2.23 Waivers and Releases from Law for Recreation and Sport Managers
by Doyice J. Cotten and John Wolohan | 978-1-4652-1054-8 | 6th Edition
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2.23 WAIVERS AND RELEASES

Doyice J. Cotten | Sport Risk Consulting



Much has been written regarding waivers and how to write them. Many judges have made suggestions, but the judge in *Cohen v. Five Brooks Stable* (2008) gave what may be the most thought- provoking and insightful statement yet.

> While it is true, as we have seen, that California courts hold releases of liability to a high standard of clarity, it does not in our view require Olympian efforts to meet the standard. **An effective release is hard to draft only if the party for whom it is prepared desires to hide the ball, which is what the law is designed to prevent.** A release that forthrightly makes clear to a person untrained in the law that the releasor gives up any claim against the releasee for the latter's own negligence . . . or that the releasee cannot be held liable for *any and all risks* the releasor encounters while on the former's premises or using its facilities . . . , ordinarily passes muster (*Cohen v. Five Brooks Stable*, 2008, pp. 27–28).

A **waiver** or **release of liability** in the recreation or sport setting is a contract in which the participant or user of a service agrees to relinquish the right to pursue legal action against the service provider in the event that the ordinary negligence of the provider results in an injury to the participant. Injuries in sport and recreation result from one of three causes—(1) inherent risks of the activity (common accidents), (2) negligence by the service provider or its employees, and (3) more extreme or aggravated acts by the service provider or its employees (i.e., gross negligence, reckless conduct, or willful/wanton conduct) (see Chapter 2.11 *Negligence*).

It is important to understand that *the waiver is usually meant to protect the service provider from liability for the ordinary negligence of the service provider or its employees*. It will not generally protect the service provider from liability for degrees of negligence.[5] Although providers are not generally liable for injuries resulting from the inherent risks of the activity, the document can include language that will help protect the provider from liability for injuries resulting from inherent risks (see Participant Agreements later in this chapter). The waiver is an important tool in the risk management arsenal of the service provider.

Although waivers are commonly used by more recreation- and sport-related businesses than ever before, many service providers are still under the erroneous impression that waivers are worthless and offer no protection to the service provider. The validity of a waiver, however, is determined by the law in each state and subsequently, the validity of a waiver will vary depending upon the state.

Cotten and Cotten (2012) have placed each state, some territories, and Washington, D.C. into one of five categories depending upon the degree of rigor required for a valid waiver by the courts in that state. Figure 2.23.1 presents an updated classification of each state, Washington, D.C., Virgin Islands, and Puerto Rico. The first category (Lenient) includes the Virgin Islands and 12 states that not only allow waivers, but also have very lenient requirements for their enforcement. The second category (Moderate) includes 19 states as well as D.C. and Puerto Rico in which waivers are allowed and the requirements for enforcement are moderate in nature. The third category (Strict) includes 14 states that allow waivers, but maintain very rigorous requirements for a waiver to be upheld. The fourth category (Strict or Not Enforced) consists of four states in which the impact of their constitution, legislation, or Supreme Court decisions is unclear. At the very least, waivers will have to pass rigorous standards for enforcement, and at the most, waivers will not protect the service provider from liability for negligence. The final category (Not Enforced) consists of three states in which waivers have been declared unenforceable either by statute or by the state Supreme Court. *Thus, in at least 43 states, D.C., Puerto Rico, and*

[5]Waivers in four states (Florida, Illinois, Kentucky, and North Carolina) may be able to protect the service provider from liability for gross negligence. Courts in two states, West Virginia (*Murphy v. North American River Runners, Inc.*, 1991) and Pennsylvania (*Scott v. Altoona Bicycle Club*, 2010) have stated that one may contract to relieve a party of the liability for reckless conduct.

