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The Supreme Court of the State of Old Yorke
Gayle W. MOORE, Appellant,
v.
HARTLEY MOTORS, INC.; ATV Safety Institute; Specialty Vehicle Institute Of America, a corporation incorporated in the District of Columbia; and Jim Croak, Appellees.
No. S-9336.
Sept. 14, 2001.
Rehearing Denied Dec. 18, 2001.

Student enrolled in an all-terrain vehicle (ATV) safety course sued ATV dealer, safety class instructor, organizations that developed and offered the class, and owner of the property on which the class took place, for injuries from a roll-over accident on the course location. The Circuit Court for Harrogate, Beverly W. Cutler, J., entered summary judgment for defendants. Court of Appeals of Old Yorke affirmed. Student appealed. The Supreme Court of Old Yorke, Fabe, C.J., held that: (1) release from liability signed by student was not invalid for want of consideration, nor was it unconscionable or contrary to public policy, but (2) genuine issue of material fact existed regarding whether student's injury resulted from unreasonable dangers not within scope of the release.

Reversed and remanded.

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Before FABE, Chief Justice, MATTHEWS, EASTAUGH, and BRYNER, Justices.

## OPINION

FABE, Chief Justice.

## I. INTRODUCTION

Gayle Moore was injured during an all-terrain vehicle (ATV) safety class when she drove her ATV over a rock and the vehicle rolled over. Before participating in the class, Moore signed a release of liability. After her injury, however, she sued for damages the safety class instructor, the organizations that developed and offered the class, and the owner of the property on which the class took place. She alleged that the release was not valid because she received no consideration, the release was against public policy, and the course was inherently unsafe. The superior court granted summary judgment to the defendants. Because there is a factual dispute regarding whether the layout of the course was unnecessarily dangerous, we reverse and remand for trial on that issue.

## II. FACTS AND PROCEEDINGS

Gayle Moore and her husband bought a Suzuki four-wheel ATV in May 1993 from Suzuki, Arctic Cat Motor Sports. At the time of the sale, the salesperson offered the Moores a $50 rebate upon completion of an ATV rider safety class. On October 23, 1993, the Moores attended an ATV rider safety class held on the property of Hartley Motors, Inc. James Croak instructed the class using the curriculum of the ATV Safety Institute. Before starting instruction, Croak requested that all participants sign a consent form and release. Moore signed the consent form and release.

The driving portion of the class took place on a course marked with cones on unpaved ground. During the class, Moore drove her ATV through high grass beyond a cone marking the course. Her vehicle rolled up on a rock protruding from the ground in the high grass. Moore was thrown from her vehicle, suffering injuries as a result.

Moore brought suit in July 1995 against Hartley Motors, the dealer that sold the Moores their ATV, ATV Safety Institute, and Jim Croak.FN1 She alleged that the defendants negligently failed to provide a safe ATV rider training course and location, and negligently concealed the fact that the course was unsafe.

FN1. Specialty Vehicle Institute of America was added as a defendant in the Second Amended Complaint in October 1995.

In 1996 the defendants FN2 sought summary judgment based on the release signed by *630 Moore before the class. In opposition to summary judgment, Moore presented a transcript of a telephone conversation between an investigator hired by her attorney and Michael Swan, a former ATV Safety Institute instructor. In this telephone conversation, Swan indicated that he had chosen not to teach an ATV rider course at the Hartley Motors location because he found the location inappropriate.

FN2. The ATV dealer was dismissed as a defendant in 1997.

Circuit Court Judge Beverly W. Cutler initially denied the motion for summary judgment. She concluded that while the release was valid as a matter of law, genuine issues of material fact existed regarding the defendants' knowledge of the suitability of the course site and whether they informed Moore of its suitability before she signed the release. In denying summary judgment, the superior court relied upon a theory of material nondisclosure by the defendants. The court found that the allegations presented in the telephone conversation with Swan could be supported by admissible evidence at trial.

In 1999 ATV Safety Institute, Specialty Vehicle Institute of America, and Croak (collectively ATVSI) sought reconsideration of the 1997 summary judgment denial because Michael Swan had died and therefore could not testify at trial. The court denied the motion for reconsideration but granted Hartley Motors's motion in limine to exclude hearsay statements by or attributed to Swan.

ATVSI then filed a motion for summary judgment and Hartley Motors filed a renewed motion for summary judgment based on the release Moore had signed. The superior court granted summary judgment to the defendants. The superior court entered final judgment for $32,817.56 fees and costs to Hartley Motors, and $21,049.12 fees and costs to ATVSI. Moore appeals.

III. DISCUSSION

A. Standard of Review

This court reviews grants of summary judgment de novo. We will affirm a summary judgment if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. When making this determination, we draw all reasonable inferences in favor of the non-moving party. We make no attempt to weigh the evidence or evaluate the credibility of witnesses, and we assume that all facts set forth in the nonmoving party's affidavits are true and capable of proof.

B. The Circuit Court Did Not Err in Finding that the Release Was Valid.

The Circuit Court determined in 1997 that "the release itself is valid as a matter of law against negligence claims brought by [Moore]." Moore asserts that the trial court erred in treating the release as valid because (1) there was no consideration for the release and (2) the release should have been declared void as against public policy.

1. There was consideration for the release.

Moore argues that she did not receive any consideration in return for her release. She contends that the $50 rebate promised by the salesperson upon completion of the course FN7 was to have been the consideration for her release of liability. Because Moore did not complete the course, she did not receive the $50 rebate.FN8 She asserts that *631 since she did not receive any consideration for the release, it was not effective to protect the defendants from liability.

FN7. Moore has not presented evidence that the parties to this case promised to provide the $50 rebate.

FN8. Moore also asserts that the release was not valid because the instructor returned the signed release to her after the injury. She claims that by returning the slip of paper to her, Croak rejected the release, and therefore the release does not bind Moore. The physical location of the signed consent form-in ATVSI's possession or Moore's-has no effect on the bargained-for exchange that occurred before Moore began participation in the class.

Moore misconstrues the role of consideration by equating inducement with consideration. Here ATVSI provided consideration for the release, not by offering a $50 rebate, but by offering participation in the class. Thus, even if the $50 rebate induced Moore to take the class, the only reasonable inference from the facts presented is that Moore exchanged the release of liability for participation in the program. Whether Moore considered the $50 rebate her inducement is immaterial to the sufficiency of consideration. FN9 The trial court did not err in rejecting Moore's claim that the release was invalid for failure of consideration.

FN9. A comment to the Restatement (Second) of Contracts states:

Even in the typical commercial bargain, the promisor may have more than one motive, and the person furnishing the consideration need not inquire into the promisor's motives. Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so.

Restatement (Second) of Contracts § 81 cmt. b (1979).

2. The release did not violate public policy.

REMOVED—This section has been removed by the editors.

C. A Genuine Issue of Material Fact Exists as to Whether the Course Layout Was Inherently Dangerous.

The trial court's summary judgment analysis focused on alleged misrepresentations that could have invalidated the release. As with any contract, a release of liability is only valid to the extent that it reflects a "conspicuous and unequivocally expressed" intent to release from liability. FN25 The trial court granted summary judgment after determining that no genuine issue of material fact existed as to whether ATVSI or Hartley Motors knew that the course was allegedly unsafe.

FN25. Kissick v. Schmierer, 816 Yorke 188, 191 (1991).

Even if there was no genuine issue of material fact regarding a misrepresentation, the trial court erred in failing to consider the scope of the release signed by Moore.FN26 Moore agreed to release the ATV *633 Safety Institute and all other organizations and individuals affiliated with the ATV safety class from liability, loss, and damages "including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse." But the release does not discuss or even mention liability for general negligence. Its opening sentences refer only to unavoidable and inherent risks of ATV riding, and nothing in its ensuing language suggests an intent to

release ATVSI or Hartley Motors from liability for acts of negligence unrelated to those inherent risks. Based on this language, we conclude that Moore released ATVSI and Hartley Motors only from liability arising from the inherent risks of ATV riding and ordinary negligence associated with those inherent risks.FN27 As we noted in Kissick v. Schmierer, an exculpatory release can be enforced if "the intent to release a party from liability for future negligence" is "conspicuously and unequivocally expressed." FN28 However, underlying the ATV course release signed by Moore was an implied and reasonable presumption that the course is not unreasonably dangerous.

FN26. The release signed by Moore reads as follows:
IMPORTANT INFORMATION. YOU MUST READ AND SIGN THIS CONSENT FORM AND RELEASE: The Consumer Product Safety Commission ("CPSC") reports that over 1,186 people, including many children, have died in accidents associated with ATVs since March, 1986. You should also be aware that 70cc to 90cc ATVs should be used only by persons aged 16 and older. Having been advised of the above, the undersigned agrees to release the ATV Safety Institute, the Specialty Vehicle Institute of America, its members, Trustees, employees, agents, representatives and all other organizations affiliated with the ATV RiderCourse, from any and all liability, loss, damage claim or cause of action, known or unknown, including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse.

FN27. The inherent risks of an activity such as ATV riding are those risks that are obvious and necessary to the sport. These inherent risks, by the very nature of being "inherent," are beyond the control of instructors teaching the activity, the landowner on whose land the activity is conducted, or an organization conducting a program involving the activity.

FN28. 816 Yorke at 191.

Moore claims that she was injured when she fell off her ATV after riding over a rock obscured by tall grass. We assume the truth of this assertion for purposes of reviewing the superior court's summary judgment order. Moore asserts that the course on which the class operated was set up in such a way that she had to ride into the grass and that this posed an unnecessary danger.

The allegedly improper course layout may be actionable if the course posed a risk beyond ordinary negligence related to the inherent risks of off-road ATV riding assumed by the release.FN29 As we have explained in the context of skiing, "[i]f a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger" and is therefore not an inherent risk of the sport.FN30 We have described an "unreasonable risk" as one for which "the likelihood and gravity of the harm threatened outweighed the utility of the ... conduct and the burden on the [defendant] for removing the danger." FN31 If the course was designed or maintained in such a manner that it

increased the likelihood of a rider encountering a hidden rock, then the course layout may have presented an unnecessary danger; holding an ATV safety class on an unnecessarily dangerous course is beyond the ordinary negligence released by the waiver. Holding a safety class on an unreasonably risky course may give rise to liability even if encountering rocks is generally an inherent risk of ATV riding. Moreover, the fact that the course was geared towards novice ATV riders may also affect the level of care required of ATVSI and Hartley Motors to reduce unnecessary dangers and unreasonable risk.FN32

FN29. See Scott v. Pacific West Mountain Resort, 119 Wash.2d 484, 834 P.2d 6, 10 (1992) (noting that an exculpatory clause should not be upheld where "the negligent act falls greatly below the standard established by law for protection of others").

FN30. Hiibschman ex rel. Welch v. City of Valdez, 821 P.2d 1354, 1360 n. 12 (Alaska 1991) (quoting Assumption of Risk After Sunday v. Stratton Corp.: The Vermont Sports Liability Statute and Injured Skiers, 3 V.L.Rev. 129, 141-42 (1978)).

FN31. State v. Abbott, 498 Yorke 712, 725 (1972).

FN32. See, e.g., Hiibschman, 821 P.2d at 1360 (citing as evidence of ski operator negligence evidence that a ski jump that caused injury was on a beginner's slope, and that an expert witness stated that there should not have been any jumps on a beginner's slope, especially if it was not clearly marked as only being for expert skiers); Scott, 834 P.2d at 15 (reversing summary judgment where "some of the evidence would support a conclusion that the race course was laid out in an unnecessarily dangerous manner that was not obvious to a young novice ski-racing student").

