



**AMC 2023**

**Session 5**

**Schabelski v. Nova Casualty:  
Finding the Fine Line Between  
“Not Specific Enough,”  
“Too Long,” and “Overboard”**

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## About the Presenters...

**Prof. Paul Anderson** is the Director of the Sports Law Program and National Sports Law Institute and Marquette University Law School where he is also a Professor of Law. Professor Anderson received his B.A. in English and Philosophy, phi beta kappa, from Marquette University and his J.D. from Marquette University Law School. Before returning to Marquette, he worked in the athletic departments at San Jose State and the University of San Francisco. Professor Anderson manages all aspects of the Sports Law Program including directing the Sports Law Certificate Program, all sports law events, and competitions, and advising six student organizations including the *Marquette Sports Law Review* (as a student he was editor in chief of the formerly named *Marquette Sports Law Journal*). In addition to his management of the Sports Law Program, Professor Anderson teaches seven courses in the Law School including 2 research courses, 1 writing seminar, and workshops on youth, high school and recreational sports, college sports, gender equity in sports, the regulation of athlete agents, and sports venues. Professor Anderson is past chair of the Sports & Entertainment Law Section of the State Bar of Wisconsin, founder and chair of the National Sports Law Institute's Sports Law Alumni Association, and a long-time member of the Sports Lawyers Association, Sport and Recreation Law Association, ABA's Forum on the Entertainment and Sports Industries, and International Association of Sports Law. Professor Anderson has published more than a dozen law journal/review articles and five books. He is a frequent commentator and contributor on sports law topics in the national media.

**Alexander "Sandie" Pendleton**, is a business lawyer and business litigator, and is the founder and owner of Pendleton Legal, S.C. (Milwaukee). He received his undergraduate degree from the University of Wisconsin-Madison in History and Political Science, and his J.D. degree *cum laude* from the University of Minnesota Law School (where he was an editor of the University of Minnesota Law Review). One of the focuses of his practice is advising recreational-opportunity providers, recreational-product manufacturers, and insurers about waiver-of-liability agreements (and many other aspects of legal-liability risk management). He is the author of numerous articles relating to waivers and legal-liability risk management, and is a frequent speaker nationwide on those issues. Sandie is the co-author (with Doyice Cotton) of the forthcoming 11<sup>th</sup> Edition of *Waivers & Releases of Liability*. For more articles regarding waiver agreement issues, see his website [www.ReleaseLaw.com](http://www.ReleaseLaw.com). Sandie is a prior member of the State Bar Board of Governors, and over the course of his career has served on numerous State Bar committees. He currently serves on the Board of the State Bar's Solo, Small Firm and General Practice Section. In his spare time, he skis the Birkie, open-water swims in Lake Michigan, and advocates for better, more-bike/ped-friendly streets in the Milwaukee area (for more information, see the "Lake Michigan Swimmers" Blog, and the "Greater Shorewood Bikers" Blog). Sandie can be reached at [pendleton@pendletonlegal.com](mailto:pendleton@pendletonlegal.com).

## Waiver of Liability Agreements and *Schabelski v. Nova Casualty*: Finding the Fine Line Between “Not Specific Enough,” “Too Long,” and “Overbroad”

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### I. Waivers in Context: Sport, Society and Permitting Waivers of Liability

A. The great policy debate regarding waivers:

Are waivers worthwhile for our society, so as to ensure ample and affordable sport, fitness and recreational (“SFR”) opportunities?	<b>or</b>	Would our society be better off if waivers in an SFR context are unenforceable?
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B. The debate does not occur in a vacuum:

1. Waiver policy in the U.S. is the result of the competing desires of various interest groups (*see* Figures 1 and 2).
2. Whether waivers are enforced has real world consequences: If waivers are permitted/enforced, victims of negligence are not compensated, and the theory is: (a) future negligent behavior is not deterred, and (b) providers are not incentivized to obtain reasonable insurance coverage, and spread the cost of that insurance in the prices providers charge patrons.

C. The tension between America’s robust tort system, and its robust SFR culture.

D. The enormous size of the U.S. SFR sphere (*excluding* the huge U.S. professional sports industry).

1. Exact statistics are difficult to come by.
2. Just youth and high school sports participation:
  - a. Youth: around 60 million participants; and
  - b. High School: over 7.5 million participants.
3. Just the outdoor recreation industry economy:
  - i. In the U.S., outdoor recreation accounts for 2.0% of GDP, and about 4.3 million jobs.
  - ii. In Wisconsin, outdoor recreation accounts for 2.7% of GDP, and about 90,000 jobs.
  - iii. It is estimated that 95% of Wisconsinites participate in some type of outdoor recreation each year.

B. Why our society chooses to encourage and promote SFR activities, and provide some liability protection to SFR opportunity providers.

<sup>1</sup> No views expressed in this outline, or in the presentation accompanying this outline, may be attributed to any client of Alexander T. Pendleton or Pendleton Legal, S.C.

1. The significant (or even catastrophic) cumulative adverse health effects of sedentary lifestyles (on youth and adults).
    - a. Obesity
    - b. Diabetes
    - c. Depression
  2. The concern regarding what kids will do without recreational opportunities (crime, sex, drugs, isolation).
  3. Youth SFR opportunities as a means to lessen crime rates (one of the reasons why organizations like “police youth sports leagues” and the Boys & Girls Clubs exist).
  4. Youth SFR opportunities as a means to promote youth community connection.
  5. Youth SFR activities generate economic activity (*i.e.*, youth sports are cumulatively a “big business”).
- C. Why our society allows recreational activities that involve a risk of significant injury.
1. Examples: organized amateur auto racing, parachute jumping, bungee jumping and boxing.
  2. Prohibition vs. regulation.
- D. In addition to the physical health benefits associated with youth SFR activities, parents (and society) value the ability of such activities to teach certain difficult to develop life skills, coping skills, and positive character traits:
1. Discipline, grit and persistence
  2. Courage
  3. Risk taking
  4. “Sportsmanship” (a/k/a, a sense of what is and isn’t “sporting” or “fair play”)
  5. Teamwork and selflessness
- E. Participation in high school sports is associated with higher academic performance, as well as a host of other positive things (higher graduation rates, lower levels of depression, lower rates of involvement in the justice system). A large study of 140,000 Kansas high school students indicated these benefits were especially apparent when comparing students of color involved in H.S. athletic teams, with students of color not involved with such. See [\*The Case for High School Activities\*](#) (National Federation of State High School Associations).
- F. Sports as a means to create or enhance community cohesion and pride.
- G. The important role sports have played over the last 150 years in breaking down social barriers and prejudices.<sup>2</sup>
1. Sports as a means of lessening racial, religious, ethnic, and economic prejudice.
  2. Sports and recreational opportunities as a means of promoting gender equity, and women’s empowerment.
  3. Sports as a means of promoting LGBTQ acceptance and empowerment.
  4. Mixed-gender team sports as a means to promote greater gender equity.

<sup>2</sup> See, e.g., David K. Wiggins, *More than a Game: A History of the African American Experience in Sport* (Rowman & Littlefield 2018); Billie Jean King, *All In: An Autobiography* (Knopf 2021).

- H. **The theory is that if waivers are not allowed, such will have a chilling effect on the availability of SFR opportunities, and all (or too many) of the above-identified individual benefits, and societal benefits, will be lost.** The theory that SFR-opportunity providers advance:
1. The very nature of SFR activities creates some risk of injury.
  2. Some injuries are by the nature of SFR activities going to occur, and that if providers cannot use waivers, injured participants are going to seek to hold providers liable for every injury that occurs, regardless of whether the provider was negligent.
  3. It is easy for injured participants to commence negligence claims.
  4. It is expensive and time-consuming for providers to defend against such claims.
  5. For several reasons, it is difficult for a provider to get a claim dismissed at the summary judgment level, or to obtain a favorable verdict from a jury.
  6. If waivers cannot be used, potential providers will simply decide “it is not worth the risk” to provide the SFR opportunity in question, and not enter the marketplace, or get involved in providing the opportunity.
  7. If waivers cannot be used, existing providers will go out of business, or choose not to provide the SFR activity in question.
- I. This theory is not universally accepted, as different jurisdictions in the United States vary widely as to how they treat waiver-of-liability agreements. For example, if one just focuses on how different states treat parental waiver-of-liability agreements:<sup>3</sup>
1. In 11 states (22% of states), courts hold (or statutes provide) that parents have authority to enter into waiver agreements on behalf of their minor children, and therefore **enforce** parental waivers that are well drafted, and well deployed.<sup>4</sup>
  2. In 5 states (10%), the limited authority that exists suggests that courts will probably **enforce** parental waivers.<sup>5</sup>
  3. In 13 states (26%), as a matter of public policy, courts hold (or a statute provides) that parents **do not** have the authority to enter into parental waivers on behalf of minors, and therefore courts **do not enforce** parental waivers.<sup>6</sup>

<sup>3</sup> In contrast, when it comes to waiver-of-liability agreements relating to *adult participants*, a higher number of states in general enforce such agreements, and only three states have a statute or public policy that invalidates all such agreements.

<sup>4</sup> Those 11 “enforce” states are: Alaska, California, Colorado, Connecticut, Delaware, Indiana, Maryland, Massachusetts, Minnesota, Ohio, and Wisconsin. Please note, however, that in two of those states (Connecticut and Wisconsin), while lower courts have enforced parental waivers, the standard for enforcement set by the highest court in Connecticut and Wisconsin as to adult waivers is very high, relative to other states. As such, providers that choose to use parental waiver agreements in Wisconsin (and Connecticut), must ensure that any parental waiver they use must be very carefully drafted and deployed, if they want to have any chance of convincing a court in either of those states to enforce the parental waiver.

<sup>5</sup> Those 5 “probably enforce” states are: Arizona, Georgia, Idaho, Montana, and North Dakota.

<sup>6</sup> Those 13 “do **not** enforce based on public policy” states are: Illinois, Iowa, Louisiana, Maine, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, Tennessee, Utah, Virginia, and Washington.

4. In 4 states (8%), the approach that each of those states take is **unique or unusual**, such that that they are **not easily categorized** into any of the above categories.<sup>7</sup>
5. In 17 states (34%), there is **insufficient authority** (statutory or case law) to determine whether courts in those states will or will not enforce parental waivers.<sup>8</sup> (See Figures 3.1 and 3.2.)

## II. Wisconsin Waiver Law Standards Before *Schabelski v. Nova Casualty*<sup>9</sup>

A. The dismal record of waivers before the Wisconsin Supreme Court.

B. Wisconsin Supreme Court waiver cases and their key holdings.

1. *Merten v. Nathan*, 108 Wis. 2d 205 (Wis. 1982).
  - a. Inexperienced rider injured while taking horse riding lessons.
  - b. Waiver unenforceable due to misrepresentation in waiver about insurance coverage.
2. *Arnold v. Shawano County Agr. Soc.*, 111 Wis. 2d 203 (Wis. 1983) (later overruled on other grounds).
  - a. Stock car race participant injured due to accident and post-accident negligent rescue efforts.
  - b. Waiver unenforceable as too broad, negligent rescue not clearly within scope of agreement.
3. *Dobratz v. Thomson*, 161 Wis. 2d 502 (Wis. 1991).
  - a. Death of water ski show performer.
  - b. Waiver unenforceable due to vagueness, as it was unclear whether activity that caused the injury, was type of activity covered by the waiver.

<sup>7</sup> Those 4 “not easily categorized” states are: Florida, Hawaii, Kentucky, and Texas. For example, in Florida courts enforce parental waivers when used by *non-profit or community organizations*, but the Florida Supreme Court in *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2003) held that parental waivers used by *commercial entities* are not enforceable, but then after *Kirton* the Florida legislature enacted a statute that permits the use of parental waivers as to some types of claims, even when used by commercial entities.

<sup>8</sup> Those 17 “insufficient information” states are: Alabama, Arkansas, Kansas, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Vermont, West Virginia, and Wyoming. However, note that in 6 of those states (Alabama, Arkansas, North Carolina, Oklahoma, West Virginia, and Wyoming), in each of those states there is one federal court decision (interpreting the law of the state in question), that holds that parental waivers are *not* enforceable under the laws of those states.

<sup>9</sup> Any discussion of SFR activities in Wisconsin—and how the Wisconsin legislature attempts to promote SFR activities in general—would be incomplete without at least a brief mention of the multiple immunity statutes that the legislature has created to protect certain classes of persons (such as volunteers, and “rural” landowners), and industries (such as the ski industry, or the equine-activity industry). *See, e.g.*, Wis. Stat. § 895.48 (Wisconsin’s “Good Samaritan Law”); Wis. Stat. §895.52 (the Wisconsin Recreational Use Statute); Wis. Stat. §167.33 (the “alpine sports” act, which also applies to claims involving bike-related injuries at ski areas) Wis. Stat. §895.482 (ski patrol immunity statute); Wis. Stat. §895.481 (Equine Activities Liability Act); Wis. Stat. §895.525 (participation in recreational activities; restrictions on civil liability, assumption of risk; restrictions on liability as to contact sport participants); *see also* 42 U.S.C. §§ 14501 – 14505 (the Volunteer Protection Act of 1997). The Wisconsin legislature has also created numerous immunities, or procedural protections, that apply in situations in which the provider of an opportunity for an SFR activity is a governmental body or employee. *See, e.g.*, Wis. Stat. §893.80 and §895.523. While the above types of statutes can play dramatic roles in limiting liability in particular situations, the focus of this presentation is on waiver-of-liability agreements, so the above statutory protections are not addressed in any detail in this outline or presentation.

4. *Richards v. Richards*, 181 Wis. 2d 1007 (Wis. 1994).
    - a. Passenger in company truck injured.
    - b. Waiver void as against public policy as it serves two purposes, and is extremely broad and all inclusive
  5. *Yauger v. Skiing Enterprises, Inc.*, 206 Wis. 2d 76 (Wis. 1996).
    - a. Eleven -year-old skier killed when she collided with the concrete base of a chairlift tower.
    - b. Waiver void against public policy as did not unambiguously release ski operator negligence and waiver language was not conspicuous to signer.
  6. *Atkins v. Swimwest Family Fitness Center*, 2005 WI 4.
    - a. Visitor at swim center for rehabilitation purposes drowned while using pool.
    - b. Waiver unenforceable as against public policy as language was ambiguous as to what was covered, and it served two purposes (registration and waiver).
  7. *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20.
    - a. Event attendee injured in something of a freak accident (struck by a hot air balloon basket, while she was waiting in line to take a tethered ride).
    - b. Waiver was voided based on its being overly broad and ambiguous, and in that it provided no opportunity to bargain.
- C. A Summary of the Factors the Supreme Court Considers (a Two Step Inquiry):<sup>10</sup>
1. Step 1: Is the waiver broad enough to cover the activity that caused the injury?
  2. Step 2: Public policy (five key factors):
    - a. Is the waiver overbroad?
    - b. Does the document serve two purposes?
    - c. Does *the form itself* provide an opportunity to bargain?
    - d. Whether “the document clearly, unambiguously and unmistakably explain[s] to the signer that he or she is accepting the risk of the releasee’s negligence”?
    - e. Is the waiver “camouflaged” (*i.e.*, whether “the form, when viewed in its entirety, fail[s] to alert the signer to the nature and significance of the document being signed”)?
- D. A Relatively Recent Example of a Waiver Found Valid by the Court of Appeals (*Beer v. La Crosse County Agricultural Soc.*, 332 Wis. 2d 316 (Wis. App. 2011) *unpublished decision authored by Judge Gary Sherman*).
1. Two step review process followed.