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Lenient	Moderate	Strict	Strict Or Not Enforced	Not Enforced
Alabama	Colorado	Alaska	Arizona	Louisiana
Arkansas	*D.C.*	California	Connecticut	Montana
Georgia	Florida	Delaware	Hawaii	Virginia
Kansas	Idaho	Indiana	Wisconsin	
Maryland	Illinois	Maine		
Massachusetts	Iowa	Mississippi		
Michigan	Kentucky	Missouri		
Nebraska	Minnesota	Nevada		
North Dakota	New Mexico	New Hampshire		
Ohio	North Carolina	New Jersey		
South Carolina	Oklahoma	New York		
Tennessee	Oregon	Pennsylvania		
Virgin Islands	Pennsylvania	Utah		
	Puerto Rico	Vermont		
	Rhode Island			
	South Carolina			
	South Dakota			
	Texas			
	Washington			
	West Virginia			
	Wyoming			

FIGURE 2.23.1 CLASSIFICATION OF STATES, D.C., AND TERRITORIES AS TO THE RIGOR REQUIRED FOR ENFORCEABLE WAIVERS[2]

the Virgin Islands a well-written, properly administered waiver, voluntarily signed by an adult, can be used to protect the recreation or sport business from liability for ordinary negligence by the business or its employees.

Providers must understand, however, that not all waivers are upheld in lenient states and that many well-written waivers are upheld in strict states. The category simply indicates the degree of rigor or specific requirements that must be met in the state for a waiver to be enforceable. Providers should also be aware that the law is never static so requirements are always subject to change. Providers should also keep in mind that this categorization is based upon the subjective judgment of the authors and will change as state requirements change.

FUNDAMENTAL CONCEPTS

There are a number of terms that are often confused by both students and professionals in recreation and sport. It is important that recreation and sport managers understand the meaning of each term. A **waiver** is a contract by which the participant releases the provider from liability for injuries resulting from provider negligence. A **release** is a term often used synonymously with waiver; however, it can be confusing because *release* also refers to a settlement agreement signed after the injury. An **exculpatory agreement** and **covenant not to sue** are also generally used synonymously with waivers. A **disclaimer** is a statement by which the provider proclaims that the provider is not liable for injury. It is often found on a ticket or on a sign, is not signed by the

[2]Cotten, D.J. and Cotten, M.B., 2012.

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patron, and is usually ineffective. An **informed consent** is a contract by which a provider informs the signer of the risks and benefits of a treatment or training program. Many erroneously use the term synonymously with waiver; however, it provides no protection from liability for negligence. A **parental permission form** grants permission for the youngster to participate, but it, too, provides no protection from liability for negligence.

Requirements for a Valid Waiver

A waiver is a legal contract and, as such, must adhere to the basic requirements of contract law. Some contract requirements are presented here, but the reader should refer to Chapter 5.10 *Contract Essentials* for more information regarding contracts.

Public Policy

A contract or waiver is not valid if it is against **public policy**—sometimes defined as that principle of law under which freedom of contract or private dealings is restricted for the good of the community (*Merten v. Nathan*, quoting *Higgins v. McFarland*, 1955). A waiver is generally against public policy if (1) it pertains to a service important to the public (*e.g.* medical care, electric power), (2) if the parties are not of equal bargaining power (e.g., employer-employee), (3) the agreement is unconscionable (e.g., grossly unfair to one party), or (4) it attempts to preclude liability for aggravated degrees of conduct such as gross negligence, reckless misconduct, or willful and wanton conduct. *The general rule in most states is that recreation- or sport-related waivers are not against public policy.*

Consideration

A valid contract requires that something of value be exchanged between parties. The courts have held that the opportunity to participate constitutes consideration on the part of the service provider. Waivers usually include language such as "In consideration for being allowed to participate, I hereby waive. . . ."

Parties to the Contract

Three important points relate to the parties involved in a waiver. They are parties relinquishing their rights to redress, parties protected by the contract, and whether parties have the capacity to contract (See also Chapter 5.10 *Contract Essentials*).

