

2000

Jessica Hawkins v. Blair Peart dba Navajo Trails : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

JESSICA HAWKINS through her)
guardians, Brian and Melinda Hawkins,)

Appellant,)

vs.)

BLAIR PEART,)
dba NAVAJO TRAILS,)

Appellee.)

Case No: 20000562-SC

Dist. Ct. Case No.: 980600017

BRIEF OF PLAINTIFF/APPELLANT

JESSICA HAWKINS through her guardians, Brian and Melinda Hawkins

APPEAL FROM SIXTH DISTRICT COURT ORDER
GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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FILED

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PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Jessica Hawkins, a minor;
2. Brian and Melinda Hawkins, as guardians of Jessica Hawkins, a minor; and,
3. Blair Peart, dba Navajo Trails

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann § 78-2a-3(2)(j) and Utah R. App. P. 4(a). Judge David L. Mower entered an Order denying in part and granting in part the parties' Cross Motions for Summary Judgment on March 31, 2000. The trial court's order certifying the Order of March 31, 2000, under U.R.Civ.P 54(b) as appealable was entered on May 26, 2000. Plaintiff filed a Notice of Appeal on June 19, 2000.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Issue: Did the trial court err in determining the Release Form violated public policy?
- Citation to Record to Preserve Issue on Appeal: Appellant's Addendum ("Aplt. Add.") p. 000043.
- Standard of Review: This Court reviews all legal conclusions *de novo*, reviewing the trial court's ruling for correctness without deferring to its legal conclusions. Bonham v. Morgan, 788 P.2d 497 (Utah 1989).
- II Issue: Did the trial court err in giving effect to the indemnification clause within the Release Form rather than declaring it unenforceable?
- Citation to Record to Preserve Issue on Appeal: Aplt. Add., p. 000043.
- Standard of Review: This Court reviews all legal conclusions *de novo*, reviewing the trial court's ruling for correctness without deferring to its legal conclusions. Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND
REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE
APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL**

Appellant is not aware of any controlling statutes or case law that dispose of the issue before the Court. However, the following statutes are relevant to the issues on appeal:

1. U.C.A. §15-2-2
2. U.C.A. §75-5-103
3. U.C.A. §75-5-209
4. U.C.A. §78-11-6
5. U.R.Civ.P. 17

STATEMENT OF THE CASE

On July 17, 1997, Jessica Hawkins ("Jessica") went horseback riding using horses and guides provided by Defendant Blair Peart, dba Navajo Trails ("Navajo Trails"). At the time, she was 11 years old. Before beginning the trail ride, Jessica's mother, Melinda, signed a document (the "Release Form") which stated that, acting on behalf of Jessica, Melinda Hawkins released Navajo Trails from any claims for injury, loss or damage incurred by Jessica as a result of Navajo Trails' acts, other than for gross negligence or willful misconduct. In the Release Form, Melinda also agreed to indemnify Navajo Trails for any damages paid to Jessica as a result of injury to her.

While on the trail ride, Jessica's horse was spooked and bolted from the group. The two 15 year old trail guides assigned to the group by Navajo Trails failed to stop or control Jessica's horse. After galloping away, the horse threw Jessica and she incurred serious injuries including a blowout fracture of her cheekbone, a fractured nose and significant facial lacerations. These injuries resulted in medical expenses exceeding \$10,000. Jessica's recovery was complicated by hypertrophic scarring and she has significant permanent facial scarring.

The district court ruled that, while the release language in the Release Form was void as against public policy, the indemnification language in the Release Form was enforceable. As a result, this appeal and cross appeal are before this Court. Jessica appeals the district court's determination that the indemnification language in the Release Form signed by

Melinda Hawkins is enforceable; Navajo Trails appeals the district court's determination that the release language in the Release Form is not.

SUMMARY OF ARGUMENTS

The district court erred in making inconsistent rulings regarding the Release Form. Both the release language and the indemnification language are unenforceable. The release language is unenforceable because a parent's release of a minor's rights to pursue a cause of action is against public policy in the State of Utah. Once that determination is made, it must follow that the indemnification language is likewise void. While the indemnification does not involve the problem of substituting a parent's consent for that of a minor, it impermissably pits the economic interests of the children against the parent in a way that endangers the child's interests. It is simply an attempt to accomplish by another avenue the same result sought by the release language: insulation of a tortfeasor from responsibility for his negligent actions. This Court should rule that both the release and the indemnification provisions of the Release Form are invalid.

STATEMENT OF THE FACTS

1. On July 18, 1997, Jessica was in Duck Creek, Utah, with her family for a family reunion. Jessica went on a horseback ride using horses and guides provided by Navajo Trails, a trail riding business in the Duck Creek area. At the time, Jessica was 11 years old. Aplt. Add., p. 000017, Aplt. Add. p. 000023, ¶s 2,3.
2. The Hawkins family told Navajo Trails both at the time they made the reservation and at the time they arrived, that the group would be equally split between children and adults. They informed Navajo Trails that there would be a total of 18 individuals in their group. Aplt. Add., p. 000024, ¶4.
3. Navajo Trails assured Jessica's mother that all of the adults and children would be riding mild mannered trail horses and that, in light of the mild nature of the horses, even children as young as 3 years old could ride alone. Aplt. Add., p. 000024, ¶5.
4. Jessica had little experience riding horses, and her mother relied on the representations of Navajo Trails that the horses were calm, gentle, and easy to control. Aplt. Add., p. 000024, ¶5.
5. The Hawkins family reserved a total of 14 horses, with the 4 youngest children riding with their parents. Aplt. Add., p.000024, ¶6
6. All of the conversations on July 18, 1997, the day of the ride, were with the teenage employees of Navajo Trails at the location of the stables. Aplt. Add., p. 000024, ¶7.

7. When the Hawkins family arrived at the stable to begin the trail ride, Jessica's mother was told to sign a document entitled "Release Form." She was told that there must be one form filled out for every adult, and that each adult needed to add his or her child's name(s) on the form. Aplt Add., p. 000024, ¶8.
8. In pertinent part, the Release Form stated:

Riding and handling horses can be dangerous . . . By signing this form you agree to assume the risk of any injury, death, or loss, or damage which you or your child . . . may suffer.

In consideration . . . of trail riding . . . service[s] . . . [t]he undersigned on behalf of himself or for any person for whom he or she is a parent . . . does hereby indemnify (reimburse), release and forever hold harmless, Navajo Trails and Outfitters . . . of any claims . . . or causes of actions on account of . . . injury or loss or damage which may occur from any cause, without regard to negligence, other than . . . gross negligence or willful misconduct . . . during the presence of the undersigned or . . . her child . . . at Navajo Trails and Outfitters. If the undersigned is a parent . . . he or she further agrees to indemnify (reimburse) Navajo Trails . . . for any damages paid by or assessed against Navajo Trails . . . as a result of injury . . . of a child.

Aplt. Add., p. 000028.

9. Jessica's mother filled out the Release Form for herself but did not list any of her children on the form. She intentionally omitted the names of her children because she did not want the language of the Release Form to cover any of them. Aplt. Add., p. 000024, ¶8.

10. Defendant did not question Jessica's mother about the fact that none of her children were listed on the Release Form. Aplt. Add., p. 000024, ¶9.
11. Originally, three teenagers were scheduled to go with the Hawkins family as guides. However, at the last minute, only two guides were sent with the group. Each of the young men appeared to be about 16 years old. One of them rode at the front of the group and the other at the rear, with the Hawkins family riding horses in between them. Jessica rode her own horse. Aplt. Add., p. 000025, ¶s 10, 11.
12. Jessica's mother became concerned on the trail ride that the guides did not know exactly where to take the group. One of the guides later told Jessica's mother that the group had been taken on a new trail, one that the guides had not been on before. Aplt. Add., p.000025, ¶12.
13. As the group came up to a road and prepared to cross it, Jessica's horse suddenly bolted onto the road. Two Suburbans traveling on the road spooked Jessica's horse and she began to lose control of him. Aplt. Add., p. 000025, ¶ 13.

Even after Jessica's horse had been spooked by the cars on the road, the guides had a chance to calm the horse down and maintain control of the situation. However, there was only one guide with the group. The other guide was still following the rest of the group as it approached the road. The guide with Jessica's group did not appear confident about how to deal with the situation, and while he was looking for help

from his co-worker, Jessica's horse bolted away from the group. After galloping away, the horse threw Jessica. Aplt. Add., p. 000025, ¶¶14, 15.

15. Following attempts to deal with her injuries at the scene, Jessica was eventually transported to St. George, where she was treated in the emergency room for her injuries, including a fractured nose and cheek, and significant facial lacerations. Aplt. Add., pp. 000025-000026, ¶¶ 16, 17.
16. Jessica suffered hypertrophic scarring as result of the facial lacerations and continues to have significant scarring as a result of the fall and her injuries. Jessica has medical expenses exceeding \$10,000.00. Aplt. Add., p. 000026, ¶18.
17. In March, 1998, Jessica, through her parents, brought this lawsuit against Blair Peart, dba Navajo Trails, claiming negligence by the defendant and requesting compensation for her injuries. Plaintiffs' Complaint, Aplt. Add. at pp. 000001-000005.
18. If Navajo Trails is allowed to obtain indemnification from Jessica's mother for any amounts Navajo Trails pays for Jessica's injuries, Jessica's mother has asked Jessica and her father not to pursue any claims against Navajo Trails. Aplt. Add., p. 000026, ¶19.
19. The trial court concluded that a parent's release of a third party's liability to a child for negligence violates public policy and is unenforceable. Aplt. Add. at pp. 000036, 000042.

