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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Ramon J. Maestas  
Chief Clerk

4 **No. A-1-CA-40098**

5 **TEAL PECK, as next friend for A.Z.,**  
6 **a minor,**

7           Plaintiff-Appellant,

8 v.

9 **G-FORCE GYMNASTICS ACADEMY, LLC**  
10 **and LISA GRAVELLE,**

11           Defendants-Appellees.

12 **APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY**  
13 **Christopher G. Perez, District Court Judge**

14 Law Offices of Marshall J. Ray, LLC  
15 Marshall J. Ray  
16 Albuquerque, NM

17 for Appellant

18 Resnick & Louis, P.C.  
19 Harriett J. Hickman  
20 Albuquerque, NM

21 for Appellees

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} We are asked to decide whether a waiver of liability for future negligence,  
4 entered into by Plaintiff Teal Peck (Parent), on behalf of her minor child, A.Z.  
5 (Child), is enforceable by Defendants G-Force Gymnastics Academy, LLC and its  
6 owner, Lisa Gravelle (collectively, G-Force). G-Force is a business offering  
7 gymnastics facilities, training, and competition to children in Albuquerque, New  
8 Mexico. Child, a student at G-Force, suffered a serious ankle injury during vault  
9 practice. Parent filed a complaint in district court on Child’s behalf seeking damages  
10 for the injury to Child allegedly caused by G-Force’s negligent placement of  
11 gymnastics equipment. G-Force moved for summary judgment claiming that the  
12 waiver of liability for negligence in its contract for services to Child, signed by  
13 Parent, barred Parent’s action. Applying the analysis adopted by our Supreme Court  
14 in *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, 134 N.M. 341, 76 P.3d 1098,  
15 the district court found that the contract provision waiving G-Force’s liability for  
16 negligence “is clear and unambiguous to a layperson” and that under the factors  
17 articulated by the California Supreme Court in *Tunkl v. Regents of University of*  
18 *California*, 383 P.2d 441 (Cal. 1963) (en banc) and adopted by this Court in *Lynch*  
19 *v. Santa Fe National Bank*, 1981-NMCA-055, 97 N.M. 554, 627 P.2d 1247, New

1 Mexico public policy does not prohibit a parent from waiving liability for negligence  
2 on behalf of their minor child in a contract for recreational services. We affirm.

3 **BACKGROUND**

4 {2} Child was enrolled at G-Force starting in 2013, when she was seven years old.  
5 Child trained in gymnastics at G-Force and competed as a member of G-Force’s  
6 gymnastics team on the vault, uneven parallel bars, balance beam, and floor  
7 categories.

8 {3} On November 3, 2016, when Child was ten years old and had been a student  
9 of gymnastics at G-Force for three years, Parent electronically signed a contract  
10 enrolling Child in an advanced gymnastics training and competition program at G-  
11 Force. The contract included terms of payment and the waiver of liability at issue in  
12 this case. The waiver of liability consists of the following relevant paragraphs:

13 **WAIVER/RELEASE**

14 G-Force Gymnastics Academy or the coaching staff will not be held  
15 liable or financially responsible for accidental injury of any nature. The  
16 undersigned hereby remise, release, and forever discharge G-Force. . . ,  
17 administrators and employees from all actions, causes of action, claims  
18 and demands whatsoever, whether or not well founded in fact or in law,  
19 and from all suits.

20 . . . .

21 **RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF**  
22 **RISK, AND INDEMNITY AGREEMENT (“AGREEMENT”)**

23 In consideration of participating in activities at G-Force . . . , I represent  
24 that I understand the nature of these activities and that I am qualified,  
25 in good health, and in proper physical condition to participate in such  
26 Activity. I acknowledge that if I believe event conditions are unsafe, I

1 will immediately discontinue participation in the activity. I fully  
2 understand that these activities involves risks of serious bodily injury,  
3 including permanent disability, paralysis and death, which may be  
4 caused by my own actions, or inactions, those of others participating in  
5 the event, the conditions in which the event takes place, or the  
6 negligence of the “releas[e]es” named below; and that there may be  
7 other risks either not known to me or not readily foreseeable at this  
8 time; and I fully accept and assume all such risks and all responsibility  
9 for losses, cost, and damages I incur as a result of my participation in  
10 these activities. I hereby release, discharge, and covenant not to sue G-  
11 Force . . . , its respective administrators, directors, agents, officers,  
12 volunteers, and employees, other participants, any sponsors,  
13 advertisers, and, if applicable, owners and lessors of premises on which  
14 the Activity takes place, (each considered one of the “RELEASEES”  
15 herein) from all liability, claims, demands, losses, or damages, on my  
16 account caused or alleged to be caused in whole or in part by the  
17 negligence of the “releasees” or otherwise, including negligent rescue  
18 operations and future agree that if, despite this release, waiver of  
19 liability, and assumption of risk, I or anyone on my behalf, makes a  
20 claim against any of the Releasees, I will indemnify, save, and hold  
21 harmless each of the Releasees from any loss, liability, damage, or cost,  
22 which may incur as the result of such claim.

23 I have read the RELEASE AND WAIVER OF LIABILITY,  
24 ASSUMPTION OF RISK, AND INDEMNITY AGREEMENT,  
25 understand that I have given up substantial rights by signing it and have  
26 signed it freely and without any inducement or assurance of any nature  
27 and intend it to be a complete and unconditional release of all liability  
28 to the greatest extend allowed by law and agree that if any portion of  
29 this agreement is held to be invalid the balance, notwithstanding, shall  
30 continue in full force and effect.

31 **PARENTAL CONSENT**

32 AND I, the minor’s parent and/or legal guardian, understand the nature  
33 of the above referenced activities and the [m]inor’s experience and  
34 capabilities and believe the minor to be qualified to participate in such  
35 activity. I hereby Release, discharge, covenant not to sue and AGREE  
36 TO INDEMNIFY AND SAVE AND HOLD HARMLESS each of the  
37 Releasees from all liability, claims, demands, losses or damages on the  
38 minor’s account caused or alleged to have been caused in whole or in

1 part by the negligence of the Releasees or otherwise, including  
2 negligent rescue operations, and further agree that if, despite the  
3 release, I, the minor, or anyone on the minor's behalf makes a claim  
4 against any of the above Releasees, I WILL INDEMNIFY, SAVE AND  
5 HOLD HARMLESS each of the Releasees from any litigation  
6 expenses, attorney fees, loss liability, damage, or cost any Releasees  
7 may incur as the result of any such claim.<sup>1</sup>

8 {4} On December 21, 2018, Child, who was then twelve years old, was seriously  
9 injured during vault practice at G-Force. Plaintiff filed a complaint against G-Force  
10 alleging that on the day of Child's injury, G-Force had "rearranged the gymnastics  
11 academy, including moving the vaults, foam pit, and mats" and that G-Force staff  
12 had negligently moved the vaults "unreasonably close to each other." The complaint  
13 alleges that the negligent placement of the vaults caused Child's right foot to hit a  
14 mat instead of the protective foam in the landing pit as she was completing a vault,  
15 causing a serious ankle injury. In its answer, G-Force denies the allegation that its  
16 staff was negligent in the set-up of the equipment, or that its negligence of its  
17 employees caused Child's injury.

