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## Tort Immunity for Volunteers in Ohio: *Zivich v. Mentor Soccer Club, Inc.*

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**TORT IMMUNITY FOR VOLUNTEERS IN OHIO: *ZIVICH v. MENTOR SOCCER CLUB, INC.*<sup>1</sup>**

I. INTRODUCTION

Commentators have dubbed volunteers the “[t]hird [s]ector” of the American economy, which is otherwise composed of business and government.<sup>2</sup> Various services such as libraries, school boards, scout troops and little league teams depend upon volunteers.<sup>3</sup> However, a series of highly publicized tort actions against volunteers in the 1980’s combined with a cycle of increasing insurance premiums and decreasing coverage for volunteers and nonprofit organizations, raised concern within the volunteer community.<sup>4</sup> Over the past several years some jurisdictions afraid of losing volunteer services have made public policy decisions shielding volunteers from liability for their own negligence.<sup>5</sup>

This note explores the debate regarding the decision to provide tort immunity for volunteers in the context of the Ohio Supreme Court’s opinion in *Zivich v. Mentor Soccer Club, Inc.*<sup>6</sup> The first section reviews the historical roots of volunteer protectionism as well as the relevant federal and state legislation. The second section introduces the *Zivich* case. The final section explains Ohio’s new “public policy” allowing enforcement of exculpatory agreements signed by parents against their minor children.

II. BACKGROUND: POTENTIAL TORT LIABILITY FOR VOLUNTEERS AND VOLUNTEER ORGANIZATIONS

A. *Historical Perspective*

Historically, charities have enjoyed an exception to the normal rules of tort liability.<sup>7</sup> The doctrine of charitable immunity found its first American foothold in Massachusetts in the 1876 decision of *McDonald v. Massachusetts General*

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<sup>1</sup> 696 N.E.2d 201 (Ohio 1997).

<sup>2</sup> David W. Hartmann, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 U. BRIDGEPORT L. REV. 63, 72 (1989).

<sup>3</sup> *Id.* at 72-73.

<sup>4</sup> See generally Charles Tremper, *Volunteers Vulnerable: Protective Laws Are a Shield Full of Holes*, BUS. L. TODAY, Dec. 1994, at 22.

<sup>5</sup> *Developments in the Law-Nonprofit Corporations: Special Treatment and Tort Law*, 105 HARV. L. REV. 1677, 1680 (1992) [hereinafter *Special Treatment and Tort Law*].

<sup>6</sup> 696 N.E.2d 201 (Ohio 1998).

<sup>7</sup> See, e.g., *Special Treatment and Tort Law*, *supra* note 5, at 1680.

*Hospital*.<sup>8</sup> There the court, relying on English case law, granted immunity to a charity hospital.<sup>9</sup> However, by the 1940's courts began to question the doctrine's basis.<sup>10</sup> Over the next thirty years, nearly every American jurisdiction at least partially abrogated the doctrine.<sup>11</sup> Recently, America has experienced a resurgence

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<sup>8</sup> 120 Mass. 432 (1876); *see also* David James Bush, Note, *The Constitutionality of the Charitable Immunity and Liability Act of 1987*, 40 BAYLOR L. REV. 657, 658 (1988) (citing *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876)). "The doctrine of immunity of charitable corporations found its way into the law . . . through misconception . . . of previously established principles." Note, *The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1399 n.8 (1987) (quoting *President of Georgetown College v. Hughes*, 130 F.2d 810, 815 (D.C. Cir. 1942)). The doctrine developed based upon dicta from two already overruled English cases. *Special Treatment and Tort Law*, *supra* note 5, at 1680. The *McDonald* court relied upon the English case of *Holliday v. Parish of St. Leonard*, 142 Eng. Rep. 769 (1861) which held trustees not liable for their employees' negligence. Note, *supra* note 8, at 1399 n.9. *Holliday* was based upon the dicta of two earlier cases. *Id.* (citing *Feoffees of Heriot's Hosp. v. Ross*, 8 Eng. Rep. 1508 (1846); *Duncan v. Findlater*, 7 Eng. Rep. 934 (1839)). *Holliday* and the two cases upon which it had been based were overturned by the House of Lords ten years before the Massachusetts court adopted the holding in 1876. *Id.* at 1399 n.10 (citing *Mersey Docks & Harbour Bd. of Trustees v. Gibbs*, 11 Eng. Rep. 1500 (1866)).

<sup>9</sup> Bush, *supra* note 8, at 658.

<sup>10</sup> Hartmann, *supra* note 2, at 64. In *President and Dirs. of Georgetown College v. Hughes*, the United States Court of Appeals for the District of Columbia challenged the traditional reasons supporting the doctrine of charitable immunity and decided that it should be completely abandoned. *Id.* (citing *President and Dirs. of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942)).

<sup>11</sup> *Special Treatment and Tort Law*, *supra* note 5, at 1680 (citing Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y 969, 971 (1979)). By 1938 forty states had accepted the doctrine of charitable immunity, but by 1985 it had been at least partially eliminated by nearly every American jurisdiction. *Id.* Although the complete demise of charitable immunity had been widely predicted, some argue that it has never completely come to pass. Note, *supra* note 8, at 1399 n.2. Due to the weak theoretical basis for the immunity, "most courts needed little prodding to riddle the doctrine with exceptions and eventually abolish it." Charles Robert Tremper, *Compensation for Harm From Charitable Activity*, 76 CORNELL L. REV. 401, 410 (1991). The Ohio Supreme Court abolished the doctrine of charitable immunity. *Albritton v. Neighborhood Ctrs. Ass'n for Child Dev.*, 466 N.E.2d 867 Ohio (1984). Prior to that decision, Ohio had adhered to the doctrine, but with various exceptions. *See, e.g.* *Gibbon v. YWCA of Hamilton*, 164 N.E.2d 563, 566 (Ohio 1960) (citing *Newman v. Cleveland Museum of Natural History*, 55 N.E.2d 575 (Ohio 1944); *Cullen v. Schmit*, 39 N.E.2d 146 (Ohio 1942); *Waddell v. YWCA*, 15 N.E.2d 140 (Ohio 1938); *Sisters of Charity of Cincinnati v. Duvelius*, 173 N.E. 737 (Ohio 1930); *Rudy v. Lakeside Hosp.*, 155 N.E. 126 (Ohio 1926); *Taylor v. Flower Deaconess Home and Hosp.*,

in tort reform and many jurisdictions have instituted some form of tort liability protection for volunteers and/or volunteer organizations.<sup>12</sup>

Proponents of charitable immunity advance four theories in support of the doctrine.<sup>13</sup> Authorities have labeled these theories: (1) the trust fund theory; (2) the inapplicability of the doctrine of respondeat superior theory; (3) the implied waiver theory; and (4) the public policy theory.<sup>14</sup> The trust fund theory focuses on the donors' intent, therefore, it refuses to allow the use of funds, donated for charitable causes, to satisfy tort judgments.<sup>15</sup> Courts following the inapplicability of the doctrine of respondeat superior theory hold charities exempt from vicarious liability imposed for acts of their workers because the agency receives no profit from their work.<sup>16</sup> The implied waiver theory holds that anyone accepting the

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135 N.E. 287 (Ohio 1922)). Ohio first established a rule of full tort immunity for charitable organizations in 1911. *Avellone v. St. John's Hosp.*, 135 N.E.2d 410, 414 (Ohio 1956). The first exception, made in 1922, was to hold charitable organizations liable for torts caused by negligent selection of servants. *Id.* In 1930, the court carved out a second exception to allow claims against charitable organizations brought by injured non-beneficiaries of the charity. *Id.* Charitable hospitals were removed from the ambit of protection in 1956. *Id.* at 416-17. The erosion of the doctrine of charitable immunity may have been a product of a broader movement to expand tort recovery. *Special Treatment and Tort Law*, *supra* note 5, at 1680; Tremper, *supra* note 11, at 410-11. "Compensating victims became paramount. In the interest of spreading losses and internalizing costs, charitable immunity went the way of a host of doctrines that had limited businesses' liability for whatever harm they caused." Tremper, *supra* note 11, at 411.

