Waivers or release of liability forms used in many recreational settings are contracts. Such contracts are referred to in the law as exculpatory agreements. In such agreements, the recreational user agrees to waive any legal claim for future injuries caused by the ordinary negligence of the leisure service provider. However, in a valid waiver, the recreational user does not waive any claim for gross negligence. Consequently, a valid waiver effectively lowers the applicable standard of care owed the recreational user from ordinary negligence to gross negligence. While mere carelessness or a momentary oversight may constitute ordinary negligence, gross negligence requires much more outrageous misconduct demonstrating an utter disregard for the physical well being of others.

Like any contract, valid exculpatory agreements involve an exchange of promises or performance by the parties involved. Specifically, the recreational user, if injured, promises not to bring a claim for ordinary negligence against the provider of recreational land or services. In exchange for this promise to waive any prospective claim for ordinary negligence, the recreational user is then provided with an opportunity to participate in a given activity.

In almost every instance, these agreements are held to be void as against public policy when they involve public agencies. In public recreation, the citizen's opportunity to participate cannot be conditioned on the execution of a waiver form. If the applicable standard of care in public recreation is to be lowered from ordinary negligence to gross negligence, it must be through the legislative process, not waiver form requirements imposed by individual public agencies.

In addition, waiver of liability forms are not necessarily binding when signed by children and/or parents on behalf of their children.

As a general rule, children lack the legal capacity to enter into binding contracts, including exculpatory agreements. Further, parents cannot contract away the legal rights of the child to sue for ordinary negligence by executing an exculpatory agreement on behalf of the child. To the best of my knowledge, the Simmons case described herein is the latest reported court decision which grappled with this issue.

CHILD MAY CANCEL WAIVER?

In the case of *Simmons v. Parkette National Gymnastic Training Center*; 670 F.Supp. 140 (E.D.Pa. 1987), plaintiff Tara Simmons alleged that she was injured "as a result of the negligent acts, and/or omissions" on the part of defendant Parkette National Gymnastic Training Center (Parkette). Parkette responded that the following release signed by Simmons and her mother, Sharon Grenell,
precluded any liability.

In consideration of my participation in Parkettes, I, intending to be legally bound, do hereby, for myself, my heirs, executors, and administrators, waive and release any and all rights and claims for damages which I may hereafter accrue to me against the United States Gymnastic Federation, the Parkette National Gymnastic Team, their officers, representatives, successors, and/or assigns for any and all damages which may be sustained and suffered by me in connection with my association with the above gymnastic, or which may arise out of my traveling to or participating in and returning from any activity associated with the program.

As described by the federal district court, this particular release was "prospective in nature, i.e., it purports to exculpate the defendants from future liability, as opposed to a release compromising and settling an already existing claim for damages." According to the court, this type of exculpatory agreement is valid if it meets the following requirements:

(a) it does not contravene any policy of the law, that is, if it is not a matter of interest to the public or State; (b) the contract is between persons relating entirely to their own private affairs; (c) each party is a free bargaining agent and the agreement is not in effect a mere contract of adhesion, whereby one party simply adheres to a document which he is powerless to alter having no alternative other than to reject the transaction entirely.

Assuming an exculpatory agreement meets these requirements, the court would apply the following standards in determining the enforceability of the release.

(1) contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law; (2) such, contracts must spell out the intentions of the parties with the greatest of particularity; and show the intent to release from liability beyond doubt by express stipulation and no inference from words of general import can establish it; (3) such contracts must be construed with every intendment against the party who seeks the immunity from liability; (4) the burden to establish immunity from liability is upon the party who asserts such immunity.

The court acknowledged that, under Pennsylvania law, "a valid release is an absolute bar to recovery for everything included in the release." In addition, the court noted that a valid release "can only be set aside as any contract in the presence of clear, precise, and indubitable evidence of fraud, accidental means or incompetence of the party who is alleged to have signed it." Under, state law, the court found further that "personal injuries to a minor gives rise to two separate and distinct causes of action, one the parents' claim for medical expenses and loss of the minor's services during minority [i.e., before age 18], the other the minor's claim for pain and suffering and for the losses after minority [i.e., after age 18]."
In considering the effect of the release on the parent's claim, the court found that "her cause of action is indeed barred by the exculpatory agreement she signed."

