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### This is Not Sparta: The Extensive and Unknown Inherent Risks in Obstacle Racing

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# THIS IS NOT SPARTA: THE EXTENSIVE AND UNKNOWN INHERENT RISKS IN OBSTACLE RACING

## I. INTRODUCTION

As the first Spartan Race of 2016 commences, Jason shouts to the heavens, “I am Spartan! Aroo!”<sup>1</sup> To begin, Jason, who is running in his first ever Spartan Race, gets a solid head start into the woods. Suddenly, his legs start burning while attempting to run up and down uneven terrain. While running and feeling the burn, Jason sees other competitors breathing heavily because it looks like they did not properly train for the event. Out of the woods, Jason uses his entire body to climb over the first set of obstacles at an excellent pace.

After straining his arms by swinging and climbing on monkey bars and obstacles made of rope, Jason prepares for the Muddy Mayhem, the next obstacle of the Spartan Race. He slides into cold, muddy water and his body temperature drops exponentially. Jason is constantly tracking up muddy hills and falling face first into the mud. Finally, he finishes the Muddy Mayhem obstacle by climbing up a thirty-foot rope to ring a bell. He strains his shoulders while climbing up the rope, so he climbs back down slowly so he does not fall hard onto the Earth. Nevertheless, the race continues on.

The finishing touches to this intense race include: running on sharp rocks that could impale a person’s body, crawling under barbed wire through long tiers of mud, and jumping over an open pit of rising flames. Jason does not know about the obstacles he faces next, but as Jason looks on after completing the Muddy Mayhem, he questions himself about what other gruesome risks come with the rest of this obstacle race. Before the event that day, Jason signed a liability waiver expressing he understood the risks in the event and forfeited his ability to sue Spartan Race for any injuries that could result.<sup>2</sup> However, Jason puts those thoughts aside and pumps himself up so he can begin the final stretch of the race.

This Note scrutinizes how obstacle racing liability waivers should be inherently invalid because most competitors cannot expressly understand

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<sup>1</sup> See *Spartan Race 2015 Washington D.C.*, YOUTUBE (Aug. 2, 2015), <http://www.youtube.com/watch?v=2yC4OA3MCZ4> [<https://perma.cc/P72K-AQ3C>] (illustrating an example of the hypothetical Spartan Race by guiding the readers through a 2015 race that was held in Washington, D.C.). The story described in the introduction parallels the video of the 2015 Spartan Race; however, the recount of the video is the author’s sole description and interpretation.

<sup>2</sup> See *infra* Part II.B (specifying that sports providers distribute liability waivers for competitors to sign before competing in the particular sporting event).

all the inherent risks that may incur in obstacle races.<sup>3</sup> Competitors do not have the appropriate subjective understanding to appreciate all the inherent risks because they failed to properly train for the event.<sup>4</sup> While liability waivers list the inherent risks, competitors cannot mentally appreciate all the risks.<sup>5</sup> Because most of the competitors cannot mentally appreciate all the inherent dangers, the inherent risks and terminology in the liability waivers are considered ambiguous and not concise.<sup>6</sup>

First, Part II provides a brief history of obstacle racing, defines tort law doctrines in sports injury cases, and explores case law in Illinois, Michigan, and Florida regarding exculpatory clauses.<sup>7</sup> Next, Part III analyzes exculpatory clauses in Tough Mudder, Spartan Race, and Warrior Dash liability waivers and argues why obstacle-racing waivers should be inherently invalid.<sup>8</sup> Additionally, Part III proposes a generic exculpatory clause for obstacle racing waivers and explains why obstacle-racing providers should take the generic clause into consideration for the purpose of making inherent risk exculpatory clauses unambiguous.<sup>9</sup> Finally, Part IV concludes this Note by finding out if Jason crosses the finish line, and summarizes why these liability waivers should be invalid.<sup>10</sup>

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<sup>3</sup> See *infra* Part III (analyzing the terminology in obstacle racing liability waivers to argue that most competitors cannot fully comprehend and appreciate all of the risks in obstacle racing).

<sup>4</sup> See *infra* Part III.B (arguing that the high standard of training for intense physical activities are not achieved by most competitors so they cannot appreciate the risks within obstacle racing).

<sup>5</sup> See *infra* Part III (emphasizing that most competitors do not have sufficient knowledge to compete and take on the inherent risks because of the lack of experience and training to prepare themselves).

<sup>6</sup> See *infra* Part III.A (illustrating that the inherent risks in obstacle racing cannot be appreciated fully to agree to the liability waiver).

<sup>7</sup> See *infra* Part II (defining sports injury doctrines including: inherent risks, negligence, assumption of risk defenses, and exculpatory clauses within liability waivers).

<sup>8</sup> See *infra* Part III.A–B (referring to the inherent risks and legal doctrines to depict how the terminology regarding the inherent risks, in the exculpatory clauses, are ambiguous to competitors).

<sup>9</sup> See *infra* Part III.C (proposing a generic exculpatory clause that should be considered for obstacle racing providers to attribute further detail and explanation of the risks and harms involved for competitors to fully understand).

<sup>10</sup> See *infra* Part IV (concluding the arguments about how obstacle racing liability waivers should be inherently invalid because the inherent risk terminology is ambiguous to most competitors).

## II. BACKGROUND

The phenomenon of obstacle racing has taken sports by storm.<sup>11</sup> History has shown that obstacle racing has a strong lineage with training and improving the physiques of soldiers and warriors.<sup>12</sup> While history portrays the importance of physical capabilities and mentalities, people who are attracted to obstacle racing might not be physically and mentally trained to combat the obstacles.<sup>13</sup> First, Part II.A provides a history of obstacle racing, explains various obstacle injury cases, and shows similar concerns with other sporting activities.<sup>14</sup> Second, Part II.B discusses the different doctrines in sports injury cases.<sup>15</sup> Third, Part II.C differentiates case law regarding exculpatory clauses.<sup>16</sup> Finally, Part II.D provides examples of exculpatory clauses from obstacle racing liability waivers.<sup>17</sup>

A. *Impactful Growth and Problematic Concerns of Obstacle Racing*

Throughout history, the Romans and Greeks battled gruesome obstacle courses to improve their physiques.<sup>18</sup> In the twentieth century, George Herbert took exercises and arranged them into unique obstacles.<sup>19</sup>

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<sup>11</sup> See *infra* Part II.A (providing not only the increase and popularity of obstacle racing, but also the increase of legal issues regarding different series of injuries and deaths to competitors).

<sup>12</sup> See *infra* Part II (demonstrating how obstacles were introduced through different eras of our time from the Romans to the 1900s).

<sup>13</sup> See *infra* Part II.A (explaining the different occurrences where competitors were injured or killed while competing in an obstacle event).

<sup>14</sup> See *infra* Part II.A (illustrating the history of obstacle racing, exemplifying how obstacles began as a trend for improving physical physiques and have since been used in a competitive nature in today's society, and discussing the issues that have progressed through obstacle racing).

<sup>15</sup> See *infra* Part II.B (discussing the different doctrines of law regarding sports injury cases including: assumption of risk, negligence, and exculpatory clauses in liability waivers).

<sup>16</sup> See *infra* Part II.C (distinguishing various case law to understand how courts determine the validity of exculpatory clauses in liability waivers). For the purposes of this Note, the distinguishing case law will be from Illinois, Michigan, and Florida.

<sup>17</sup> See *infra* Part II.D (illustrating exculpatory clauses from Tough Mudder, Warrior Dash, and Spartan Race liability waivers involving the inherent risks in the events and the legal terminology imbedded in the clauses).

<sup>18</sup> See Margaret C. Keiper et al., Case Study, *The Legal Implications of Obstacle Racing and Suggested Risk Management Strategies*, 24 J. LEGAL ASPECTS SPORT 78, 78 (2014) (describing how obstacle racing has also been used for improving the physicality of soldiers in the military to make sure they are in excellent shape for serving). History has shown that obstacle racing can be used as an essential tool for enhancing youths' motor, cognitive, and emotional development. *Id.* at 78-79.

<sup>19</sup> See Brett McKay & Kate McKay, *The History of Obstacle Courses for Military Fitness, Sport, and All-Around Toughness*, FITNESS, HEALTH & SPORTS (Mar. 3, 2016), <http://www.artofmanliness.com/2015/09/10/the-history-of-obstacle-courses/> [<https://perma.cc/9SAU-7T3K>] (exemplifying that physical fitness became popular in the

In 1986, Billy Wilson introduced the first ever obstacle race, and since then, obstacle racing has attracted over 1.5 million competitors nationwide.<sup>20</sup> Currently, the biggest obstacle races are the Warrior Dash, Tough Mudder, and Spartan Race.<sup>21</sup> The Warrior Dash purports to be enjoyable, and competitors are encouraged to dress up, go through obstacles, and celebrate at the end.<sup>22</sup> In comparison, the Tough Mudder ranges from ten to twelve miles of obstacles with chilling waters, fire pits, and mechanisms that purposely electrocute competitors.<sup>23</sup> However, the Spartan Race is the global leader in obstacle racing.<sup>24</sup> While the Spartan Race includes fire, mud, water, and barbed wire, the purpose of the Spartan Race is to

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nineteenth century, and European soldiers would complete different workouts throughout different obstacles to keep in shape). Dr. Joseph E. Raycroft served as an advisor to the American Army and designed obstacles to strengthen a soldier's stamina and agility. *Id.* During the twentieth century, obstacle courses were used to train soldiers in World War I and II. *Id.*

<sup>20</sup> See Lauren Etter, Feature, *The Few, the Proud, the Extreme: Extreme Recreational Sports Are More Popular Than Ever, Bringing with Them Growing Numbers of Injuries and Deaths*, 100 A.B.A. J. 38, 41 (Jun. 2014) (evaluating statistics of how obstacle racing has increased since 2010 and how other functional fitness activities, like CrossFit, have increased in popularity too); Alexis Petridis, *Tough Guy Competition: An Extreme Fun Day out or an Expression of Masculinity in Crisis?*, GUARDIAN (July 19, 2013), <http://www.theguardian.com/sport/2013/jul/19/tough-guy-competition-obstacle-course> [<https://perma.cc/W5MX-H4WF>] (emphasizing that Billy Wilson has been named the father of "America's fastest growing sport" by *Outside* magazine).

<sup>21</sup> See Keiper et al., *supra* note 18, at 79 (showing that Spartan Race, Warrior Dash, and Tough Mudder combined made over \$50 million in 2012). From 2006 to 2010, the Outdoor Industry Association reported an eighty-five percent increase of extreme activity events for people to participate and compete in. *Id.* See also Dan England, *Obstacle Course Racing Goes Big Time!*, COMPETITOR (June 3, 2014), [http://running.competitor.com/2014/05/obstacle-racing-2/obstacle-course-racing-goes-big-time\\_103101](http://running.competitor.com/2014/05/obstacle-racing-2/obstacle-course-racing-goes-big-time_103101) [<https://perma.cc/6U3P-HQQQ>] (describing how Spartan Race strongly promotes competition, while Tough Mudder and Warrior Dash strongly promotes fun and excitement).

<sup>22</sup> See Keiper et al., *supra* note 18, at 79 (beginning in 2009, Warrior Dash had different obstacles added to the race including: Muddy Mayhem, Warrior Roast, and Giant Cliffhanger); *What Is Warrior Dash?*, WARRIOR DASH (Dec. 14, 2015), <https://www.warriordash.com/info/what-is-warrior-dash/> [<https://perma.cc/WHP7-6UEQ>] (stating that these are "obstacle race[s] that anyone can start and everyone can finish," and they are not taken too seriously).

<sup>23</sup> See Keiper et al., *supra* note 18, at 79–80 (explaining that participants pledge to put teamwork and camaraderie ahead of course time); *What is Tough Mudder?*, TOUGH MUDDER (Dec. 14, 2015), <https://toughmudder.com/events/what-is-tough-mudder?gclid=CMfyuqff3MkCFQEaaQodc4EACA> [<https://perma.cc/V7UZ-CX25>] (stating that the Mudder Pledge includes: understanding the event is not a race, but a challenge, understanding to help other Mudders throughout courses, and overcoming all fears).

<sup>24</sup> See Keiper et al., *supra* note 18, at 79 (stating that Joe DeSensa, the creator of Spartan Race, has been trying to make obstacle racing an Olympic sport); *Spartan Race*, SPARTAN (Dec. 14, 2015), <http://www.spartan.com/en> [<https://perma.cc/Z97V-SWA8>] (providing different links to workouts and nutrition plans to assist with preparation to compete in a Spartan Race).

challenge competitors.<sup>25</sup> Because of these obstacle races, the sport keeps increasing in popularity.<sup>26</sup>

The growing increase of popularity is producing deliberate, and sometimes fatal injuries to competitors.<sup>27</sup> Between 2009 and 2013, competitors became ill from contaminated mud, recorded multiple counts of hypothermia, and were injured by live electrical wires.<sup>28</sup> In a 2011 Warrior Dash, the Warrior Dash's emcee told James Sa to jump headfirst into a mud pit.<sup>29</sup> Sa complied and became paralyzed.<sup>30</sup> In a 2013 Tough Mudder, Avishek Sengupta died from drowning when he jumped off an obstacle called "Walk-the-Plank" after a competitor jumped on him in the

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<sup>25</sup> See Keiper et al., *supra* note 18, at 79 (providing that Spartan Race has events called "Death Race" where Spartan Race does not provide support in the event and the event goes on for as long as possible until the last person is standing). "Death Race" can go on for over seventy hours. *Id.* Spartan Race does not provide any support to the competitors because the purpose of "Death Race" is to make the competitors quit. *Id.*

<sup>26</sup> See *id.* at 80 (describing how more obstacle races have been created around the country and some companies have even created obstacles to put on the market for purchase). Substantially, a lot of sports providers are creating their own obstacle races due to the success Warrior Dash, Tough Mudder, and Spartan Race have received since their creation. *Id.*

<sup>27</sup> See *infra* Part II.A (describing the different concerns and problems that have developed in obstacle racing recently). The increase of popularity correlates with the increase of injuries and problems with obstacle racing. *Infra* Part II.A.

<sup>28</sup> See Keiper et al., *supra* note 18, at 80–81 (including more examples of deaths and injuries from different obstacle races). In a Michigan Tough Mudder in 2013, over 200 people became ill from a virus in the mud and water. *Id.* at 80. Also, in a 2013 local obstacle race in Port Orchard, Washington, two competitors injured their ankles and another broke every bone in her foot from an obstacle called "Gravity's Revenge." *Id.* at 81. See also Erin Beresini, *Fitness Coach: Could Tough Mudder's Electric Shocks Kill Me?*, OUTSIDE (July 23, 2012), <http://www.outsideonline.com/1783811/could-tough-mudder%E2%80%99s-electric-shocks-kill-me> [<https://perma.cc/BNR8-4UWS>] (explaining that the electric shocks can be extreme based on the amount of amps that are delivered to the human body).

