Arena Liability *from page 2*

many, but forty-nine are not? Are five baseballs at a time too many, but four are not? Where that line is to be drawn simply begs the question.
Id. at 356-57, 637.

The Supreme Court of New Jersey also rejected plaintiff's argument that, as a first time attendee of hockey, she was entitled to an independent duty to warn her of the peril of pucks leaving the ice. The court held, instead, that the duty to warn is separate from the Limited Duty Rule and the court refused to impose a separate duty to warn of self evident risks in circumstances where an arena operator demonstrated compliance with the Limited Duty Rule.

Sciarrotta was a 4-3 decision of the Supreme Court of New Jersey. Under the minority opinion, the dissenting judges stated that the following warning, if posted at ticket booths and in the arena, would have caused them to vote with the majority and find the plaintiff's claims to be barred:

> DURING WARM-UPS AND HOCKEY GAMES, PUCKS AND OTHER ITEMS MAY FLY OFF THE ICE AND INTO THE STANDS. UNDER NEW JERSEY LAW, A HOCKEY RINK OPERATOR MUST PROVIDE A PROTECTED AREA FOR SPECTATORS WHO CHOOSE NOT TO BE EXPOSED TO SUCH RISKS. YOU HAVE A RIGHT TO ASK FOR SUCH PROTECTED SEATING, AND THE OPERATOR HAS A DUTY TO PROVIDE IT IF AVAILABLE. IF YOU DO NOT DO SO AND ARE INJURED, YOU WILL NOT BE ABLE TO RECOVER MONEY DAMAGES FROM THE OPERATOR.
> *Id.* at 362, 641.

While **Sciarrotta's** majority does not impose a duty to warn if the Limited Duty Rule is followed, it may be worth the practitioner's consideration, since only one judge voting with the minority would have meant the arena operator losing its summary judgment motion. ■

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Liability Releases and Waivers in North Carolina

By Rick Conner

Imagine this – you have front row seats to watch the Charlotte Bobcats play the Phoenix Suns. You have an unbeatable view of the action – so close that you are able to strike up a conversation with Gerald Wallace during warm-ups. The arena staff brings the food and beverage of your choice right to your courtside seat. Things can't get much better, until Shaquille O'Neal comes hurtling at you while chasing a loose ball. As Shaq pulls his 325-pound frame off of your flattened, beer-soaked body, you notice the waiver language on the back of your ticket and wonder – is that enforceable?

Most sports and recreational activities are accompanied by an inherent level of risk for participants, and sometimes for observers as well. Whether you are playing recreational league football with your buddies, carving turns down a snow-packed mountain, or sitting along the first base line at a minor league baseball game, there is often some risk that you may suffer an injury.

Where there is risk of injury, there is also the risk of a lawsuit by the injured person against participants, facility owners, or event organizers and promoters. Courts are often left with the difficult task of determining when the dangers that led to the injury exceed those which are normally accepted in the particular sport and rise to the level of actionable negligence.[1]

Owners, organizers, and promoters of sporting events and recreational activities often try to minimize their risk of liability for injuries to participants and observers through releases, waivers, and warnings. This article examines the circumstances under which courts, applying North Carolina law, have enforced liability releases and waivers in connection with sporting events and activities, and provides some practical suggestions to help you ensure that these releases and waivers will be upheld.

What's Up With the Small Print on the Back of my Lift Ticket?

Liability releases and waivers are being incorporated more and more often in a variety of settings and document types. For example, it is common to find releases and waivers:

- On the back of tickets to sporting events, or on lift tickets at ski slopes;
- Included in rental agreements for equipment such as snow skis, jet skis, or surfboards;
- Included in employment agreements for certain employees;
- In agreements signed prior to participation in guided excursions such as white

See LIABILITY RELEASES *page 4*

water rafting, rock climbing, parasailing or skydiving;

• Executed by competitors in an automobile race or sports league;

• Included in documents signed by sports fans as a condition of being given special access at sports facilities, such as pit passes at race tracks or sideline passes at football games.

In some circumstances, these releases and waivers can help owners and operators of sports facilities and excursions avoid liability for damages when participants or fans are injured.

Are Liability Releases and Waivers Enforceable in North Carolina?