20. The trial court also concluded that Navajo Trails' indemnification clause within the Release Form did not violate public policy and is enforceable. The effect of the indemnification clause is that Navajo Trails would be able to obtain reimbursement from Melinda Hawkins, Jessica's mother, for any damages paid by or assessed against Navajo Trails as a result of Jessica's injuries. Aplt. Add. at p. 000043.
21. On May 26, 2000, notice of the signed order was filed in district court. On June 19, 2000, Jessica filed a notice of appeal. On June 29, 2000, Navajo Trails filed a notice of cross appeal. Aplt. Add., pp.000044-000047.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, GIVING EFFECT TO THE INDEMNIFICATION LANGUAGE WITHIN THE RELEASE FORM RATHER THAN DECLARING IT UNENFORCEABLE

A The Trial Court Erred In Making Inconsistent Rulings On The Enforceability Of The Release Language And The Indemnification Language

The Release Form contains language in which Melinda Hawkins, acting on behalf of Jessica, both releases Navajo Trails from liability for any injuries Jessica may incur, and, on her own behalf, indemnifies Navajo Trails for any damages it may be required to pay out to Jessica in the event of injury to her. At times, the Release Form contains reference to the indemnification and the release in the same sentence. Despite this, the district court struck down the release language and upheld the indemnification language in the Release Form. The basis for the district court's distinction was that while the release provisions was entered into on behalf of a minor child, the indemnification language of the Release Form was between two competent adults.

The district court's ruling on the indemnification language circumvents the important public policy considerations it followed when it invalidated the release provisions. Upholding the indemnification provision also creates a conflict of interest between Jessica and her mother, Melinda Hawkins. Public policy considerations require that both the release and the indemnification language in the Release Form be invalidated.

B. The Navajo Trails Release Language Violated Public Policy And Is Unenforceable Because Melinda Hawkins Should Not Be Allowed To Waive The Rights Of Jessica, A Minor Child

Utah courts have not reached the issue of whether exculpatory provisions signed by a parent on behalf of a minor are enforceable. While exculpatory agreements may be enforceable between two adults if the language is clear and unequivocal, Russ v. Woodside Homes, Inc., 905 P.2d 901 (Ut. App. 1995), exculpatory clauses are not favored under the law. Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1887, 1889 (Utah 1983). Consequently, they are to be strictly construed against the indemnitee, Navajo Trails. Id. Release and indemnity provisions may be invalidated as violating public policy where they result from duress, deception, disparity of bargaining power or negotiations conducted at less than arm's length. Id.

Courts in other jurisdictions have held that release and indemnification agreements are unenforceable as against public policy when they involve the rights of minor children. Representative of the cases is Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992). In Scott, the Washington Supreme Court, *en banc*, struck down an attempt to enforce a parent's pre-injury release of a tortfeasor's liability for injury to a minor child. The Court unanimously decided that its discussion about a parent's release of a child's rights was a very different question than whether release clauses between two adults were enforceable. Scott, 834 P.2d at 11.

The same Justice that authored Scott had written another opinion four years earlier comprehensively analyzing the factors to consider when evaluating whether release provisions in other contexts were enforceable. Wagenblast v. Odessa School District 105-157-166J, 758 P.2d 968 (Wash. 1988). In turn, Wagenblast relied heavily on Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963) in establishing six factors to consider when determining whether to enforce pre-injury release provisions. However, in Scott, the Washington court, while citing to Wagenblast, did not go through the process of analyzing the six factors. Rather, the Court concluded that the public policy in protecting children was sufficient, by itself, to mandate invalidation of the release agreement. Scott, 834 P.2d at 11-12.

Scott noted that Washington statutes require judicial approval for the settlements paid to minors, indicating that state's public policy of protecting minors from improper release of personal injury claims. Scott, 834 P.2d at 11. Like Washington, Utah has statutes in place to provide procedural and substantive protection for minors when their legal rights are at stake. For example, U.C.A. §§75-5-101 through 211 detail the procedures that apply when a guardian is appointed to represent a minor's interests. Utah's district courts retain jurisdiction in some cases to supervise disbursements from a minor's trust, require a trustee of the minor's settlement proceeds to file a bond, etc. Id. Utah Rules of Civil Procedure, Rule 17(b) and (c), together with U.C.A. §78-11-6, deal with procedures for bringing or defending a suit by or against a minor.

In addition, children are entitled to a wide array of statutory protections from tolling of statutes of limitations, U.C.A. §78-12-20, to establishing a separate juvenile court system, U.C.A. §78-3a, et. seq., to giving minors the right to repudiate contracts they make before the age of majority, U.C.A. §15-2-2. In fact, the State “holds a compelling interest in the safety and welfare of the children within its jurisdiction.” J.B. v. Washington County, 905 F.Supp. 979, 986 (D. Utah 1995). Minors necessitate court intervention to protect them “. . . from being taken advantage of by designing persons . . . It is the responsibility of our courts to so safeguard [minors’] rights until they have attained their majority and thus presumably have the maturity of judgment necessary to deal with opposing parties on equal terms, so that it is fair and equitable to bind them by their acts.” Harvey v. Hadfield 372 P.2d 985, 986 (Utah 1965). The court should nullify the release and indemnification clauses because they impermissably interfere with the fundamental rights of a minor to seek compensation from a tortfeasor.

Other states’ courts are no less direct than Scott in their refusal to enforce such releases. *See, e.g., Meyer v. Naperville Manor, Inc.*, 634 N.E.2d 411, 414 (Ill. App. 2 Dist. 1994)(“It is now the general rule that, in the absence of statutory or judicial authorization, a parent cannot waive, compromise or release a minor child’s cause of action merely because of the parental relationship.”) ; Munoz v. I.I. Jaz, Inc., 863 S.W. 2d 207, 209-210 (Tex. App. 1993)(holding that state statute giving parents power to make decisions of substantial legal significance for their child did not give them the power to waive a child’s cause of action for

personal injuries); Childress v. Madison County, 777 S.W.2d 1, 6-8 (Tenn.App. 1989)(attempt by parent to execute release for negligence is void); and Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 558 (N.J. 1970) ("A parent has no authority unless he has been appointed guardian to compromise or release claims or causes of action belonging to the child"). *See also* Fedor v. Mauwehu Council, Boy Scouts of America, Inc., 143 A.2d 466 (Conn.Super. 1958) (invalidating release) and Doyle v. Boudoin College, 403 A.2d 1206, fn. 3 (Me.App. 1979) (invalidating release). While there is a split of authority on the issue, the logic of Scott and the cases from other jurisdictions cited above is sound and should be adopted in Utah. The public policy of protecting Utah's children is sufficiently important, without more, to justify invalidation of the release provisions in the Release Form.

Alternatively, the analytic framework initially set forth in Tunkl by the California Supreme Court and adopted by Washington in Wagenblast is likewise sound and weighs against upholding the release provisions. In Tunkl, the California Supreme Court considered whether a release imposed as a condition for admission to a charitable research hospital was valid. After being treated, Hugo Tunkl brought an action for personal injuries and challenged the release provision as being violative of public policy. In attempting to define what constitutes the "public interest," the court noted:

If, then, the exculpatory clause which affects the public interest cannot stand, we must ascertain those factors or characteristics which constitute the public interest. The social forces that have led to such characterization are volatile and dynamic. No definition of the concept of public interest can be contained within the four corners of a formula.

The concept, always the subject of great debate, has ranged over the whole course of the common law; rather than attempt to prescribe its nature, we can only designate the situations in which it has been applied. We can determine whether the instant contract does or does not manifest the characteristics which have been held to stamp a contract as one affected with the public interest.

Tunkl, 383 P.2d at 444.

The court then identified six separate factors to consider in determining if a contract containing an exculpatory clause affected the public interest. The court determined that such a transaction exhibits some or all of the following characteristics:

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

Tunkl, 383 P.2d at 445.

Applying these factors to this case, most, if not all, of the six factors clearly weigh against enforcement of the release provisions. First, the Release Form concerns an endeavor

of a type thought suitable for public regulation. While Navajo Trails is a private company, not subject to public regulation, and Jessica is not aware of statutes or regulations specifically applicable to horseback riding companies that regulate Navajo Trails' behavior, that is not the entire scope of the issue in this case. The specific question for this Court is whether Navajo Trails may enforce a release it has obtained on behalf of a minor child. As noted above, the circumstances under which businesses may obtain a waiver of a minor's legal rights, is subject to extensive regulation and scrutiny by the State of Utah. This factor clearly weighs against enforcement of the release provision.

As for the second factor, whether Navajo Trails is engaged in performing a service of significant public importance, or which concerns necessary services for at least some members of the public, it does not appear that horseback riding *per se* falls into this category. However, once again, as noted above, when providing services to children in the State of Utah, it is of great importance that businesses deal fairly with minors in negotiating to provide their services. Once an agreement has been made, it is likewise of great concern to the State of Utah that its minor children be provided an adequate method of redress if they are injured through the negligence of the company providing the services. Consequently, when viewed in the context of the facts of this case, this factor likewise suggests that the release provisions should be invalidated.

As for the third factor, Navajo Trails held itself out as willing to provide its trail guide services for any member of the public. Indeed, the undisputed facts show that Melinda

Hawkins questioned whether the ride was appropriate for her own children and other children in the group. Navajo Trails reassured Jessica's mother that children as young as three years old could ride the horses safely and that the horses were mild mannered. Partly on the basis of this reassurance by Navajo Trails employees, Melinda Hawkins went ahead and signed the Release Form. This factor likewise weighs in favor of invalidating the release provisions.

