

PTA MAGIC SHOW WAIVER SIGNED BY MINOR & PARENT ENFORCEABLE, IF CLEAR

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Signed waivers of liability involving public entities are usually void as against public policy. As a result, most reported cases addressing the enforceability of waivers involve private entities. Further, waivers signed by children can be voided by the child because minors lack the legal capacity to enter into such agreements. In light of this, the *Hohe* case described herein is particularly interesting because the named defendant is a public entity, a school district, and the challenged waiver was signed by a minor and her parent.

In finding waivers for youth activities enforceable, the appeals court in *Hohe* acknowledged the importance of liability waivers to private volunteer groups providing public recreation opportunities. In this particular instance, the school district's mere sponsorship of the PTA magic show may not have involved sufficient control to impose liability upon the public entity itself. Control of the magic show and, therefore, any attendant liability was probably retained by the parent-teacher association, a private volunteer group.

Consequently, this situation is very different from an earlier case, *Wagonblast v. Odessa School District*, Report # 88-40, *Recreation and Parks Law Reporter*, Vol. V, no. 4, pp. 145-148 (1988), where the public entity itself required public school students and their parents to sign liability waivers as a prerequisite to participation in interscholastic sports. In *Wagonblast*, the court applied the same general criteria applied by courts in most jurisdictions, including the *Hohe* court, to determine whether the challenged waivers were void as against public policy. The *Wagonblast* court correctly reasoned that interscholastic sports were an integral part of the public school curriculum and, therefore, a right of every student which could not be conditioned by the public entity's requiring execution of a liability waiver.

By contrast, the *Hohe* court found the challenged waiver released liability for a magic show sponsored by private volunteers. Since it was a private, voluntary action, the court concluded that this particular waiver was not necessarily void as against public policy. Although the waiver was not void as against public policy, the court found however that the ambiguity in this particular waiver presented a jury issue regarding enforceability.

Do You Believe in Magic

In the case of *Hohe v. San Diego Unified School District*, 224 Cal.App.3d 1559, 274 Cal.Rptr. 647 (1990), plaintiff Sarah Hohe alleged that she was injured during a school activity sponsored by defendants San Diego Unified School District (School District) and the Mission Bay High School Parent, Teacher, and Student Association (PTSA). The facts of the case were as follows:

Hohe, a 15-year-old junior at Mission Bay High School in San Diego, was injured during a campus hypnotism show sponsored by the PTSA as a fund-raiser for the senior class. Hypnotism shows had been held annually since 1980.

Hohe was one of 18 or 20 subjects selected at random from a group of many volunteers. Her participation in the "Magic of the Mind Show" was conditioned on

signing two release forms. Hohe's father signed a form entitled "Mission Bay High School PTSA Presents Dr. Karl Santo." Hohe and her father both signed a form entitled "KARL SANTO HYPNOTIST".

The release form read as follows: "CAUTION: Children with any mental disorder or of a nervous disposition are not allowed to participate. A portion of the program occasionally contains adult theme; parental discretion is advised..."

"My son/daughter Sarah Hohe, grade 11 has my permission to be hypnotized by Dr. Karl Santo during his program at Mission Bay High School. I waive all liability against the PTSA, its members, Mission Bay High School, and the San Diego Unified School District.

"I agree to indemnify and hold you and any third parties harmless from any and all liability, loss or damage (including reasonable attorney fees) caused by or arising in any manner from my participation in the Magic of the Mind Show including any utterances made by me during the above named show or material furnished by me in connection with my participation in the show. I am solely responsible for my appearance in the show and for any loss to any party arising therefrom.

"I acknowledge that I am not receiving any compensation from my participation or the above authorization; and that you are relying on the above understandings in your use and broadcasting of my participation and in the production and promotion of the Magic of the Mind Show."

Hohe saw the prior year's hypnotism show. She explained to her father that it would be fun, the show was popular and discussed at least one previous stunt where a subject was suspended between two objects while another person stood on the subject's stomach. She also said people sang.

During the course of the show, Hohe slid from her chair and also fell to the floor about six times.

The trial court granted summary judgment in favor of defendants School District and PTSA. According to the trial court, "the releases signed by Hohe and Steven Hohe on his daughter's behalf barred her personal injury lawsuit." Hohe appealed.

On appeal, Hohe contended that "the [trial] court erred because the releases are contrary to public policy," and "unenforceable because of her minority". In addition, Hohe argued that "the written release did not clearly notify her or her parent of its effect." The appeals court rejected Hohe's argument that "the releases she and her father signed are contrary to public policy." In so doing, the appeals court described the following factors which determine whether or not a release is against public policy.

No public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.

An attempted but invalid exemption from liability involves a transaction which exhibits

some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

Applying these principles to the facts of this particular case, the appeals court found the release at issue did not violate public policy.