<sup>29</sup> See *Sa v. Red Frog Events, LLC*, 979 F. Supp. 2d 767, 770 (E.D. Mich. 2013) (stating the emcee "continually enticed, encouraged, and specifically told competitors to dive into the mud pit"). The Court found the waiver unambiguous, but the waiver was invalid because the gross negligence of the sports provider's emcee breached the provider's duty of not increasing the inherent risk of being paralyzed. *Id.* at 778.

<sup>30</sup> See *id.* at 770 (providing that the obstacle event did not have signs prohibiting the competitors to jump head first into the mud pits). The encouragement and enthusiastic attitude to jump head first into the mud pits were out of the sports provider's scope of reasonable care. *Id.* at 778.

water.<sup>31</sup> Both of the injured parties sued the sports providers for damages.<sup>32</sup>

While obstacle racing continues to create serious physical injuries, other physical activities like cross fit, triathlons, and marathons share similar problems.<sup>33</sup> Most injured parties blame the sports providers for not making the event safe.<sup>34</sup> The main argument against the sports providers is that they breached their duty by being grossly negligent or reckless.<sup>35</sup> The ultimate setback when trying to sue a sports provider is the competitors are barred from suing because they signed a liability waiver.<sup>36</sup> Part II.B discusses the legal doctrines in sports injury cases, including the concept of liability waivers.<sup>37</sup>

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<sup>31</sup> See *Sengupta v. Tough Mudder LLC*, No. 14-C-66-H, 2015 WL 3903478, at \*1-2 (Cir. Ct. W. Va. Jan. 9, 2015) (understanding that Sengupta's mother represented his estate against Tough Mudder for one count of wrongful death and two counts of declaratory relief for the unenforceability of two clauses in the liability waiver); see also Sydney Lupkin, *The Hidden Cost of Extreme Obstacle Races*, ABC NEWS (May 8, 2014), <http://abcnews.go.com/Health/hidden-cost-extreme-obstacle-races/story?id=23625173> [<https://perma.cc/PE9R-TAAJ>] (illustrating the news report about how Sengupta jumped from a tall obstacle, with others jumping right behind him, and he never came back up).

<sup>32</sup> See *supra* Part II.A (referring to the cases that have been taken to civil court); *Sa*, 979 F. Supp. 2d at 769-70 (introducing the civil procedures of the case and what both parties have gone through); *Sengupta*, 2015 WL 3903478 at \*1, \*8 (explaining the civil procedures about how the estate's representation has gone through the beginning stages of the civil litigation including what the trial court ruled).

<sup>33</sup> See Devon Battersby, *Running on Empty or Water or Gatorade?* *Saffero v. Elite Racing*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 97, 97-98 (2003) (explaining marathon events where highly intensified competitors train to be fully aware of all the inherent risks and that a high standard of training involves understanding all the risks); Etter, *supra* note 20, at 41 (describing that the advancement of high intensity sports, like CrossFit, have similar concerns when understanding all the inherent risks); *Too Much Pain for CrossFit Gains?*, HEALTH & FITNESS (Dec. 15, 2015), <http://www.mensjournal.com/health-fitness/exercise/too-much-pain-for-crossfit-gains-20140326> [<https://perma.cc/G5P2-9Z3F>] (emphasizing that competitors must go into CrossFit knowing that it is a high intensity sport with inherent risks).

<sup>34</sup> See Beth A. Easter et al., Symposium, *Legal Issues Related to Adventure Racing*, 13 J. LEGAL ASPECTS SPORT 253, 259 (2003) (describing a California Court of Appeals case holding that the race organizers did not provide a "reasonably safe environment" for the participants by not refilling the refreshment stands). The importance of knowing one's capabilities and knowledge is also making sure the sports provider is maintaining a safe environment for the participants. *Id.*

<sup>35</sup> See *id.* (showing that the race organizers breached their duty of care by not refilling their refreshment stands for the runners, which increased the inherent risks). The inherent risks of marathons include dehydration and hypernatremia, and the race organizer has a duty to not increase those inherent risks. *Id.*

<sup>36</sup> See *infra* Part II.B (relating the problem with the express assumption of risk defense because the competitors expressly consented to relinquishing their right to sue the sports provider).

<sup>37</sup> See *infra* Part II (discussing common legal doctrines in sporting event injuries such as: negligence, inherent risks, and the assumption of risk defenses).

B. *Legal Doctrines in Sports Injury Cases*

When competing in a sport, the competitor must sign a liability waiver.<sup>38</sup> If the competitor gets injured, the sports provider is not liable for the injuries because the competitor assumed the risk of getting injured.<sup>39</sup> However, there are exceptions where a liability waiver cannot bar liability.<sup>40</sup> For example, if the exculpatory clauses in a waiver are ambiguous, then the waiver is invalid.<sup>41</sup> A liability waiver is also invalid if the sports provider breaches its duty by increasing the inherent risks that caused the injury.<sup>42</sup> Part II.B defines negligence and the assumption of risk doctrines.<sup>43</sup> Additionally, Part II.B discusses liability waivers and explains what exculpatory clauses are.<sup>44</sup> To understand the basis of liability waivers, sports providers have liability waivers to protect themselves against the inherent risks in the event.<sup>45</sup>

Inherent risks are risks that cannot be eliminated from the sport.<sup>46</sup> The inherent risks help support the assumption of risk defense.<sup>47</sup> Since the

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<sup>38</sup> See *infra* Part II (providing that sports providers always give competitors a waiver to sign so the sports providers will not be sued by the competitors for any injuries).

<sup>39</sup> See *infra* Part II (referring to the express assumption of risk defense because the competitor signed a waiver, explaining that the competitor agrees that he or she understands the risks that are provided in the exculpatory clause).

<sup>40</sup> See *infra* Part II (distinguishing a few exceptions on how a liability waiver may be invalid). A waiver may be deemed invalid if it is against public policy or if the exculpatory clauses are not clear and are ambiguous. *Infra* Part II.B.

<sup>41</sup> See *infra* Part II.B (explaining how an exculpatory clause may be unclear and ambiguous). If a word or phrase has more than one reasonable meaning, then the word or phrase will be considered ambiguous and not concise to the full agreement. *Infra* Part II.B.

<sup>42</sup> See *infra* Part II.B (referring to the negligence doctrine and how sports providers do not have a duty to decrease the inherent risks, but a duty to provide a reasonably safe atmosphere to not increase the inherent risks in the event).

<sup>43</sup> See *infra* Part II.B (providing what inherent risks are in sporting events and distinguishing negligence and the assumption of risk doctrines).

<sup>44</sup> See *infra* Part II.B (distinguishing further detail about the purpose of liability waivers in sporting events and showing how the exculpatory clauses make liability waivers valid); *infra* Part II.D (breaking down examples of liability waivers in Spartan Race, Tough Mudder, and Warrior Dash by providing detail to what the exculpatory clauses illustrate).

<sup>45</sup> See *infra* Part II.B (stating that the purpose of liability waivers is to protect the sports providers from known and unknown risks in the particular sport).

<sup>46</sup> See Terrance M. Miller et al., *Providing a Roadmap: Check your Assumptions about Assumption of Risk*, 49 NO. 12 DRI FOR DEF. 46, 46 (2007) (explaining that in sporting events cases, the sports providers cannot eliminate the inherent risks because it would change the sport itself). In baseball, you cannot make sliding into bases against the rules because that would discourage baseball players from participating in the sport and decrease the value of the game for spectators. *Id.*

<sup>47</sup> See *infra* Part II.B (referring to the implied and express assumption of risk defenses defendants would use to get out of liability in court). Only implied and express assumption of risk will be discussed in this Note based on the implied and expressed conduct given by the competitors before and during a sporting event.



inherent risks cannot be eliminated, the sports providers do not have a duty to decrease the inherent risks.<sup>48</sup> However, the sports providers have a duty to not increase the inherent risks.<sup>49</sup>

Most states have created sport safety statutes to protect sports and recreational providers from liability.<sup>50</sup> The purpose of a sport safety statute is to balance the economic profit for the state and the safety of the athletes.<sup>51</sup> Legislators have statutory provisions for different sports because they want to reduce the cost of litigation and keep businesses running.<sup>52</sup> However, any intentional or grossly negligent actions do not bar sports providers from waiving liability and they are not protected under the sport safety statutes.<sup>53</sup>

Since obstacle racing does not have a sports safety statute, obstacle racing providers have a unionized governing body to implement safety

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<sup>48</sup> See Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 81, 91 (2012) (clarifying that because of the doctrine of primary assumption of risk, the defendant does not owe a duty to protect the plaintiff from the inherent risk within the event); *infra* Part II.D (showing the inherent risks in exculpatory clauses from Tough Mudder, Spartan Race, and Warrior Dash).

<sup>49</sup> See David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F.L. REV. 599, 604-05 (2004) (discussing that even though the primary assumption of risk doctrine releases a defendant's duty of liability to the plaintiffs from the event's inherent risks, the sports providers do have a duty not to increase the inherent risks).

<sup>50</sup> See Greer, *supra* note 48, at 94-96 (justifying that popular sports in most states have sport safety statutes for snowboarding, roller skating, hang gliding, and snowmobiling); Alexander M. Waldrop et al., *Horse Racing Regulatory Reform through Constructive Engagement by Industry Stakeholders with State Regulators*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 389, 392 (2012) (illustrating how horse racing injuries and fatalities have grown to necessarily need an administrative body to regulate safety provisions and create a sport safety statute for equestrian racing); see also Whitney Johnson, Note, *Deception, Degeneration, and the Delegation of Duty: Contracting Safety Obligations between the NCAA, Member Institutions, and Student-Athletes*, 49 VAL. U. L. REV. 1045, 1054-62 (2015) (discussing the inherent nature of concussions in the National Collegiate Athletic Association ("NCAA") and the NCAA's concussion legislation).

<sup>51</sup> See Horton, *supra* note 49, at 619 (ensuring that many states protect sports vendors from losing money by allowing state legislators to free the vendors from liability, including extreme sports like motocross, so the courts will not be flooded with civil litigants).

<sup>52</sup> See Greer, *supra* note 48, at 94 (providing justification that the state legislators design the statutes to balance economics and athlete safety). For example, without a ski resort's business in a state that is popular for skiing, the state will not attract additional tourism. *Id.* Therefore, the state will lose out on the positive economic impact increased tourism has on the economy. *Id.*

<sup>53</sup> See Horton, *supra* note 49, at 620 (illustrating that most states do immunize companies from suits because of a sport's inherent risks, but the statutes do not permit immunization for negligent conduct by the company). If legislators to immunize companies from their negligent conduct, then excluding the negligent conduct would violate public policies dealing with public safety. *Id.*

provisions for obstacles and to provide insurance policies.<sup>54</sup> Obstacle racing providers have a non-legislative governing body because they do not want state legislators to regulate obstacle racing.<sup>55</sup> Whether or not obstacle racing should be regulated, sports providers can be taken to court for sports injuries because they were grossly negligent.<sup>56</sup>

When an injured competitor sues for an injury or an estate sues for a death, a negligence claim is filed.<sup>57</sup> To prove a sports provider caused the injury or death, there are four elements that need to be satisfied.<sup>58</sup> The four elements that need to be proven by the injured party are duty, breach, causation, and damages.<sup>59</sup> The first element, duty, shows the sports provider had a duty of reasonable care to make sure the competitors were

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<sup>54</sup> See Kelly O'Mara, *Obstacle Races Get a Governing Body Whether They Want One or Not*, BEACON (Oct. 18, 2015), <https://www.beaconreader.com/kelly-omara/obstacle-races-get-a-governing-body-whether-they-want-one-or-not> [<https://perma.cc/59Y5-29HW>] (launching the United States Obstacle Course Racing ("USOCR") in January 2014). The unionized governing body provides obstacle racing providers and competitors insurance policies and other benefits if they sign up with USOCR. *Id.* See also Elliott D. Woods, *Obstacle-Course Racing Gets Government*, OUTSIDE LIVE BRAVELY (Jan. 14, 2014), <http://www.outsideonline.com/1921121/obstacle-course-racing-gets-government> [<https://perma.cc/K7HT-ZKFL>] (providing that the USOCR organization deals with the issue of event insurance when trying to get a better understanding of the risks in obstacle racing).

<sup>55</sup> See Woods, *supra* note 54 (providing a statement from Rob Dickens, Chief Operating Officer of Rugged Maniac, that he does not want a governing body to tell them what to do because doing so would change the entire sport itself).

<sup>56</sup> See Horton, *supra* note 49, at 619–20 (referring back to sport safety statutes and how negligent conduct by a sports provider will not be immune and a competitor who gets injured because of the negligent conduct may sue for their injuries).

<sup>57</sup> See *Negligence*, BLACK'S LAW DICTIONARY (3d ed. 2006) (defining negligence as "[t]he omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do"); Teri Brummet, Comment, *Looking Beyond the Name of the Game: A Framework for Analyzing Recreational Sports Injury Cases*, 34 U.C. DAVIS L. REV. 1029, 1034 (2001) (providing that the plaintiff would sue a defendant because the defendant's conduct created an unreasonable risk of harm to the plaintiff); Donald T. Meier, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout from the Tragedies on the Training Ground for American Values*, 2 VA. SPORTS & ENT. L.J. 80, 101–05 (2002) (providing examples of cases where football players died while performing drills in practice). To bring about a wrongful death suit, the estate of the competitor or participant must prove, similarly to negligence, that the defendant breached their duty of care. *Id.* at 102.

<sup>58</sup> See Ian M. Burnstein, Note, *Liability for Injuries Suffered in the Course of Recreational Sports: Application of the Negligence Standard*, 71 U. DET. MERCY L. REV. 993, 1014–19 (1994) (providing necessary information about the four elements of negligence and how to prove each of the elements in a negligence lawsuit).