Parties Relinquishing Rights. When signing a waiver, the signer is obviously relinquishing the rights of the signer to hold the service provider liable in the event of injury. However, the spouse or heirs often file suit against the service provider when the signer is seriously injured or killed. A phrase by which the signer relinquishes the right of others to recover for injury or death is usually included in the waiver (e.g., on behalf of self, spouse, heirs, estate, and assigns). Providers should be aware, however, that such phrases are not enforceable in all states because some states hold that **loss of consortium**[6] and **wrongful death**[7] claims are independent causes of action and are not derivative upon whether the signer has or would have had a valid claim.

Parties Protected by the Waiver. The waiver must specify the parties protected by the agreement. Parties for which protection is often sought (e.g., corporation, management, employees, sponsors, volunteers) should be listed. One is safer to list all protected parties, at least by category, than to rely on some inclusive phrase such as ". . . and all others who are involved."

Parties Who Do Not Have Capacity to Contract. The third point of importance regards the capacity of the individual to contract. Contract law specifies that certain classes of individuals are not generally bound by contracts. Among those classes are persons lacking mental capacity, those unduly influenced by drugs or alcohol, and persons who have not reached the age of majority (see the following Waivers and Minors section).

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[6]**Loss of Consortium** is the loss of material services and intangibles such as companionship and sexual relations. The non-signing spouse of a participant suffering serious injury often seeks damages for loss of consortium.

[7]The non-signing spouse or others often seek damages through **wrongful death** actions when the cause of death was a negligent or willful act of another.

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Waivers and Minors

The general rule has long been *that a waiver is a contract and that a minor cannot be bound by a contract that is signed only by the minor.* Consequently, while the service provider contracting with a minor is bound by the contract, the minor is not. Thus the waiver will not prevent the minor from taking legal action against a negligent service provider. This general rule is well-supported. In *Dilallo v. Riding Safely Inc*. (1997), a 14-year-old Florida girl signed a waiver absolving a stable of liability. The court held that "a minor child injured because of a defendant's negligence is not bound by her contractual waiver of her right to file a lawsuit." In a Pennsylvania case (*Emerick v. Fox Raceway*, 2004), the court did not enforce a waiver signed by a 16-year-old boy who misrepresented his age in order to enter a motocross race.

Since waivers signed solely by the minor are ineffective, providers have used three strategies in attempting to gain protection. They have (1) required that the parent or guardian sign the waiver on behalf of the minor client (**parental waiver**); (2) required the parent to indemnify the provider [agree to repay the provider for any loss suffered due to the participation of the minor, e.g., monetary award by the court] (**parental indemnity agreement**); and (3) most recently, by requiring the parent to sign a mediation/arbitration agreement by which the parent agrees to submit any claim to mediation and/or arbitration rather than filing a lawsuit (**parental arbitration agreement**). See Chapter 5.30 *Alternative Dispute Resolution* for more information on mediation and arbitration.

Parental Waivers. In the past, parental waivers have not been effective. For example, a 10-year-old girl was injured when another child jumped into a swimming pool on top of her. The girl's mother signed a post-injury release in exchange for a $3275 settlement. Eight years after the accident, upon reaching the age of majority, the girl filed suit against the YMCA. The court stated that "It is well settled in Michigan that, as a general rule, a parent has no authority, merely by virtue of being a parent, to waive, release, or compromise claims by or against the parent's child" and ruled that the YMCA was not protected by the release signed by the mother (*Smith v. YMCA of Benton Harbor/St. Joseph,* 1996). The Michigan Supreme Court reinforced this ruling in *Woodman v. Kera* in 2010.

In recent years, however, courts in some states have begun to enforce waivers and indemnity agreements signed by parents on behalf of their minor children (see Figure 2.23.2). California courts were the first to enforce parental waivers. In 1990, *Hohe v. San Diego Unified Sch. Dist*. made it clear that while minors are free to disaffirm contracts signed by the minor, they cannot disaffirm contracts made by the parent or guardian of the minor. Since that time, numerous California courts have ruled similarly. The Supreme Court of Ohio also ruled waivers signed by parents in favor of non-profit, public service providers are enforceable against the minor child (*Zivich v. Mentor Soccer Club*, 1998). Courts in a number of other states have enforced parental waivers (See Figure 2.23.2). From the figure, one can see that courts in some states have enforced parental waivers only when the defendant is a non-profit entity; others, when a commercial entity was the provider. Five states have enforced parental waivers regardless of the status of the provider.