The fourth factor is whether, as a result of the essential nature of Navajo Trails' services and the economic setting of the transaction, it possessed a decisive advantage and bargaining position against Jessica. While it could be argued by Navajo Trails that Melinda Hawkins signed on behalf of her daughter completely voluntarily and was free to go elsewhere for trail guide services, the setting of the transaction is important to take into account. The group of eighteen individuals associated with the Hawkins family had reserved the trail guide services before arriving at Duck Creek. This group of eighteen people, in a rural location at least 30 miles from Cedar City, the nearest town of any size, were not informed that they would be required to sign the Release Form until immediately before the ride began. They were not in a good position to choose to do anything other than sign the Release Form. Under the facts and circumstances in their totality, Navajo Trails was in a position of significant advantage when it presented a Release to Melinda Hawkins to sign, both on her own behalf and on Jessica's.

The fifth factor is whether Navajo Trails presented Jessica or Melinda Hawkins with a standardized adhesion contract releasing it and providing no option for Melinda to pay

additional amounts to cover the risk of Navajo Trails' exposure, should it be required to pay damages for injury to Jessica. Once again, this clearly weighs against enforcement of the release provisions. The Release Form was presented to Melinda Hawkins for signing immediately before the ride began. It was prepared by Navajo Trails. Melinda was not told it was optional nor was she given the ability to negotiate any terms other than what the form provided. Her choices were to either fill out and sign the document or not go on the trail ride. It was simply offered to her on a take-it-or-leave-it basis.

Finally, as to the sixth factor, whether Jessica was placed under the control of Navajo Trails, and subject to the risk of negligence by it, there can be little question that this was true to an overwhelming extent for Jessica. As a minor child with very little experience riding horses, she was at the mercy of Navajo Trails and its employees.

The Tunkl court noted that satisfying each of the six elements was unnecessary to determine that an exculpatory provision violated public policy. Under the circumstances of this case, all six weigh, to varying degrees, in favor of invalidating the release language. For all, little argument can be made in favor of validating the release provisions. Whether this Court adopts the more definitive approach of the Washington Supreme Court in Scott and other jurisdictions cited herein, or the Tunkl factors, there can be little question that the release language fails to pass muster under public policy in the State of Utah.¹

¹ There is an advantage in definitively stating that release provisions dealing with minor childrens' rights are void as a matter of law: such a rule of law provides clear guidance to people doing business within the State of Utah. Even if this Court adopts the

C If The Release Provisions Are Unenforceable, The Indemnification Language Should Likewise Be Struck Down As Violating Public Policy Of The State Of Utah

If this Court determines the release provisions of the Release Form are invalid based on public policy concerns, it makes no sense to uphold the indemnification language of the Release Form. The district court decided that the release language was unenforceable and against public policy and yet held that the indemnification provisions were enforceable. It is difficult to understand the district court's logic behind the different interpretations of the exculpatory language in the Release Form. Release and indemnification clauses and their effects go hand in hand. In this case, the purpose for both provisions in the Release Form was to protect Navajo Trails from any economic loss associated with its negligent acts and shift the burden of loss to either Jessica or her mother.

Several courts have invalidated attempts by tortfeasors to have innocent parties indemnify the tortfeasor for any payments made to the minor child. The following cases interpret language that is directly on point with the language at issue in this case, in that they contain both release and indemnification language: Childress, supra; Fitzgerald, supra; and Ohio Casualty Insurance Company v. Mallison, 354 P.2d 800 (Ore. 1960). The district court's ruling in this case is unprecedented: Jessica's counsel has found no case invalidating

Tunkl factors to evaluate the legitimacy of release provisions in other contexts, those factors justify a bright-line test invalidating release provisions as applied to minors because so many of those factors implicate Utah's public policy in protecting the rights of minors, their personal safety and their right to redress when injured through the fault of others.

release provisions on public policy grounds while at the same time upholding the enforceability of indemnification provisions.

Courts have ruled that indemnification provisions drive a wedge between parents or guardians and their children or wards. Typical of these concerns are the comments of the Oregon Supreme Court in Mallison:

As parent-guardian he owes a duty to act for the benefit of his child. That duty is not fully discharged where the parent enters into a bargain which gives rise to conflicting interests There is a real danger that the child's interests will be put in jeopardy because of the parent's concern over his or her own economic interests . . . Looking at the matter from the standpoint of the child's, rather than the parent's, choice of action (if the child had the capacity to make a choice) again we find policy considerations which are important. A child, realizing that his recovery from the defendant would ultimately call for the parent to indemnify the defendant, would not be likely to pursue his rights.

Mallison, 354 P.2d at 803.

Even though the district court found the release language to be unenforceable, Jessica is denied any remedies if the indemnification language is valid. She is not likely to seek damages against Navajo Trails for her injuries, which in turn would be indemnified by her mother. The undisputed facts verify that Melinda Hawkins has asked her husband, Jessica's father, not to pursue this action if to do so would result in Melinda indemnifying Navajo Trails. The conflict of interest, apparent at the time the Release Form was signed, has come to fruition in this case. Even though the conflict of interest was only potential at the time the Release Form was signed, it is now real. As such, the indemnification provisions are not enforceable. Loesch, to Use of Harleysville Mutual Cas. Co. v. Vassiliades, 86 A.2d 14

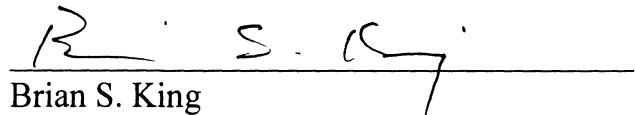
(N.J.Super 1952). Jessica's interests are not furthered in any way by invalidating the release terms of the Release Form unless the indemnification terms are also invalidated.

CONCLUSION

This Court must reverse the district court's order of granting in part Defendant's motion for summary judgment. For the reasons set above, the district court erred in not holding that both the release and indemnification provisions were unenforceable and against public policy. This court must, therefore, uphold the district court's ruling that the release provisions are unenforceable and against public policy. This court must also hold that the indemnification language is also unenforceable and against public policy.

DATED this 5 day of September, 2000.

KING & ISAACSON, P.C.

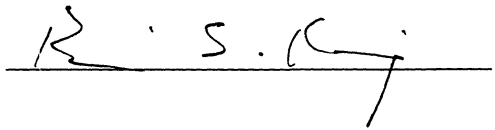
A handwritten signature in black ink, appearing to read "B. S. King", is written over a horizontal line.

Brian S. King
Attorneys for Plaintiff/Appellant Jessica Hawkins
4 Triad Center, Suite 825
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Telephone: (801)532-1700

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of September, 2000, I mailed a copy of the foregoing APPELLANT'S OPENING BRIEF, first class mail, postage prepaid to the following:

James W. Jensen
HIGBEE MACFARLANE & JENSEN, P.C.
250 South Main Street
P.O. Box 726
Cedar City, UT 84721



IN THE SUPREME COURT OF UTAH

JESSICA HAWKINS through her
guardians, Brian and Melinda Hawkins,

Appellant,

vs.

BLAIR PEART, dba NAVAJO TRAILS,

Appellee.

)
)
)
)
)
)
)
)
)
)

Case No: 20000562-SC

Dist. Ct. Case No.: 980600017

ADDENDUM OF PLAINTIFF/APPELLANT
JESSICA HAWKINS through her guardians, Brian and Melinda Hawkins

APPEAL FROM SIXTH DISTRICT COURT ORDER
GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

Brian S. King #4610
KING & ISAACSON, P.C.
4 Triad Center, Suite 825
Salt Lake City, Utah 84180

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Attorneys for Defendant/Appellee

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I.
COMPLAINI

COPY

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HE

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR KANE COUNTY, STATE OF UTAH

JESSICA HAWKINS through)
her guardians, Brian and)
Melinda Hawkins,)

Plaintiffs,)

vs.)

BLAIR PEART, dba)
NAVAJO TRAILS,)

Defendant.)

COMPLAINT

Civil No. 980600017

Judge Mower

Plaintiff, Jessica Hawkins, by and through her guardians, Brian and Melinda Hawkins
("Hawkins"), by and through her undersigned counsel, complains and alleges as follows:

1. Jessica Hawkins is a natural person residing in the State of California.
2. Defendant Blair Peart is doing business in Kane, Iron and Washington Counties as Navajo Trails ("Navajo Trails").
3. The accident which is the subject matter of this Complaint occurred in Kane County, State of Utah.

000001

4. This Court has jurisdiction over this matter pursuant to U.C.A. §78-3-4, and venue is appropriate in this Court pursuant to U.C.A. §78-13-7.

FACTUAL BACKGROUND

5. Hawkins realleges and incorporates by reference paragraphs 1 through 4.

6. On July 18, 1997 Hawkins, eleven years old at the time, was on a vacation with her parents and other family members in the Cedar City area.

7. As part of the activities of the family vacation, the group with which Hawkins was vacationing contacted Navajo Trails to arrange for trail rides at Duck Creek.

8. Navajo Trails is in the business of providing trail rides for hire to residents and visitors to the area.

9. On July 18, 1997, the group of which Jessica was a part contracted with Navajo Trails to have it take the group on a ride for approximately an hour in the evening.

10. Navajo Trails represented to the Hawkins group that the horses used by Navajo Trails were gentle and appropriate for any child over the age of three to ride.

11. Navajo Trails also represented that its employees and guides were experienced and competent to take the group on a trail ride.

12. Navajo Trails provided two trail guides for the group.

13. Individuals in the Hawkins group told Navajo Trails' employees that only one of the 18 individuals in the Hawkins group had significant experience riding horses and that the group would be relying upon the experience and expertise of the Navajo Trails' guides.

14. During the ride with the group, Hawkins' horse bolted from the group and ran

away.

15. In the process, Hawkins was thrown to the ground and incurred severe injuries, including a blowout fracture of the right orbital facial bones, fractured nasal passages, and significant facial lacerations.

16. Surgery was necessary to repair the injuries of Hawkins and she has been left with significant permanent facial scarring.

CAUSE OF ACTION

17. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 16 above.

18. In conducting its business activities, Navajo Trails had a duty to provide safe and competent riding conditions for the public generally and the Hawkins group specifically.