<sup>59</sup> See *id.* at 1014–18 (establishing that if one of the elements is not met, the defendant will not be liable for the plaintiff's injuries). The difficult portion of proving negligence is whether the defendant breached the reasonable duty of care. *Id.* at 1018.

safe.<sup>60</sup> The second element, breach, explains that the sports provider violated its duty and was grossly negligent based on its reckless or malicious conduct during the event.<sup>61</sup> The third element, causation, is satisfied if the plaintiff proves the sports provider was “the actual and proximate cause” of the injury or death.<sup>62</sup> The fourth element, damages, is satisfied if the sports provider’s conduct caused actual injury to the competitor.<sup>63</sup> Nevertheless, a sports provider may escape liability because of the assumption of risk doctrine.<sup>64</sup>

According to the assumption of risk defense, the competitor or injured party knowingly assumed the risk of injury in accord to their actions or

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<sup>60</sup> See Brummet, *supra* note 57, at 1035 (detailing that the courts will determine the appropriate standard of care, but the standard of care will determine the reasonable amount of duty the defendant owed to the plaintiff). However, sports providers are allowed to waive ordinary negligence because inherent risks may not be eliminated. *Id.* See also *supra* Part II.B (explaining that sports providers, including obstacle racing providers, only have a duty to not increase the inherent risks that cannot be eliminated from the sporting event). The sports providers’ reasonable care is to make sure the inherent risks do not increase the competitors’ chances of sustaining an injury. See Erica K. Rosenthal, Note, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 FORDHAM L. REV. 2631, 2647–48 (2004) (providing that for a plaintiff to receive damages for the defendant’s negligence, the defendant’s negligence must be considered reckless conduct). The reckless conduct refers to the defendant being grossly negligent. See Burnstein, *supra* note 58, at 1014–18 (illustrating the different standards of care in regards to the kind of sport people compete in, including contact or non-contact sports and organized or non-organized sports).

<sup>61</sup> See Brummet, *supra* note 57, at 1035 (determining that once the defendant had a duty, the next question courts must evaluate is whether the defendant breached its duty of care). For obstacle races and other sporting events, the issue is whether the sports providers were grossly negligent or reckless. See *Sa v. Red Frog Events, LLC*, 979 F. Supp. 2d 767, 778 (E.D. Mich. 2013) (showing that the Warrior Dash emcee told the plaintiff to jump head first into one of the obstacles, the Muddy Mayhem). The only way to prove a breach of duty is if the sports provider contributed to the injury or death. See *id.* (showcasing that the emcee was grossly negligent in telling the competitors to jump into an obstacle). By telling the competitors to jump head first into the mud pit, the sports provider’s emcee increased the inherent risks. See Brummet, *supra* note 57, at 1036 (defining that “a defendant is only liable for a breach of duty if that breach actually caused injury”).

<sup>62</sup> See Burnstein, *supra* note 58, at 1019 (clarifying that the plaintiff must establish a connection with the defendant, and the defendant’s connection must be a legal or proximate cause of the injury or death). When the breach of duty element is satisfied, it is easy to prove causation based on the facts of the case. *Id.*

<sup>63</sup> See *id.* (providing that the plaintiff only needs to prove that he or she was physically injured or in the case of a wrongful death, the estate only needs to prove that a death occurred during the sporting event). It is important to keep medical records or pre-injury physical sheets to prove the element because authorized documentation will satisfy the element. *Id.*

<sup>64</sup> See *infra* Part II.B (introducing the assumption of risk defense, which sports providers use as an affirmative defense to avoid liability against the injured competitor in sports injury cases).

written consent.<sup>65</sup> If the court rules in the sports provider's favor, it is entitled to a final judgment as a matter of law.<sup>66</sup> The two types of assumption of risk defenses raised in a sports injury claim by the sports provider are implied and express assumption of risk.<sup>67</sup> Under the implied assumption of risk doctrine, the competitor's conduct must have implicitly assumed the risk of the harm.<sup>68</sup> For the doctrine to be successful, the defendant must prove the competitor voluntarily and knowingly encountered the risk.<sup>69</sup> During the event, the competitor's conduct will bar further litigation because the competitor's implied actions assumed the foreseeable harm because he or she personally understood the risk and took it head on.<sup>70</sup> However, the express assumption of risk defense is used because the competitor consented to the dangers by signing a waiver before competing in the event.<sup>71</sup>

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<sup>65</sup> See Jason R. Jenkins, *Not Necessarily the Best Seat in the House: A Comment on the Assumption of Risk by Spectators at Major Auto Racing Events*, 35 TULSA L.J. 163, 173–75 (1999) (encompassing how foreseeable an injury is, injuries at a racing event have been a question of whether the sports providers are negligent for not preventing a dislodged tire from jumping a fourteen-foot fence and hitting a spectator in the stands); Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 484–86 (2002) (describing the doctrine of assumption of risk, which has developed over the years to determine whether plaintiffs could receive damages if they are partially responsible for their actions, based on the jurisdiction they are in); Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 875–78 (1996) (discussing how in most jurisdictions, instead of doing an absolute bar to the plaintiff, the award for injury is proportioned on how much each party is at fault).

<sup>66</sup> See Beatty Marion, *Summary Judgment*, 36 J. KAN. B. ASS'N 1, 18 (1967) (detailing that summary judgment is granted when there are no more controversies to argue). The plaintiff has the burden to show that there are still some controversies and the defendant's defense will not satisfy a final judgment. *Id.*

<sup>67</sup> See *infra* Part II.B (exploring the most common assumption of risk doctrines that defendants use to try and get out of liability). This Note focuses on the doctrine of express assumption of the risk involved with exculpatory clauses in liability waivers. *Infra* Part II.B.

<sup>68</sup> See Miller et al., *supra* note 46, at 46 (stating that a defendant does not owe a duty to a plaintiff that voluntarily engages in an inherent risk or a negligently made inherent risk). When plaintiffs see a risk that could hurt them, and attempt to surpass the risk, it will be implied the plaintiffs assumed the dangers in front of them. *Id.*

<sup>69</sup> See Simons, *supra* note 65, at 487 (considering the effects of comparative fault in a jurisdiction). The defendant does not owe nor can it breach a duty because no duty is created when the plaintiff voluntarily assumed the dangers of a negligent risk. *Id.* However, deciding on the type of fault in a jurisdiction will ultimately determine if the injured party will receive any damages. *Id.*

<sup>70</sup> See Kimberly A. Potter, *Rough Terrain – Navigating the Duty Owed Athletes in Sponsored Events*, 30 TRIAL ADVOC. Q. 13, 14 (2011) (dictating that voluntary participants in sporting events are held to have consented to their consequences that are reasonably foreseeable to them); Marion, *supra* note 66, at 18 (concluding that there are no genuine issues of fact, which gives the defendant the final judgment as a matter of law).

<sup>71</sup> See *infra* Part II.B (discussing the express assumption of risk defense and how it bars plaintiffs from suing defendants in sports injury cases). The express assumption of risk

According to the express assumption of risk defense, a competitor “who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct cannot recover for such harm.”<sup>72</sup> Before the event, competitors must sign a liability waiver, which states they are agreeing to the risks in the event and agreeing not to sue the sports provider for any damages.<sup>73</sup> The liability waiver is the most common tool that bars an injured party from suing.<sup>74</sup> In general, people cannot bring a lawsuit against a sports provider because competitors sign an agreement with the sports provider.<sup>75</sup> Courts refer back to the implied assumption of risk doctrine to determine whether the competitor subjectively understood the risks.<sup>76</sup> However, the express assumption of risk defense may fail because the exculpatory clauses in the liability waivers are unclear or violate public policy.<sup>77</sup>

For the express assumption of risk defense to succeed, competitors must sign the liability waiver, which is also called the exculpatory agreement.<sup>78</sup> Within the agreement, the exculpatory clauses list injuries,

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defense is commonly used because competitors sign a liability waiver, which expressly clarifies they know the risks of the event and consented to the rest of the terms. *Infra* Part II.B.

<sup>72</sup> RESTATEMENT (SECOND) OF TORTS: § 496B (Am. Law. Inst. 1965). See also Lura Hess, Note, *Sports and the Assumption of Risk Doctrine in New York*, 76 ST. JOHN’S L. REV. 457, 463 (2002) (stating that under the comparative fault scheme in New York, the express assumption of risk defense is not an absolute bar, but the defense is in line with how much fault both parties have regarding the incident).

<sup>73</sup> See Miller et al., *supra* note 46, at 46 (providing that the common example of written consent is when a participant in a sporting event signs a release before participating in the event). The concept of the express assumption of risk defense is that if a participant consents to the risk in writing, then the participant cannot recover for any sustained injuries. *Id.*

<sup>74</sup> See *id.* (signing a release is the most common example of providing sports providers evidence that supports the express assumption of risk defense); Ammie I. Rosemann-Orr, *Recreational Activity Liability in Hawai’i: Are Waivers Worth the Paper on Which They are Written?*, 21 U. HAW. L. REV. 715, 724 (1999) (showing that the release restricts the injured party from suing the company for high risk sports like skiing, sky diving, and scuba diving).

<sup>75</sup> See Brummet, *supra* note 57, at 1038–39 (stating the signed liability waiver expressly waives the defendant’s duty to protect the participant). The only duty that a sports provider has is to not increase the inherent risks in the event. *Supra* Part II.B.

<sup>76</sup> See Brummet, *supra* note 57, at 1039–41 (explaining courts will look at three factors to determine if the participant’s conduct showed an implied determination of assuming the risks). First, courts must determine if the plaintiff had knowledge of a specific risk arising from the defendant’s conduct. *Id.* at 1040. Second, the courts must consider whether the plaintiff subjectively appreciated the magnitude of the risk. *Id.* Finally, the courts must look at if the plaintiff voluntarily encountered the risk. *Id.*

<sup>77</sup> See generally *infra* Part II.B (illustrating the legal terminology for contractual agreements, the anatomy of a liability waiver for the waiver to become valid, and specific public policy violations that would make a liability waiver invalid).

<sup>78</sup> See *supra* Part II.B (reiterating the express assumption of risk defense and how a competitor must sign the waiver in order for the sports provider to have a valid defense against a sports injury claim).

inherent risks, assumption of risk clauses, and other binding clauses.<sup>79</sup> The clauses are the main proponents of the agreement because the clauses demonstrate how binding they are in court.<sup>80</sup> In the standard terminology, “[e]xculpatory agreements are referred to as a release.”<sup>81</sup> The competitor signing the release relinquishes the ability to sue the sports provider for any injuries.<sup>82</sup> Parallel to the express assumption of risk doctrine, both these legal doctrines deny the injured party rights to recover damages from the defendant’s ordinary negligence.<sup>83</sup> Additionally, the agreement must show a specific framework to make the agreement valid.<sup>84</sup> For example, the exculpatory clauses must describe and explain the dangers of the activity.<sup>85</sup> An exculpatory clause cannot

<sup>79</sup> See *infra* Part II.B (discussing the explanation of exculpatory clauses within liability waivers for sporting events). The exculpatory clauses within the liability waivers must be concise and unambiguous for the competitors to fully agree with them. *Infra* Part II.B.

<sup>80</sup> See *infra* Part II.D (evaluating the wording within exculpatory clauses in obstacle racing liability waivers). The exculpatory clauses that will be provided in this Note include clauses regarding: the inherent risks within obstacle racing, the legal doctrine of negligence and assumption of risk, and that the competitors are in good health to compete in the event.

<sup>81</sup> Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 7 (1997). The two most commonly used releases include a liability waiver and the express assumption of risk doctrine, but both are parallel because they relinquish the sports provider’s ordinary duty of care. *Id.* at 8.

<sup>82</sup> See *id.* at 8–9 (agreeing that a competitor cannot hold the sports provider liable for the competitor’s injuries as a result of the sports provider’s ordinary negligence). By relinquishing his or her capability to sue, the express writing proves the competitor fully understood and assumed all of the risks. *Id.* at 9.

<sup>83</sup> See *supra* Part II.B (reiterating the express assumption of risk defense when competitors sign a waiver stating they consented to all the risks in the event).

<sup>84</sup> See Scott J. Burnham, *Are You Free to Contract Away Your Right to Bring a Negligence Claim?*, 89 CHI.-KENT L. REV. 379, 397 (2014) (describing the characteristics that need to be included within an exculpatory clause such as a description of the dangers in particular); Steven B. Lesser, *How to Draft Exculpatory Clauses that Limit or Extinguish Liability*, 75 FLA. B.J. 10, 12 (Nov. 2001) (addressing a checklist from Florida case law on how to draft enforceable exculpatory clauses). Some of the examples on the checklist, as exemplified by Florida statutory and case law, include: broadly identifying the extent of the risks, having a separate release to be executed to avoid multiple signatures, and boldfacing large words to draw attention to the clauses. *Id.*

<sup>85</sup> See Lesser, *supra* note 84, at 12 (emphasizing that the dangers and harms need to be specifically described for the reader to understand); *Physical Activity Readiness Questionnaire/Waiver*, CLEAR LAKE CROSSFIT (Dec. 16, 2015), <http://static1.1.sqspcdn.com/static/f/342140/17224785/1332269940370/Waiver+And+Release+Form.pdf?token=KBksqb8hxBp4YpLVJGJDR2Ui98Y%3D> [https://perma.cc/6SBY-JEK5] [hereinafter *Physical Activity*] (providing an example of an exculpatory clause). The following is an example providing the risks and injuries in CrossFit:

I understand that the reaction of the heart, lungs[,] and vascular system to exercise cannot always be predicted with accuracy. I understand that there is a risk of certain abnormal changes occurring during or following exercise which may include abnormalities of blood pressure or heart rate; chest, arm or leg discomfort; transient light-headedness or fainting;

waive gross negligence or intentional acts because then the agreement would be against public policy.<sup>86</sup> However, an agreement can be invalid because of the court's interpretation of the exculpatory clauses.<sup>87</sup>

An exculpatory agreement is invalid if the exculpatory clauses are unclear and ambiguous.<sup>88</sup> While some courts simply interpret the signed liability waiver, other courts look at the competitor's subjective understanding of the waiver.<sup>89</sup> The courts must look at the exculpatory agreements and the clauses within them to see if they also violate any public policies.<sup>90</sup> Furthermore, an exculpatory agreement can be invalid if the agreement violates a state's public policy.<sup>91</sup> For example, there cannot be any unequal bargaining powers between the parties.<sup>92</sup> If the plaintiff can prove there were unequal bargaining powers that completely

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and in rare instances, heart attack, stroke or even death. Excessive work can result (in rare cases) in exertional rhabdomyolysis.

*Id.*

<sup>86</sup> See *Physical Activity*, *supra* note 85 (showing within the CrossFit liability form that a sports provider cannot contract away gross negligence or intentional acts); Miller et al., *supra* note 46, at 16 (understanding that ordinary negligence from the sports provider may be waived because of the inherent risks within the sport).

<sup>87</sup> See *infra* Part II.B (discussing examples of how an exculpatory agreement can be invalid either by the clauses themselves or the direct conflict with public policy standards).