<sup>10</sup> As recently explained in *Stewart v. Wang*, No. 20-cv179-jdp, 2023 WL 2302065 (March 1, 2023 W.D. Wis.), of the two steps, the public policy step has evolved to usually become the more important step of the two:

The Wisconsin courts’ analytical approach to liability waivers has evolved in recent years. Specifically, courts remained focused on the same set of concerns, but those concerns have been **recast from contract interpretation to a set of public policy factors**. The court will ground its analysis of the liability waiver in this case in the two most recent Wisconsin Supreme Court liability waiver cases, *Atkins* and *Roberts*. *Atkins v. Swimwest Fam. Fitness Ctr.*, 2005 WI 4, ¶ 1, 277 Wis. 2d 303, 307, 691 N.W.2d 334, 336; *Roberts*, 2016 WI 20.

*Stewart*, at \*3-\*4. *Stewart* is also an example of how complicated waiver law cases can be, in that the case involved a water ski accident, so a large portion of the opinion is devoted to determining whether Wisconsin waiver law controlled, or whether instead federal admiralty law controlled.

2. Waiver found to have clearly communicated terms to the signer.
3. Was only a release (*i.e.*, the document did not serve “two purposes”).
4. The document provided an opportunity to bargain.

**III. *Schabelski v. Nova Casualty***

A. *Schabelski v. Nova Casualty*, 2022 WI App 41.

1. The facts.
2. The majority opinion.
3. The dissenting opinion.
4. The lessons of *Schabelski*.

B. Drafting waivers post-*Schabelski*: The Fine Line Between “Not Specific Enough,” “Too Long,” and “Overbroad”

**IV. Five Common Mistakes Attorneys Often Make When Drafting Waivers (Just to Name a Few):**

- A. Copying a Waiver from the Internet.
- B. Simply Using a Release Prepared by a National Organization.
- C. Failing to Handle the Issue of Minor Participants Correctly.
- D. Failing to Address the Issue of Bargaining appropriately.
- E. Failing to advise that waivers are just one component of an overall risk management plan.

**V. Representing the plaintiff who signed a waiver:**

- A. Reviewing the waiver text critically.
- B. Reviewing the deployment of the text critically.
- C. Investigating all facts surrounding the presentation and signing of the waiver.
- D. Negotiating with an insurer when a waiver is involved.

**VI. Representing the organization that obtained a waiver from a subsequently injured participant:**

- A. Considering whether to file a motion to dismiss.
- B. Preparing for the motion for summary judgment.
- C. Arguing the motion for summary judgment, or the waiver on appeal.

**VII. Closing Thoughts:**

- A. If your client is going to use a waiver, should it use a waiver that is enforceable?
- B. If your client is going to use a waiver, should you be the lawyer who drafts it?
- C. If your client is going to have a risk management program, should you be the lawyer who advises the client on that program?

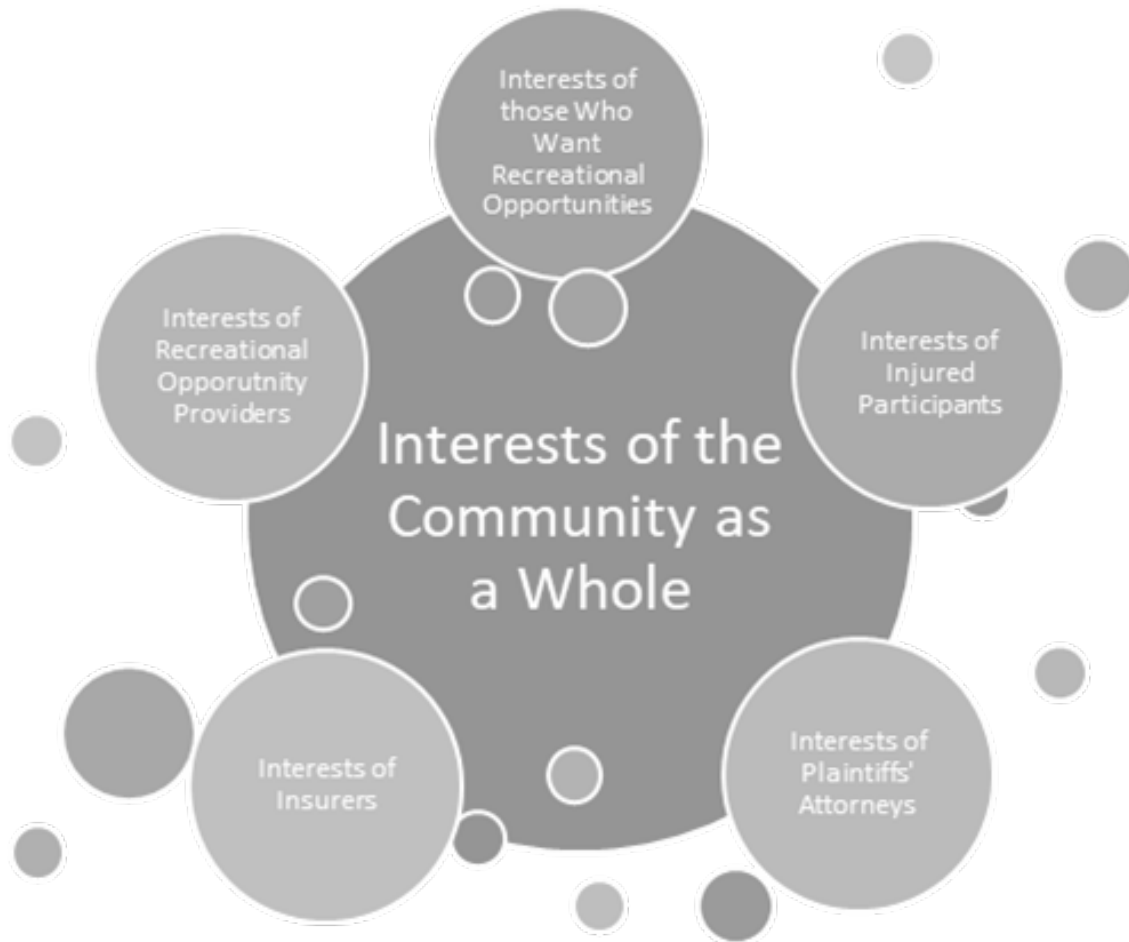


**VIII. Other Resources:**

- A. Pendleton Legal, S.C. Websites: [www.WaiverLaw.com](http://www.WaiverLaw.com) and [www.ReleaseLaw.com](http://www.ReleaseLaw.com).
- B. Doyice J. Cotten Websites: [www.SportWaiver.com](http://www.SportWaiver.com).
- C. Alexander T. Pendleton & Doyice J. Cotten, *Waivers & Releases of Liability* (11th ed. scheduled for publication 2023).
- D. Ralph C. Anzivino, *The Exculpatory Contract and Public Policy*, 102 Marq. L. Rev. 747 (2019).
- E. Blake A. Nold, *Codify This: Exculpatory Contracts in Wisconsin Recreational Businesses* 101 Marq. L. Rev. 573 (2017).
- F. Alexander T. Pendleton, *Recreational Liability: Plaintiff-Friendly Standards Remain*, 90 Wis. Law 11 (Oct. 2017).
- G. Alexander T. Pendleton, *Enforceable Exculpatory Agreements: Do They Still Exist?*, 78 Wis. Law. 10.
- H. Alexander T. Pendleton, *Enforceable Exculpatory Agreements*, 70 Wis. Law. 10 (Nov. 1997).
- I. Alexander T. Pendleton, *Wisconsin's Recreational Use Statute: Wide Open Spaces and Wide Open Immunity*, 66 Wis. Law. 14 (May 1993).

Figure 1

**The Major Interest Groups that Shape Waiver Law<sup>11</sup>**



<sup>11</sup> Groups omitted from Figure 1 include manufacturers of recreational equipment, volunteers (such as volunteer coaches), defense lawyers, judges, and law professors. There can also be differing interests between different types of recreational opportunity providers (*e.g.*, between for-profit providers, non-profit providers, and governmental-unit providers).

Figure 2:

**The Competing Interests and Desires of the Groups that Shape Waiver Law**

THE (SOMETIMES CONFLICTING) INTERESTS OF THE COMMUNITY AS A WHOLE

- Avoidance of injured persons becoming wards of the State, or financial burdens on the community
- Promotion of safety
- Protection of youth from injury
- Providing youth positive channels for development and recreation
- Discouraging “black market” recreational activities/events (*e.g.*, illegal street racing, unregulated “fight club” events, etc.)
- Promotion of commerce, tourism and/or recreational opportunity
- Growth of employment, growth in the economy, increased prosperity
- Promotion of a healthy, strong, active, vigorous, talented, risk-taking and robust populace
- Protection of liberty, and the free market

INTERESTS OF THOSE WHO WANT TO ENGAGE IN RECREATIONAL ACTIVITIES

- Ample availability of recreational opportunities
- Affordability (or low cost) of recreational opportunities
- Safety

INTERESTS OF RECREATIONAL OPPORTUNITY PROVIDERS

- Avoidance (or limitation) of liability
- Predictability in the law and outcomes; clear standards
- Profitability
- The creation of statutory caps on certain types of damages, and the creation of high threshold standards for liability for certain types of damages that are not covered by most types of insurance policies (such as punitive damages)
- Promotion or growth of the particular sport or recreational activity

INTERESTS OF INJURED PARTICIPANTS IN RECREATIONAL ACTIVITIES

- Compensation for injuries and losses suffered
- Deterrence of negligent behavior in the future

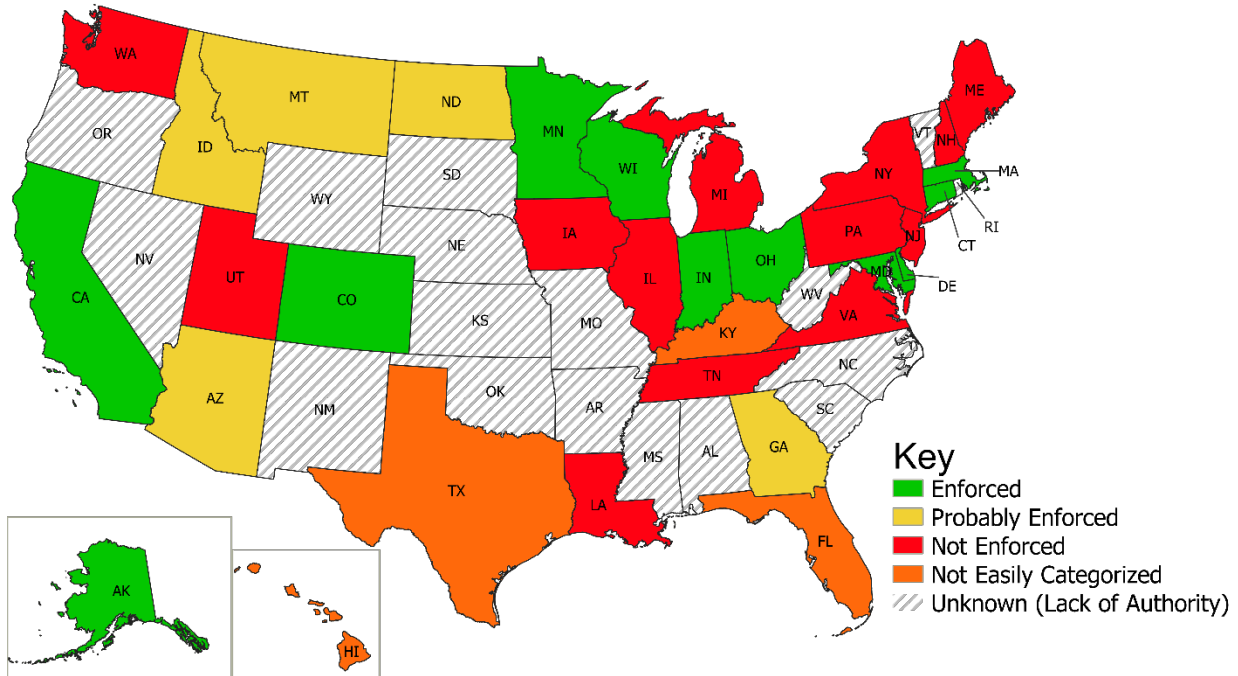
INTERESTS OF PLAINTIFFS’ ATTORNEYS

- The availability of compensation for injured clients
- Profitability of the attorney’s legal practice
- Predictability in the law and outcomes
- Deterrence of negligent behavior in the future

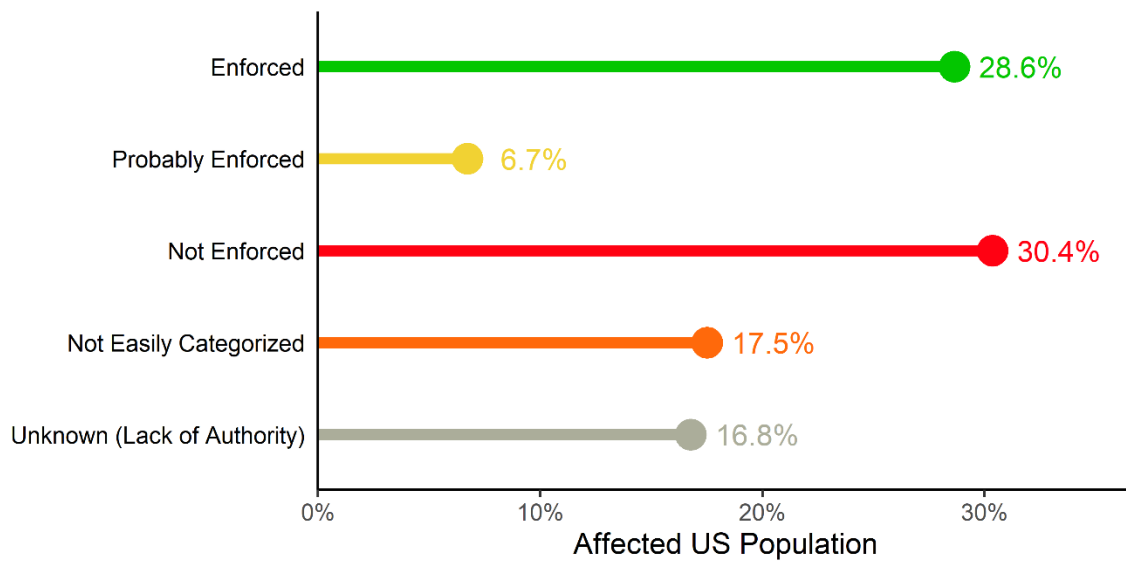
INTERESTS OF INSURERS

- Avoidance (or limitation) of liability
- Profitability
- Predictability in the law and outcomes

**Figure 3.1**  
**Enforcement of Parental Waiver Agreements**



**Figure 3.2**  
**Percentage of U.S. Population Living in States that Enforce (or Do Not Enforce) Parental Waiver Agreements**



404 Wis.2d 217

Court of Appeals of Wisconsin.