Under North Carolina law, "a person may effectively bargain against liability for harm caused by his ordinary negligence in the performance of a legal duty."[2] Although North Carolina courts will strictly construe contracts that attempt to relieve a party of liability for damages caused by negligence,[3] courts will enforce such agreements unless they are "violative of a statute, gained through inequality of bargaining power, or contrary to a substantial public interest."[4]

Releases are contractual in nature and their interpretation is governed by the same rules governing the interpretation of contracts.[5] A release that is supported by consideration can operate to protect specifically named parties, and may also validly extend to "all other persons or entities" as well.[6] A release is binding unless procured by fraud, duress, or oppression,[7] or based on a mutual mistake.[8]

North Carolina courts have not specifically ruled on whether a release or waiver may bar a claim for gross negligence or willful or wanton conduct.[9] However, courts in other jurisdictions have generally held that prior releases of claims for gross negligence or willful or wanton conduct are void because they violate public policy.[10]

The release defense is an affirmative defense which must be specially pled, and on which the defendants have the burden of proof.[11] Where a plaintiff seeking recovery for personal injuries admits the execution of a release, the plaintiff has the burden to prove any matter in avoidance.[12]

The Public Interest Exception

The Supreme Court of North Carolina has held that "a party cannot protect himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty."[13] One federal district court, interpreting this statement, noted that other jurisdictions usually hold exculpatory clauses to be unenforceable "where the party relying on the exculpatory clause (a) is significantly regulated by public authority, (b) holds himself out to the public as willing to perform the sort of services subject to such regulation [and] (c) purports to be capable of performing those services in conformity with the standard of care established in the community …"[14] Another district court held that the public interest exception "applies only to entities or industries that are heavily regulated."[15]

The public interest exception has been applied by state and federal courts in North Carolina to prevent ski area operators[16] and motorcycle safety instructors[17] from limiting or escaping liability for their own negligence.[18] On the other hand, state and federal courts in North Carolina have held that the public interest exception would not prevent a release or waiver from protecting a company renting jet skis from a claim by an injured renter,[19] a track owner from a claim by an injured participant in a go-kart race,[20] or a race car driver from a claim by an injured NASCAR official.[21] A few of these decisions are discussed in more detail below to illustrate how state and federal courts in North Carolina have interpreted the public interest exception.

Bertotti v. Charlotte Motor Speedway, Inc.

In **Bertotti v. Charlotte Motor Speedway, Inc.,**[22] the United States District Court for the Western District of North Carolina held that a release signed by a go-kart driver prior to a race barred the driver from suing the racetrack owner for negligence after he was injured in a crash. There was no dispute that the driver saw and signed two separate release agreements, though he claimed that he did not read the release agreements before he signed them.[23] The court noted, however, that under North Carolina law, "a party's failure to actually read a contract before signing it does not make the agreement unenforceable unless there is some evidence of mutual mistake, fraud, or oppression."[24]

The plaintiff argued that the releases should be invalidated under the public interest exception, noting that the speedway entered into a joint venture with the State of North Carolina to build an interstate interchange near the speedway, and that the speedway was designated as a special recreational district by statute so it could obtain special permits for the sale of alcohol.[25] The court rejected the plaintiff's contention, holding that the public interest exception applies only to "heavily regulated" industries and noting that North Carolina does not regulate the racing industry or the amateur go-kart racing industry.[26] The court recognized that other jurisdictions have similarly held that "exculpatory contracts entered in connection with motor sports do not violate public policy because such contracts do not involve public interests."[27]

The North Carolina Court of Appeals recently endorsed the Bertotti decision in an unpublished opinion, and held that a race car driver was protected from a personal injury claim filed by a NASCAR official because the official had signed releases in his Membership and License Application, a "race night release," and his "Pit Pass."[28]

Strawbridge v. Sugar Mountain Resort, Inc.

