pre-accident waiver/release signed by Plaintiff. The Appellate Court found summary judgment was not warranted insofar as the **waiver/release was void as against public policy.** In reaching their decision, the Court relied on the fact the spa's purpose was recreational and the instructional activity Plaintiff was engaged in at the time was purely ancillary to the recreational nature of the facility's purpose.
4. In *Franco v. Neglia, 3 Misc.3d 15, 776 N.Y.S.2d 690 (App. Term. 2004)*, a minor kick-boxing student sought to recover damages for injuries sustained during class. The martial arts academy moved for summary judgment. The Appellate Term found the pre-accident **release/waiver signed by the 14 year old Plaintiff was unenforceable** because he lacked the legal capacity to enter into such an agreement.
5. In *Applbaum v. Golden Acres Farm and Ranch, 333 F.Supp.2d 31 (N.D.N.Y. 2004)*, the District Court denied the Defendant's Motion for Summary Judgment which argued Plaintiff's claim was barred based on execution of a pre-accident release. The Court found the release unclear and not unequivocal in its terms as it appeared more like a sign in sheet and sound to release "any and all claims" the Court further found the **release was void** as Plaintiff was engaged in a recreational activity at the time of her injury.

B. Case Law where release enforceable:

1. In *Brookner v. New York Roadrunners Club, 51A.D.3d 841, 858 N.Y.S.2d 348 (2nd Dept. 2008)*, a marathon participant brought suit against the running club and the City seeking damages for injuries sustained during a marathon. The Court found the **release was enforceable and barred his claim** as 1) the fee he paid was for his participation in the marathon and was not an admission fee allowing him to use the City owned roadway, 2) the release was clear and unambiguous, and 3) the public roadway where the injury occurred was not a "place of amusement or recreation."
2. In *Boateng v. Motorcycle Safety School, 51 A.D.3d 702, 858 N.Y.S.2d 312 (2nd Dept. 2008)*, Plaintiff enrolled in a motorcycle safety school taught at Yonkers Raceway. Plaintiff brought suit to recover for injuries she sustained, claiming the school was negligent in allowing her to operate a motorcycle in the rain

without proper instruction. Defendant moved for summary judgment based on a pre-accident release signed by Plaintiff. The Court found the **release was enforceable** as 1) the raceway premises were used for instructional, not recreational or amusement purposes, 2) the contract fee paid by Plaintiff was tuition for a course of instruction and not a "use fee" for the premises, and 3) the terms of the release were clear and unequivocally express the intention of the parties to relive Defendant of liability for injuries sustained by Plaintiff as a result of Defendant's negligence. (The release also clearly recited Plaintiff's awareness of and assumption of the risks associated with participating in the course.)

3. In *Stuhlweissenburg v. Town or Orangetown, 223 A.D.2d 633, 636 N.Y.S.2d 853 (2nd Dept. 1996)*, the Appellate Court dismissed Plaintiff's personal injury Complaint against the Town of Orangetown based on the execution of a pre-accident release of liability inasmuch as the activity (Plaintiff was part of a softball league which played at a field owned by the town) was recreational and Plaintiff failed to produce any evidence she paid a fee for admission to or use of the Town's softball field. Therefore, **the release was enforceable.** *It is notable, in this case the Court acknowledged the sponsor of the team paid a fee to the Town, but Plaintiff did not pay a fee.*

6. One of the most crucial areas to address is whether the facility is Instructional or Recreational

In assessing whether a facility is instructional or recreational, Courts have examined the organization's name, its certificate of incorporation, its statement of purpose, and whether the money its charges is tuition or a fee for use of the facility.

Courts have found a release to be void where the facility provides instruction only as an "ancillary function," even though it is a situation where the injury occurs while receiving some instruction.

Some New York Court focus less in a facility's purpose and more on whether the person was at the facility solely for the purposes of receiving instruction.

NEW JERSEY

NEW JERSEY

Are releases enforceable? Yes.

Are there any statutes that reflect enforcement of a release?

N.J.S.A. 5:13-3
Responsibility of operator (Skiing)

N.J.S.C. 5:14-1
Roller Skating Rink Safety and Liability

N.J.S.A. 5:15-1
Equine Animal Activities

Can a parent execute a release for a minor? No.

Hojnowski v. Vans Skate park, 375 N.J.Super.568 (2005)
However, this case was appealed to the New Jersey Supreme Court, which held that an arbitration agreement signed by the parent (involving a Van's Skate Park) on behalf of the minor, could operate to force the matter to be arbitrated, as an alternative to a jury trial.