Kathleen A. SCHABELSKI and Jay  
P. Schabelski, Plaintiffs-Appellants,  
Blue Cross Blue Shield of Illinois, a foreign  
corp. and Golden Rule Insurance Company,  
a foreign corp., Involuntary-Plaintiffs,

v.

NOVA CASUALTY COMPANY, a foreign  
corp., Friedl Ski Ventures, LLC, a WI LLC and  
Alex James Fuhrman, Defendants-Respondents.

Appeal No. 2021AP1174

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Submitted on Briefs: March 16, 2022

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Opinion Filed: June 30, 2022

**Synopsis**

**Background:** Snowboarder and her family filed a negligence complaint against ski lift chair operator, owners of ski and snowboard park, and insurers after snowboarder fell from ski lift chair. The Circuit Court, Washington County, James G. Poulos, J., granted defendants summary judgment. Snowboarder appealed.

**Holdings:** The Court of Appeals, Neubauer, J., held that:

[1] release was ambiguous with respect to snowboarder's claim that ski and snowboard park negligently attempted to rescue her from lift chair after it had been stopped;

[2] chair lift operator's conduct before stopping chair lift did not arise to level of reckless conduct;

[3] ski and snowboard park release did not violate public policy; and

[4] ski and snowboard park release was not rendered unenforceable because snowboarder and her family were allegedly not afforded opportunity to bargain over its terms.

Affirmed in part, reversed in part, and remanded.

West Headnotes (19)

**[1] Contracts** 🔑 Exemption from liability

Exculpatory releases are viewed with disfavor.

**[2] Contracts** 🔑 Exemption from liability

To be enforceable, exculpatory releases must, among other things, clearly, unambiguously, and unmistakably inform signer of what is being waived.

**[3] Contracts** 🔑 Exculpatory contracts

Exculpatory releases are construed strictly against those who seek to rely on them.

**[4] Contracts** 🔑 Exemption from liability

In analyzing whether release is enforceable, court must examine facts and circumstances of agreement to determine if it covers activity at issue, and if activity is not covered by release, then release should be determined to be unenforceable in regard to such activity; if release does cover activity in question, then court proceeds to second step of determining whether release is enforceable under public policy.

**[5] Contracts** 🔑 Public Policy in General

“Public policy” refers to principle of law under which freedom of contract or private dealings is restricted by law for good of community.

**[6] Contracts** 🔑 Public Policy in General**Torts** 🔑 Purpose or function of tort law

In undertaking public policy analysis, court of appeals attempts to balance tension between contract law, which seeks to protect ability to manage one's own affairs without government interference, and tort law, which seeks to deter

conduct below standard of care and compensate persons injured by unreasonable conduct of others.

**[7] Public Amusement and Entertainment** ➔ Pre-Injury Releases

Release was ambiguous with respect to snowboarder's claim that ski and snowboard park negligently attempted to rescue her from lift chair after it had been stopped, and thus release was unenforceable against that claim; while release indicated it applied to "chairlift loading" and "unloading operations," terms of release did not clearly, unambiguously, and unmistakably inform snowboarder and family that they were releasing claims for negligent rescue in event they found themselves hanging from lift chair, and defendants' alleged failure to have proper rescue equipment on hand, allegedly inadequate training of employees, and purported lack of adequate written procedures for responding to evacuating riders from chair lift were distinct from any negligent operation of chair lift, boarding or unboarding.

**[8] Contracts** ➔ Exemption from liability

In determining whether specific activity is covered by exculpatory release, court focuses on whether risk of that act was within parties' contemplation when release was signed.

**[9] Contracts** ➔ Exemption from liability

Terms of release must be specific in describing risks for which signer is releasing.

**[10] Public Amusement and Entertainment** ➔ Pre-Injury Releases

Any alleged negligent conduct by ski chair lift operator in playing loud music in ski chair lift loading area, failing to "bump" lift chair, shoveling snow as snowboarder and her husband boarded, and not immediately stopping lift at first sign of problem, which occurred before chair lift was stopped, fell within "operation of chairlifts,

and chairlift loading," and thus was barred by release signed by snowboarder, in negligence action filed by snowboarder and her family after she fell from lift chair.

**[11] Public Amusement and Entertainment** ➔ Pre-Injury Releases

Chair lift operator's conduct before stopping chair lift, in playing loud music in ski chair lift loading area, failing to "bump" lift chair, shoveling snow as snowboarder and her husband boarded, and not immediately stopping lift at first sign of problem, did not arise to level of reckless conduct, such that it would not be covered by release signed by snowboarder, in negligence action filed by snowboarder and her family after she fell from ski lift chair; before snowboarder fell she told operator she had disability as he observed her being "shaky" when boarding lift previously however she also stated she had boarded lifts before, and snowboarder described speed of chair lift that morning as on "slower side."

**[12] Negligence** ➔ Reckless conduct

Recklessness contemplates conscious disregard of unreasonable and substantial risk of serious bodily harm to another.

**[13] Negligence** ➔ Heightened Degrees of Negligence

**Negligence** ➔ Reckless conduct

Conduct which creates high risk of physical harm to another is substantially greater than negligent conduct; mere inadvertence or lack of skill is not reckless conduct.

**[14] Negligence** ➔ Heightened degrees of negligence

Whether conduct meets standard for recklessness is question of law.

**[15] Public Amusement and Entertainment** ➔ Pre-Injury Releases

Ski and snowboard park release did not violate public policy, even though “catch-all” language in release stated snowboarder accepted full responsibility for any personal injury; release expressly stated it applied only to negligent conduct, and release specifically identified categories of negligent conduct it covered.

**[16] Contracts** ➔ Exemption from liability

Exculpatory release violates public policy when its terms purport to shield defendant from liability for any reason.

**[17] Contracts** ➔ Exculpatory contracts

In construing terms of release, courts strive to give each provision meaning and avoid interpretations that render language superfluous.

**[18] Public Amusement and Entertainment** ➔ Pre-Injury Releases

Release was not rendered unenforceable due to alleged misrepresentation of ski and snowboard park gift shop attendant, as argued by snowboarder in negligence action against park and others after snowboarder fell from ski lift chair; even if attendant misrepresented second form as being related to purchase of additional health insurance when she gave it to snowboarder, misrepresentation was not relevant to snowboarder's decision to choose “no release” lift ticket option.

**[19] Public Amusement and Entertainment** ➔ Pre-Injury Releases

Ski and snowboard park release was not rendered unenforceable because snowboarder and her family were allegedly not afforded opportunity to bargain over its terms; release applied only to specified categories of conduct, was expressly limited to negligence, and specifically disclaimed application to reckless or intentional

conduct, and release was not presented to customers on take-it-or-leave-it basis as persons wishing to ski or snowboard at park could sign release or pay extra fee for non-release lift ticket.

**\*\*533** APPEAL from an order of the circuit court for Washington County, Cir. Ct. No. 2019CV80: **JAMES G. POUROS**, Judge. *Affirmed in part; reversed in part and cause remanded.*

**Attorneys and Law Firms**

On behalf of the plaintiffs-appellants, the cause was submitted on the briefs of **Robert D. Crivello** and Jay M. McDivitt, of Cannon & Dunphy S.C., Brookfield.

On behalf of the defendants-respondents, the cause was submitted on the brief of **W. Thomas Terwilliger** of Terwilliger, Wakeen, Piehler, & Conway, S.C., Wausau.

Before **Neubauer**, **Grogan** and **Kornblum**, JJ.

**Opinion**

**NEUBAUER**, J.

**\*222** ¶1 Kathleen and Jay Schabelski appeal from an order of the circuit court granting a motion for summary judgment in favor of Nova Casualty Company, Friedl Ski Ventures, LLC and Alex James Fuhrman (referred to collectively herein as Friedl).<sup>1</sup> The circuit court granted Friedl's motion after concluding that the Schabelskis' claims, which arose out of Kathleen's fall from a ski lift chair at the Sunburst Winter Sports Park in Kewaskum, Wisconsin, were barred by the terms of a release they signed when they purchased lift tickets.<sup>2</sup>

[1] [2] ¶2 Wisconsin law views such exculpatory releases with disfavor. *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20, ¶48, 367 Wis. 2d 386, 879 N.W.2d 492. To be enforceable, they must, among other things, “clearly, unambiguously, and unmistakably inform the signer of **\*223** what is being waived.” *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 84, 557 N.W.2d 60 (1996). Here, we conclude that the release is ambiguous with respect to the Schabelskis' claim that Friedl negligently attempted to rescue her from the lift chair after it had been stopped. The terms of the release did not clearly, unambiguously, and unmistakably inform the Schabelskis

that they were releasing claims for negligent rescue. Our conclusion means that the release is not enforceable against that claim.

¶3 We also conclude that the release does apply to any negligent conduct that occurred before the chair lift was stopped because that conduct falls within language in the release applying it to “the operation of chairlifts, and chairlift loading.” Further, we conclude that this conduct does not, as a matter of law, meet the standard for recklessness such that it would not be covered by the release. Finally, we reject the Schabelskis’ arguments that the release is void under public policy. Accordingly, we affirm the circuit court’s order in part, reverse in part, and remand this case for further proceedings on the negligent rescue claim.

## BACKGROUND

¶4 The following facts are taken from the parties’ summary judgment submissions. Except as noted below, they are undisputed.

¶5 Jay has a bachelor’s degree in civil engineering and a master’s degree and runs a business that designs and manufactures soil testing equipment. Kathleen holds a bachelor’s degree in broadcast \*\*534 communications and a master’s degree in business administration and does accounting and human resources work for the business. Kathleen has had cerebral palsy \*224 since birth but received training from the Southeastern Wisconsin Adaptive Ski Program and became an experienced snowboarder. Before the accident, Kathleen had successfully boarded chair lifts “hundreds of times.”

¶6 The Schabelskis and their son arrived at Sunburst in the morning on February 28, 2016. They purchased lift tickets from an attendant in the gift shop because the ticket window was closed. The attendant presented them with a release and briefly showed them a second form that gave them the option to purchase health insurance for an additional fee, which they declined.

¶7 The release is a one-page document entitled “**SUNBURST DAILY LIFT TICKET RELEASE OF LIABILITY AND PARENT AGREEMENT 2015-2016.**” Below the title at the top of the page, the following language appears: “**PLEASE READ CAREFULLY BEFORE SIGNING. THIS IS A RELEASE OF LIABILITY AND WAIVER**

**OF CERTAIN LEGAL RIGHTS.**” The release then sets out the following relevant text in single-spaced paragraphs:

I understand that skiing in its various forms, including snowboarding, involves risks, dangers, and hazards that may cause serious personal injury or death and that injuries are a common and ordinary occurrence. Risks include, but are not limited to, changes in terrain, weather and snow surfaces, ice, moguls, bare spots, rocks, stumps, debris, fences, posts, trees, lift equipment and towers, the operation of chairlifts, and chairlift loading, riding, and unloading operations, including the presence or absence of restraint bars on the chairs, light poles, signs, buildings, ramps, roads and walkways, rails, boxes, corrugated pipes, cylinders, \*225 dance floors, wall rides, rollers, and table tops and other jumps, including their height, the location of the start point, and the angle of their approaches and the angle and length of their take-off ramps and landing areas, and other terrain features, padded and non-padded obstacles, snowmaking, grooming, and snowmobile equipment and operations, and collisions with other persons and other natural and man-made hazards, including collisions with people and obstacles adjacent to and off the skiable terrain, such as snowmaking pipes, hydrants, guns, wands, and other snowmaking equipment, rocks and trees, and improperly-adjusted and malfunctioning equipment. I acknowledge the risks in the sport of skiing can be greatly reduced by taking lessons, abiding by the Skier Responsibility Code (known as Your Responsibility Code), obeying the Wisconsin Skier Safety Act, and using common sense.

In consideration of the purchase of a lift ticket for Sunburst and use of its facilities, **I HEREBY RELEASE AND FULLY DISCHARGE Friedl Ski Ventures, LLC d/b/a/ Sunburst, and eco Land Holdings, LLC, their owners, officers, shareholders, directors, agents, and employees (collectively the “SUNBURST RELEASEES”) from any liability resulting from any personal injury to myself, including death, which is caused by any NEGLIGENT ACT OR OMISSION of any SUNBURST RELEASEE with respect to:**

....

- the operation of chairlifts, and chairlift loading, riding, and unloading operations, including the presence or absence of restraint bars on the chairs;

\*\*535 ....



**\*226** I accept full responsibility for any personal injury which may result from my participation in the sport, and I hereby HOLD HARMLESS the SUNBURST RELEASEES for any personal injury sustained by me, including death, caused by the negligence of any SUNBURST RELEASEE while participating in the sport. I agree not to bring any action or lawsuit against any SUNBURST RELEASEE for any personal injury caused by the NEGLIGENCE of any SUNBURST RELEASEE.

In accordance with Wisconsin law, nothing in this Release should be construed as releasing, discharging, or waiving any claims I may have for reckless or intentional acts on the part of any SUNBURST RELEASEE.

....

I understand that for a fee of \$10.00 per person per day in addition to the normal lift ticket price, Sunburst offers an optional lift ticket that does not require me to sign a Release of Liability. In signing this Release of Liability, I acknowledge I am aware of this option offered by Sunburst and hereby waive my right to purchase the same.

**I HAVE CAREFULLY READ THIS LIFT TICKET RELEASE OF LIABILITY AND UNDERSTAND ITS CONTENTS. I AM AWARE THAT BY SIGNING THIS RELEASE OF LIABILITY, I AM WAIVING CERTAIN LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE SUNBURST, ITS OWNERS, OFFICERS, SHAREHOLDERS, AGENTS OR EMPLOYEES FOR CERTAIN CLAIMS.**

**CAUTION: READ BEFORE SIGNING! THIS DOCUMENT AFFECTS YOUR LEGAL RIGHTS AND WILL BAR YOUR RIGHT TO SUE!**

Immediately below these paragraphs are lines for up **\*227** to six ticket holders to print and sign their names. The circuit court described the size of most of the printed text in the release as “small; like this --- 8 point or smaller.” We are unable to determine the exact size of the text, but it appears smaller than the text in this opinion, which is printed in 13-point font.