In **Strawbridge v. Sugar Mountain Resort, Inc.**, the Western District of North Carolina held that a ski area operator was not protected from a negligence claim by an injured skier, despite a liability release on the back of the skier's lift ticket and a release in the equipment rental agreement signed by the skier.[29] With regard to the equipment rental agreement, the court noted that the agreement released the resort from liability "related to" and "resulting from … the use of this equipment."[30] Strictly construing the liability release, the court found that this language only barred suits arising out of injuries caused by the equipment, and held that the skier's claim was not barred by this release because he alleged that his injuries were

caused by a bare spot on the slopes and not by the equipment he rented.[31]

As for the waiver on the back of the skier's lift ticket, the court said that the writing (which stated that the user agrees to "assume all risk of personal injury as a result of all the inherent risks of skiing," including "bare spots") would bar the skier from suing the resort for the injury he suffered, if not for the application of the public interest exception and the impact of a North Carolina statute.[32] The court said that enforcing the exculpatory terms on the back of the lift ticket would violate N.C. Gen. Stat. § 99C-2, which "imposes on ski area operators the duty '[n]ot to engage willfully or negligently in any type of conduct that contributes to or causes injury to another person or his properties.'"[33] The court also held that the exculpatory clause was voided by the public interest exception, although it noted that "this case presents a very close question."[34] "[S]kiing presents numerous risks to participants which has led the General Assembly to enact legislation regulating the operation of ski slopes," the court noted.[35] Although the court recognized that the skiing regulations were not as extensive as those regulating cosmetology,[36] it said that it would not "draw arbitrary lines regarding how much legislation constitutes 'heavy regulation' under North Carolina law."[37]

Waggoner v. Nags Head Water Sports, Inc.

In **Waggoner v. Nags Head Water Sports, Inc.**,[38] the Fourth Circuit held that a woman who was injured while riding a rented jet ski was barred from asserting a negligence claim against the company that rented the jet ski due to a waiver she signed in the rental agreement. The court said that her release of "all claims" and "all liability for damages, losses or injuries that may arise from [her] use of the craft" included her negligence claim.[39]

The court also found that the public interest exception did not apply to prevent enforcement of the release, noting that North Carolina's Boating Safety Act "deal[s] almost exclusively with the operation of water craft and do[es] not address the duties owed by one who rents such craft for recreational use."[40] "North Carolina courts have not held that recreational boat renting, as opposed to the services of a common carrier, is sufficiently important to justify such an imposition on the freedom of contract."[41]

The Fourth Circuit also rejected the plaintiff's argument that the release should not be enforced because it was an adhesion contract and she suffered from an inequality of bargaining power. Although the plaintiff could not negotiate the terms of the contract, and had to either sign the exculpatory clause or decline to rent the jet ski, the court said that the inequality in bargaining power was "more apparent than real," and was no different from "that which exists in any other case in which a potential seller is the only supplier of the particular article or service desired."[42] "Only where 'it is necessary for [the plaintiff] to enter into the contract to obtain something of importance to him which for all practical purposes is not obtainable elsewhere' will 'unequal bargaining power' void an exculpatory clause."[43]

Tips for Making Releases and Waivers Enforceable

1. Avoid ambiguity.

Remember that releases and waivers are not favored by courts and will be strictly construed against the party seeking to enforce them. Be as specific and as inclusive as possible about what types of claims the release is intended to cover, and what persons or entities the release is intended to protect. For example, the release in **Waggoner** provided that the jet ski renter "assume[s] all risk of accident or damages to her person … which may be incurred from or connected in any manner with [her] use, operation or rental of the craft," and that she released the rental company from "all claims, demand, actions, cause of action, and from all liability for damages, losses or injuries that may arise from [her] use of the craft."[44] The release in **Brown v. Robbins** specifically released vehicle owners, drivers, and others connected with the race from negligence claims by the plaintiff.[45] It is always a good idea to specifically mention that the release is intended to cover claims of negligence.

