2002

Icing on the Cake: Allowing Amateur Athletic Promoters to Escape Liability in Mohney v. USA Hockey, Inc.

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"ICING" ON THE CAKE: ALLOWING AMATEUR ATHLETIC PROMOTERS TO ESCAPE LIABILITY IN
MOHNEY v. USA HOCKEY, INC.

I. INTRODUCTION

Amateur athletics are a major attraction for today's youth. With such a large enrollment in the various amateur sports available to youngsters, injuries are unavoidable. For example, approximately 25,000 people each year require emergency room treatment for injuries sustained while playing hockey. While some sports' injuries are unavoidable, others are a direct consequence of promoter error. The question then arises as to whether a parent can recover damages for injuries sustained by their child in an amateur athletic sport. In the case of clear negligence by the amateur league or coach, one expects that a parent should be able to recover for injuries sustained by their child. Youth athletic leagues, however, have increased the use of release agreements in which the parents and the child expressly assume the risks involved in the sport. These release agreements, coupled with the assumption of the risk doctrine, have enabled amateur athletic leagues to escape liability from injured athletes who assert negligence claims. The inequities of allowing amateur athletic leagues to escape liability is arguably contrary to public policy because the leagues will no

1. See Tom Appenzeller, Youth Sport and the Law 12 (2000) (estimating at least 25 million young people from five to eighteen years of age are participating in youth athletics).

2. See Mario R. Arango & William R. Trueba, Jr., The Sports Chamber: Exculpatory Agreements Under Pressure, 14 U. Miami ENT. & SPORTS L. REV. 1, 2 (1996) (explaining that increased popularity of various sports creates risk of increased litigation because of injuries occurring in these sports).


5. For a discussion of basic negligence principles, see infra notes 34-37 and accompanying text.

6. For a discussion of express assumption of the risk, see infra notes 51-59 and accompanying text.

7. See Perkins, supra note 4, at 560 (noting recovery in negligence for promoter error limited due to judicial tolerance of exculpatory agreements between service providers and participants).
longer be compelled to promote and ensure the safety of the young and naïve.  

This Note examines the application of the assumption of the risk doctrine and the enforceability of a standard exculpatory agreement as set forth specifically in Mohney v. USA Hockey, Inc.  

Section II paints the factual setting for the application of the assumption of the risk doctrine in an ice hockey game and the standard exculpatory agreement signed prior to participation in that game.  

Section III describes the complex legal background behind the assumption of the risk doctrine and the validity of exculpatory agreements.  

Section IV delineates the reasoning espoused by the United States Court of Appeals for the Sixth Circuit in holding that the plaintiff assumed the risks of the hockey game and the valid, signed exculpatory agreement precluded recovery from all defendants, except the equipment manufacturers.  

Section V critically analyzes the Sixth Circuit’s application of express assumption of the risk and its enforcement of the signed exculpatory agreement.  

Finally, Section VI examines the implications of the decision exempting negligent amateur athletic promoters from liability and the potential future harm this decision will have on the safety of an already dangerous sport.  

II. Facts  

From May 20-21, 1995, the Toledo Cherokees held an amateur ice hockey developmental camp in Sylvania, Ohio for hockey players between the ages of sixteen and twenty.  

The developmental camp chose to play under National Hockey League ("NHL") Rules,  

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8. For a discussion of the public policy implications of exculpatory agreements, see infra notes 115-25 and accompanying text.  
10. For a discussion of the facts of Mohney, see infra notes 15-33 and accompanying text.  
11. For a discussion of the background of assumption of the risk and exculpatory agreements used in the Mohney decision, see infra notes 34-125 and accompanying text.  
12. For a discussion of the narrative analysis, see infra notes 126-47 and accompanying text.  
13. For a discussion of the critical analysis, see infra notes 148-214 and accompanying text.  
14. For a discussion of the impact of the Mohney decision, see infra notes 215-21 and accompanying text.  
15. See Mohney v. USA Hockey, Inc., No. 00-3105, 2001 U.S. App. LEXIS 3584, at *4 (6th Cir. Mar. 1, 2001). The Toledo Cherokees, Jr. Club is a Junior B Level amateur hockey team that is a member of the Central States Hockey League ("CSHL"). See Mohney v. USA Hockey, Inc., 77 F. Supp. 2d 859, 863 (N.D. Ohio
which differ from USA Hockey Rules regarding an infraction known as "icing the puck."\textsuperscript{16} The NHL plays by "touch icing" rules, whereby a player on the team shooting the puck across the opposing team's goal line can prevent an adverse icing call by gaining control of the puck before anyone on the opposing team touches the puck.\textsuperscript{17} On the other hand, USA Hockey plays by "automatic icing" rules, whereby an icing infraction is automatically whistled once the puck crosses the opposing team's goal line.\textsuperscript{18}

During a scrimmage on the second day of developmental camp, Plaintiff Levi Mohney and Defendant Reneger were chasing after an iced puck, as defined by the touch icing rule, when Reneger fell into Mohney from behind.\textsuperscript{19} Mohney and Reneger were both racing towards the iced puck and heading quickly towards the boards to be the first to touch the puck.\textsuperscript{20} Both players lost control and slammed into the boards at the end of the rink.\textsuperscript{21} As Mohney's face struck the boards, a clip on the cage of his facemask broke off.\textsuperscript{22} As a result of the accident, Mohney suffered severe spinal cord damage that left him quadriplegic.\textsuperscript{23}

USA Hockey requires that all participants in its programs sign an Individual Membership Registration Form, containing a release of liability clause as a precondition to participation.\textsuperscript{24} Mohney and

\textsuperscript{1999). The CSFL is a regional arm of USA Hockey, Inc., the national governing body of amateur hockey. See id.}

\textsuperscript{16. See Mohney, 2001 U.S. App. LEXIS 3584, at *4-5. "Icing the puck" occurs when a player of a team, equal or greater in numerical strength to the opposing team, shoots, bats or deflects the puck from his own half of the ice beyond the goal line of the opposing team. See NHL Official Rules R. 65(a).}

\textsuperscript{17. See NHL Official Rules R. 65(a). Under "touch icing" rules, both teams have an incentive to reach a loose puck first in order to cause or prevent an icing infraction from being called. See Mohney, 2001 U.S. App. LEXIS 3584, at *5.}

\textsuperscript{18. See USA Hockey Official Rules R. 620(a)(3). Under "automatic icing" rules, the incentive to chase a loose puck is lost because the icing infraction is called no matter which team's player gets to the puck first. See Mohney, 2001 U.S. App. LEXIS 3584, at *5.}

\textsuperscript{19. See Mohney, 77 F. Supp. 2d at 864.}

\textsuperscript{20. See id. (emphasizing touch icing increases likelihood of injury caused by collision with "boards" at end of rink).}

\textsuperscript{21. See id. (noting no penalty was called by referee).}

\textsuperscript{22. See Mohney, 2001 U.S. App. LEXIS 3584, at *5. Mohney had on a SK 2000 L helmet manufactured by Defendant Bauer and a facemask manufactured by Defendant Karhu. See Mohney, 77 F. Supp. 2d at 864.}

\textsuperscript{23. See Mohney, 2001 U.S. App. LEXIS 3584, at *4 (noting Mohney left paralyzed one week short of his eighteenth birthday).}

\textsuperscript{24. See id. at *6. The Individual Membership Registration Form provides that [u]pon entering events sponsored by USA Hockey and/or its member districts, 1/We agree to abide by the rules of USA Hockey as currently published. 1/We understand and appreciate that participation or observation of the sport constitutes a risk to me/us of serious injury, including}
his father had signed similar release forms in the past, as well as before entering the 1994-95 hockey season.\(^{25}\)

The plaintiffs filed suit against Reneger, USA Hockey, the Central States Hockey League ("CSHL"), the Cherokees, Karhu and Bauer to recover for Mohney’s physical injuries.\(^{26}\) Plaintiffs claimed that Reneger recklessly checked Mohney from behind.\(^{27}\) Additionally, the plaintiffs claimed that USA Hockey, CSHL and the Cherokees failed to warn players of the dangers involved in checking from behind and playing under the touch icing rules.\(^{28}\) Further, plaintiffs raised product liability claims against Karhu and Bauer, manufacturers of the faceguard and helmet worn by Mohney.\(^{29}\) The plaintiffs argued that assumption of the risk was inapplicable under the factual scenario and the release agreement was unenforceable.\(^{30}\) According to the plaintiffs, therefore, recovery for damages could not be precluded.\(^{31}\)

In *Mohney*, the Sixth Circuit affirmed the granting of summary judgment for the defendant team player and all of the hockey defendants because Mohney had assumed the risk of the sport and signed a valid release agreement, making the hockey defendants only liable for wanton and willful actions.\(^{32}\) The Sixth Circuit re-

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permanent paralysis or death. I/We voluntarily and knowingly recognize, accept, and assume the risk and release USA Hockey, its Affiliates, their sponsors, event organizers and officials from any liability therefore.

*Id.*

25. See *Mohney*, 77 F. Supp. 2d at 863 (explaining because Levi Mohney was minor at time of registration, his father was also required to sign each release form).

26. See *id.* at 864; see also Jeffrey M. Schalley, *Eliminate Violence from Sports Through Arbitration, Not the Civil Courts*, 8 SPORTS LAW. J. 181, 202 (2001) (noting plaintiffs claimed that exculpatory agreement signed “did not cover the brand of hockey that was being played that day”).

