Enforceability of Exculpatory Clauses: Judicial Declarations of Public Policy as a Means to Promote Freedom of Contract in Tennessee

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I. INTRODUCTION

When consumers download applications, go rock-climbing, or begin gym memberships, the contracts they sign typically contain an exculpatory clause.[1] An exculpatory clause allows one party to shift both their monetary risk and tort liability to another.[2] Without them, providers of goods and services would be forced to litigate more lawsuits, which would increase consumer costs and reduce the availability

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1. *See* Maggie Lu, Comment, *Against Public Policy: Enforceability of Exculpatory Clauses*, 60 S. TEX. L. REV. 497, 498 (2019).

2. Steven B. Lesser, *The Great Escape: How to Draft Exculpatory Clauses that Limit or Extinguish Liability*, 75 FLA. BAR J. 10, 10 (2001).

of goods and services in the marketplace.[3] But the issue of whether a particular exculpatory clause is enforceable is a difficult question that straddles the blurred lines between tort and contract law.[4]

When determining whether a contract clause validly exculpates an entity, courts must delicately balance individuals' freedom to contract with broader public policy concerns.[5] Where state law is silent, generally it is left to the state's courts to determine the enforceability of an exculpatory clause.[6] Therefore, each state's highest court must define the appropriate balance between the freedom to contract and the public policy concerns involved in exculpating tort liability.[7] As with many common law rules, state courts create complicated distinctions and caveats over time,[8] which lower courts must then attempt to reconcile.

Tennessee is no exception, and this area of the law is vague and troubled with confusion.[9] For nearly fifty years, contracting parties and legal practitioners in Tennessee have grappled with exculpatory clauses, as the Tennessee Supreme Court has struggled to clearly define

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3. *See* Nadia N. Sawicki, *Choosing Medical Malpractice*, 93 WASH. L. REV. 891, 910 (2018) (discussing how default liability rules encourage high malpractice payouts, thus leading to increased malpractice insurance premiums, increased costs to patients, and physicians leaving the practice of medicine).

4. John G. Shram, Note, *The Collision of Tort and Contract Law: Validity and Enforceability of Exculpatory Clauses in Arkansas*, 28 U. ARK. LITTLE ROCK L. REV. 279, 279 (2006).

5. *See* Copeland v. HealthSouth/Methodist Rehab. Hosp., 565 S.W.3d 260, 265 (Tenn. 2018); *see also* Lu, *supra* note 1, at 521 ("Wisconsin defines public policy as 'that principle of law under which freedom of contract or private dealings is restricted by law for the good of the community.'").

6. *Copeland*, 565 S.W.3d at 268 (citing Crawford v. Buckner, 839 S.W.2d 754, 759 (Tenn. 1992)).

7. *Id.*; *see also* Lu, *supra* note 1, at 498–500.

8. *See* Lu, *supra* note 1, at 502 ("[D]istinctions and caveats only serve to cause more confusion in an area of the law already shrouded with it.").

9. *See* James Lee Deckard, Comment, *Contracts*—Crawford v. Buckner*: Public Policy Expansion in the Judicial Review of Contracts*, 24 MEM. ST. U. L. REV. 361, 374 (1994) ("Where the *Crawford* court's expansion of the *Olson* analysis will lead is unclear. The *Crawford* court made it clear that exculpatory clauses formed in all situations are now within the *Olson* scope, thus limiting . . . 'freedom to contract' as the dominant basis of judicial reasoning.").

their enforceability.[10] In 1977, the Supreme Court of Tennessee in *Olson v. Molzen* explained that exculpatory clauses are generally enforceable if: (1) the exculpating party's intent is for the plaintiff to assume the risk of the transaction; and (2) enforcing the clause would not affect the public interest.[11] However, the court appeared to limit this test to professional service contracts only,[12] and for years this resulted in inconsistent lower court holdings as to the enforceability of exculpatory clauses in nonprofessional service contracts.[13] When the court had the opportunity to remedy the inconsistency when deciding this issue in the context of a residential lease, it merely held that "the landlord-tenant relationship falls within the final public interest criterion set forth in *Olson*."[14] Thus, the court avoided the issue and forewent the opportunity to provide contracting parties and practitioners with some certainty when dealing with exculpatory clauses.[15] As a result, lower

10. *See* Copeland v. HealthSouth/Methodist Rehab. Hosp., 565 S.W.3d 260 (2018) (explaining the development of the jurisprudence deciding the issue of the enforceability of exculpatory clauses spanning from *Olson* to *Copeland*).