19. Navajo Trails violated its duty to Hawkins in the following specific ways:

(a) Navajo Trails failed to provide competent, experienced guides to the Hawkins group;

(b) Navajo Trails failed to provide horses that were trained and predisposed to be appropriate to carry individuals with little or no riding skills such as Hawkins and others in the Hawkins group.

(c) Navajo Trails failed to provide a sufficient number of guides for the individuals in the Hawkins group.

(d) The Navajo Trails' guides accompanying the Hawkins group failed to properly carry out their duties and responsibilities regarding controlling the horses, taking an appropriate route for the group, and responding to the actions of the horse Hawkins was riding before it

become unmanageable.

20. The actions and failures to act of Navajo Trails as outlined above are both the cause in fact and proximate cause of the injuries Hawkins has incurred.

21. As a result of the breach of the duties owed Hawkins by Navajo Trails, Hawkins sustained significant and permanent physical injuries, including but not limited to a blowout fracture of the right orbital bones, fractured nose, and facial lacerations, including significant permanent scarring.

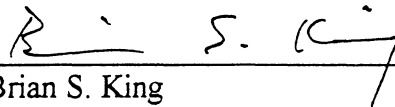
22. In addition, Hawkins has incurred medical expenses exceeding \$10,000, prospective future medical expenses, and has incurred and will continue to incur significant pain and suffering, stress, mental and emotional pain and anguish, and other general damages.

23. Hawkins is entitled to be compensated for her injuries in an amount to be determined at trial of this matter in the form of payment for past and future medical expenses, property damage, and an award of general damages for pain and suffering and to compensate Hawkins for the permanent disfiguring effects of her injuries.

WHEREFORE, Hawkins prays for judgment against defendant on her cause of action for an award of damages in an amount to be determined by the court for past and future medical expenses, property damages and general damages for her pain and suffering, mental and emotional anguish, both past and future, and for such further relief as the court deems proper.

DATED this 19 day of March, 1998.

KING & ISAACSON



Brian S. King
Attorneys for Plaintiffs

Plaintiff's Address:
16 Calad'or
Laguna Niguel, CA 92677

II.
PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
(Exhibit B excluded)

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Marcie E. Schaap (#4660)
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Telephone: (801) 532-1700

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

IN AND FOR KANE COUNTY, STATE OF UTAH

JESSICA HAWKINS through	:	MEMORANDUM OF POINTS &
her guardians, Brian and	:	AUTHORITIES IN SUPPORT
Melinda Hawkins,	:	OF MOTION FOR PARTIAL
	:	SUMMARY JUDGMENT
Plaintiffs,	:	
	:	
vs.	:	Civil No. 980600017
	:	
BLAIR PEART, dba	:	Judge David L. Mower
NAVAJO TRAILS,	:	
	:	
Defendant.	:	

Plaintiff, Jessica Hawkins ("Hawkins") through her undersigned counsel, submits the following Memorandum in Support of Motion for Partial Summary Judgment pursuant to 4-501 of the Rules of Judicial Administration for the District Courts of the State of Utah.

STATEMENT OF UNDISPUTED FACTS

1. On July 17, 1997, Hawkins was in Duck Creek, Utah with her family for a family reunion. On the day, Hawkins went on a horseback ride using horses and guides provided by Defendant Blair Peart, dba Navajo Trails ("Navajo Trails"), a trail riding business in the Duck Creek area. Affidavit of Melinda Hawkins, ¶3.

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2. Navajo Trails assured Heather's mother that all of the adults and children would be riding mild mannered trail horses and that in light of the mild nature of the horses, even children as young as 3 years old could ride alone. Aff. of Melinda Hawkins, ¶5.

3. Hawkins had little experience riding horses and relied on the representations of the Navajo Trails guides that the horses were calm, gentle, and easy to control. Aff. of Melinda Hawkins, ¶5.

4. When Hawkins' family arrived at the stable to begin the trail ride, Hawkins' mother was told to fill out a release form for the ride. She was told there needed to be one form filled out for every adult, and that each adult needed to add his or her child's name(s) on the form. Hawkins' mother filled out the release for herself but did not include any of her children on the form. She intentionally omitted the names of her children because she did not want the language of the release to cover any of them. Aff. of Melinda Hawkins, ¶8.

5. Hawkins' mother was not questioned about the fact that none of her children were listed on the form. Aff. of Melinda Hawkins, ¶9.

6. The Navajo Trails guides were young and had never been on the particular trail they were riding on with a group before. Aff. of Melinda Hawkins, ¶12.

7. While on the trail ride, Hawkins' horse was spooked and bolted away from the group. After galloping away, the horse threw Hawkins. Aff. of Melinda Hawkins, ¶13-15.

8. Hawkins incurred serious injuries including a fractured nose and cheek and significant facial lacerations. Aff. of Melinda Hawkins, ¶ 15-18.

9. Hawkins is left with permanent facial scarring as a result of the accident and has medical expenses exceeding \$10,000.00. Aff. of Melinda Hawkins, ¶18.

10. In March, 1998, Hawkins, through her parents, brought this lawsuit against Blair Peart, dba Navajo Trails, claiming negligence by the defendant and requesting compensation for her injuries.

11. If Navajo Trails is allowed to obtain indemnification from Hawkins' mother for any amounts Navajo Trails pays for Hawkins' injuries, Hawkins' mother has asked Hawkins and her father not to pursue any claims against Navajo Trails. Aff. of Melinda Hawkins, ¶ 19.

STANDARD OF REVIEW

The issues presented to the court involve the interpretation of language in a document signed by Hawkins' mother, Melinda Hawkins. There are no genuine issues as to any material facts relating to the document and it can be interpreted and ruled on as a matter of law. Russ v. Woodside Homes, Inc., 905 P.2d 901 (Utah.App. 1995)

ARGUMENT

This Motion for Partial Summary Judgment deals with the validity and enforcement of exculpatory contractual provisions that are sought to be applied to and enforced against the rights of a minor child to seek compensation for personal injuries based on the negligence of Navajo Trails. First, Hawkins claims that the terms of the release do not apply to any claim brought by her, or to any compensation received by her. Second, to the extent that the release does apply to and bind Jessica Hawkins, it should be declared void and unenforceable because it is against the public policies of the State of Utah.

//

A. The Exculpatory And Indemnity Provisions Of The Release Do Not Apply To Hawkins' Claim Or To Amounts Received By Her As A Result Of Her Claim.

Navajo Trails has raised two defenses that Hawkins seeks to dispose of in this motion. Both of the defenses arise out of the language of a document signed by Melinda Hawkins at the time the injury occurred. A copy of the release document ("the Release") is attached hereto as Exhibit A.

The Defendant claims the Release gives rise to two separate but related defenses. The first is that the language of the Release bars Hawkins from bringing any claims against Navajo Trails based on anything other than gross negligence or willful misconduct. The second defense is that the Release requires Melinda Hawkins to indemnify Navajo Trails for any amounts Navajo Trails may be required to pay to Melinda's daughter, Hawkins.

Both of these defenses fail for the simple reason that, on its face, the Release is not broad enough to include Hawkins or her claims within its language.

Utah law relating to agreements such as the one at issue in this case is summarized in the case of Russ v Woodside Homes, Inc., 905 P.2d 901 (Utah App. 1995). In that case, the court of appeals stated that parties may shift financial responsibility for harm caused by their ordinary negligence "... only if the contract language clearly and unequivocally expresses the parties' intent to indemnify one another." Id. at 904.

Historically, such agreements to release or indemnify a tortfeasor are "... not the favorites of the law." Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1887, 1189 (Utah 1983). Consequently, they are strictly construed against the indemnitee. Id. In this case, that is Navajo Trails. Courts are suspicious of such releases and indemnity agreements. They

may be invalidated as violating public policy where they result from duress, deception, disparity of bargaining power or negotiations conducted at less than arm's length. Id.

Fundamental to proving the existence of any contract, especially one disfavored, such as the Release, is the clear expression of intent by an individual that he or she agrees to be bound by the terms of the contract. It is axiomatic that there can be no enforceable contract on a subject matter not agreed to by the parties. Sackler v. Savin, 897 P.2d 1217, 1220 (Utah, 1995). Similarly, there can be no enforceable contract against individuals who have not manifest their assent to the terms of the contract. Id.

In this particular case involving the Release, there is no action by Melinda Hawkins, Hawkins' mother, that indicates assent on her part, either individually or as agent for Hawkins, to include her daughter within the terms of the Release. This is made clear by two undisputed facts. The first is that the face of the contract itself does not include any reference to Hawkins. This is especially telling in light of the fact that there is space on the face of the agreement for the adult signing the Release to list any children that are taken on the trail ride. This blank space has no information in it to indicate that Melinda Hawkins intended to include any of her three children within the scope of the Release.

Second, there is Melinda Hawkins' undisputed testimony that she had no intention at the time she signed the Release of adding her childrens' names to that document. Having received a signed Release for Melinda Hawkins only, Navajo Trails cannot now shoehorn Melinda's daughter into the document.

Hawkins was obviously not a party to the agreement by her own assent. As a minor, Hawkins did not have capacity to enter into an enforceable contract. Swalberg v. Hannegan, 883

P.2d 931 (Utah App. 1994). The only way in which she could allegedly fall within the scope of the Release is by Melinda, as her mother, signing on her behalf and binding Hawkins to the terms of the Release because Melinda is Hawkins' parent. Hawkins disputes that even if she had been listed as an individual covered by the terms of the Release, this would have been enforceable against her. *See* sub-point B below. However, this is a point the court need not reach in light of the failure of the Release to identify Hawkins as being a party to it.

B. To The Extent Navajo Trails Succeeds In Making The Release Applicable To Either Prevent A Claim Being Brought By Hawkins Or To Require Indemnification By Melinda For Any Amounts Paid To Hawkins, The Release Is Void As Against Public Policy.