18 {5} Prior to trial, G-Force filed a motion for summary judgment seeking dismissal  
19 of the complaint based on Parent's waiver of liability for negligently-caused injuries  
20 to Child. G-Force claimed that "[Parent] signed an enforceable [w]aiver and  
21 explicitly agreed that she would release, discharge and covenant not to sue [G-Force]

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<sup>1</sup>The contract includes an indemnity provision. Neither party has raised the enforceability of this provision in the district court or in this Court. We, therefore, do not consider that issue.

1 even if [Child] suffered injuries alleged to be caused in whole or in part by [G-  
2 Force’s] negligence.” G-Force argued that New Mexico recognizes that a party to a  
3 contract may explicitly assume risk, and that “[r]eleases of liability will generally be  
4 enforced,” citing *Berlangieri*, 2003-NMSC-024, ¶ 17. Both parties focused their  
5 arguments on *Berlangieri*, and the factors adopted by our Supreme Court to  
6 determine when an exception to the general rule that waivers of liability for  
7 negligence will be enforced applies.

8 {6} The district court, as requested by both parties, applied the two-step process  
9 adopted by *Berlangieri*, first determining that the release was sufficiently clear to  
10 inform a layperson that they were giving up their right to sue for any injury to Child,  
11 including an injury caused by G-Force’s negligence. The district court rejected  
12 Parent’s argument that the agreement’s description of the risks of gymnastics was  
13 insufficient to put Parent on notice of the risks she was accepting on Child’s behalf,  
14 and concluded that the *Tunkl* factors “weigh in favor of Defendants.” The district  
15 court also rejected Parent’s argument that, rather than relying on the *Tunkl* factors,  
16 the court should adopt the position taken by the majority of the courts of other states:  
17 holding that allowing a parent to waive liability for negligence on behalf of their  
18 child violates that state’s public policy protecting children. Concluding that the  
19 waiver of liability for negligence is enforceable, the district court granted G-Force’s  
20 motion for summary judgment and dismissed with prejudice. Parent appeals.

1 **DISCUSSION**

2 **I. Standard of Review**

3 {7} “Summary judgment is appropriate when there are no genuine issues of  
4 material fact and the movant is entitled to judgment as a matter of law.” *Self v. United*  
5 *Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. The facts  
6 here are undisputed and only a legal interpretation of those facts remains for this  
7 Court on appeal. We, therefore, apply a de novo standard of review. *Headley v.*  
8 *Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 5, 137 N.M. 339, 110 P.3d 1076.

9 **II. The Governing Principles of Law**

10 {8} We first address the principles of law applicable to the question of whether  
11 waivers of liability for negligence will be enforced in New Mexico. The parties and  
12 the district court have rightly turned to our Supreme Court’s decision in *Berlangieri*,  
13 both because it is the most recent review of New Mexico law concerning waivers of  
14 liability and because the waiver addressed by *Berlangieri* was for physical injuries  
15 negligently caused by a recreational activity, in that case, horseback riding. Our  
16 Supreme Court concluded that under New Mexico law, the waiver of liability for  
17 negligence was unenforceable based on New Mexico public policy. *Berlangieri*,  
18 2003-NMSC-024, ¶ 53. Notably, however, our Supreme Court in *Berlangieri*  
19 refused to approve the broad limitation on all waivers of liability for negligently-  
20 caused physical injury—the approach then taken by this Court. Rejecting this

1 Court’s assessment of the public interest as heavily weighted toward tort principles  
2 of protection from injury, and encouraging the exercise of reasonable care, *see id.*  
3 ¶¶ 20-22, our Supreme Court instead concluded that New Mexico public policy  
4 weighs equally the public interest in encouraging reasonable care under our tort law  
5 and freedom to contract under our common law of contracts. *Id.* ¶ 20 (holding that  
6 New Mexico’s policy of freedom to contract is “no less important to society as a  
7 whole and the common good than those policies that undergird the law of tort”). Our  
8 Supreme Court ultimately concluded that, in the absence of a clear policy derived  
9 from New Mexico common law, any policy broadly invalidating waivers of liability  
10 for negligence must come from our Legislature. *Id.* ¶ 15.

11 ¶ Turning then to look specifically at New Mexico precedent addressing  
12 waivers of liability, our Supreme Court noted that like most jurisdictions, New  
13 Mexico had adopted the Restatement (Second) of Torts § 496(B) (1965), which  
14 states that “[a] plaintiff who by contract or otherwise expressly agrees to accept a  
15 risk of harm arising from the defendant’s negligent or reckless conduct cannot  
16 recover for such harm, unless the agreement is invalid as contrary to public policy.”  
17 *Berlangieri*, 2003-NMSC-024, ¶ 18 (internal quotation marks and citation omitted).  
18 Noting that the then recently adopted Restatement (Third) of Torts: Apportionment  
19 Liability § 2 (2000), had not modified this principle, *see Berlangieri*, 2003-NMSC-



1 024, ¶ 18, the Court reaffirmed the general rule in New Mexico that “liability  
2 releases for personal injury may be enforced in limited circumstances.” *Id.* ¶ 27.