11. 558 S.W.2d at 430–31.

12. *Id.* at 430 ("[A] professional person operating in an area of public interest and . . . subject to licensure by the state" may not "contract against his or her own negligence . . . . *The rules that govern tradesmen in the market place are of little relevancy in dealing with professional persons* . . . ." (emphasis added)).

13. *See, e.g.*, Schratter v. Dev. Enter., Inc., 584 S.W.2d 459, 461 (Tenn. Ct. App. 1979) (upholding an exculpatory provision in a residential lease despite its raising public interest concerns because the *Olson* standard was limited "to professional service contracts"), *overruled by* Crawford v. Buckner, 839 S.W.2d 754, 760 (1992) (voiding an exculpatory clause in a residential lease, reasoning that "the landlord-tenant relationship falls within the final public interest criterion set forth in *Olson*"); Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc. 730 S.W.2d 634, 636 (Tenn. Ct. App. 1987) (holding that an automobile repair shop was not a professional service contract for the purpose of the *Olson* standard but refusing to enforce the provision on contractual grounds), *overruled by* Copeland v. HealthSouth/Methodist Rehab. Hosp., 565 S.W.3d 260, 274 (Tenn. 2018) (holding that "the enforceability of an exculpatory agreement should be determined by considering the totality of the circumstances" with no professional/nonprofessional distinction and refusing to enforce an exculpatory provision in a medical transport agreement); Buckner v. Varner, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990) (upholding an exculpatory clause in a horseback riding competition agreement without referencing the *Olson* factors).

14. *Crawford*, 839 S.W.2d at 758.

15. *See generally* Deckard, *supra* note 9.

courts continued to inconsistently enforce the provisions.[16] Finally, nearly thirty years later, the Supreme Court of Tennessee again had the opportunity to remedy the inconsistent enforcement of exculpatory clauses.[17] This time, though the court claimed its approach finally clarified this area of the law, the fact-driven test it adopted did not provide any more clarity on the question than before.

In *Copeland v. HealthSouth/Methodist Rehabilitation Hospital*, the court held that the enforceability of exculpatory clauses is to be decided by considering the totality of the circumstances and balancing three non-exclusive factors: "(1) relative bargaining power of the parties; (2) clarity of the exculpatory language, which should be clear, unambiguous, and unmistakable about what the party who signs the agreement is giving up; and (3) public policy and public interest implications."[18] The court explained that the totality of the circumstances of each agreement will dictate the relative weight of these factors, in addition to listing the numerous facts of the case that were considered within each factor.[19] It explicitly stated that the distinction between professional service contracts and other contracts for the purposes of enforcing exculpatory clauses was no longer valid.[20] The court then used its rule to find that the exculpatory clause was unenforceable.[21]

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16. *Compare* Henderson v. Quest Expeditions, Inc., 174 S.W.3d 730, 732–33 (Tenn. Ct. App. 2005 (upholding waiver for whitewater rafting because it did not affect the public interest), *overruled in part by Copeland*, 565 S.W.3d at 274 *and* Russell v. Bray, 116 S.W.3d 1, 6 (Tenn. Ct. App. 2003) (upholding waiver for boarding and training horses because *Olson* only applies to agreements involving a professional service), *overruled in part by Copeland*, 565 S.W.3d at 274, *with* Maxwell v. Motorcycle Safety Found., Inc., 404 S.W.3d 469, 474–75 (Tenn. Ct. App. 2013) (finding a release for a motorcycle safety course was enforceable under *Olson* because it was a voluntary activity).

17. 565 S.W.3d 260, 264 (2018).

18. *Id.* at 274.