Hohe volunteered to be part of a PTSA activity because it would be "fun." There was no essential service or good being withheld by PTSA. Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing -- victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.

The appeals court also addressed Hohe's argument that "the release from liability cannot be enforced against her because she is a minor."

The permission and waiver forms were signed on her behalf by her parent. Hohe also signed one of the release documents.

It is true, with certain limited exceptions, a minor can disaffirm his or her contract. Civil Code section 35 provides, in relevant part, "the contract of a minor may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards" The purpose of Civil Code section 35 is to protect the minor from his own improvidence. It is often said, "he who affirmatively deals with a minor, does so at his peril." However, the releases signed here were signed on Hohe's behalf by her parent. A parent may contract on behalf of his or her children. Civil Code section 35 was not intended to affect contracts entered into by adults on behalf of their children.

As a result, the appeals court held that "Hohe cannot disaffirm the release based on her minority."

As stated by the appeals court, "[t]he more troublesome issue before us is the scope and effect of the release forms." Hohe had argued that "the executed forms do not clearly and unequivocally release School District and PTSA from liability for negligence." The appeals court agreed that an effective release must be clear and unequivocal in its terms.

To be effective, an agreement which purports to release, indemnify or exculpate the

party who prepared it from liability for that party's own negligence or tortious conduct must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement..

A valid release must be simple enough for a layman to understand and additionally give notice of its import. A draftsman of such a release faces two difficult choices. His Scylla [i.e., a mythical monster rock] is the sin of oversimplification and his Charybdis [i.e., a mythical whirlpool] a whirlpool of convoluted language which purports to give notice of everything but as a practical matter buries its message in minutia.

A line of cases exists suggesting a release to be effective against "active" negligence must specifically refer to "negligence" in the language of the contract. In other words, a general release will not protect a party from liability unless the negligent acts are ones of nonfeasance or "passive" negligence.

However, an analysis based on the "active-passive dichotomy" or on the absence or presence of a specific reference to "negligence" is not dispositive. It is manifest that it is the intent of the parties which the court seeks to ascertain and make effective. Where the circumstances of the claimed wrongful conduct dictate that damages resulting therefrom were intended to be dealt with in the agreement, there is no room for construction of the agreement. It speaks for itself. Whether a release bars recovery against a negligent party turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control.

Consequently, the issue to be addressed by the appeals court was "whether the release and waiver language in the documents signed by Hohe and her father exculpates PTSA and School District from the consequences of its own breach of duty." Applying the above stated principles to the facts of this case, the appeals court found that "the intention as expressed in the releases signed by the parent for his child is not clear."

The permission form signed by Steven Hohe "waived all liability against PTSA, its members, Mission Bay High School, and the San Diego Unified School District." The form began with precautionary language stating children with mental disorders or of a nervous disposition were not allowed to participate. The parent was advised to exercise parental discretion because the anticipated program might contain an adult theme. The additional form signed by both Hohe and her father stated "I agree to indemnify and hold you and any third parties harmless from any and all liability, loss or damage (including reasonable attorney fees) caused by or arising in any manner from my participation in the Magic of the Mind Show" This second document signed at the same time as the permission form granted Karl Santo the authority to broadcast and record Hohe's performance and to use her name and likeness for promotional purposes. It also specifically indemnified Santo from any liability due to Hohe's utterances while participating in the show.

The permission form signed by Hohe's father and the additional indemnification and "hold harmless" form signed by both Hohe and her father are general releases. There is no language which specifically speaks to a release from liability for negligence. Nor is

there any language which specifically alerts the parent his child is barred from a recovery based on her bodily injury. It is true, to require that an express indemnity clause be cast in a rote form is to compel contracting parties to lie upon a Procrustean bed of linguistic formalism [i.e., a ruthless disregard of individual differences and special circumstances] that inhibits the clear meaning of plain English. Our analysis is not based on the mechanical application of some formula. The presence or absence of the words "negligence" or "bodily injury" is not dispositive. We look instead to the intention of the parties as it appears in the release forms before the court... Although the parent waived all liability it was in the context of two documents which focused on mental and nervous disorders, defamation and broadcast rights.

As a result, the appeals court concluded that "[t]he scope of the waiver is ambiguous."

Where the intention of the parties on the face of the releases is ambiguous, a triable factual issue is presented. Any doubts as to the propriety of granting the motion for summary judgment should be resolved in favor of the party opposing the motion [i.e., Hohe]. We are mindful of the salutary purposes sometimes served by releases in diminishing the risk of litigation to groups and entities sponsoring student and recreational activities. However, we cannot say the release documents signed by Hohe and her parent bar recovery for her personal injuries as a matter of law.

Accordingly, the appeals court reversed the summary judgment of the trial court in favor of defendants. This case would, therefore, proceed to trial in which a jury would consider the alleged ambiguity and whether the release of liability signed by Hohe and her father was enforceable.