3 {10} Our Supreme Court then turned to discuss the standards that should be applied  
4 by New Mexico courts to determine if, under the circumstances of a given case, an  
5 exculpatory agreement is unenforceable. Looking to this Court’s decision in *Lynch*,  
6 1981-NMCA-055, ¶ 16, our Supreme Court identifies as the first relevant  
7 consideration that “exculpatory clauses are construed strictly against the drafter.”  
8 *Berlangieri*, 2003-NMCA-024, ¶ 28. Strict construction, the Court explains, is  
9 necessary because a waiver must be voluntary to be enforceable, and a plaintiff can  
10 assume a risk voluntarily only if the terms of the agreement are clear and  
11 unequivocal, such that they can be understood by someone who has no legal training.  
12 *Id.* ¶¶ 29-31. The contract must inform the patron of the types of risks involved,  
13 disclosing any hidden risks, and must not rely exclusively on legal terms to explain  
14 the nature of the rights being waived. *Id.* The Court notes that in assessing the clarity  
15 of a waiver, “[c]ontext is important; the words surrounding the portion being  
16 construed and the circumstances surrounding the agreement are relevant.” *Id.* ¶ 33.  
17 In addition to the language of the release itself, and the surrounding circumstances,  
18 “courts look to the placement of that language within the document to determine  
19 whether it is conspicuous enough.” *Id.* ¶ 36.

1 {11} If the waiver clause is sufficiently clear and unambiguous, then whether the  
2 waiver is enforceable turns on public policy. Again relying on this Court’s decision  
3 in *Lynch*, 1981-NMCA-055, ¶ 20, our Supreme Court adopted the list of factors in  
4 *Tunkl* to guide our courts in determining whether public policy should operate to  
5 void a waiver. *Berlangieri*, 2003-NMSC-024, ¶ 39. *Tunkl* provides that a waiver or  
6 release of liability is invalid when the transaction “exhibits some or all of the  
7 following characteristics”:

8 [1] It concerns a business of a type generally thought suitable for public  
9 regulation.

10 [2] The party seeking exculpation is engaged in performing a service of  
11 great importance to the public, which is often a matter of practical  
12 necessity for some members of the public.

13 [3] The party holds [themselves] out as willing to perform this service  
14 for any member of the public who seeks it, or at least for any member  
15 coming within certain established standards.

16 [4] As a result of the essential nature of the service, in the economic  
17 setting of the transaction, the party invoking exculpation possesses a  
18 decisive advantage of bargaining strength against any member of the  
19 public who seeks [their] services.

20 [5] In exercising a superior bargaining power the party confronts the  
21 public with a standardized adhesion contract of exculpation, and makes  
22 no provision whereby a purchaser may pay reasonable fees and obtain  
23 protection against negligence.

24 [6] Finally, as a result of the transaction, the person or property of the  
25 purchaser is placed under the control of the seller, subject to the risk of  
26 carelessness by the seller or [their] agents.

1 *Berlangieri*, 2003-NMSC-024, ¶ 39 (quoting *Tunkl*, 383 P.2d at 445-46 (footnotes  
2 omitted)). In applying these factors, “a simple balancing test is [not] appropriate.”  
3 *Id.* These six factors provide only helpful guidance “in determining the larger  
4 question of whether enforcement of the release would be unjust.” *Id.*

5 {12} We now apply the principles identified by our Supreme Court in *Berlangieri*  
6 to the G-Force waiver, first determining whether this waiver is clear and  
7 unambiguous, and then considering each of the *Tunkl* factors to decide whether  
8 enforcement of this waiver “would be unjust” as a matter of New Mexico public  
9 policy. 2003-NMSC-024, ¶ 39.

10 **III. The Agreement Clearly and Unambiguously Waives the Liability of G-**  
11 **Force for Negligence**

12 {13} The district court found that the language of the agreement, even when strictly  
13 construed, met the test established by *Berlangieri*—that the waiver of liability for  
14 negligence by G-Force was stated in a way that was understandable to a layperson.  
15 In particular the court found that a layperson would understand that they were giving  
16 up their rights to sue G-Force for any reason, including negligence. We agree with  
17 the district court’s analysis.

18 {14} Although the agreement is overly long and repetitive, it provides, under the  
19 bolded heading, “**Waiver/Release**” at the top of the document, that Parent agrees  
20 that G-Force “will not be held liable or financially responsible for accidental injury  
21 of any nature.” Although this statement, standing alone, might not be sufficiently

1 clear to withstand strict construction, under the bolded heading, “**Parental**  
2 **Consent**,” at the bottom of the document, Parent is asked to agree to “[r]elease,  
3 discharge, and covenant not to sue [G-Force] . . . from all liability, claims, demands,  
4 losses or damages . . . caused in whole or in part by the negligence of the Releasees  
5 or otherwise, including negligent rescue operations.” The inclusion of the agreement  
6 “not to sue [G-Force]” followed by the specific mention of liability or damages  
7 “caused in whole or in part by the negligence of the Releasees . . . , including  
8 negligent rescue operations,” is sufficient to alert a reasonable parent that they are  
9 giving up the right to sue G-Force specifically for negligence. This language does  
10 not create the sort of confusion found in some other waivers about whether suit is  
11 being waived only if an injury is due to the inherent risks of the activity or sport.  
12 Here, the word “negligence” with reference to G-Force is specifically included in  
13 the waiver. Like the language in the release reviewed in *Berlangieri*, this language  
14 has only one reasonable interpretation: it is an agreement not to sue G-Force for  
15 injuries to Child caused by the negligence of G-Force. We conclude that the  
16 agreement adequately expresses the intent of the parties that Parent will not hold G-  
17 Force liable for its negligent acts.

18 {15} Parent claims that, even if the language of the agreement waiving her right to  
19 sue G-Force for negligence is clear and understandable, the agreement should have  
20 specifically described all of the risks of injury attributable to gymnastics. The

1 agreement describes the risks of injury by focusing on the demands of the sport of  
2 gymnastics on the body: “[a]ny activity which involves motion, inversion, height,  
3 contact, speed, and rotation of the human body (such as Gymnastics) has the  
4 potential for severe accidental injury.” In the next paragraph, the agreement states  
5 that “these activities involve[] risks of serious bodily injury, including permanent  
6 disability, paralysis and death.”

7 {16} We are not persuaded that these descriptions of the risks associated with  
8 gymnastics need to be any more specific to put Parent on notice that Child could  
9 suffer an ankle injury when landing from a vault, an activity which involves all of  
10 the body movements listed in the general description of the risk of injury from  
11 gymnastics—height, inversion, rotation in the air, speed, and contact when landing.  
12 Of the many possible injuries from gymnastics, an injury to an ankle upon landing  
13 from a vault is a sort of injury that should be known and potentially expected given  
14 the nature of the training and competition provided by G-Force.