27. See *Mohney*, 77 F. Supp. 2d at 864.

28. See *id.* (noting plaintiffs claim defendants should have instructed players of dangers involved in checking from behind).

29. See *id.*

30. See *id.* at 864-65 (noting defendants moved for summary judgment based on assumption of risk).

31. See *id.* Plaintiffs asserted numerous reasons at the district court level why the release agreement, admittedly signed, should not be enforced including: (1) the release was signed in Indianapolis, Indiana and did not include a game played in Toledo, Ohio that occurred after the conclusion of the regular season; (2) the release did not include or expressly mention claims based on strict liability against equipment manufacturers; (3) the release lacked the requisite sufficient consideration; (4) the release was vague; (5) the plaintiffs lacked the proper understanding and explanation of the release; (6) USA Hockey had a statutory duty to warn players about sports safety and (7) the release did not bind Levi Mohney’s mother because she never signed the release agreement. See *id.* at 873-76.

32. See *Mohney* v. USA Hockey, Inc., No. 00-3105, 2001 U.S. App. LEXIS 3584, at *3, 17 (6th Cir. Mar. 1, 2001). The district court granted all of the defend-
versed and remanded the product liability claims against the hockey manufacturers, finding that the plain language of the release agreement did not preclude claims for defective equipment.33

III. BACKGROUND

A. The Assumption of the Risk Doctrine

1. Basic Negligence Principles in Sporting Events

Under normal circumstances, a person who owes a duty of care to others could be held liable for careless conduct that causes injury to another.34 Generally, individuals engaged in recreational activities owe a duty of reasonable care to the participants.35 Whether a participant’s injury causing conduct constitutes actionable negligence involves a fact specific inquiry that is decided on a case-by-case basis.36

A case-by-case analysis includes the consideration of material factors including

the specific game involved, the ages and physical attributes of the participants, their respective skills of the game and

33. See Mohney, 2001 U.S. App. LEXIS 3584, at *26. The district court granted summary judgment in favor of the equipment manufacturers, finding that the release agreement signed by the plaintiffs barred any claims because the manufacturers were "sponsors" of USA Hockey. See Mohney, 77 F. Supp. 2d at 874. The Sixth Circuit reversed and remanded in order to allow plaintiffs' product liability claims to proceed. See Mohney, 2001 U.S. App. LEXIS 3584, at *26.

34. See Mohney, 77 F. Supp. 2d at 871. The Restatement (Second) of Torts defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregarding an interest of others." Restatement (Second) of Torts § 282 (1965). Generally speaking [i]n most cases, the standard against which any particular act or omission must be tested to determine whether it is negligent is the conduct expected of an ordinary, reasonable person under like circumstances. In other words, negligence is either the failure to do something that would have been done by a reasonable person, guided by those considerations that ordinarily regulate the conduct of human affairs, or doing something that the prudent and reasonable person would not do.


35. See RIFFER, supra note 3, § 2.01, at 84.

36. See id. (suggesting close look at facts of each case to determine negligence).
their knowledge of its rules and customs, their status as amateurs or professionals, the type of risks which are inherent in the game and those which are outside the realm of reasonable anticipation, the presence or absence of protective uniforms or equipment, and the degree of zest with which the game is being played.37

2. Basic Assumption of the Risk Principles in Sporting Events

A person who voluntarily chooses to participate in a sport is said to assume the ordinary risks of the sport, thereby precluding recovery for any resulting injury.38 Although sports participants assume the risk of injury from the sport itself, the participants do not assume the risk of injury from a violation of the general rules of the game.39

In the sports arena, conduct that might be viewed as a breach of a duty of care under normal circumstances is a regular occurrence and an integral part of sports.40 While most jurisdictions criticize or disregard the assumption of the risk doctrine, cases

37. Id. at 84-85.
38. See W.R. Habeeb, Annotation, Liability for Injury To or Death of Participant in Game or Contest, 7 A.L.R. 2D 704, 707 (1949). The Restatement (Second) of Torts states generally that "a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." Restatement (Second) of Torts § 496A (1965). In the sporting context,
[a] voluntary participant in any lawful game, sport, or contest, in legal contemplation by the fact of his or her participation, assumes all risk incidental to the particular game, sport, or contest which are obvious and foreseeable; but he or she does not assume an extraordinary risk which is not normally incident to the game, sport, or amusement activity unless he or she knows about it and voluntarily assumes it.
39. See Habeeb, supra note 38, at 707. The general rule is that:
Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.
40. See Mohney v. USA Hockey, Inc., 77 F. Supp. 2d 859, 871 (N.D. Ohio 1999). "Injuries are a regular occurrence in many sports, such as football and hockey. Moreover, one who plays baseball, tennis, volleyball, soccer, basketball, or golf is subjected to risk of harm from balls struck or thrown travelling at considerable speed." Id. (quoting Thompson v. McNeill, 559 N.E.2d 705, 707 (Ohio 1990)).
involving injury in lawful sports have generally taken the stance that participants assume the risks "incident to the contest which are obvious and foreseeable."41 In determining whether a plaintiff assumes the risk,

[t]he court would consider the experience and understanding of the plaintiff — whether the plaintiff had reasonable opportunity to abandon or leave the situation or to take an alternative course available to him, and whether a person of ordinary prudence, under the circumstances, would have refused to continue and would have abandoned that course of conduct or that activity.42

In states that have adopted the assumption of the risk doctrine for sports, an individual must demonstrate that the other participant acted recklessly or intentionally in order to recover for an injury.43 Although the participant in the sport assumes risks ordinarily incident to the sport, he or she does not assume the risk of intentional or negligent infliction of injury.44

42. James A. Baley & David L. Matthews, Law and Liability in Athletics, Physical Education, and Recreation 59 (2d ed. 1989) ("One who knows of a danger arising from the act or omission of another and understands risk theretofrom, and who nevertheless voluntarily exposes himself to it, is precluded from recovering for an injury that results from the exposure.").
43. See Mohney, 77 F. Supp. 2d at 871 (citing Marchetti v. Kalish, 559 N.E.2d 699, 703-04 (Ohio 1990), which held when participants engage in sporting activity, they assume ordinary risks of activity and cannot recover for injuries unless other participant’s actions were reckless or intentional). The general rule is that a sporting event participant is not liable for ordinary careless conduct engaged in during the sport, but only for intentionally injuring another player or engaging in reckless conduct that is totally outside the range of ordinary activity involved in the sport. This is so because in the heat of an active sporting event, a participant’s normal energetic conduct often includes accidentally careless behavior, and vigorous participation in sporting events might be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct. In such a sport, even when a participant’s conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.
44. See Walter T. Champion, Jr., Fundamentals of Sports Law § 7.1, at 130 (1990) ("Generally, participants will assume the risks of unintentional injuries suffered at the hands of another participant, but will not assume the risk of injuries either inflicted intentionally or as the result of a disregard for safety."); Habeeb, supra note 38, at 716.
3. **Types of Assumption of the Risk**

Assumption of the risk doctrine is divided into primary assumption of the risk and secondary assumption of the risk.\(^{45}\) Primary assumption of the risk involves cases where the defendant has no duty of care to protect the plaintiff from the risk of injury.\(^ {46}\) Under primary assumption of the risk, “[t]he question whether the defendant has a legal duty to protect the plaintiff from a particular risk of harm turns solely on the nature of the activity in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.”\(^ {47}\)

Alternatively, secondary assumption of the risk occurs when the defendant owes a duty of care to the plaintiff, but the plaintiff knowingly accepts the risk created by the defendant’s breach of this duty.\(^ {48}\) Under secondary assumption of the risk, plaintiffs cannot recover for injuries if the plaintiffs unreasonably accepted the risk under the totality of the circumstances.\(^ {49}\) In the context of sports and recreational activities, primary assumption of the risk is the applicable doctrine.\(^ {50}\)

Express assumption of the risk represents a contract-based form of primary assumption of the risk, in which “the plaintiff, in advance, gives express consent to relieve the defendant of an obligation of conduct toward him . . . . The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.”\(^ {51}\) Express assumption of the

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45. See Mohney, 77 F. Supp. 2d at 871 (citing 2 Harper & James, The Law of Torts § 21.1 (1st ed. 1956); Prosser & Keeton on Torts § 68 (5th ed. 1984)).

46. See id.

47. Id. (citing Knight v. Jewett, 834 P.2d 696, 704 (Cal. 1992); Marchetti, 559 N.E.2d at 703); see also Ammie I. Roseman-Orr, Comment, Recreational Activity Liability in Hawai‘i: Are Waivers Worth the Paper on Which They Are Written?, 21 U. Haw. L. Rev. 715, 720-21 (1999) (noting primary assumption of risk exists in sports arena when plaintiff voluntarily participates in activity and reasonably knows activity involves risk).

48. See Mohney, 77 F. Supp. 2d at 872; Roseman-Orr, supra note 47, at 721 (noting secondary assumption of risk, also known as unreasonable assumption of risk, centers on whether plaintiff unreasonably assumed known danger).

49. See Rosemann-Orr, supra note 47, at 721 (noting that in some jurisdictions secondary assumption of risk has been merged with comparative negligence).