<sup>12</sup> See, e.g., *Special Treatment and Tort Law*, *supra* note 5, at 1682; *infra* Part II.C. (discussing current legislation protecting volunteers from tort liability). The doctrine of charitable immunity barred nearly every tort claim against a charitable or nonprofit organization, but it had no effect upon the individual liability of the volunteer. Hartmann, *supra* note 2, at 64. Public support for protecting volunteers from the consequences of their torts began to rise as the concern for protecting the volunteer organization was on the decline. *Id.*

<sup>13</sup> Bush, *supra* note 7, at 659; Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities*, 25 A.L.R. 4th 517, § 2 (1981); Note, *supra* note 8, at 1384.

<sup>14</sup> Fairchild, *supra* note 13, at § 2.

<sup>15</sup> *Id.*; Bush, *supra* note 8, at 659; Note, *supra* note 8, at 1384 & n.17 (citing *Perry v. House of Refuge*, 63 Md. 20 (1885); *McDonald v. Massachusetts*, 120 Mass. 432 (1876)). Some writers have criticized the trust fund theory because the same funds may be used to satisfy a tort judgment against a trustee in his representative capacity. Bush, *supra* note 8, at 660.

<sup>16</sup> Bush, *supra* note 8, at 659. The doctrine of respondent superior has been defined as follows.

Let the master answer. This doctrine or maxim means that a master is liable in

benefits of charitable services assumes the risk, impliedly waiving any cause of action in tort.<sup>17</sup> The public policy theory is extremely controversial because it is not easily defined.<sup>18</sup> This theory allows the court to adopt any rule it chooses.<sup>19</sup>

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certain cases for the wrongful acts of his servant, and a principal for those of his agent. Under this doctrine master is responsible for want of care on servant's part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment.

BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990) (citation omitted). The three prerequisites for imposition of such liability include: (1) a servant's negligence or will caused an injury; (2) a master-servant relationship exists; and (3) the injury was inflicted while the servant was acting within the scope of his employment. Jeffrey D. Kahn, Comment, *Organizations' Liability for Torts of Volunteers*, 133 U. PA. L. REV. 1433, 1438 (1985). This theory has been criticized for its misunderstanding of the doctrine of respondeat superior. Bush, *supra* note 8, at 660 (citing KEETON, PROSSER & KEETON ON THE LAW OF TORTS, sections 69-70). Respondeat superior rests on the agency relationship between the master and the servant not the potential for profit. *Id.* Thus, this justification for charitable immunity is contrary to the well established doctrine of respondeat superior. *Id.*; see also Allan Manley, Annotation, *Liability of Charitable Organization under Respondeat Superior Doctrine for Tort of Unpaid Volunteer*, 82 A.L.R.3d 1213, § 2 (1978) (explaining analysis of the relationship between the unpaid volunteer-tortfeasor and the charitable institution).

<sup>17</sup> Bush, *supra* note 8, at 659; Fairchild, *supra* note 13, at § 2. The doctrine of assumption of the risk is based upon the idea that "[a] plaintiff may not recover for an injury to which he assents, i.e, that a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger." BLACK'S LAW DICTIONARY 123 (6<sup>th</sup> ed. 1990). Obviously, courts would have had difficulty basing immunity on this theory where plaintiffs paid for the service rendered. Bush, *supra* note 8, at 660. Further, this theory has been criticized for its unjust result. *Id.* Although the beneficiary of a charity "may not expect the best care, he does not necessarily expect to be treated with something less than reasonable care." *Id.*

<sup>18</sup> Fairchild, *supra* note 13, at § 2. Many commentators argue it does not actually constitute a separate theory. *Id.* 'Public policy' has become an official sounding label to justify the judges' personal opinion expressed as a decision of the court. *Id.*

<sup>19</sup> *Id.* Another explanation for the public policy argument is that charitable immunity is merely a subsidy for good works. Note, *supra* note 8, at 1388. Thus, the same justifications that support other economic advantages for charities support immunity as well. *Id.* However, those justifications may actually cut the other way. *Id.* Charities hardly benefit society by injuring members of the public they are there to serve. *Id.* Many argue that because charities are not supervised by "most of the watchdogs of the commercial sector, [they] should at a minimum be held accountable for their negligence or willful acts of harm." *Id.*

During the decline of charitable immunity, many jurisdictions effectively discredited each of the foregoing theories.<sup>20</sup>

### *B. Basis for Liability*

Tort law rests on the theory that the fear of liability for falling below a required standard of care is an effective incentive which naturally increases the quality of goods and services.<sup>21</sup> “Accordingly, the common law imposes a minimum level of due care on people who choose to volunteer.”<sup>22</sup> Judge Learned Hand describes the appropriate level of care as an economic formula.<sup>23</sup> Negligence is generally considered to be doing something which “a person of ordinary prudence would not have done under similar circumstances.”<sup>24</sup> The basis for this standard is “the notion of expectations; one is expected to act as a reasonable person would act under the same circumstances.”<sup>25</sup>

<sup>20</sup> Fairchild, *supra* note 13, at § 2; Note, *supra* note 8, at 1387-1392.

<sup>21</sup> Andrew F. Popper, *A One-Term Tort Reform Tale: Victimized the Vulnerable*, 35 HARV. J. ON LEGIS. 123, 134 (1998). Thus, tort liability is used to protect society from those who undertake to perform a duty negligently. *Id.*

<sup>22</sup> *Id.* at 135.

<sup>23</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW*, 85 (1987). The Hand formula is  $B < PL$  where B is the burden of adequate precautions, P is the probability of harm occurring and L is the gravity of resulting harm. *Id.* (citing *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)). The level of care varies not only with the cost of precautions but also with the probability of an accident occurring and the gravity of harm such an accident would likely cause. *Id.* at 98. “[Thus,] the optimal level of care is a function of its cost, other things being equal. . . . [E]ven if the probability of harm is slight, if the cost of avoiding harm is also slight the failure to avoid may be negligence.” *Id.*

<sup>24</sup> BLACK’S LAW DICTIONARY 1032 (6th ed. 1990). Negligence is further defined as: [the] failure to do what a person of ordinary prudence would have done under similar circumstances. Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances . . . . It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like, while ‘wantonness’ or ‘recklessness’ is characterized by willfulness . . . . [The] [d]octrine of negligence rests on duty of every person to exercise due care in his conduct toward others from which injury may result. *Id.* (citations omitted).

<sup>25</sup> Kahn, *supra* note 16, at 1439. The requirements for a successful cause of action include:

- (1) a duty requiring a person to conform to a standard of conduct that protects others from unreasonable risk of harm; (2) a breach of that duty (i.e., the person’s failure to conform to the standard of conduct); (3) a causal connection between the breach of the duty and the resulting injury (i.e., proximate cause

### C. Legislation

Many jurisdictions have now decreased the required standard of care by enacting legislation freeing volunteers from the consequences of their own negligence.<sup>26</sup> Some jurisdictions have even gone so far as to relieve volunteers from liability for all unintentional conduct including gross negligence and even reckless, willful or

and cause in fact); and (4) resulting injury or damages.

Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7, 13 (1996) (footnotes omitted) (discussing the various duties of the sports coaches). Specific duties of coaches include: supervision, training and instruction, ensuring proper use of safety equipment, providing competent and responsible personnel, warning of latent dangers, providing prompt and proper medical care, preventing injured participants from competing and matching participants of similar competitive levels. *Id.* at 15-38.