Trumping a Colorado Supreme Court ruling prohibiting parental waivers, the Colorado Legislature passed a statute allowing such waivers. The Alaska legislature has subsequently passed a statute allowing parental waivers. So, parental waivers are now enforceable in at least nine to twelve states.[5]

Parental Indemnity Agreements and Parental Arbitration Agreements. Courts in two states, Connecticut and Massachusetts, have upheld parental indemnity agreements. Courts in California, Hawaii, Ohio, Louisiana, New Jersey, and Florida have upheld agreements by which parents agreed to submit any claims of the minor to arbitration. Alternatively, courts in Idaho, Pennsylvania, and Texas have ruled that minors are not bound by parental arbitration agreements.

It is also important to understand that the enforceability of parental waivers, indemnity agreements, and arbitration agreements has not been addressed by the courts in most states; for this reason, they may be enforced in a number of those states as well. Consequently, providers in all states might consider the use of such agreements when dealing with minor participants. However, in doing so, the provider should remember two things: (1) always have the parents sign the document and (2) use liability protection in addition to the waiver and/or indemnity agreement.

[5]Refer to footnotes in Figure 2.23.2.

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Insufficient Information to Predict			Do Not Enforce			Enforces Waivers for		
						School & Community Recreation Waivers	Commercial Recreation Entity Waivers	Both
GA	ID	KS	AL	AR	FL[2]	CT[3]	AZ[4]	AK
KY	MO	MS	HI	IA	IL	FL[5]	IN[6]	CA
NC	NE	NV	LA	MD	ME	ND	MN	CO
NH	NM	NY	MI	MT	NJ	IN	WI[7]	MA
OK	OR	RI	PA	TN	TX		DE	OH
SC	SD	VT	UT	VA	WA			
WY			WV					

FIGURE 2.23.2 LIKELIHOOD OF ENFORCEMENT OF PARENTAL WAIVERS[1]

Format of the Waiver

Waivers are generally found in one of four formats. The first is as a **stand-alone document—**one in which the only function of the document is to provide liability protection for the service provider. The patron is asked to sign a sheet of paper containing only a waiver and related exculpatory material. The second format is the **waiver within another document** such as a membership agreement, an entry form, or a rental agreement (see the example in the Significant Case). The third format is a **group waiver**—which generally includes a waiver at the top of a sheet on which several parties sign (e.g., a team roster, a sign-in sheet at a health club). Both the waiver within another document and the group waiver can be effective when carefully worded and properly administered; however, many courts, and this author, have encouraged providers to use the stand-alone waiver since it reduces the likelihood of ambiguity and can provide much more protection than the shorter agreements. The fourth format is the **disclaimer** of liability, often found on the back on tickets and sometimes in the form of a posted sign. A disclaimer is a statement asserting that the provider is not responsible for injuries. The disclaimer is not signed, provides no evidence that the participant agreed to it, and, with a few exceptions, is ineffective. There is no harm in including such disclaimers on the back of a ticket, but they will only be enforced if the provider has conclusive evidence that the party was aware of the disclaimer. Such evidence is difficult to obtain without a signature by the party. Consequently, the service provider should operate on the assumption that the statement will not effectively protect the business.

Participant Agreement

Since many courts recommend the use of a stand-alone document, that format will be emphasized in this chapter. In fact, the most comprehensive stand-alone document recommended is sometimes called a participant agreement. The **participant agreement** is a relatively new concept in liability protection and is much more than a simple waiver. While the participant agreement includes a basic waiver, it differs in that it (1) is designed to improve the rapport and understanding between the provider and the participant; (2) increases the understanding of the rewards and activity risks of the participant, (3) prepares them psychologically for any

[6]Cotten, D.J. and Cotten, M.B., 2012.