51. Mohney, 77 F. Supp. 2d at 872 (quoting Prosser & Keeton on Torts § 68 (5th ed. 1984)). In one jurisdiction: The California appellate court has defined an express assumption of the risk as one “when the [participant], in advance, expressly consents . . . to relieve the [provider] of an obligation of conduct toward him, and to
risk commonly takes the form of an exculpatory or release agreement in which one party contracts "to abandon or relinquish a claim, obligation or cause of action against another party."52 By express consent, the participant agrees to accept the chance of injury from a known or possible risk, relieving another of the obligation to exercise reasonable care for their protection.53 Under express assumption of the risk, therefore, the participant in a sporting event or recreational activity can contract away his or her right to a negligence claim against the proprietor; but the participant can still recover for the proprietor’s wanton or willful conduct.54

A typical example of a party expressly assuming the risk would be the case of McPherson v. Sunset Speedway, Inc.55 In McPherson, the plaintiff was injured when a racing car lost control and entered the infield area where the plaintiff and other spectators were stand-

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52. Arango & Trueba, supra note 2, at 7 (discussing commonly used exculpatory agreements). Sport and recreational activity proprietors generally require participants to sign release agreements, therefore, the proprietors allocate the risk of injury to the participant and relieve themselves of possible personal injury costs. See Roseman-Orr, supra note 47, at 724 (noting before Hawaii Recreational Activity Liability Statute was enacted to expand sport participant rights, exculpatory agreements were considered valid in state unless attacked under contract theory).

53. See Lowell, supra note 34, at 42 (noting clearest example of express assumption of risk in sports arena involves contractual agreement between participant and sports promoter in which participant assumes risk inherent to particular sport).


55. 594 F.2d 711 (8th Cir. 1979).
ing.\textsuperscript{56} The plaintiff had been a stock car owner and racer; therefore the plaintiff was aware of the inherent risks involved in racing.\textsuperscript{57} Further, the plaintiff's admission to the infield area was conditioned on the signing of a waiver and release agreement.\textsuperscript{58} The Eighth Circuit Court of Appeals concluded that under Nebraska law the express assumption of the risk doctrine was a complete defense to the negligence action.\textsuperscript{59}

4. \textit{Application of the Assumption of the Risk Doctrine}

A critical factor in determining whether the assumption of the risk doctrine applies is whether an inherent risk was involved.\textsuperscript{60} An inherent risk, as defined by one state statute, generally includes "those dangers or conditions which are characteristic of, intrinsic to, or an integral part of any sport or recreational activity."\textsuperscript{61} As a general rule, participants in an athletic event assume and are responsible only for the natural and ordinary risks of the game, but not the non-obvious or extraordinary risks.\textsuperscript{62} An assumption of un-

\textsuperscript{56} See id. at 712. The general public is normally admitted into the grandstand area, but for an additional charge, individuals were admitted into the infield. See id. at 714.

\textsuperscript{57} See id. at 714-15.

\textsuperscript{58} See id. at 712 (explaining plaintiff had ample time to read release agreement).

\textsuperscript{59} See id. at 715 (finding plaintiff should have comprehended risk that was clear and obvious to him).

\textsuperscript{60} See Cooperman v. David, 214 F.3d 1162, 1165 (10th Cir. 2000) (finding injury caused by slipping saddle due to loose cinch was inherent risk in horseback riding).


\textsuperscript{62} See Cooperman, 214 F.3d at 1165; Mauner v. Feinstein, 623 N.Y.S.2d 326, 328 (N.Y. 1995) (holding summary judgment inappropriate because participation by adult counselors in rugby contest unreasonably increased risk of injury to minor participants); Caroline R. Krivacka & Paul D. Krivacka, Annotation, \textit{Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Occurring During School Athletic Events}, 68 A.L.R. 5th 663, 677 (1999). Generally, voluntary . . . participants in lawful sporting activities assume, as a matter of law, all of the ordinary and inherent risks in the sport, as long as the activity is played in good faith and the injury is not the result of an intentional or willful act . . . [T]he general rule will be inapplicable where the injured participant can establish that the injuries were either the result of other than good faith competition or the product of risks that are not ordinary or inherent in the sport in question.

known risks, however, shall not be inferred. The type of negligence that the participant expressly agrees to excuse the promoter from “need[s] not be foreseen with absolute clarity, however, such acts cannot lie beyond the reasonable contemplation of the parties.”

Whether a party has assumed the risks inherent in a sport or recreational activity “includes consideration of the participant’s knowledge and experience in the activity generally.” A knowing assumption of the risk is dependent upon whether the plaintiff had actual knowledge of the risk or whether that knowledge could be inferred because the participant made certain observations and should have reasonably identified the risk. Additionally, the plaintiff must know the existence of the inherent risk and appreciate its unreasonable character. Furthermore, the plaintiff will not have consented to the assumption of the risk if he fails to comprehend the risk involved because of age or lack of information or experience. Whether a participant in a sport has the awareness and appreciation of the apparent risks is not to be determined in a


64. Id. at 245 (citing Larsen v. Vic Tanny Int’l, 474 N.E.2d 729, 732 (Ill. App. Ct. 1984), holding inhalation of dangerous gaseous vapor was outside scope of injuries contemplated by parties in health club exculpatory agreement).


66. See Champion, supra note 44, ¶ 10.1, at 187 (noting in order to assume risk, participant must “understand and appreciate the risk involved and must accept the risk as well as the inherent possibility of the danger which could result from that risk”).

67. See Wicker v. Consol. Rail Corp., 142 F.3d 690, 702 (3d Cir. 1998) (holding exculpatory agreement attempting to settle claims regardless of whether parties were aware of potential risks unenforceable); Wells v. Colo. Coll., 478 F.2d 158, 161 (10th Cir. 1973) (holding assumption of risk inapplicable where unable to prove plaintiff anticipated extraordinary hazard); Grazis, supra note 41, at 538 (noting assumption of risk requires person assuming risk to have actual knowledge and appreciation of danger).

68. See Lowell, supra note 34, at 44 (noting lack of skill or improper conduct in sport may create unreasonable risk unable to be assumed); Krivacka & Krivacka, supra note 62, at 677 (explaining courts will look to “age, experience, and intelligence of the plaintiff to determine whether the plaintiff is capable of assuming any risk”). A minor’s assumption of the risk “will be tested by the child’s maturity and capacity to evaluate the circumstances surrounding him, with due consideration given to the child’s age, intelligence and experience.” Anthony S. McCaskey & Kenneth W. Biedynski, A Guide To the Legal Liability of Coaches for a Sports Participant’s Injuries, 6 Seton Hall J. Sport L. 7, 46 (1996) (noting some commentators argue assumption of risk not effective defense against claims made by minors).
vacuum. Rather, the awareness of the risk in the sports arena is assessed according to the background of a participant's skill and experience, imputing a higher degree of awareness for a professional athlete than an amateur athlete.

B. Releasing Liability Through Exculpatory Agreements

1. Basic Exculpatory Agreement Principles

Due to the substantial risk of injury in sporting events, those sponsoring events will typically seek to obtain a release from any liability arising from the sport. These releases, also termed exculpatory agreements, normally seek "to release the promoter, or other party, from any and all liability resulting from any loss that may be sustained by the athlete during the event in question." The exculpatory agreement typically states that if the participant is injured or killed, the participant will not hold the provider responsible.

Exculpatory agreements are "contractual efforts to shift the risk of damages from the negligent party to the injured party, with the injured party having expressly agreed to accept that risk." Exculpatory agreements place the established principle of freedom to contract in tension with the basic principle that a party should bear the responsibility for its own negligence. Nonetheless, particip-

69. See Champion, supra note 44, § 7.6, at 141 (noting subjective state of participant's mind and knowledge is essential in determining assumption of risk); Bell, supra note 63, at 245 (explaining that actual or implied knowledge of risk involved is vital ingredient to knowing assumption of risk).


71. See Lowell, supra note 34, at 52 (suggesting application of contract law to releases).

72. Id. (indicating effect of exculpatory agreement is to shift responsibility from one party to another).

73. See Roseman-Orr, supra note 47, at 725-26 (noting promoters continue to use exculpatory agreements to deter lawsuits even though they tend to believe they are unenforceable).


75. See Champion, supra note 44, § 11.2, at 206 (stressing exculpatory agreements present conflict between contract rule that all persons should be free to contract and negligence rule that tortfeasor should be responsible for negligent acts resulting in injury); Espaldon, supra note 74, at 29 (explaining exculpatory agreements attempt to allocate tort damage through contract mechanisms); Recent Cases: Negligence — Exculpatory Clauses — School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics - Wagenblast v. Odessa School District, 102 Harv. L. Rev. 729, 729 (1989).
pants who sign exculpatory agreements may recover damages for injuries sustained if they can invalidate the release of liability.  

2. The General Enforceability of Exculpatory Agreements

Exculpatory agreements have traditionally been disfavored in the law.  

Exculpatory agreements have traditionally been disfavored in the law. An exculpatory agreement exonerating a party from liability will be strictly construed against the party receiving the benefit. Primarily, there are two reasons for this: "First, public policy attempts to limit the effect of these provisions since they limit an individual's responsibility for negligence. Second, writings are usually construed against their drafter . . . . Courts should not, however, strain the words used in the exculpatory provision to render them inapplicable." A major drawback of exculpatory agreements is that they tend to encourage a lack of due care on the part of the individual released from liability.