¶8 Kathleen did not ask the attendant any questions about the release. The attendant did not discuss the “nature of [the] bullet points” in the release with the Schabelskis. Kathleen did not recall seeing or discussing the language in the release allowing customers to purchase a lift ticket without signing a release for an extra ten dollars.

¶9 Kathleen did not read the release “word for word” because it contained, in her words, “very fine print,” and she had never seen anyone do so before purchasing a ticket. But she believed she understood what the release meant based on her “prior knowledge of what a liability waiver typically contains”—namely, that such waivers “protect[ ] the ski hill if I am injured due to my own mistake.” Kathleen could have read the release “word for word” had she chosen to do so. Instead, she and Jay signed the release after a brief exchange with the attendant, who seemed to Kathleen to be more focused on their potential purchase of health insurance.

¶10 With lift tickets in hand, the Schabelskis hit the slopes. Kathleen used Chairlift No. 3 once without incident and then returned to that lift with Jay for another trip up the hill. Riders board the two-person chairs on the lift from the right side of the lift looking uphill.

¶11 That morning, Sunburst employee Alex Fuhrman was attending the lift. After Kathleen's first run, which she described as “a little bit shaky,” Fuhrman **\*228** asked her **\*\*536** if it was her first time snowboarding, to which she responded by “point[ing] to the multiple tags that I had on my jacket and said ‘No, I've done this before.’ ” She also explained to him that she had a disability. According to Fuhrman, Kathleen was “a little bit shaky” each time she boarded, “but she always settled in before she started taking off upwards.”

¶12 Jay recalled that loud music was playing in the loading area that morning. Fuhrman did not specifically remember playing music that morning but did recall bringing a speaker to his work area at times. Sunburst did not prohibit employees from playing music in their work areas.

¶13 After their son boarded a chair, the Schabelskis moved into the loading position and waited for a chair to arrive behind them. Kathleen always rode chair lifts with another person, but did not usually require physical assistance once she was seated in the chair. She described the speed at which the lift was moving that morning as “on the slower side.”

¶14 Kathleen, Jay, and Fuhrman gave deposition testimony about what happened next. Their accounts differ in two principal respects. The first is whether Fuhrman “bumped” the lift chair just before the Schabelskis boarded. A lift attendant “bumps” a chair by stalling it as it reaches a rider, which briefly slows the chair to prevent it from hitting the

backs of the rider's legs. Bumping also tilts the chair slightly, allowing the rider to sit down in the chair as it arrives at the rider's position. When the attendant releases the chair, it swings forward slightly and plants the rider in the seat. Fuhrman received training on how to bump chairs at Sunburst.

\*229 ¶15 According to Kathleen, Jay boarded the lift chair safely when it reached them but she was only able to get herself partially on the chair and was left “dangling” as it continued to move forward. Kathleen did not know why she was unable to seat herself fully on the chair and did not recall whether Fuhrman bumped the chair before it reached them.

¶16 According to Jay, Fuhrman did not bump the chair as the Schabelskis attempted to board. Jay testified that Fuhrman was shoveling snow onto the path between the waiting area and the loading area as he and Kathleen attempted to board, but later acknowledged that he “d[id]n't really know where the lift attendant was” when they boarded.

¶17 Fuhrman denied shoveling snow when the Schabelskis were boarding, though he did acknowledge shoveling between passenger boardings. Fuhrman testified that “whenever [Kathleen] boarded I was paying complete attention, because I was a little nervous about the way she boarded.” Fuhrman also testified that he bumped the chair for her on the run on which she fell and was “fairly certain” that he “bumped the chair every time for her, because it made me nervous the way she boarded the chair. It took extra long for her to get settled.”

¶18 The second area of dispute between Fuhrman and the Schabelskis concerns what happened after the lift chair left the loading area and began moving up the hill. As the chair moved forward with Kathleen only partially on board, she “was very surprised, because typical procedure is the lift is stopped immediately.” She and Jay yelled, “Stop” as he held onto her. Then, according to Kathleen,

instead of stopping the lift immediately when he recognized that there was a problem, [Fuhrman] ran \*230 out and asked, “Do you want me to stop the lift” as I'm dangling from it, getting higher and higher off the ground. And of course we immediately say “Yes.” But by the time \*\*537 he runs back and stops the lift I'm between 15 and 20 feet off the ground.

Kathleen estimated that Fuhrman ran ten to fifteen feet to ask her if she wanted him to stop the lift, at which point she was “[p]artially seated, hanging on desperately.”

¶19 Fuhrman disputed the Schabelskis' claim that they began yelling for the lift to be stopped almost immediately after they boarded, though he did acknowledge “a small possibility” that he did not hear them because of the music playing in the loading area. Fuhrman testified that he watched the Schabelskis depart the loading area “to see if she would get settled in.” As Kathleen started “to gain some air and did not settle in at the usual comfortable time that I watched her settle in,” Fuhrman asked if she was all right and if she wanted him to stop the lift. According to Fuhrman, Jay responded, “No, we'll be all right.” Fuhrman continued to watch the Schabelskis and eventually tried to “push up on her snowboard to give that upward pressure to sink her up and back into the chair.” When that proved unsuccessful, Fuhrman asked again if Kathleen needed the lift stopped and Jay said, “Yeah, stop the lift.” Fuhrman testified that he “immediately ran right back to the station and hit the button” and the lift slowed to a stop.

¶20 Fuhrman and Kathleen estimated that she hung on to the chair for around ten minutes before she fell to the ground. In that time, two other employees came over to where Kathleen was located. According to Kathleen, the first employee walked over “very slowly,” looked up at her and said, “I need to get a ladder,” and \*231 walked back. A second employee then came over with, in Kathleen's words, “something that clearly was not going to be tall enough to do the job.”<sup>3</sup> According to Kathleen, the second employee said, “Oh, that's not going to work,” and left. She did not see Fuhrman after the lift came to a stop.

¶21 Sunburst did not have a “protocol” for situations like the one in which Kathleen found herself. Chairlift evacuations are overseen by Sunburst management and are performed by management, ski patrol, other employees and, if necessary, the Kewaskum Fire Department. Sunburst did not have “catch nets” on its premises because its owner deemed them dangerous to use. Sunburst did not attempt to use ropes and a seat to lower Kathleen off the lift because it would only use that method if the chairlift was not operational and could not be restored to operation using a secondary emergency motor. According to an expert witness for the Schabelskis, it is “standard custom and practice” for mountain resorts in North America to provide evacuation training and equipment to lift attendants and to have “rescue devices immediately available at the loading area” to evacuate misloaded passengers.

## PROCEDURAL HISTORY

¶22 The Schabelskis commenced this action in February 2019. Their complaint included the following allegations of negligence against Fuhrman (and Friedl pursuant to vicarious liability):

That at all times material hereto, the defendant, Alex James Fuhrman, was negligent in that he, among \*232 other things, failed to stop the subject ski lift in a timely manner; failed to exercise a proper lookout for Mrs. Schabelski on the ski lift; failed to have proper management and \*\*538 control of the ski lift; and/or otherwise failed to exercise ordinary care for the safety of the plaintiff, Kathleen A. Schabelski, thereby creating a foreseeable risk of harm to her; and was otherwise negligent.

In August 2019, the circuit court set a dispositive motion briefing schedule focused on the release. Following the submission of briefs, the court issued an “Interim Decision and Order” denying Friedl’s motion with leave to re-file and giving the parties time to conduct additional discovery.

¶23 Friedl filed a “supplemental” motion for summary judgment in December 2020. In their opposition, the Schabelskis identified allegedly negligent conduct not mentioned in their complaint—Sunburst’s rescue operations and emergency response—and argued that it fell outside the scope of the release. On May 24, 2021, the circuit court issued an order granting Friedl’s supplemental motion. The court found that there were no genuine issues of material fact and concluded that the release was enforceable under Wisconsin law and barred the Schabelskis’ claims.

¶24 The Schabelskis appeal. We include additional facts as necessary in the discussion below.

## DISCUSSION

¶25 Whether the circuit court properly granted summary judgment is a question of law that we review de novo. *Atkins v. Swimwest Fam. Fitness Ctr.*, 2005 WI 4, ¶11, 277 Wis. 2d 303, 691 N.W.2d 334. Summary judgment is appropriate if “there is no genuine \*233 issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2) (2019-20).

¶26 The Schabelskis argue that the release does not apply to their claims and that the release is unenforceable as a matter of law. We begin by discussing the legal principles that govern the analysis of exculpatory releases in Wisconsin.

[3] ¶27 Wisconsin law does not favor exculpatory releases because “they tend to allow conduct below the acceptable standard of care applicable to the activity.” *Richards v. Richards*, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118 (1994). Wisconsin courts construe such releases strictly against those who seek to rely on them. *Atkins*, 277 Wis. 2d 303, ¶12, 691 N.W.2d 334.

[4] ¶28 In its most recent decision examining an exculpatory release, our supreme court identified a two-step process for analyzing whether a release is enforceable. *Roberts*, 367 Wis. 2d 386, ¶49, 879 N.W.2d 492. First, we must “examin[e] the facts and circumstances of the agreement to determine if it covers the activity at issue.” *Id.* If the activity is not covered by the release, then the release “should be determined to be unenforceable in regard to such activity.” *Atkins*, 277 Wis. 2d 303, ¶13, 691 N.W.2d 334. If the release does cover the activity in question, then we proceed to the second step of determining whether the release is enforceable under public policy. *Roberts*, 367 Wis. 2d 386, ¶49, 879 N.W.2d 492.

[5] [6] ¶29 Public policy refers to the “principle of law under which freedom of contract or private dealings is restricted by law for the good of the community.” \*234 *Merten v. Nathan*, 108 Wis. 2d 205, 213, 321 N.W.2d 173 (1982) (citation omitted). In undertaking the public policy analysis, we attempt to balance the tension between contract law, which seeks to protect the ability to “manage [one’s] own affairs without government interference,” and tort law, which seeks to deter conduct below the standard of care and compensate persons injured by the unreasonable conduct \*\*539 of others. *Richards*, 181 Wis. 2d at 1016, 513 N.W.2d 118. With these principles in mind, we turn to the parties’ arguments.

### I. Activities Covered by the Release

#### A. Rescue Operations

[7] ¶30 The Schabelskis argue that the release is ambiguous as applied to Sunburst’s allegedly negligent rescue of Kathleen, or that a genuine issue of material fact exists concerning whether negligent rescue was within the parties’

contemplation when the Schabelskis signed the release. To be clear, we understand the Schabelskis' negligent rescue claim to encompass Friedl's acts or omissions that came into play during the attempt to rescue Kathleen from the lift. These acts or omissions started after Fuhrman stopped the chair lift and include (1) the alleged failure to have proper rescue equipment on hand; (2) allegedly inadequate training of resort employees to respond to a rider hanging from a lift chair; and (3) the purported lack of adequate written plans or procedures for responding to evacuating riders.

¶31 Friedl argues that the efforts to rescue Kathleen are within the release because it applies to “the operation of chairlifts, and chairlift loading, riding, and unloading operations.” More specifically, \*235 Friedl contends that the attempts to get Kathleen off the lift before she fell were part of “unloading operations.” We agree with the Schabelskis that the release is, at best, ambiguous as applied to Sunburst's allegedly negligent rescue operations.

[8] ¶32 In determining whether a specific activity is covered by an exculpatory release, we focus on whether the risk of that act was within the parties' contemplation when the release was signed. *Atkins*, 277 Wis. 2d 303, ¶21, 691 N.W.2d 334. For example, in *Arnold v. Shawano County Agricultural Society*, our supreme court examined an exculpatory release that purportedly barred negligence claims asserted by a driver whose car left the racetrack, crashed, and caught fire. 111 Wis. 2d 203, 330 N.W.2d 773 (1983), *overruled on other grounds by Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 401 N.W.2d 816 (1987). Among other things, the driver alleged that track personnel negligently sprayed chemicals to extinguish the fire while he was still in the car, which caused him personal injuries. *Arnold*, 111 Wis. 2d at 204-05, 330 N.W.2d 773. The release contained broad language that applied to “all liability ... for all loss or damage, and any claim or demands therefor ... whether caused by the negligence of Releasees or otherwise.” *Id.* at 206 n.1, 330 N.W.2d 773.

¶33 The supreme court held that this language was ambiguous as applied to the attempts to rescue the driver. *Id.* at 212, 330 N.W.2d 773. Though it “would be reasonable to assume that this exculpatory contract was intended to preclude liability for such things as negligent maintenance of the track or the negligent driving of another driver participant,” the court could not “conclude that this contract was meant to cover negligent rescue operations.” *Id.* To withstand scrutiny, the release \*236 must “clearly express the intent of the parties so that with the surrounding circumstances, it is clear the parties

knowingly agreed to excuse one of them from otherwise responsible acts.” *Id.* at 213, 330 N.W.2d 773.

¶34 The release at issue in this case is more specific than that in *Arnold* insofar as it contains nine bulleted statements that describe categories of conduct to which it applies. However, rescuing or providing aid to imperiled lift riders is not specifically mentioned in any of the categories. Friedl argues that the specific injury-causing act need not be specified in the release and maintains that the phrase “unloading \*\*540 operations” is broad enough to cover the efforts to rescue Kathleen. We do not believe that phrase clearly expresses the parties' intent to release claims for the negligent rescue of a rider in Kathleen's circumstances.

¶35 The release does not define “unloading,” but as relevant here, its ordinary meaning is “to take off” or “to take the cargo from.” *Unload*, Webster's Third New International Dictionary (unabr. 1993); *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 507, 577 N.W.2d 617 (1998) (“dictionary definitions are dispositive of the ordinary meanings ascribed to contract terms”). In the context of riding a chair lift, “unloading” can reasonably be understood to refer to the process by which a rider gets off the lift at a designated point along the lift's path, just as “loading” can reasonably be understood to refer to the process of getting on the lift at a designated point along the path. Both processes connote a degree of intention and orderliness. Riders intend to board and exit a lift at points along the lift path designed for those activities. Lift attendants provide assistance as needed to enable riders to accomplish both tasks safely and in an orderly fashion.

\*237 ¶36 One would not necessarily think of efforts to rescue a rider in danger of falling off a halted chair lift as “unloading” that rider. Such efforts lack the regularity and orderliness of normal “loading” and “unloading operations.” Instead, they are dictated by the circumstances giving rise to the need for rescue. In addition, as the Schabelskis point out, Sunburst appears to treat unloading and rescue operations as distinct activities. Whereas lift attendants like Fuhrman provide assistance with loading and unloading, Sunburst's management oversees “chairlift evacuation,” which is performed “by management, ski patrol, all employees, and also the Kewaskum Fire Department” when necessary.