While Utah courts have not reached the issue of whether exculpatory provisions signed by a parent on behalf of a minor are enforceable, other courts deciding the issue have held that such release and indemnification agreements are unenforceable as violations of public policy.

Representative of the cases is Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992). In Scott, the Washington Supreme Court, *en banc*, outlined a rule comparable to those in Utah regarding exculpatory clauses generally. The Court indicated that they would be strictly construed and, if clear in their scope, would be enforced. However, in Scott, the Court dealt with a parent's pre-injury release of a tortfeasor's liability for injury to a minor child. The Court discussed at length the public policy behind whether such a release by a parent on behalf of a child should be enforced. The Court unanimously decided that this would not be allowed. The child was free to pursue a claim for personal injury, despite his parent's purported release of liability on the child's behalf.

In Scott the Court noted that the requirement of judicial approval for settlements paid to minor's indicated the public policy of Washington to protect minors from release of personal injury claims. Id. at p. 11. Utah has the same requirement for personal injury settlements for a minor's claim. U.C.A. §75-5-101 through 211.

Other states are no less direct in their refusal to enforce such releases. Meyer v. Naperville Manor, Inc., 634 N.E.2d 411 (Ill. App. 2 Dist. 1994); Munoz v. I.I. Jaz, Inc., 863 S.W. 2d 207 (Tex. App. 1993). Several other courts extend this analysis to invalidate attempts by tortfeasors to have innocent parties indemnify the tortfeasor for any payments made to the minor child. The following cases interpret language that is directly on point with the language at issue in this case, in that they contain both release and indemnification language: Childress v. Madison County, 777 S.W.2d 1 (Tenn. App. 1989); Fitzgerald v. Newark Morning Ledger Company, 267 A.2d 557 (N.J. 1970); Ohio Casualty Insurance Company v. Mallison, 354 P.2d 800 (Ore. 1960). Copies of the cases from outside Utah on which Hawkins relies are attached as Exhibit "B".

The basis for the ruling by courts specifically relating to the indemnity language is that to enforce such an agreement would drive a wedge between parents or guardians and their children or wards. As stated by the Oregon Supreme Court in Mallison:

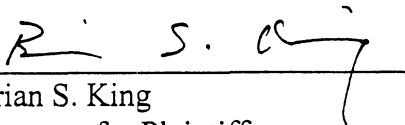
As parent-guardian he owes a duty to act for the benefit of his child. That duty is not fully discharged where the parent enters into a bargain which gives rise to conflicting interests. . . . There is a real danger that the child's interests will be put in jeopardy because of the parent's concern over his or her own economic interests . . . Looking at the matter from the standpoint of the child's, rather than the parent's, choice of action (if the child had the capacity to make a choice) again we find policy considerations which are important. A child, realizing that his recovery from the defendant would ultimately call for the parent to indemnify the defendant, would not be likely to pursue his rights. Ohio Casualty Insurance Co. v. Mallison, 354 P.2d at 803.

Under the circumstances, there can be little question that both the Release language and the indemnification language in the Release are unenforceable as being void against public policy in the State of Utah.

CONCLUSION

The language of the Release is not broad enough to apply to claims brought by Hawkins. Even if it were, the Release is unenforceable as a violation of public policy within the State of Utah. All defenses Navajo Trails raises under the Release should be stricken.

DATED this 28 day of April, 1999.



Brian S. King
Attorney for Plaintiff

EXHIBIT A

Navajo Trails and Outfitters
291 W 500 N
La Verkin Utah 84745

**RELEASE FORM FOR THE RIDERS OF NAVAJO TRAILS AND OUTFITTERS
AND SWAINS CREEK PINES LOT OWNERS ASSOCIATION**

Riding and handling horses can be **DANGEROUS**. This form must be completed and signed before you can ride or work for the Navajo Trails and Outfitters/ Swains Creek Pines Lot Owners Association. By signing this form, you agree to **ASSUME THE RISK** of any injury, death, or loss, or damage which you or your child or ward may suffer. MA initial if you read this.

Name Hawkins Melinda Phone 495-7199
Last First
Address 16 Calle D'Or Age 34
 La Verkin UT 84745
City State Zip

In consideration for the rendering of trail riding and or wagon riding service by Navajo Trails and Outfitters,/Swains Creek Pines Lot Owners Association. The undersigned on behalf of himself or for any person for whom he or she is a parent or legal guardian, does hereby indemnify (reimburse), release, and forever hold harmless, Navajo Trails and Outfitters,/Swains Creek Lot Owners Association, it's employees, officers, agents, patrons, students, invitees, contractors, horse owners and landlords acting officially or otherwise, of any claims, demands, and actions or causes of action on account of death or injury or loss or damage which may occur from any cause, without regard to negligence, other than the gross negligence or willful misconduct of Navajo Trails and Outfitters /Swains Creek Pines Lot Owners Association or such persons, during the presence of the undersigned or the presence of his or her child or ward at Navajo Trails and Outfitters / Swains Creek Pines Lot Owners Association or while the undersigned, or his or her child or ward, is in transit to or from Navajo Trails and Outfitters / Swains Creek Pines Lot Owners Association premises. If the undersigned is a parent or guardian, he or she further agrees to indemnify (reimburse) Navajo Trails and Outfitters and / or such persons for any damages paid by or assessed against Navajo Trails and Outfitters and / or such persons as a result of injury to or death of a child or ward.

Date 7/18/97 Signed Melinda Hawkins
Parent or Guardian for:

III.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM
IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT**

.....

vs. : Civil No. 980600017

BLAIR PEART, dba : Judge David L. Mower
 NAVAJO TRAILS, :
 :
 Defendant .

Defendant has filed separate Memorandums in Opposition to Hawkins' Motion for Partic

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Judgment and then address the Statement of Undisputed Facts presented by Defendant in his cross motion for Summary Judgment.

RESPONSE TO DEFENDANT'S STATEMENT OF DISPUTED FACTS

1. Hawkins agrees that the accident occurred on July 18, 1997 rather than July 17, 1997. The error in dates was inadvertent.

2. The reference to "Heather" in paragraph 2 of the Statement of Facts in Hawkins' primary memorandum was in error. The reference should be to "Hawkins."

3. Hawkins disputes paragraph 3 of Defendant's Statement of Disputed Facts. The wranglers did not know the trail very well since it was their first time on that particular trail. The owner has stated that the wranglers were not familiar with the trail. The new trail would have taken the group beyond the routine trail to the restaurant for dinner. Since it was the first weekend the wranglers had tried that particular trail, they did not seem to know where they were going. See Affidavit of Melinda Hawkins ¶12.

RESPONSE TO DEFENDANT'S STATEMENT OF ADDITIONAL FACTS

4. With regard to paragraph 7 of Defendant's Statement of Additional Facts, Hawkins disputes that signing the release constitutes the sole or primary consideration for Defendant's services. Hawkins paid Defendant for his work. This was the primary consideration for Defendant's services.

5. With regard to paragraph 10 of Defendant's Statement of Additional Facts, Hawkins disputes that McKelly Peart and Brett Weston were qualified to lead the trail ride. In August of 1998, over a year after the accident occurred, Defendant stated that at the time of the response to the interrogatories these individuals were 16 years old. That means that at the time of the accident the

individuals were, at most, 15 years old. Hawkins disputes their competence and judgment. See Defendant's Answer to Plaintiff's First Set of Interrogatories and Request for Production of Documents, Interrogatory No. 2.

**STATEMENT OF ADDITIONAL FACTS IN RESPONSE
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

6. Hawkins' mother did sign the release form for herself but did not include any of her children on the form. She intentionally omitted the names of her children because she did not want the language of the release to cover any of them. See Affidavit of Melinda Hawkins ¶8.

7. Defendant did not question Hawkins' mother about the fact that none of her children were listed on the form. See Affidavit of Melinda Hawkins ¶12.

8. While on the trail ride, Hawkins' horse was spooked and bolted away from the group. After galloping away, the horse threw Hawkins. See Affidavit of Melinda Hawkins ¶13-15.

9. Hawkins incurred serious injuries including a fractured nose and cheek and significant facial lacerations. See Affidavit of Melinda Hawkins ¶15-18.

10. Hawkins is left with permanent facial scarring as a result of the accident and has medical expenses exceeding \$10,000.00. See Affidavit of Melinda Hawkins ¶18.

STANDARD OF REVIEW

Summary judgment is only appropriate when the moving party has shown that there is no genuine issues as to any material facts relating to the document and it can be interpreted and ruled as a matter of law. Russ v. Woodside Homes, Inc., 905 P.2d 901 (Utah App. 1995).

ARGUMENT

Hawkins' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment deal with the same issue: the validity and enforcement of exculpatory contractual provisions that are sought to be applied to and enforced against the rights of a minor child to seek compensation for personal injuries based on the negligence of Navajo Trails. The arguments presented by Hawkins in her Memorandum in Support of the Motion for Partial Summary Judgment apply with equal force in response to the arguments presented by Defendant in his Motion for Summary Judgment. Hawkins incorporates by reference her Memorandum in Support of Motion for Partial Summary Judgment in response to Defendant's Motion for Summary Judgment. In addition, Hawkins has the following comments.

Hawkins has no quarrel with many of the legal principles cited by Defendant in his Memorandum. However Defendant's brief never addresses the issue before the Court: the enforceability of an exculpatory provision when it is being pressed on a minor. In fact none of the cases cited by Defendant deal with the issue before the court. The cases cited by Hawkins in her principal brief, however, are directly on point in discussing and invalidating exculpatory clauses as applied to minors. See Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992); Meyer v. Naperville Manor, Inc., 634 N.E.2d 411 (Ill. App. 2 Dist. 1994); Munoz v. I.I. Jaz, Inc., 863 S.W. 2d 207 (Tex. App. 1993); Childress v. Madison County, 777 S.W. 2d 1 (Tenn. App. 1989); Fitzgerald v. Newark Morning Ledger Company 267 A.2d 557 (N.J. 1970); Ohio Casualty Insurance Company v. Mallison, 354 P.2d 800 (Ore. 1960). Copies of the cases from outside Utah on which Hawkins relies are attached to Hawkins' principal brief as Exhibit "B".