Even when exculpatory agreements are formally drafted and executed, their validity may be challenged according to "(1) whether they are void as against public policy, (2) whether the lessee knew and understood the risk being assumed, and (3) whether the waiver was clear and unambiguous as to what was being waived." Courts have invalidated these agreements for being against public policy, improper drafting, print size, ambiguity and language rendering the contract not understandable.

76. See Roseman-Orr, supra note 47, at 727 (explaining exculpatory agreements typically subject to contract analysis in determining validity).

77. See id. at 725. "[T]he law frowns upon contracts intended to exculpate a party from consequences of his own negligence and though, with certain exceptions, they are exonerable, such agreements are subject to close scrutiny." Thomas A. Moore & Matthew Gaier, Courts Disfavor Exculpatory Releases, N.Y.L.J., Oct. 6, 1998, at 3 (citing Gross v. Sweet, 400 N.E.2d 306, 308 (N.Y. 1979)), which held exculpatory agreement signed by parachute jumper did not release defendant from liability for negligence.

78. See CHAMPION, supra note 44, § 11.2, at 208 (noting exculpatory agreements strictly construed against benefiting parties because they are not favored by courts and any clause overly ambiguous is not enforceable).

79. RIFFER, supra note 3, § 10.01, at 515-16.

80. See BALEY & MATTHEWS, supra note 42, at 56 (noting exculpatory agreements provide no incentive for promoters to actively prevent negligence).

81. Roseman-Orr, supra note 47, at 725 (explaining several grounds to challenge validity of exculpatory agreements).

82. See Arango & Trueba, supra note 2, at 10; McCaskey & Biedzynski, supra note 68, at 60 (explaining exculpatory agreements generally disfavored by courts of law). Generally, for waivers to remain enforceable they must clearly define which claims or rights are being released. This and the following three conditions should help insulate a waiver from judicial review: (1) an intent to excuse one party from the consequences of his own negligence must be expressed in clear, definite and unambiguous language; (2) the contract
In order to be enforceable, "the waiving party must have had an opportunity to know the terms of the release."83 To be valid, the wording of the exculpatory agreement must be unambiguous and understandable.84 The exculpatory agreement "should contain clear, explicit, and unequivocal language referencing the types of activities, circumstances or situations that it encompasses."85 Furthermore, the exculpatory agreement "must [convey] plainly and precisely that the 'limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility.'"86 However, not every possible act of negligence on the part of the provider needs to be explicit in the exculpatory agreement.87

When applying the applicable state law, circuit courts have upheld the validity of exculpatory agreements in the sports and recreation arena if the agreements are clear and unambiguous.88 In *Campbell v. Country Club Stables, Inc.*,89 the Seventh Circuit, in applying Illinois law, upheld an exculpatory agreement after the plaintiff was thrown from a horse while taking riding lessons.90 In *Waggoner v. Nags Head Water Sports, Inc.*,91 the Fourth Circuit, applying mari-

must have been made at arm's length with no vast disparity of bargaining power between the parties; and (3) the exculpation must not be against public policy in the circumstances of the case.

Schalley, *supra* note 26, at 201.

83. Lowell, *supra* note 34, at 53 (explaining enforceable exculpatory agreement "must be conspicuous, result from free and open bargaining, and its express terms must be applicable to particular misconduct of party whose potential liability is waived").

84. See Riffer, *supra* note 3, § 10.01, at 516 (noting party being bound by exculpatory agreement "must not be compelled to resort to a magnifying glass and lexicon").

85. Bell, *supra* note 63, at 239 (noting valid exculpatory agreement must state participant agrees to relieve promoter from duty of care).

86. Moore & Gaier, *supra* note 77, at 3 (explaining exculpatory agreements must include claims of negligence in understandable and unambiguous terms).

87. See Arango & Trueba, *supra* note 2, at 17 (stating "[a]lthough every possible risk need not be expressed, agreement must give participant general understanding of inherent dangers involved").

88. See *Waggoner v. Nags Head Water Sports, Inc.*, No. 97-1394, 1998 U.S. App. LEXIS 6792, at *17-24 (4th Cir. Apr. 6, 1998) (holding jet ski exculpatory agreement did not violate policies of admiralty law, state law or general contract law); Brooks v. Timberline Tours, Inc., 127 F.3d 1273, 1275 (10th Cir. 1997) (holding snowmobile exculpatory agreement enforceable because it was clear and unambiguous); *Campbell v. Country Club Stables, Inc.*, No. 89-2830, 1990 U.S. App. LEXIS 11222, at *5-7 (7th Cir. July 2, 1990) (holding exculpatory agreement signed by horse rider not contrary to public policy and enforceable).


90. See id. at *5-7 (holding exculpatory agreement not contrary to public policy and plaintiff acknowledged risk of being thrown from horse). In *Campbell*, the plaintiff had owned a pony and had ridden horses in the past. See id. at *2.


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time law, upheld an exculpatory agreement as unambiguous and conspicuous after the plaintiff was injured in a jet skiing accident. In *Brooks v. Timberline Tours, Inc.*, the Tenth Circuit, applying Colorado law, upheld the validity of an unambiguous release agreement even after plaintiff's son was killed in a snowmobile accident while partaking in a snowmobile tour.

Many courts have questioned the validity of exculpatory agreements and refused to resolve their validity on a granting of summary judgment. In *Juete v. Jarnowski*, for example, the Seventh Circuit in applying Illinois law, held that whether an alleged release was obtained knowingly and fairly is a fact question for the jury to decide. Further, in *Anderson v. Eby*, the Tenth Circuit, applying Colorado law, held that the ambiguity of the language in an exculpatory agreement signed by a snowmobile rider presented an issue of material fact to which a motion for summary judgment should have been denied. In *Ghionis v. Deer Valley Resort Company*, the District Court for the Central District of Utah, applying Utah law, held that summary judgment was improper in a skiing accident case because the plaintiff signed an ambiguous release before renting

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92. See id. at *17-24 (holding exculpatory agreement comport with policies of admiralty law, state law, or general contract law). Despite the plaintiff's inexperience with rental jet skis, the Tenth Circuit granted defendant's motion for summary judgment based on its findings that the exculpatory agreement was valid. See id. at *24.

93. 127 F.3d 1273 (10th Cir. 1997).

94. See id. at 1274-75 (holding exculpatory agreement expressed clearly and unambiguously intent of parties to preclude liability). Specifically, the Tenth Circuit found that the exculpatory agreement was written in clear, simple terms, free of legal jargon, and that the release was neither long nor complicated. See id.

95. See Anderson v. Eby, 998 F.2d 858, 865 (10th Cir. 1993) (holding that meaning of ambiguous snowmobile contract terms is issue of fact to be determined in same way as other factual issues under dispute); Juete v. Jarnowski, 393 F.2d 513, 515 (7th Cir. 1968) (holding summary judgment improper for horse rider thrown to ground because factual issues remained); Ghionis v. Deer Valley Resort Co., 899 F. Supp. 789, 793-94 (C.D. Utah 1995) (holding that wording of ski resort exculpatory agreement ambiguous); Fasules v. D.D.B. Needham Worldwide, Inc., No. 89-1078, 1989 U.S. Dist. LEXIS 10573, at *15-16 (N.D. Ill. Sept. 7, 1989) (holding failure to make plaintiff aware of risks of whitewater rafting at time agreement was signed rendered exculpatory agreement unenforceable).

96. 398 F.2d 513 (7th Cir. 1968).

97. See id. at 515 (finding summary judgment improper where defendant thrown to ground mounting rented horse and factual issues remained). Specifically, the Seventh Circuit found that a factual issue remained as to whether the circumstances upon which the plaintiff signed the exculpatory agreement made the release binding. See id. at 514.

98. 998 F.2d 858 (10th Cir. 1993).

99. See id. at 865-66 (noting that meaning of ambiguous contract terms is issue of fact to be determined in same way as other factual issues under dispute).

Finally, in *Fasules v. D.D.B. Needham Worldwide, Inc.*, the District Court for the Northern District of Illinois, applying Illinois law, held that an ambiguous exculpatory agreement signed by a whitewater rafter did not warrant summary judgment against the plaintiff.

3. *Application of Exculpatory Agreements to Minors*

Normally, when a minor is involved with a release, the law will not bind the participant to the exculpatory agreement. The failure to enforce exculpatory agreements against minors is true whether the minor or the parent of the minor signed the release. A child cannot waive his own rights, and the parents of the child cannot waive rights for their child. "The traditional contract rule for minors is that they can disaffirm contracts unless they involve the necessities of life, and since recreation is never viewed as a necessity, then exculpatory contracts that are signed by minors are usually voidable." A majority of the case law indicates that exculpatory agreements do not bar minors from recovering for negligence claims.

101. *See id.* at 793-94, 797 (holding scope ambiguous and "as is" language of ski resort exculpatory agreement inconspicuous).


103. *See id.* at *15-16 (holding failure to warn and make plaintiff aware of risks of whitewater rafting at time agreement was signed rendered ambiguous exculpatory agreement unenforceable).