<sup>26</sup> See Popper, *supra* note 21, at 135; Bush, *supra* note 8, at 681 n.41 (citing COLO. REV. STAT. § 13-21-116 (1987), which provides immunity from ordinary negligence for directors of nonprofit corporations and for volunteers of nonprofit entities serving young persons; DEL. CODE ANN. tit. 10, § 8133 (Supp. 1986), which provides immunity for the ordinary negligence of a volunteer; GA. CODE ANN. § 105-114 (Harrison 1984), which provides immunity for members, directors, officers and trustees of charities from negligence claims asserted by beneficiaries of the charity; IND. CODE ANN. §§ 34-4-11.5-2 (Burns 1986), which limit liability of directors of charities to the extent of the charity's insurance policy and under which the director is immune from civil liability if the charity lacks insurance coverage; KAN. STAT. ANN. § 60-3601 (1987), which provides that a volunteer of a nonprofit organization is immune from liability for negligence if the organization carries general liability insurance coverage; LA. REV. STAT. ANN. §§ 2792-2792.1 (West Supp. 1988), which provides immunity similar to Georgia; MASS. ANN. LAWS ch. 231, § 85K (law. Co-op. 1986 & Supp. 1988), which limits the liability of charities to \$20,000 and provides immunity for directors, officers or trustees of nonprofit educational institutions from ordinary negligence claims; MINN. STAT. ANN. § 317.201 (West Supp. 1988), which provides that directors, officers, trustees, members or agents of nonprofit entities are immune from liability for ordinary negligence; NEB. REV. STAT. § 25-21, 191 (1987), which provides immunity to directors, officers, and trustees of nonprofit organizations from liability for ordinary negligence; N.J. STAT. ANN. §§ 2A: 53A-7 to 7.1 (West 1983), which provides that charities, their trustees, officers, directors and volunteers are immune from liability for ordinary negligence; N.Y. NOT-FOR-PROFIT CORP. LAW § 720-a (Consol. Supp. 1987), which provides that directors, officers, and trustees of charities are immune from liability for ordinary negligence; OHIO REV. CODE ANN. § 2305.38 (Anderson Supp. 1987), which provides broad immunity for volunteers of charitable organizations; R.I. GEN. LAWS § 7-6-9 (Supp. 1987), which provides that directors, officers, and trustees of nonprofit corporations shall be immune from civil liability for ordinary negligence; VA. CODE ANN. § 8.01-38 (1987), which provides that a tax-exempt hospital under 26 U.S.C. § 501 (c)(3) with a \$500,000 liability insurance policy shall not be liable in excess of its policy; and WYO. STAT. § 1-23-107 (Supp. 1987), which provides that board members of a nonprofit corporation or other entity are not individually liable for the negligence of such entity)).

wanton conduct.<sup>27</sup> This variation among state laws created a patchwork of volunteer immunity.<sup>28</sup> The debate regarding the proper standard of care for volunteers is one indication of the great difficulty state governments have had trying to reconcile competing interests.<sup>29</sup> Proponents of volunteer protection argue that full tort liability for volunteers and their organizations will stifle volunteerism and limit the rendering of charitable services.<sup>30</sup> Opponents fear that immunity will deny victims compensation and fail to deter risky and harmful behavior by volunteers and their sponsoring organizations.<sup>31</sup>

Congress responded to this patchwork of state laws in 1997 with the enactment of the Federal Volunteer Protection Act.<sup>32</sup> The stated purpose of the Act is to “promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions . . . .”<sup>33</sup> The Act focuses

<sup>27</sup> See Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities - The Alternative to “Nerf®” Tiddlywinks*, 53 OHIO ST. L. J. 683, 706-07 (1992). *But see Special Treatment and Tort Law*, *supra* note 5, at 1686 & n.71 (stating the “vast majority of statutes” do not protect willful, wanton, or intentional injurious behavior).

<sup>28</sup> *Special Treatment and Tort Law*, *supra* note 5, at 1684; *see, e.g.*, Hartmann, *supra* note 2, at 68 (explaining the differences in protection afforded various types of volunteers suggest the success of certain lobbying groups over others). Other state variations include the classes of potential plaintiffs and types of organizations to which vicarious liability will be extended for torts of its volunteers. King, *supra* note 27, at 706. Some states allow protection for charitable or nonprofit organizations on the condition that they maintain adequate insurance or meet other conditions such as participation in safety programs. Tremper, *supra* note 11, at 412; *Special Treatment and Tort Law*, *supra* note 5, at 1685. Other states place damage caps on tort judgments from charitable organizations or protect certain charitable assets completely. Tremper, *supra* note 11, at 412. Much of the state legislation is complicated and unclear and precious little case law has worked to clarify the details. *Special Treatment and Tort Law*, *supra* note 5, at 1687-88.

<sup>29</sup> Tremper, *supra* note 11, at 412.

<sup>30</sup> *See generally* Howard P. Benard, *Little League Fun, Big League Liability*, 8 MARQ. SPORTS L. J. 93 (1997); King, *supra* note 27.

<sup>31</sup> *See generally* Jamie Brown, *Legislators Strike Out: Volunteer Little League Coaches Should not be Immune From Tort Liability*, 7 SETON HALL J. SPORT L. 559 (1997); Popper, *supra* note 21, at 146-47.

<sup>32</sup> 42 U.S.C.A. §§ 14501 to 14505 (West 1998) [hereinafter the Act] The federal statute pre-empts inconsistent state laws except those which “provide[ ] additional protection from liability relating to volunteers . . . .” § 14502(a). However, the statute does allow states to opt out by enacting a statute declaring their intention to do so. Henry Cohen, *The Volunteer Protection Act of 1997*, FED. LAW., Apr. 1998, at 40.

<sup>33</sup> 42 U.S.C.A. § 14501(b) (West 1998). The official findings upon which the Act was based include:

- (1) the willingness of volunteers to offer their services is deterred by the



potential for liability actions against them; (2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities; (3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating; (4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation; (5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce; (6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and (7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because (A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits; (B) the citizens of the United States depend on , and the Federal Government expends funds on , and provides tax exemptions and other consideration to , numerous social programs that depend on the services of volunteers; (c) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and (D)(i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and (ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

42 U.S.C.A. § 14501(a) (West 1998). However, the bases for these findings have been criticized. Popper, *supra* note 21, at 131-32.

In the past, when the insurance and manufacturing sectors have claimed crisis from excess exposure, independent research has proved such claims to be baseless. Often, the research arms of Congress performed these studies. This time, no study or statistical analysis was even proffered to support the claim that the volunteers immunized under the new law needed protection against rampant, unwarranted liability . . . . [Furthermore] no testimony or information was submitted to support an assumption that volunteers will exercise the same level of care regardless of personable accountability.

*Id.* (footnotes omitted). The Act has also been criticized for its likely consequences. “[T]he savings that the [Act] would confer on defendants will come at the expense of the often-poor

on protecting volunteers from individual liability for ordinary negligence.<sup>34</sup>

However, the Act allows an action against the organization responsible for the acts of the volunteer via the doctrine of vicarious liability.<sup>35</sup>

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people they serve, who can least afford to pay for their injuries.” Cohen, *supra* note 32, at 42.

<sup>34</sup> Cohen, *supra* note 32, at 40. The Act defines a volunteer as:

an individual performing services for a nonprofit organization or a governmental entity who does not receive (A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or (B) any other thing in lieu of compensation, in excess of \$500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

42 U.S.C.A. § 42505(6) (West 1998). “Nonprofit organization” is in turn defined by the Act as follows:

The term “nonprofit organization” means (A) any organization which is described in section 501(c)(3) of Title 26 and exempt from tax under section 501(a) of Title 26 and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or (B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).

42 U.S.C.A. § 14505(4) (West 1998). The Act states:

(a) Liability protection for volunteers: Except as provided in subsections (b) and (d) of this section, no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if (1) the volunteer was acting within the scope of the volunteer’s responsibilities in the nonprofit organization or governmental entity at the time of the act or omission; (2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities . . . (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or owner . . . to (A) possess an operator’s license; or (B) maintain insurance.

42 U.S.C.A. § 14503(a) (West 1998).

<sup>35</sup> 42 U.S.C.A. § 14503(c), (d) (West 1998).