¶37 Finally, we note that the distinction between “unloading” and “evacuating” riders is present throughout the American National Standards Institute's (ANSI) safety standards

applicable to aerial lifts, which are incorporated by reference into the Wisconsin Administrative Code. See Wis. Admin. Code § SPS 333.17(1) (Mar. 2014). The ANSI standards repeatedly refer to the location at which “unloading” occurs as a designated point, such as an “area,” “platform,” or “station.” American Nat'l Standard for Passenger Ropeways—Aerial Tramways, Aerial Lifts, Surface Lifts, Tows & Conveyors—Safety Requirements, ANSI B77.1-2011, § 4.1.1.7 (Am. Nat'l Standards Inst. 2011) (requiring two-way communication system “between the prime mover and evaluation power unit control point, drive system building, loading stations, and unloading stations”); § 4.1.1.9 (“Platforms, ramps, corrals, and mazes comprising the loading and unloading areas of an aerial lift are integrally related to its operation.”); § 4.1.1.9.2 (“For chair lifts, the unloading point where the passengers stand up and disembark \*238 shall be marked on or near the unloading surface.”). The standards separately address requirements for unloading areas and evacuation of stranded passengers. *Id.*, §§ 4.1.1.9, 4.1.1.9.2 (discussing requirements for unloading areas); § 4.3.2.5.7 (listing items to be included in “plan for evacuation of passengers from each aerial lift”); see also *id.*, § 4.2.13.4 (requiring emergency lighting to permit “regular unloading of an aerial lift” and “emergency evacuation of carriers”); § 4.3.6.2 (Passengers “shall be presumed to have sufficient ability, physical dexterity, and/or personal assistance to negotiate and to be *evacuated* from the aerial lift safely. Passengers shall maintain control of their speed and course \*\*541 while *loading* and *unloading* the aerial lift.” (emphasis added)).

[9] ¶38 To summarize, our task is to determine whether the parties contemplated release of the activity at issue, which we do by strictly construing the release's terms to determine whether they “clearly, unambiguously, and unmistakably inform the signer” that liability for the activity at issue is being waived. *Yauger*, 206 Wis. 2d at 84, 86, 557 N.W.2d 60 (citing “the well established principle that exculpatory contracts are construed strictly against the party seeking to rely on them”). Here, the Schabelskis have set forth facts on summary judgment to support their assertion that Friedl failed to have proper training, a proper plan, and proper equipment to evacuate or rescue skiers who are hanging from a lift. This failure is alleged to be a cause of Kathleen's injuries separate and distinct from any negligence in Friedl's operation of the chairlift. See *Ehlinger by Ehlinger v. Sipes*, 155 Wis. 2d 1, 12-13, 454 N.W.2d 754 (1990) (there may be more than one cause in contributing to the result, as long as it is a \*239 substantial factor). Our supreme court has repeatedly

made clear that the terms of the release must be specific in describing the risks for which the signer is releasing liability. See, e.g., *Roberts*, 367 Wis. 2d 386, ¶¶59-60, 879 N.W.2d 492 (invalidating release in which hot air balloon riders assumed “full responsibility for all risks of any and every kind involved with or arising from my participation in hot air balloon activities”). We conclude that the release did not “clearly, unambiguously, and unmistakably” inform the Schabelskis that they were releasing Friedl from liability for a negligent rescue attempt in the event they found themselves in danger of falling from a lift chair.

¶39 These considerations lead us to conclude that the phrase “unloading operations” is, at a minimum, ambiguous as applied to the efforts to rescue Kathleen after Fuhrman stopped the chair lift. Had Friedl wished to make clear that riders were giving up the right to sue for negligent rescue, that “certainly could have been written into the agreement.” See *Arnold*, 111 Wis. 2d at 214, 330 N.W.2d 773. Accordingly, the release is not enforceable with respect to the Schabelskis' claim of negligent rescue.

## B. Pre-Rescue Conduct

¶40 Friedl argues that the Schabelskis have conceded that other allegedly negligent conduct up to the point at which Fuhrman stopped the lift, such as playing music in the loading area, failing to “bump” the lift chair, shoveling snow as the Schabelskis boarded, and not immediately stopping the lift, are part of “the operation of chairlifts and chairlift loading, riding, and unloading operations.” The Schabelskis do not offer a substantive response to this argument in their reply brief.

\*240 [10] ¶41 We agree that the Schabelskis' negligence claim is within the scope of the release to the extent it is predicated on Fuhrman's actions before the chairlift stopped. Even if a jury were to find that Fuhrman was playing loud music, did not bump the Schabelskis' chair, shoveled snow while they boarded, and delayed in stopping the lift, those acts are covered by the release because they are part of “the operation of chairlifts” and “chairlift loading.”

## C. Recklessness

[11] ¶42 The Schabelskis make a second scope-related argument—that a reasonable jury could find Fuhrman's

conduct to be reckless and thus not covered by the release. See \*\*542 *Brooten v. Hickok Rehab. Servs., LLC*, 2013 WI App 71, ¶10, 348 Wis. 2d 251, 831 N.W.2d 445 (“It is well-settled that an exculpatory clause ... cannot, under any circumstances ... preclude claims based on reckless or intentional conduct.”). Because we have already determined that the release is unenforceable with respect to the Schabelskis’ claim based on rescue operations, we consider their recklessness argument only with respect to Fuhrman’s conduct before he stopped the lift.

[12] [13] [14] ¶43 Recklessness “contemplates a conscious disregard of an unreasonable and substantial risk of serious bodily harm to another.” *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶36, 315 Wis. 2d 350, 760 N.W.2d 156 (citation omitted). “Conduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadvertence or lack of skill is not reckless conduct.” *Id.* (citing Wis. \*\*241 Ji—Civil 2020). Whether Fuhrman’s conduct meets the standard for recklessness is a question of law. See *Kellar v. Lloyd*, 180 Wis. 2d 162, 184, 509 N.W.2d 87 (Ct. App. 1993).

¶44 The Schabelskis rely on our decision in *Werdehoff v. General Star Indemnity Co.*, 229 Wis. 2d 489, 600 N.W.2d 214 (Ct. App. 1999). In that case, two motorcycle racers brought suit after they lost control of their motorcycles during a race when they slipped on an area of the track that was covered by oil. *Id.* at 493-94, 600 N.W.2d 214. The defendants argued that the racers’ claims were barred by several exculpatory releases. *Id.* at 494, 600 N.W.2d 214. The circuit court granted summary judgment to the defendants but we reversed after concluding that the record contained a genuine issue of material fact as to whether the defendants’ conduct was reckless. *Id.* at 507, 600 N.W.2d 214. Specifically, we relied on deposition testimony from four race workers which revealed that (1) there had been a “major spill” of oil on the track before the plaintiffs’ race; (2) the spill area remained slippery after efforts to clean the oil off the track; and (3) race officials went ahead with the race because of “time constraints” despite warnings from workers near the spill area about the slippery conditions. *Id.* at 508-511, 600 N.W.2d 214. Based on the evidence, we determined that a jury could reasonably conclude that the defendants had acted recklessly in “allow[ing] the race to go on with knowledge that the dangerous condition still existed and that this decision was made because of time constraints.” *Id.* at 511, 600 N.W.2d 214.

¶45 We do not believe a reasonable jury could reach a similar conclusion with respect to Fuhrman’s conduct before he stopped the lift. Before the ride on which Kathleen fell, she told Fuhrman that she had a disability and he had observed her being “a little bit \*242 shaky” when boarding the chair lift. However, Kathleen also informed Fuhrman that she had boarded a lift before, and he had seen that she was able to “settle in” to the lift chair on at least one prior trip. Kathleen also described the speed at which the lift was moving that morning as “on the slower side.” Given these facts, boarding the lift chair did not present “an unreasonable and substantial risk of serious bodily harm” to Kathleen. See *Noffke*, 315 Wis. 2d 350, ¶36, 760 N.W.2d 156. Any risk that boarding a slow-moving lift chair presented was materially less than the oil-slicked track on which motorcycles were racing at high speed in *Werdehoff*.

¶46 Additionally, even if we accept the Schabelskis’ version of events during the boarding process as true, no reasonable juror could conclude that Fuhrman consciously disregarded a risk that the boarding process could result in serious bodily injury to Kathleen. Assuming that Fuhrman was playing music in the loading area, \*\*543 did not bump the slow-moving lift chair before the Schabelskis boarded, and did not initially hear them yell for the lift to be stopped, the Schabelskis acknowledge that Fuhrman did ask if they wanted the lift stopped and that he stopped the lift when they said, “Yes.” When alerted that Kathleen may not have loaded properly, Fuhrman took action to confirm if she needed assistance and stopped the lift when asked to do so. That he may not have bumped the lift chair or stopped the lift as quickly as he could have shows, at most, “inadvertence, or simple negligence” rather than a conscious disregard for Kathleen’s safety. See *Noffke*, 315 Wis. 2d 350, ¶37, 760 N.W.2d 156.

## II. Public Policy

¶47 Because we have concluded that at least some of Friedl’s allegedly negligent conduct is within \*243 the scope of the release, we must consider whether the release is enforceable under public policy. *Roberts*, 367 Wis. 2d 386, ¶49, 879 N.W.2d 492. The Schabelskis raise three arguments as to why the release is unenforceable, which we address below.

### A. Overbreadth

[15] ¶48 The Schabelskis argue that certain “catch-all” language in the release renders it overbroad and unenforceable. Specifically, they focus on the following paragraph, which appears immediately below the nine bulleted statements that identify categories of negligence that are covered by the release:

I accept full responsibility for any personal injury which may result from my participation in the sport, and I hereby HOLD HARMLESS the SUNBURST RELEASEES for any personal injury sustained by me, including death, caused by the negligence of any SUNBURST RELEASEE while participating in the sport. I agree not to bring any action or lawsuit against any SUNBURST RELEASEE for any personal injury caused by the NEGLIGENCE of any SUNBURST RELEASEE.

This language, when read together with the text that precedes it, does not render it fatally overbroad.

[16] ¶49 An exculpatory release violates public policy when its terms purport to shield a defendant from liability for any reason. *Roberts*, 367 Wis. 2d 386, ¶59, 879 N.W.2d 492. In *Atkins*, 277 Wis. 2d 303, ¶19, 691 N.W.2d 334, our supreme court refused to enforce a one-paragraph release that insulated a fitness center from liability without regard to “fault” because that term was “broad enough to \*244 cover a reckless or an intentional act.” More recently, in *Roberts*, 367 Wis. 2d 386, ¶¶59-60, 879 N.W.2d 492, the supreme court held that language in a release requiring persons wishing to ride in a hot air balloon to “assume full responsibility for all risks of any and every kind involved with or arising from ... participation in hot air balloon activities” and to hold certain parties harmless “for[ ] all claims, rights, demands or causes of action whether known or unknown, suspected or unsuspected, arising out of the ballooning activities” was overbroad because it would protect the released parties from liability “for any activity for any reason, known or unknown.”

¶50 Sunburst's release is materially distinguishable from those at issue in *Atkins* and *Roberts*. First, the release expressly applies only to negligent conduct. In the second full paragraph, the release states that the signer is releasing the “SUNBURST RELEASEES” from “any liability resulting from any personal injury to myself, including death, which is caused by any NEGLIGENT ACT OR OMISSION of any SUNBURST RELEASEE with respect to” specific categories of conduct listed in nine bulleted statements that appear \*\*544 immediately below the paragraph. In the paragraph that follows those bulleted statements, the release refers to “the negligence of any SUNBURST RELEASEE” twice in

specifying what claims are being released. The release then states that it is not to be construed “as releasing, discharging, or waiving any claims I may have for reckless or intentional acts on the part of any SUNBURST RELEASEE.” Together, these provisions clearly and expressly limit the release to negligent conduct in line with our supreme court's prior suggestion. See *Atkins*, 277 Wis. 2d 303, ¶20, 691 N.W.2d 334 (“While this court has never specifically required \*245 exculpatory clauses to include the word ‘negligence,’ we have stated that ‘we consider that it would be very helpful for such contracts to set forth in clear and express terms that the party signing it is releasing others for their negligent acts.’” (citing *Dobratz v. Thomson*, 161 Wis. 2d 502, 525, 468 N.W.2d 654 (1991))).

¶51 Second, rather than asking participants to assume all risks associated with skiing or snowboarding at Sunburst, the release specifically identifies the categories of negligent conduct which it covers in the bulleted statements. This distinguishes the Sunburst release from the release at issue in *Roberts*, which failed to identify any specific risks associated with hot air balloon riding and did not limit its scope to specific acts or omissions. See *Roberts*, 367 Wis. 2d 386, ¶60, 879 N.W.2d 492.

¶52 The Schabelskis focus on the paragraph following the bulleted statements and argue that it improperly expands the scope of the release to encompass “any” negligent conduct and renders the bulleted statements superfluous. We do not agree.

[17] ¶53 In construing the terms of the release, we strive to give each provision meaning and avoid interpretations that render language superfluous. See *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶37, 363 Wis. 2d 699, 866 N.W.2d 679. Here, the paragraph that follows the bulleted statements consists of two sentences that memorialize complementary obligations that ensure compliance with the release. In the first sentence, the Schabelskis agree to hold the “SUNBURST RELEASEES” harmless for injuries caused by the releasees’ negligence. In the second sentence, the Schabelskis promise not to bring \*246 a lawsuit against any of the “SUNBURST RELEASEES” for injuries caused by the releasees’ negligence.

¶54 When read together with the preceding paragraph that contains the actual promise to release from liability, these two sentences impose obligations that correspond to, and are coterminous with, the release obligation. That is to

say, the Schabelskis (1) agree to release the “SUNBURST RELEASEES” from liability for certain, specified negligent conduct; (2) agree to comply with the release by holding the “SUNBURST RELEASEES” harmless from such negligence liability; and (3) agree not to sue the “SUNBURST RELEASEES” for the negligent conduct that has been released. Even if the inclusion of the word “any” in the paragraph following the bulleted statements might make the scope of the release uncertain, we would be obliged to construe the release strictly against Friedl and limit it to the specific activities listed in the bulleted statements. See *Atkins*, 277 Wis. 2d 303, ¶19, 691 N.W.2d 334.<sup>4</sup>

### \*\*545 B. Misrepresentation

[18] ¶55 The Schabelskis also contend that an issue of fact exists as to whether the gift shop attendant who provided the release misled them concerning the nature \*247 of the second form she showed them when they purchased lift tickets. Recall that the release informs a ticket holder that “for a fee of \$10.00 per person per day in addition to the normal lift ticket price, Sunburst offers an optional lift ticket that does not require me to sign a Release of Liability.” The Schabelskis suggest that the gift shop attendant mistakenly described the second form she showed to them as one relating to the purchase of additional health insurance, when in fact the second form gave them the opportunity to pay an extra \$10.00 fee and not sign a release of liability. Thus, the Schabelskis argue they may have been misled into believing that their chance to bargain was about purchasing insurance, rather than signing or not signing the release.