104. *See Champion,* supra note 44, § 11.5, at 213; *Riffer,* supra note 3, § 10.03, at 523 (indicating jurisdictions nearly unanimous in holding that parent's signing of exculpatory agreement on behalf of child does not prevent child from suing). In contrast, the Ohio Supreme Court has taken the minority position that parents are capable of waiving a minor's rights through exculpatory agreements. *See Melinda Smith,* Note, *Tort Immunity for Volunteers in Ohio: Zivich v. Mentor Soccer Club, Inc.*, 32 Akron L. Rev. 699, 716 (1999) (citing *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 207-08 (Ohio 1998), upholding exculpatory agreement signed by parent on child's behalf in order to encourage youth sports and promote volunteer services).

105. *See Champion,* supra note 44, § 11.5, at 213 (citing *Santangelo v. New York,* 411 N.Y.S.2d 666, 667 (App. Div. 1978), which held minor injured at ice hockey clinic not bound by release signed by father exempting city and hockey league from liability for injuries); *Riffer,* supra note 3, § 10.03, at 523 (noting that in some jurisdictions, parent's signing of exculpatory agreement on behalf of minor does not bar parent from later making claim).

106. *See Bailey & Matthews,* supra note 42, at 56 (citing *Doyle v. Bowdoin Coll.,* 403 A.2d 1204, 1209 (Me. 1979), holding release signed by parent of minor injured while playing floor hockey unenforceable because parent cannot waive minor's rights).

107. *Champion,* supra note 44, § 11.5, at 214 (declaring contracts with minors voidable even if minor misrepresents age).

108. *See Scott v. Pac. W. Mountain Resort,* 834 P.2d 6, 12 (Wash. 1992) (holding exculpatory agreement unenforceable against twelve-year old advanced skier);
In *Childress v. Madison County*, for example, the Tennessee Court of Appeals held that an exculpatory agreement signed by the mother of a mentally retarded student did not waive the minor's rights. The *Childress* court concluded that “[t]he law is clear that a guardian cannot on behalf of an infant or incompetent, exculpate or indemnify against liability those organizations which sponsor activities for children and the mentally disabled.” Further, in the benchmark case, *Scott v. Pacific West Mountain Resort*, the Washington Supreme Court refused to enforce a clear and unambiguous exculpatory agreement against a minor after he sustained severe head injuries in a skiing accident at a commercial resort. The *Scott* court held that “it is settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release a cause of action belonging to their child.”

4. Public Policy and Exculpatory Agreements

In determining the validity of exculpatory agreements, public policy has been at the center of the debate. The notion of public
policy is a "principle of law which declares that no one may lawfully do that which has a tendency to be injurious to the public welfare."116 Public policy forbids an exculpatory agreement that a party attempts to absolve itself of liability for its own negligence in circumstances within its exclusive control.117 Furthermore, an exculpatory agreement is contrary to public policy "if it unfairly requires a person with little bargaining power to undertake unreasonable risks which the person did not fully understand."118 Whether an exculpatory agreement violates public policy is typically made on a case-by-case basis.119

In two companion cases, Wagenblast v. Odessa School District and Vulliet v. Seattle Public School District,120 the Washington Supreme Court examined two school districts' requirements that parents and their children execute an exculpatory agreement before participation in interscholastic athletics.121 The Washington Supreme Court held that releases relieving the school districts from future negligence were invalid as against public policy.122 Further, in Hiett v. Lake Barcroft Community Ass'n, Inc.,123 the Virginia Supreme Court


117. See Diamond Crystal Salt Co. v. Thielman, 395 F.2d 62, 66 (5th Cir. 1968) (holding exculpatory agreement signed by parties injured during guided tour of underground mine was contrary to public policy because plaintiffs could not have understood risk involved to legally assume it).

118. Roseman-Orr, supra note 47, at 727 (explaining valid exculpatory agreement in Hawaii must show participant knows and comprehends risk involved and expresses agreement to waive promoter's liability).

119. See Bell, supra note 63, at 241 (noting analysis of exculpatory agreement considers bargaining power of parties and type of services provided).

120. 758 P.2d 968 (Wash. 1988) (en banc).

121. See Recent Cases, supra note 75, at 730.

122. See Wagenblast, 758 P.2d at 973. In determining when an exculpatory agreement violates public policy, the Washington Supreme Court adopted the six criteria test introduced in Tunkl v. Regents of the Univ. of Cal. See 383 P.2d 441, 444-48 (Cal. 1963) (invalidating charitable hospital's requirement that patients release hospital from liability for future negligence before admittance). The six criteria for striking down exculpatory agreements under public policy are: (1) "the agreement concerns an endeavor of a type generally thought suitable for public regulation;" (2) "party seeking exculpation is engaged in performing a service of great importance to the public;" (3) "such party holds itself out as willing to perform this service for any member of the public who seeks it;" (4) "party invoking exculpation possesses a decisive advantage of bargaining strength;" (5) "in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence" and (6) "person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents." Wagenblast, 758 P.2d at 970-73.

held that a pre-injury release provision signed by the plaintiff prior to the plaintiff's participation in a triathlon was invalid and prohibited as contrary to public policy.\textsuperscript{124} The Virginia Supreme Court found that "to put the other parties to the contract at the mercy of its own misconduct . . . can never be lawfully done where an enlightened system of jurisprudence prevails."\textsuperscript{125}

IV. Narrative Analysis

The Sixth Circuit affirmed the district court's granting of summary judgment to the hockey player and hockey organizations in \textit{Mohney v. USA Hockey}, finding that the team player did not act recklessly or intentionally and the release signed by plaintiffs relieved the hockey organizations from liability.\textsuperscript{126} The Sixth Circuit, however, reversed and remanded the district court's granting of summary judgment in favor of the hockey manufacturers, finding the language of the release agreement did not relieve the manufacturers from a product liability claim of defective equipment.\textsuperscript{127}

A. Summary Judgment for Hockey Team Player

In affirming the district court's granting of summary judgment in favor of the hockey player defendant, the Sixth Circuit relied on the express assumption of the risk doctrine.\textsuperscript{128} In applying Ohio law, the Sixth Circuit stressed that

\begin{enumerate}
\item[124.] See \textit{id.} at 897 (relying on Johnson's Adm'x v. Richmond and Danville R.R. Co., 11 S.E. 899, 830 (Va. 1890), which held excusable clause relieving railroad from liability for injuries to workers on adjacent quarry invalid).
\item[125.] \textit{Id.} at 896. In holding that excusable releases were prohibited "universally," the Virginia Supreme Court relied heavily on its 1890 decision, \textit{Johnson's Administrrix}. See \textit{id.}. In \textit{Johnson's Administrrix}, the Virginia Supreme Court addressed the question of pre-injury releases of liability for future negligent acts. See \textit{id.} at 830. The railroad company had its quarry workers sign a pre-injury release, which absolved the railroad from liability for injury or death resulting from any cause possible. See \textit{id.}. Thus, the \textit{Johnson's Administrrix} court concluded that public policy considerations prohibited such exculpatory agreements universally. See \textit{id.}.
\item[126.] See \textit{Mohney v. USA Hockey}, Inc., No. 00-3105, 2001 U.S. App. LEXIS 3584, at *11-20 (6th Cir. Mar. 1, 2001). Specifically, the Sixth Circuit held that while the severity of the injury sustained by plaintiff was not a normal occurrence in hockey, the risk of the injury sustained could have reasonably been expected. See \textit{id.} at *17. Further, the Sixth Circuit found that the release agreement signed by the plaintiffs was valid, and thus, the hockey organizations were not liable for their actions because they did not act willfully or wantonly. See \textit{id.} at *19-20.
\item[127.] See \textit{id.} at *20-23. Specifically, the Sixth Circuit found that the district court had erred in concluding as a matter of law that the hockey manufacturers were protected from liability under the release agreement as "sponsors" of USA Hockey. See \textit{id.} at *20.
\item[128.] See \textit{id.} at *11-17 (relying on Marchetti v. Kalish, 559 N.E.2d 699, 699-700 (Ohio 1990); Thompson v. McNeill, 559 N.E.2d 705, 708 (Ohio 1990)).
\end{enumerate}
The Sixth Circuit found that while the plaintiff’s injuries were severe and extraordinary in hockey, the risk of a spinal injury was reasonably possible. The Sixth Circuit, therefore, held that the plaintiff assumed the risk of the sport because no reasonable jury could find that the defendant hockey player performed any conduct that would be deemed intentional or reckless.

B. Summary Judgment for Hockey Organizations

In affirming the district court’s granting of summary judgment in favor of defendant hockey organizations, the Sixth Circuit relied on the validity of the release agreement signed by the plaintiffs. Under Ohio law, those partaking in a sporting event or recreational activity are “free to contract with the proprietor ’to relieve the proprietor of responsibility to the participant for the proprietor’s negligence, but not for the proprietor’s willful or wanton misconduct.’” The Sixth Circuit concluded that the release signed by the plaintiffs was “clear and unambiguous” and the release applied to all USA Hockey sponsored events during the 1994-

129. Id. at *11 (quoting Marchetti, 559 N.E.2d at 699). In determining an unreasonable risk, as opposed to an ordinary risk, of the activity, the court should look to the rules and customs of the particular game to determine what constitutes foreseeable conduct. See id. at *12 (citing Thompson, 559 N.E.2d at 708).