### III. STATEMENT OF THE CASE: *ZIVICH V. MENTOR SOCCER CLUB, INC.*

Pamela Zivich registered her seven-year-old son, Bryan Zivich, for soccer in the spring of 1993.<sup>36</sup> The soccer club<sup>37</sup> required Mrs. Zivich to sign a release form for her son as a part of the registration process.<sup>38</sup> Bryan was injured at soccer practice on October 7, 1993.<sup>39</sup> As the practice ended, Bryan's father, Philip Zivich, stood on the sideline talking with Bryan's coach.<sup>40</sup> In an unsupervised moment, Bryan jumped on the goal and swung back and forth.<sup>41</sup> The unanchored goal fell on Bryan's chest, severely bruising his lungs, breaking his collarbone, and fracturing three ribs.<sup>42</sup>

Bryan's parents sued the Club for Bryan's injuries.<sup>43</sup> The Ziviches alleged negligence and willful or wanton misconduct.<sup>44</sup> The trial court granted the Club's

<sup>36</sup> *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998).

<sup>37</sup> The Mentor Soccer Club, Inc. "is a nonprofit organization that provides children in the greater Mentor area with the opportunity to learn and play soccer. The Club is primarily composed of parents and other volunteers who provide their time and talents to help fulfill the Club's mission." *Id.*

<sup>38</sup> *Id.* at 203. The exculpatory clause stated:

Recognizing the possibility of physical injury associated with soccer and for the Mentor Soccer Club, and the USYSA [United States Youth Soccer Association] accepting the registrant for its soccer programs and activities, I hereby release, discharge and/or otherwise indemnify the Mentor Soccer Club and the USYSA, its affiliated organizations and sponsors, their employees, and associated personnel, including the owners of the fields and facilities utilized by the Soccer Club, against any claim by or on behalf of the registrant as a result of the registrant's participation in the Soccer Club. . . .

*Id.* Mrs. Zivich signed the release dated May 6, 1993 and paid a forty-five dollar entrance fee. *Zivich v. Mentor Soccer Club, Inc.*, 1997 WL 203646, at \*1 (Ohio App. 11 Dist. April 21, 1997), *aff'd*, 696 N.E.2d 201 (Ohio 1998).

<sup>39</sup> *Zivich*, 696 N.E.2d at 203.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Bryan's team had just won an intrasquad scrimmage and Bryan was presumably excited about the win. *Id.*

<sup>42</sup> *Zivich*, 696 N.E.2d at 203. "In fact, the injuries were so severe, that it became necessary to life flight Bryan from Lake West Hospital to Rainbow Babies and Children's Hospital." Brief for Appellant at 2, *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1997) (No. 97-1128). The Appellants note that since 1979 falling soccer goals have caused at least twenty-one deaths. *Id.* at 1. The victims have generally been young, ranging in age from three to twenty-two years. *Id.*

<sup>43</sup> *Zivich*, 696 N.E.2d at 203. Bryan's parents brought the suit as next friends of their son. *Zivich*, 1997 WL 203646 at \*1.

<sup>44</sup> *Zivich*, 1997 WL 203646 at \*1. The appellate court defined willful misconduct as "conduct involving 'an intent, purpose, or design to injure.'" *Id.* at \*4 (quoting *McKinney*

motion for summary judgment based upon the release form signed by Pamela Zivich.<sup>45</sup> The Ziviches appealed.<sup>46</sup> The appellate court affirmed, although on partially separate grounds.<sup>47</sup> The court held the exculpatory agreement effective against Bryan's parents, but not against Bryan.<sup>48</sup> Thus, the release form Bryan's mother signed had not extinguished Bryan's cause of action for personal injuries.<sup>49</sup>

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*v. Hartz & Restle Realtors, Inc.*, 510 N.E.2d 386, 389 (Ohio 1987)). The court defined wanton misconduct as "where one 'fails to exercise any care whatsoever toward those to whom he owes a duty of care, and [t]his failure occurs under circumstances in which there is a great probability that harm will result.'" *Id.* (quoting *McKinney*, 510 N.E.2d at 388).

<sup>45</sup> *Id.* at \*1. The Club and the city moved for summary judgment on the grounds of the release having barred all claims. *Id.* The trial court granted both motions. *Id.* First, the court held Bryan a recreational user of the park. *Zivich*, 1997 WL 203646 at \*1. Thus, O.R.C. § 1533.18 et seq. barred any claim against the city. *Id.* Second, the court held the city was protected by sovereign immunity under O.R.C. § 2744.02(A)(1). *Id.* Finally, the trial court held the release which Pamela Zivich had signed barred the Ziviches' claims against both the city and the Club. *Id.* at \*2.

<sup>46</sup> *Id.* at \*2.

<sup>47</sup> *Zivich*, 696 N.E.2d at 203. The court dismissed the willful and wanton misconduct claim on summary judgment on the alternative ground of lack of evidence to support such a claim. *Zivich*, 1997 WL 203646 at \*13. Bryan's father's claim of negligent infliction of serious emotional distress was also lost on summary judgment due to his failure to produce evidence of a "severe and debilitating emotional distress." *Id.* Bryan's mother was barred from bringing claims on Bryan's behalf because she had signed the release. *Id.* His father was barred because he had "acquiesced to the terms of the agreement signed by his wife." *Id.* Thus, the appellate court dismissed the entire action against the defendant/Soccer Club. *Id.* The court found neither parent able to sue the Club either in his/her own capacity or as the child's next friend. *Id.*

<sup>48</sup> *Zivich*, 1997 WL 203646 at \*13. The appellate court highlighted the fact that this was a case of first impression in Ohio. *Id.* at \*6. Judge Nader held that the release signed by a parent did not bind the minor child. *Id.* at \*13. Thus, in spite of the release, Bryan could still bring a cause of action for his personal injuries. *Id.* at \*11. This could be done through a guardian ad litem appointed by the court pursuant to OHIO CIV. R. 17(B). *Id.* Another option is for Bryan to wait until he reaches the age of majority and bring the cause of action on his own behalf. *Id.* The court stressed the fact that the release had simply effected an "implied covenant not to sue as the child's next friend." *Zivich*, 1997 WL 203646 at \*9. Therefore, the parent who signed agreed not to sue the other party on behalf of the child. *Id.* The other parent in the *Zivich* case was held bound by the release under the doctrine of estoppel by acquiescence. *Id.* at \*12.

<sup>49</sup> *Id.* at \*13. The court points out that "when a minor child suffers an injury, allegedly as a result of the negligence of a defendant, two separate causes of action arise: an action by the child for his or her personal injuries, and a derivative action in favor of the parents for loss of services and medical expenses." *Id.* at \*6 (citing *Grindell v. Huber*, 275 N.E.2d 614 (1971) at paragraph one of the syllabus).

The Supreme Court of Ohio affirmed the appellate court's decision.<sup>50</sup> However, the supreme court's reasoning went one step further than that of the appellate court.<sup>51</sup> According to the supreme court, the *Zivich* release not only bound the parents, but also their minor child.<sup>52</sup> The court held, "parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence."<sup>53</sup> Thus, the court lowered the standard of care volunteers in Ohio owe their young charges when parents have signed a valid pre-injury release.<sup>54</sup> Before this decision, Ohio youth injured while engaged in such activities had a cause of action against a negligent volunteer and the supervising charitable or nonprofit organization.<sup>55</sup> On June 29, 1998, the highest court in Ohio effectively barred such relief for these injured youngsters.<sup>56</sup>

#### IV. ENFORCEMENT OF EXCULPATORY AGREEMENTS

##### A. General Overview

An exculpatory clause is an express agreement which falls into the defense category of assumption of the risk.<sup>57</sup> Such an agreement "releases one of the parties [to a

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<sup>50</sup> *Zivich*, 696 N.E.2d at 208.

<sup>51</sup> *Id.*

<sup>52</sup> *Zivich*, 696 N.E.2d at 208.