19. *See id.* ("The totality of the facts and circumstances of *each case* will dictate the applicability of and the weight to be given each of these factors." (emphasis added)).

20. *See id.* ("In addition, we hold that there is no 'professional services criterion' that restricts application of this analysis to contracts for professional services. Therefore, we overrule . . . previous decisions to the extent these cases conflict with our holding.).

21. *Id.* at 276–79.

The Tennessee Supreme Court's intent was to honor the freedom of contract while providing much-needed clarity on the issue of the enforceability of exculpatory clauses in nonprofessional service contracts.[22] The effect of *Copeland* is that the issue is now determined by a test dependent almost entirely on the facts of each case.[23] While the result of the test is fairly clear in professional service contract cases, the court effectively provided grounds for all of these clauses in nonprofessional service contracts to be challenged. Additionally, it will be difficult for lower courts to apply such an ad hoc analysis consistently. Thus, although the *Copeland* court's reasoning and outcome were sound under *those* circumstances, the court's rule did not clarify the question of whether exculpatory clauses in nonprofessional service contracts are enforceable.

This Case Comment therefore argues that the court should have taken a more direct approach. Specifically, the court should have maintained the distinction between professional and nonprofessional service contracts. While the *Copeland* test is sufficient for professional service contracts, the court should have created a presumption of enforceability of exculpatory clauses in nonprofessional service contracts.

This Comment begins with an examination of Tennessee's approaches to the enforceability of exculpatory clauses that set the stage for the court's decision in *Copeland*. It then elaborates on the current *Copeland* test. Finally, it concludes with the call to reinstate the professional/nonprofessional distinction and hold that exculpatory clauses in nonprofessional service contracts are presumptively valid unless the party seeking to invalidate the clause can show that the terms of the provision are ambiguous and that public policy interests are implicated by an element of involuntariness.

II. COMMON LAW DEVELOPMENTS FOR DETERMINING THE ENFORCEABILITY OF EXCULPATORY CLAUSES IN TENNESSEE

Tennessee has long recognized that parties have the freedom to contract for one party to avoid liability, subject to certain exceptions.[24]

22. *See id.* at 273.

23. *See supra* notes 18–19 and accompanying text.

24. Olson v. Molzen, 558 S.W.2d 429, 430 (Tenn. 1977) ("The courts of Tennessee have long recognized that, subject to certain exceptions, parties may contract that one shall not be liable for his negligence to another."); *see also Copeland*, 565

But these exceptions were inconsistently applied to nonprofessional service contracts, adding complication to this area of the law.[25] As a result, contracting parties and legal practitioners were left with little certainty in predicting the enforceability of agreed upon exculpatory provisions.[26]

In 1977, the Supreme Court of Tennessee considered the enforceability of an exculpatory clause signed by a plaintiff who sought an abortion in *Olson v. Molzen*.[27] After her procedure, the plaintiff was still pregnant and sued her doctor for negligence.[28] The court held that the exculpatory clause was unenforceable because it violated public policy for a doctor to have a patient sign an exculpatory contract as a condition of treatment.[29] It adopted a six-factor analysis to decide whether an exculpatory clause violates public policy, and it reasoned that each of those factors were satisfied under the circumstances.[30]

Based on the factors, the *Olson* court noted that exculpatory clauses involving professional services generally cannot be enforced, noting that these professionals' statuses inure more responsibility.[31] In so doing, it implied a distinction between professional and

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S.W.3d at 273 ("After reviewing precedent in this state and across the country, we conclude that the public policy in Tennessee has historically favored freedom of contract. Thus, contracts exempting one party from liability for negligence are not disfavored and are generally enforceable.").

25. *See* sources cited *supra* note 13 and accompanying text.

26. See *Copeland*, 565 S.W.3d at 265–70 for a discussion of Tennessee's inconsistency in this area.

27. 558 S.W.2d 429, 430 (Tenn. 1977).

28. *Id.* at 430.

29. *Id.* at 432.