Utah's public policy with respect to minors is reflected in statute and case law. Children are entitled to a wide array of statutory protections running from tolling of statutes of limitations, U.C.A. §78-12-20, to establishing a separate juvenile court system, U.C.A. §78-3a et. seq., to giving minors the right to repudiate contracts they make before the age of majority, U.C.A. §15-2-2. In fact, the State of Utah, "holds a compelling interest in the safety and welfare of the children within its jurisdiction" J.B. v. Washington County, 905 F.Supp. 979, 986 (D. Utah 1995). Minors necessitate court intervention to protect them ". . . from being taken advantage of by designing persons . . . It is the responsibility of our courts to so safeguard [minors'] rights until they have attained their majority and thus presumably have the maturity of judgment necessary to deal with opposing parties equal terms, so that it is fair and equitable to bind them by their acts." Harvey v. Hadfield 372 P.2d 985 (Utah 1965). The court should nullify the release and indemnification clauses because they impermissably interfere with the fundamental rights of a minor to seek compensation from a tortfeasor.

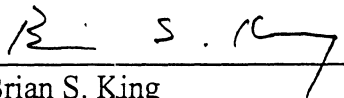
A final example of State protection provided to minors directly analogous to this case involves the procedures in place for a court to review and approve settlements of a minor's tort claim. These are found in Rule 17(b) and (c) of the Utah Rules of Civil Procedure, U.C.A. §78-11-6 and in the Probate Code, U.C.A. §75-5-201 through 212. In addition, Utah's district courts retain jurisdiction in some cases to supervise disbursements from the trust, require a trustee of the minor's settlement proceeds to file a bond, etc. Id. In short, the State bends over backwards to protect its children. If it is necessary for a guardian to be appointed and a court to approve the settlement and release of a tortfeasor after injury to a minor, no basis exists to afford less protection to a minor before the injury occurs.

CONCLUSION

The enforcement of exculpatory contractual provisions against the rights of a minor child should be unenforceable as a violation of public policy within the State of Utah. All defenses raised by Navajo Trails under the Release should be stricken and should not be applied to nor enforced against Hawkins in seeking compensation for personal injuries based on the negligence of Navajo Trails.

DATED this 25 day of May, 1999.

KING & ISAACSON, P.C.



Brian S. King
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the document entitled
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT was sent via U.S. Mail, postage pre-paid,
to the following:

James W. Jensen
HIGBEE, MACFARLANE & JENSEN, P.C.
P.O. Box 726
Cedar City, UT 84721

DATED this 25 day of May, 1999.

Nicole Thomas

IV.
AFFIDAVIT OF MELINDA HAWKINS

Brian S. King (#4610)
Marcie E. Schaap (#4660)
KING & ISAACSON, P.C.
4 Triad Center, Suite 825
Salt Lake City, Utah 84180
Telephone: (801) 532-1700

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

IN AND FOR KANE COUNTY, STATE OF UTAH

JESSICA HAWKINS through	:	
her guardians, Brian and	:	
Melinda Hawkins,	:	
	:	AFFIDAVIT OF MELINDA HAWKINS
Plaintiffs,	:	
	:	
vs.	:	Civil No. 980600017
	:	
BLAIR PEART, dba	:	Judge David L. Mower
NAVAJO TRAILS,	:	
	:	
Defendant.	:	

Being first duly sworn, the undersigned deposes and states as follows:

1. I am over the age of eighteen years, am competent to provide this testimony, and have personal knowledge of the matters of which I testify.
2. I am the mother of the plaintiff in this case, Jessica Hawkins. Jessica's date of birth is March 6, 1986.
3. On July 17, 1997, I was in Duck Creek, Utah with my children for a family reunion. On that day, our family was scheduled to go horseback riding using horses and guides from Navajo Trails, a trail riding business in the Duck Creek area.

4. Navajo Trails was told both at the time the reservation was made and at the time our group arrived, that the group would be equally split between children and adults. We informed Navajo Trails that there would be a total of 18 individuals in our group.

5. The individuals at the stable assured me that all of the adults and children would be riding mild mannered trail horses and that, in light of the mild nature of the horses, even children as young as 3 years old could ride alone. Neither I nor my children had much experience riding horses, and we relied on the representations of the Navajo Trails guides that the horses were calm, gentle, and easy to control in agreeing to go on the ride.

6. We reserved a total of 14 horses, with the 4 youngest children riding with their parents.

7. All of the conversations on the day of the ride were with teenage employees of Navajo Trails at the location of the stables.

8. When we arrived at the stables at approximately 7:00 P.M., we were informed we needed to fill out release forms for the ride. We were told there needed to be one form filled out for every adult, but that each adult needed to add their children's names on the form. I filled my form out but did not add any names of my children. I intentionally omitted the names of my children on the form because I did not want the language of the release to cover any of them. Attached to this Affidavit as Exhibit A is a copy of the form I remember filling out with my signature on it.

9. I turned the form with my signature back into the young men helping us, and we prepared for the ride. I was not questioned about the fact that none of my children were listed on the form.

10. Originally, there were three teenagers scheduled to go with us as our guides. However, at the last minute, there were only two guides sent with us. Each of the young men were 16 years old. One of them rode at the front of the group and the other at the rear, with 15 horses being ridden by members of our group in between them.

11. I rode with my 4 year old daughter on my horse. Another son and Jessica were on their own horses.

12. After the accident, I was told by our guides that we had been taken on a new trail, one that the guides had not been on before. As we went along through dense wooded areas, I became concerned because it did not appear that our guides knew exactly where to take us.

13. As we came up to a road and prepared to cross it, Jessica's horse, which was behind me with Jessica on it, suddenly bolted onto the road. Two Suburbans, traveling on the road, spooked Jessica's horse and she began to lose control of him.

14. Even after Jessica's horse had been spooked by the Suburbans on the road, the guides had a chance to calm the horse down and maintain control of the situation. However, there was only one guide with us and the other was still following the rest of our group as it approached the road. The guide with us did not appear confident about how to deal with the situation, and while he was looking for help from his co-worker, Jessica's horse ran down the road with Jessica on him.

15. Jessica's horse galloped down the road and out of our sight with Jessica holding on as best she could. When we caught up with Jessica several minutes later, she had been thrown from the horse onto the ground on her face. She had a gaping wound to her face and was going into shock.

16. Following our attempts to deal with her injuries at the scene, Jessica was eventually transported to St. George, where she was treated in the emergency room for her injuries.

17. She was treated for a fractured nose and cheek bone, and received dozens of stitches to repair lacerations on her nose and cheek.

18. She has experienced hypertrophic scarring as a result of the facial lacerations and continues to have significant scarring as a result of the fall and her injuries. Her medical expenses to date exceed \$10,000.00.

19. I am aware that Navajo Trails is claiming the right to receive indemnification from me for any amounts it has to pay to Jessica for her injuries. If Navajo Trails is allowed to obtain indemnification from me for any amounts Navajo Trails pays for Jessica's injuries, I have asked Jessica and her father not to pursue the lawsuit against Navajo Trails.

FURTHER AFFIANT SAYETH NOT.

DATED this 5 day of May, 1999.

Melinda Hawkins

State of California)
SS:

County of Orange)

Subscribed and sworn to before me on this 5th day of May, 1999.



[Signature]
Notary Public

EXHIBIT A

Navajo Trails and Outfitters
291 W 500 N
La Verkin Utah 84745

**RELEASE FORM FOR THE RIDERS OF NAVAJO TRAILS AND OUTFITTERS
AND SWAINS CREEK PINES LOT OWNERS ASSOCIATION**

Riding and handling horses can be **DANGEROUS**. This form must be completed and signed before you can ride or work for the Navajo Trails and Outfitters/ Swains Creek Pines Lot Owners Association. By signing this form, you agree to **ASSUME THE RISK** of any injury, death, or loss, or damage which you or your child or ward may suffer. MA initial if you read this.

Name Hawkins Melinda Phone 495-7199
Last First
Address 16 Cedar Dr Age 34
La Verkin UT 84745
City State Zip

In consideration for the rendering of trail riding and or wagon riding service by Navajo Trails and Outfitters,/Swains Creek Pines Lot Owners Association. The undersigned on behalf of himself or for any person for whom he or she is a parent or legal guardian, does hereby indemnify (reimburse), release, and forever hold harmless, Navajo Trails and Outfitters,/Swains Creek Lot Owners Association, it's employees, officers, agents, patrons, students, invitees, contractors, horse owners and landlords acting officially or otherwise, of any claims, demands, and actions or causes of action on account of death or injury or loss or damage which may occur from any cause, without regard to negligence, other than the gross negligence or willful misconduct of Navajo Trails and Outfitters /Swains Creek Pines Lot Owners Association or such persons, during the presence of the undersigned or the presence of his or her child or ward at Navajo Trails and Outfitters / Swains Creek Pines Lot Owners Association or while the undersigned, or his or her child or ward, is in transit to or from Navajo Trails and Outfitters / Swains Creek Pines Lot Owners Association premises. If the undersigned is a parent or guardian, he or she further agrees to indemnify (reimburse) Navajo Trails and Outfitters and / or such persons for any damages paid by or assessed against Navajo Trails and Outfitters and / or such persons as a result of injury to or death of a child or ward.