Fitzgerald. Newark Norning Ledger Co., 111 N.J.Super.104 (1970)

Relevant Cases: Brough v. Hidden Valley, 312 N.J.Super.139 (1998); Stelluti v. Casapenn Enters, LLC (2009) 408 N.J. super. 435 (trial court properly granted summary judgment to a fitness club in a member's lawsuit, based upon the waiver and release provision in the membership agreement. The court did note, that public policy would not insulate the health club from unreasonable acts or reckless/wilful conduct).

Facts - When Plaintiff purchased a condominium at Hidden Valley, she was required to become a member of the resort and, amongst the various closing documents, sign a Member Winter Dues Application, which included a release. Plaintiff sustained serious injuries while skiing on one of Defendants ski slopes. Plaintiff contends that given the obligations imposed on ski operators by the Ski Statute any release discharging liability that arises under the Statute is patently invalid and against public policy.

Rationale - An affirmative statutory duty of care imposed upon ski resort operators by N.J.S.A. 5:13-3(a) cannot be the subject of what, in effect, are contracts of adhesion. The release was included in a membership agreement which was one of several closing documents Plaintiffs were required to sign. There was nothing in those documents that would have alerted Plaintiffs to the fact that they were releasing Defendants from their statutory duties. Further, the release here does not expressly focus upon the liability that might arise from a failure of Defendants to comply with their statutory duty of care.

Holding - The release should have no role whatsoever in the trial.

Hojnowski v. Vans Skate Park, 375 N.J.Super.568 (2005)

Facts - The minor wanted to use the skate park. To that end, his mother executed on the minors behalf a document that waived the right to hold the skate park liable for injuries. Several days later, the minor, who was 12 years old, fractured his femur while skateboarding at the skate park.

Rationale - To allow a parent or guardian to execute exculpatory provisions on his or her minors behalf would render meaningless for all practical purposes the special protections historically accorded minors. In the tort context especially, a minor should be afforded protection not only from his own improvident decision to release his possible prospective claims for injury based on anothers negligence, but also from unwise decisions made on his behalf by parents who are routinely asked to release their childs claims for liability.

Holding - The release at issue was voided because it limited the tort remedies available to the minor child to less than the law, if unfettered, would otherwise provide.

NORTH CAROLINA

Validity of Liability Waivers/Releases – North Carolina

1. Controlling Law

1. Actions Relating to Skier Safety and Skiing Accidents. N.C. Gen. Stat. § 99C-2(c)(7). Imposes on ski area operators the duty "[n]ot to engage willfully or negligently in any type of conduct that contributes to or causes injury to another person or his properties."
2. Motorcycle Safety Instructions Programs, N.C. Gen. Stat. § 115D-72.
3. Roller Skating. N.C. Gen. Stat. §§ 99E-10 to 99E-14 (1999).
4. Equine Liability Act. N.C. Gen. Stat. §§ 99E-1 to 99E-3 (1999).

2. Waiver Requirements

A party's failure to actually read a contract before signing it does not make the agreement unenforceable unless there is some evidence of mutual mistake, fraud or oppression. *See Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963); *Harris v. Bingham*, 246 N.C. 77, 79, 97 S.E.2d 453, 454 (1957); *Biesecker v. Biesecker*, 302 S.E.2d 826, 828 (N.C. Ct. App. 1983). North Carolina courts have applied this rule rigorously and repeatedly to enforce release agreements in North Carolina. *Bertotti v. Charlotte Motor Speedway, Inc.*, 893 F. Supp. 565, 568 (W.D.N.C. 1995); *see also Harrison v. Southern Ry. Co.*, 229 N.C. 92, 95, 47 S.E.2d 698, 700 (1948) (enforcing a post-injury release agreement despite the plaintiff's allegations that he did not read the agreement); *Watkins v. Grier*, 224 N.C. 339, 343, 30 S.E.2d 223, 225 (1944) (enforcing post-injury release even though plaintiff alleged he did not actually read it); *Ward v. Heath*, 222 N.C. 470, 475-77, 24 S.E.2d 5, 9 (1943) (upholding a nonsuit enforcing a post-injury release agreement because there was no evidence of fraud or misrepresentation).