130. See id. at *16. The Ohio Supreme Court has noted that hockey is a dangerous sport in which “injuries are a regular occurrence.” Id. at *16 (quoting Thompson, 559 N.E.2d at 707).

131. See Mohney, 2001 U.S. App. LEXIS 3584, at *17. The Sixth Circuit rejected plaintiff’s contention that the district court erred by substituting its judgment for that of a jury when it concluded that defendant hockey player did not act recklessly or intentionally. See id. at *16.

132. See id. at *17-19. For an excerpt of the release agreement signed, see supra note 24.

133. Id. at *13 (quoting Bowen v. Kil-Kare, Inc., 585 N.E.2d 384, 390 (Ohio 1992)). Under Ohio law, “willful misconduct” is “conduct involving an intent, purpose or design to injure;” while “wanton” misconduct is “conduct where one fails to exercise any care whatsoever toward those to whom he owes a duty of care, and this failure occurs under circumstances in which there is a great probability that harm will result.” Id. at *13-14 (quoting Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 207 (Ohio 1998)).
95 season, including the pre-season and post-season. In finding the release valid, the Sixth Circuit ruled that the plaintiffs could only recover if the hockey organizations' actions constituted willful or wanton misconduct.

The Sixth Circuit rejected the plaintiffs' contention that they lacked the proper understanding of the contents of the release agreement. In addition, the court rejected the plaintiffs' argument that the release agreement should have been declared invalid because a USA Hockey rule was violated. Alternatively, the plaintiffs asserted that the failure of the hockey organizations to warn the plaintiffs of the increased spinal injury risk from playing under touch icing rules was willful and wanton misconduct. Yet, because the court could not find evidence in the record that the hockey organizations acted willfully or wantonly, the valid release agreement barred the plaintiffs' negligence claims.

C. Summary Judgment for Hockey Manufacturers

In reversing and remanding the district court's granting of summary judgment for the hockey manufacturers, the Sixth Circuit concluded that the plain language of the release agreement signed by the plaintiffs did not preclude them from bringing a product liability claim against the manufacturers for defective equipment.

134. See id. at *17. For a discussion of the arguments rejected by the Sixth Circuit regarding the validity of the release agreement, see infra notes 136-39 and accompanying text.

135. See id. at *19 (relying on Bowen, 585 N.E.2d at 390).

136. See Mohney, 2001 U.S. App. LEXIS 3584, at *18. Under Ohio law, "[a] person who signs a contract without making a reasonable effort to know its contents cannot, in the absence of fraud or mutual mistake, avoid the effect of the contract." Id. (quoting Pippin v. M.A. Hauser Enter., Inc., 676 N.E.2d 932, 937 (Ohio Ct. App. 1996)). Therefore, the plaintiffs are presumed to understand the contract and cannot claim an inability to understand the agreement to avoid its effects. See id.

137. See id. at *18-19. Plaintiffs relied on a section of the release agreement which stated that, "upon entering events sponsored by USA Hockey and/or its member districts, I/We agree to abide by the Rules of USA Hockey as currently published." Id. at *18. The Sixth Circuit stressed that this language did not create a contingency that the validity of the release agreement would hinge on whether or not one of the rules of USA Hockey was broken. See id. at *18-19.

138. See id. at *19. The Sixth Circuit affirmed the district court's finding that no reasonable jury could find that the hockey organizations' failure to warn of the risk of spinal injury when playing under touch icing rules was willful and wanton misconduct. See id.

139. See id. at *20 (citing Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 207 (Ohio 1998)).

140. See id. The Sixth Circuit held that the protection of the release agreement signed by the plaintiffs did not extend to the hockey manufacturers in their role as manufacturers. See id. at *23.
Based on the language of the release agreement, the district court barred the plaintiffs' product liability claims because the hockey manufacturers qualified as "sponsors" of USA Hockey. The Sixth Circuit disagreed with the district court's reasoning and found that the release agreement could not preclude product liability claims against the hockey manufacturers. In particular, the court held that because the hockey manufacturers were not protected by the release agreement, "the district court erred in considering the validity of the Mohney's product liability claims under the standard of willful and wanton misconduct."

Moreover, the Sixth Circuit found that the plaintiffs did not have a fair chance to establish a genuine issue of material fact for their product liability claims because of a case management order imposed. Under the order, the parties were limited to briefing the issues of "(1) whether Plaintiffs' claims are barred by express assumption of the risk, and (2) whether Plaintiffs' claims are barred by primary assumption of the risk." The Sixth Circuit concluded that the district court could not independently adjudicate the product liability claims without giving the plaintiffs the chance to discover and present evidence on these claims. Due to these errors, the Sixth Circuit remanded to the district court the plaintiffs' product liability claims in order to allow them to proceed forward.

V. CRITICAL ANALYSIS

In Mohney, the Sixth Circuit interpreted Ohio law and applied the express assumption of the risk doctrine to a valid exculpatory agreement to preclude liability for all of the hockey defendants ex-

141. See Mohney, 2001 U.S. App. LEXIS 3584, at *20. The release agreement states in relevant part that participants "release USA Hockey, its Affiliates, their sponsors, event organizers and officials from liability therefore." Id.

142. See id. at *20. According to the plain language of the release, the Sixth Circuit concluded that the release agreement does not bar plaintiffs from bringing a product liability claim against the manufacturer of any equipment deemed defective. See id.

143. Id. at *23 (holding willful and wanton standard should not have been applied).

144. See id. at *21. Under the Case Management Conference Order of Oct. 22, 1997, the district court limited the scope of discovery to "the validity, coverage, and enforceability of the release signed by Plaintiffs Levi Mohney and Timothy Mohney as to each party, and on the issue of assumption of the risk." Id.

145. Id.

146. See Mohney, 2001 U.S. App. LEXIS 3584, at *23. Specifically, the Sixth Circuit held that the district court "contravened the parameters imposed by its case management order" by ruling on the product liability claims without proper discovery. Id. at *23.

147. See id.
cept the equipment manufacturers. Although the application of the express assumption of the risk doctrine and the validity of exculpatory agreements was congruous with the current trend of Ohio law, the factual circumstances of Mohney create inconsistencies and inequities in the court's reasoning.

A. Inappropriate Application of the Express Assumption of the Risk Doctrine

1. Lack of Awareness of Inherent Risk

Under the doctrine of express assumption of the risk, the participant in a sporting event is aware and accepts the risks created by the sport while contracting away his or her right to a negligence claim against the proprietor, except for cases of willful or wanton conduct. A critical factor in determining whether the assumption of the risk doctrine is applicable involves whether the participant in the sport was aware of and understood the inherent risk. Specifically, in the context of a sporting event, an inherent risk includes those dangers which are characteristic of the sport.

In Mohney, the Sixth Circuit focused on whether the plaintiff's injuries were "reasonably anticipated," instead of determining whether the plaintiff was aware of the inherent risk of the injury involved. First, the Sixth Circuit recognized that hockey is a dangerous sport in which injuries occur on a regular basis. Then, the circuit court stressed that although the severity of the injury was not a regular occurrence in hockey, the risk of such an injury was at least a reasonable possibility. But the Sixth Circuit failed to ex-

148. See id. at *6.
149. See id. at *11-15; see also Smith, supra note 104, at 712 (noting exculpatory agreements unenforceable when against public policy).
150. For a discussion of the express assumption of the risk doctrine, see supra notes 49-59 and accompanying text.
151. For a discussion of the inherent risk aspect of the assumption of the risk doctrine, see supra notes 60-70 and accompanying text.
152. See Cooperman v. David, 214 F.3d 1162, 1165 (10th Cir. 2000) (finding injury caused by slipping saddle due to loose cinch was inherent risk in horseback riding); CHAMPION, supra note 44, § 7.6, at 141 (noting participant's subjective state of mind and knowledge is essential to determine whether participant has assumed and appreciated risk of sport).
153. See Mohney, 2001 U.S. App. LEXIS 3584, at *17 (affirming grant of summary judgment for defendant because plaintiff could have reasonably anticipated injury suffered).
154. See id. at *16 (citing McKichan v. St. Louis Hockey Club, 967 S.W.2d 209, 213 (Mo. Ct. App. 1998)).
155. See id. at *17 (holding that unless defendant acted recklessly or intentionally, summary judgment should be granted).
amine whether the plaintiff actually was aware of the inherent risk involved and appreciated its unreasonable character.156 Furthermore, the circuit court failed to examine whether the plaintiff assumed the risks inherent to ice hockey in light of his knowledge and experience in the sport.157

The trial court described the plaintiff as an “exceptionally good amateur player,” who played in a number of junior hockey leagues.158 The plaintiff played numerous years of junior ice hockey under the rules of USA Hockey; therefore, one could reasonably assume that he was aware of the inherent risks of amateur hockey.159 In Mohney, however, the plaintiff was not injured while playing under the amateur rules of USA Hockey.160 Rather, the plaintiff was injured while playing under the “touch icing” rules of NHL Hockey.161 Although the plaintiff’s goal was to eventually play ice hockey professionally, he played under the rules of USA Hockey for the majority of his life and had only limited knowledge and experience playing under the rules of NHL Hockey.162

Whether a participant in ice hockey has the requisite awareness of the risk involved should be assessed against the background and experience of the participant.163 Generally, a minor’s assump-

156. See Wells v. Colo. Coll., 478 F.2d 158, 161 (10th Cir. 1973) (holding assumption of risk doctrine inapplicable because plaintiff did not appreciate extraordinary hazard involved in self-defense class); CHAMPION, supra note 44, §10.1, at 187 (noting application of assumption of risk doctrine requires participant to understand and appreciate risk involved).