15 {17} Finally, we determine that the release was conspicuous enough in the short,  
16 one-page document to afford fair notice of its existence. The document title itself, at  
17 the top of the page contains both the term “release” and “waiver.” The subheadings  
18 also contain the terms “release” and “waiver,” as well as the term “consent.” Indeed,  
19 with the exception of one paragraph concerning terms of payment, the entire  
20 document concerns waiver of liability. Although the typeface on the printed exhibit

1 is significantly smaller than the 14-point typeface used by this Court in this opinion,  
2 the original document was an electronic document, which was read and signed by  
3 Parent electronically. We recognize that the size of the print is readily adjustable on  
4 a computer, and, therefore, do not find the typeface to be a significant impediment  
5 to Parent’s review of the terms of the agreement.

6 **IV. New Mexico Public Policy Allows a Parent to Waive Liability for**  
7 **Negligence on Behalf of Their Child**

8 {18} We turn now to examine whether a waiver of liability for the negligence of a  
9 recreational facility signed by a parent on behalf of their minor child “is affected  
10 with a public interest such that it is unenforceable as contrary to public policy.”  
11 *Berlangieri*, 2003-NMSC-024, ¶ 38. This requires us to apply the six *Tunkl* factors  
12 to “determine whether public policy should operate to void the [waiver].” *Id.* ¶ 39.  
13 In applying these factors, “a simple balancing test is [not] appropriate.” *Id.* Our  
14 Supreme Court cautions that these six factors provide only helpful guidance “in  
15 determining the larger question of whether enforcement of the release would be  
16 unjust.” *Id.*

17 {19} The first *Tunkl* factor (factor one) looks at legislation, and rules or regulations  
18 that either directly set applicable policy or address issues from which public policy  
19 can be inferred. The next four factors (factors two through five) focus on whether  
20 the contract is procedurally unconscionable—a contract of adhesion—making the  
21 waiver of liability not truly a voluntary agreement between the parties. The final

1 factor (factor six) looks to whether the facility exercises such a degree of control  
2 over person or property that it would be substantively unfair or unconscionable to  
3 allow a customer to waive the facility’s liability.

4 {20} Parent argues that this Court should adopt what is described as the majority  
5 view of the courts of other states that have considered the question of a parent’s  
6 authority to waive liability for negligence when their child engages in a recreational  
7 activity or sport. We understand this argument to be addressed to the first *Tunkl*  
8 factor—legislation, rules, or regulations that set public policy. Parent argues that  
9 *Tunkl* factors three, five, and six—addressing aspects of procedural and substantive  
10 unconscionability—also support a conclusion that the G-Force waiver violates New  
11 Mexico public policy.

12 {21} We construe *Berlangieri* to require this Court to consider each of the *Tunkl*  
13 factors that apply to the circumstances here, considering briefly, as well, those  
14 factors that do not apply, before making the difficult decision about whether any  
15 single factor or combination of factors create an exception to the general rule in New  
16 Mexico that waivers of liability for negligence are enforceable.

17 **A. *Tunkl* Factor One: Legislation and Public Regulation**

18 {22} We begin with the first *Tunkl* factor: whether the transaction “concerns a  
19 business of a type generally thought suitable for public regulation.” *Berlangieri*,  
20 2003-NMSC-024, ¶ 39 (internal quotation marks and citation omitted). In

1 *Berlangieri*, our Supreme Court explored, under the auspices of this factor, New  
2 Mexico legislation, rules and regulations that addressed the liability of lodges that  
3 offer horseback riding to guests or customers. The Court relied on the Equine  
4 Liability Act, NMSA 1978, §§ 42-13-1 to -5 (1993, as amended through 1995),  
5 which addresses the liability for physical injury of facilities offering horseback  
6 riding to the public. *See Berlangieri*, 2003-NMSC-024, ¶ 12. Although the Court  
7 found that the terms of the Equine Liability Act did not directly resolve the question  
8 before the Court about whether a waiver of liability for the negligence of a stable is  
9 enforceable, the Court found the Act relevant to its assessment of New Mexico’s  
10 public policy. *Id.* (rejecting the view that the Equine Liability Act is not a relevant  
11 part of the Court’s assessment of New Mexico public policy, even though it did not  
12 directly resolve the question before the Court). The Court found that the legislative  
13 intent of the Equine Liability Act “expresses a policy that equine operators *should*  
14 not be held liable” for their own negligence, *id.* ¶ 42, while relieving operators from  
15 liability for injuries caused by equine behavior, over which the operators have no  
16 control. The policy expressed by the Legislature in the Equine Liability Act  
17 ultimately was found to “weigh[] heavily,” together with other applicable *Tunkl*  
18 factors, in the Court’s determination that the lodge’s waiver of liability for  
19 negligence should not be enforced. *Id.* ¶ 52.



1 {23} With our Supreme Court’s approach to the first *Tunkl* factor in mind, we turn  
2 to Parent’s policy argument. Parent begins by acknowledging the absence of a statute  
3 or common law precedent in New Mexico directly addressing the enforceability of  
4 a waiver of negligence entered into by a parent on behalf of a child. Parent then turns  
5 to the opinions of the courts of other states that have directly addressed this issue in  
6 the context of contracts for recreational activities. Parent correctly points out that the  
7 majority of the state courts to consider the issue have found such a waiver  
8 unenforceable, and contends that this Court should adopt the majority position. *See*  
9 *Galloway v. State*, 790 N.W.2d 252, 258 (Iowa 2010) (“Like a clear majority of other  
10 courts deciding such releases are unenforceable, we believe the strong policy in  
11 favor of protecting children must trump any competing interest of parents and  
12 tortfeasors in their freedom to contractually nullify a minor child’s personal injury  
13 claim before an injury occurs.”).

14 {24} Our examination of the cases cited by Parent reveals that the state courts that  
15 have not allowed parents to waive liability on behalf of their minor children have  
16 uniformly relied on state legislation, regulations, rules or longstanding common law  
17 prohibiting parents from agreeing to a settlement for their child in a tort action  
18 without the approval of a court. These cases reason that a parent who does not have  
19 the authority to “unilaterally release a child’s claims *after* a child’s injury,” also  
20 “does not have the authority to release a child’s claims *before* an injury.” *Hawkins*