Whether the injury resulted from an unnecessarily dangerous course or a course placed perilously close to an obscured obstacle are questions of fact. Here, Moore presented facts that could support a finding that *634 the ATV safety course was laid out in an unnecessarily dangerous manner that was not obvious to novice ATV riders and therefore not within the scope of the release. Thus, it was error to grant summary judgment.

## IV. CONCLUSION

Moore agreed to release the defendants from liability for injuries sustained as a result of participation in the ATV riding and safety class. The trial court erred in granting summary judgment because genuine issues of material fact existed regarding whether the injury resulted from unreasonable dangers not within the scope of the release. Therefore, we REVERSE the grant of summary judgment in favor of the defendants and REMAND the case to the trial court for further proceedings consistent with this opinion.

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The Supreme Court of the State of Old Yorke,
Veda SIREK and Don Sirek, wife and husband, Plaintiffs-Appellants,
v.
FAIRFIELD SNOWBOWL, INC., an Old Yorke corporation, Defendant-Appellee.
Oct. 30, 1990.

Skier brought negligence action against ski rental shop after she was injured when her bindings failed to release. The Circuit Court, Harrogate County, Cause No. CV-43109, H. Jeffrey Coker, J., found that rental agreement released shop from any claims skier might have had for negligence. The Court of Appeals of Yorke affirmed. Sirek appealed. The Supreme Court of Yorke, Claborne, J., held that: (1) trial court did not abuse its discretion in allowing rental shop to amend its answer to include affirmative defense of release, and (2) rental agreement did not explicitly state intention to release rental shop from its own negligence.

Reversed and remanded.

OPINION

CLABORNE, Judge.
Veda and Don Sirek FN1 appeal from the trial court's grant of summary judgment in favor of appellee Fairfield Snowbowl, Inc. (Snowbowl). In granting summary judgment in favor of Snowbowl, the trial court held that an exculpatory clause in a ski equipment rental agreement executed by Sirek released any claims that Sirek may have had against Snowbowl for negligence. We reverse the summary judgment and remand to the trial court for further proceedings.

FN1. Although Veda Sirek and her husband filed suit jointly, Veda was the injured party. For clarity, she will be referred to as Sirek.

The material facts in this case are not in dispute. On January 16, 1986, Sirek travelled from Phoenix to Fairfield Snowbowl in Flagstaff to ski. Sirek owned her own ski boots, as well as skis with bindings. However, that day she travelled only with her boots, planning to rent skis and bindings at Snowbowl. Prior to renting the skis and bindings from Snowbowl, Sirek executed a rental agreement. She read the rental agreement before signing it. The relevant parts of the agreement said:
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As part of the consideration of renting these skis and equipment, the user agrees to hold Fairfield Snow Bowl, Inc. and/or its employees harmless and free from blame and liability for any injury which may result during or from their use.

I hereby agree that Fairfield Snow Bowl, Inc. is not liable for any injury incurred while using this rental equipment.

I understand that the bindings furnished on said rental equipment are release type designed to reduce the risk and degree of injury from falling and that these bindings will not release under all circumstances and are no guarantee of my safety.

While skiing at Snowbowl that day, Sirek suffered injuries when she fell and her bindings failed to release. Sirek then sued Snowbowl, alleging that its employees had acted negligently in the selection of skis and bindings that were incompatible with her boots and also in the adjustment of the release settings on the bindings. In its answer, Snowbowl denied liability, but failed to include the word “release” in its recital of affirmative defenses. After some discovery had been conducted, Snowbowl moved for summary judgment claiming that the rental agreement released Snowbowl from any negligence claims. Sirek responded to the motion and filed a cross-motion for partial summary judgment against Snowbowl, claiming that the affirmative defense of release was waived because it was not included in the answer to Sirek's complaint that the release was void because it was against public policy and that the language did not effectively exculpate Snowbowl from its own negligence. In response, Snowbowl moved to amend its answer to include the release defense. The trial court granted Snowbowl's motion to amend and its motion for summary judgment and denied Sirek's **1293 *185 cross-motion for partial summary judgment. Sirek appealed to the Court of Special Appeals of Yorke, which affirmed the trial court. Sirek timely appealed.

The issues presented are (1) whether Snowbowl's failure to affirmatively plead the release in its answer constituted a waiver of that defense, (2) whether the exculpatory clause contained in Snowbowl's rental agreement is unenforceable as against public policy, and (3) whether the exculpatory clause effectively releases Snowbowl from Sirek's claims of negligence.

1. Did Snowbowl Waive Its Release Defense?

Sirek first argues that Snowbowl's failure to affirmatively plead the release defense in its answer constituted a waiver of that defense. Sirek claims that the trial court erred in permitting Snowbowl to amend its answer to include this defense and in granting Snowbowl's motion for summary judgment based on the release provision.

If the trial court did not abuse its discretion in permitting Snowbowl to amend its answer to include the release defense, then it was proper for the trial court to consider such a defense in weighing the motions for summary judgment.

To provide an answer to the waiver allegation, we must examine Rules 8(d), 12(b), 12(i) and 15(a) of the Yorke Rules of Civil Procedure and their relationship to each other. Rule 8(d) provides that, in pleading to a preceding pleading, a party shall affirmatively plead

all affirmative defenses, which would include “release.” This mandate is also expressed in Rule 12(b), which states that “[e]very defense, in law or in fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required ...,” except that seven enumerated defenses, which are not material here, may be made by motion. There is no dispute that Snowbowl failed to plead the release defense in its original answer. The penalty for failing to appropriately plead a defense is set forth in Rule 12(i), which provides that “[a] party waives all defenses and objections which that party does not present either by motion as hereinbefore provided, or, if that party has made no motion, in that party's answer or reply.” However, Rule 15(a) states, in part, that “a party may amend the party's pleading ... by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires.”

Sirek argues that the trial court's granting of Snowbowl's motion to amend its answer and consideration of the release defense in granting Snowbowl's motion for summary judgment was contrary to the express provisions of Rule 12(i). As mentioned earlier, Rule 12(i) provides generally for the waiver of defenses that are not presented by motion or in the party's answer or reply. However, this rule only expressly removes the court's discretion to allow leave to amend a responsive pleading or motion with respect to four defenses: lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process. Rule 12(i)(1), Yorke Rules of Civil Procedure. These four defenses are strictly waived if omitted from a Rule 12 motion, or, if no Rule 12 motion is made, then from a responsive pleading or an amendment thereof permitted as a matter of course under Rule 15(a) (normally within twenty days after service). By specifically denying the court discretion with respect to these four defenses, the rule implicitly recognizes the court's discretion to permit other defenses to be asserted by amendment.FN3 This interpretation**1294 *186 is supported by the State Bar Committee Note to Rule 12(i) regarding the 1966 Amendments, which states that Rule 12(i) does not alter existing Yorke case law and “is in accord for example with Baxter v. Harrison, 83 Yorke 354 (1958).”

FN3. Rule 12(i)(2) states that the defenses of failure to state a claim upon which relief can be granted, failure to join an indispensable party pursuant to Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading, by motion for judgment on the pleadings, or at the trial on the merits. Therefore, if any of these defenses or objections is not raised in a responsive pleading, the party may introduce the issue at any time up to and including trial and need not invoke the court's discretion to amend its original responsive pleading or motion.

In Baxter, the defendants raised the affirmative defense of lack of capacity to sue for the first time in their motion for summary judgment. 83 Yorke at 356. The trial court treated the allegations in the affidavit in support of summary judgment as amending the answer for this purpose. Id. The Court of Appeals of Yorke found that such treatment properly raised the issue of the capacity of plaintiffs to bring this action. Id. Baxter clearly acknowledged the trial court's power to allow amendment of the pleadings at any time.

Id. Because Rule 12(i) is intended to be in accord with Baxter, the rule does not preclude the raising of a defense when it may have been omitted from the answer.

Sirek argues that Baxter can be distinguished because the defense in Baxter was not known at the time the answer was filed. Here, says Sirek, Snowbowl knew of the existence of the release at all times. However, the fact that Snowbowl was aware of the release at the time of its answer makes little difference unless Sirek suffered prejudice from the granting of the motion to amend. A court may properly allow a defendant to amend an answer to include an omitted defense as long as the plaintiff is not surprised or prejudiced thereby. It is clear from the record that Sirek suffered no inconvenience or delay due to the amendment of Snowbowl's answer.

We find that Rule 12(i) of the Yorke Rules of Civil Procedure does not remove the trial court's discretion to grant leave to amend an answer to add an affirmative defense such as release. We find no abuse of discretion in granting the motion to amend here, particularly because Sirek can point to no prejudice.

2. Did The Contract Release Snowbowl From Liability For Its Own Negligence?
We now deal with the merits of this case. Sirek first argues that the exculpatory provisions in the rental agreement are unenforceable because they violate public policy. Sirek claims that it is against public policy to allow Snowbowl to insulate itself from its own negligence by inserting an inconspicuous disclaimer in a form rental agreement where Snowbowl's business requires a particular knowledge, skill and expertise upon which the normal consumer relies. We need not reach this issue because we hold that this exculpatory clause, as a matter of law, did not release Snowbowl from its own negligence.

Sirek next argues that, even if the release is generally valid, it fails to exculpate Snowbowl from the negligent acts of its employees because it does not expressly include negligence within its scope.FN4 Interpretation and construction of contractual provisions are questions of law for the court to decide. See Abrams v. Horizon Corp., 137 Ariz. 73, 78, 669 P.2d 51, 56 (1983).

FN4. Both parties assumed for the purpose of the summary judgment motions that Fairfield's agents did act negligently with respect to the selection of Sirek's skis and the setting of her bindings.

An attempt to limit one's liability from one's own negligence is not uncommon. The general reaction of courts to this attempt**1295 *187 has been unfavorable. The reason is simple. To relieve oneself of liability for one's own negligence may encourage carelessness. Salt River Project Agricultural Improvement and Power Dist. v. Westinghouse Electric Corp., 143 Yorke 368, 382-83 (1984) (quoting Union Pacific Railroad Co. v. El Paso Natural Gas Co., 17 Utah 2d 255, 259, 408 P.2d 910, 913 (1965)). Although it may sometimes be permissible for a party to contractually absolve

itself from liability for negligence, such provisions are strictly construed against the party relying on them. Id. Not only should such attempts be clear and unequivocal, it seems reasonable that the language should alert the party agreeing to such a provision that it is giving up a very substantial right. Id. at 383 (quoting Basin Oil Co. of California v. Baash-Ross Tool Co., 125 Cal.App.2d 578, 594, 271 P.2d 122, 131 (1954)). "[A]ny attempt to limit one's liability for his own negligent act will not be inferred from an agreement unless such intention is expressed in clear and unequivocal terms." O'Connell v. Walt Disney World Co., 413 So.2d 444, 446 (Fla.App.1982). Accord Colgan v. Agway, Inc., 150 Vt. 373, 553 A.2d 143, 145-46 (1988); Gross v. Sweet, 49 N.Y.2d 102, 424 N.Y.S.2d 365, 368, 400 N.E.2d 306, 309 (1979); Doyle v. Bowdoin College, 403 A.2d 1206, 1208 (Me.1979); Celli v. Sports Car Club of America, Inc., 29 Cal.App.3d 511, 516, 105 Cal.Rptr. 904, 909 (1972). Cases in some jurisdictions considering this issue have generally held that, although the specific word "negligence" need not appear in an exculpatory clause in order for such clause to have the effect of releasing claims based on negligent acts, words conveying a similar import must appear. See Colgan v. Agway, Inc., 553 A.2d at 146; Milligan v. Big Valley Corp., 754 P.2d 1063, 1068 (Wyo.1988). Other jurisdictions apparently feel that an exculpatory clause should not only be clear and unequivocal, but also should include the word "negligence" to alert the party that it is giving up a substantial right. See Jones v. Dressel, 623 P.2d 370, 378 (Colo.1981); Ciofalo v. Vic Tanney Gyms, Inc., 10 N.Y.2d 294, 220 N.Y.S.2d 962, 965, 177 N.E.2d 925, 926-27 (1961); Boll v. Sharp & Dohme, Inc., 281 A.D. 568, 121 N.Y.S.2d 20, 22-24 (1953), aff'd, 307 N.Y. 646, 120 N.E.2d 836, 837 (1954).