2. Make the release language conspicuous.

Do not bury the release language in the middle of a paragraph or in small print. Instead, draw attention to the language by making it conspicuous and obvious through the use of bold, underlined, or capitalized lettering. For example, in **Waggoner**, the court noted that the waiver signed by the plaintiff was titled, in all capital letters, "WAIVER AND ASSUMPTION OF RISKS."[46] The plaintiff's attention was drawn to this clause as illustrated by the facts that she had to write her name in the first sentence of the clause and that she signed the document immediately below the clause."[47]

3. Include a parent's signature and indemnification language for minors.

Because a minor lacks the legal capacity to form a binding contract,[48] a release executed by a minor is not enforceable. Many courts have also held that a parent or guardian cannot release a child's cause of action without court approval.[49] Other options may be available to avoid liability in such situations, such as asking the parents of the minor sign a covenant not to sue the host facility or enterprise on behalf of themselves, and to agree to indemnify and hold harmless the host facility or enterprise if the minor should bring a personal injury lawsuit against it, as this could deter legal action in the event of injury. North Carolina courts have not ruled on the enforceability of such an arrangement, however.

4. Get the release signed up front.

Have the participant sign the release prior to admission or commencement of the activity, so that you will have a stronger argument that his or her admission or participation is the consideration for the release. It is also a good idea to expressly recite in the language of the release that the participant's admission or participation is his or her consideration for executing the release. Encourage the participant to read the release and give him or her plenty of time to do so, to lessen the risk that the participant will argue that he or she signed the release based on fraud or duress.

5. Be careful not to waive your release rights.

A valid and enforceable release can be waived by a host facility or enterprise if it is found to have "intentionally relinquish[ed] a known right, advantage, or benefit."[50] "[S]uch intention to waive may be expressed or implied from acts or conduct naturally leading the other party to believe that the right has been relinquished."[51] In **Johnson v. Dunlap**, the North Carolina Court of Appeals found that the defendants waived their rights to enforce a pre-race release signed by a driver who was hit by a vehicle in the pit area when they visited the plaintiff at the hospital after the incident and had him sign a new release in exchange for a payment of $1,500.[52] The court also held that it was

See LIABILITY RELEASES *page 6*

Liability Releases from page 5

error for the trial court to grant judgment notwithstanding the verdict to defendants on the basis of the second release, as there was ample evidence to show that the plaintiff was not mentally competent at the time he signed the second release due to his hospitalization and the pain medication he was taking at the time.[53]

If your sport is not subject to the public interest exception or otherwise "heavily regulated" by the State of North Carolina, making liability releases and waivers a part of your standard practices and procedures may prove valuable in helping to minimize the risks you face from injuries to participants and observers. ■

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End Notes

1. The focus of this article is on releases and waivers in connection with dangers relating to the actual sporting activities. It does not cover other potential liabilities that host facilities and enterprises may face, such as premises liability or dram shop liability.

2. **Strawbridge v. Sugar Mountain Resort, Inc.**, 320 F. Supp.2d 425, 432 (W.D.N.C. 2004) (quoting **Hall v. Sinclair Refining Co.**, 242 N.C. 707, 709, 89 S.E.2d 396, 397 (1955)).

3. *Id.*

4. *Id.* (quoting **Waggoner v. Nags Head Water Sports**, No. 97-1394, 1998 WL 163811, *7 (4th Cir. April 6, 1998))

5. **Chemimetals Processing, Inc. v. Schrimsher**, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2004).

6. **Best v. Ford Motor Co.**, 148 N.C. App. 42, 45, 557 S.E.2d 163, 165 (2001).

7. **Pass v. McClaren Rubber Co.**, 198 N.C. 123, 150 S.E.2d 709, 711 (1929).

8. **Van Keuren v. Little**, 165 N.C. App. 244, 247, 598 S.E.2d 168, 170 (2004).

9. *See, e.g.*, **Bertotti v. Charlotte Motor Speedway, Inc.**, 893 F. Supp. 565, 569 (W.D.N.C. 1995) (noting that North Carolina courts have not addressed the issue and declining to do so, since plaintiff did not introduce evidence sufficient to establish gross negligence).

10. *See* **Waggoner**, 1998 WL 163811 at *4 (noting that courts have generally held that public policy forbids waiver of a claim for gross negligence); Walter T. Champion, Jr., *Fundamentals of Sports Law* § 8:3 (2007).

11. **Alston v. Monk**, 92 N.C. App. 59. 63, 373 S.E.2d 463, 466 (1988).

12. **Caudill v. Chatham Mfg. Co.**, 258 N.C. 99, 102, 128 S.E.2d 128, 130 (1962).