30. *Id.* at 431 (citing Tunkl v. Regents of U. of Cal., 383 P.2d 441, 445 (Cal. 1963)) (listing the following factors: (1) whether the transaction concerns a business suitable for public regulation; (2) whether the defendant engages in an important public service, often a practical necessity; (3) whether the defendant holds himself out to the public as willing to perform this service; (4) whether the defendant possesses a bargaining advantage; (5) whether the defendant uses a standard adhesion contract, forbidding a purchaser from obtaining protection against negligence; and (6) whether the plaintiff or his property is placed under the control of the seller, subject to the risk of carelessness).

31. *Id.* at 430 (explaining there is "a general rule [that] a party may contract against his or her own negligence, [but that the rule does] not afford a satisfactory solution in a case involving a professional person operating in an area of public interest and pursuing a profession subject to licensure by the state").

nonprofessional service contracts.[32] As a result, *Olson* led to an unequal application of the six-factor test, as some lower courts then applied the test to both professional and nonprofessional service contracts, while others applied it only to contracts for professional services (and generally upheld exculpatory provisions in nonprofessional contracts).[33]

Nearly ten years later, the Tennessee Supreme Court was presented with and failed to resolve this question in *Adams v. Roark* when it analyzed a release clause in a motor racing contract.[34] Rather than focus its analysis on the differences in responsibility between professional and nonprofessional service providers as the *Olson* court did, the *Roark* court focused instead on the differences in avoiding liability for negligence and gross negligence.[35] By sidestepping the *Olson* analysis altogether, the court avoided the question of whether *Olson* applied to nonprofessional service contracts.

In the 1992 case *Crawford v. Buckner*, the Tennessee Supreme Court finally faced the question of whether *Olson* applies to nonprofessional service contracts head on, yet the court once again refused to provide a definitive answer.[36] The court held that the exculpatory clause in a residential lease was unenforceable as against public policy,[37] but it limited its holding to the landlord-tenant relationship at issue in *Crawford*.[38] This certainly did not resolve and may have even complicated the questions left after *Olson*. Lower courts continued to apply *Olson* inconsistently to nonprofessional service contracts, and contracting parties and legal practitioners had little certainty in

32. *Id.*

33. *See* Copeland v. HealthSouth/Methodist Rehab. Hosp., 565 S.W.3d 260, 266–70 (2018) ("After our decision in *Olson*, there was some confusion about whether the *Olson* factors applied only to exculpatory agreements involving professional services.") (citing various, contradictory Tennessee cases decided in the wake of *Olson*). 34 686 S.W.2d 73, 74 (Tenn. 1985).

35. *Id.* at 75–76.

36. 839 S.W.2d 754, 755 (Tenn. 1992).

37. *Id.* at 760.

38. *Id.* at 759, 760 ("Accordingly, we hold that under the facts here, the lease clause limiting the residential landlord's liability for negligence to its tenants is void as against public policy. As a result, we expressly overrule the intermediate court decision in *Schratter v. Development Enterprises, Inc.*, 584 S.W.2d 459 (Tenn. Ct. App.1979), and any other prior decision, but only to the extent they conflict with this holding."); *see also* sources cited *supra* notes 14–15 and accompanying text.

predicting which circumstances might render an exculpatory provision violative of public policy.[39] By 2019, this question was muddled and required direct attention by the court, but as is explained below, the purported solution did nothing to improve the position of parties and practitioners.

III. THE CURRENT *COPELAND* TEST

In 2019, the Supreme Court of Tennessee had a long-awaited opportunity to clarify the enforceability of exculpatory clauses and resolve the questions left after *Olson* and *Crawford*. In *Copeland v. HealthSouth/Methodist Rehabilitation Hospital*, an elderly hospital patient signed a contract purporting to release a medical transportation company from any claims that arose while it transported him to a doctor's appointment.[40] During transport, he fell and was injured, and he sued the medical transportation company for negligence.[41] The circuit court granted a motion for summary judgment in favor of the defendant, finding that the release from "any and all claims, suits, rights, . . . causes of action, liabilities, accident, [or] injury" was enforceable because it was neither a contract of adhesion nor a contract for professional services.[42] The court of appeals affirmed, finding that the case presented no public interest considerations.[43]

On appeal, the Supreme Court of Tennessee reversed the lower courts' findings and held that the release was unenforceable.[44] The *Copeland* court held that the validity of exculpatory clauses in professional *and* nonprofessional service contracts turns on how much weight the totality of the circumstances demands each of the following factors be given: (1) the parties' relative bargaining power; (2) the clarity of the exculpatory language; and (3) public policy and public interest implications.[45]

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39. *See supra* note 33 and accompanying text.