[7]A 2008 **Florida** Supreme Court ruling declared parental waivers by commercial entities unenforceable.

[8]Recent Supreme Court rulings in **Connecticut** and **Wisconsin** seem to indicate that any sport- or recreation-related waivers may be unenforceable in those states. At present, the status of parental waivers is uncertain.

[9]A.R.S 12–553 A.2 equine statute allows owners to use parental waivers for liability protection; however, the Supreme Court has interpreted the **Arizona** Constitution to mean that all assumption of risk questions are a matter for the jury and not to be decided by summary judgment. Presumably, the waiver could still be used during the trial.

[10]Parental waivers for school- or community-based activities are still enforced by appellate courts in some Florida jurisdictions.

[11]I.C. 34-28-3 Partial Emancipation for Minors to Participate in Automobile and Motorcycle Racing Act allows waivers and indemnity agreements by certain minors and their parents for participation in professional automobile and motorcycle racing events in **Indiana**.

[12]See the Connecticut footnote above.

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discomforts, making legal action less likely; (4) allows participants to make more informed decisions as to participation; and (5) provides a much broader range of protection. The mere existence of a waiver or participant agreement can often deter a party from filing a claim. If a claim is filed, both the waiver and the participant agreement provide the potential for early dismissal.

Content of the Participant Agreement. The participant agreement is much broader in scope than a simple waiver clause or even a broad stand-alone waiver. The contents of the document are meant to provide protections for the provider and to serve as an exchange of information (providing information about the activity to the participant and collecting information about the participant). Suggested content of the participant agreement is listed below.

1. Material meant to inform the participant of the **nature of the activity** and to help them understand and appreciate the risks involved;
2. An **assumption of inherent risks** to protect against liability for the inherent risks;
3. A **waiver** of liability as protection against ordinary negligence. Most states do not require the use of the term "**ordinary negligence**" in the exculpatory language; however any waiver is stronger when this term is used.
4. An **indemnification agreement** to provide further protection against both the risks of ordinary negligence and the inherent risks;
5. Five selected clauses calling for **severability** (provides that if any part of the document is void, the rest remains in effect), for **mediation and/or arbitration** (provides that any resultant claims will be submitted to mediation and binding arbitration rather than entering the court system) [see Chapter 5.30 *Alternative Dispute Resolution*], **venue and jurisdiction** (specifies where legal action must occur and which court has legal authority), **covenant not to sue** (a contract not to sue to enforce a right of action), and an **integration clause** which asserts that this is the entire agreement and supersedes any previous oral or written agreements.
6. Authorizations, assertions, and agreements regarding **health status**, **emergency care**, and **rules and safety** (information that allows the provider to better meet the needs of the participant and provide a safer activity environment); and
7. A **final acknowledgement of release and assumption of risk** prior to the signatures. Space should be provided for signatures by both the participant and the parents or guardians if the participant is a minor.

The scope of this book does not allow the presentation of further detail. For a complete discussion of waivers and participant agreements, including the waiver law in each state and more than 50 guidelines for writing and preparing waivers and participant agreements, the reader is referred to Cotten and Cotten, 2012.

Administering the Waiver

Many waivers fail to protect the provider from liability because of flaws in the administration process. Some administration guidelines that will help to ensure the enforcement of a waiver are:

1. Be straightforward in explaining what the waiver is and what it is intended to do. Do not claim it is just an unimportant insurance requirement or any other false claim. Educate your staff regarding administration and see that they make no false claims.
2. Allow the signer enough time to read the document and provide conditions conducive to reading (e.g., adequate lighting).
3. If the waiver is a group waiver, have an employee explain the waiver to the group if possible. If not, explain it to the group member who will be administering the waiver and stress that he/she communicates the importance to the signers.
4. Do not allow signers to cross out parts of the waiver. Require that all participants (without exception) sign before participating.
5. If clients had to pay a fee in advance and refuse to sign when presented with the waiver, the fee should be refunded. Always inform clients in advance that a waiver will be required.
6. Store your waivers on CDs and retain waivers forever. A discarded waiver offers little protection.