<sup>88</sup> See Lesser, *supra* note 84, at 10 (explaining that exculpatory clauses will be enforced if the language is clear and unequivocal, which means there is only one interpretation of the terms and clauses); *infra* Part II.C (discussing the veracity of case laws in Michigan, Illinois, and Florida by providing examples where clauses are ambiguous).

<sup>89</sup> See Arango & Treuba, Jr., *supra* note 81, at 19 (showcasing further analysis that the agreement between both parties determines the subjective intentions and expectations of each party). To understand the full intentions of the parties, the competitor must expect that the sports provider will provide a safe environment for the competitors. *Id.*

<sup>90</sup> See Lesser, *supra* note 84, at 10 (discussing that the exculpatory clauses cannot be ambiguous to the point that more than one meaning of the terms may be derived).

<sup>91</sup> See Arango & Treuba, Jr., *supra* note 81, at 12 (showing other examples of public policy issues used by plaintiffs to argue that a contract is void such as "whether the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or the seller's agents"); Rosenthal, *supra* note 60, at 2651-52 (illustrating recklessness is supported by two main policy reasons when courts allow a negligence cause of action from a sport injury). The first policy reason is that the recklessness promotes vigorous competition and participation. *Id.* at 2652. The second policy reason is the sport is trying to avoid a flood of litigation in the courts. *Id.* See Joseph R. Flood, Jr. & Joshua B. Walker, *Protecting Municipalities from Liability for Recreational Activities*, 32 NO. 4 TRIAL ADVOC. Q. 17, 18 (2013) (clarifying that when an agreement violates a public's interest of the particular state, the agreement is void).

<sup>92</sup> See Douglas Leslie, *Sports Liability Waivers and Transactional Unconscionability*, 14 SETON HALL J. SPORTS & ENT. L. 341, 342 (2004) (proclaiming that participants fighting off the risks without receiving the necessary safeguards to reduce those risks, while the sports provider receives all the profit, resembles unconscionability).

avored the defendant, then the agreement is unconscionable.<sup>93</sup> Additionally, the agreement itself will be invalid if the sport needs to be state regulated.<sup>94</sup> Nevertheless, Part II.C demonstrates that some courts rule an exculpatory clause invalid if it only violates public policy, while other courts factor in the subjective understanding of the competitor who signed the waiver.<sup>95</sup>

### C. Case Law Regarding Exculpatory Clauses

The express assumption of risk doctrine and the exculpatory clauses coincide to make a sports provider not liable for injuries sustained by the competitor.<sup>96</sup> However, courts determine the validity of exculpatory clauses based on the circumstances surrounding the injury.<sup>97</sup> To understand the laws around exculpatory clauses, this Note focuses on Illinois, Michigan, and Florida law.<sup>98</sup>

In Illinois, a contractual agreement cannot violate public policy, nor may there be something in the social relationship of the parties militating against upholding the agreement.<sup>99</sup> Furthermore, the agreement must

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<sup>93</sup> See *id.* at 341 (outlining that most states, except Virginia, do not view unconscionability as a public policy issue in waivers). However, the value of the increased risk to the competitor is by far substantially greater than what the sports provider received as a profit. *Id.* at 358. See also Burnham, *supra* note 84, at 384 (illustrating substantive unconscionability, which means the clauses “are so oppressive that no reasonable person would make them and no fair and honest person would accept them”).

<sup>94</sup> See Arango & Treuba, Jr., *supra* note 81, at 26–30 (providing that state legislators regulate specific sports like skiing and bungee jumping to uphold public safety in sports that have inherent risks); *supra* Part II.B (incorporating sport safety statutes to promote athletic safety and reduce litigation costs).

<sup>95</sup> See *infra* Part II.C (comparing and contrasting case law from Illinois, Michigan, and Florida regarding exculpatory clauses).

<sup>96</sup> See Brummet, *supra* note 57, at 1038–39 (referring to the express assumption of risk doctrine and how the affirmative defense prevents injured parties from litigating any further actions against the sports provider).

<sup>97</sup> See *infra* Part II.C (evaluating case law in Illinois, Michigan, and Florida to provide examples of different cases regarding liability waivers and whether the exculpatory clauses are valid).

<sup>98</sup> See *infra* Part II.C (explaining the court system’s evaluation process in Illinois, Michigan, and Florida to determine whether an exculpatory agreement and its clauses are valid). The author selected these three states for the purpose of comparing and contrasting how intense sports have factored into the court systems.

<sup>99</sup> See *Garrison v. Combined Fitness Centre, Ltd.*, 559 N.E.2d 187, 189–90 (Ill. App. Ct. 1990) (explaining that a contract will be enforceable unless there is a substantial disparity in the bargaining position, if the social relationship has something militating against upholding the clause, or if there is fraud or willful and wanton negligence). Garrison had experience in weightlifting and was aware that the bench press he used did not have a certain safety device. *Id.* at 190. There was no evidence to show that supplying the bench without the safety device would violate public safety. *Id.* Further, Garrison could not bring a strict liability claim against Centre because Centre was not considered a seller in Illinois. *Id.* at 191.



contain unequivocal language in order to relieve the defendant from having a duty.<sup>100</sup> While Illinois courts must be strictly construed against the benefiting party, the courts support the idea of honoring contractual agreements.<sup>101</sup> By honoring the contractual agreements, the courts will not interfere between parties if the parties freely enter into the agreement and know all the terms of the agreement.<sup>102</sup>

In Michigan, the courts focus on whether a contractual agreement has clear and unambiguous exculpatory clauses.<sup>103</sup> The phrases and terminology of the clauses must be reasonably interpreted in more than one way for the clause to be ambiguous.<sup>104</sup> Looking outside the waiver, the courts determine whether a waiver is invalid if the benefiting party was grossly negligent or acted maliciously towards the other party.<sup>105</sup>

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<sup>100</sup> See *Polansky v. Kelly*, 856 F. Supp. 2d 962, 964–67, 970–71 (S.D. Ill. 2012) (holding that the term “work” in the exculpatory clause was not ambiguous when a racer was working as a corner captain and was injured by a racer). Polansky had a substantial amount of experience working on the track, whether it dealt with racing or working by the track according to the background. *Id.* at 964–67; *Garrison*, 559 N.E.2d at 190–91 (showcasing that an exculpatory clause to relieve a non-manufacturing party like the fitness center in purchasing an allegedly defective product did not violate any public policy concerns).

<sup>101</sup> See *Locke v. Life Fitness, Inc.*, 20 F. Supp. 3d 669, 673–76 (N.D. Ill. 2014) (recognizing that Illinois enables businesses to engage in commerce without incurring excessive financial risks that would economically damage the business). The plaintiff’s estate argued that inadequate emergency aid from the staff was not in the contract, but the court upheld that the clause, waiving ordinary negligence, reasonably applied to inadequate emergency aid and the rest of the contract was enforceable. *Id.* at 673–75. See also *Hussein v. L.A. Fitness Intern, LLC*, 987 N.E.2d 460, 464 (Ill. App. Ct. 2013) (describing that Illinois’s public policy strongly encourages the freedom to contract with parties). In this case, it explains that in Illinois, “an express choice-of-law provision will be given effect where there is some reasonable relationship between the chosen forum and the parties or transaction and it is ‘not dangerous, inconvenient, immoral, nor contrary to the public policy of our local government.’” *Id.*

<sup>102</sup> See *Harris v. Walker*, 519 N.E.2d 917, 919–20 (Ill. 1988) (clarifying that the freedom to contract manifests both from the United States Constitution and the Illinois Constitution). Harris was an experienced rider and consented to release Ky-Wa Acres and the employees from liability because of the horse’s conduct. *Id.* at 919–20; *Garrison*, 559 N.E.2d at 189–90 (describing that a contract will not be enforced if there is a substantial disparity in the bargaining position of the parties).

<sup>103</sup> See *Sa v. Red Frog Events, LLC*, 979 F. Supp. 2d 767, 772 (E.D. Mich. 2013) (holding that Red Frog Events, LLC was grossly negligent when the emcee increased the inherent risk of a competitor getting injured by telling the competitors to jump head first into the mud pit).

<sup>104</sup> See *Cole v. Ladbroke Racing Michigan, Inc.*, 614 N.W.2d 169, 176–77 (Mich. Ct. App. 2000) (adding that parties disputing the meaning of a release does not establish ambiguity within the agreement). The release that the plaintiff signed covered “all risks of any injury that the undersigned may sustain while on the premises.” *Id.* The foreseeable risk of a horse being provoked was within the scope and reasonable for an experienced rider. *Id.* at 176–77.

<sup>105</sup> See *Sa*, 979 F. Supp. 2d at 779–80 (showing that an obstacle announcer acted grossly negligent and with willful and wanton misconduct by directing participants to dive into the mud pit head first, which caused a participant to be paralyzed from the chest down).

Then, the courts examine whether the plaintiff contributed to the extent of their injury.<sup>106</sup>

In Florida, the exculpatory clauses must be “clear and unequivocal.”<sup>107</sup> Florida determines whether the plaintiff subjectively appreciated and intended to assume the risks of the injury, making it a factor to figure out whether the terms and clauses were unambiguous.<sup>108</sup> If the plaintiff was not subjectively aware of the risks, the courts determine whether the risk was reasonable under the scope of the waiver.<sup>109</sup>

The laws behind sports injuries protect the sports providers because the inherent risks cannot be eliminated.<sup>110</sup> Under very limited circumstances, the express assumption of risk defense will not apply.<sup>111</sup> However, looking at obstacle racing exculpatory clauses in Part II.D will help foster a better understanding of how the case law can be applied.<sup>112</sup>

#### *D. Current Obstacle Racing Liability Waiver Exculpatory Clauses*

The following examples of exculpatory clauses are three standard clauses from the Tough Mudder, Spartan Race, and Warrior Dash liability waivers.<sup>113</sup> First, the inherent risks and injuries are listed within the

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<sup>106</sup> See *Lucas v. Norton Pines Athletic Club, Inc.*, No. 289658, 2010 WL 2332384, at \*3–4 (Mich. Ct. App. June 10, 2010) (explaining that an experienced rock climber sufficiently understood the inherent risks by not clipping on the auto-belay system or making eye contact with the employees).

<sup>107</sup> See *Borden v. Phillips*, 752 So. 2d 69, 73–74 (Fla. Dist. Ct. App. 2000) (providing that the exculpatory clause releasing the boat operators was unambiguous and concise because the professional affiliation of the group worked with the injured party during scuba training).

<sup>108</sup> See *Kuehner v. Green*, 436 So. 2d 78, 80–81 (Fla. 1983) (concluding that the plaintiff subjectively appreciated the danger of a “leg sweep” during a karate session and voluntarily exposed himself to the injury).

<sup>109</sup> See *Diodato v. Islamorada Asset Mgmt., Inc.*, 138 So. 3d 513, 517–18 (Fla. Dist. Ct. App. 2014) (describing that the injury sustained during that activity must be considered reasonable within the scope of the waiver). A waiver is unenforceable if the participant assumes unknown risks, unless it is intended for the participant to assume the risks based on the experience with the activities. *Id.* See also *O’Connell v. Walt Disney World Co.*, 413 So. 2d 444, 447–48 (Fla. Dist. Ct. App. 1982) (explaining that an amusement park company does not have a duty to protect against unknown risks unless it is grossly negligent).

<sup>110</sup> See *supra* Part II.B (acknowledging the duty sports providers have to competitors, which is to not increase the inherent risks of the sport).

<sup>111</sup> See *supra* Part II.B (describing some ways an exculpatory clause may be considered invalid including proving there were unequal bargaining powers between the parties).

<sup>112</sup> See *infra* Part II.D (providing the exculpatory clauses within the three obstacle liability waivers that will be analyzed in Part III).

<sup>113</sup> See *infra* Part II.D (distinguishing three examples of liability waivers in obstacle racing and breaking down the terminology within the clauses about the inherent risks and injuries in competing in an event).

waivers.<sup>114</sup> Next, the waivers state or imply the negligence and assumption of risk doctrines.<sup>115</sup> Finally, the waivers include clauses regarding the competitors to be in good health.<sup>116</sup>

The 2015 Chicago Tough Mudder Liability Agreement included three exculpatory clauses regarding the risks in the event and the competitors' protection.<sup>117</sup> Within this waiver, the Assumption of Inherent Risks clause provides the risks and injuries that can occur.<sup>118</sup> Next, the "Waiver of

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<sup>114</sup> See *infra* Part II.D (illustrating that each of the waivers provide the inherent risks in the obstacle racing event and the injuries a competitor can sustain).

<sup>115</sup> See *infra* Part II.D (explaining that the waivers either explicitly state the legal doctrines or imply the legal doctrines within the specific clauses of the waiver, and thus, unambiguously discuss them).

<sup>116</sup> See *infra* Part II.D (describing that the events are for people who know that they are in proper physical shape and will not create a hazard for their health during the event).

<sup>117</sup> See *Participant Legal Liability Agreement: Chicago 2015*, SPARTAN RACE (Oct. 21, 2015), <http://tmmailcdn.toughmudder.com/2015-Chicago-Participant-Waiver.pdf> [<https://perma.cc/TXK8-DA4A>] (clarifying the three main clauses that refer to the inherent risks and negligence doctrines).

<sup>118</sup> See *id.* (understanding that Tough Mudder is "meant to be a test of toughness, strength, stamina, camaraderie, and mental grit that takes place in one place in one day"). In addition, the clause states:

I understand and acknowledge that the inherent risks include, but are not limited to: (1) contact or collision with persons or objects (e.g., collision with spectators or course personnel, contact with other participants, contact or collision with motor vehicles or machinery, and contact with natural or man-made fixed objects or obstacles); (2) encounter with obstacles (e.g., natural and man-made water, road and surface hazards, close proximity and/or contact with thick smoke and open flames, barbed wire, pipes, and electric shocks); (3) equipment related hazards (e.g., broken, defective or inadequate competition equipment, unexpected equipment failure, imperfect course conditions); (4) weather-related hazards (e.g., extreme heat, extreme cold, humidity, ice, rain, fog); (5) inadequate or negligent first aid and/or emergency measures; (6) judgment- and/or behavior-related problems (e.g., erratic or inappropriate co-participant or spectator behavior, erratic or inappropriate behavior by the participant, errors in judgment by personnel working the event; and (7) natural hazards (e.g. uneven terrain, rock falls, lightning strikes, earthquakes, wildlife attacks, contact with poisonous plants, marine life and/or ticks).