Construing the language of Snowbowl's rental agreement strictly against Snowbowl, as we must, we conclude that although the language does alert Sirek as to the dangers inherent in skiing and to the possibility that the bindings may not always release, it does not alert the person who rents skis that Snowbowl is released from its own negligence in selecting appropriate skis or properly setting the bindings. See Gross v. Sweet, 424 N.Y.S.2d at 369, 400 N.E.2d at 310. Put another way, the agreement does not reflect the clear intent of the parties to bargain away the right to hold one party responsible for its own negligence. See Salt River Project, 143 Yorke at 382-83.

Snowbowl argues that the exculpatory clause contained in the rental agreement must be construed as including its own negligent acts because otherwise the release would be meaningless.FN5 We disagree. Even if the release does not absolve Snowbowl from its negligent acts, it could be effective as against liability for injuries or damage occasioned during the use of the equipment and not caused by Snowbowl's negligent acts, such as those resulting from defects in the equipment. We hold that if Snowbowl intended to absolve itself from its own negligence, it should have clearly and explicitly stated so in the rental agreement. As stated in the well-reasoned dissenting opinion in Schutkowski v. Carey, 725 P.2d 1057, 1063 (Wyo.1986), "[t]his requirement is most likely to alert the other party to the extent of the release which he is granting in the contract, which usually is prepared in advance. **1296 *188 In many respects this simply would seem to be fair." Indeed, Sirek introduced uncontradicted evidence that the 1985-86 Solomon Binding Manual, which Snowbowl's employees utilized in assisting them in selecting skis

and bindings that would be compatible with Sirek's boots, contains sample release forms which expressly include negligence within their scope.

FN5. Some cases from other jurisdictions support Snowbowl's position. See, e.g., Milligan v. Big Valley Corp., 754 P.2d at 1068; Poskozim v. Monnacep, 131 Ill.App.3d 446, 86 Ill.Dec. 663, 665, 475 N.E.2d 1042, 1044 (1985); Douglass v. Skiing Standards, Inc., 142 Vt. 634, 459 A.2d 97, 98-99 (1983); Zimmer v. Mitchell & Ness, 253 Pa.Super. 474, 385 A.2d 437, 439 (1978), aff'd, 490 Pa. 428, 416 A.2d 1010 (1980).

Reading the rental agreement strictly against Snowbowl, we find that Snowbowl failed to exempt itself from liability for its own negligent conduct. Therefore, the trial court was in error in granting summary judgment in favor of Snowbowl. We reverse the granting of Snowbowl's motion for summary judgment and remand for further proceedings to determine the validity of Sirek's claims.

KLEINSCHMIDT, P.J., and LANKFORD, J., concur.

203 Cal.App.3d 589

NORMAN MADISON et al., Petitioners,
v.
THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent;
SULEJMAN SULEJMANAGIC et al., Real Parties in Interest

No. B033331.
Court of Appeal, Second District, Division 3, California.
Aug 4, 1988.

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SUMMARY

Defendants petitioned to the Court of Appeal in a wrongful death action for a writ of mandate to direct the trial court to vacate its order denying their motion for summary judgment and to enter a new and different order granting that motion, based upon a waiver and release signed by plaintiffs' decedent pursuant to his enrollment in defendants' scuba diving training course. The decedent had drowned while participating in defendants' training course, after a diving instructor had left him alone on the surface. The release expressly stated that it was the decedent's intent to exempt and relieve defendants from any liability for their negligence, but the trial court found that triable issues of fact existed as to whether the release agreement constituted an express assumption of all risks so as to bar the wrongful death claim by plaintiffs, the decedent's family.

The Court of Appeal granted the writ. It held the release could not operate to limit plaintiffs' right to prosecute a wrongful death claim, since the decedent had no power or right to waive that cause of action on behalf of his heirs. However, it also held that a plaintiff in a wrongful death action is subject to any defenses which could have been asserted against the decedent, including an express agreement by the decedent to waive the defendants' negligence and assume all risks. By the language of the release, the decedent expressly manifested his intent to relieve defendants of any duty to him and to assume the entire risk of any injury, and that no public policy reason existed to preclude him from validly executing the agreement. Thus, it held the agreement was enforceable and, as against any action brought by the decedent, would have served as a complete defense to any injury he might suffer as a result of defendants' negligence during the training course. Also, this defense could be asserted against plaintiffs. It further held the release was sufficient to cover the particular risk of injury which occurred. (Opinion by Croskey, J., with Klein, P. J., and Arabian, J., concurring.)

CROSKEY, J.
Petitioners Norman Madison (Madison) and YMCA of Metropolitan Los Angeles (YMCA)FN1 (collectively defendants) are defendants in a wrongful death action filed by Sulejman Sulejmanagic and Maida Sulejmanagic (hereinafter Plaintiffs). They are before this court seeking a writ of mandate directing the trial court (1) to vacate its order denying their motion for summary judgment and (2) to enter a new and different order

granting that motion. As we conclude that no triable issue of material fact exists with respect to the scope and legal effect of the pre-accident waiver and release given by plaintiffs' decedent and that by reason of such waiver and release the defendants, as a matter of law, have no liability to plaintiffs, we grant the petition.

FN1 YMCA of Metropolitan Los Angeles was erroneously sued herein as the "YMCA." It is the same entity and organization described in the subject Waiver, Release and Indemnity Agreement as "Westchester YMCA."
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Factual and Procedural Background

Plaintiffs' son, Ken Sulejmanagic (Ken) drowned on November 15, 1986, while participating in a YMCA scuba diving training course. He was 19 years old at the time. Ken enrolled in the course on July 29, 1986, and completed the course except for one missed dive. He therefore had not received his Openwater I Certification. On November 15, 1986, he was participating in a makeup dive, which was also to be his final checkout, when the fatal accident occurred.

Ken and a recently certified student named Robbins went on the dive with one of YMCA's instructors, Rene Rojas (Rojas).FN2 When Ken ran low on air during the dive Rojas accompanied him to the surface and directed him to swim toward a buoy that had been anchored prior to the commencement of the dive. Rojas then left Ken alone on the surface to continue the dive with Robbins. About 10 minutes later, when Rojas and Robbins surfaced, Ken was nowhere to be found. A search was commenced and Ken's body was located on the bottom.

FN2 Rojas is also a named defendant who has appeared separately herein. Although he joined in the motion for summary judgment he has not, for reasons not disclosed by the record, joined in the subject petition. However, since it is not disputed that he at all times was the agent and employee of YMCA, and acting within the course and scope of that agency and employment, he is entitled to the legal protection of the release and waiver to the same extent as YMCA even though not specifically named therein.

When Ken had enrolled in the course on July 29, 1986, he was asked to and did sign a document entitled "NAUI Waiver, Release and Indemnity *594 Agreement."FN3 This agreement (hereinafter the agreement), which contains language of waiver, release and indemnity, served as the basis for defendants' motion for summary judgment. The relevant portions of the agreement provide as follows: "For and in consideration of permitting (1) Ken Salejmanagie [ sic] to enroll in and participate in diving activities and class instruction of skin and/or scuba diving given by (2) Norman Madison/Westchester YMCA ... the Undersigned hereby voluntarily releases, discharges, waives and relinquishes any and all actions or causes of action for personal injury, property damage or wrongful death occurring to him/herself arising as a result of engaging or receiving

instructions in said activity or any activities incidental thereto wherever or however the same may occur and for whatever period said activities or instructions may continue, and the Undersigned does for him/herself, his/her heirs, executors, administrators and assigns hereby release, waive, discharge and relinquish any action or causes of action, aforesaid, which may hereafter arise for him/herself and for his/her estate, and agrees that under no circumstances will he/she or his/her heirs, executors, administrators and assigns prosecute, present any claim for personal injury, property damage or wrongful death against (2) Norman Madison/Westchester YMCA or any of its officers, agents, servants or employees for any of said causes of action, whether the same shall arise by the negligence of any of said persons, or otherwise. It Is the Intention of (1) ______________________FN[4] by This Instrument, to Exempt and Relieve (2) Norman Madison/Westchester YMCA From Liability for Personal Injury, Property Damage or Wrongful Death Caused by Negligence."

FN3 A copy of this document is attached as an Appendix to this opinion. It was prepared by the National Association of Underwater Instructors (NAUI).

FN[4] This space was apparently inadvertently left blank. However, no issue is made here that Ken did not freely and voluntarily sign the agreement nor is there any dispute that it was the intent and understanding of all parties, including Ken, that his name should have been inserted at this point.

The agreement concludes with the following acknowledgment: "The Undersigned acknowledges that he/she has read the foregoing two paragraphs, has been fully and completely advised of the potential dangers incidental to engaging in the activity and instructing of skin and/or scuba diving, and is fully aware of the legal consequences of signing the within instrument."

Plaintiffs filed this action on February 3, 1987. The defendants answered and later, on November 16, 1987, filed a motion for summary judgment. The motion was heard on February 5, 1988, and, on February 29, the court filed an order denying it. The court found that triable issues of fact existed as to whether (1) the release and waiver agreement constitutes an "express assumption of all risks" so as to bar plaintiffs' wrongful death claim, (2) the *595 "potential dangers incidental to engaging in the activity and instructing of skin and/or scuba diving" were fully and completely disclosed to Ken so as to have enabled him to make a knowing waiver of his or his heirs' rights and (3) the occurrence which proximately caused Ken's death was one that was obvious, or might have been reasonably foreseen by Ken to be within the "potential dangers incidental to ... scuba diving."

Defendants now seek a writ of mandate to vacate the trial court's order and to compel instead entry of judgment in their favor on the ground that no triable issue of material fact exists with respect to the effect of the agreement and that, as a matter of law, it provides a complete defense to plaintiffs' action.

Discussion

While the record does not disclose precisely how or why Ken lost his life, the declaration of Rojas reveals that when he and Robbins surfaced about 10 minutes after Ken was left alone they were approached by another diver who asked if “they had been the ones yelling for help.” This suggests that somehow Ken developed a problem while trying to swim to the buoy as instructed by Rojas. In any event, it is clear that plaintiffs' theory against the defendants is that they were negligent in failing to observe the “buddy system” by making sure that Ken was not left alone at any time. They argue that had someone else been with Ken that person could have come to his aid and perhaps have prevented this unfortunate tragedy.

On these facts, and for the purpose of our decision, we take it as established that, but for the provisions of the agreement, defendants' actions would constitute an act of negligence which proximately resulted in Ken's death and for which they would be liable. The critical question, however, is whether the agreement absolves defendants, in spite of their actions, from any liability to the plaintiffs.