1 *ex rel. Hawkins v. Peart*, 2001 UT 94, ¶ 13, 37 P.3d 1062, *superseded by statute as*  
2 *stated in Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, 301 P.3d 984. This state  
3 policy requiring judicial approval to settle a child’s claim is the foundation of every  
4 out-of-state case relied on by Parent on appeal. *See, e.g., Miller ex rel. E.M. v. House*  
5 *of Boom Kentucky, LLC*, 575 S.W.3d 656, 662 (Ky. 2019) (holding that “children  
6 deserve as much protection from the improvident compromise of their rights before  
7 an injury occurs as [Kentucky] common law and statutory schemes afford them after  
8 the injury” (alterations, internal quotation marks, and citation omitted)); *Hojnowski*  
9 *ex rel. Hojnowski v. Vans Skate Park*, 901 A.2d 381, 386 (N.J. 2006) (noting that  
10 pursuant to New Jersey statute, a parent could not settle a minor child’s tort claim  
11 without court approval, and holding that the purposes underlying the prohibition  
12 against a parent settling a minor child’s tort claim after a cause of action accrues  
13 apply equally to a prospective waiver of negligence); *Scott ex rel. Scott v. Pac. W.*  
14 *Mountain Resort*, 834 P.2d 6, 11-12 (Wash. 1992) (en banc) (noting that a  
15 Washington statute prohibits a parent from releasing a minor child’s cause of action  
16 after injury, and concluding that “[s]ince a parent generally may not release a child’s  
17 cause of action after injury, it makes little, if any, sense to conclude a parent has the  
18 authority to release a child’s cause of action prior to an injury”).

19 {25} In contrast to these out-of-state cases relied on by Parent, New Mexico does  
20 not have either a statute, common law doctrine, regulation, or court rule that prohibits

1 a parent from settling a civil suit on behalf of their minor child. *See Shelton v. Sloan*,  
2 1999-NMCA-048, ¶ 41, 127 N.M. 92, 977 P.2d 1012. New Mexico has “a statute  
3 requiring judicial approval of settlements on behalf of incapacitated persons,” *id.*;  
4 *see* NMSA 1978, § 38-4-16 (2009), but that statute specifically excludes minors. *See*  
5 NMSA 1978, § 38-4-14 (1989). A parent is permitted to serve as their minor child’s  
6 next friend in a suit to recover property, debt, or damages. *See* NMSA 1978, §§ 38-  
7 4-7 to -13 (1897, as amended through 1975); *see also* Rule 1-017 NMRA. None of  
8 these statutes or Rule 1-017 requires court approval for a next friend to release or  
9 settle a child’s claim. Although this Court has noted that “[w]hen a minor is a party,  
10 . . . it is apparently common practice for the district court to review the settlement to  
11 determine whether it is fair to the child,” *Shelton*, 1999-NMCA-048, ¶ 39, this  
12 informal practice is not the same as a declaration of policy by our Legislature or a  
13 common law doctrine requiring such approval.

14 {26} We also have not found indirect policy support in other areas of New Mexico  
15 law concerning parental authority. New Mexico respects a parent’s authority to make  
16 decisions on behalf of their child with only limited exceptions: where a parent has  
17 been found to be unfit, and therefore, unable to act in the best interests of their child;  
18 or where there is a conflict of interest between the child and the parent; or between  
19 two parents with differing positions. *See Kimbrell v. Kimbrell*, 2014-NMSC-027,  
20 ¶ 18, 331 P.3d 915 (holding that “a parent does not have standing to bring such a

1 lawsuit [on behalf of their child] because the custody court has already determined  
2 that the parent is incapable of acting in the best interests of the child”); *Collins ex*  
3 *rel. Collins v. Tabet*, 1991-NMSC-013, ¶ 28, 111 N.M. 391, 806 P.2d 40 (noting that  
4 parents can no longer represent their child where there is a conflict of interest as to  
5 a settlement). Although it is the policy of our courts to be “especially solicitous of  
6 the rights of juveniles,” *State v. Hunter*, 2001-NMCA-078, ¶ 12, 131 N.M. 76, 33  
7 P.3d 296, and it is often stated that “[a] minor in court is represented not only by the  
8 guardian ad litem or next friend, but by the court itself,” *Shelton*, 1999-NMCA-048,  
9 ¶ 42 (alterations, internal quotation marks, and citation omitted), we do not equate  
10 this policy with the statutes or common law in other states that deny a parent the  
11 authority to settle a claim on their child’s behalf without court approval.

12 **B. *Tunkl* Factors Two through Six**

13 {27} Parent contends that, even if there is no dispositive statute or common law  
14 policy, the remaining *Tunkl* factors, particularly the third, fifth, and sixth factors—  
15 (3) that G-Force offers its services to “any member of the public”; (5) that G-Force  
16 “confronts the public with a standardized adhesion contract of exculpation, and  
17 makes no provision whereby a purchaser may pay additional reasonable fees and  
18 obtain protection against negligence”; and (6) “as a result of the transaction, . . . the  
19 purchaser is placed under the control of the seller, subject to the risk of carelessness

1 by the seller”—make this waiver unenforceable. *Berlangieri*, 2003-NMSC-024, ¶ 39  
2 (internal quotation marks and citation omitted).

3 {28} We note that Parent does not contend that the recreational service provided by  
4 G-Force is “a service of great importance to the public, which is often a matter of  
5 practical necessity for some members of the public,” the second *Tunkl* factor. *Id.*  
6 (internal quotation marks and citation omitted). Only a handful of essential public  
7 services have been identified as of sufficient public importance to justify a  
8 prohibition on a disclaimer of liability for negligence. These include public utilities,  
9 medical care, and in some jurisdictions, residential leases. *See, e.g., Sw. Pub. Serv.*  
10 *Co. v. Artesia Alfalfa Grower’s Ass’n*, 1960-NMSC-052, ¶ 36, 67 N.M. 108, 353  
11 P.2d 62 (holding that a public service corporation, or a public utility such as an  
12 electric company, “cannot validly contract against its liability for negligence in the  
13 performance of a duty of public service, since such stipulation would be in  
14 contravention of public policy”); *Tunkl*, 383 P.2d at 447 (medical care); 2 E. Allan  
15 Farnsworth, *Farnsworth on Contracts* § 5.2, at 14 (2d ed. 1998) (residential leases).  
16 The failure to satisfy the second factor, concerning when a public service is essential,  
17 also rules out the fourth *Tunkl* factor that “[a]s a result of the essential nature of the  
18 service, in the economic setting of the transaction, the party invoking exculpation  
19 possesses a decisive advantage of bargaining strength.” *Berlangieri*, 2003-NMSC-  
20 024, ¶ 39 (internal quotation marks and citation omitted).