<sup>53</sup> *Id.* at 207. The court dismissed the city of Mentor from the suit in December of 1997 in response to a settlement agreement. *Id.* at 203 n.1 (citing *Zivich v. Mentor Soccer Club, Inc.*, 687 N.E.2d 471 (Ohio 1997)). The court affirmed the judgment of the appellate court. *Id.* at 203-04. The Supreme Court of Ohio held: (1) Bryan's injury had occurred within the scope of the exculpatory agreement; (2) parents have authority to bind minor children to exculpatory agreements signed by a parent; (3) the father's claim for loss of consortium was barred by the doctrine of acquiescence; and (4) Bryan's injury was not caused by the Club's willful or wanton misconduct. *Id.* at ¶ 1 of the syllabus.

<sup>54</sup> *Zivich*, 696 N.E.2d at 207-08. Such a release can now be used in Ohio to protect the volunteer as well as the organization from causes of action for their negligent conduct. *Id.* Therefore, a volunteer in Ohio no longer need avoid negligent conduct out of fear of personal liability. *Id.* However, the court made it clear that such a release would not operate to protect them from the consequences of their willful and wanton conduct. *Id.*

<sup>55</sup> *Zivich*, 1997 WL 203646 at \*13.

<sup>56</sup> *Zivich*, 696 N.E.2d at 208. In order to avoid any cause of action for negligence, any qualifying group or agency need only require that participants' parents sign a properly worded release before accepting the minor child into the program. *Id.*

<sup>57</sup> Donald H. Henderson et al., *The Use of Exculpatory Clauses and Consent Forms by Educational Institutions*, 67 ED. LAW REP. 13, 16-17 (1991). Assumption of risk is an affirmative defense that defendant must bear the burden of proving. *Id.* at 36 n.32. To

contract] from liability for his or her wrongful acts.”<sup>58</sup> Generally courts have disfavored these express assumptions of risk.<sup>59</sup> However, where the injured

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succeed, the defendant generally must prove the plaintiff: “(1) knew of the risk; (2) had full subjective understanding of its nature; (3) voluntarily chose to encounter that risk; and (4) agreed in advance not to hold the defendant liable for the consequences of conduct that would ordinarily amount to negligence.” *Id.* at 17. The majority of jurisdictions allow express assumption of the risk, where proven, to serve as a complete bar to recovery by the plaintiff. *Id.* However, in some jurisdictions the application of the defense has been limited or completely abolished. *Id.* In cases involving sport injuries courts have strictly applied the assumption of the risk doctrine. See Daniel Nestel, “*Batter Up!*”: *Are Youth Baseball Leagues Overlooking the Safety of Their Players?*, 4 SETON HALL J. SPORT L. 77, 79 (1994) (explaining an indiscriminate application of the assumption of the risk doctrine as evidenced by denial of recovery in one case involving an eleven-year-old boy struck by a bat at recess and another case involving a professional baseball player sustaining a career ending injury by slipping on a wet field).

<sup>58</sup> BLACK’S LAW DICTIONARY 566 (6th ed. 1990). These are generally signed before undertaking an activity or event where danger is to be anticipated. Alexander T. Pendleton, *Enforceable Exculpatory Agreements*, WIS. LAW., Nov., 1997, at 10. Exculpatory agreements or clauses are often referred to as waivers of liability or releases. Brenda Kimery, Comment, *Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma*, 33 TULSA L. J., 683, 690 (1997); McCaskey & Biedzynski, *supra* note 25, at 54; Note, *supra* note 8, at 1394.

<sup>59</sup> Pendleton, *supra* note 58, at 10. Courts are often loathe to enforce such agreements once an applicable injury has actually occurred. *Id.* Courts will not enforce exculpatory agreements that attempt to protect a tortfeasor from liability for injury caused by intentional or reckless conduct. James M. Fischer, *The Presence of Insurance and the Legal Allocation of Risk*, 2 CONN. INS. L. J. 1, 17 (1996). Exculpatory contracts have the best chance of being enforced where (1) it does not contravene any state public policy; (2) the agreement affects only private affairs of the parties; and (3) it is fairly bargained for and entered into freely. *Id.* at 17-18. Although the law varies by state, generally exculpatory agreements will be subject to strict construction against the party seeking to escape liability. *Id.* at 18; Note, *supra* note 8, at 1394. Some factors influencing courts in individual decisions to allow this shifting of the risk are (a) the relative ability of each party to insure against the risk; (b) the relative sophistication of the parties; and (c) relative ability of the parties to anticipate, identify, and quantify the risk. Fischer, *supra* note 59, at 20. In Wisconsin, for example:

The facts surrounding the negotiation and signing of the document control, and the focus is on the knowledge, understanding, and experience of the injured party before the release was signed . . . . The prescribed “balancing test” is between the individual’s freedom to contract, and the principle that individuals should be compensated for injuries sustained as a reasonable result of another’s negligence.

Jay A. Urban, *Sports Torts in Wisconsin*, 8 MARQ. SPORTS L. J. 365, 380-81 (1998) (footnotes omitted). In *Yauger v. Skiing Enterprises, Inc.*, the Wisconsin Supreme Court evaluated a waiver of liability executed before a skiing mishap. *Id.* at 381. There the court

plaintiff is the adult who signed the contract, most courts will enforce the agreement if it is not against public policy.<sup>60</sup>

Public policy has generally been central to the debate regarding the validity of exculpatory releases.<sup>61</sup> In *Tunkl v. Regents of the University of California*,<sup>62</sup> the Supreme Court of California set forth a set of criteria for judging the validity of releases. The *Tunkl* test was meant to invalidate any release implicating the “public interest.”<sup>63</sup> Courts in other jurisdictions have adopted these criteria in slightly

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delineated the following rules regarding the validity of exculpatory contracts in Wisconsin. *Id.* “First, the waiver must clearly, unambiguously and unmistakably inform the signer of what is being waived. Second, the form, looked at in its entirety, must alert the signer to the nature and significance of what is being signed.” *Id.*

<sup>60</sup>Recent Case, *Negligence—Exculpatory Clauses—School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics—Wagonblast v. School District*, 110 Wash.2d 854, 758 P.2d 968 (1988), 102 HARV. L. REV. 729, 729-30 (1988); Cynthia Trimboli Adams & Charles R. Adams III, *Torts, Annual Survey of Georgia Law*, 43 MERCER L. REV. 395, 421 (1991) (citing *Bodyslimmer, Inc. v. Sanford*, 398 S.E.2d 840 (1990) (enforcing an exculpatory agreement where the service provided was not of great public importance)). This is especially true where the activity is hazardous. *Zivich*, 1997 WL 203646 at \*6. There is a long line of Ohio cases upholding such releases under the doctrine of express assumption of the risk. *Id.* (citing *French v. Special Servs., Inc.*, 159 N.E.2d 785, (Ohio Ct. App. 1958); *Tanker v. North Crest Equestrian Ctr.*, 621 N.E.2d 589 (Ohio 1993) (horseback riding); *Simmons v. American Motorcyclist Assn., Inc.*, 591 N.E.2d 1322 (Ohio 1990) (motorcycle racing); *Cain v. Cleveland Parachute Training Ctr.*, 457 N.E.2d 1185 (Ohio 1983) (parachuting); *Hine v. Dayton Speedway Corp.*, 252 N.E.2d 648 (Ohio 1969) (automobile racing); *Thompson v. Otterbein College* (Feb. 6, 1996), Franklin App. No. 95APE08-1009, unreported, 1996 WL 535233 (ice skating); *King v. United Skates of America* (Nov. 10, 1994), Lake App. No. 93-L-199, unreported, 1994 WL 652655 (same); *Valeo v. Pocono Int’l. Raceway, Inc.*, 500 A.2d 492 (Pa. Super. Ct. 1985) (enforcing an exculpatory agreement against adult race car driver in favor of owner of track and sponsor of race)).

<sup>61</sup> *King*, *supra* note 27, at 721.

<sup>62</sup> 383 P.2d 441 (Cal. 1963).