Code of Civil Procedure section 437c, subdivision (c), provides that a motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” As we explain below, of the three issues found by the trial court, the first really is an issue of law, given the undisputed facts presented, and the other two raise no triable issues of material fact in view of the provisions of the agreement. (1)(See fn. 5.) Our de novo examination of the moving and opposing papers, including the affidavits, demonstrates to us that no genuine issue of material fact has been raised as to the terms of the *596 agreement or to the circumstances under which it was executed.FN5 We thus may determine whether, by virtue of the agreement, the defendants are entitled to judgment as a matter of law. ( D'Aquisto v. Campbell Industries) (1984) 162 Cal.App.3d 1208, 1212 [209 Cal.Rptr. 108].)

FN5 There is nothing in this record to suggest that Ken would not be bound by the terms of this agreement or that he did not realize what he was signing or was somehow misled as to the significance and import of the terms of the agreement. “It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it. [Citations.]” ( Hulsey v. Elsinsore Parachute Center (1985) 168 Cal.App.3d 333, 339 [214 Cal.Rptr. 194].) There is no evidence here of any fraudulent or other conduct on the part of the defendants which would provide a basis for avoiding the agreement.

1. The Release Could Not Operate to Limit Plaintiffs' Right to Prosecute a Wrongful Death Action

(2) As this is a wrongful death case, we must deal first with the issue of Ken's purported "release" of plaintiffs' wrongful death claim. Although the agreement expressly purports to release and discharge any action for wrongful death, it is clear that Ken had no power or right to waive that cause of action on behalf of his heirs. ( Scroggs v. Coast Community College Dist. (1987) 193 Cal.App.3d 1399 [239 Cal.Rptr. 916].) This is a right which belongs not to Ken but to his heirs. "The longstanding rule is that a wrongful death action is a separate and distinct right belonging to the heirs, and it does not arise until the death of the decedent. ( Earley v. Pacific Electric Ry. Co. [1917], 176 Cal. [79, 81] [167 P. 513].) Since Earley the courts have consistently articulated this principle and have validated it in a variety of circumstances. (See, e.g., Garcia v. State of California (1967) 247 Cal.App.2d 814, 816 [56 Cal.Rptr. 80] [fact that prisoner is barred from suit alleging injuries from dangerous condition is no bar to action for wrongful death by surviving spouse]; Blackwell v. American Film Co. (1922) 189 Cal. 689, 693-694 [209 P. 999] [prior judgment in favor of decedent for injuries does not bar later action for wrongful death]; Marks v. Reissinger (1917) 35 Cal.App. 44, 54 [169 P. 243] [statute of limitations runs from date of death, not injury of decedent].)" ( Id., at p. 1403.)

In Scroggs (which also involved a scuba diving death), the court reversed the trial court's summary judgment on the ground that the release given by the decedent to Coast Community College did not, by its terms, indicate an intention on decedent's part to assume all risks of the activity nor did it encompass a waiver of the defendant's negligence. Thus, it provided no protection to the defendants and since the decedent's purported release of the heirs' wrongful death action was ineffective, the judgment in favor of defendants could not stand. *597

However, the court recognized that a plaintiff in a wrongful death action is subject to any defenses which could have been asserted against the decedent, including an express agreement by the decedent to waive the defendant's negligence and assume all risks. In other words, a distinction must be made between the legal ineffectiveness of a decedent's preinjury release of his heirs's subsequent wrongful death action and the legal effectiveness of an express release of negligence by a decedent which provides a defendant with "a complete defense." ( Scroggs v. Coast Community College Dist., supra, 193 Cal.App.3d at p. 1402.)

2. Ken Assumed the Risk of Injury and Thereby Relieved Defendants of Any Duty to Him

(3a) The release signed by Ken does not suffer from the drafting infirmities found in Scroggs. Although the words "assumption of the risk" are not specifically used, it is clear that Ken expressly acknowledged his intent to do just that. In heavy bold type the release expressly states that it was Ken's intent to exempt and relieve the defendants from any liability for their negligence. By this language Ken expressly manifested his intent to

relieve the defendants of any duty to him and to assume the entire risk of any injury. (4) "'In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. [Fn. omitted.] ... The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.' (Prosser & Keeton, Torts (5th ed. 1984) § 68, pp. 480-481, italics in original.)" ( Coates v. Newhall Land & Farming, Inc. (1987) 191 Cal.App.3d 1, 8 [236 Cal.Rptr. 181], fn. omitted.)FN6

FN6 This is essentially the definition of express assumption of the risk which is contained in BAJI No. 4.30 (7th ed. 1986): "If, prior to an event in which the plaintiff was injured as a result of defendant's negligence, the plaintiff had expressly assumed the risk of such injury by specifically agreeing with the defendant that he, the plaintiff, would not hold the defendant responsible if an injury should be caused by the defendant's negligence, the plaintiff may not recover damages from the defendant for that injury."

We cannot distinguish this case from Coates. Apart from a specific reference in the Coates release to the voluntary assumption of all risks, the language used there is substantially identical to that which was used in the waiver and release form signed by Ken. In our view, this difference is not critical. (5) As long as the release constitutes a clear and unequivocal waiver with specific reference to a defendant's negligence, it will be sufficient. Celli v. Sports Car Club of America, Inc. (1972) 29 Cal.App.3d 511, 518-519 [105 Cal.Rptr. 904]; Prosser & Keeton, Torts (5th ed. 1984) *598 § 68, p. 484.) For it to be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties. ( Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal.App.3d 309, 314-315, 317-318 [195 Cal.Rptr. 90].) If a tortfeasor is to be released from such liability the language used "must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement." ( Id. at p. 318.)

Plaintiffs argue, and the trial court found, that there is an issue of fact with respect to this question. We disagree. (6) Whether a contract provision is clear and unambiguous is a question of law, not of fact. ( Brant v. California Dairies, Inc. (1935) 4 Cal.2d 128, 133 [48 P.2d 13]; Hulsey v. Elsinore Parachute Center, supra, 168 Cal.App.3d at p. 340.) (3b) Our examination of the agreement compels the conclusion that it was clear and free from ambiguity. It would be difficult to imagine language more clearly designed to put a layperson on notice of the significance and legal effect of subscribing to it. The emphasized references to the exemption and relief from "liability for personal injury, property damage or wrongful death caused by negligence" could not be more explicit.

Moreover, we perceive of no reason why Ken could not validly execute such a broad agreement. (7) "[N]o public policy opposes private, voluntary transactions in which one

party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party ....". Civil Code section 1668 provides that "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." However, "Despite its broad language, section 1668 does not apply to every contract." ( Vilner v. Crocker National Bank (1979) 89 Cal.App.3d 732, 735 [152 Cal.Rptr. 850].) "It will be applied only to contracts that involve 'the public interest.' [Citations.]" ( Cregg v. Ministor Ventures (1983) 148 Cal.App.3d 1107, 1111 [196 Cal.Rptr. 724].)

"In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party *599 seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

The court in Kurashige v. Indian Dunes, Inc. (1988) 200 Cal.App.3d 606 [246 Cal.Rptr. 310], concluded that a release signed by motorcycle dirt-bike riders did not involve a public interest. The court, in language equally applicable here, stated that the release "... agreement used here was printed legibly, contained adequate, clear and explicit exculpatory language and indicated defendants were to be absolved from the consequences of their own negligence. ... Furthermore, it did not involve the public interest: defendants' business was not generally thought to be suitable for public regulation; defendants did not perform a service of great importance to the public, and the business was not a matter of practical necessity for members of the public; and defendants' customers did not place their persons under defendants' control. [Citation.]" ( Id., at p. 612.)

It thus seems clear, absent a public interest involvement, that Civil Code section 1668 will not invalidate contracts which seek to exempt one from liability for simple negligence or strict liability. This is such a case. (3c) Here, Ken certainly had the option of not taking the class. There was no practical necessity that he do so. In view of the dangerous nature of this particular activity defendants could reasonably require the

execution of the release as a condition of enrollment. Ken entered into a private and voluntary transaction in which, in exchange for an enrollment in a class which he desired to take, he freely agreed to waive any claim against the defendants for a negligent act by them. This case involves no more a question of public interest than does motorcross racing ( McAtee v. Newhall Land & Farming Co. (1985) 169 Cal.App.3d 1031 [216 Cal.Rptr. 465]), sky diving ( Hulsey v. Elsinore Parachute Center, supra, 168 Cal.App.3d 333), or motorcycle dirt-bike riding ( Kurashige v. Indian Dunes, Inc., supra, 200 Cal.App.3d 606). *600

Therefore, we conclude that the agreement is enforceable and, as against any action brought by Ken, would have served as " a complete defense." It had the obviously intended legal effect of shifting the responsibility for any negligence by the defendants from the defendants to Ken. By this agreement, Ken effectively assumed all of the risks of any injury he might suffer as a result of defendants' negligence during the training course.

This defense may also be asserted here against the plaintiffs. (8) "It is axiomatic that a plaintiff in a wrongful death action is subject to defenses which could have been asserted against the decedent. (See, e.g., Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530, 552 [138 Cal.Rptr. 705, 564 P.2d 857, 99 A.L.R.3d 158] [contributory negligence]; Barnett v. Garrison (1949) 93 Cal.App.2d 553, 557 [209 P.2d 426] [assumption of the risk]; Nakashima v. Takase (1935) 8 Cal.App.2d 35, 38 [46 P.2d 1020] [justifiable homicide].)" ( Scroggs v. Coast Community College Dist., supra, 193 Cal.App.3d at pp. 1402-1403.)

(3d) We therefore determine that the legal effect of the release and waiver provisions of the agreement is to provide to defendants "a complete defense" to plaintiffs' action.FN7 As a result, no triable issue of fact has been raised with respect to the legal meaning or effect of the agreement and summary resolution of this issue in defendants' favor was required.

FN7 This case thus illustrates the essential compatibility of Coates and Scroggs. In Coates, the decedent's release provided defendant with a complete defense to the action itself (as opposed to a simple waiver of a future right to sue) whereas in Scroggs it did nothing more than purport to release a right which decedent did not own, a result which Scroggs properly refused to sanction.

3. Ken's Express Waiver and Release Was Sufficient to Cover the Particular Risk of Injury Which Resulted in His Death

(9a) The other two issues of fact found by the trial court relate to (1) the extent of Ken's knowledge or appreciation of all the risks to which he would be exposed and (2) whether the risks of the particular act of negligence which proximately resulted in his death were reasonably foreseen by him so as to be fairly encompassed by the agreement. Neither of these questions needs detain us long. We conclude that the defendants' negligence here

was reasonably foreseeable and the fact that Ken may not have specifically discussed or anticipated it does not alter that conclusion.

Plaintiffs seek to demonstrate the existence of a triable issue by evidence of just what “potential dangers” were actually discussed with Ken and his fellow class members. That evidence indicates that the possibility of instructor *601 negligence was never mentioned. However, it was not necessary that such a specific discussion have taken place.

Given the express provisions of the agreement, the law imposes no requirement that Ken have had a specific knowledge of the particular risk which resulted in his death. Under the agreement Ken clearly accepted responsibility for the consequences of any act of negligence by the defendants. (10a) As the court noted in Coates v. Newhall Land & Farming, Inc., supra, 191 Cal.App.3d at page 9, “... knowledge of a particular risk is unnecessary when there is an express agreement to assume all risk; by express agreement a 'plaintiff may undertake to assume all of the risks of a particular ... situation, whether they are known or unknown to him.' (Rest. 2d Torts § 496D, com. a, italics added; Prosser & Keeton, Torts (5th ed. 1984) § 68, p. 482.)” (Fn. Omitted.)FN8 (9b) Therefore, plaintiffs can claim no triable issue with respect to whether there was a specific discussion of, or disclosure about, the particular risk that resulted in his death (i.e., the defendants' failure to follow the “buddy system” rule). Whether Ken knew about that specific possibility at the time he signed the release is irrelevant.