*Id.* Furthermore, the portion also states the following injuries from contact with electrical obstacles:

I understand and acknowledge that exposure to such electrically charged objects may directly cause or contribute to serious and permanent bodily injury. The injuries include, but are not limited to: skin irritation, electrical burns, muscle spasm, muscle contraction, single or multiple organ failure, eye injuries including cataracts and temporary or permanent blindness, cardiac arrest, heart attack, disruption of normal cardiac rhythm, bleeding, muscular swelling, decreased blood flow to extremities, loss of consciousness, coma, seizure, spinal cord injury, fracture, injury to ligaments, paralysis, stroke muscle weakness,

Liability for ORDINARY NEGLIGENCE” explains that the competitor relinquishes his or her right to sue Tough Mudder for ordinary negligence.<sup>119</sup> Finally, the Agreements for the Protection of Participants states that the competitor agrees he or she is in the proper condition for competing.<sup>120</sup>

Next, the Reebok Spartan Race Series Liability Waiver contains clauses referring to the inherent risks and the assumption of risk and negligence doctrines.<sup>121</sup> First, the inherent risk clauses refer to the injuries and inherent risks in the event.<sup>122</sup> Second, the negligence doctrine is

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neurological disorder, tingling sensations, infection, muscle breakdown or destruction, depression, anxiety, aggressive behavior, ulcer, pneumonia, sepsis, and even death.

*Id.*

<sup>119</sup> See *id.* (providing that the competitor may not sue Tough Mudder for negligent acts in regards to “personal injuries and claims resulting in damage to, loss of, or theft of property”). The waiver states:

In consideration of being permitted to participate in the TM Event, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, I (on behalf of the Releasing Parties) hereby forever waive, release, covenant not to sue, and discharge Tough Mudder Inc. and the other Released Parties from any and all claims resulting from the INHERENT RISKS of the TM Event or the ORDINARY NEGLIGENCE of Tough Mudder Inc (or other Released Parties) that I (and/or my participating minor child/ward) may have arising out of my (and/or my minor child/ward’s) participation in the TM Event.

*Id.*

<sup>120</sup> See *id.* at 2 (acknowledging that the participant is “in good health and in proper physical condition to safely participate in the TM Event”). The clause also provides that the participant should receive medical clearance before participating in the event. *Id.*

<sup>121</sup> See *Participant Waiver, Release of Liability, Covenant Not to Sue & Image Release*, REEBOK SPARTAN RACE SERIES (Oct. 21, 2015), <http://d2md0bjwkj5142.cloudfront.net/Spartan-Race-Workout-Waiver.pdf> [<https://perma.cc/E9EL-629M>] (illustrating that competitors must acknowledge that they know about all the inherent risks and dangers in the event before participating).

<sup>122</sup> See *id.* (stating that the competitor “knowingly and freely assume[s] and accept[s] all such risks, both known and unknown and assume full responsibility and all risks for my participation in the Event”). In addition, there is a list of injuries that can be sustained including:

(i) Drowning; (ii) near-drowning; (iii) sprains; (iv) strains; (v) fractures; (vi) heat and cold injuries; (vii) over-use syndrome; (viii) injuries involving vehicles; (ix) animal bites and/or stings; (x) contact with poisonous plants; (xi) accidents involving, but not limited to paddling, climbing, biking, hiking, skiing, snow shoeing, travel by boat, truck, car, or other convenience; (xii) heart attack and (xiii) the potential for permanent paralysis and/or death. While particular rules, equipment, and personal discipline may reduce this risk, the risk of death or serious injury does exist.

*Id.*

implied with the competitors' actions if they observe a hazard during the event.<sup>123</sup> Third, the last clause refers to participants agreeing they know they are physically fit, sufficiently trained, and that they voluntarily agree to compete in the event.<sup>124</sup>

Finally, the Warrior Dash Liability Waiver provides exculpatory clauses regarding the inherent risks and legal doctrines in sports injury cases.<sup>125</sup> First, some clauses explain the assumption of risk and negligence doctrines.<sup>126</sup> Second, other clauses provide the inherent risks and the injuries that may occur.<sup>127</sup> Finally, there is a clause that refers to the physical condition of the competitor to show the competitor's health is satisfactory to compete.<sup>128</sup>

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<sup>123</sup> See *id.* (providing another clause that releases Spartan Race from liability in regards to injuries, disabilities, deaths, and loss or damage to person or property). The main clause in the sentence refers to the implied assumption of risk defense if the plaintiff did not remove himself or herself from the event or the risk. *Id.*

<sup>124</sup> See *id.* (indicating from the clause that the participant is also free from any injuries and defects that could cause problems to the competitor's safety during the event, and reinforcing that participating in activities associated with the event is voluntary).

<sup>125</sup> See *Warrior Dash Waiver and Release of Claims, Assumption of Risk and Consent to Medical Treatment*, WARRIOR DASH (Oct. 21, 2015), <https://www.warriordash.com/app/uploads/2013/06/WarriorDashWaiver.pdf> [<https://perma.cc/E9AM-T2CF>] (providing exculpatory clauses including inherent risks, injuries, assumption of risk, and negligence doctrines in a Warrior Dash event).

<sup>126</sup> See *id.* (quoting from one clause that the competitor "expressly acknowledge[s] . . . and agree[s] that the activities of the Event involve the risk of serious injury and/or death and/or property damage"). In addition, from another clause, the waiver also states:

I recognize and acknowledge that there are hazards and risks of physical injury or illness to Event participants and that not all such hazards or risks can be fully eliminated. I freely and voluntarily agree to assume the full risk of death, bodily injury or property damage, regardless of severity, that I may sustain as a result of my . . . participation in the Event, whether or not caused by the active or passive negligence of the Releasees.

*Id.*

<sup>127</sup> See *id.* (providing from a clause that the competitor understands the inherently dangerous activities during the obstacles). In addition, the clause expands on the dangerous activities by stating the following:

[T]he Event is . . . inherently dangerous . . . [because of,] but not limited to, fire, mud pits, barbed wire, slides, cargo nets, heights, climbing, jumping into water, water crossings, swimming, steep hills and/or uneven terrain. I understand, agree and accept that some of the Event course or obstacles may go through water that has not been treated for chemicals, disease or contamination and that the Event may contain wild animals, insects, and plants.

*Id.*

<sup>128</sup> See *id.* (explaining that it is the participant's responsibility to determine whether he or she is mentally and physically fit and capable to compete in the event and that the participant's physical and mental condition will not cause problems).

After reading the liability waivers, the inherent risks and the large task of understanding all the risks seem demanding.<sup>129</sup> The waivers list the risks and injuries, but the waivers are not specific enough to illustrate what obstacles are in the race.<sup>130</sup> By not being precise, Part III argues that the risks in the waivers are ambiguous and not concise because some competitors cannot comprehend all the risks in this sport.<sup>131</sup>

### III. ANALYSIS

The nature of obstacle racing and the current lack of proper exculpatory clauses make the current liability waivers invalid.<sup>132</sup> The terms in the exculpatory clauses are ambiguous for most competitors because the risks are not specific in detail.<sup>133</sup> The exculpatory clauses must be precise about where the risks and injuries occur, and the clauses must specify, in specific detail, the different obstacles.<sup>134</sup> Therefore, Part III.A first analyzes the case law in Illinois, Michigan, and Florida, applies the clauses and terminology to determine the overall validity of the clauses, and determines the waivers are against public policy.<sup>135</sup> Next, Part III.B takes the exculpatory clauses from the Spartan Race, Tough Mudder, and Warrior Dash liability waivers to look at the ambiguity and reasonableness of how someone cannot fully appreciate all the inherent risks.<sup>136</sup> Finally, Part III.C proposes a generic exculpatory clause that

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<sup>129</sup> See *supra* Part II.D (presenting the exculpatory clauses in obstacle racing that discuss the inherent risks and legal terminology for relinquishing a sport provider's duty to the competitors).

<sup>130</sup> See *infra* Part III.C (illustrating a generic exculpatory clause that obstacle racing providers should take into consideration when drafting future waivers).

<sup>131</sup> See *generally infra* Part III (demonstrating that the current obstacle racing liability waivers are invalid because the intense effect of obstacle racing affects most competitors who are not able to appreciate the risks listed in the liability waivers).

<sup>132</sup> See *infra* Part III.A-B (arguing that obstacle racing waivers should be invalid because the inherent risks within the sport cannot be fully perceived by most competitors, the effect the waiver has on most competitors is ambiguous, and the ambiguous waivers have public policy concerns).

<sup>133</sup> See *infra* Part III.A-B (disputing how the inherent risks listed in the exculpatory clauses are ambiguous because the competitors' mindsets are not substantial enough to fully understand the terms and conditions of the inherent risks).

<sup>134</sup> See *infra* Part III.C (proposing a generic exculpatory clause that gives obstacle racing providers an idea of how to implement and explain the event's obstacles within the waivers).

<sup>135</sup> See *infra* Part III.A (analyzing the case law from Illinois, Michigan, and Florida to determine the issues coming out of the exculpatory clauses in the three analyzed liability waivers, specifically arguing public policy concerns regarding substantial unconscionability between the two parties and making obstacle racing state regulated).

<sup>136</sup> See *infra* Part III.B (taking the three obstacle racing liability waivers and analyzing the clauses that refer to the inherent risks and the clauses referring to the competitors being in good health for this particular sport).

provides a generic format for obstacle racing sports providers to consider putting in the obstacle racing liability waivers.<sup>137</sup>

A. *Case Law Analysis Proves the Liability Waivers Are Invalid*

The terms referring to the inherent risks are not just ambiguous and lengthy, but the waivers themselves are inherently invalid because they violate public policy.<sup>138</sup> In analyzing the case law from Illinois, Michigan, and Florida, some courts look at whether competitors had the subjective mindset to understand the exculpatory clauses before signing, but most courts focus on whether the exculpatory clauses are concise and unambiguous.<sup>139</sup> However, the violation of public policies within a state will automatically make a liability waiver invalid.<sup>140</sup>

Part III.A applies the Spartan Race, Tough Mudder, and Warrior Dash liability waivers and interprets their exculpatory clauses under Illinois, Michigan, and Florida law.<sup>141</sup> When interpreting an agreement that waives ordinary negligence, courts strictly construe against the defendant and the courts must determine the severity and the reasonableness of that agreement.<sup>142</sup> However, the severity of obstacle racing agreements is crucial for a competitor to appreciate and recognize the risks.<sup>143</sup>

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<sup>137</sup> See *infra* Part III.C (providing a generic exculpatory clause that obstacle racing sports providers should take into consideration that will fix the ambiguous understanding of the inherent risks because most competitors cannot fully understand and appreciate the risks within the current liability waivers).

<sup>138</sup> See *infra* Part III.A (discussing the public policy arguments to help amplify one of the arguments that obstacle racing liability waivers should be inherently invalid because of how much public safety is critically affecting the competitors).

<sup>139</sup> See *infra* Part III.A (deliberating that courts should factor in the total amount of experience, training, and knowledge of all competitors so the courts can determine whether a competitor can fully understand the inherent risks in the exculpatory clauses).

<sup>140</sup> See Flood, Jr. & Walker, *supra* note 91, at 18 (showing that exculpatory clauses are disfavored by law because the provider shifts the burden of care onto the competitors in the sport; however, the competitors might not be able to properly take care of themselves to the fullest extent). In determining the enforceability of the express writing, the terms and conditions differ depending on where the exact liability waiver is being enforced. *Id.*

<sup>141</sup> See *infra* Part III.A (analyzing case law from Illinois, Michigan, and Florida to argue that waivers should be inherently invalid because of the exculpatory clauses, referring to the inherent risks and the physical conditions of the competitors, which are ambiguous for most competitors to fully understand).

<sup>142</sup> See *Platt v. Gateway Intern. Motorsports Corp.*, 813 N.E.2d 279, 282–83 (Ill. App. Ct. 2004) (discussing that an agreement is construed because every clause in the agreement was for a specific purpose in which the severity should not be an issue); *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444, 446 (Fla. Dist. Ct. App. 1982) (disfavoring beneficiary parties unless the exculpatory clauses are concise and unambiguous).

<sup>143</sup> See *Easter et al.*, *supra* note 34, at 257–58 (describing that the primary issue in an express assumption risk defense in recreational and sports injuries is whether the competitor had the proper knowledge and mentality to appreciate the risks that injured them during the event).

In Illinois, there is a significant difference between freely and knowingly agreeing to a waiver when the competitor is properly trained and experienced in the sport to fully understand the agreement.<sup>144</sup> The parties must have the same understanding and knowledge regarding the inherent risks, but most competitors do not even possess the particular mindset to have the mutual understanding for obstacle racing.<sup>145</sup> Within the range of injuries and risks listed in these exculpatory clauses, competitors may be seriously risking permanent bodily disfigurement or death, which is more than just financial risks.<sup>146</sup> If the future financial risks are problematic, then no competitor would jeopardize their livelihood.<sup>147</sup> No competitor is going to fully or voluntarily agree to sign a liability waiver if the competitor cannot even be aware of “all” the inherent risks.<sup>148</sup>

When emphasizing “all” the inherent risks in a sporting event, the sports provider may not eliminate the unknown risks themselves.<sup>149</sup> Even so, a competitor’s subjective mindset needs to fully appreciate what they are getting into and how treacherous the obstacles and unknown inherent risks will be.<sup>150</sup> If the competitor does not proficiently appreciate the

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Some competitors may be minors and the liability waiver may be considered void because the minor did not have the mental capacity to contract. *Id.* at 258.

<sup>144</sup> See *Harris v. Walker*, 519 N.E.2d 917, 920 (Ill. 1988) (providing that even though the liability waiver mentioned that an inherent risk in riding horses involved side-shocks by natural forces, the plaintiff should have foreseeably known about the inherent risks based on her experience in riding horses and how horses react to outside interference, making the liability waiver not against public policy).

<sup>145</sup> See *Hussein v. L.A. Fitness Intern., LLC*, 987 N.E.2d 460, 465 (Ill. App. Ct. 2013) (enforcing that Illinois courts will not interfere if both parties freely understand the terms and conditions of their agreement). There cannot be a substantial disparity in the parties’ bargaining powers, especially the party receiving the benefit, or the agreement will be void because the agreement violates public policy. *Id.* The liability waivers must give notice to the competitors about the inherent risks so the competitors have a full understanding of the event. *Id.*

<sup>146</sup> See *Rosenthal*, *supra* note 60, at 2660 (considering public policy concerns as to whether the financial consequences, competitor’s earning of a salary, and the potential physical and economic impact on the competitor, violates a standard of public policy).

<sup>147</sup> See *Etter*, *supra* note 20, at 44 (taking into consideration that common sense should be a factor so the competitors, with the right mindset to know their limitations, fully understand whether they know all the inherent risks and whether they are properly trained to compete in the obstacle race).