¶56 In support of this argument, the Schabelskis rely primarily on our supreme court's decision in *Merten*. In that case, the plaintiff signed a release in connection with taking horseback-riding lessons which stated, among other things, that the farm providing the lessons did not have insurance covering equestrian activities. *Merten*, 108 Wis. 2d at 208, 321 N.W.2d 173. After the plaintiff was injured during a lesson, she learned that the farm did have insurance coverage. *Id.* at 209, 321 N.W.2d 173. The supreme court determined that the misrepresentation contained in the release about the existence of insurance coverage went “to the essence of the contract, that is, how and why the risks of loss are to be shifted from the prospective negligent actor to the victim.” *Id.* at 213, 321 N.W.2d 173. It raised a “strong suspicion of inequitable motive and overreaching and of lack of good faith or fair dealing on the part of the party seeking the release and of

oppression of the party executing the release.” *Id.* at 214, 321 N.W.2d 173. Because the purported lack of insurance was “highly relevant” to a student's decision to sign the \*248 release in order to receive the lessons, the misstatement deprived the bargaining process of integrity and rendered the release unenforceable. *Id.* at 214-15, 321 N.W.2d 173.

¶57 The present case is distinguishable from *Merten* in that there is no evidence that the release contained a misrepresentation of fact. Moreover, even if the Schabelskis are correct that the attendant described the second form as relating to insurance, whether there was health insurance or not was not relevant to the Schabelskis' decision whether to choose the “no release” option set forth in the release. Even if the attendant misspoke, that would mean there was simply a missed opportunity to provide the same “no release” information as set forth in the release. The Schabelskis would have known about the availability of a “no release” lift ticket by reading the release before they signed it. As it stands, having signed the release, they are presumed to have read it and understood its contents. See *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶36, 374 Wis. 2d 513, 893 N.W.2d 212 (“those who sign written instruments are presumed to know their contents and their legal effect” (citation omitted)). In short, the offer of the health insurance in no way prevented the Schabelskis from reading the release and then pursuing the “no release” option. The record does not show that a false statement of fact relevant to a \*\*546 reasonable person's decision to sign the release was made to the Schabelskis in the release.

### C. Opportunity to Bargain

[19] ¶58 Lastly, the Schabelskis contend that the release is unenforceable because they were not afforded an opportunity to bargain over its terms. The bargaining factor has been addressed by our supreme \*249 court on several occasions. In *Richards*, 181 Wis. 2d at 1019, 513 N.W.2d 118, the court invalidated an exculpatory release contained in a standard form authorization that the plaintiff had to sign in order to ride in the company truck driven by her husband because, among other things, the form offered “little or no opportunity for negotiation or free and voluntary bargaining.” The court considered the lack of such an opportunity problematic “when considered with the breadth of the release,” which purported to release liability for “intentional, reckless, and negligent conduct” of the husband's employer and numerous other persons and entities. *Id.* at 1017-1019, 513 N.W.2d 118.



¶59 In *Atkins*, 277 Wis. 2d 303, ¶¶25-26, 691 N.W.2d 334, the court again invalidated a release based in part on the lack of an opportunity to bargain over its terms. There, as in *Richards*, the signer was forced to accept the terms of the release or forego the chance to participate in the activity at issue. *Atkins*, 277 Wis. 2d 303, ¶26, 691 N.W.2d 334. The decedent had the opportunity to read Swimwest's release and ask questions about it, but that did not satisfy public policy because “[t]he form itself” did not provide an opportunity to bargain. *Id.*, ¶25. Though the supreme court did not mention the breadth of the release in its discussion of the bargaining requirement, the release in *Atkins* was also very broad—it purported to relieve Swimwest of “ALL LIABILITY ... WITHOUT REGARD TO FAULT.” *Id.*, ¶4.

¶60 Finally, in *Roberts*, 367 Wis. 2d 386, ¶8, 879 N.W.2d 492, the plaintiff had to sign a release printed on a standard form in order to ride in a hot air balloon. The scope of the release was again broad: the signer assumed “full responsibility for all risks of any and every kind involved with or arising from my participation in hot air balloon activities” and released “all claims, rights, \*250 demands or causes of action ... arising out of the ballooning activities.” *Id.*, ¶9. Our supreme court concluded that the breadth of the release combined with the plaintiff's inability to negotiate over its terms violated public policy. *Id.*, ¶¶59-62.

¶61 The Sunburst release is materially distinguishable from the releases invalidated in these cases. Though printed on what appears to be a standardized form, the release applies only to specified categories of conduct. The release is expressly limited to negligence and specifically disclaims application to reckless or intentional conduct. Moreover, the Sunburst release was not presented to customers on a take-it-or-leave-it basis: persons wishing to ski or snowboard at Sunburst could sign the release or pay an extra \$10.00 for a non-release lift ticket. The release afforded customers an opportunity to bargain because it allowed them to select one of two sets of terms: (1) the base ticket price in exchange for the release or (2) a higher ticket price with no release. Because the form itself alerted customers to the availability of release and no-release options, it afforded the Schabelskis an opportunity to bargain.<sup>5</sup> Although the font was small, \*\*547 Kathleen testified that she could have read the release “word for \*251 word.” That she may not have been aware of the “no release” option because she did not take the time to read the release does not mean it did not present the opportunity to bargain. See *Richards*, 181 Wis. 2d at 1017, 513 N.W.2d 118

(“A person signing a document has a duty to read it and know the contents of the writing.”).

## CONCLUSION

¶62 For the reasons stated above, we affirm the circuit court's order insofar as it granted Friedl summary judgment with respect to the Schabelskis' negligence claim based on Fuhrman's conduct before he stopped the lift chair. We reverse the circuit court's order with respect to the Schabelskis' claim of negligent rescue and remand for further proceedings on that claim.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded.

GROGAN, J. (concurring in part; dissenting in part).

¶63 I join the part of the majority opinion that affirms the circuit court's order; however, I dissent from the part of the majority opinion that reverses the circuit court's order for two reasons. First, I disagree with the majority opinion excepting from the release what it terms “negligent rescue” or “rescue operations.” Second, I disagree that the release is ambiguous as to whether it covered the negligent acts that allegedly caused the injuries in this case. The release protects Sunburst from any negligence suits from injuries the Schabelskis claim Sunburst caused with \*252 respect to: “the operation of chairlifts, and chairlift loading, riding, and unloading operations, including the presence or absence of restraint bars on the chairs[.]” This specific language put the Schabelskis on notice that they were releasing Sunburst from liability for any injuries caused by Sunburst's negligence with respect to each of those things. The Schabelskis' claims here arise directly from injuries as a result of negligence with respect to chairlift operations, loading and riding the chairlift, and chairlift unloading operations. Thus, I would enforce the release and affirm the circuit court's summary judgment order dismissing the Complaint.

¶64 The Schabelskis' Complaint alleged, as relevant:

Kathleen A. Schabelski[ ] was attempting to sit down on a *chair* of a *ski lift* prior to *the chair* escalating in height, Mrs. Schabelski became stuck and was unable to secure herself on or in *the chair*; that the plaintiffs *screamed at the ski lift operator*, the defendant, Alex James Fuhrman, to *stop the ski lift* prior to and *while the ski lift* continued to carry Mrs.

Schabelski upwards (while she was not properly secured on or *in the chair*), however Mr. Fuhrman *failed to timely stop the lift*, causing the plaintiff, Kathleen A. Schabelski, to fall from a high distance to the ground, sustaining severe personal injuries as hereinafter set forth.

(Emphases added.)

It further alleged:

**\*\*548** That at all times material hereto, the defendant, Alex James Fuhrman, was negligent in that he, among other things, *failed to stop the subject ski lift* in a timely manner; failed to exercise a proper lookout for Mrs. Schabelski *on the ski lift*; failed to have proper **\*253** management and control of *the ski lift*; and/or otherwise failed to exercise ordinary care for the safety of the plaintiff, Kathleen A. Schabelski, thereby creating a foreseeable risk of harm to her; and was otherwise negligent.

(Emphases added.) These allegations, and all others the Schabelskis make, fall within the terms of the release. The majority opinion identifies the non-covered risk as “rescue operations” and determines that the release is ambiguous as it did not contemplate any negligence with respect to Sunburst’s inability to unload (or, as the majority opinion terms it, “rescue”) Mrs. Schabelski from the chairlift. I disagree with the majority opinion—regardless of how it identifies the negligent conduct—because the undisputed facts connect any negligent act to the specifically identified risks with respect to the chairlift operations, loading or riding the chairlift, or unloading chairlift operations.<sup>1</sup>

**\*\*549 \*255 ¶65** The Schabelskis sued Sunburst for alleged negligence with respect to the risks specifically covered and contemplated by the release. They acknowledged in the release that they understood that snowboarding “involves risks, dangers, and hazards that may cause serious personal injury or death and that injuries are a common and ordinary occurrence,” and these “[r]isks include, but are not limited to ... lift equipment and towers, the operation of chairlifts, and chairlift loading, riding, and unloading operations.”

¶66 The Schabelskis agreed to release Sunburst “from any liability resulting from any personal injury to” either of them for all negligence “with respect to:” “the operation of chairlifts, and chairlift loading, riding, and unloading operations, including the presence or absence of restraint bars on the chairs.” In my view, based on the undisputed facts in **\*256** the record, this covers injuries caused by any negligence with respect to what the majority opinion terms “rescue operations.” Describing the act of getting

Mrs. Schabelski off the chairlift (after she had Sunburst stop it due to the misload) as a “rescue” does not remove the act from what was released. If Sunburst had been negligent in “rescuing” Mrs. Schabelski from some act unrelated to the operation of the chairlift, loading, riding, or unloading operations, this might be a different case.<sup>2</sup> For example, if Mrs. Schabelski had slipped off the side of the hill down into a ravine, and while Sunburst was hoisting her out, the hoist broke her leg or her back—or dropped her—that could be a negligent “rescue operation” not related to “the operation of chairlifts, and chairlift loading, riding, and unloading operations.” That could be an act that was *not* contemplated or covered by the release. But, the negligent “rescue” involved here was covered because it was with respect to chairlift operations/loading/riding/unloading operations. Thus, the release “clearly, unambiguously, and unmistakably” informed the Schabelskis that by signing, they released Sunburst from injuries Mrs. Schabelski suffered that were caused by Sunburst’s negligent acts in attempting to unload her from the chairlift while she was riding it after she initially misloaded and then had the Sunburst attendant stop the chairlift. Sunburst’s inability to promptly assist Mrs. Schabelski off of the chairlift before she slipped is conduct contemplated by the specific terms of the release.

¶67 The majority opinion relies on **\*\*550 *Arnold v. Shawano County Agricultural Society***, 111 Wis. 2d 203, 330 N.W.2d 773 (1983), *overruled on other grounds by \*257 *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 401 N.W.2d 816 (1987), and adopts that case’s “rescue operations” language. But *Arnold* is distinguishable and does not control because the facts and release in *Arnold* are different than the facts in this case, and the Sunburst release is completely different (as even the majority opinion acknowledges in ¶34). The *Arnold* release used broad and general language and could “bar only those claims that are within the contemplation of the parties when the contract was executed.” *Arnold*, 111 Wis. 2d at 211, 330 N.W.2d 773. The *Arnold* court agreed that *it would be* “reasonable to assume that this exculpatory contract was intended to preclude liability for such things as negligent maintenance of the track or the negligent driving of another driver participant,” but the broad, general language in the release created ambiguity “as to whether the risk of negligent rescue operations was within the contemplation of the parties at the time the exculpatory contract was executed.” *Id.* at 212, 330 N.W.2d 773.*

¶68 *Arnold* explained the factual circumstances in that case:

The injuries were sustained by Leroy J. Arnold while participating in a stock car race at the Shawano county fair grounds. The car operated by Leroy J. Arnold crashed through a guardrail, left the track, and then struck a utility pole and a lumber pile located outside of the guardrail causing a fire in the automobile. As a part of the rescue operations, fire extinguishing chemicals were sprayed on the burning vehicle without removing Leroy Arnold from the vehicle. The chemicals allegedly caused the plaintiff to sustain severe brain damage.

\*258 *Id.* at 204. The supreme court concluded a jury should decide whether the parties intended to release the injuries arising from those facts. *Id.* at 212, 330 N.W.2d 773.

¶69 Here, the release is not broad or general—it is quite specific. It specifically informs the Schabelskis that they are releasing Sunburst from *any* claims with respect to chairlift operations, loading and unloading operations,<sup>3</sup> or riding, and importantly it does not distinguish between the Schabelskis' own acts and the acts of others in regard to those activities. Unlike in *Arnold*—where one may not expect a broad release for stock car racing to also release a claim where one suffers brain damage after being sprayed with fire-extinguishing chemicals—a negligence claim against Sunburst for injuries Mrs. Schabelski suffered after slipping off a chairlift is exactly the type of claim contemplated by the specific language of the Sunburst release. The ambiguity in the *Arnold* release does not exist here. There is no ambiguity, and there are no disputed issues of fact as to whether negligence from operation of the chairlift—which led to Mrs. Schabelski slipping off of it after misloading and while riding it or waiting for unloading operations—were within the contemplation of the parties when the Schabelskis executed the contract. A proper application of *Arnold* would actually support my position because the *Arnold* court concluded that it is “reasonable to assume that \*259 this exculpatory contract was intended to preclude liability for such \*\*551 things” that are inherent dangers ordinarily expected from the activity involved. See *Arnold*, 111 Wis. 2d at 212, 330 N.W.2d 773.

¶70 In this case, the activity involves a chairlift at a ski hill. The American National Standards Institute (ANSI) safety standards state that “[a]ll passengers who use an aerial lift shall be responsible for their own embarkation, riding and disembarkation. They shall be presumed to have sufficient ability, physical dexterity, and/

or personal assistance to negotiate and to be evacuated from the aerial lift safely.” American Nat'l Standard for Passenger Ropeways—Aerial Tramways, Aerial Lifts, Surface Lifts, Tows & Conveyors—Safety Requirements, ANSI B77.1-2011, § 4.3.6.2 (Am. Nat'l Standards Inst. 2011). These safety standards also provide: “It is recognized that certain dangers and risks are inherent in machines of this type [chairlifts], and their operation. It is also recognized that inherent and other risks or dangers exist for those who are in the process of embarking, riding or disembarking from fixed grip aerial lifts.... Passengers accept the risks inherent in such participation of which the ordinary prudent person is or should be aware.” *Id.*, § 4.3.6.1. Thus, when signing a release that specifically says the person will release Sunburst for all negligence with respect to chairlifts, it is reasonable to conclude Sunburst's inability to unload Mrs. Schabelski from the chairlift before she slipped off of the chairlift was an act contemplated by the release.