FN8 The cases cited by plaintiffs for the proposition that it was necessary that Ken be aware of the specific risk for which he assumed responsibility involve implied not express risk assumptions. Such specific knowledge is required under the doctrine of implied assumption of the risk.

Similarly, there can be no issue with respect to whether such negligence on defendants' part was reasonably foreseeable by Ken or reasonably within the potential dangers to which the release is applicable. (10b) While it is true that the express terms of any release agreement must be applicable to the particular misconduct of the defendant (Prosser & Keeton on Torts (5th ed. 1984) § 68, pp. 483-484), that does not mean that every possible specific act of negligence of the defendant must be spelled out in the agreement or even discussed by the parties. (9c) Where, as here, a clear unambiguous release of all liability for any act of negligence has been given, then it is, by definition, “applicable” to the defendant's negligent act, whatever that act may have been. (11) It is only necessary that the act of negligence, which results in injury to the releasor, be reasonably related to the object or purpose for which the release is given.FN9 Here, that object or purpose was a training course in scuba diving. (12)(See fn. 10.) The negligence of the defendants in failing adequately to supervise Ken during such course is clearly so related.FN10 The opinion of plaintiffs' expert that defendants' failure *602 to provide such supervision was not one of the “potential dangers” of scuba diving makes a judgment under the wrong standard and is therefore irrelevant.FN11

FN9 If the negligent act is so related then, as a matter of law, it is reasonably foreseeable whether or not it was actually in the contemplation of either party. To the extent that anything in Bennett v. United States Cycling Federation (1987) 193 Cal.App.3d 1485 [239 Cal.Rptr. 55] (a case in which the release document contained an express assumption of all risks) suggests a different rule, we respectfully decline to follow it.

FN10 While the existence of such a reasonable relationship (which itself will demonstrate reasonable foreseeability) might in some cases be an issue of fact, that is not so here. Where "under the undisputed facts ... there can be no reasonable difference of opinion" the question may be resolved as a matter of law. ( Scrimsher v. Bryson (1976) 58 Cal.App.3d 660, 664 [130 Cal.Rptr. 125]; accord Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal.3d 49, 56 [192 Cal.Rptr. 857, 665 P.2d 947]; Imperial Cas. and Indem. Co. v. Sogomonian (1988) 198 Cal.App.3d 169, 182 [243 Cal.Rptr. 639].)

FN11 It is apparent that such testimony was limited to those dangers and risks which are inherent to scuba diving and gave no consideration to the possibility of instructor negligence. What plaintiffs' expert was actually addressing was risk exposure which occurs in the absence of negligence. We, however, are here concerned with the scope of an agreement expressly releasing instructor negligence. It seems obvious that if the parties had attempted expressly to anticipate the various acts of such negligence which could reasonably be foreseen, an instructor's neglect of a student while in the water (i.e., the very act which occurred here) would head the list.

The release signed by Ken covered and was applicable to the act of negligence by the defendants which occurred here. Therefore, the agreement, by its express terms, applied to that negligent act.

Disposition

The alternative writ is discharged and a peremptory writ of mandate shall issue to the Superior Court of Los Angeles County directing it (1) to vacate its order of February 29, 1988, denying defendants' motion for summary judgment and (2) to enter a new and different order granting said motion and entering judgment in favor of the defendants.

Klein, P. J., and Arabian, J., concurred.

The petition of real parties in interest for review by the Supreme Court was denied October 13, 1988. Mosk, J., was of the opinion that the petition should be granted. *603

Appendix

NAUI WAIVER, RELEASE AND INDEMNITY AGREEMENT

For and in consideration of permitting (1) Ken Salejmanajie to enroll and participate in diving activities and class instruction of skin and/or scuba given by (2) Norman Madison/Westchester YMCA, in the City of Los Angeles, County of Los Angeles, and State of California, beginning on the 29 day of July, 1986, the Undersigned hereby voluntarily releases, discharges, waives and relinquishes any and all actions or causes of action for personal injury, property damage or wrongful death occurring to him/herself arising as a result of engaging or receiving instructions in said activity or any activities incidental thereto wherever or however the same may occur and for whatever period said activities or instructions may continue, and the Undersigned does for him/herself, his/her heirs, executors, administrators and assigns hereby release, waive, discharge and relinquish any action or causes of action, aforesaid, which may hereafter arise for him/herself and for his/her estate, and agrees that under no circumstances will he/she or his/her heirs, executors, administrators and assigns prosecute, present any claim for personal injury, property damage or wrongful death against (2) Norman Madison/Westchester YMCA or any of its officers, agents, servants or employees for any of said causes of action, whether the same shall arise by the negligence of any of said persons, or otherwise. IT IS THE INTENTION OF (1) ________________________________________ BY THIS INSTRUMENT, TO EXEMPT AND RELIEVE (2) Norman Madison/Westchester YMCA FROM LIABILITY FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH CAUSED BY NEGLIGENCE.

The Undersigned, for him/herself, his/her heirs, executors, administrators or assigns agrees that in the event any claim for personal injury, property damage or wrongful death shall be prosecuted against (2) Norman Madison/Westchester YMCA he/she shall indemnify and save harmless the same (2) Norman Madison/Westchester YMCA from any and all claims or causes of action by whomever or wherever made or presented for personal injuries, property damage or wrongful death.

The Undersigned acknowledges that he/she has read the foregoing two paragraphs, has been fully and completely advised of the potential dangers incidental to engaging in the activity and instructing of skin and/or scuba diving, and is fully aware of the legal consequences of signing the within instrument.

WITNESS: ____________________ ____________________

Signature of Student

DATED: 7-29-86 ____________________

Signature of Parent or Guardian - where applicable

364 S.C. 242, 612 S.E.2d 462

Court of Appeals of South Carolina.
Christine McCUNE, Appellant,
v.
MYRTLE BEACH INDOOR SHOOTING RANGE, INC., a/k/a Myrtle Beach Shooting Range, Inc. and Brass Eagle, Inc., Defendants,
of whom Myrtle Beach Indoor Shooting Range, Inc., a/k/a Myrtle Beach Shooting Range, Inc. is, Respondent.
No. 3974.
Heard March 8, 2005.
Decided April 11, 2005.

Background: Patron brought action for negligence and strict liability against indoor playground for injuries patron sustained when she was participating in a paintball game. The Circuit Court, Horry County, John L. Breeden, Jr., J., entered summary judgment for playground, and patron appealed.

Holding: The Court of Appeals, Beatty, J., held that release signed by patron was sufficient to release indoor playground from all liability in this incident.

Affirmed.

BEATTY, J.:
Christine McCune brought an action for negligence and strict liability against the Myrtle Beach Indoor Shooting Range (the Range) for injuries sustained while she was participating in a paintball game.FN1 McCune appeals from the trial court's grant of summary judgment to the Range. We affirm.

FN1. Brass Eagle, Inc., was also named in the action as the manufacturer of the mask McCune alleged was defective or in poor operating condition. McCune and Brass Eagle settled the suit and Brass Eagle is not a party to this appeal.

*463*245

FACTS

The Range offers paintball games and allows participants to rent protective equipment, including face masks, provided by the Range. McCune participated in a paintball match with her husband and friends. She utilized a mask provided by the Range. Prior to being allowed to participate, McCune signed a general waiver. The waiver released the Range from liability from all known or unknown dangers for any reason with the exception of gross negligence on the part of the Range.

During her play, the mask was loose and ill fitting. She attempted to have the mask tightened or replaced on several occasions and an employee of the Range attempted to properly fit the mask for McCune. While playing in a match, McCune caught the mask on the branch of a tree. The tree was obscured from her field of vision by the top of the mask. The mask was raised off her face because it was loose, and provided no protection against an incoming paintball pellet. The pellet struck McCune in the eye, rendering her legally blind in the eye.

McCune brought suit, alleging causes of action for negligence and strict liability based on the failure of the mask to properly be fitted and protect her during play. The **464 Range filed an answer asserting the waiver released them from all liability as a result of the paintball striking McCune. Additionally, *246 it asserted McCune's comparative negligence barred recovery.

Subsequently, the Range filed a motion for summary judgment, again alleging the waiver and McCune's comparative negligence barred recovery. The court granted the Range's motion, finding the waiver was sufficient to show McCune expressly assumed the risks associated with playing paintball. Additionally, the court found her overwhelming comparative fault barred recovery. The trial court subsequently denied McCune's motion for reconsideration. This appeal followed.

## STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP; Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003) (“Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). “On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.” Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

## DISCUSSION

McCune maintains the trial court erred in granting summary judgment to the Range on the basis of the exculpatory language in the release of liability signed by McCune. McCune asserts she did not anticipate the harm that was inflicted or the manner in which

it occurred. Additionally, she *247 contends the failure of the equipment was unexpected and she could not have voluntarily assumed such a risk. We disagree.

As an initial matter, we must determine whether this is a case involving express assumption or implied assumption of the risk. Express assumption of the risk sounds in contract and occurs when the parties agree beforehand, “either in writing or orally, that the plaintiff will relieve the defendant of his or her legal duty toward the plaintiff.” Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 79-80, 508 S.E.2d 565, 569-70 (1998).

“Express assumption of risk is contrasted with implied assumption of risk which arises when the plaintiff implicitly, rather than expressly, assumes known risks. As noted above, implied assumption of risk is characterized as either primary or secondary.” Id. at 80-81, 508 S.E.2d at 570. “[P]rimary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.” Id. at 81, 508 S.E.2d at 570 (quoting Perez v. McConkey, 872 S.W.2d 897, 902 (Tenn.1994)). “Secondary implied assumption of risk, on the other hand, arises when the plaintiff knowingly encounters a risk created by the defendant's negligence.” Id. at 82, 508 S.E.2d 565, 508 S.E.2d at 571.

In the instant case, we are confronted with a defense based upon McCune's express assumption of the risk. She signed a release from liability prior to participating in the paintball match. As acknowledged by Davenport, the courts of South Carolina have analyzed express assumption of the risk cases in terms of exculpatory contracts. Id. at 80, 508 S.E.2d at 570.

Exculpatory contracts, such as the one in this case, have previously been upheld by the courts of this state. See Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by **465 “waiver and release” voluntarily signed by plaintiff prior to entering the race track); Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 619-22, 138 S.E.2d 155, 157-58 (1964) (holding it was not violative of public policy for telephone company to legally limit its liability by contract for negligence *248 in the publication of a paid advertisement in the yellow pages of its telephone directory). “However, notwithstanding the general acceptance of exculpatory contracts, ‘[s]ince such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon.’ ” Fisher v. Stevens, 355 S.C. 290, 295, 584 S.E.2d 149, 152 (Ct.App.2003) (quoting Pride, 244 S.C. at 619, 138 S.E.2d at 157). This court has explained:

Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair and just, the latter construction will prevail.

Georgetown Mfg. & Warehouse Co. v. South Carolina Dep't of Agric., 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct.App.1990) (citing C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)).

Contracts that seek to exculpate a party from liability for the party's own negligence are not favored by the law. Pride, 244 S.C. at 619, 138 S.E.2d at 157. An exculpatory clause, our supreme court has held, is to be strictly construed against the party relying thereon. Id. An exculpatory clause will never be construed to exempt a party from liability for his own negligence " 'in the absence of explicit language clearly indicating that such was the intent of the parties.' " South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct.App.1984) (quoting Hill v. Carolina Freight Carriers Corp., 235 N.C. 705, 71 S.E.2d 133, 137 (1952)).