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SIGNIFICANT CASE

Stokes v. Bally's Pacwest, Inc. provides an excellent, straightforward example of the value of liability waivers in protecting against liability for negligence in the recreation or sport setting. The case illustrates very clearly the need to make sure the waiver is conspicuous and that the document plainly provides for protection against liability for negligence. When read carefully, one can see that Stokes specifically releases Bally's from liability for Bally's negligence. While the recommended waiver format is the stand-alone waiver, this waiver within another document is better than average and provided effective liability protection to Bally. Observe, also, that the fact Stokes did not read the waiver is irrelevant.

STOKES V. BALLY'S PACWEST, INC.

COURT OF APPEALS OF WASHINGTON, DIVISION ONE
113 Wn. App. 442; 54 P.3d 161; 2002 Wash. App. LEXIS 2233
September 16, 2002, Filed

Opinion: Cox, A.C.J. –

Persons may expressly agree in advance of an accident that one has no duty of care to the other, and shall not be liable for ordinary negligence (Chauvlier v. Booth Creek Ski Holdings, Inc., 109 Wn. App. 334, 339, 35 P.3d 383 (2001)). Such exculpatory agreements are generally enforceable, subject to three exceptions. Because the "waiver and release" language at issue here was conspicuously stated in the agreement that Michael Stokes signed, we reverse both summary judgment orders and direct entry of summary judgment in favor of Bally's Pacwest Total Fitness Center on remand.

Stokes joined Bally's, a health club. He signed a retail installment contract that evidenced the terms and conditions of membership. The contract contained the waiver and release provisions at issue in this appeal. Several months after signing the agreement, Stokes slipped on a round metallic plate placed in a wooden floor at the club while playing basketball. He injured his knee and shoulder. Stokes sued Bally's, alleging that the health club's negligence caused him serious, painful, and permanent injuries. Bally's moved for summary judgment, which the trial court denied. According to the trial court, there were "material questions of fact whether the 'Waiver and Release' provisions set forth in the Retail Installment Contract [that Stokes signed], were sufficiently conspicuous or knowingly consented to by [him]."

We granted discretionary review of that decision. Pursuant to RAP 7.2, we also granted Bally's permission to renew its summary judgment motion in the trial court in order to allow that court to consider this court's then recent decision in Chauvlier. Following Bally's renewed motion, the trial court again denied summary judgment for the same reason that it did before.

* * *

We now focus our attention on the two orders before us. To prevail on his ordinary negligence claim against Bally's, Stokes must establish that the health club owed him a duty. Whether such a duty exists is a question of law. As we recently noted in Chauvlier, our Supreme Court has recognized the right of parties, subject to certain exceptions, to expressly agree in advance that one party is under no obligation of care to the other, and shall not be held liable for ordinary negligence.

The general rule in Washington is that such exculpatory clauses are enforceable unless (1) they violate public policy; (2) the negligent act falls greatly below the standard established by law for protection of others; or (3) they are inconspicuous (Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 492, 834 P.2d 6 (1992). Neither of the first two of these exceptions is at issue here. The trial court expressly relied on only the third exception in making its rulings, denying summary judgment on the ground that a genuine issue of material fact existed whether the waiver and release clause was inconspicuous.

This court will not uphold an exculpatory agreement if "the releasing language is so inconspicuous that reasonable persons could reach different conclusions as to whether the document was unwittingly signed" (Chauvlier, at 341). Conversely, where reasonable persons could only reach the conclusion that the release language is conspicuous, there is no question of the document having been unwittingly signed. Whether Stokes subjectively unwittingly signed the form is not at issue. Rather, the question is whether, objectively, the waiver provision was so inconspicuous that it is unenforceable.