13. **Hall v. Sinclair Ref. Co.**, 242 N.C. 707, 710, 89 S.E.2d 396, 398 (1955).

14. **Tatham v. Hoke**, 469 F. Supp. 914, 918 (W.D.N.C. 1979).

15. **Bertotti v. Charlotte Motor Speedway, Inc.**, 893 F. Supp. 565, 569 (W.D.N.C. 1995).

16. **Strawbridge**, 320 F. Supp.2d at 434 (holding that ski area operator was not protected by release and waiver on the back of skier's lift ticket because it would violate a North Carolina statute imposing duties on ski area operators, and run counter to the public interest).

17. **Fortson v. McClellan**, 131 N.C. App. 635, 508 S.E.2d 549 (1998) (noting the "extensive regulation of motorcycle use" and the "hazards to the public associated with motorcycle instruction").

18. *See* also **Alston**, 92 N.C. App. at 63-64, 373 S.E.2d at 466-67 (holding that cosmetology industry was sufficiently tied to public interest to prevent cosmetologists from escaping liability for their negligence, since cosmetology practice is extensively regulated by the General Assembly, and may affect the health of the general public); **Tatham v. Hoke**, 469 F. Supp. at 918 (noting that the public interest in and extensive regulation of doctors and abortion practice "is beyond question").

19. **Waggoner**, 1998 WL 163811 at *7 (noting that North Carolina statutes "do not address the duties owed by one who rents such craft for recreational use").

20. **Bertotti**, 893 F. Supp. at 569 (noting that "North Carolina does not regulate the racing industry generally, much less the amateur kart racing industry").

21. **Brown v. Robbins**, No. COA07-77, 2007 WL 3256866 (N.C. Ct. App. Nov. 6, 2007) (holding that driver that hit NASCAR official with his car during the race was protected by releases and waivers signed by official prior to the race, citing Bertotti for the proposition that racing is not "heavily regulated" and does not involve a public interest).

22. 893 F. Supp. 565 (W.D.N.C. 1995).

23. *Id.* at 568.

24. *Id.*

25. *Id.* at 568-569.

26. *Id.* at 569.

27. *Id.* at 566.

28. **Brown**, 2007 WL 3256866 at *3.

29. 320 F. Supp.2d 425 (W.D.N.C. 2004).

30. *Id.* at 432.

31. *Id.*

32. *Id.* at 432-433.

33. *Id.* at 433 (citing N.C. Gen. Stat. § 99C-2(c)(7)).

34. *Id.* at 434.

35. *Id.*

36. *See* note 18, *supra*.

37. *Id.*

38. No. 97-1394, 1998 WL 163811 (4th Cir. April 6, 1998).

39. *Id.* at *4.

40. *Id.* at *7.

41. *Id.* at *8.

42. *Id.* at *7 (citing **Gas House, Inc. v. Southern Bell Tel. and Tel. Co.**, 289 N.C. 175, 221 S.E.2d 499, 505 (1976), overruled on other grounds, **State ex rel. Utilities Comm'n v. Southern Bell Tel. and Tel. Co.**, 307 N.C. 541, 299 S.E.2d 763 (1983)).

43. *Id.* (quoting **Hall v. Sinclair Refining Co.**, 242 N.C. 707, 710, 89 S.E.2d 396, 398 (1955)).

44. **Waggoner**, 1998 WL 163811 at *3.

45. **Brown**, 2007 WL 3256866 at *3.

46. **Waggoner**, 1998 WL 163811 at *3.

47. *Id.*

48. **Creech ex. rel. Creech v. Melnik**, 147 N.C. App. 471, 556 S.E.2d 587 (2001).

49. Walter T. Champion, Jr., *Fundamentals of Sports Law* § 8:3 (2007) (citing **Doyle v. Bowdoin College**, 403 A.2d 1206 (Me. 1979). *See* generally Richard B. Malamud and John E. Karayan, *Contractual Waivers for Minors in Sports-Related Activities*, 2 Marq. Sports L.J. 151 (1992).

50. **Johnson v. Dunlap**, 53 N.C. App. 312, 316, 280 S.E.2d 759, 762 (1981).

51. *Id.*

52. *Id.*

53. *Id.* at 317, 280 S.E.2d at 763.