The release in the instant case explicitly and unambiguously limited the Range's liability. Specifically, McCune signed the release, thereby acknowledging the following pertinent clauses:

1. The risk of injury from the activity and weaponry involved in paintball is significant, including the potential for permanent disability and death, and while particular protective equipment and personal discipline will minimize this risk, the risk of serious injury does exist;

2. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING *249 FROM THE NEGLIGENCE of those persons released from liability below, and assume full responsibility for my participation; and,

...

4. I, for myself and on behalf of my heirs ... HEREBY RELEASE AND HOLD HARMLESS THE AMERICAN PAINTBALL LEAGUE (APL), THE APL CERTIFIED MEMBER FIELD, the owners and lessors of premises used to conduct the paintball activities, their officers, officials, agents, and/or employees ("Releasees"), WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, or loss or damage to person or property, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, except that which is the result of gross negligence and/or wanton misconduct.

...

I HAVE READ THIS RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT, FULLY UNDERSTANDING ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

The agreement is then signed by McCune and dated the date of the incident.

The above agreement is sufficient to limit the liability of the Range to McCune. The agreement was voluntarily signed and specifically stated: (1) she assumed the risks, whether known or unknown; and (2) she released the Range from liability, even from injuries sustained because of the Range's **466 own negligence. It is clear McCune voluntarily entered into the release in exchange for being allowed to participate in the paintball match.

Additionally, she expressly assumed the risk for all known and unknown risks while participating and cannot now complain because she did not fully appreciate the exact risk she faced. “ Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.” Restatement (Second) of Torts 496D (1965) (emphasis added).

*250 We find the release entered into by the parties does not contravene public policy. In Huckaby, the plaintiff signed a waiver similar to the one above, which was required before he could participate in a sanctioned automobile race. He maintained his injuries were caused by the speedway's faulty installation and maintenance of a guardrail. Huckaby, 276 S.C. at 630, 281 S.E.2d at 223. As was found in Huckaby, participation in a paintball match is voluntary. “ ‘If these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, this would not be in the public interest.’ ” Huckaby, 276 S.C. at 631, 281 S.E.2d at 224 (quoting Gore v. Tri-County Raceway, Inc., 407 F.Supp. 489, 492 (M.D.Ala.1974)).

Furthermore, we find the instant case to be distinguishable from this court's decision in Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct.App.2003). In Fisher, the plaintiff worked on a wrecker crew at the Speedway of South Carolina. In order to work at the Speedway, Fisher was required to sign a release and waiver of liability. During a race, the wrecker on which Fisher was working responded to a crash. While the wrecker was moving towards one of the vehicles, Fisher, who was riding on the back of the wrecker, fell off and suffered severe head injuries. Through a guardian, Fisher brought suit alleging negligence, gross negligence, and recklessness against the driver and the owner of the wrecker as well as the Speedway. The defendants raised the Release as an affirmative defense. All parties filed cross-motions for summary judgment, alleging the Release acted as a complete bar to Fisher's claims. The circuit court judge granted partial summary judgment to Fisher against the driver and the owner of the wrecker on the ground the Release, as a matter of law, did not bar Fisher's claims. Additionally, the court denied summary judgment to the Speedway. The court found an issue of material fact existed as to whether Fisher was an employee of the Speedway.

On appeal, the driver and the owner of the wrecker argued the circuit court erred in finding the Release was inapplicable to them. Specifically, they contended they were released from liability given the Release encompassed “VEHICLE OWNERS, DRIVERS, [and] ... ANY PERSONS IN ANY RESTRICTED *251 AREA.” Id. at 294,

584 S.E.2d at 151-52. In analyzing this issue, we found the Release, an exculpatory contract, was ambiguous because the terms, “driver” and “vehicle owner” were “terms of art [which were] not used to identify any owner or driver of any vehicle.” Id. at 295, 584 S.E.2d at 152. Additionally, we agreed with the circuit court that the phrase “ANY PERSONS IN ANY RESTRICTED AREA” did not relieve the driver and the owner of the wrecker of liability on the ground it was overly broad and, thus, in contravention of public policy. Because the contract “did not clearly inform Fisher he would be waiving all claims due to the [driver's and vehicle owner's negligence],” we held the driver and the vehicle owner could not be released from liability “based on the broad ‘catch-all’ phrase.” Id. at 298, 584 S.E.2d at 153.

In contrast, the release in the case at bar is neither ambiguous nor overbroad. In fact, McCune in her deposition characterized the release as a “standard waiver.” Although our research reveals no South Carolina case that deals specifically with a release for paintball, other jurisdictions have found similarly worded releases to be unambiguous. See Taylor v. Hesser, 991 P.2d 35, 38 (Okla.Civ.App.1998) (affirming grant of summary judgment to operators of paintball facility and shooter where plaintiff, who was injured during the paintball game, signed a release prior to participating); **467 Kaltenbach v. Splatball, Inc., No. C7-99-235, 1999 WL 690191, at *2 (Minn.Ct.App.1999) (finding paintball participant was precluded from recovering against owner of a paintball facility for injuries where participant signed a release of owner's liability).

We would also note that unlike the release in Fisher, the release signed by McCune did not preclude recovery for a cause of action involving gross negligence.FN2 Thus, this opinion should not be construed as creating an indefensible position for all injuries sustained during inherently dangerous recreational activities. Cf. Adams v. Roark, 686 S.W.2d 73, 75-76 (Tenn.1985) (recognizing, in an action to recover for injuries sustained by a motorcyclist at a drag way, that an agreement to contract against liability for gross negligence is unenforceable); *252 Murphy v. N. Am. River Runners, Inc., 186 W.Va. 310, 412 S.E.2d 504, 510 (1991) (stating, in an action to recover for injuries sustained during a whitewater rafting accident, “a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention”).

FN2. Neither in her brief nor at oral argument did McCune assert that the Range's actions constituted gross negligence. Instead, she acknowledged at oral argument that the Range operated with at least slight care by attempting to properly adjust the mask to McCune. See Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994)( “Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.”); Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002) (stating gross negligence “is the failure to exercise even the slightest care”).

Accordingly, we hold the trial court properly determined the release signed by McCune was sufficient to release the Range from all liability in this incident. Therefore, the decision of the trial court is

AFFIRMED

303 F.Supp.2d 94

United States District Court,
D. Connecticut.
Alicia DELK, Plaintiff,
v.
GO VERTICAL, INC., a/k/a “Go Vertical,” Defendant.
Feb. 3, 2004.

Background: Climbing gym patron brought negligence action in state court against gym owner to recover for injuries sustained when she fell while climbing on rock wall. Owner removed.

Holdings: On owner's motion for summary judgment, the District Court, Hall, J., held that:
(1) patron's alleged failure to read waiver prior to signing was insufficient to establish that patron did not assent to the terms of the waiver, and
(2) waiver was valid and enforceable.

Motion granted.

RULING GRANTING GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 20]

HALL, District Judge.
Plaintiff Alicia Delk (“Delk”), a citizen of Oregon, brings this diversity action sounding*95 in negligence as a result of injuries she sustained when she fell while climbing at a climbing gym in Stamford, Connecticut owned and operated by the defendant, GO VERTICAL, INC. (“Go Vertical”). Go Vertical has moved to dismiss the complaint [Dkt. No. 20], claiming that this action is barred by the release Delk signed indemnifying it from liability for all claims arising from its negligence. The court agrees and grants Go Vertical's motion for summary judgment.

I. FACTS & PROCEDURAL HISTORY
On December 13, 2001, Delk and some friends visited a climbing gym located in Stanford, Connecticut owned and operated by Go Vertical. When she and Sara Mullins, another first-time climber in the group, approached the sign-in desk upon entering, they were each given a piece of paper and were told that they had to sign the form before they would be allowed to climb.

The paper contained a waiver, entitled “ASSUMPTION OF RISK, RELEASE, AND INDEMNIFICATION FOR GO VERTICAL, INC.,” which read in pertinent part FN1:

FN1. The language cited in the main text of this opinion reflects the contractual language particularly pertinent to this ruling. The deleted text is quoted in full in the footnotes that follow.

In consideration of my being allowed to use the Go Vertical, Inc. Climbing Wall ("Climbing Wall"), Climbing School ("School") and related training facilities ("Facilities"), I the undersigned, hereby agree to and acknowledge the following: 1. ASSUMPTION OF RISK: I hereby acknowledge and accept and agree that the sport of rock climbing and the use of the Climbing Wall involve inherent risks. I received full information regarding the Climbing Wall and Go Vertical's facilities and had the opportunity to ask any questions that I wished. I have examined the Climbing Wall and have full knowledge of the nature and extent of all the risks associated with rock climbing and the use of the Climbing Wall, including, but not limited to .... FN2

FN2. The deleted list of risks reads in full:a. All manner of injury resulting from my falling off or from the Climbing Wall and hitting the floor, wall faces, people or rope projections, whether permanently or temporarily in place;

b. Rope abrasion, entanglement and other injuries resulting from activities on or near the Climbing Wall such as, but not limited to, climbing, belaying, rappelling, lowering on ropes, rescue systems, and any other rope techniques;

c. Injuries resulting from the actions or omission of others, including but not limited to falling climbers or dropped items, such as, but not limited to, ropes climbing hardware, wall parts or personal effects;

d. Cuts and abrasions resulting from skin contact with the Climbing Wall or any other surface;

e. Failure or misuse of ropes, slings, harnesses, climbing holds, anchor points, or any part of the Climbing Wall;

f. Failure to follow Go Vertical employee instruction or failure to ask for information or assistance.

I further acknowledge that the above list is not inclusive of all possible risks associated with the use of the Climbing Wall and related training facilities and I agree that such list in no way limits the extent or reach of this Assumption of Risk, Release, and Indemnification. If I see or hear anything that is questionable or dangerous, it is my

responsibility to ask or inform Go Vertical employees until corrected or satisfactorily answered.

2. RELEASE: In consideration of my use of the Climbing Wall and/or Go Vertical's facilities and/or participation in *96 any program or competition offered by or held at Go Vertical's facilities, I hereby release and discharge Go Vertical, Inc., their owners, affiliates, agents and employees, and their successors and assigns, from any and all liabilities, suits, claims and demand actions or damages (including attorneys fees and disbursement) incurred by me or are in any way related to or arising out of the use or intended use of the Climbing Wall and /or Go Vertical facilities whether supervised or not, including without limitation, all claims for property damage, personal injuries or wrongful death including any such claims which allege negligent acts or omissions of Go Vertical.

3. INDEMNIFICATION: I hereby agree to indemnify and hold harmless Go Vertical, Inc., affiliates, agents and employees, and their successors and assigns, from any and all causes of action, claims, demands, losses and costs of any nature whatever arising out of or in any way relating to my use of the Climbing Wall or Go Vertical's facilities, including any such claims which allege negligent acts or omissions of Go Vertical.

. . . . . FN3

FN3. The deleted paragraph reads in full: “I understand and agree that Go Vertical and its personnel reserve the right to deny access to its facilities to any individual permanently, or for a specified period of time, for any breach of any of Go Vertical's policies, rules and regulations or for any conduct that is viewed as unsafe or inappropriate.”

I expressly state that I have read, understand and am familiar with this document and all of its provisions and that I have full knowledge of the nature and extent of the risks incident to and inherent in the sport of rock climbing and my use of the Facilities or participation with the School. I hereby voluntarily and knowingly assume those risks and I understand that I will be solely responsible for any injury, loss or damage, including death, which I sustain while using the Climbing Wall or Go Vertical's facilities and that by this agreement, I relieve Go Vertical from any and all liability for such injury, loss, damage or death.