<sup>148</sup> See *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470, 476-77 (7th Cir. 1991) (showing that the plaintiff fully assumed the known and obvious risk of what could foreseeably happen when climbing backwards up a slide during an obstacle course, which prevented the plaintiff from recovering any damages).

<sup>149</sup> See *supra* Part II.B (stating inherent risks in sporting events include both known and unknown risks, and the sports providers need to make sure they do not increase the inherent risks).

<sup>150</sup> See *Macias v. Naperville Gymnastics Club*, No. 2-14-0402, 2015 WL 1048388, at \*2-4 (Ill. App. Ct. Mar. 10, 2015) (providing that the plaintiff completely understood and was aware



severity of the risks, then that should raise concerns with public safety.<sup>151</sup> In obstacle racing, or any extreme sport, the necessity for public safety must always outweigh the sports provider's goal of making a profit.<sup>152</sup>

In Michigan, both the parties must agree to knowing all the inherent risks, just like in Illinois.<sup>153</sup> The obstacle racing waivers describe that the competitors waive their right to sue the sports providers for injuries because sports providers have the right to waive ordinary negligence.<sup>154</sup> The plaintiff has the burden to prove that the sports provider was grossly negligent by increasing the risk that caused the plaintiff's injury, but the plaintiff's interpretation of the exculpatory clause regarding the inherent risks is a significant issue to be determined in court as well.<sup>155</sup>

To put a strong emphasis on the mutual understanding of both the parties, the competitors need to knowingly assume all the risks that are both known and unknown.<sup>156</sup> If the exculpatory clauses are ambiguous regarding what is expected from an inherent risk in the sporting event, then the waiver should be invalid, unless the risks are very specific in the

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of all the risks with gymnastics, even though he participated in an open gym as a non-gymnastic member and attempted to try gymnastic moves). The defendant provided sufficient evidence in a deposition that the plaintiff was fully aware of the possible consequences of jumping off a springboard and landing head first into a foam pit. *Id.*

<sup>151</sup> See *id.* at 4–13 (questioning, in the analysis, the motive and purpose behind the sports provider's decision to run open gyms for non-gymnastic members, unless they are trained beforehand). However, the purpose was clear between both the parties and the terminology in the liability waiver was unambiguous. *Id.*

<sup>152</sup> See *Garrison v. Combined Fitness Centre, Ltd.*, 559 N.E.2d 187, 189–90 (Ill. App. Ct. 1990) (explaining further that a contract will be enforceable unless there is a substantial disparity in the bargaining position). The disparity is that the competitors are going into an event that they cannot substantially understand while the sports providers are receiving a profit when the competitors' lives are in serious financial and physical jeopardy. *Id.*

<sup>153</sup> See *Sa v. Red Frog Events, LLC*, 979 F. Supp. 2d 767, 772 (E.D. Mich. 2013) (quoting "the validity of a release turns on the intent of the parties" and making sure that the sports provider does not increase the inherent risks of the event).

<sup>154</sup> See *supra* Part II.D (referring back to competitors waiving the right to sue the sports providers based on ordinary negligence). The Spartan Race liability waiver has an implied negligence standard within the waiver that implies that the legal doctrine is consistent with the particular exculpatory clause. *Supra* Part II.D.

<sup>155</sup> See *infra* Part III.B (analyzing how the inherent risks in obstacle racing cannot be fully understood by most competitors because of numerous factors, which include proper training and experience to appreciate all the risks involved in the race).

<sup>156</sup> See *Lucas v. Norton Pines Athletic Club, Inc.*, No. 289685, 2010 WL 2332384, at \*2–4 (Mich. Ct. App. June 10, 2010) (explaining that an experienced rock climber sufficiently understood the risks of not clipping on his auto-belay system or making eye contact with the employees that were watching him climb the wall); *Sa*, 979 F. Supp. 2d at 778–79 (emphasizing that the plaintiff did not freely assume the risk of being paralyzed when the sports provider's emcee encouraged all the competitors to jump head first into the mud pits, which increased the inherent risk of receiving severe bodily injuries to the competitors).

clause and the obstacles are described in explicit detail.<sup>157</sup> A lay person may understand the terms and conditions in the obstacle racing agreement perfectly because they read the entire agreement, but a lay person will not understand the strict severity of the inherent risks because he or she did not properly train or prepare to formulate the necessary subjective mindset for competing in obstacle races.<sup>158</sup>

In Florida, competitors are not going to be subjectively aware of all the inherent risks in obstacle racing.<sup>159</sup> A competitor will freely assume the opportunity to compete in an obstacle-racing event, but all the inherent risks may not be knowingly appreciated—especially the unknown risks that sports providers cannot eliminate.<sup>160</sup> If the competitor does not know all of the inherent risks, then the competitor will not freely and knowingly agree to sign the agreement.<sup>161</sup>

Nevertheless, most of the injuries and risks could be reasonable within the scope of a liability waiver.<sup>162</sup> The conduct by the competitor may also show he or she appreciated all the inherent risks.<sup>163</sup> At the same time, with Florida's focus on a competitor's subjective mindset as a factor, if the

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<sup>157</sup> See Burnham, *supra* note 84, at 397 (providing that the inherent risks and other clauses should provide explicit detail about the risks and injuries for a competitor to understand); *infra* Part III.C (providing exculpatory clauses for sports providers to consider when explicitly describing the obstacles with descriptive explanations of the injuries and risks).

<sup>158</sup> See Arango & Treuba, Jr., *supra* note 81, at 18–19 (showing that one court upheld a liability waiver because the business provided sufficient resources to give the skydiver the right mindset including a video explaining the exculpatory clauses he signed). The waiver was unambiguous to the injured plaintiff because after watching the video, the plaintiff understood the terms and conditions in the liability waiver to fully express that he understood all the inherent risks. *Id.*

<sup>159</sup> See *Diodato v. Islamorada Asset Mgmt., Inc.*, 138 So. 3d 513, 516, 519–20 (Fla. Dist. Ct. App. 2014) (concluding that the term “activity” was ambiguous in the waiver, and the plaintiff subjectively did not appreciate all the inherent risks in a “wreck dive”). The plaintiff had signed a valid one-year release, and he had completed open reef dives in shallow waters but he never signed a waiver regarding wreck dives in deep waters. *Id.* at 516.

<sup>160</sup> See *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318, 321 (Fla. Dist. Ct. App. 1984) (exemplifying that because of the negligent operation of the speed-regulating mechanism of a mechanical bull, the plaintiff could not manifest and agree to the risks that originally came with riding the mechanical bull).

<sup>161</sup> See *id.* (discussing that the participant was aware of the known risks when she signed the liability waiver, but because the employee increased the unknown risks, the liability waiver was invalid and the participant could receive insurance coverage for her injuries).

<sup>162</sup> See *Diodato*, 138 So. 3d at 517–18 (describing that the injury sustained during the activity must be considered reasonable within the scope of the waiver and considered broad enough to make the risks in that activity reasonable). The wreck dive was not reasonable under the circumstances due to the ambiguity of the one-year release and the dives the plaintiff performed. *Id.*

<sup>163</sup> See *supra* Part II.B (referring back to the implied assumption of risk doctrine, which the competitors' conduct shows that they assumed the risk based on their conduct during the event and were fully aware of what could happen if they attempted to take on the risk).

competitor could not appreciate the risk that caused his or her injury and the risk was not reasonable within the scope of the liability waiver, then the waiver must be invalid.<sup>164</sup> For the courts to interpret liability waivers, the subjective mindset of the competitor factors into whether the exculpatory clauses were considered reasonable in the specific circumstance.<sup>165</sup>

The safety and protection of the competitors in a sport like obstacle racing is the most important necessity that needs to be upheld.<sup>166</sup> Regarding the necessity of safety and protection of the competitors, the proponent of supporting contractual agreements where both parties know what to expect out of the agreement should correlate with what a true agreement is supposed to represent.<sup>167</sup> After discussing the case law in Illinois, Michigan, and Florida and the clauses themselves, multiple public policy concerns are at issue, but a few public policy issues strongly question obstacle racing and the liability waivers.<sup>168</sup>

The first public policy concern is that obstacle racing waivers are substantially unconscionable and that competitors are deeply disadvantaged in obstacle racing.<sup>169</sup> The waivers should be considered unconscionable because, without the sufficient mindset to be aware of all the inherent risks, they are considered one-sided agreements that favor

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<sup>164</sup> See Simons, *supra* note 65, at 484–86 (showing that by voluntarily competing in the sporting event, the competitors fully knew what was considered reasonable and that their involvement showed they knew how to combat the known and unknown inherent risks because of their past training and experiences). The jurisdiction will determine whether the assumption of risk defense is considered a complete bar or partial bar to recover damages. *Id.* at 486.

<sup>165</sup> See *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444, 448–49 (Fla. Dist. Ct. App. 1982) (demonstrating that for the express assumption of risk doctrine to be valid for the defendant, the competitor or participant must have subjectively understood the risks associated with the sport or activity and actually intended to assume the possible consequence of those risks).

<sup>166</sup> See *supra* Part II.A (providing that the substantial amount of injuries to competitors has increased throughout the years ever since the sport became increasingly popular and the injuries have become unreasonably severe to the point that competitors cannot foresee those injuries).

<sup>167</sup> See *supra* Part II.C (referring back to Illinois, Michigan, and Florida case law, where all the three courts conclusively must determine that both parties fully and knowingly entered into the agreement and agreed with the terms of the agreement).

<sup>168</sup> See *infra* Part III.A (focusing on the unconscionability and state-regulated public policy violations to argue about the legality and validity of the obstacle racing liability waivers).

<sup>169</sup> See Leslie, *supra* note 92, at 342 (explaining that sports providers receiving a profit and having the competitors fight off risks without receiving the proper precautions to understand and reduce the risks is unconscionable); Burnham, *supra* note 84, at 384 (illustrating how substantive unconscionability questions the fairness in having competitors fend off risks in a sporting event that do not offer a safe environment).

the sports provider.<sup>170</sup> If the waivers are one-sided, then there is substantially an unequal bargaining power between the competitor and the sports provider.<sup>171</sup>

There are unequal bargaining powers between competitors and sports providers because the waivers do not provide everything for a lay person to fully understand all the inherent risks within the sport.<sup>172</sup> However, if a competitor cannot be fully aware of all the inherent risks based on the severity of getting extremely injured, then the agreement should be considered unconscionable to the point that only the sports provider is benefiting from the liability waiver.<sup>173</sup> Although most courts disagree on accepting the unconscionable doctrine, the obstacle racing liability waivers should be inherently invalid because of the sport of obstacle racing itself and its effects on public safety.<sup>174</sup>

The second public policy concern is that obstacle waivers should be regulated per state because of the severe risk of future injuries and deaths.<sup>175</sup> With the extreme nature of obstacle racing and the unpredictable consequences that are stated within the waivers, a state government or administrative body should regulate obstacle racing.<sup>176</sup> If

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<sup>170</sup> See Burnham, *supra* note 84, at 384–86 (explaining, under the substantive unconscionability doctrine, the terms and conditions of the inherent risk exculpatory clause should be struck down because no reasonable person would accept the agreement as a whole to fully appreciate the risks and dangers of obstacle racing). Outside of recreational activities, exculpatory clauses have been struck down and held unenforceable in multiple cases including lease and housing transactions. *Id.* at 389.

<sup>171</sup> See *id.* 384–89 (providing that the unequal bargaining power is based on the immense amount of unknown risks involved with obstacle racing that makes it substantially unfair for competitors because the competitors are at a disadvantage to fend off all the unknown dangers and never agreed to the consequences that come with the unknown dangers).

<sup>172</sup> See Leslie, *supra* note 92, at 341 (restating that Virginia is the only state that finds unconscionability as a public policy issue in agreements). The purpose of unconscionability is to prevent agreements from being upheld because there were unfair surprises that gave all superior bargaining powers to the party making a profit. *Id.* at 342.

<sup>173</sup> See Potter, *supra* note 70, at 14 (providing that the experience and knowledge of the competitors are taken into consideration, which shows that a person who has performed the activity numerous times would find the risks to be reasonable). For example, a competitive weight lifter knows all the inherent risks in a weight lifting competition, especially the possibility of losing control of the weight bar and sustaining severe injuries. *Id.*

<sup>174</sup> See *id.* at 16–17 (implementing that the degree and effect of the sport must correlate with the competitors to get a directed correlation of what the competitors are expected to know and what kinds of risks should be known based on the specific activity).

<sup>175</sup> See Arango & Treuba, Jr., *supra* note 81, at 26–27 (implementing that society is not comfortable with the safety precautions and implementations set by the sports providers because the public concern deals with endangering participants). When it comes to a state regulating a sport, the state has an economic interest to compel regulation and cease any economic harm of the state. *Id.* at 27.

<sup>176</sup> See Greer, *supra* note 48, at 94–96 (regarding that because there are inherent risk statutes implemented by different states involving sports, where the degree of risks cannot be

obstacle racing is regulated by a state governing body, then obstacle racing waivers will include better provisions and safer restrictions over the inherent dangers.<sup>177</sup>

However, the problem with states regulating obstacle racing is that obstacle racing already has a union-based governing body that provides safety provisions and insurance policies.<sup>178</sup> Furthermore, not a lot of state agencies might want to regulate obstacle racing because of how self-regulated the sport has become throughout the years.<sup>179</sup> Yet, if obstacle racing becomes an imminent danger to the public in future cases, then legislators need to take action and have obstacle racing regulated per state.<sup>180</sup> The public policy concerns and the case law question the validity and the legitimacy of obstacle racing waivers, but the terms and clauses within the waivers provide more verification that exculpatory clauses, regarding the inherent risks, are ambiguous for most competitors.<sup>181</sup>

### B. *The Terms and Clauses of Obstacle Racing Clauses Are Invalid*

Most competitors signing obstacle racing waivers cannot subjectively appreciate the known and unknown risks toward that competitor's well-being and safety.<sup>182</sup> The exculpatory clauses in the Tough Mudder,

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eliminated, legislators should create a statute that regulates obstacle racing). For example, about forty-one states have inherent risk statutes for horse riding and twenty-six states have inherent risk statutes for skiing. *Id.* at 94-95.

<sup>177</sup> See Arango & Treuba, Jr., *supra* note 81, at 27 (showing that sports, like skiing in Colorado, provide regulation to decrease litigation and help increase the cost effectiveness in making a profit for Colorado's economy). Florida has also attributed to bungee jumping regulations by governing bungee jumping facilities and every aspect of bungee jumping from the designs to the maintenance of the equipment. *Id.* at 30.