<sup>63</sup> *Id.* at 443 (citing various cases from around the United States in support of its proposition that the majority rule is in accord). The court first expressed the difficulty of defining the concept of the public interest in light of the “great debate” which has caused the concept to “range[ ] over the whole course of the common law.” *Id.* at 444. The court then described the type of release which must be held invalid as violative of public policy. *Id.* at 445-46.

It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this

altered forms.<sup>64</sup> However, neither the appellate court nor the Ohio Supreme Court evaluated the Zivich release using any of these widely accepted modes of analysis.<sup>65</sup> Rather, the court followed the lead of appellee's counsel by changing the policy focus.<sup>66</sup> Instead of asking whether this release should be void as a matter of public policy, the question became whether public policy justifies enforcement.<sup>67</sup> In supporting its decision to enforce the agreement against Bryan, the court focused

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service for any member of the public coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, 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 his agents.

*Id.* (footnotes omitted). The court goes on to note that the test does not require that every factor be found before invalidating a release on this basis. *Id.* at 447.

<sup>64</sup> See Angeline Purdy, Note, *Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of a Minor's Future Claim*, 68 WASH. L. REV. 457, 462 (1993). The Supreme Court of Washington adopted a similar analysis in *Wagenblast v. Odessa School Dist.*, 758 P.2d 968 (Wash. 1988). The Wagenblast court set forth six factors often found in releases which are contrary to the public interest. *Id.* These factors are:

(1) the release concerns an activity thought suitable for public regulation; (2) the party seeking to enforce the release provides a service of great public importance, often one of practical necessity; (3) that party provides the service to anyone meeting certain established standards; (4) the party seeking the release possesses greater bargaining strength than those seeking the service; (5) the release consists of a standardized adhesion contract; and (6) the party providing the service has control over the person or property of those seeking the service.

*Id.* at 462. The more factors found in the circumstances surrounding the release, the more likely the release should be invalidated. *Id.* at 462-63. The Colorado Supreme Court addressed the issue similarly in *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (en banc), where they followed a four part analysis. King, *supra* note 27, at 722. The important factors there were "(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language." *Id.* (citing *Dressel*, 623 P.2d at 377).

<sup>65</sup> *Zivich*, 1997 WL 203646; Ohio Ct. App. *Zivich*, 696 N.E.2d 201 (Ohio 1998).

<sup>66</sup> *Zivich*, 696 N.E.2d at 204. This approach was also adopted by Judge Ford in his concurring opinion at the appellate level. *Zivich*, 1997 WL 203646 (Ford, J., concurring).

<sup>67</sup> *Zivich*, 696 N.E.2d at 204.



on: (1) the release allowed a minor to participate in a recreational activity;<sup>68</sup> and (2) the activity was sponsored by a nonprofit agency staffed by volunteers.<sup>69</sup>

### B. *Special Case: Minors as Victims of Volunteers' Torts*

#### 1. Parental Authority to Bind Their Minor Children

The majority of jurisdictions have held that parents are not capable of releasing their children's causes of action for personal injury.<sup>70</sup> The primary reason for the

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<sup>68</sup> *Id.* "Ohio courts have routinely upheld releases in the context of recreational activities." Brief for appellee at 15, *Zivich*, 696 N.E.2d 201 (Ohio 1997) (No. 97-1128) (citing *Simmons v. American Motorcyclists Assoc.*, 69 Ohio App.3d 844 (1990); *Cain v. Cleveland Parachute Training Ctr.*, 9 Ohio App.3d 27 (1983); *Seymour v. New Bremen Speedway*, 31 Ohio App.2d 141 (1971); *Hine v. Dayton Speedway Corp.*, 20 Ohio App.2d 185 (1969)).

<sup>69</sup> *Zivich*, 696 N.E.2d at 204-07.

<sup>70</sup> *King*, *supra* note 27, at 684. In the *Zivich* case, Judge Ford concurs in the appellate opinion admitting, "courts have almost unanimously held that waivers and/or releases executed by parents in behalf of minor children are void as against public policy." *Zivich*, 1997 WL 203646 at \*14 (Ford, J., concurring). The Supreme Court of Washington first faced the question in *Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (Wash. 1992). There the court pointed out that "[t]here are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract." *Id.* at 11. In that case a twelve-year-old boy suffered severe head injuries while attempting to ski on a slalom race course laid out by the ski school on property owned by the ski resort. *Id.* at 8. The Scotts brought a negligence suit against both the ski school and the ski resort. *Id.* The registration process had required the boy's mother to sign an application stating in part:

For and in consideration of the instruction of skiing, I hereby hold harmless [the owner of the ski school], and [the ski school] and any instructor or chaperon from all claims arising out of the instruction of skiing or in transit to or from the ski area. I accept full responsibility for the cost of treatment for any injury suffered while taking part in the program.

*Id.* at 8. The court adhered to the majority rule of other jurisdictions, holding the release barred the parents' cause of action but was ineffective as to their son's rights. *Id.* at 12. The *Scott* court highlights the fact that "numerous cases in other jurisdictions have . . . concluded that such releases do not bar the child's cause of action for personal injuries. *Scott*, 834 P.2d at 12 (citing *Fedor v. Mauwehu Coun., Boy Scouts of Am., Inc.*, 143 A.2d 466 (Conn. 1958) (a release signed by a parent waiving future claims for injury violates public policy, and is ineffective to bar minor's negligence claim); *Childress v. Madison Cy.*, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (mother cannot execute a valid release or exculpatory clause as to the rights of her son and such release is void as to the son's rights although valid to waive the mother's claim)). *Accord* *Rogers v. Donelson-Hermitage Chamber of*

general refusal to enforce such agreements is that most states do not allow parents to release a cause of action belonging to their minor child without specific judicial or legislative approval.<sup>71</sup> Although Ohio follows that rule, the state's highest court elected not to follow the analysis relied upon by the majority of other jurisdictions.<sup>72</sup> The court found the analogy other courts have drawn between pre and post injury releases inappropriate.<sup>73</sup> The court pointed out that many of the

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Commerce, 807 S.W.2d 242 (Tenn. Ct. App. 1990); *Doyle v. Bowdoin College*, 403 A.2d 1206, 1208 n.3 (Me. 1979) (releases signed by parent prior to son being injured playing hockey were void as a parent cannot release a child's cause of action) (citing *Stockman v. South Portland*, 87 A.2d 679 (Me. 1952))).

<sup>71</sup> *Scott*, 834 P.2d at 11 (citing 59 Am.Jur.2d Parent and Child § 40, at 183 (1987); 67A C.J.S. Parent and Child § 114, at 469 (1978)). The *Scott* court found the situation "analogous . . . [to that of] parents seek[ing] to release their child's cause of action for injuries already sustained." *Id.*; see OHIO REV. CODE ANN. § 2118.18 (Anderson 1998) (requiring parents obtain an order from probate court before settling a claim on their minor child's behalf). The appellate court dealt with this issue at length. *Zivich*, 1997 WL 203646 at \*6. "Under Ohio law, it has been held that parents are not the legal guardians of their children's personal property and have no power to release a minor's claim once it has arisen." *Id.* (citing *Weiland v. Akron*, 233 N.E.2d 880, 882 (Ohio Ct. App. 1968)).

<sup>72</sup> *Zivich*, 696 N.E.2d at 206.

<sup>73</sup> *Id.* The court quoted extensively from a law review article criticizing the *Scott* decision. Angeline Purdy, *Scott v. Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of a Minor's Future Claim*, 68 WASH. L. REV. 457, 474 (1993).

The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.

A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.

A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. . . . Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.

Moreover, parents are less vulnerable to coercion and fraud in a preinjury release setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim.