¶71 Chairlifts, as recognized by ANSI, are an inherently dangerous but ordinary and expected risk of the sport involved here. People misload them and fall off. People ride them and fall off. People slip off when the chairlift stops and, as shown here, people slip \*260 off while waiting to be unloaded. These circumstances are no doubt sad and tragic. I am sure all parties, if given a chance, would have done things differently to avoid the injuries that befell Mrs. Schabelski. But, based on these facts and the law, I cannot join the majority opinion in latching on to “rescue operations” to avoid the effect of the release. The Schabelskis signed a release that plainly contemplated releasing Sunburst for injuries caused by negligence with respect to chairlift operations, riding, loading, and unloading operations. The Schabelskis contracted away their right to file suit against Sunburst for its negligence with respect to the chairlift. They had the option to pay an extra \$10 fee to retain that right, but they did not choose that option. There is no ambiguity as to what the parties contemplated.

¶72 I would affirm the circuit court's order and enforce the release as to the entirety of the Schabelskis' claims. I respectfully concur in part and dissent in part.

#### All Citations

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#### Footnotes

- 1 For ease of reference, we refer to the Schabelskis individually by their first names because they share the same surname.
- 2 Friedl Ski Ventures, LLC owns and operates the Sunburst Winter Sports Park.
- 3 Though not clear from the record, the “something” Kathleen referred to may have been a ladder or a “gator” utility vehicle.
- 4 The Schabelskis also contend that Sunburst “impliedly recognized” the overbreadth of this paragraph because it removed the paragraph from a later version of the release. Friedl denies any such recognition and states that the paragraph was removed because it was determined to be unnecessary. We need not resolve this disagreement, as the Schabelskis’ speculation as to Sunburst’s motive for removing the paragraph is not sufficient to establish that it makes the release impermissibly broad in light of the other language that limits the release to specific negligent conduct.
- 5 The Schabelskis caution us against reaching this conclusion because, in their view, we would be straying from our role as an error-correcting court into making “final determinations affecting state law.” *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986). We disagree. Our conclusion that the Sunburst release satisfies *Atkins*’ requirement that a release afford the signer an opportunity to bargain rests on the application of established legal principles to the particular facts before us. That the supreme court has not addressed this issue on these facts does not prevent us from doing so. See *Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997) (“under some circumstances [the court of appeals] necessarily performs a second function, that of law defining and development, as it adapts the common law ... in the cases it decides”).

1 The majority opinion says Sunburst's failure to have “a proper plan and proper equipment to evacuate or rescue skiers who are hanging from a lift ... is alleged to be a cause of [Mrs. Schabelski's] injuries separate and distinct from any negligence in [Sunburst's] operation of the chairlift.” Majority, ¶38. But the Schabelskis never alleged *this* separate negligence in their Complaint. All the negligent acts and all the causes alleged in the Complaint describe chairlift operations, riding, loading, and unloading operations. Negligence based on or caused by “rescue operations” is absent from the Complaint. The other summary judgment materials reaffirm that Mrs. Schabelski's injury, which forms the basis of her Complaint, stemmed from her use of the chairlift and overall chairlift operations, all of which were covered under the release. Mrs. Schabelski attributed her injury to a “misload” of the chairlift followed by Sunburst's failure to stop the lift sooner, which resulted in her slipping off the chairlift. Mr. Schabelski identified several allegedly negligent acts, including an inattentive chairlift attendant, failure to stop the chairlift sooner, and failure to have a response plan “once we got into that situation,” and “almost no first aid availability. No ski patrol[.]” Even if the Schabelskis have alleged a claim that could be construed as “negligent rescue,” the dispositive question is whether that unambiguously falls within the terms of the release. Based on the undisputed facts here and the release language, I conclude that all of the alleged claims were covered by the release. The Complaint identifies the parties in the first six paragraphs. Then, the “GENERAL ALLEGATIONS” section provides:

8. That on February 28, 2016, the plaintiff, Kathleen A. Schabelski and her husband Jay, were skiing at Sunburst Winter Sports Park in Kewaskum, Wisconsin; that as the plaintiff, Kathleen A. Schabelski, was attempting to sit down on a chair of a ski lift prior to the chair escalating in height, Mrs. Schabelski became stuck and was unable to secure herself on or in the chair; that the plaintiffs screamed at the ski lift operator, the defendant, Alex James Fuhrman, to stop the ski lift prior to and while the ski lift continued to carry Mrs. Schabelski upwards (while she was not properly secured on or in the chair), however Mr. Fuhrman failed to timely stop the lift, causing the plaintiff, Kathleen A. Schabelski, to fall from a high distance to the ground, sustaining severe personal injuries as hereinafter set forth.

9. That as a result of the described incident and the negligence of the defendant, Alex James Fuhrman, as hereinafter alleged, the plaintiff, Kathleen A. Schabelski, sustained permanent injuries and damages including past and future pain, suffering, disability, and loss of enjoyment of life; past and future medical expenses; and other compensable injuries and damages, all to her damage in an amount to be determined at a trial of this matter.

Next, the Complaint's first claim of negligence alleges:

11. That at all times material hereto, the defendant, Alex James Fuhrman, was negligent in that he, among other things, failed to stop the subject ski lift in a timely manner; failed to exercise a proper lookout for Mrs. Schabelski on the ski lift; failed to have proper management and control of the ski lift; and/or otherwise failed to exercise ordinary care for the

safety of the plaintiff, Kathleen A. Schabelski, thereby creating a foreseeable risk of harm to her; and was otherwise negligent.

12. That the negligence of the defendant, Alex James Fuhrman, as alleged, was a cause of the injuries and damages sustained by the plaintiffs as set forth herein.

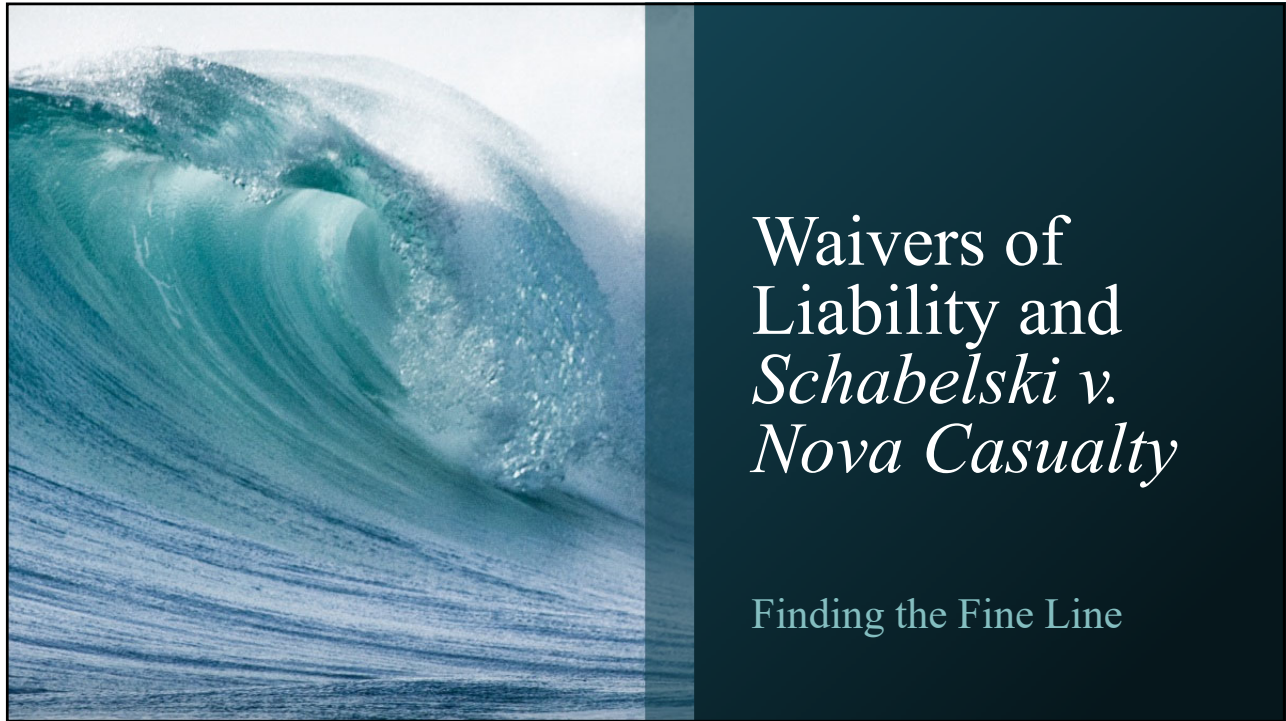
Then, the Complaint's second claim of vicarious liability alleges:

14. That on information and belief, at all times material hereto, the defendant, Alex James Fuhrman, was an employee/agent of the defendant, Friedl Ski Ventures d/b/a Sunburst, and was operating the subject ski lift while in the scope of his employment/agency with said defendant.

15. That the defendant, Friedl Ski Ventures d/b/a Sunburst, is vicariously liable for the negligent acts of the defendant, Alex James Fuhrman, as alleged above.

The third claim simply alleged loss of society, companionship, and consortium for Mr. Schabelski and contains no other substantive allegations. All of the alleged negligent acts, even including those presented in opposition to summary judgment, are "with respect to" the chairlift operations, loading, riding, or unloading operations and are therefore covered by the release.

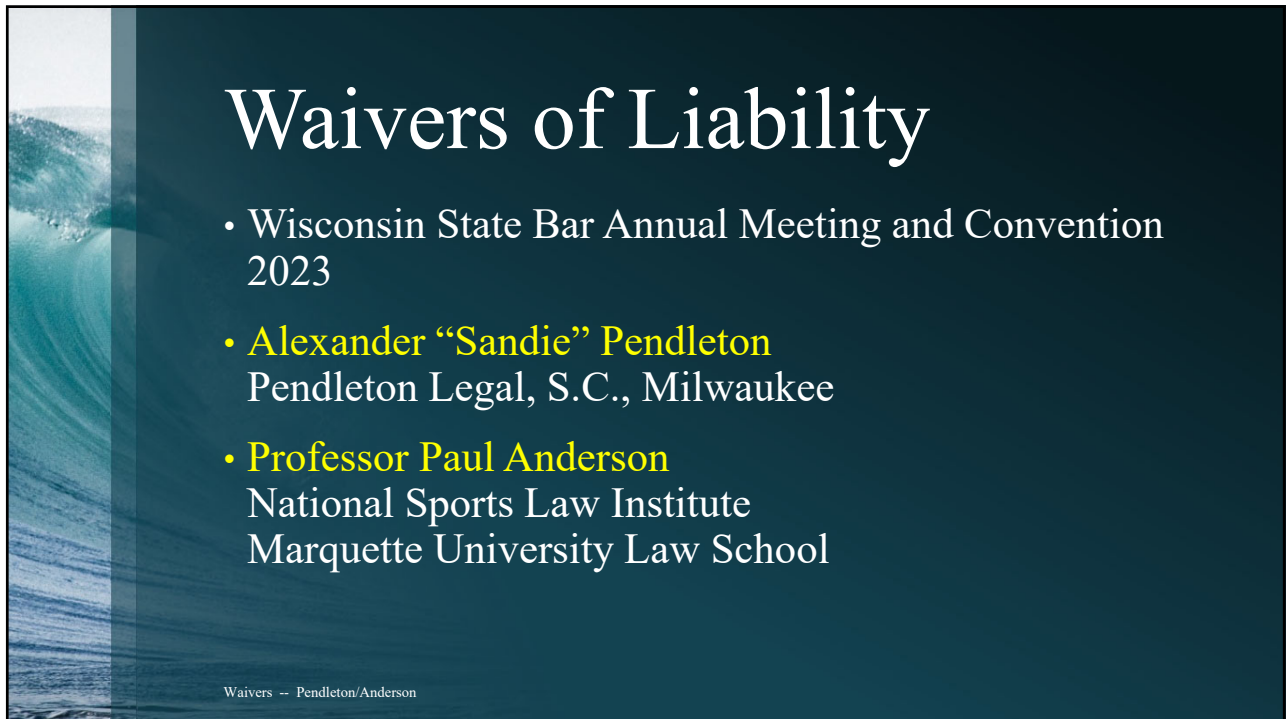
- 2 This is dependent, of course, on whether the release otherwise applied.
- 3 Although the release includes "unloading *operations*"—not just "unloading"—the majority opinion defines only "unloading" rather than "unloading operations." In addition, its attempt to distinguish chairlift operations from chairlift evacuation is immaterial. Even if chairlift *evacuation* could be carved out from chairlift *operations* and unloading *operations*, the Sunburst owner's uncontroverted deposition testimony shows that evacuation occurred only when the chairlift was not operational, which was not the case here.



# Waivers of Liability and *Schabelski v. Nova Casualty*

Finding the Fine Line

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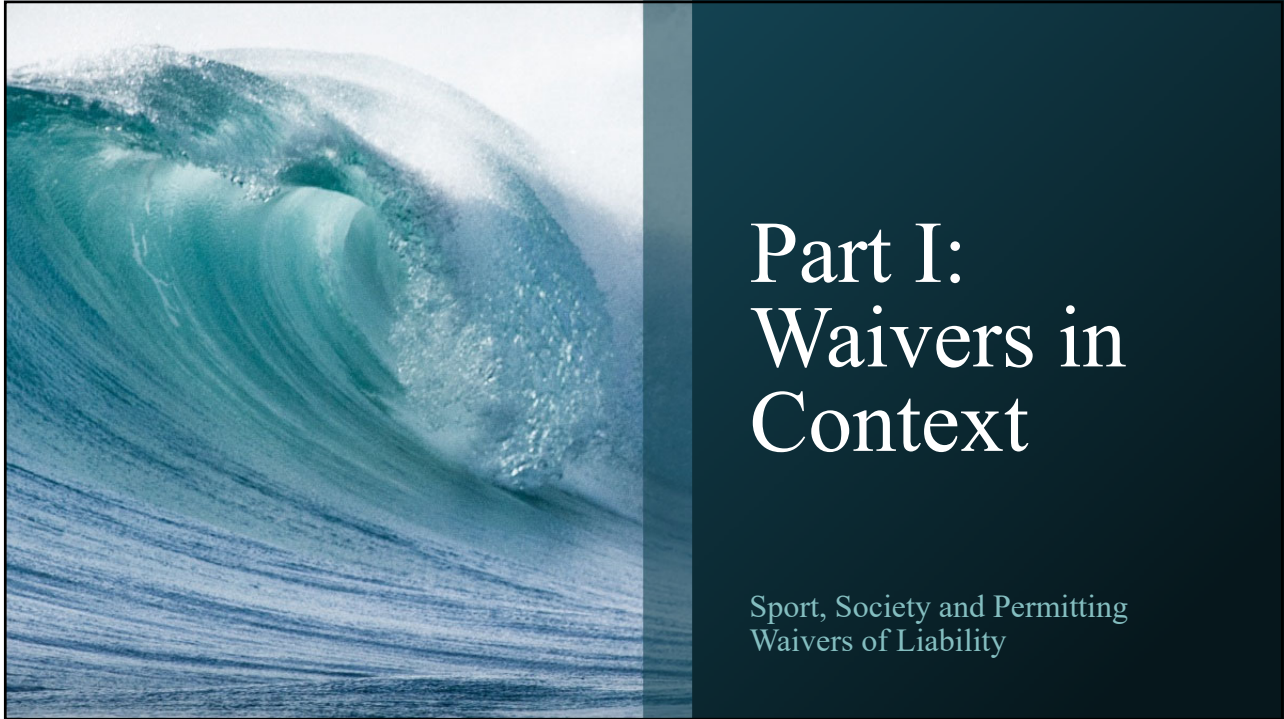


## Waivers of Liability

- Wisconsin State Bar Annual Meeting and Convention 2023
- **Alexander “Sandie” Pendleton**  
Pendleton Legal, S.C., Milwaukee
- **Professor Paul Anderson**  
National Sports Law Institute  
Marquette University Law School

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# Part I: Waivers in Context

Sport, Society and Permitting  
Waivers of Liability

3



## The great policy debate regarding waivers:

- Are waivers worthwhile for our society, so as to ensure ample and affordable sport, fitness and recreational (“SFR”) opportunities?