. . . . . FN4

FN4. This final, deleted paragraph reads in full: I expressly state that I am in good health and that I have no physical limitations which would preclude my safe use of the

Climbing Wall and/or Go Vertical's facilities. I am at least 18 years of age and otherwise legally competent to sign this agreement. This Assumption of Risk, Release, and Indemnification shall be effective and binding upon me and upon my assigns, heirs, and representatives, executors and administrators. (If under the age of 18, this release must also be signed and filled out below by the parent of the Minor.) In the event that I file a lawsuit against Go Vertical, Inc., I agree to do so solely in the state of Connecticut, and I further agree that the substantive law of that state shall apply in that action without regard to the conflict of law rules of that state. I agree that if any portion of this agreement is found to be void or unenforceable, the remaining portion shall remain in full force and effect.

See Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl's Mem. Opp.") [Dkt. 26], Ex. H: Waiver Form. With the exception of the title at the top of the release and the section headings, which were in capital letters, the language contained in the release was in the same font, one which looked virtually identical to Galliard BT 9-point of Word Perfect, Version 11.

Although Delk admits to having signed the form, she says she did not read it. When asked whether she knew what the form was, she replied: "No, I just signed it. I assumed it was something that allows you to climb." See Pl's Mem. Opp., Ex. A: *97 Delk Dep., at 27. However, Delk also stated that, when she approached the employee at the sign-in desk, "[h]e said, 'It's a waiver.' He said, 'You got to sign it before you climb.' " Id., Ex. A: Delk Dep., at 43. When asked what she thought she was signing, Delk explained: "To tell you the truth, I didn't pay much attention. They sort of shuffled us in and said, 'You have to sign this before you climb.' They said, 'Here you go. Sign it.' It was as quick as signing my name and it was out of my face, so I didn't really think about it again." FN5 Id., Ex. A: Delk Dep., at 28. When asked whether she remembered having read the waiver, she responded:

FN5. Delk was a first-time climber, and Go Vertical asserts that it has a policy of asking customers when they enter whether they have climbed at the gym before. If not, its policy is to give first-time patrons a waiver form and to ask them to sign it. Go Vertical further claims that its policy is to ask first-time patrons if they have ever filled out a waiver before and, if the answer is no, to show new customers the form, ask them to read and sign it. For purposes of this motion, the court accepts Delk's testimony that this procedure was not followed in her case.

I don't recall. Like I said, it was a very, very quick thing. I don't even think we paid. It was, "Hey, Crystal. Hey, Jason. How are you doing? Have your friends sign this." "Let's go in." It was just, "Shove your shoes under there." ... I didn't really give it much thought. It was "You have to sign this before you climb." That's what I heard. That's what I did. I was with-Crystal and Jason had been there before and I honestly didn't give it much thought. I was just taken [a]back by the place, looking around.

Id., Ex. A: Delk Dep., at 43-44. Delk's friend, Sara Mullins, also states:

The waiver was not, at all, explained to me. I was not educated by the guy at the front desk about what the waiver was, what it meant, or what it really constituted. It was very nonchalant. Alicia was with me when the whole check-in and sign-in process was going on. I believe that she received the same papers to sign and again was not provided with any of the information about the waiver and what it meant.

Id. at 28 (quoting Mullins' sworn statement).

At the time of this visit, Delk was a twenty-one-year-old student at University of Oregon who had just completed the fall semester of her junior year. She had no experience rock climbing before this visit, and she received no training from Go Vertical as its patron. The visit concluded without incident.

However, the following day, Delk returned with friends for her second visit. As a returning customer who had already signed a waiver, she was not asked to sign another waiver. While she was “bouldering” FN6 on a rock of about sixteen feet in height and had reached a height of perhaps as much as fifteen feet, Delk realized that she did not know how to get down and became frightened. The sole employee available to assist her was in another location, either climbing a rock wall or belaying on the rock wall. Because she had witnessed others jump down in a certain position, and because her more experienced friend advised her to do so, Delk attempted to jump in such a position. She landed on her buttocks, sustaining burst fractures in her spine, injuries that form the basis of this lawsuit.

FN6. The parties both define “bouldering” as climbing a rock formation without protection or climbing aids.

Delk commenced this negligence action by filing a complaint, dated July 1, 2002, in Connecticut state court. See Notice of *98 Removal [Dkt. 1], Complaint (attached). On July 30, 2002, Go Vertical removed the case to this court, alleging federal diversity jurisdiction pursuant to 28 U.S.C. § 1332. The complaint seeks to recover compensatory damages arising from Delk's physical and psychological injuries that it alleges resulted from Go Vertical's “negligence and/or carelessness.” FN7 Id. In its Answer [Dkt. 14], Go Vertical asserts the special defenses of contributory negligence and waiver.

FN7. Specifically, the complaint alleges that Go Vertical failed to adequately or properly: 1) supervise Delk; 2) instruct or train her with respect to bouldering; 3) maintain the bouldering equipment; 4) put in place adequate safety procedures concerning bouldering; 5) provide adequate safety equipment with respect to bouldering; 6) provide adequate staffing; 7) put in place adequate safety equipment in general; 8) operate, maintain, and control the bouldering equipment; 9) operate the premises and its

equipment; 10) avoid foreseeable injuries to patrons; 11) warn patrons of risks in using the facilities; 12) failed to follow acceptable rules or regulations for safety at climbing facilities; 13) give Delk notice of dangerous and unsafe conditions; and 14) failed to take proper preventative precautions. The Complaint also alleges that Go Vertical negligently lulled Delk into a false sense of security and failed to exercise due care under the circumstances and in general. Id.

On August 29, 2003, Go Vertical moved for summary judgment [Dkt. No. 20] based on its waiver defense. Delk opposes the motion, arguing that she did not legally assent to the waiver and, in the alternative, that the waiver itself is not valid and therefore cannot be enforced. See Pl's Mem. Opp., at 25, 29. For the reasons stated below, the court grants Go Vertical's motion for summary judgment.

## II. DISCUSSION

### A. Summary Judgment Standard

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Hermes Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 107 (2d Cir.2000). The moving party bears the burden of showing that no genuine factual dispute exists. Carlton v. Mystic Transp., Inc., 202 F.3d 129, 133 (2d Cir.2000) (citing Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir.1994)). In assessing the record to determine if such issues exist, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 721 (2d Cir.1994). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” Anderson, 477 U.S. at 255, 106 S.Ct. 2505. When reasonable persons applying the proper legal standards could differ in their responses to the questions raised on the basis of the evidence presented, the question is best left to the jury. Sologub v. City of New York, 202 F.3d 175, 178 (2d Cir.2000).

Once the moving party has met its burden, in order to defeat the motion the nonmoving party must “set forth specific facts showing that there is a genuine issue for trial,” Anderson, 477 U.S. at 255, 106 S.Ct. 2505, and present such evidence as would allow a jury to find in his favor, Graham v. Long Island R.R., 230 F.3d 34, 38 (2d Cir.2000). A party may not rely “on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment.” Lipton v. The Nature Company, 71 F.3d 464, 469 (2d Cir.1995) (quoting *99 Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir.1986)). Additionally, a party may not rest on the “mere allegations or denials” contained in his pleadings. Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir.1995). See also Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir.1993) (holding that party may not rely on conclusory statements or an argument that the affidavits in support of the motion for summary judgment are not credible).

B. Assent

Delk attempts to raise an genuine question of material fact as to whether she properly assented to the waiver. In her memorandum, Delk claims that "[she] was rushed through the process" and "was not provided an opportunity to read the waiver before signing it." See Pl's Mem. Opp., at 25. She also claims that she simply did not read the waiver form she signed. The court concludes, however that, even when viewing the facts in the light most favorable to Delk, no reasonable juror could do otherwise than conclude that she assented to the waiver.

In Connecticut, "the general rule is that where a person of mature years and who can read and write signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it and notice of its contents will be imputed to him if he negligently fails to do so." Dimaggio v. Labreque, No. CV000438800S, 2003 WL 22480968, *3, 2003 Conn.Super. LEXIS 2823, *7 (Conn.Super. October 9, 2003) (quoting DiUlio v. Goulet, 2 Conn.App. 701, 704, 483 A.2d 1099 (Conn.App.1984)); Lombardo v. Maguire Group, Inc., No. CV 96077767, 1997 WL 325354, 1997 Conn.Super. LEXIS 1543 (Conn.Super. June 6, 1997) (citing DiUlio ); Golden v. Curves International, Inc., No. CV020818216S, 2003 WL 21214122, 2003 Conn. LEXIS 1441, *2 (Conn.Super. LEXIS May 1, 2003) (citing Connors v. Reel Ice, Inc., No. CV 980579993S, 2000 WL 1161241, 2000 Conn.Super. LEXIS 1926 (Conn. Super July 26, 2000)). Connecticut courts have repeatedly held that plaintiffs cannot escape the consequences of a waiver into which they voluntarily entered merely by establishing that they did not read it. See Fischer v. Rivest, No. X03CV000509627S, 2002 WL 31126288, 2002 Conn.Super. LEXIS 2778, *31 (Conn.Super. August 15, 2002); cf. DiUlio, 2 Conn.App. at 704, 483 A.2d 1099 (reiterating rule that notice of contents will be imputed despite failure to read but also noting that this rule is subject to qualification); Caron v. Waterford Sports Center, No. X07CV010077059S, 2002 WL 31898081, 2002 Conn.Super. LEXIS 3996, *10-11 (Conn.Super. December 13, 2002) (rejecting argument that Caron did not read, and therefore did not assent to, waiver because there was no evidence that employee rushed him to sign and because he had signed similar waivers in the past); Smith v. Connecticut Racquetball Club, No. CV97342983S, 2002 WL 1446633, 2002 Conn.Super. LEXIS 1869, *9 (Super. Ct. June 3, 2002) (plaintiff cannot raise an issue of material fact concerning assent merely by alleging that "she did not discuss the waiver with anyone, was not told what the waiver contained, was not told to read it or discuss it with an attorney and that she would not have signed the waiver had she known that it released the defendant from liability for the defendant's own negligence"). Therefore, Delk cannot meet her burden of producing evidence sufficient to raise an issue of material fact that she did not assent to the terms of the waiver simply by establishing that she did not read the waiver.

The court also concludes that Delk's allegation that Go Vertical's employee improperly prevented her from reading the *100 waiver by rushing her is conclusory and unsupported by the evidence. The argument that Delk's assent was vitiated by the fact that Go Vertical's employee rushed her, and thereby deprived her of the opportunity to

read the waiver, would be reason to deny the motion for summary judgment, had any evidence she submitted supported such an allegation.

In support of her argument, Delk relies on reasoning similar to that employed by the Connecticut Court of Appeals in DiUlio, an opinion which reaffirmed the general "duty to read" rule but also noted that "this rule is subject to qualifications, including intervention of fraud or artifice, or mistake not due to negligence, and applies only if nothing has been said or done to mislead the person sought to be charged or to put a man of reasonable business prudence off his guard in the matter." See 2 Conn.App. at 704, 483 A.2d 1099 (quoting Ursini v. Goldman, 118 Conn. 554, 562, 173 A. 789 (1934)). The Appellate Court in DiUlio reversed the trial court and found that a genuine factual dispute existed as to assent based on a counteraffidavit submitted by the plaintiff in which she stated that she had failed to read the release before signing it because the gatekeeper of the auto race track she was trying to enter as a spectator had "rushed" her and others in a long admission line through the gate and thereby prevented her from scrutinizing the document. Similarly, the Connecticut Superior Court in Golden v. Curves International, Inc., No. CV020818216S, 2003 WL 21214122, 2003 Conn. LEXIS 1441 (Conn.Super. LEXIS May 1, 2003), relying on DiUlio, refused to grant judgment in favor of the defendant health club because it concluded that "there may be a question of fact whether a first time health club patron would view the tipping over of an exercise machine as a foreseeable risk covered by a waiver agreement signed under rushed circumstances at an opening day enrollment, claimed to have taken place in a 'mad house' and a 'chaotic' atmosphere." Id., 2003 WL 21214122 at *1, 2003 Conn. LEXIS 1441, at *2-3.