40. Copeland v. HealthSouth/Methodist Rehab. Hosp., 565 S.W.3d 260, 263–64 (2018).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 279.

45. *Id.* at 274.

These factors already provide ample room to challenge exculpatory contracts. But in applying the factors to the facts at hand, the court essentially created sub-factors for each of the three above. With respect to the first factor, the court analyzed both the importance of the service at issue for the physical or economic well-being of the party signing the agreement and the amount of free choice that the party has in seeking alternative services.[46] After considering that the medical transportation services were a practical necessity, that the standardized form was offered on a take-it-or-leave-it basis, and that the plaintiff had little time to read the release clause, the court determined that the company had sufficiently greater relative bargaining power than the plaintiff.[47] Moving to the clarity-of-the-language factor, the court noted that the release was in bold and capital letters but also that it contained expansive language that would have immunized gross negligence.[48] Finally, in turning to the third factor, the court specified that the plaintiff's appointment was a medical necessity, not a voluntary, recreational activity.[49]

The result of this balance is fairly clear in the context of professional service contracts. The first and third factors will almost always weigh against enforcing these clauses, particularly in the medical setting. There will likely always be unequal bargaining power between the parties, coupled with significant public policy concerns to ensure an adequate degree of public safety in those transactions. But for nonprofessional service contracts, the outcome of the balance is virtually a toss-up. Not only did the *Copeland* court lay out three subjective factors, its analysis took so many facts into consideration as to make nearly every situation an open question. And once parties take advantage of the pliability of these factors, *Copeland*'s fact-intensive analysis now sets the precedent for lower courts to consider at least three subfactors factors *within* each of the three primary, nonexclusive factors.

The Supreme Court of Tennessee should have established a brighter-line rule to finally provide clarity as to the enforceability of exculpatory clauses in nonprofessional service contracts. Contracting parties and legal practitioners can only assume that exculpatory clauses

46. *Id.*
47. *Id.* at 276–77.
48. *Id.* at 277–78.
49. *Id.* at 278.

in contracts for medical services, residential leases, and any other professional services are unlikely to be upheld, as these contracts will likely always involve disparities in relative bargaining power and implicate public policy considerations.[50] The question of enforceability of these clauses in professional service contracts has always been fairly clear,[51] and the *Copeland* test thus maintains that status quo. But for nonprofessional service contracts, the question has been decided differently depending on a particular lower court's reading of *Olson* and other precedent.[52] The court should therefore have taken a more direct approach and held that exculpatory clauses in nonprofessional service contracts are presumptively valid.

The court recognized Tennessee's longstanding public policy in favor of the freedom to contract and sought to honor that tradition with its test.[53] However, the *Copeland* decision does not efficiently do so. While a balance that tends to weigh against enforcement of these clauses in professional service contracts makes sense in that a professional's training and status begets more responsibility,[54] the freedom of contract in nonprofessional service contracts carries more weight. In addition, the question of whether a contracted-for exculpatory provision in a nonprofessional service contract is enforceable is still open in any situation not identical to a case already decided. Parties have wide latitude to challenge the enforceability of these exculpatory clauses because the Supreme Court of Tennessee created what is essentially a ten-part balancing test. Lower courts are unlikely to consistently apply the *Copeland* test to nonprofessional service contracts, which detrimentally infringes on individuals' freedom to contract in Tennessee.

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50. *See Copeland*, 565 S.W.3d at 278 (noting "that practical necessity distinguishes this case from those involving purely voluntary or recreational activities"); *see also* cases cited *supra* note 13.

51. *See Copeland*, 565 S.W.3d at 266–69 (discussing confusion post-*Olson*, none of which had to do with its applicability to professional service contracts); *see also* cases cited *supra* note 13 (noting in each that *Olson* clearly applies to professional services contracts).