157. See Habeeb, supra note 38, at 707 (explaining background of participant’s skill and experience considered in application of assumption of risk); Krivacka & Krivacka, supra note 62, at 677 (noting courts look to participant’s age, experience and intelligence in determining whether participant assumed risk).


159. See id. (noting Mohney played in numerous traveling junior leagues during his adolescent years).

160. See Mohney, 2001 U.S. App. LEXIS 3584, at *4-5 (explaining developmental camp plaintiff attended chose not to play under automatic icing rule of USA Hockey).

161. See id. (explaining developmental camp plaintiff attended by Mohney played under “touch icing” rule of NHL Hockey). For a further discussion of the “touch icing” rule, see supra notes 16-18 and accompanying text.

162. See Mohney, 77 F. Supp. 2d at 863 (explaining Mohney dreamed of playing hockey professionally, but his only experience up to time of injury was with amateur hockey).

tion of the risk will be tested according to the minor's maturity and capacity to evaluate the circumstances around him.\textsuperscript{164} It seems unfair to infer that a minor with limited experience playing under the "touch icing" rule of NHL Hockey would be aware of and appreciate the inherent risk involved in "touch icing," after having played under the "automatic icing" rule of USA Hockey for most of his life.\textsuperscript{165} The Sixth Circuit never considered whether the plaintiff was aware of the risk; thus, such a determination should be left to a trier of fact and not extinguished on a motion for summary judgment.\textsuperscript{166}

2. Failure to Expressly Assume Inherent Risk

In \textit{Mohney}, the Sixth Circuit specifically applied the contract-based express assumption of the risk doctrine.\textsuperscript{167} Express assumption of the risk normally involves an exculpatory agreement in which the participant agrees to relinquish any claim of negligence against the proprietor.\textsuperscript{168} In \textit{Mohney}, the Sixth Circuit found that the plaintiff expressly assumed the risks of ice hockey when he and his parents signed the standard release form upon registering for the junior hockey league.\textsuperscript{169}

The release in question specifically stated that "I/We agree to abide by the rules of USA Hockey as currently published" in assuming the risk of serious injury in the sport.\textsuperscript{170} If the plaintiff had been injured while playing under the "automatic icing" rule of USA Hockey, the Sixth Circuit could have reasonably concluded that this express assumption of the risk released the hockey defendants from

\begin{itemize}
\item \textsuperscript{164} See McCaskey & Biedzynski, supra note 68, at 46 (explaining due consideration should be given to minor's age, intelligence and experience in applying assumption of risk).
\item \textsuperscript{165} See Bell, supra note 63, at 246 (explaining assumption of unknown risks should not be inferred); Grazis, supra note 41, at 538 (noting assumption of risk doctrine requires participant to have actual knowledge of risk and appreciate its danger).
\item \textsuperscript{166} See Vandervelde v. United States, No. 98-018, 1999 U.S. Dist. LEXIS 1710, at *15 (Wyo. Feb. 1, 1999) (holding determination of whether accident caused by inherent risk is issue of fact for jury and not to be decided on motion for summary judgment).
\item \textsuperscript{168} For a discussion of express assumption of the risk, see supra notes 49-59 and accompanying text.
\item \textsuperscript{169} See Mohney, 2001 U.S. App. LEXIS 3584, at *18-20 (rejecting all of plaintiff's challenges and holding exculpatory agreement valid).
\item \textsuperscript{170} Id. at *6. For the exculpatory agreement contained in the Individual Membership Registration Form, see supra note 24 and accompanying text.
\end{itemize}
liability.171 Instead, the plaintiff was injured while abiding by an entirely different set of rules, specifically the "touch icing" rule of NHL Hockey.172

Assuming the exculpatory agreement was valid, it would appear to be unenforceable under the factual situation because the release is worded in such a way as to limit the express assumption of the risk to the rules of USA Hockey.173 The release in Mohney mentioned nothing about assuming the risks involved in the sport while abiding by the rules of NHL Hockey.174 It is questionable whether a release that appears to limit liability to the rules of USA Hockey should preclude liability for injury caused while playing under the rules of NHL Hockey.175 It would be unreasonable to hold that a hockey player is aware of an entirely different set of rules to which he is not accustomed.176 At the very least, the question of whether the plaintiff assumed the risk of injury while playing under NHL rules, instead of the rules of USA Hockey, should not have been determined at the summary judgment level.177

B. Invalid Exculpatory Agreement Enforced

1. Release Unclear and Ambiguous

In Mohney, the Sixth Circuit concluded, as a matter of law, that the release signed by the plaintiffs prior to the start of the 1994-95 hockey season was a valid exculpatory agreement.178 First, the Sixth Circuit concluded that the language of the release was clear and

171. See McPherson v. Sunset Speedway, Inc., 594 F.2d 711, 714-15 (8th Cir. 1979) (holding plaintiff expressly assumed risk of injury by signing release agreement to enter infield area at car race).
173. See Arango & Trueba, supra note 2, at 8 (requiring exculpatory agreement to be clear and unambiguous); Bell, supra note 63, at 239 (noting exculpatory agreement should contain explicit language of circumstances it encompasses).
175. See Arango & Trueba, supra note 2, at 8. The plain language of the release appears to state clearly that the plaintiffs assume the risk of injury caused while playing under the rules of USA Hockey. See Mohney, 2001 U.S. App. LEXIS, at *6. But, the plain language of the release does not clearly state that the plaintiff assumed the risk of injury caused while playing under the rules of NHL Hockey. See id.
unambiguous.\textsuperscript{179} Specifically, the Sixth Circuit concluded that the release was clear and unambiguous in not limiting its application to the 1994-95 regular season, but included events such as the developmental camp.\textsuperscript{180}

In order to be enforceable, an exculpatory agreement should "contain clear, explicit, and unequivocal language referencing the types of activities, circumstances or situations that it encompasses."\textsuperscript{181} The release may be clear and unambiguous to a participant agreeing to abide by the rules of USA Hockey, but the release is unclear and ambiguous as to whether the rules not sanctioned by USA Hockey will be used in the league.\textsuperscript{182} In particular, the release is silent and unclear about whether a participant assumes the risk of injury as a result of abiding by the rules of NHL Hockey.\textsuperscript{183} As a result, the release fails to be clear and explicit in all of its essential details.\textsuperscript{184} The exculpatory agreement, therefore, appears to be unenforceable because of a failure to be clear and unambiguous about problems that may arise while playing under the rules of NHL Hockey.\textsuperscript{185}

In \textit{Mohney}, the Sixth Circuit also concluded that the plaintiffs could not invalidate the exculpatory agreement by claiming lack of

\begin{footnotesize}
\textsuperscript{179} See id.
\textsuperscript{180} See id. (noting exculpatory agreement applied to pre-season and post-season events for the hockey league).
\textsuperscript{181} Bell, \textit{supra} note 63, at 239. For a further discussion of the enforceability of exculpatory agreements, see \textit{supra} notes 71-127 and accompanying text.
\textsuperscript{182} See Anderson v. Eby, 998 F.2d 858, 865 (10th Cir. 1993) (holding that meaning of ambiguous contract terms is issue of fact to be determined in same way as other factual issues under dispute); Fasules v. D.D.B. Needham Worldwide, Inc., No. 89-1078, 1989 U.S. Dist. LEXIS 10573, at *15-16 (N.D. Ill. Sept. 7, 1989) (holding failure to warn and make plaintiff aware of risks of whitewater rafting at time agreement was signed rendered ambiguous exculpatory agreement unenforceable); Bell, \textit{supra} note 63, at 239 (noting exculpatory agreement should explicitly state types of activities encompassed).
\textsuperscript{183} See \textit{Mohney}, 2001 U.S. App. LEXIS 3584, at *6 (explaining that plaintiffs agreed to abide by rules of USA Hockey, not rules of NHL Hockey).
\textsuperscript{184} See Riffer, \textit{supra} note 3, § 10.01, at 516 n.12 (noting exculpatory agreement must be written in clear and understandable words).
\textsuperscript{185} See Anderson, 998 F.2d at 865 (holding that meaning of ambiguous contract terms is issue of fact to be determined in same way as other factual issues under dispute); Ghionis v. Deer Valley Resort Co., Ltd., 899 F. Supp. 789, 793-94 (C.D. Utah 1993) (holding scope and language of ski resort exculpatory agreement ambiguous); Fasules, 1989 U.S. Dist. LEXIS 10573, at *15-16 (holding ambiguous whitewater rafting exculpatory agreement unenforceable).

The injured plaintiff agreed "to abide by the rules of USA Hockey as currently published." \textit{Mohney}, 2001 U.S. App. LEXIS 3584, at *6. When the plaintiff was injured, the rules of NHL Hockey were in place; however, the release was silent as to the applicability of these rules. See id.
\end{footnotesize}
understanding of the release's contents. The Sixth Circuit stressed that a person who signs a contract without making an attempt to understand its contents cannot avoid the later effect of the contract. Even if the plaintiffs clearly understood the effects of the release when signed, they still would not have known the effects of the release involving NHL Hockey rules, instead of the USA Hockey rules that were clearly mentioned in the release. As a result, it is difficult to presume the plaintiff understood the contract that was silent on the applicability of NHL Hockey rules.