As we stated in Chauvlier, a person who signs an agreement without reading it is generally bound by its terms as long as there was ample opportunity to examine the contract and the person failed to do so for personal

reasons. Here, Stokes admitted that he did not remember reading the waiver and release provision of the contract. But this admission does not end our review. We must still determine whether the waiver and release language is inconspicuous so as to invalidate Stokes' release of Bally's from any duty to him for its alleged ordinary negligence.

We most recently considered whether a release was inconspicuous and unwittingly signed in Chauvlier. The release in that case was printed on a ski pass application. Comparing the release to those considered in Baker and Hewitt v. Miller, n16 we held that the release was sufficiently conspicuous to be enforceable. We noted that the release was not hidden within part of a larger agreement, and that it was clearly entitled "LIABILITY RELEASE & PROMISE NOT TO SUE. PLEASE READ CAREFULLY!." We also noted that the words "RELEASE" and "HOLD HARMLESS AND INDEMNIFY" were set off in capital letters throughout the agreement, and that the release contained the language, just above the signature line, "Please Read and Sign: I have read, understood, and accepted the conditions of the Liability Release printed above."

At the other end of the spectrum of reported cases is Baker (Baker, 79 Wn.2d at 202). There, our Supreme Court held that a disclaimer in a golf cart rental agreement, consisting of several lines of release language printed in the middle of a paragraph discussing other information, was so inconspicuous that enforcement of the release would be unconscionable.

In McCorkle, another division of this court held that a trial court erred in granting summary judgment on McCorkle's negligence claims against a fitness club. The holding was that there were genuine issues of material fact whether a liability statement contained in a membership application McCorkle signed was sufficiently conspicuous.

The provision at issue in that case had as a heading "LIABILITY STATEMENT." In the first few sentences, the provision declared that the member accepted liability for damages that the member or the member's guests caused. The last sentence of the provision stated that the member waived any claim for damages as a result of any act of a Club employee or agent. And nothing in the document alerted the reader to the shift in the liability discussion from liability of the member to waiver of liability for claims against the Club.

The parties now before us cite to other cases, Hewitt and Conradt v. Four Star Promotions (Hewitt, 11 Wn. App. at 78-80; Conradt, 45 Wn. App. at 850). Both are factually distinguishable. In each of those cases, the waiver and release form was in a separate document, not a separate provision in one document

Here, the release is more like that in Chauvlier and unlike that in Baker or McCorkle. In our view, reasonable minds could not differ regarding whether the waiver and release provisions in this retail installment sales contract were so inconspicuous that it was unwittingly signed. The language is conspicuous, as a matter of law, and it was not unwittingly signed.

The release provision in this retail installment contract, which Stokes signed, must be read in context. Several lines above Stokes' signature is a section in bold type, which states:

NOTICE TO BUYER: (a) Do not sign this Contract before you read it or if any of the spaces intended for the agreed terms, except as to unavailable information, are blank. . . .

> THIS IS A RETAIL INSTALLMENT CONTRACT, THE RECEIPT OF AN EXECUTED COPY OF WHICH, AS WELL AS A COPY OF THE CLUB RULES AND REGULATIONS AND A WRITTEN DESCRIPTION OF THE SERVICES AND EQUIPMENT TO BE PROVIDED, IS HEREBY ACKNOWLEDGED BY THE BUYER.

Immediately following Stokes' signature is a line, starting in bold and capital letters, stating: "WAIVER AND RELEASE: This contract contains a WAIVER AND RELEASE in Paragraph 10 to which you will be bound."