Parties are free to allocate the risk of injury by means of exculpatory contracts, unless the subject matter of such contracts affects a public interest. *See Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 144 S.E.2d 393 (1965); *Hall v. Sinclair Refining Co., Inc.*, 242 N.C. 707, 89 S.E.2d 396 (1955). The public interest exception to the general rule that exculpatory clauses are enforceable is based on the North Carolina Supreme Court's statement that "a party cannot protect himself by contract[ing] against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty." *Hall*, 89 S.E.2d at 398 (quotation omitted). One district court, attempting to interpret this statement from *Hall*, noted that other jurisdictions usually hold exculpatory clauses to be unenforceable "where the party relying on the exculpatory clause (a) is significantly regulated by public authority, (b) holds himself out to the public as willing to perform the sort of services subject to such regulation, [and] (c) purports to be capable of performing those services in conformity with the standard of care established in the community. . . ." *Tatham v. Hoke*, 469 F. Supp. 914, 918 (W.D.N.C. 1979). Another district court held that the public interest exception "applies only to entities or industries that are heavily regulated." *Bertotti v. Charlotte Motor Speedway, Inc.*, 893 F. Supp. 565, 569 (W.D.N.C.1995). Regulated industries include skiing, *Fortson v. McClellan*, 131 N.C. App. 635 (1998), and cosmetology, *Alston v. Monk*, 373 S.E.2d 463, 466-67 (N.C. Ct. App. 1988), but not go-kart rental, *Bertotti v. Charlotte Motor Speedway, Inc.*, 893 F. Supp. 565, 568 (W.D.N.C. 1995) (noting the rental of vehicles for auto racing was not regulated, especially for go karts), and jet-

ski rental, *Waggoner v. Nags Head Water Sports*, 141 F.3d 1162, 1169 (4th Cir. 1998) (holding the North Carolina Boating Safety Act does "not address the duties owed by one who rents such craft for recreational use").

3. Waiver of Minors' Prospective Claims

There is insufficient information to predict whether a parent may waive his child's prospective claim for negligence.

4. Willingness of Courts to Enforce Waivers

Courts "will enforce an exculpatory clause unless it is violative of a statute, gained through inequality of bargaining power, or contrary to a substantial public interest." *Waggoner v. Nags Head Water Sports*, 141 F.3d 1162, 1169 (4th Cir. 1998) (enforcing a liability waiver and dismissing negligence claim against a company that rented a jet ski to the plaintiff).

5. Defenses to Liability Waivers

In holding that the use of the term "all claims" in a waiver includes "negligence," the *Waggoner* court did not address the issue of whether "all claims" would bar a waiver based on gross negligence or recklessness because the plaintiff failed to offer any admissible evidence of gross negligence or recklessness.

6. Other Issues

When a release or covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or the same wrongful death:

> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death *unless its terms so provide;* but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or the amount of the consideration paid for it, whichever is the greater; and,
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. N.C. Gen. Stat. § 113-4 (1969)

Thus, a general release of all persons releases all tortfeasors even though each tortfeasor is not specifically named in the release. *See White v. Am. Motors Sales Corp.*, 550 F. Supp. 1287, 1290 (W.D. Va. 1982) *aff'd sub nom. White v. Am. Motors Corp.*, 714 F.2d 135 (4th Cir. 1983) (upholding release against "all other persons, firms or corporations"); *Battle v. Clanton*, 27 N.C. App. 616, 619 (N.C. Ct. App. 1975) (same).

NORTH DAKOTA

VALIDITY OF LIABILITY WAIVERS/RELEASES – NORTH DAKOTA

1. Controlling Law

There is applicable case law, but no statute. There are also statutes that essentially waive liability for equine activities liability and skiing.

2. Waiver Requirements

Parties may be bound by clear and unambiguous language evidencing an intent to extinguish liability. However, because the law does not favor contracts exonerating parties from liability for their conduct, pre-injury releases are strictly construed against the benefitted party. ***Reed v. Univ. of N.D.***, 589 N.W.2d 880 (N.D. 1999).

A pre-injury release should be clear and unambiguous. The pre-injury release should include separate and distinct assumption of risk and waiver clauses, each containing a clearly expressed meaning and consequence. In the assumption of risk clause, one should require the participant to assume the full risk of injury and damages directly or indirectly resulting from his or her participation in activities associated with a program. In the waiver clause, one should require the participant to waive and relinquish all claims for all injuries or damages incurred on account of participation in a program. Ensure the language of the release is not limited to only those injuries incurred while participating in activities associated with program, but to all injuries incurred by the participant on account of his mere participation in the program. ***Konrad ex rel. McPhail v. Bismarck Park Dist.***, 655 N.W.2d 411 (N.D. 2003).

One should limit a pre-injury release to a single program or event, if possible, rather than an entire season or year. ***Reed***, 589 N.W.2d 880.

Under **N.D.C.C. §§ 53-09-01, *et seq.*,** skiers are completely barred from recovery resulting from knowingly exposing themselves to the inherent risks of skiing.

N.D.C.C. §§ 53-10-01, *et seq.*, governs equine activities, and an equine activity sponsor or professional is not liable for an injury to or the death of a participant engaged in an equine activity, nor may a participant maintain an action against a sponsor or professional. Liability is not limited, however, where the equine sponsor or professional knowingly provided faulty tack or equipment, failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, owns or otherwise is in lawful possession of the land or facilities upon which the participant sustained injuries because of a known, dangerous latent condition, or if he or she commits an act or omission that constitutes willful or wanton disregard for the safety of the participant or intentionally injures the participant.