1 {29} Recognizing that the second and fourth factors operate together and that  
2 neither is satisfied here, Parent turns to the third factor. The third *Tunkl* factor  
3 addresses unequal bargaining strength when a service is not essential. Parent argues  
4 that the third factor is satisfied because G-Force is a business that is open to the  
5 public without restriction, and that G-Force does not require children to meet criteria  
6 such as being experienced gymnasts before they can enroll in G-Force’s classes.  
7 Although it is undisputed that G-Force enrolls children of all ages and ability levels  
8 in its program, the summary judgment record focuses on Child and does not establish  
9 whether G-Force requires a waiver of liability for negligence for younger children,  
10 who are novices. The undisputed facts on summary judgment show that Child had  
11 three years of experience in gymnastics classes at G-Force and was a competitive  
12 gymnastics team member when Parent signed the release of liability at issue in this  
13 case. We note that neither party presented any evidence about whether other  
14 gymnastics programs were available to Child that did not require a waiver of liability  
15 for negligence. Such availability would be relevant to the relative bargaining  
16 strength of the parties. Given these gaps in the evidence, this factor thus weighs in  
17 favor of disallowing the liability waiver, but not as strongly as Parent argues.

18 {30} We agree with Parent that *Tunkl* factor five, which addresses whether this is a  
19 standardized adhesion contract of exculpation, without provision to pay extra for  
20 protection against negligence, weighs in favor of invalidating the release. The

1 contract is prepared by G-Force, and its terms do not invite bargaining. Similarly,  
2 *Tunkl* factor six—that child is under the control of the staff of G-Force and subject  
3 to the risk of their carelessness in setting up the equipment—weighs in favor of  
4 invalidating the release. Although Child was a skilled gymnast and likely capable of  
5 identifying obvious shortcomings in the setup of the gymnastics equipment, we  
6 agree with Parent that Child was subject to the risk of G-Force’s carelessness in  
7 placing the vaults and mats that allegedly were the cause of her injury.

8 {31} Looking at all *Tunkl* factors—as our precedent establishes is the process by  
9 which this analysis must be undertaken and resolved—we are not persuaded that  
10 those few that favor invalidation of Parent’s waiver of liability for negligence are  
11 sufficient to support a public policy exception to the general rule in New Mexico  
12 that waivers of liability for negligence will be enforced. We note that our Supreme  
13 Court in *Berlangieri* relied heavily on the policy expressed by our Legislature in the  
14 Equine Liability Act to conclude that the *Tunkl* factors weighed in favor of holding  
15 that “equine operators should be accountable for injuries due to their own fault.”  
16 2003-NMSC-024, ¶ 45. Although the Court stated that the policy expressed by our  
17 Legislature in the Equine Liability Act “is not the sole basis” for its decision, and  
18 that “[a] review of all of the *Tunkl* factors applicable in this case leads us to this  
19 result,” the Court nonetheless acknowledged that the Equine Liability Act “weighs  
20 heavily in this determination.” *Id.* ¶ 52. On the question of parental authority at the

1 heart of this case, in contrast, there is no affirmative expression by our Legislature  
2 of an intent to limit parental authority to make decisions for their children about the  
3 risks and benefits of various recreational activities, and New Mexico law allows fit  
4 parents to make important decisions for their children with a rare exception where  
5 there is a conflict of interest.

6 {32} We do not find the three *Tunkl* factors that weigh at least somewhat in favor  
7 of invalidating the waiver sufficient to tip the balance of the public interest.  
8 Recreational activities are not essential services. We cannot conclude that a local  
9 gymnastics academy has a decisive advantage in bargaining strength so that  
10 invalidation of the waiver is required on the basis of the unconscionability of the  
11 agreement under the *Tunkl* factors. Factor six—that Child, because of her age, was  
12 subject to an increased risk from G-Force’s carelessness—is the strongest factor  
13 favoring voiding the waiver. Our Supreme Court, in *Berlangieri*, however, was clear  
14 that the tort policy of protecting the public against carelessness could not be  
15 considered alone, apart from the equally strong countervailing policy providing for  
16 freedom of contract. 2003-NMSC-024, ¶ 20.

17 {33} We, therefore, agree with the district court that the *Tunkl* factors do not  
18 support the invalidation of Parent’s waiver of liability on behalf of Child in this  
19 recreational services contract. Public policy in New Mexico allows parents to weigh  
20 the benefit to their child of participation in a recreational activity against the risk of



1 personal injury. Our Legislature has adopted policies by statute for only two kinds  
2 of recreational activities—skiing and equine activities. *See* NMSA 1978, §§ 24-15-  
3 1 to -14 (1969, as amended through 2023) (Ski Safety Act); §§ 42-13-1 to -5 (Equine  
4 Liability Act). Neither statute separately addresses waiver of liability in the context  
5 of children participating in these sports.

6 {34} Courts are generally less well-equipped to address complex policy issues than  
7 legislatures. We, therefore, believe that public policy addressing waivers of liability  
8 by parents for recreational activities must come from our Legislature. *See Torres v.*  
9 *State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609, 894 P.2d 386 (“[I]t is the particular  
10 domain of the [L]egislature, as the voice of the people, to make public policy.”).


11 **CONCLUSION**

12 {35} For the reasons stated, we affirm the district court’s dismissal with prejudice.

13 {36} **IT IS SO ORDERED.**

14   
15 JANE B. YOHALEM, Judge

16 **I CONCUR:**

17   
18 J. MILES HANISEE, Judge

19 **MICHAEL D. BUSTAMANTE, Judge, retired,**  
20 **sitting by designation, dissenting**

1 **BUSTAMANTE, Judge, retired, sitting by designation (dissenting).**

2 {37} I respectfully dissent. I would hold that parents cannot waive potential tort  
3 claims on behalf of their minor children in circumstances such as this. In my view,  
4 the majority's contrary holding is driven by two factors. First, following the district  
5 court's lead, the majority improperly injects the *Tunkl* factors into the parental  
6 consent/waiver analysis. *Maj. op.* ¶ 18. Second, I believe the majority is over-reading  
7 the foreign cases that have considered the issue of a parent's ability to waive their  
8 child's potential tort claims. *Id.* ¶ 24. I conclude that there is ample authority in New  
9 Mexico for this Court to limit parental authority here. I also disagree with the  
10 majority's conclusion that G-Force's waiver form is unambiguous.

11 **Parental Waiver of a Child's Tort Claims**

12 {38} In paragraph 18 of its opinion, the majority explicitly tethers its analysis of  
13 the parental waiver issue to the six *Tunkl* factors, saying that its task is to determine  
14 whether there is a public interest at work that makes parental waivers unenforceable.  
15 The majority also asserts that *Berlangieri* requires use of the *Tunkl* factors in the  
16 inquiry. *Maj. op.* ¶ 18.