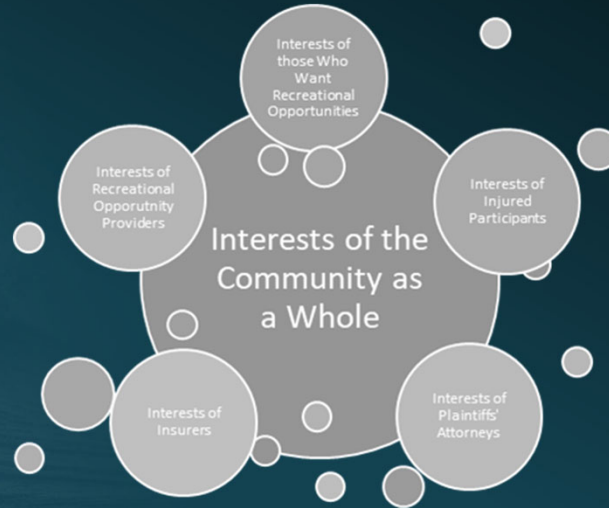
-- or --

- Would our society be better off if all waivers in an SFR context are unenforceable?

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## Waiver policy is the result of the competing desires of various interest groups



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## Theory: the result if waivers are permitted and enforced

SFR Opportunity Availability	↑
The Cost of SFR Opportunities	↓
Participation in SFR Activities	↑
Deterrence of Negligent Behavior by SFR Providers	↓
The Number of Uncompensated Victims of Negligence	↑

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## Why Does Society Care if there are Ample and Affordable SFR Activities?

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### America's robust tort system v. its robust sports and recreation culture

- Claims about the U.S. tort system (U.S. Chamber of Commerce):
  - The U.S. tort system is more plaintiff friendly than other systems
  - Costs and compensation of the U.S. Tort system (excluding auto and med mal): \$229B
  - Equal to 1.1% of U.S. GDP
  - Average cost per U.S. household: \$3,621
  - The inefficiency of the U.S. tort system: only 53% of amounts paid in the tort system goes to claimants/victims (the rest goes to legal fees, claim costs and other expenses)

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## “Follow the Money”

Ski resorts, snowmobile trails, recreational trails, races-of-all-types, water parks, hunting, etc., create the economic lifeblood that keeps alive many rural Wisconsin communities

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## The size of the U.S. SFR industry (excluding professional sports)

- Exact statistics are difficult to come by
- If one focuses on the size of just the outdoor recreation industry economy:
  - In the U.S., outdoor recreation accounts for 2.0% of GDP, and about 4.3 million jobs.
  - In Wisconsin, outdoor recreation accounts for 2.7% of GDP, and about 90,000 jobs.
  - It is estimated that 95% of Wisconsinites participate in some type of outdoor recreation each year.

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# SFR activities as one means to address significant individual health and societal problems/risks

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## Society allows recreational activities that involve a risk of significant injury: why?

- Examples: organized auto racing, parachute jumping, bungee jumping, boxing, etc.
- Limited government v. the “nanny state”
- Prohibition vs. regulation

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## SFR activities as a means to teach certain life skills and coping skills:

- *Courage*
- *Risk taking*
- *Grit and persistence*
- *Assertiveness and aggressiveness*
- *Character*
- *Teamwork and selflessness*

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## Sports as a means to promote community cohesion and pride

- A high school state championship
- An MATC national championship
- A university team's successful season
- Ariens Nordic Center, in Brillion


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## SFR activities as a means to overcome inequities and discrimination

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## Sports as a means of undermining racial, religious and ethnic prejudice

- The societal implications of prominent minority athletes in the U.S.
  - Jim Johnson, Jim Thorpe, Joe Louis, Hank Greenberg, Jessie Owens, Jackie Robinson
  - College sports teams breaking the color line in the 1950s and 1960s
- Sport and apartheid in South Africa

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## Sports as a means of undermining gender discrimination or prejudice

- The societal implications of prominent female athletes in the U.S., and robust participation rights
  - Babe Didrikson Zaharias; Billy Jean King
  - Title IX in the U.S.
- The impact of women in the Olympics
- The impact of female athletes in socially conservative cultures

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## Sports as a means of undermining LGBTQ+ discrimination or prejudice

- Bill Tilden, Bruce Jenner, Tom Waddell, Martina Navratilova, Greg Louganis
- The Gay Games (since 1982)
- The impact of successful Gay athletes in socially conservative cultures

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## Mixed-gender team sports as a means to promote gender equity



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(Picture by 2021 Getty Images)

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## Sure, there are many benefits associated with SFR activities and opportunities

But can't we still obtain those multiple benefits, while still ensuring those injured by the negligence of SFR opportunity providers receive compensation for their pain, suffering, medical bills, and lost wages?

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## Opportunities for empirical research regarding waiver policies, and challenges

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# The Theory: If Waivers Are Prohibited, Chilling Effect, and the Loss of Individual and Societal Benefits

What providers say.

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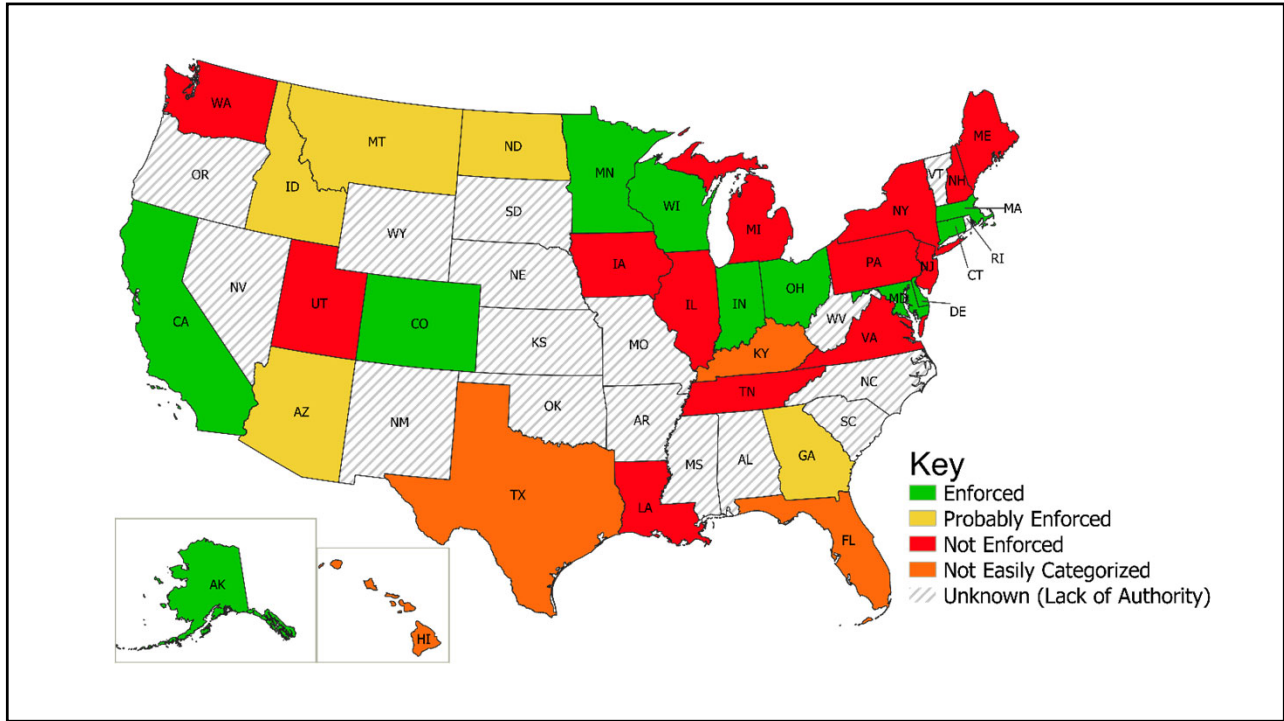
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# The Theory Advanced by Providers Is Not Universally Accepted

Wide variation as to how individual states treat waivers.

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Can (and should) a distinction be made between “Big SFR Operations,” and “the Little Guys”?

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## The “Florida Approach”

- Courts will not enforce *parental* waivers used by for-profit businesses.
- Courts will enforce *parental* waivers used by non-profits and community organizations.
- Rationale: If the “Little Guys” cannot use waivers, that will result in volunteers, non-profits, and community organizations deciding “it’s just not worth it” or “the risks are just too great” to be involved in providing SFR opportunities, which would decrease the availability of such opportunities, to the detriment of society as a whole.

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## Part II: Wisconsin Waiver Law Standards Before *Schabelski v. Nova Casualty*

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## Disclaimer

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## Key Pre-*Schabelski* Wisconsin Waiver Decisions:

- *Atkins v. Swimwest Family Fitness Center* (Wis. 2005)
- *Roberts v. T.H.E. Insurance Co.* (Wis. 2016)

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# The Two Step Process

- Step 1: Is the waiver broad enough?
- Step 2: Public policy requirements or pitfalls

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## Part III: *Schabelski v. Nova Casualty*

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*Schabelski v. Nova Casualty* (Wis. Ct. App. 2022):

- The facts
- The opinions



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Drafting waivers post-  
*Schabelski*

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## Using (or Approving) a Release Prepared by a National Organization



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## Failing to Handle the Issue of Minor Participants Correctly



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Failing to Address the Issue of Bargaining appropriately.



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Failing to advise that waivers are just one component of an overall risk management plan.



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## Advanced Enterprise Liability Risk Management

*Elements, Environment, Evaluation, Improvement*



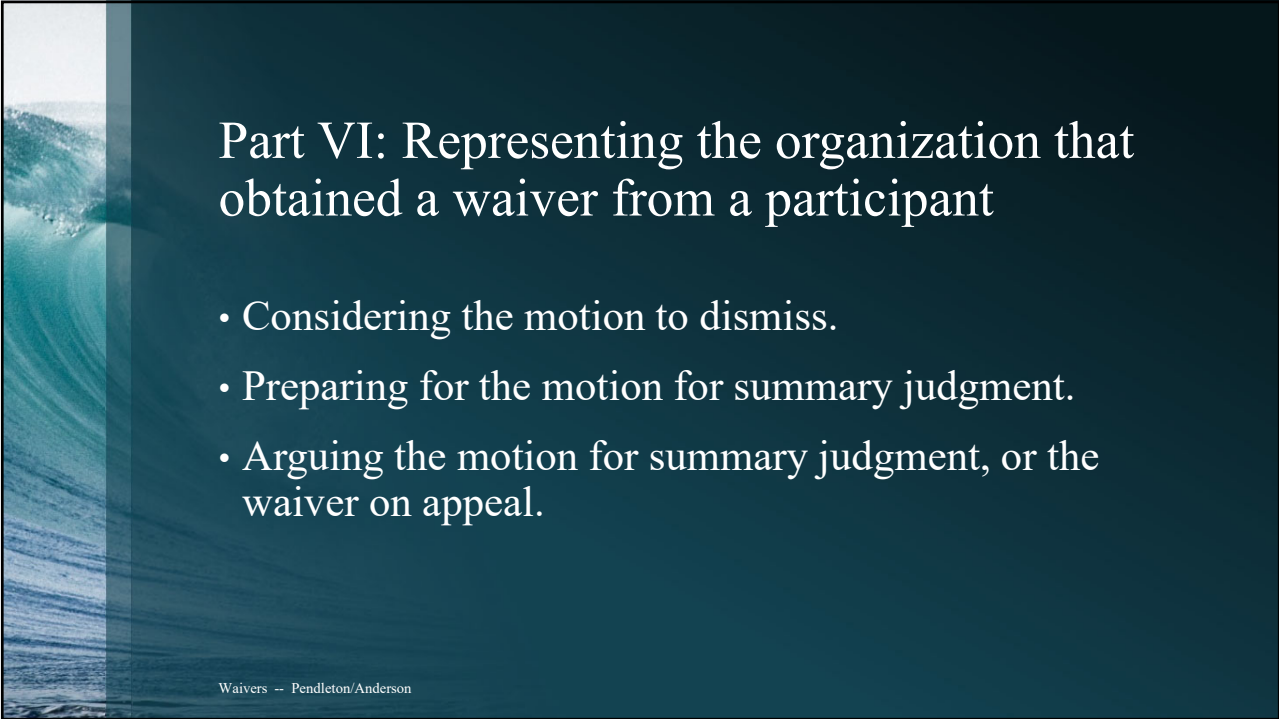
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## Part V: Representing the plaintiff who signed a waiver:

- Reviewing the waiver text critically.
- Reviewing the deployment of the text critically.
- Investigating all facts surrounding the presentation and signing of the waiver.
- Negotiating with an insurer when a waiver is involved.

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## Part VI: Representing the organization that obtained a waiver from a participant

- Considering the motion to dismiss.
- Preparing for the motion for summary judgment.
- Arguing the motion for summary judgment, or the waiver on appeal.

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## Some Closing Thoughts

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# Does the organization really need an enforceable waiver agreement?

What could possibly go wrong?

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# Professional liability: are you sufficiently versed in waiver law to review or draft a waiver agreement?

What could possibly go wrong?

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# Questions

- **Alexander “Sandie” Pendleton**  
Pendleton Legal, S.C., Milwaukee
- **Professor Paul Anderson**  
National Sports Law Institute  
Marquette University Law School

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