<sup>178</sup> See *supra* Part II.B (reiterating that obstacle racing providers do not want state agencies or statutes to determine what they can and cannot do because that would limit the degree of activity in obstacle racing).

<sup>179</sup> See Woods, *supra* note 54 (providing that the self-governing body provides insurance coverage and has taken time to understand and solve the issues deriving from obstacle racing that have concerned the self-governing body). The insurance coverage provides the proper care from medical providers that contract with the sports providers to prevent any litigation from the injured party. *Id.*

<sup>180</sup> See Arango & Treuba, Jr., *supra* note 81, at 26-31 (explaining from bungee jumping to skiing, the increased amount of injuries by competitors and participants have influenced the need for states to create regulations for the purpose of reducing litigation costs, providing insurance to injured parties, and protecting the state's citizens from severe injuries).

<sup>181</sup> See *infra* Part III.B (arguing how competitors without sufficiently trained mindsets cannot distinguish the severity of the inherent risks that are listed in the liability waivers).

<sup>182</sup> See Keiper et al., *supra* note 18, at 87-90 (providing if a competitor is injured by a risk that he or she could not have been aware of during the event, then that competitor could not have fully appreciated or understood that risk). Competitors need to be able to evaluate the hazards and obstacles in front of them to ensure they are safe from harm based on their proper physical and mental capabilities. *Id.* at 87-88.

Spartan Race, and Warrior Dash liability waivers include uncommon risks for competitors to appreciate because competitors do not purposely encounter those risks outside of the sport.<sup>183</sup> The risks in the waivers include encountering obstacles with “electric shocks,” “open flames,” “contaminated waters that have not been tested,” “defective or inadequate completion equipment,” “natural hazards including wildlife attacks,” “contact with poisonous plants,” and “possible earthquakes that cannot be controlled.”<sup>184</sup> Competitors cannot fully realize the risk of being shocked, burnt, or poisoned by contaminated waters because of the competitors’ lack of experience with the extreme effects of those dangers.<sup>185</sup> If the competitors fully availed themselves to the stated conditions that put them in danger outside of the event, then the risks would be reasonable to anticipate because the competitors properly trained to understand those dangers.<sup>186</sup>

The waivers do not specify how many volts each competitor receives in an obstacle race that shocks competitors.<sup>187</sup> The waivers that mention shocks, like Tough Mudder, illustrate the bodily injuries that are caused from the shocks, but there is no indication of the actual amount of voltage the obstacle gives to each competitor.<sup>188</sup> To be precise, Tough Mudder

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<sup>183</sup> See Horton, *supra* note 49, at 624 (comparing obstacle racing with other extreme sports like building, antenna, span, and Earth (“BASE”) jumping, which looks at participants who have had previous experience jumping and what expectations they have from jumping based on that experience). Adventure seekers, risk takers, and trained specialists take on the inherent risks head on by fully cooperating with the fact that the activity they are doing is dangerous based on the serious possibility of getting injured. *Id.*

<sup>184</sup> See *supra* Part II.D (describing some of the natural hazards that cannot be eliminated from an obstacle racing event like forest attacks and earthquakes because the event is held in open, natural arenas).

<sup>185</sup> See Rosenthal, *supra* note 60, at 2659–60 (describing that courts mention important factors to public policy considerations including: the financial impact of the injury, the experience level of the competitor, and the foreseeability of the risks based on the scheme of the sport). One key factor courts have questioned regarding policy considerations is what the competitor’s general purpose for competing in the sport was. *Id.* at 2660–61.

<sup>186</sup> See *id.* at 2659–60 (encouraging that the proper standard for determining if the competitor assumed the full risk of injury is based on his or her experience and knowledge).

<sup>187</sup> See *supra* Part II.D (showing that none of the exculpatory clauses describing electric shocks explain how many volts of electricity a competitor gets shocked with during the event). However, the only obstacle course race that has used electrical shocks is Tough Mudder. *Supra* Part II.D

<sup>188</sup> See *supra* Part II.D (providing some examples of injuries like “skin irritation, electrical burns, muscle spasm, muscle contraction, single or multiple organ failure, eye injuries including cataracts and temporary or permanent blindness”). There are no clauses referring to the effect of the obstacle course that provides the electrical shocks, nor are there any indications of the amount of voltage the obstacle gives out. *Supra* Part II.D.

purposefully shocks competitors with 10,000 volts of electricity.<sup>189</sup> If the competitors cannot fully know the full extent of an obstacle, let alone the amount of voltage unspecified in the exculpatory clause, then the competitor cannot expressly assume the risk of being injured by electrical shocks.<sup>190</sup> Being electrocuted is not just a known risk, but a risk that Tough Mudder has control over, and it has the capabilities to amplify the electric shocks.<sup>191</sup>

Most competitors cannot subjectively understand the effect of going through an obstacle that has open flames because the competitors do not understand the obstacle in detail and the extreme effects of the open flames.<sup>192</sup> There are obstacles with open flames for the purposeful effect of living dangerously.<sup>193</sup> Some competitors in an obstacle race find jumping over flames and other extreme obstacles to be living on the edge, but those competitors also expect flames and other obstacles to be properly controlled to the point they are not excessive.<sup>194</sup> If the competitors expect to appreciate the danger, then the competitors need to be aware about the extent of the flames in detail and in more explicit writing.<sup>195</sup>

The Warrior Dash liability waiver, which acknowledges some waters may have not been tested for anything contaminated, is unnervingly

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<sup>189</sup> See Beresini, *supra* note 28 (explaining that the amplified volts administered through the obstacle called “Electroshock Therapy” are crucial because the way the amps are controlled is key to preventing severe injuries from occurring to the competitors).

<sup>190</sup> See Brummet, *supra* note 57, at 1039–41 (emphasizing that the unknown fact of the electrical voltage should be unreasonable, and a competitor could not fully appreciate an injury from the electrical shocks because the competitor was not fully informed about the details of the obstacle in the waiver and most competitors never properly trained to avail themselves to electric shocks).

<sup>191</sup> See Beresini, *supra* note 28 (stipulating that when competitors are running through the Electroshock Therapy obstacle, many factors determine the electric shocks including the frequency of the currents and how long they last). The determined shocks can easily affect participants who are more susceptible to severe injuries. *Id.*

<sup>192</sup> See *supra* Part II.D (stating that the inherent risks involved in the obstacles include going through or jumping over open flames that can cause serious burns or possibly permanent damage).

<sup>193</sup> See Etter, *supra* note 20, at 43–44 (specifying that obstacle races like Tough Mudder and Spartan Race have hazards and extreme obstacles for competitors who want to be physically and mentally challenged to the brink of even death); Horton, *supra* note 49, at 621–24 (analyzing the competitor’s knowledge, experience, and mental fortitude to understand why the individual would specifically do an extreme activity).

<sup>194</sup> See Easter et al., *supra* note 34, at 259 (illustrating that sports providers still have to maintain a safe environment for the competitors because they cannot eliminate the inherent risks, but they cannot increase the inherent risks by being grossly negligent or acting maliciously).

<sup>195</sup> See *infra* Part III.C (clarifying that exculpatory clauses need to be more precise to point out the dangers and risks regarding the different types of obstacles that are in the event because none of the liability waivers discuss any of the obstacles in detail).

problematic.<sup>196</sup> Sports providers need to thoroughly test every body of water they use so they do not increase the chance of poisoning competitors.<sup>197</sup> Testing every single natural hazard and natural area of water is necessary to prevent excessive harm.<sup>198</sup> If sports providers are trying to control natural hazards like bodies of water, then they need to examine everything and specify that everything is sufficiently controlled so the competitors are aware of the possible increased risks from natural forces.<sup>199</sup>

The exculpatory clauses imply competitors need the proper subjective mindset to illustrate that the competitors are in good health and are sufficiently trained to compete in the particular event.<sup>200</sup> For any sport, whether professional, sponsored, or recreational, competitors compete and try to beat other competitors.<sup>201</sup> However, in Tough Mudder competitors are encouraged to help others out.<sup>202</sup> If the competitors are helping other competitors, then the effects of the sport itself are ambiguous to determine what defines a competitor to be in good health and how much training a competitor needs because the effects and the

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<sup>196</sup> See *supra* Part II.D (explaining the terminology that the waters may not have been tested for contamination by dangerous toxins, which could infect the competitors).

<sup>197</sup> See Keiper, *supra* note 18, at 80 (showing different incidents where participants got sick including in a 2013 Tough Mudder event in Michigan when over 200 competitors became ill from a virus in the mud and water). Natural risks and diseases from bodies of water cannot be eliminated, but all the natural bodies of water in the event should be treated for the safety of the competitors because the sports providers have a duty to the competitors. *Id.* at 83–84.

<sup>198</sup> See Miller et al., *supra* note 46, at 46 (implying that removing or eliminating parts of the obstacle course will not affect the sport, but the sports providers will have to coordinate around other areas of the premise). For the primary implied or express assumption of risk to work, the sports providers must coordinate the race around the areas that have been examined and cleared for a safe race environment. *Id.*

<sup>199</sup> See Battersby, *supra* note 33, at 97 (arguing that just like refilling water at water stations in marathon races, obstacle racing providers should test all the waters around the course for the purpose of not increasing the inherent risk of illness to the competitors); *supra* Part II.D (referring that the competitors accepted the risk that “some” waters have not been tested). This clause should specify what waters have not been tested so if the competitors want to avoid those waters, then they would have the knowledge to do so. *Id.* See *infra* Part III.C (illustrating further provisions that obstacle course providers should take into consideration for future liability waivers).

<sup>200</sup> See *supra* Part II.D (acknowledging that a sports provider wants each competitor to be in “good health” during the obstacle event so the competitor’s health will not factor into causing any injuries).

<sup>201</sup> See Greer, *supra* note 48, at 83 (explaining that the X Games are an enormous competition where all the best competitors compete against one another).

<sup>202</sup> See England, *supra* note 21 (understanding that obstacle racing providers have different aspects of racing). Spartan Race promotes competition, while Tough Mudder and Warrior Dash promote teamwork. *Id.* Not a lot of people thoroughly perceive the differences between the purposes of each obstacle event because the all-around inherent risks that can cause serious injuries, based on the obstacles, are within the obstacle races. *Id.*



inherent risks of obstacle racing make the exculpatory clauses completely ambiguous.<sup>203</sup>

In addition to competitors needing the proper subjective mindset to understand the inherent risk terms in a liability waiver, the Spartan Race waiver mentions opportunities to train competitors.<sup>204</sup> For sports that test a competitor's physical and mental capabilities, a competitor needs the proper training to be prepared to take on physically demanding tasks.<sup>205</sup> Not only is training necessary to compete, but training would make competitors fully aware of all the inherent risks before the event begins.<sup>206</sup> If liability waivers require competitors to receive the proper training before the event, then competitors would be fully aware of all the inherent risks in the obstacle race to truly give written consent.<sup>207</sup> They would also fully agree to the terms and the conditions, which would make the waivers almost absolute.<sup>208</sup>

To further pinpoint the problems with obstacle racing liability waivers, the arguable ambiguity in the terms and clauses originate from the sport of obstacle racing itself.<sup>209</sup> A competitor's understanding of all the inherent risks conflict with what the true nature of obstacle racing is

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<sup>203</sup> See Potter, *supra* note 70, at 14-17 (detailing that the courts are in conjunction with taking into account the knowledge and expertise with the sport so a competitor can know his or her own body to determine if he or she is capable of taking on the risks in front of him or her); *supra* Part III.A (implying that the knowledge and experience of the competitors will give them a full understanding of the inherent risks that are stated in the liability waivers and therefore are not considered ambiguous).

<sup>204</sup> See *supra* Part II.D (demonstrating that Spartan Race expresses in its liability waiver that competitors can participate in any training activities with the sports provider before competing in an event).

<sup>205</sup> See Battersby, *supra* note 33, at 97-98 (discussing that the high standard of training and competing in intense activities provides the full preparation to be fully aware of the consequences and actions). The intense training and preparation lets the competitors know the limits of their bodies and what risks not to endure. *Id.* See also *supra* Part II.A (emphasizing that in CrossFit, the participants need to come in with the proper mindset to be aware of all the risks that come with performing activities at the CrossFit center).

<sup>206</sup> See Battersby, *supra* note 33, at 97 (explaining that competitors in high intensity sports that cause serious injuries, such as running a Marathon, choose to compete while knowing and assuming the inherent risks involved in that particular sport that causes dehydration or serious internal problems).

<sup>207</sup> See Simons, *supra* note 65, at 485-86 (including that competitors will then be able to mentally know, while competing, what obstacles and areas should be avoided because then they may voluntarily accept or decline to go through the risk).

<sup>208</sup> See *supra* Part II.B (furthering that the gross negligence from the defendant or any of its employees would make the liability waiver invalid). Additionally, a violation of public policy would make a waiver or contract void. *Supra* Part II.B.

<sup>209</sup> See *supra* Part III.A-B (arguing the lack of understanding of some of the inherent risks within the sport, but especially in the obstacles themselves).

and how seriously it should be taken.<sup>210</sup> In regards to the exculpatory clauses, the clauses and terms about the inherent risks should be considered ambiguous because the risks cannot be fully understood based on the competitor's subjective outlooks on obstacle racing.<sup>211</sup> Furthermore, to understand the risks, an exculpatory clause must be clear and unambiguous.<sup>212</sup> However, if the clauses are interpreted in just one concise way, based on a generic format for specifically explaining and defining the obstacles themselves, then any competitor would understand all the inherent risks.<sup>213</sup>

### C. Contribution

This Note argues that most competitors cannot fully understand all the inherent risks in an obstacle racing liability waiver because most competitors do not have the training to achieve the appropriate subjective mindset.<sup>214</sup> Since most competitors cannot understand all the inherent risks by reading the obstacle racing liability waivers, the waivers should be inherently invalid.<sup>215</sup> Nevertheless, the liability waivers do specify the risks and injuries by listing them, but most competitors cannot

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<sup>210</sup> See *supra* Part III.A-B (reviewing the concept that most competitors may not fully understand the risks because they do not have the subjective outlook and proper preparation to anticipate the risks or comprehend them when reading the waivers).

<sup>211</sup> See *supra* Part III.A-B (emphasizing that most competitors reading obstacle racing liability waivers cannot fully understand all the risks because of their subjective mindsets and their inexperience).

<sup>212</sup> See *Cox v. U.S. Fitness Inc.*, 2 N.E.3d 1211, 1215 (Ill. App. Ct. 2013) (providing that in Illinois, the courts will have the final determination if the exculpatory clauses have more than one reasonable interpretation). Even though there was a supplemental agreement when the plaintiff bought a personal training session after she bought a gym membership, there were no modifications in the supplemental clauses to indicate that any of the gym membership exculpatory clauses changed. *Id.* at 1218.