17 {39} I simply disagree. *Tunkl* has become a foundational opinion providing a  
18 framework for analysis of exculpatory provisions purporting to protect defendants  
19 from the consequences of their negligence. *Berlangieri*, 2003-NMSC-024, ¶ 17.  
20 *Tunkl's* focus is on the nature of the interaction between the defendants and their

1 adult customers, clients, and users. 383 P.2d at 441-42. *Tunkl*'s six factor inquiry  
2 takes into account the service or product provided by the defendant and the relative  
3 bargaining power balance between the defendant and its consumers. *Berlangieri*,  
4 2003-NMSC-024, ¶ 39. The information drawn from the *Tunkl* factors informs the  
5 decision as to whether releasing the defendant from liability adversely affects the  
6 “public interest such that it is unenforceable as contrary to public policy.”  
7 *Berlangieri*, 2003-NMSC-024, ¶ 38.

8 {40} The *Tunkl* factors say nothing about whether parents should be allowed to  
9 execute waivers of liability binding their children. *Berlangieri*, 2003-NMSC-024,  
10 ¶ 39. That inquiry involves a set of considerations unique to the status of children  
11 and to the child-parent relationship that *Tunkl* was not intended to—and does not—  
12 take into account. As the court in *Hawkins* noted, “[W]e need not reach the question  
13 of whether to adopt the *Tunkl* . . . standard, or any other standard generally relating  
14 to the public interest exception, because, in deciding the case before us, we rely on  
15 a public policy exception specifically relating to releases of a minor’s claims.” 2001  
16 UT 94, ¶ 10. The court in *Scott* echoed that theme when it noted, “Although we  
17 adhere to prior Washington law that an adult sports participant can waive liability  
18 for another’s negligence, we consider this a very different question than whether  
19 parents can release another for negligence which injures their child.” 834 P.2d at  
20 493.

1 {41} Because it does not deal with the parental waiver issue as a separate—and  
2 primary—matter, the majority opinion in effect decides that Parent here could waive  
3 Child’s tort claims because the waiver would be enforceable had an adult signed it  
4 for themselves. *Maj. op.* ¶ 33. If that were the proper analysis, there would be no  
5 need to ever delve into the issue of whether parents can waive their child’s potential  
6 tort claims. The parent/child relationship would be irrelevant to the inquiry. But that  
7 is not the tenor of the authorities. None of the cases cited to us by the parties, or the  
8 cases cited by those cases, or the cases revealed in my research have approached the  
9 issue in that manner.<sup>2</sup>

10 {42} Analyzing whether a parent can waive their child’s prospective tort claims as  
11 a stand-alone issue, I come to a different conclusion. I start with the unremarkable  
12 observation that minors are treated differently under the law than adults. As the  
13 Court of Appeals of New York observed 110 years ago, “Infants are the wards of the  
14 courts, and our rules of practice abound in provisions of ancient origin designed to  
15 safeguard their legal rights.” *Greenburg v. N.Y. Cent. & Hudson River R.R. Co.*, 210  
16 N.Y. 505, 509 (N.Y. 1914); *id.* at 509, 512-13 (affirming lower court rulings setting  
17 aside a satisfaction of judgment approved by the plaintiff’s father as guardian eight

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<sup>2</sup>One opinion used *Tunkl* for its public policy analysis, but only after it noted that, unlike other states, Maryland had enacted a statute that explicitly allowed parents to settle their minor children’s tort claims without getting court approval. *BJ’s Wholesale Club, Inc. v. Rosen*, 80 A.3d 345 (Md. 2013).

1 years before when the plaintiff was eleven years old because the guardian had not  
2 complied with a statute requiring posting of a bond to secure the minor’s settlement  
3 fund). Our Supreme Court made the same observation—though less emphatically—  
4 in *Bonds v. Joplin’s Heirs*, 1958-NMSC-095, ¶ 9, 64 N.M. 342, 328 P.2d 597, where  
5 it affirmed a judgment overturning probate proceedings because the minor heirs had  
6 not been properly joined even though a pro forma guardian ad litem had been  
7 appointed to represent their interests. *See Haden v. Eaves*, 1950-NMSC-050, ¶¶ 13-  
8 30, 55 N.M. 40, 226 P.2d 457 (reviewing of the issue in the context of a quiet title  
9 action). This Court relied on *Bonds* and *Haden* to hold that courts are required to  
10 “reject a Rule 1-068 [NMRA] settlement on behalf of a minor if it is unfair to the  
11 minor.” *Shelton v. Sloan*, 1999-NMCA-048, ¶ 42, 127 N.M. 92, 977 P.2d 1012.  
12 Noting that there is no specific statute or rule governing settlements of claims on  
13 behalf of minors, we concluded that the “power of the minor’s representative with  
14 respect to settlements is therefore left to the common law.” *Id.* ¶ 41.

15 {43} These cases demonstrate that New Mexico’s courts have recognized that they  
16 have an inherent power and responsibility to protect minors as their interests may  
17 appear to require. The interest at work in this case is in the protection of minors’  
18 property interests in tort actions, but the general power and duty of the courts is in  
19 my view broader and by itself supports a rule negating the enforceability of waivers  
20 such as G-Force’s. I do not rely only on my view of the preferable public policy in

1 this area. There are a number of statutory expressions of public solicitude for minor’s  
2 economic interests.

3 {44} For example, minors are allowed to repudiate contracts entered into during  
4 their minority.<sup>3</sup> See *In re Estate of Duran*, 2003-NMSC-008, ¶¶ 12, 13, 133 N.M.  
5 553, 66 P.3d 326 (holding that an oral partition agreement among siblings could not  
6 be enforced against siblings who were minors at the time of the agreement). In  
7 addition, general statutes of limitations are extended for minors for a period of one  
8 year after they reach majority. NMSA 1978, § 37-1-10 (1975). For children under  
9 the “full age of seven years,” the Tort Claims Act statute of limitations is extended  
10 until their ninth birthday. NMSA 1978, § 41-4-15(A) (1977). New Mexico does not  
11 allow parents to avoid, reduce, or forgive child support payments by agreement  
12 absent court approval. *Mintz v. Zoernig*, 2008-NMCA-162, ¶¶ 14, 15, 145 N.M. 362,  
13 198 P.3d 861; *Poncho v. Bowdoin*, 2006-NMCA-013, ¶ 32, 138 N.M. 857, 126 P.3d  
14 1221. And, our rules of civil procedure require that minors be represented in  
15 litigation by a guardian, conservator, or next friend. Rule 1-017(D). The rule requires  
16 the district court to “appoint a guardian ad litem for an infant . . . not otherwise  
17 represented . . . or . . . make any other order as it deems proper for the protection of

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<sup>3</sup>This precept of the law of minors refutes G-Force’s blithe argument below that “New Mexico does not give special dispensation to minors participating in recreational activities.” Had Child alone signed the waiver form it could not be enforced against her.