*Zivich*, 696 N.E.2d at 206 (quoting Purdy, *supra*, at 474).

pressures parents of an injured child have to deal with simply do not exist before a claim arises.<sup>74</sup> Therefore, the decision to release a child's future claim does not require the same judicial protection as the release of a present claim.<sup>75</sup> Thus, the Ohio Supreme Court took the minority position, holding parents capable of waiving their minor child's tort claims through pre-injury releases.<sup>76</sup> In justification of its position, the court announced the new public policy embodied in the decision.<sup>77</sup>

## 2. Ohio's New "Public Policy"

In reaching its conclusion to enforce the release against Bryan, the Ohio Supreme Court focused on two "public policy" points.<sup>78</sup> First, the court pointed out that various statutes enacted by the Ohio General Assembly show a legislative intent to encourage the sponsorship of sports activities and protect volunteers.<sup>79</sup> Second, the court emphasized the fear that invalidating such releases could lead to a loss to society of the important contributions of volunteers.<sup>80</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Zivich*, 696 N.E.2d at 206.

<sup>76</sup> *Id.* at 207-08.

<sup>77</sup> *Id.* at 205.

<sup>78</sup> *Zivich*, 1997 WL 203646 at \*9. Courts have had a lot of difficulty defining the term 'public policy.' In fact, the Eleventh District Court of Appeals of Ohio explained,

[a] correct definition, at once concise and comprehensive . . . has not yet been formulated by our courts. . . . In substance, it may be said to be the community common sense and conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people--in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic.

*Id.* at 9-10 (quoting *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 115 N.E. 505, 506-07 (Ohio 1916)).

<sup>79</sup> *Zivich*, 696 N.E.2d at 205.

<sup>80</sup> *Id.* Although the appellate court refused to "vest parents with new authority over the personal property of their offspring," *Zivich* 1997 WL 203646 at \*8, both the majority and concurring opinions agreed that such releases signed by parents should be enforced as a matter of public policy. *Id.* at \*11, \*20-23. The court noted their concern for the "[t]housands of community programs . . . in Ohio which allow our youth to participate in organized sporting events." *Id.* at \*11. The court further expressed the belief that enforcing

The court found legislative intent to support such activities in two types of statutes: (1) those “designed to encourage landowners to open their land to public use for recreational activities without fear of liability”<sup>81</sup> and (2) those enacted after

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these releases will “hold[ ] potential litigation costs down, and encourage[ ] these organizations to continue to provide our children with the opportunity to participate in a quintessentially American tradition.” *Id.* at \*11. However, the majority of that court refused to uphold the *Zivich* release on such grounds because,

in [the] . . . opinion [of the court], judges should confine themselves to interpreting the law, not making it. Although some hold the view that courts can declare the public policy of this state and may ‘mark out natural justice’ where the legislature is silent on a particular matter, [they] oppose such judicial activism.

The judiciary is not the policy-making branch of the government and is not at liberty to usurp that function; if a new principle of law is laudable or advisable on the ground that it would serve public policy, it is, in the first instance, an issue for the General Assembly. If courts are to be involved at all, then it should be up to the Supreme Court to set public policy in the absence of a legislative pronouncement on the issue.

*Id.* at \*7-8 (quoting *Tamarkin v. Children of Israel, Inc.*, 206 N.E.2d 412, 416 (Ohio 1965) (citations omitted)).

<sup>81</sup> *Zivich*, 696 N.E.2d at 204-05 (citing OHIO REV. CODE §§ 1533.18, 1533.181; *Moss v. Dept. of Natural Resources*, 404 N.E.2d 742, 745 (Ohio 1980)). The Ohio General Assembly enacted legislation to protect land owners from any tort liability due to injuries received by any recreational user. OHIO REV. CODE § 1533.181 (Anderson 1998). Recreational user is defined as follows:

‘Recreational user’ means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency thereof, to enter upon premises to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits.

§ 1533.18(B). Such landowners are then exempted from all liability. *Id.* The statute explains:

(A) No owner, lessee, or occupant of premise:

- (1) Owes any duty to a recreational user to keep the premises safe for entry or use;
- (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
- (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

(B) Division (A) of this section applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals.

*Id.*

the *Zivich* case arose which “accord qualified immunity to unpaid athletic coaches and sponsors of athletic events.”<sup>82</sup>

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<sup>82</sup> *Zivich*, 696 N.E.2d at 205. The Ohio statutes providing qualified immunity to volunteers involved in sporting activities did not become effective until January 27, 1997. *Id.*; OHIO REV. CODE §§ 2305.381, 2305.382 (Anderson 1998). Bryan’s injury occurred on October 7, 1993 and his claim was filed in 1995, therefore, this statutory protection for volunteers was not intended to be effective against the *Ziviches*. *Zivich*, 1997 WL 203646 at \*1. The legislative history of the act specifically shows:

With respect to causes of action against athletic coaches, officials, or sponsors for injury, death, or loss to person or property that arose before the effective date of this act and that are not barred by a statute of limitations, the liability or immunity from liability of, and defenses available to, an athletic coach, official, or sponsor shall be determined as if this act had not been enacted.

1996 H 350, § 6(Q). However, the court saw the statutes as an indication of the General Assembly’s legislative intent to protect volunteers. *Zivich*, 696 N.E.2d at 205. These statutes define a “sponsor” as:

a person who provides goods, services, or other assistance to a sports team or sports program other than a manager, coach, instructor, umpire, referee, or other person who officiates in connection with a sports team or sports program and who does not receive compensation for providing those goods, services, or other assistance.

OHIO REV. CODE § 2305.381(A)(5) (Anderson 1998). An “athletic coach” or “official” is defined as:

either . . . (a) A person who provides services to a sports program as a manager, coach, or instructor or as an umpire, referee, or other person who officiates in connection with a sports program and who does not receive compensation for providing those services; (b) An individual who assists a person described in division (A)(1)(a) of this section in connection with a sports program and who does not receive compensation for providing the assistance. § 2305.381(A)(1). This legislation protects volunteer athletic coaches and officials from tort liability as long as “[t]he act or omission does not constitute willful or wanton misconduct or . . . intentionally tortious conduct . . . [and] the athletic coach or official satisfactorily . . . completed the requisite [safety] course . . .” § 2305.381(B)(1). However, this immunity does not apply if the conduct at issue occurred while in transit to or from a practice or event. § 2305.381(B)(2)(a). The immunity is also inapplicable where the athletic coach or official “has the duty or responsibility to provide, or cause the provision of, supervision [for such an event, but] . . . permits the competition, practice, or instruction to be conducted without the necessary supervision.” § 2305.381(B)(2)(b). The statutes do not prohibit the use of vicarious liability to impute the volunteer’s actions to the nonprofit agency with which the volunteer has a principle-agent relationship. §§ 2305.381, 2305.382.

The court then turned to the “important function” served by volunteers in community recreational activities.<sup>83</sup> The court expressed its fear that if such releases were not enforced, the number of volunteers would dwindle out of fear of tort liability.<sup>84</sup> The court feared this would lead to many children losing the opportunity to participate in and benefit from such activities.<sup>85</sup>

In this case of first impression, the Ohio Supreme Court was asked to reach a policy decision on an issue recently faced by the Ohio legislature.<sup>86</sup> The court followed the legislative intent evidenced by the recent statutes protecting Ohio’s

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<sup>83</sup> *Zivich*, 696 N.E.2d at 205.

Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills. Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost. *Id.* “Youth recreational activities can begin to fill the growing void in the lives of many young people. Positive habits can be developed and reinforced, self-esteem enhanced, and emulation of suitable role models encouraged.” King, *supra* note 27, at 688. Some conceive of volunteerism in terms of the contribution it makes to our national debt. *Id.* at 686.

It is unthinkable that we could afford to pay for the services currently provided by volunteers. More than . . . [eighty-five] million Americans engage in volunteer activities. These volunteers spend an average of . . . [five] hours a week on volunteer projects, and provide 16.5 billion hours of volunteer services each year . . . . Considering that these services are conservatively valued at \$110 billion a year, it is clear that the government could not afford to finance such services with current government revenues.

*Id.* at 686-87.

<sup>84</sup> *Zivich*, 696 N.E.2d at 205.

Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort.