In contrast, here, Delk's deposition suggests that it was either the presence of her friends, who had already signed waivers as previous customers of Go Vertical, or even Delk's own wonder and excitement when she arrived at the climbing gym, that prevented her from reading the waiver she signed. As Delk testified, "I was with-Crystal and Jason had been there before and I honestly didn't give it much thought. I was just taken [a]back by the place, looking around." Pl's Mem. Opp., Ex. A: Delk Dep., at 27. Unlike the facts in DiUlio, Delk does not claim that there was a long line of waiting customers who were also pressured into signing. Evidence that the atmosphere was "chaotic," as in Golden, or even rushed as a result of behavior by the Go Vertical employee are totally absent here. Delk states only that the process was very "quick." Id., Ex. A: Delk Dep., at 43. Allegations by Delk's friend Mullins that the employee at the sign-in desk was "nonchalant" when requesting that they sign the waiver are simply insufficient to support a claim that Delk was rushed by Go Vertical or to suggest that something "ha[d] been said or done to mislead [Delk] or to put a man of reasonable business prudence off his guard in the matter." DiUlio, 2 Conn.App. at 704, 483 A.2d 1099 (quoting Ursini v. Goldman, 118 Conn. 554, 562, 173 A. 789 (1934)). There is simply no evidence before the court that raises a genuine question as to whether Go Vertical or its employees deprived Delk of the opportunity to review the waiver or coaxed her to avoid reading it before she signed. See Caron, 2002 WL 31898081, at *3, 2002 Conn.Super. LEXIS 3996, at *11. Therefore, the court concludes that, even when viewing *101 the facts in the light most favorable to her, Delk has not met her burden of producing evidence sufficient to raise an issue of material fact that she did not assent to the terms of the waiver.

C. Validity of Waiver Itself
Delk further asserts that, even assuming she assented to its terms, the waiver is not valid because it does not satisfy the strict requirements under Connecticut law for exculpatory or indemnification clauses and therefore does not overcome the presumption against validity with respect to contract provisions that seek to relieve persons from their own negligence. The case law simply does not support this contention.

To begin, although Delk has not raised any factual issues as to the scope of the waiver, the court notes that the exculpatory clause clearly and expressly purports to absolve Go Vertical of liability resulting from its own negligence.FN8 In its recent decision in Hyson v. White Water Mountain Resorts of Connecticut, Inc., 265 Conn. 636, 829 A.2d 827 (2003), the Connecticut Supreme Court concluded:

FN8. Arguing that the format of the release form raises a triable issue of fact sufficient to defeat Go Vertical's motion for summary judgment, Delk cites language from the Court of Appeals decision in B & D Associates v. Russell, 73 Conn.App. 66, 72, 807 A.2d 1001 (2002):

Not only does this stringent standard require that the drafter of such an agreement make its terms unambiguous, but it mandates that the terms be understandable as well. Thus, a provision that would exempt its drafter from any liability occasioned by his fault should not compel resort to a magnifying glass and lexicon ....

Id. at 72, 807 A.2d 1001 (quoting Griffin v. Nationwide Moving & Storage Company, 187 Conn. 405, 413, 446 A.2d 799 (1982)). However, after examining the waiver form, this court easily concludes that the provisions of the waiver were “clear and coherent,” id., as required by the case law. Although the font of the waiver was on the small side, there was no “fine print,” as the entire document appears to have been in the same size font. Neither a magnifying glass nor a lexicon would have been necessary in order to read, comprehend, and legally assent to the terms of waiver.

[A]lthough “in many jurisdictions a written contract of indemnity will not be construed to indemnify against the indemnitee's own negligence unless there is a clear expression of that intention, and then the contract is strictly construed ...[, a] specific reference to negligence of the indemnitee is not always required.” In keeping with the well established principle, however, that “the law does not favor contract provisions which relieve a person from his own negligence,” we conclude that the better rule is that a party cannot be released from liability for injuries resulting from its future negligence in the absence of language that expressly so provides.

Id. at 642-43, 829 A.2d 827 (internal citations omitted); see also Foley v. Southington-Cheshire Community YMCAS, Inc., No. CV00502023, 2002 WL 725492, at *1, 2002 Conn.Super. LEXIS 990, *3-9 (Conn.Super. March 28, 2002) (concluding, before Hyson, that waivers must contain specific language such as the word “negligence” to absolve

sports facilities of liability for their own negligence); Bashura v. Strategy Plus, Inc., No. CV 950050871, 1997 Conn.Super. LEXIS 3084, *15-16 (Conn.Super.Nov. 20, 1997) ("[T]he fairer rule [would] require the exculpatory agreement to specifically alert the patron that he or she by signing the waiver is releasing the operator of the facility from injury caused by the operator's own negligence."); but see, e.g., Krazek v. Mountain River Tours, Inc., 884 F.2d 163, 166 (4th Cir.1989) ("To hold otherwise would create a requirement that to bar negligence claims all releases must *102 include the words 'negligence' or 'negligent acts.' We decline, however, to formulate a rule that requires the use of specific 'magic words' in contracts such as this one."). In fact, the express terms of the waiver at issue in this case provide for the release of liability for "negligent acts" in two separate paragraphs.FN9 Thus, by its express terms, the scope of the waiver clearly purported to release Go Vertical from claims resulting from its own negligence.

FN9. As noted above, the release section of the waiver reads in relevant part:

I hereby agree to indemnify and hold harmless Go Vertical, Inc...., from any and all causes of action, claims, demands, losses and costs of any nature whatever arising out of or in any way relating to my use of the Climbing Wall or Go Vertical's facilities, including any such claims which allege negligent acts or omissions of Go Vertical.

See Pl's Mem. Opp., Ex. H: Waiver Form (emphasis added). Likewise, indemnification section reads in relevant part:

I hereby release and discharge Go Vertical, Inc...., from suits, claims and demand actions or damages (including attorneys fees and disbursement) incurred by me or are in any way related to or arising out of the use or intended use of the Climbing Wall and /or Go Vertical facilities whether supervised or not, including without limitation, all claims for property damage, personal injuries or wrongful death including any such claims which allege negligent acts or omissions of Go Vertical.

Id. (emphasis added).

Admittedly, the Connecticut Supreme Court in Hyson refrained from deciding the precise question facing this court. The Hyson Court held that, because the contract before it did not include express language indemnifying the proprietor of the recreational facility for its own negligence, it did not have such an effect.FN10 Notably, the Court explicitly left open the question of whether an agreement having such express language would be enforceable. See 265 Conn. at 640, 643 n. 11, 829 A.2d 827.

FN10. Two Justices dissented in Hyson, arguing that even releases that do not contain exculpatory clauses explicitly stating that the signatory is releasing all claims sounding in negligence should be given such effect. See 265 Conn. at 644-50, 829 A.2d 827 (Norcott, J., dissenting, with whom Borden, J., joins).

Notwithstanding this uncertainty in state supreme court jurisprudence, state trial courts have been strikingly consistent in upholding as valid and enforceable “agreements exempting owners and operators of sports facilities from liability for negligence entered into with patrons of the facility,” Smith, 2002 WL 1446633, at *2, 2002 Conn.Super. LEXIS 1869, *3 (citing Slauson v. White Water Mountain Resorts of Connecticut, No. CV990432460, 2001 WL 688620, at *1, 2001 Conn.Super. LEXIS 1489, *2-3 (Conn.Super. May 30, 2001)), except in limited circumstances warranting a public policy exception to the rule of enforceability,FN11 and despite the disfavor with which the law traditionally views contract provisions which relieve a person from his own negligence, see Griffin v. Nationwide Moving & Storage Co., 187 Conn. 405, 413, 446 A.2d 799 (1982). See, e.g., Dimaggio, 2003 WL 22480968, 2003 Conn.Super. LEXIS 2823 (waiver by sports facility patron is valid and enforceable);*103 Gagliardi v. World Gym Fitness, No. CV000500627S, 2002 WL 31374848, 2002 Conn.Super. LEXIS 3188, (Conn.Super.Aug. 27, 2002) (same); Fischer, 2002 WL 31126288, 2002 Conn.Super. LEXIS 2778 (same); Smith, 2002 WL 1446633, 2002 Conn.Super. LEXIS 1869 (same); Mattei v. City of New Haven, No. CV990265897S, 2001 WL 811194, 2001 Conn.Super. LEXIS 1690 (Conn.Super. June 19, 2001) (same); Lombardo, 1997 WL 325354, 1997 Conn.Super. LEXIS 1543 (same); accord Foley, 2002 WL 725492, 2002 Conn.Super. LEXIS 990 (waiver invalid due to failure to mention “negligence”). Only waivers that do not satisfy the strict language requirements set forth by the Connecticut Supreme Court in Hyson have been deemed unenforceable with respect to negligence suits brought against sports facilities by their patrons. See Potts v. White Water Mountain Resorts of Connecticut, No. 550961, 2001 WL 1132411, 2001 Conn.Super. LEXIS 2433 (Conn.Super. Aug. 24, 2001) (waiver invalid because language of waiver mentioned only “inherent and other risks involved in snowtubing” but not liability resulting from defendant's own negligence); Malin v. White Water Mountain Resorts of Connecticut, Inc., No. 432774, 2001 WL 309030, 2001 Conn. Super LEXIS 768 (Conn.Super. March 16, 2001) (same). But cf. Salvatore v. 5 D's, Inc., No. CV990153131, 2001 Conn.Super. LEXIS 542, *6 (Conn.Super. February 20, 2001) (suggesting in dicta that “[h]ad [the plaintiff] been totally unfamiliar with the sport and equipment, the court would be more inclined to accept his argument that he relied upon the defendant to warn him of the dangerous conditions regarding the skates and that he did not fully appreciate the import of the waiver he chose to sign before skating”); Caron v. Waterford Sports Center, No. X07CV010077059S, 2002 Conn.Super. LEXIS 3996, *10-11 (Conn.Super. December 13, 2002) (rejecting argument that Caron did not read, and therefore did not assent to, waiver in part because he had signed similar waivers in the past). In light of the dicta in Hyson and the weight of Connecticut trial court precedent, this court holds that the waiver is valid and enforceable.

FN11. “Connecticut courts ... recognize public policy exception for adults who sign waivers on behalf of minors ..., where there is unequal bargaining power ..., or when the release would exempt a party from liability for violating a duty established by a statute or ordinance....” Id. (citing cases); see also Mattei v. City of New Haven, No. CV990265897S, 2001 WL 811194, 2001 Conn.Super. LEXIS 1690, *8 (Conn.Super. June 19, 2001) (“This is not a case involving the violation of statutes or ordinances protecting human life, or human health, nor is this a case involving a minor or an adult

acting on behalf of a minor. Thus, the public policy reasons allegedly prohibiting waiver of liability are not sufficiently clear to bar the special defense of waiver of liability.") (internal quotations omitted).

## III. CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment [Dkt. No. 20] is GRANTED. The court directs the clerk to close the case.

SO ORDERED.