<sup>213</sup> See *Diodato v. Islamorada Asset Mgmt., Inc.*, 138 So. 3d 513, 517-20 (Fla. Dist. Ct. App. 2014) (stating that the particular scuba diving "activity," which was described and stipulated in numerous exculpatory clauses, was outside the scope of the activity because the clause did not portray a scuba diving activity regarding hazardous waters); *infra* Part III.C (proposing a generic exculpatory clause about how the obstacles should be specified and how they should describe the risks of taking on the obstacles).

<sup>214</sup> See *supra* Part III.A-B (arguing why obstacle racing waivers should be invalid based on looking at the inherent risk and good health exculpatory clauses and construing a high standard of knowledge that needs to be implied when reading the Tough Mudder, Spartan Race, and Warrior Dash liability waivers).

<sup>215</sup> See *supra* Part III.A-B (explaining that because of the specific subjective mindset that competitors need in reading the waivers, the exculpatory clauses are ambiguous because most competitors failed to achieve the proper training to obtain that specific subjective mindset).

subjectively understand the specified terminology like the inherent risks in the exculpatory clauses.<sup>216</sup>

As such, Part III.C contributes to the Note by proposing a generic exculpatory clause that obstacle racing sports providers should take into consideration.<sup>217</sup> Even though the inherent risks are described as the risks in all the obstacles, the liability waivers do not explicitly describe the actual obstacles themselves.<sup>218</sup> With the inherent risks that describe the possible injuries by fire, electric shocks, contaminated waters, and other risks, the exculpatory clauses do not identify the obstacles that the competitors will take on in the obstacle race.<sup>219</sup> First, Part III.C.1 provides a generic exculpatory clause for competitors to determine whether the competitors can handle the obstacles and be aware of all the inherent risks.<sup>220</sup> Finally, Part III.C.2 discusses the generic exculpatory clause and explains why the clause is necessary to implement into obstacle racing liability waivers.<sup>221</sup>

### 1. Proposed Exculpatory Clause for Obstacle Racing Sports Providers

This Note proposes a generic exculpatory clause that describes the particular obstacle, breaks down the structure, and explains the inherent risks and injuries.<sup>222</sup> Following the generic clause, there will be examples

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<sup>216</sup> See *supra* Part II.D (providing the inherent risk and good health exculpatory clauses in the Tough Mudder, Spartan Race, and Warrior Dash liability waivers).

<sup>217</sup> See *infra* Part III.C (suggesting obstacle racing providers should take into consideration the proposed clause for their liability waivers so even competitors without the right mental mindset can reasonably understand the severe risks and dangers of the obstacles); *supra* Part II.D (stating the exculpatory clauses that were analyzed throughout the Note). The clauses in the Contribution are inspired and reflected for further detail based on the obstacle racing waivers that have been analyzed from Tough Mudder, Spartan Race, and Warrior Dash. *Supra* Part II.D.

<sup>218</sup> See *supra* Part II.D (illustrating the exculpatory clauses regarding the inherent risks, negligence and assumption of risk doctrines, and good health standards in the three analyzed liability waivers).

<sup>219</sup> See *supra* Part III (arguing how most competitors cannot fully understand the risks of being shocked, burnt, poisoned, or availed to other severe injuries because they do not have the proper mindset to understand the severity, and a lot of the risks are uncommon for people to face outside of obstacle racing).

<sup>220</sup> See *infra* Part III.C.1 (contributing how the exculpatory clauses should describe the obstacles themselves with the inherent risks and injuries, within the clauses, so risks and injuries are grouped together and concise for any person to understand).

<sup>221</sup> See *infra* Part III.C.2 (illustrating why the proposed exculpatory clause is necessary for obstacle racing sports providers to consider for their liability waivers based on analyzing the argued ambiguity in the current inherent risk exculpatory clauses).

<sup>222</sup> See *infra* Part III.C.1 (showing the proposed generic clause for obstacle racing sports providers and examples of how it would appear in the waiver).

of how the clause will appear in the waivers.<sup>223</sup> For example, in the Tough Mudder liability waiver, the following would be eliminated:

~~I understand and acknowledge that the inherent risks include, but are not limited to: 1) contact or collision with persons or objects (e.g., collision with spectators or course personnel, contact with other participants, contact or collision with motor vehicles or machinery, and contact with natural or man made fixed objects or obstacles); 2) encounter with obstacles (e.g., natural and man made water, road and surface hazards, close proximity and/or contact with thick smoke and open flames, barbed wire, pipes, and electric shocks); 3) equipment related hazards (e.g., broken, defective or inadequate competition equipment, unexpected equipment failure, imperfect course conditions); 4) weather related hazards (e.g., extreme heat, extreme cold, humidity, ice, rain, fog); 5) inadequate or negligent first aid and/or emergency measures; 6) judgment and/or behavior related problems (e.g., erratic or inappropriate co participant or spectator behavior, erratic or inappropriate behavior by the participant, errors in judgment by personnel working the event; and 7) natural hazards (e.g., uneven terrain, rock falls, lightning strikes, earthquakes, wildlife attacks, contact with poisonous plants, marine life and/or ticks).~~<sup>224</sup>

Instead of the previous exculpatory clause, the inherent risks and the injuries will be added within exculpatory clauses about the actual obstacles themselves:

I understand and fully acknowledge that I choose to participate in [the name of the obstacle]. The obstacle [explains what the obstacle is and the characteristics of the structure]. I am fully aware of the inherent risks, which include but are not limited to: [the inherent risks with the obstacle and a description about the severity of the inherent risks]. I further understand that the inherent

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<sup>223</sup> See *infra* Part III.C.1 (explaining that the following examples illustrate using the proposed generic exculpatory clause include obstacles in events dealing with possibly being electrocuted and burnt by the obstacles themselves).

<sup>224</sup> See *supra* Part II.D (showcasing the exculpatory clause regarding the inherent risks in the Tough Mudder liability waiver).

risks may include injuries, but are not limited to: [list and describe the severity of each possible injury with the obstacle].<sup>225</sup>

The following are examples of what the exculpatory clauses would look like when the specific information about the obstacles are inserted into the exculpatory clauses regarding the inherent risks and injuries:

I understand and fully acknowledge that I choose to participate in “Electroshock Therapy.” The obstacle includes hanging wires that produce electrical shocks of 10,000 volts above muddy/wet terrain. [After that, provide more explanation to describe the specific detail of the obstacle]. I am fully aware of the inherent risks, which include, but are not limited to: [list of the inherent risks and an explanation of the severity of each inherent risk relating to the obstacle]. I further understand that the inherent risks may include injuries, but are not limited to: skin irritation, electric burns, muscle spasms . . . .<sup>226</sup>

I fully understand and acknowledge that I choose to participate in the “Fire Jump.” The obstacle includes open flames that may not be controlled because of natural forces and completing the obstacle requires competitors to run and jump over the flames. [After that, provide more explanation to describe the specific detail of the obstacle]. I am fully aware of the inherent risks, which include, but are not limited to: [list of the inherent risks and explain the severity of each inherent risk relating to the obstacle]. I further understand that the inherent risks may include injuries, but are not limited to: first-degree burns, second-degree burns, third-degree burns, broken bones, fractures . . . .<sup>227</sup>

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<sup>225</sup> See *infra* Part III.C.2 (describing how the generic exculpatory clause would make the inherent risk terms unambiguous for most competitors because the risks and injuries are stated alongside the obstacles in greater detail).

<sup>226</sup> See *infra* Part III.C.2 (referring to the generic exculpatory clause being proposed and providing an example of what an exculpatory clause would look like when one of the obstacles give out electric shocks to the competitors).

<sup>227</sup> See *infra* Part III.C.2 (showing another example of what a clause should list with regards to the risks and injuries that come with an obstacle that might cause serious injuries when jumping over an open flame).

## 2. Commentary

The generic exculpatory clause removes the inherent risks from one large exculpatory clause and inserts the inherent risks into clauses for every obstacle within the obstacle race.<sup>228</sup> The obstacles involving electric shocks, open flames, and contaminated waters will have their own separate clauses.<sup>229</sup> While the obstacles will have their own separate exculpatory clauses, the clauses will explicitly describe the particular obstacle's structure and maintenance, and illustrate the inherent risks and injuries that may occur while trying to complete the obstacle.<sup>230</sup>

The overall purpose of the generic exculpatory clause is to introduce the indication that before competing and reading the liability waiver, most competitors are not aware of the obstacles within the event.<sup>231</sup> The proposed generic clause and demonstrated examples provide extensive contributions so all the competitors can expressly acknowledge and appreciate the inherent risks in the event.<sup>232</sup> If the exculpatory clauses can specifically explain the physical requirements and knowledge required to complete the specific obstacle, then the competitors can be fully aware of all the inherent risks when they are reading the liability waivers.<sup>233</sup>

However, a lot of competitors reading the original exculpatory clauses believe they already understand all the inherent risks perfectly and do not think the exculpatory clauses need changed.<sup>234</sup> The competitors have trained their bodies and minds to combat different risks, and that extensive training shows that they have the proper subjective mindset.<sup>235</sup> Even if the reader is not experienced in competing in obstacle racing, a lay

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<sup>228</sup> See *supra* Part III.C.1 (providing the proposed revisions to the inherent risks that may be caused by the particular obstacle in the event).

<sup>229</sup> See *supra* Part III.C.1 (emphasizing that the specificity of the obstacles having their own clauses would provide clarified information about the event to competitors without the trained mindset).

<sup>230</sup> See *supra* Part III.C.1 (providing the generic exculpatory clause and examples of the clause describing different obstacles and the risks and injuries that come with the obstacle).

<sup>231</sup> See *supra* Part II.D (showing that none of the exculpatory clauses explain or give descriptions about what obstacles are in the event).

<sup>232</sup> See *supra* Part III.C.1 (giving specific details about the obstacles and what risks and injuries can come about when taking on the particular obstacle).

<sup>233</sup> See *supra* Part III (arguing that most competitors, without the proper training and experience, cannot fully comprehend the risks in the waivers, let alone comprehend the risks while competing in the event).

<sup>234</sup> See *supra* Part III.B (refuting how the terms and clauses are unambiguous and there is only one meaning to the inherent risk terms because competitors do not need specialized training to appreciate the terms and conditions).

<sup>235</sup> See *supra* Part III.B (creating a different standard for both parties to fully agree to the terms when both parties are aware of the effects of obstacle racing and consequences that come with competing in an obstacle race).

person can even understand the terms completely to know what the risks and dangers are in the obstacle event.<sup>236</sup> A lay person may know what the terminology means, but the extreme effect of obstacle racing creates a high standard that makes the exculpatory clauses amplified to a point where highly physically and mentally trained competitors are the only individuals that can reasonably understand the meaning of the inherent risks and expressly sign a liability waiver.<sup>237</sup>

The current exculpatory clauses regarding the inherent risks in obstacle racing show how essential it is to physically and mentally train for obstacle races; therefore, sports providers should take the proposed exculpatory clause into consideration.<sup>238</sup> The focus of sporting events should be around the preparation, capabilities, knowledge, and awareness of all the competitors competing in the event.<sup>239</sup> By using the generic exculpatory clause to describe the obstacles in explicit detail, with the inherent risks and injuries explained further, the competitors will be able to knowingly express on a liability waiver that they fully assume and appreciate all the inherent risks in the event.<sup>240</sup>

#### IV. CONCLUSION

As Jason progresses over the rope walls, runs through the expansive wooded areas, and swings through the obstacle rings, Jason has exerted his body to the point that everything is hurting. However, he wants to finish the event with everything he has and he is not going to stop. He runs across the sharp rocks with his calves burning in pain, and then crawls under the long tier of barbed wire while the wires scrape his back and cold, wet mud covers his entire body.

After scrapping through the barbed wire, it all comes down to jumping over the fire pit. Jason gets prepared and takes off like a bolt of lightning to the edge of the open flames and soars over to finally reach the

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<sup>236</sup> See *supra* Part III.A (discussing the analyzed case law in which the exculpatory clauses within an agreement must be unambiguous and concise to a layperson).

<sup>237</sup> See *supra* Part III.B (emphasizing how the extreme effect of obstacle racing creates a very high standard for all competitors to have the trained and experienced mindset to undoubtedly understand and appreciate all the inherent risks).

<sup>238</sup> See *supra* Part III.C.1 (stating the proposed exculpatory clause demonstrates how exculpatory clauses in obstacle racing liability waivers should be structured to make the waivers unambiguous).

<sup>239</sup> See *supra* Part III.B (explaining why properly training to be physically and mentally prepared is an extreme factor in understanding all the inherent risk terms in the liability waivers).

<sup>240</sup> See *supra* Part III.C.1 (pointing out the proposed generic clause about describing in specific detail the obstacles, the risks, and injuries that come with taking on the specific obstacle).

finish line. Satisfied with completing his first ever Spartan Race, Jason's entire body is tight and sore. While sitting down and stretching, Jason thinks back to all the obstacles he completed and back to the liability waiver he signed. Even though Jason is in good physical shape, he never properly trained to be fully aware of all the inherent risks.

Sports providers give all the competitors liability waivers so the competitors can sign and acknowledge that they are undoubtedly aware of all the inherent risks in the event. Unfortunately, most competitors cannot expressly sign the waivers because they do not have the trained mindset to be aware of all the inherent risks. Furthermore, most of the competitors do not fully understand the total effect of obstacle racing. By looking at the subjective understanding of the competitors, observing the terminology of the inherent risks within exculpatory clauses, and distinguishing the public policy issues in regards to interpreting the liability waivers, obstacle racing liability waivers should be inherently invalid and unenforceable.

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\* J.D. Candidate, Valparaiso University Law School (2017); B.A., Law Enforcement & Justice Administration, Western Illinois University (2014). During the writing and publishing process, I participated in a Super Spartan Race in Illinois. The amount of knowledge and research I received gave me the incentive to understand whether my thesis is accurate. Overall, I would like to express my gratitude and deepest respect to everyone that has helped me make this Note possible. First, I want to thank Nicole Negowetti for being my law review advisor and Emily Mussio for being my law review mentor. You two have helped me throughout the writing process and made this Note publishable. Second, I want to thank Volume 50 and 51 executive board members for their hard work and dedication. I have the upmost respect for what the executive board members have done for this law review, and I want to thank them for their sacrifices. Third, I want to thank all of my friends at Valparaiso University Law School and back home for sticking by my side and being there for me. Fourth and most importantly, I want to thank my loving family. I could not ask for a better family that has always loved me and has always been there to help my dreams become a reality.