52. *See* 565 S.W.3d at 266–69 (discussing confusion post-*Olson*, which was compounded by Crawford, involving the applicability of *Olson* to nonprofessional service contracts); *see also* cases cited *supra* note 13 (holding inconsistently on the issue of the enforceability of exculpatory provisions in nonprofessional service contracts).

53. *See* cases cited *supra* note 24 and accompanying text.

54. *See supra* note 31 and accompanying text.

Consequently, although it intended to promote the freedom to contract in Tennessee, the *Copeland* court actually restricted this liberty.

IV. PROPOSED TEST FOR DETERMINING EXCULPATORY CONTRACTS

The *Copeland* court should have maintained the professional/nonprofessional distinction and held that exculpatory clauses in nonprofessional service contracts are presumptively valid. Only in this way can the court establish the ideal balance between the freedom of contract and public policy considerations, as the current public policy factor of the *Copeland* test that considers the particular clause in dispute is likely to be inconsistently applied from case to case by lower courts.

Specifically, the Tennessee Supreme Court should reinstate the professional/nonprofessional service distinction. The *Copeland* test should be maintained for professional service contracts, as it strikes a perfect balance between public interest and freedom to contract in that context. For nonprofessional service contracts, however, enforcement should weigh more strongly in favor of the freedom to contract where parties are likely to be more equal in bargaining power and no additional training or status weighs in favor of increased responsibility. These clauses should be presumptively valid unless a party seeking to preclude enforcement can show that the terms of the provision are unclear or that public policy interests are implicated by an element of involuntariness, as was the case with medical transport in *Copeland.*

The *Copeland* court placed great emphasis on the fact that the medical transportation contract involved a practical necessity and was not a truly voluntary transaction.[55] While medical transport is not a professional service, the result in *Copeland* makes sense under those circumstances. However, for exculpatory clauses in contracts for voluntary nonprofessional services, like the recreational racing activities above,[56] not enforcing the contracted-for exculpatory provision does not serve the public interest in the same way. Even if presented on a

55. *See* Copeland, 565 S.W.3d at 278 ("Mr. Copeland's appointment with his doctor was a medical necessity. That practical necessity distinguishes this case from those involving purely voluntary or recreational activities, which generally do not affect the public interest or raise public policy concerns.").

56. *See* Adams v. Roark, 686 S.W.2d 73, 75 (Tenn. 1985) (finding that a release signed by a participant in a motorcycle race was enforceable).

take-it-or-leave-it basis, a party entering into a voluntary recreational contract has more latitude to choose to contract with someone else. Reinstating the professional services criterion to generally prohibit exculpatory clauses in professional service contracts while generally permitting them in voluntary, nonprofessional service contracts provides maximum clarity in this delicate area of the law and is consistent with the Tennessee Supreme Court's thorough reasoning in *Copeland*.

V. CONCLUSION

In sum, the *Copeland* court correctly decided the outcome of that case, but it missed a significant opportunity to provide maximum clarity in an area of the law where there is great confusion. Consequently, its reasoning will likely cause the issue of whether an exculpatory clause is valid to be more frequently litigated, as even contracts for voluntary and recreational transactions are subject to the court's holding. While contracting parties and legal practitioners should feel confident that exculpatory clauses in professional service contracts are unlikely to ever be enforced, it is unclear whether the *Copeland* test will be applied consistently by the lower courts to exculpatory clauses in nonprofessional service contracts. As a result, the court hinders the freedom to contract by failing to provide a more bright-line rule. The freedom to contract cannot be fully honored until the court defines a more explicit test that weighs in favor of enforcing exculpatory clauses in the context of nonprofessional service contracts. Therefore, in the future, the Supreme Court of Tennessee must exercise its judicial province by providing explicit pronouncements of public policy and clearly define the contours of this troublesome area of the law that straddles the line between tort and contract principles. Until then, contracting parties and legal practitioners cannot enjoy a reasonable degree of certainty when predicting whether an exculpatory clause would be enforced by a Tennessee court.