Finally, the Sixth Circuit found that the validity of the exculpatory agreement was unaffected by the possible violation of a USA Hockey rule. The Sixth Circuit found that the validity of the release did not depend on an infraction of the USA Hockey rules, but instead focused on whether the risk of slamming into the boards and suffering injury was reasonably anticipated. From this argument, the court appears to be focusing on whether a penalty, as defined by the rules of USA Hockey, should have been called on the play that injured plaintiff. Such a focus, however, is unnecessary because the play that injured the plaintiff involved an entirely different icing rule under the rules of NHL Hockey. The validity of the release should not turn on whether there was an infraction of the USA Hockey rules, but rather whether the plaintiff assumed the risk of an entirely different set of rules. Slamming into the boards may be a regular occurrence in hockey, but slamming into the boards under touch icing rules in an amateur hockey game is

186. See Mohney, 2001 U.S. App. LEXIS 3584, at *18 (noting plaintiffs later claimed to not understand terms of contract signed).


188. See Fasules, 1989 U.S. Dist. LEXIS 10573, at *14-16 (holding exculpatory agreement unenforceable because of its failure to mention risks involved in whitewater rafting).

189. See id. (illustrating importance of person knowing risks involved before enforcement of exculpatory agreement).


191. See id. at *18-19 (relying on Thompson v. McNeill, 559 N.E.2d 705, 708 (Ohio 1990)).

192. See Mohney v. USA Hockey, Inc., 77 F. Supp. 2d 859, 876 (N.D. Ohio 1999) (determining court not qualified to determine whether penalty should have been called).


194. See Fasules, 1989 U.S. Dist. LEXIS 10573, at *15-16 (holding failure to make participant aware of risks involved in whitewater rafting rendered ambiguous exculpatory agreement unenforceable).
not a regular occurrence because amateur hockey games are played under automatic icing rules.\(^{195}\)

2. **Enforceability of Exculpatory Agreements Against Minors**

The Sixth Circuit concluded that parents have the authority to bind their minor children to exculpatory agreements.\(^{196}\) Ohio has taken the minority position that parents are capable of waiving a minor’s claim with an exculpatory agreement.\(^{197}\) The majority of jurisdictions have abided by the established rule that minors cannot waive their rights even if the exculpatory agreement is clear and unambiguous.\(^{198}\) Ohio’s delineation from this established rule is unfounded and unnecessary.\(^{199}\)

*Mohney* is almost identical to *Santangelo v. New York*, in which a minor at an ice hockey clinic was injured.\(^{200}\) However, the *Santangelo* court refused to enforce the release signed by the minor’s father that exempted the city and hockey league from liability for the minor’s injuries.\(^{201}\) The Sixth Circuit’s enforcement of the exculpatory agreement in *Mohney* is clearly against settled law in which parents have no authority to release a cause of action belonging to their child.\(^{202}\)

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195. See *Mohney*, 2001 U.S. App. LEXIS 3584, at *17; see also USA Hockey Rules R. 65(a).


197. See Smith, supra note 104, at 716. But see Riffer, supra note 3, § 10.03, at 523 (indicating jurisdictions nearly unanimous in holding that parent’s signing of exculpatory agreement on behalf of child does not prevent child from suing).

198. See Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11 (Wash. 1992) (holding exculpatory agreement unenforceable against minor who was advanced skier); Childress v. Madison County, 777 S.W.2d 1, 8 (Tenn. Ct. App. 1989) (holding exculpatory agreement signed by mother waived her rights, but not the minor’s rights); Doyle v. Bowdoin Coll., 403 A.2d 1204, 1209 (Me. 1979) (holding release signed by parent of floor hockey player unenforceable because parent cannot waive rights of minor).

199. See *Champion*, supra note 44, § 11.5, at 213-14 (noting contracts with minors are voidable unless they involve necessities of life).


201. See *id.* (noting release unenforceable against minor despite fact that parent signed release on minor’s behalf).

202. See *Baley & Matthews*, supra note 42, at 56 (noting under traditional rule of contract, neither child nor parent of child can waive rights of child).
3. *Exculpatory Agreement Contrary to Public Policy*

The Sixth Circuit did not address whether the exculpatory agreement was invalid as against public policy.203 Although the circuit court failed to address this issue, the district court held that the exculpatory agreement was not contrary to public policy.204 The circuit court's failure to consider the public policy argument is unsubstantiated.205

The notion of public policy is a "principle of law which declares that no one may lawfully do that which has a tendency to be injurious to the public welfare."206 As the plaintiffs argued in Mohney, USA Hockey is the national governing body for amateur ice hockey and should be held accountable for its actions.207 Allowing the national governing body of ice hockey to escape liability for negligent behavior would clearly be injurious to the public welfare.208 A large, national organization that spans across the entire United States should not be able to escape liability for its negligent creation of unsafe conditions.209 Such a national governing body should be held to the utmost standards of safety to ensure that junior hockey players do not encounter greater risks of injury.210

The Washington Supreme Court's findings prove influential and analogous to Mohney in dealing with exculpatory agreements

204. See Mohney v. USA Hockey, Inc., 77 F. Supp. 2d 859, 875 (N.D. Ohio 1999) (relying on Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 205 (Ohio 1998), holding exculpatory agreement signed by minor's parent bars later suit suing non-profit sports organization for injuries); see also Smith, supra note 104, at 713 (explaining Zivich court wrongly focused on whether public policy justified enforcement of release instead of whether release was void as matter of public policy).
205. See Smith, supra note 104, at 712 (noting public policy has been focal point in determining validity of exculpatory agreements).
206. Bell, supra note 63, at 240. For a further discussion of the public policy implications of exculpatory agreements, see supra notes 115-25 and accompanying text.
207. See Mohney, 77 F. Supp. 2d at 875. At the trial court level, the plaintiffs argued that the Ohio Supreme Court's decision in Zivich should not support a holding in which USA Hockey is released from liability because USA Hockey has a statutory duty to encourage the active dissemination of information in sports safety. See id.
209. See Mohney, 77 F. Supp. 2d at 875. The plaintiffs attempted to distinguish the national governing body status of USA Hockey from the small, local soccer club in Zivich. See id.
210. See id. USA Hockey has "a statutory duty to encourage the dissemination of information in the area of sports safety" under 36 U.S.C. § 392(a)(9). Id.
and public policy. In *Wagenblast*, the Washington Supreme Court held that releases relieving school districts from future negligence violated public policy. Similar to *Mohney*, the children in *Wagenblast* were required to execute the exculpatory agreement before they were allowed to participate in the interscholastic athletic program. Principles of fairness and increased safety proffer that the *Mohney* court should have at least considered the signed exculpatory agreement as being in violation of public policy.

VI. IMPACT

*Mohney* represents a case that could have drastic, negative effects on the safety of amateur athletics. Amateur athletes in all sports may now face a presumption that they assume the risks involved at the amateur level and the professional level of the sport. Professional sports are by their nature more dangerous, and rules are in place to reduce this danger at the amateur level. USA Hockey was aware that the automatic icing rule of amateur hockey would be safer than the more dangerous touch icing rule of professional hockey. Yet, in *Mohney*, an amateur hockey player was held to have expressly assumed the risk of injury as if he was a professional hockey player playing under NHL rules. Levi Mohney had never played a single professional hockey game in his life, but the Sixth Circuit found that he assumed the risk of injury as if he had played under NHL Hockey rules his entire life.

By finding the exculpatory agreement in *Mohney* valid, the Sixth Circuit is expanding the enforceability of these instruments contrary to public policy. Allowing the national governing body

211. See *Wagenblast*, 758 P.2d at 973 (holding exculpatory agreement relieving school district from liability for interscholastic athletics unenforceable).

212. See id. at 970 (noting court applied the six-factor *Tunkl* test in concluding exculpatory agreement violated public policy).

213. See id. at 969 (noting participation required parent and student to sign exculpatory agreements).


216. See *Mohney*, 77 F. Supp. 2d at 864 (noting touch icing prohibited below Junior B level hockey because of increased risk of player injury).

217. See id. (explaining Mohney only played under touch icing rule at two prior developmental camps and his only real familiarity with touch icing came from watching NHL Hockey games).

218. See id.

219. For a discussion of the public policy implications of exculpatory agreements, see *supra* notes 115-25 and accompanying text.
of amateur hockey to escape liability under a questionable exculpatory clause will not improve the safety of an already dangerous sport. Negligence could go unchecked among amateur sports where parents at least assume their children are being properly supervised and not being subjected to unnecessary dangers that are not inherent to the sport. Parents who drop their children off for practice may not feel as comfortable for their safety if the amateur league and its affiliates cannot be held accountable. Safety should be a primary concern for all of amateur athletics and allowing negligence to hide behind the guise of an exculpatory agreement does not promote a safer atmosphere for the nation’s youth.

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220. See Baley & Matthews, supra note 42, at 56 (noting exculpatory agreements provide little incentive for promoters to actively prevent negligence).

221. For a discussion of the inherent risk in sporting activities, see supra notes 60-70 and accompanying text.