*Id.*

<sup>85</sup> *Id.* Many commentators believe the threat is capable of destroying the current volunteer system in America. *Id.*

[T]he cumulative effect of the threat of liability on recreation is “devastating.” . . . [f]or those individuals and organizations not completely discouraged from participating in youth activities, the threat of liability often inhibits the range of experiences offered. Thus, for example, organizations report reducing the kind of activities for children from horseback riding to book fairs.

King, *supra* note 27, at 691 (quoting Marcia Chambers, *Whatever Happened to the Sandlot?*, NAT’L. L. J., Apr. 22, 1991, at 16) (footnotes omitted).

<sup>86</sup> *Zivich*, 696 N.E.2d at 205.

volunteers from personal liability for their negligent acts.<sup>87</sup> However, many commentators who oppose such tort reform measures doubt the validity of the basis for such decisions by legislatures and courts around the country.<sup>88</sup> The primary reason cited in favor of barring an injured child's cause of action for personal injuries against a negligent volunteer is the fear that such liability suits will deter people from becoming volunteers.<sup>89</sup>

The value of services currently rendered by volunteers in America has been estimated at \$110 billion a year.<sup>90</sup> The fear of loss of such services due to decreased volunteerism was one reason cited for Ohio's new public policy in favor of protecting volunteers from liability.<sup>91</sup> However, many commentators report there has been neither widespread loss of activities nor rapidly decreasing numbers of volunteers.<sup>92</sup> Opponents of volunteer protectionism argue the fear that nonprofit groups might begin to lose volunteers came in response to the "sensationalist headlines [of the mid 1980s] meant to agitate the public's anger towards lawyers and the legal system."<sup>93</sup> Although the fear of an "avalanche" of cases created by

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<sup>87</sup> *Id.*

<sup>88</sup> Popper, *supra* note 21, at 146-47.

<sup>89</sup> 42 U.S.C.A. § 14501(a) (Anderson 1998).

<sup>90</sup> King, *supra* note 27, at 687.

<sup>91</sup> Zivich, 696 N.E.2d at 205.

<sup>92</sup> Popper, *supra* note 21, at 146-47. As part of a critique of Congress for passing the federal Volunteer Protection Act of 1997, one commentator assailed the basis for certain conclusions relied upon in the decision making process. *Id.*

Beyond the rhetoric and natural inclination to assist charities, virtually no facts were placed before Congress to justify the deprivation of the entitlement to due care. The record, in both the House and Senate, lacks any showing that volunteers face undue tort liability, that the number of volunteers has declined, or that individual volunteers who seek protection from personal liability must cope with excessive insurance rates. Instead, the record contained the same slogans, tirades against trial lawyers, and anecdotes about egregious cases (that either never existed, were reversed on appeal, or settled) that have distorted the tort reform debate for two decades. This time around, the sleight-of-hand succeeded, perhaps because cynical lobbyists mustered the right combination of popular charities, media stars, and earnest families suffering personal loss.

*Id.*

<sup>93</sup> Brown, *supra* note 31, at 560. The fear engendered by such headlines effectively shifted the focus of community concern in these cases from the injured child seeking damages for personal injuries, to the negligent volunteer who caused the injury. *Id.* Legislation to protect the negligent tortfeasor from a lawsuit is unnecessary when the court system is equipped to root out frivolous cases and demand just compensation for injured children. *Id.*

headlines quoting huge jury verdicts against volunteers has been widely commented upon, the cases never materialized.<sup>94</sup> “The fact is that few nonprofits, and even fewer volunteers, are sued.”<sup>95</sup>

Many have argued against tort reform which benefits the insurance industry to the detriment of injured children.<sup>96</sup> Opponents point out that this new public policy protects tortfeasors and is harmful to the injured party.<sup>97</sup> As the media coverage of large tort verdicts convinced the American public there was a “liability crisis” on the horizon, the insurance industry raised premiums and increased exclusions on various types of coverage.<sup>98</sup> Some commentators have argued for alternatives such as risk pooling to allow nonprofit organizations to continue providing services without barring children’s causes of action for negligence.<sup>99</sup> Risk pooling is a popular way to circumvent the commercial insurance market through the use of an

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<sup>94</sup> *Id.* at 572. However, it is noted that the public perception of a “liability crisis” could affect volunteerism whether or not such a crisis actually exists. Hartmann, *supra* note 2, at 76.

<sup>95</sup> Kimery, *supra* note 58, at 687. “ ‘Many nonprofit organizations have reported that the threat of complete financial ruin created by the specter of personal liability has dissuaded individuals from contributing their services.’ ” *Id.* (quoting *Developments in the Law-Nonprofit Corporations*, 105 HARV. L. REV. 1579, 1693 (1992)). However, the fact remains that “losses sustained by nonprofit organizations are below average and that claims against volunteers are rare.” *Id.*

<sup>96</sup> Popper, *supra* note 21, at 125 (citing Jerry J. Phillips, *Comments on the Report of the Governor’s Commission on Tort and Liability Insurance Reform*, 53 TENN. L. REV. 679, 680 (1986) (criticizing state tort reform proposals as ‘more of an evisceration than a reform of the system.’)). One commentator has called this view “conceptually myopic.” King, *supra* note 27, at 685.

Too often the costs and benefits of tort liability have focused narrowly and exclusively on the interest of the immediate victim--what it would have taken or cost in retrospect for this volunteer to have prevented this injury to this victim, or what would it take to compensate this victim. Should we not inquire more broadly?

*Id.*

<sup>97</sup> Brown, *supra* note 31, at 575.

<sup>98</sup> Tremper, *supra* note 4, at 22.

The insurance problem is grounded in the insurance industry’s fears and lack of knowledge about volunteers. The insurers’ categorization of most volunteer programs as high-risk, together with the failure to distinguish programs that have developed proper volunteer management, eliminates any incentive for organizations to strengthen control over volunteers. Furthermore, the difficulty of obtaining affordable insurance discourages the use of volunteers.

Kahn, *supra* note 16, at 1452.

<sup>99</sup> Note, *supra* note 8, at 1396.



insurance pool created by a group of charities or nonprofit organizations.<sup>100</sup> Another alternative is for a group of nonprofits to demand a better rate from the commercial market by purchasing joint insurance.<sup>101</sup>

“As in the past, when the decline of charitable immunity failed to produce the expected rash of bankruptcies, the recent fears of the [volunteer] industry’s demise may prove to be greatly exaggerated.”<sup>102</sup> In fact, most charities have survived the “liability crisis” of the mid 1980s and volunteerism is still high.<sup>103</sup> This fact calls into question the conclusions upon which the Ohio Supreme Court based its policy decision in *Zivich*.<sup>104</sup>

## V. CONCLUSION

By 1994, each state had enacted at least one law protecting some types of volunteers from the legal consequences of their negligent acts.<sup>105</sup> It seems for many legislators the fear of losing volunteer services is stronger than the fear of individual children being denied tort recovery for their injuries.<sup>106</sup> The Ohio Supreme Court’s decision in *Zivich* is one example of such a policy decision.<sup>107</sup> However, the basis of the decision has been criticized by opponents of tort reform.<sup>108</sup> These commentators argue other alternatives, such as insurance regulation, ought to prevail over denying children their right to sue for damages in cases like this.<sup>109</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> Note, *supra* note 8, at 1397. “Standing together they can demand more favorable rates, better risk management services, and better-tailored coverage.” *Id.* More stringent forms of insurance regulations have been adopted in some states. *Id.* Some states require extended notice requirements for nonrenewals and large premium increases. *Id.* Midterm policy cancellations are prohibited in some states. *Id.*

<sup>102</sup> Note, *supra* note 8, at 1397-98.

<sup>103</sup> *Id.* at 1397.

<sup>104</sup> Popper, *supra* note 21, at 131-32.

<sup>105</sup> Tremper, *supra* note 4, at 22.

<sup>106</sup> *Id.*

<sup>107</sup> *Zivich*, 696 N.E.2d at 201.

<sup>108</sup> Popper, *supra* note 21, at 146-47.

<sup>109</sup> Note, *supra* note 8, at 1396.