She [Sharon Grenell] does not argue and has presented no evidence that the release was the product of fraud, duress, incompetence or other factors which would invalidate it. Further, the fact that her minor daughter has purported to disaffirm the release has no effect on her own, personal claim for damages.

The court then considered the "somewhat more difficult question" of the effect of the exculpatory agreement on Tara Simmons' claim for damages.

It is hornbook [i.e., rudimentary] contract law that a minor, with certain exceptions, is not competent to enter into a "valid" contract. Where a minor executes a contract, however, the agreement is not "void," but rather, "voidable." After reaching the age of majority, the minor may disaffirm the contract rendering it a nullity. [According to the court, Simmons, as a minor, "need not wait until she attains the age of majority to disaffirm the exculpatory agreement involved." ] An exculpatory agreement such as that involved herein is simply a specific type of contract. Syllogistically [i.e., a reasonable conclusion], therefore, one would assume that the minor plaintiff may nullify the release by disaffirming it and, apparently in response to Parkette’s motion [to dismiss her case] this is what she has purported to do ....

[Under Pennsylvania law, parents do] not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship, but, rather, could only release the defendants from any potential claims that the parents might assert.

Applying these principles to the facts of the case, the court found that "the mother of the minor plaintiff [Tara Simmons], by executing the release involved, did not exculpate Parkette from the potential claims that eventually accrued to her daughter and which she now seeks to assert before this court."

According to the court, the enforceability of this particular waiver form was further complicated by the fact that the minor plaintiff in this case herself executed the purported release in addition to her mother." As described by the Court, the specific issue was "whether a minor may disavow a prospective, exculpatory contract which he or she has 'signed.'" The court acknowledged that Pennsylvania follows the general legal principle that "minors may disaffirm their contracts." However, the court found an exception to this rule where "the minor had personally received part of the consideration paid therefor or had participated in its benefits." Parkette maintained that the "benefit" received by the minor, Tara Simmons, "in consideration for her execution of the release was Parkette's allowing her to participate in their organization." However, in the opinion on the court, this "benefit" exception applied to 'situations
involving a release executed by a minor as a compromise and settlement of an already existing claim [e.g., an out-of-court settlement for a personal injury claim]." Rather than an existing negligence claim, this particular release was prospective, waiving any cause of action for future injuries.

The common law rule that minors, with certain exceptions, may disaffirm their contracts has as its basis the public policy concern that minors should not be bound by mistakes resulting from their immaturity or the overbearance of unscrupulous adults. As stated by the Pennsylvania Supreme Court some years ago: "All lawyers know that the protection of infants [i.e., minors, non-adults] is one of the chief concerns of the law. The rule is that no one may deal with a minor, except for necessaries ....

[A]n infant may bind himself for his meat, drink, apparel ... and other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterward. This, generally speaking, has been accepted as the true doctrine. An infant is not competent to contract. This positive inhibition the way of the law to protect infants against their own lack of discretion and against the snares of designing persons."

Applying these principles to the facts of the case, the federal court concluded that the minor plaintiff was not bound under state law by the exculpatory motion to dismiss Tara Simmons' negligence claims based upon 'this release. However, given the potential impact of this opinion on recreation and youth sports programs, the federal district court granted immediate appeal of its decision to the United States Court of Appeals, Third Circuit, in Philadelphia.

[It] is this Court's experience that agreements such as that involved herein have become commonplace in our society with regard to organizations such as little league, scouting, midget football, and so on. Thus, we believe our decision represents an important one because of the impact it may have upon such organizations. We also believe that our decision as to the claim of the minor plaintiff involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from our order will materially advance the ultimate termination of this litigation. If our decision is affirmed by the Circuit Court, the action will merely be returned to this court for trial. If the Circuit Court disagrees with our decision and concludes that the minor plaintiff is bound by that agreement, the action will be at its end.

(NOTE: At the time this column was submitted for publication, the U.S. Court of Appeals had not yet ruled on the appeal of this decision.)