1 the infant.” *Id.* These provisions are similar to those relied on by the cases cited by  
2 Plaintiff holding that a parent cannot waive potential tort claims of their child.

3 {45} The one provision New Mexico has not adopted—and that most of the cases  
4 Plaintiff relies on have—is a statutory requirement of prior court approval of a  
5 settlement of a child’s cause of action. The statute cited in *Scott*, 834 P.2d at 11 n.17,  
6 is typical of such provisions. I agree that the existence of such a statute is an  
7 important consideration for courts to include in their analysis. Such statutes are a  
8 clear indication of legislative policy providing protection for minors. In the face of  
9 such a statement, it would be very difficult for a court to rule that preinjury waivers  
10 are allowable if only because they are much more problematic than post-injury  
11 releases. *See Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1189  
12 (Utah 1983). Preinjury releases immunize the defendant from responsibility for its  
13 future negligence. The expected and natural tendency of preincident immunity is to  
14 reduce the incentive of the defendant to guard against negligent practices. The  
15 normative impact of tort law is negated to the detriment of the child, their parents,  
16 and ultimately the state if it is required to step in and provide care for a seriously  
17 injured minor. Thus, for a court to allow preinjury waivers would be illogical and  
18 well-nigh unsupportable as a matter of policy.

19 {46} The question this Court should answer is whether the existence of such a  
20 statute is necessary to rule as a matter of the common law. The majority opinion

1 implies that such a statute is necessary—if not a condition precedent—for this Court  
2 to hold that preinjury waivers are not enforceable. It is not. *Hawkins* illustrates the  
3 point. *Hawkins* relied on *Scott* for the premise that lack of the ability to unilaterally  
4 release an existing tort claim supported a ruling that a parent could not release a  
5 child’s cause of action prior to an injury. *Hawkins*, 2001 UT 94, ¶ 10. The *Hawkins*  
6 court noted that it was not aware of any source of law that granted Utah parents a  
7 “general unilateral right to compromise or release a child’s existing causes of action  
8 without court approval or appointment to that effect.” *Id.* ¶ 11. The *Hawkins* court  
9 then cited to the Utah Uniform Probate Code for examples of “checks on parental  
10 authority to ensure a child’s interests are protected.” *Id.* The provisions it cited dealt  
11 with appointments of conservators for the prosecution of a minor’s causes of action.  
12 *Id.* New Mexico has substantially the same provisions in its Uniform Probate Code.  
13 NMSA 1978, § 45-5-401 (1993); NMSA 1978, § 45-5-404 (2018); NMSA 1978, §  
14 45-5-407 (2019); NMSA 1978, § 45-5-410 (2019); NMSA 1978, § 45-5-424 (1975).  
15 Based on the Uniform Probate Code provisions and the right of minors to repudiate  
16 contracts, the *Hawkins* court held that parents could not waive a preinjury cause of  
17 action. 2001 UT 94, ¶¶ 12, 13.

18 {47} To the same effect, though involving different statutory provisions, is  
19 *Whitcomb ex rel. Whitcomb v. Dancer*, 443 A.2d 458 (Vt. 1982). In *Whitcomb*, a six-  
20 year-old child was bitten by a dog. *Id.* at 459. The child’s father brought suit as the



1 child’s “next friend.” *Id.* The plaintiff offered to settle the suit for \$800 and the  
2 defendant accepted, by sending a check for \$800 along with a stipulation of  
3 dismissal. *Id.* at 459-60. Eventually, the plaintiff returned the check and withdrew  
4 from the settlement. *Id.* at 460. The trial court enforced the settlement. *Id.* On appeal,  
5 the defendant argued that the father could bind his child to the settlement under the  
6 terms of a statute that required court approval of settlements that did “not exceed the  
7 sum of \$500.” *Id.* But the statute said nothing about settlements in a larger amount.  
8 *Id.* at 461. The court rejected the argument, emphasizing that at common law parents  
9 and guardians did not have the authority to compromise a minor’s claims without  
10 express statutory authorization, noting that minors needed protection for settlements  
11 above \$500 as much—or more—than for lesser amounts. *Id.*

12 {48} I see no reason why this Court cannot exercise its common law authority here  
13 on the same bases noted in *Hawkins* and *Whitcomb*. To the contrary, I conclude that  
14 this Court has the common law ability—and responsibility—to rule that parental  
15 preinjury waivers and releases of their child’s tort claims are not enforceable.

### 16 **Ambiguity of the Waiver**

17 {49} Finally, I conclude that G-Force’s waiver form is ambiguous and should not  
18 be enforced on that basis. The form is a hodgepodge of provisions that are not well  
19 coordinated. The first paragraph does purport to “remise, release and forever  
20 discharge” everyone connected with G-Force. But, the discharging party is referred

1 to as the “undersigned.” Only the parent signed the waiver form. The fifth paragraph  
2 of the form is clearly addressed to the participant of the activity. It is all written in  
3 the first person “I.” And all of its provisions reflect the activities of the  
4 trainee/student. But Child here did not sign the form.

5 {50} The sixth paragraph is labelled “**PARENTAL CONSENT.**” The first  
6 sentence has the parent asserting that she thinks Child is qualified to participate in  
7 the activities at the gym. The release language that follows references only the  
8 parent. Nowhere does the form include any language in which the parent releases G-  
9 Force “on behalf of” the child athlete. The most natural reading of the language is  
10 that the parent is giving up their own right to sue and is shouldering the obligation  
11 to indemnify G-Force from any suit that might be filed. On its face, the waiver form  
12 did not purport to waive Child’s right to sue, and certainly did not impose on Child  
13 the obligation to indemnify G-Force. This is not a quibble. If waivers of this type are  
14 to be enforced because they are ostensibly easily understood by a lay person, the  
15 least the courts should require is for the form to state explicitly that the parent is  
16 acting to waive the child’s rights. This form does not do so.

17 {51} For these reasons, I respectfully dissent from the majority opinion.



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**MICHAEL D. BUSTAMANTE, Judge, retired,  
sitting by designation.**