Date 7/18/97 Signed Melinda Hawkins
Parent or Guardian for:

000028

V.
SIXTH JUDICIAL DISTRICT COURT DECISION
OCTOBER 28, 1999

DISTRICT COURT, KANE COUNTY, UTAH

76 North Main

Kanab, UT 84741

Telephone: 435-644-2458 Fax: 435-644-2052

JESSICA HAWKINS through her guardians,
Brain & Melinda Hawkins,

Plaintiff,

vs.

BLAIR PERT, d.b.a. NAVAJO TRAILS,

Defendant.

DECISION

Case No. 980600017

Assigned Judge DAVID L MOWER

1. The Plaintiff is an individual and under the age of 18.
2. Defendant is in the business of renting horses for pleasure riding.
3. On July 18, 1997 the Plaintiff, in the company of her mother and other family members, visited Defendant's place of business in Kane County, Utah.
4. Plaintiff's mother signed a document entitled "Release Form for the Riders of Navajo Trails and Outfitters." It contained this text:

Riding and handling horses can be DANGEROUS. ... By signing this form you agree to ASSUME THE RISK of any injury, death, or loss, or damage which you or your child ... may suffer.

In consideration of trail riding service ... the undersigned on behalf of himself or for any person for whom he or she is a parent ... does hereby ... release ... Navajo Trails and Outfitters ... of any claims ... or causes of action on account of ... injury or loss or damage which may occur from any cause, without regard to negligence,

other than ... gross negligence or willful misconduct .. during the presence of the undersigned or ... her child ... at Navajo Trails and Outfitters.

5. Plaintiff received trail riding service from defendant. Specifically, she rode a horse provided by defendant; other horses and people were present, including two wranglers provided by defendant who lead the way.
6. Plaintiff was injured during the trail ride.
7. Plaintiff has filed this action against the Defendant. At least one of her causes of her action is based on Defendant's claimed negligence.

Issue Presented for Decision

The issue presented for decision here is framed by Motions for Partial Summary Judgment filed by both parties. The issue is: Is it against public policy in Utah to allow a parent to release the future causes of action of his or her child?

Analysis

The analysis will be divided into two parts: (1) Is the release form valid? and (2) assuming the answer to question 1 is "yes," is it against public policy in Utah to allow a parent to release the future causes of action of his or her child?

Analysis, Part 1

The form is a contract. The first step in analyzing any contract is to examine its language. If it is clear, the analysis is complete and the parties will be held to their agreement. If not, then it

becomes necessary to examine surrounding facts and circumstances until the agreement is defined. Again, once that happens, the parties will be held to their agreement.

Contracts which function as a release of potential liability are allowed in Utah.

... [P]arties may contract to avoid ... potential liability before injuries have occurred. ... [S]uch provisions relieve one party from the risk of loss or injury in a particular transaction or occurrence and deprive the other party of the right to recover damages for loss or injury.¹

However, the release contract must be "clear and unequivocal." In Russ v. Woodside, quoted above, the following language taken from actual agreements was considered to meet that standard:

"any claims for damages to property and injury or death"

"any and all claims, damages, loss and expenses."

"any death, accident, injury, or other occurrence resulting from"

In this case, the release form contains this language:

"any claims ... or causes of action on account of ... injury or loss or damage which may occur"

"DANGEROUS"

"ASSUME THE RISK"

¹ Russ v. Woodside Homes, Inc., 276 Utah Adv. Rep. 46, 905 P.2d 901, 1995 Utah App. LEXIS 110 (Utah Court of Appeals, 1995).

"any injury, death, or loss, or damage"

These words and phrases qualify as "clear and unequivocal" because (1) they are broad and sweeping, and (2) they are in common usage in the English language and would be understood by most adults. My conclusion is that the release form was clear and unequivocal. It operated to avoid defendant's potential liability to Melinda Hawkins. However, the issue here is, "Did the release operate to avoid defendant's potential liability to Jessica, Melinda's child?"

Analysis, Part 2

If one were to limit the analysis only to the words in the release, the answer would be "yes." However, plaintiff has asked for an analysis that goes beyond the document and into the realm of public policy. Plaintiff has suggested that it is the public policy of this State to invalidate the release.

Analysis of public policy is somewhat more difficult than analysis of contract language. At times it is directly stated in legislative enactments or appellate court decisions. At other times it must be drawn by analogy from those sources.

The parties have suggested that there is no direct statement of public policy as to the issue at hand. I think their suggestion is accurate. I have located no statute or case which specifically refers to an parent's authority to sign a contract on a child's behalf. However, there are other statutes and rules relating to minors which may be helpful in the analysis.

I have found three statutes and one court rule which have been helpful in my analysis. The three statutes are Sections 15-2-2, 75-5-103 and 75-5-209, Utah Code. The rule is Rule 17, Utah Rules of Civil Procedure. I will quote the relevant text and then refer to each as the analysis continues, below.

15-2-2. Liability for necessities and on contracts - Disaffirmance.

A minor is bound ... by his contracts, unless he disaffirms them before or within a reasonable time after he attains his majority

75-5-103. Delegation of powers by parent or guardian.

A parent or a guardian of a minor ... may delegate to another ... any of his powers regarding care, custody, or property of the minor ... except his power to consent to marriage or adoption... .

75-5-209. Powers and duties of guardian of minor.

A guardian of a minor has the powers and responsibilities of a parent In particular, and without qualifying the foregoing, a guardian has the following powers and duties:

- (1) He must take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.
- (2)
- (3) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented.

Rule 17. Parties plaintiff and defendant.

...

(b) A minor ... who is a party must appear either by a general guardian or by a guardian ad litem A guardian ad litem may be appointed in any case when it is

deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor ... notwithstanding that the person may have a general guardian and may have appeared by the guardian.

Section 15-2-2 refers to a child's ability to disaffirm a contract. If a child can disaffirm a contract, it seems only logical to infer that a child has the capacity to enter into a contract in the first place.

Had I been in the defendant's shoes on July 18, 1997, I would not have been inclined to ask Jessica to sign the release form. I would have said to myself, "Hey, watch out. She's a minor. If she signs, it won't be worth the paper its written on because she can disaffirm it within a reasonable time after her eighteenth birthday. You'd better have a parent sign for her." I would then have turned to Melinda and asked her to sign the release.

Now I imagine myself to be in Melinda's shoes. These thoughts go through my mind as I read the release form and consider whether or not to sign it. "You know, the Legislature has never defined my powers as a parent except to say that I can *delegate* any of them regarding care, custody, or property to a guardian (Section 75-5-103, Utah Code).

"The Legislature *has* defined a guardian's powers. It is logical for me to infer that the guardian's powers would be the same as mine, since I had the right to delegate them in the first place. So, I'm responsible to take care of Jessica's personal effects and to protect any of her other property. I'm also responsible to facilitate Jessica's education, social, or other activities (Section

75-5-209)."

Now, standing in Melinda's shoes, I would have felt the stress of a dilemma. On the one hand I would have said to myself, "You are Jessica's parent. You are responsible to facilitate her social activities. Well, this is a social activity, horse-back riding with the family. Encourage her to participate. Sign the release form."

On the other hand I would have also said to myself, "You know, Jessica could be injured, perhaps by defendant's fault. If I sign away her claim to recover (i.e., her property, her "chose in action"²), she may be injured permanently. I'm supposed to protect her property, not give it away. Don't sign that release form."

"If I were to ask the Legislature or the Supreme Court, I wonder what advice I would be given? Should I sign the form or not? Is it more important for me to protect Jessica's property or to facilitate her social activities?"

My prediction is that the Legislature would say, "We have not attempted to prioritize or rank any of a parent's duties or powers. They're all of equal importance."

The only possible reaction to that advice from the Legislature would be to adopt the conservative approach and not sign the release.

² The term "chose in action" is comprehensive; it includes the infinite variety of contracts, covenants, and promises which confer on one party the right to recover a personal chattel or a sum of money from another by action. 63C Am Jur 2d Property §23

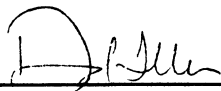
Plaintiff has suggested that another answer to the dilemma has been given in a decision of the state of Washington³: "...[T]o the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable."

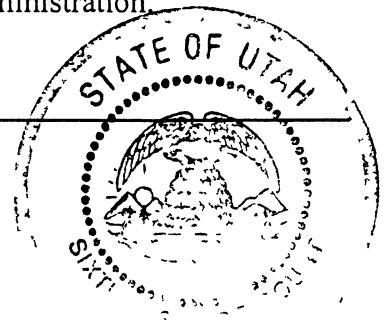
DECISION

Defendant's motion for summary judgment ought to be denied. This Court will follow the decision of the Supreme Court of the State of Washington because children have special, protected status in Utah as reflected by various legislative pronouncements. To the extent Melinda's release purports to bar Jessica's cause of action, it violates public policy and is unenforceable.

Mr. King is appointed to draft an appropriate order and to submit it for execution by following the procedure set forth in Rule 4-504, Code of Judicial Administration.

Signed on October 28, 1999


DAVID L. MOWER
DISTRICT JUDGE



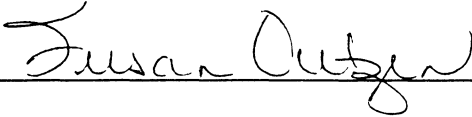
CERTIFICATE OF SERVICE

On October 28, 1999 a copy of the above DECISION was sent to each of the

³ Justin Scott, et al, Appellants, v. Pacific West Mountain Resort, et al,
Respondents 119 Wash. 2d 484, 834 P.2d 6 (Washington Supreme Court, 1992)

following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
James W. Jensen Attorney for Defendant PO Box 726 Cedar City UT 84720	[m]	Brian S. King Attorney at Law Suite 825 4 Traid Center Salt Lake City UT 84180	[m]



VI.
SIXTH JUDICIAL DISTRICT COURT FINDINGS OF FACT
AND CONCLUSIONS OF LAW
MARCH 31, 2000

JAMES W. JENSEN (6578)
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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

JESSICA HAWKINS through
her guardians, Brian and Melinda Hawkins,

Plaintiffs,

v.