> Paragraph 10, which is expressly referenced in the line directly below Stokes' signature, is entitled "WAIVER AND RELEASE." It states as follows:
>
> You (Buyer, each Member and all guests) agree that if you engage in any physical exercise or activity or use any club facility on the premises, you do so at your own risk. This includes, without limitation, your use of the locker room, pool, whirlpool, sauna, steamroom, parking area, sidewalk or any equipment in the health club and your participation in any activity, class, program or instruction. You agree that you are voluntarily participating in these activities and using these facilities and premises and assume all risk of injury to you or the contraction of any illness or medical condition that might result, or any damage, loss or theft of any personal property. You agree on behalf of yourself (and your personal representatives, heirs, executors, administrators, agents and assigns) to release and discharge us (and our affiliates, employees, agents, representatives, successors and assigns) from any and all claims or causes of action (known or unknown) arising out of our negligence. This Waiver and Release of liability includes, without limitation, injuries which may occur as a result of (a) your use of any exercise equipment or facilities which may malfunction or break, (b) our improper maintenance of any exercise equipment or facilities,

> (c) our negligent instruction or supervision, and (d) you slipping and falling while in the health club or on the premises. You acknowledge that you have carefully read this Waiver and Release and fully understand that it is a release of liability. You are waiving any right that you may have to bring a legal action to assert a claim against us for our negligence.

Unlike the waiver provisions in Baker and McCorkle, this paragraph discusses only Stokes' agreement to release Bally's from liability for its negligence. Stokes' argument that he believed that the paragraph somehow related to release from liability for his financial obligations under the retail installment sale agreement is wholly unpersuasive. As our Supreme Court stated in National Bank, it "would be impossible for a person of ordinary intelligence, much less a person of the intelligence and ability of appellant, to have misunderstood the contents of this instrument upon a casual reading thereof . . ." The same principle applies here. Reasonable persons could not disagree that the content of paragraph 10 is quite clearly a waiver and release of liability for negligence, not financial obligations. Likewise, reasonable persons could not disagree that the waiver and release provisions of the paragraph are conspicuously displayed within the larger document.

Stokes also argues that an exculpatory provision may be placed in a document separate from the retail installment sales agreement, but concedes that this is not required. Bally's counters that RCW 63.14.020 and other laws require that the exculpatory clauses and financial terms and conditions between a health club and its members all must be within one document.

We need not decide in this case whether Bally's' argument is correct. It is sufficient to state that no authority supports the proposition that an exculpatory clause must be contained in a separate document to be enforceable. Rather, what is required is that the release language in a document be conspicuous.

The language at issue in this case is conspicuous and enforceable. Bally's owes no duty to Stokes for his injuries. Summary judgment in favor of Bally's is required.

We reverse both summary judgment orders, and direct entry of summary judgment in favor of Bally's on remand.

WE CONCUR.

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CASES ON THE SUPPLEMENTAL WEB SITE

Kirton v. Fields, 2008 Fla. LEXIS 2378. This is the latest state Supreme Court ruling on the issue of parental waivers. Compare the two rationales. Also notice that this ruling applies only to waivers used by commercial businesses.

Moore v. Waller (2007 D.C. App. LEXIS 476). Examine the discussion regarding unequal bargaining power and adhesion contracts. Also of interest is the section regarding the necessity of using the word "negligence." Finally, read and evaluate the waiver used in this case.

Cohen v. Five Brooks Stable (2008 Cal. App. LEXIS 222). Study carefully the court's discussion regarding ambiguity and the use of the term "negligence."

Bailey v. Palladino, 2006 N.J. Super. Unpub. LEXIS 1774. The most interesting points in this waiver case involving a martial arts student are the lack of supervision and the fact that the martial arts business was not named as a protected party in the waiver.

Johnson v. Ubar, LLC., 2009 Wash. App. LEXIS 710. In this case, a lady is injured while working with a personal trainer in a health club. The waiver, found within the membership contract, was not enforced, in part because it was inconspicuous.

QUESTIONS YOU SHOULD BE ABLE TO ANSWER

1. Explain what is meant by the term *public policy* and explain why recreation- and sport-related waivers are generally not against public policy.
2. Contrast the rationale for enforcing parental waivers with that against such enforcement.
3. Other than the waiver of negligence section of the participant agreement, what is the most important component? Defend your answer.

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4. In *Stokes v. Bally's Pacwest*, how was the waiver made conspicuous? Why was it important that it be conspicuous?
5. Some people feel that a waiver is "bad" or unethical. Defend their use by a recreation- or sport-related business.

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