BLAIR PEART, dba NAVAJO TRAILS,

Defendant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 0980600017
Judge David L. Mower

This matter came before the court on June 25, 1999 for hearing on Motions for Summary Judgment filed by Plaintiff, Jessica Hawkins through her guardians, Brian and Melinda Hawkins, and Defendant Blair Peart, dba Navajo Trails. Brian S. King appeared on behalf of Plaintiffs. James W. Jensen appeared on behalf of said Defendant. Both parties present argument. The Court having heard the argument, and being fully advised in the premises; now therefore entered its

FINDINGS OF FACT

1. The Plaintiff is an individual and under the age of 18.
2. Defendant is in the business of renting horses for pleasure riding.

000038

3. On July 18, 1997, the Plaintiff, in the company of her mother and other family members, visited Defendant's place of business in Kane County, Utah.

4. Plaintiff's mother signed a document entitled "Release Form for the Riders of Navajo Trails and Outfitters." It contained this text:

Riding and handling horses can be **DANGEROUS**. . . By signing this form you agree to **ASSUME THE RISK** of any injury, death, or loss, or damage which you or your child . . . may suffer.

In consideration . . . of trail riding . . . service . . . [t]he undersigned on behalf of himself or for any person for whom he or she is a parent . . . does hereby indemnify (reimburse), release and forever hold harmless, Navajo Trails and Outfitters . . . of any claims . . . or causes of action on account of . . . injury or loss or damage which may occur from any cause, without regard to negligence, other than . . . gross negligence or willful misconduct . . . during the presence of the undersigned or . . . her child. . . at Navajo Trails and Outfitters. If the undersigned is a parent . . . he or she further agrees to indemnify (reimburse) Navajo Trails . . . for any damages paid by or assessed against Navajo Trails . . . as a result of injury . . . of a child.

5. Plaintiff received trail riding service from Defendant. Specifically, she road a horse provided by Defendant; other horses and people were present, including two wranglers provided by Defendant who lead the way.

6. Plaintiff was injured during the trail ride.

7. Plaintiff has filed this action against the Defendant, with at least one of her causes of action based on Defendant's alleged negligence.

CONCLUSIONS OF LAW

1. The language of the Release Form, including "any claims . . . or causes of action on account of . . . injury or los or damage which may occur. . .", "DANGEROUS"; "ASSUME THE RISK"; "any injury, death, or loss, or damage"; is "clear and unequivocal" pursuant to the

following language in Russ. v. Woodside:

(1) "any claims for damages to property and injury or death"; (2) "any and all claims, damages and expenses"; and (3) "any death, accident, injury, or other occurrence resulting from . . ."

2. The words and phrases used in the Release Form qualify as "clear and unequivocal" because they are broad and sweeping, and they are in common usage in the English language and would be understood by most adults.

3. The Release Form operated to avoid Defendant's potential liability to Melinda Hawkins for her minor child, Jessica Hawkins.

4. The indemnification language, including "indemnify (reimburse)" and "for any damages. . . as a result of injury. . . or a child", is clear and unequivocal.

5. The indemnification language is clear and unequivocal because it is broad and sweeping and is in common usage in the English language and would be understood by most adults.

6. The Release Form operated to require Plaintiff to reimburse Defendant for any damages assessed against Defendant as a result of the injury to Jessica Hawkins.

7. There are no Utah statutes or controlling case law which specifically address the issue of whether it is against public policy for a parent to sign a contract on a child's behalf, releasing the child's possible future claims or causes of action.

8. There are other statutes and rules relating to minors which are helpful in the analysis of whether such is against public policy, including the following:

- (a) Utah Code Ann. § 15-2-2. Liability for necessities and on contracts
Disaffirmance.

A minor is bound. . . by his contracts, unless he disaffirms them before or within a reasonable time after he attains his majority . . .

- (b) Utah Code Ann. § 75-5-103. Delegation of powers by parent or guardian.

A parent or a guardian of a minor . . . may delegate to another . . . any of his powers regarding care, custody, or property of the minor . . . except his power to consent to marriage or adoption . . .

- (c) Utah Code Ann. § 75-5-209. Powers and duties of guardian of minor.

A guardian of a minor has the powers and responsibilities of a parent . . . In particular, and without qualifying the foregoing, a guardian has the following powers and duties:

- (1) He must take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other Property of the ward.
- (2) . . .
- (3) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented. . .

- (d) Rule 17 of the Utah Rules of Civil Procedure. Parties Plaintiff and Defendant.

. . .

- (b) . . . A minor . . . who is a party must appear either by a general guardian or by a guardian ad litem . . . A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor . . . notwithstanding that the person may have a general guardian and may have appeared by the guardian.

9. The Court concludes that public policy weighs in favor of Plaintiff on the issue of shifting liability because a parent should protect a minor's property and not give it away.

10. “. . . [T]o the extent a parent’s release of a third party’s liability for negligence purports to bar a child’s own cause of action, it violates public policy and is unenforceable,” as stated by the Washington Supreme Court.

DATED this 31 day of March, 2000.

BY THE COURT:

51

DAVID L. MOWER
District Court Judge

VII.
SIXTH JUDICIAL DISTRICT COURT ORDER
MARCH 31, 2000

JAMES W. JENSEN (6578)
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250 South Main
PO BOX 726
Cedar City, UT 84721
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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

JESSICA HAWKINS through
her guardians, Brian and Melinda Hawkins,

Plaintiffs,

v.

BLAIR PEART, dba NAVAJO TRAILS,

Defendant.

ORDER

Case No. 0980600017
Judge David L. Mower

Based upon the Motion for Summary Judgment filed by the parties, and based upon the Court's Decision dated October 28, 1999 and based upon the Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is denied in part as to the issue of the release and granted in part as to the issue of the indemnification, and as a result, Plaintiff's Motion for Summary Judgment is moot.

DATED this 31 day of March, 2000.

BY THE COURT:

LS
DAVID L. MOWER
District Court Judge

000042

VIII.
SIXTH JUDICIAL COURT ORDER
MAY 26, 2000

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR KANE COUNTY, STATE OF UTAH

JESSICA HAWKINS through
her guardians, Brian and
Melinda Hawkins,

Plaintiffs,

vs.

BLAIR PEART, dba
NAVAJO TRAILS,

Defendant.

ORDER

Civil No. 980600017

Judge David L. Mower

FILED
KANE COUNTY
MAY 26 2000
SIXTH DISTRICT COURT
Clerk

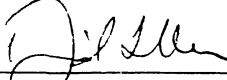
The parties appeared before the Court on March 31, 2000, for a hearing to clarify this Court's October 28, 1999, decision and to determine which party's proposed document to sign. On that date and after hearing further argument on the indemnification issue, the Court entered Findings of Fact and Conclusions of Law, together with an Order that had been prepared by Defendant's counsel. Plaintiff desires to appeal aspects of the Order that was entered March 31, 2000, which has necessitated Defendant's desire to appeal other aspects of said Order. However, the Order entered by the Court on that day does not dispose of all the claims between the parties. As such, both parties request that the Court enter a final judgment, pursuant to Utah Rule of Civil Procedure 54(b) that will allow for immediate appeal.

Having considered that matter and being fully apprised in the premises, IT IS HEREBY ORDERED that there is no just reason for delay of entry of final judgment as to the issues involved in the Findings of Fact, Conclusions of Law, and Order, entered by the Court on March 31, 2000,

000011

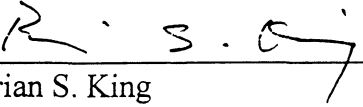
and the Court expressly directs entry of this judgment in a form which is a final, appealable Order under URCivP 54(b).

DATED this __ day of ____, 2000.

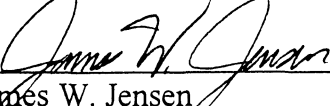
 26 MAY 00

Sixth Judicial District Court
Judge David L. Mower

Approved as to form:



Brian S. King
Attorney for Plaintiff



James W. Jensen
Attorney for Defendant

IX.
NOTICE OF APPEAL

Brian S. King (#4610)
Marcie E. Schaap (#4660)
KING & ISAACSON, P.C.
4 Triad Center, Suite 825
Salt Lake City, Utah 84180
Telephone: (801) 532-1700

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

IN AND FOR KANE COUNTY, STATE OF UTAH

JESSICA HAWKINS through
her guardians, Brian and
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Plaintiffs,

vs.

BLAIR PEART, dba
NAVAJO TRAILS,

Defendant.

NOTICE OF APPEAL

Civil No. 980600017

Judge David L. Mower

COPY

Plaintiffs/Appellants, by their counsel, Brian S. King of King & Isaacson, P.C., hereby give notice of their appeal from the Order, entered in the above referenced case in the Sixth Judicial District Court of Kane County on May 26, 2000. This appeal is taken to the Utah Supreme Court.

With this Notice of Appeal, Plaintiffs/Appellants tender the filing fee, docketing fee, and cost bond, required under Rules 3 and 6 of the Utah Rules of Appellate Procedure.

DATED the 19 day of June, 2000.

KING & ISAACSON, P.C.
ATTORNEYS FOR PLAINTIFF

Brian S. King
By: Brian S. King

CERTIFICATE OF SERVICE

I certify that on the 19 day of June, 2000, I mailed a copy of the foregoing Notice of Appeal, first class mail, postage prepaid to the following:

James W. Jensen
HIGBEE & JENSEN, P.C.
P.O. Box 726
Cedar City, UT 84720

Nicole Thomas