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NORCOTT, J., with whom BORDEN, J., joins, dissenting. In the present case, the majority concludes that ''a party cannot be released from liability for damages resulting from its future negligence in the absence of language that expressly so provides.'' Put differently, the majority concludes that, unless an exculpatory clause explicitly states that the signatory is releasing all claims sounding in negligence, the release will not be enforceable.[1] Because I believe that the release signed by the plaintiff, Francesca Hyson, fully informed her that she was releasing the defendant, White Water Mountain Resorts of Connecticut, Inc., of all liability arising out of her participation in the snowtubing operated by the defendant, and because I believe that the majority opinion will have grievous consequences in our state, particularly within the context of recreational activities, I disagree. Accordingly, I respectfully dissent.

To begin, although the issue of whether a release of liability must specifically state that the signatory is releasing any claim sounding in negligence has not been addressed by this court, the Appellate Court has had the opportunity to analyze the issue. In *B & D Associates, Inc.* v. *Russell*, 73 Conn. App. 66, 67, 807 A.2d 1001 (2002),[2] the plaintiff commercial tenant brought an action sounding in negligence against the defendant landlord for losses the plaintiff had incurred as a result of a fire. Thereafter, the defendant moved for summary judgment, claiming that a provision in the parties' lease released him from all liability. Id., 68. The lease in that case provided that the tenant bore the risk of loss and that the tenant would not hold the landlord liable for any damage or loss that occurred for any reason. Id., 68–69. After the trial court granted the defendant's motion for summary judgment on the basis of the release, the plaintiff appealed to the Appellate Court, claiming that the lease provision did not release the defendant from his own negligence. Id., 70.

Thereafter, the Appellate Court determined that the lease provision released the defendant from liability for any negligence. In so concluding, the Appellate Court explained that ''[t]he law does not favor contract provisions which relieve a person from his own negligence. . . . Such provisions, however, have been upheld under proper circumstances. . . . [T]he law's reluctance to enforce exculpatory provisions of this nature has resulted in the development of an exacting standard by which courts measure their validity. So, it has been repeatedly emphasized that unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts . . . . Put

another way, it must appear plainly and precisely that the limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility . . . .'' (Citations omitted; internal quotation marks omitted.) Id., 72; *Gross* v. *Sweet*, 49 N.Y.2d 102, 107, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979).

Moreover, the Appellate Court noted, ''[n]ot 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. . . . Of course, this does not imply that only simple or monosyllabic language can be used in such clauses. Rather, what the law demands is that such provisions be clear and coherent . . . . By and large, if such is the intention of the parties, the fairest course is to provide explicitly that claims based on negligence are included . . . . *That does not mean that the word negligence must be employed for courts to give effect to an exculpatory agreement*; however, words conveying a similar import must appear . . . .'' (Emphasis added; internal quotation marks omitted.) *B & D Associates, Inc.* v. *Russell*, supra, 73 Conn. App. 72–73. Thus, in *B & D Associates, Inc.*, because the lease provision was ''clear and unambiguous,'' it constituted an enforceable release of any liability for negligence. Id., 73.

I find the reasoning employed by the Appellate Court in *B & D Associates, Inc.*, persuasive and would adopt it herein. In the present case, the release provided in relevant part that the plaintiff ''agree[d] to hold harmless and indemnify [the defendant] . . . *for loss or damage, including any loss or injuries that result from damages related to the use of a snowtube or lift*.'' (Emphasis added.) Moreover, the release provided that the plaintiff understood that ''there are inherent and other risks involved in SNOWTUBING . . . and it is a dangerous activity/sport. These risks include . . . steepness and terrain . . . or natural or man made obstacles on and/or off chutes . . . . All of the inherent risks of SNOWTUBING present the risk of serious and/or fatal injury.'' Moreover, the document was entitled, ''RELEASE FROM LIABILITY.'' Although the ''fairest course''; *B & D Associates, Inc.* v. *Russell*, supra, 73 Conn. App. 72; would have been to include language specifically releasing any claim arising out of the defendant's own negligence, I conclude that the language in the present release was sufficient to inform the plaintiff that she was releasing any claim sounding in negligence against the defendant that might result from her use of the defendant's snowtubing facilities.

Moreover, other jurisdictions have upheld the use of exculpatory clauses notwithstanding the failure to mention negligence specifically. For instance, in *Heil*

Valley Ranch, Inc. v. *Simkin*, 784 P.2d 781, 783 (Colo. 1989), the plaintiff was injured when the horse on which she was riding reared backwards and fell on top of her. Before riding the horse, however, the plaintiff had signed a release, stating that the ''undersigned expressly assumes [the inherent] risk and waives any claim he [or] she might state against the stables as a result of physical injury incurred in said activities.'' Id., 782. Thereafter, the plaintiff brought an action against the defendant stable owner for negligence and breach of warranty. Id., 783. On the basis of the release, the defendant moved for summary judgment. The trial court in *Heil Valley Ranch, Inc.*, granted the defendant's motion for summary judgment, concluding that the language of the exculpatory clause in the release was clear and unambiguous and, therefore, shielded the defendant from liability. Id.

On appeal, the Colorado Supreme Court affirmed the grant of summary judgment, concluding that the specific term '' 'negligence' '' is ''not invariably required for an exculpatory agreement to shield a party from claims based on negligence . . . .'' Id., 785. Rather, ''[t]he inquiry should be whether the intent of the parties was to extinguish liability and whether this intent was clearly and unambiguously expressed.'' Id. Under this inquiry, the court concluded that it was ''reasonable to interpret the broad language in the release to cover claims based on negligence . . . .'' Id. Moreover, the court noted, it would have been ''unreasonable to interpret the agreement in a way that provides virtually no protection to [the defendant], and renders the release essentially meaningless.'' Id.; see also *Seigneur* v. *National Fitness*, 132 Md. App. 271, 280, 752 A.2d 631 (2000) (''[F]or an exculpatory clause to be valid, it need not contain or use the word negligence or any other magic words. . . . An exculpatory clause is sufficient to insulate the party from his or her own negligence as long as [its] language . . . clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence . . . .'' [Citations omitted; internal quotation marks omitted.]).[3]

I find the reasoning of these cases persuasive and would adopt it in the present case. Thus, in my opinion, the intent of the parties to extinguish any liability arising out of the negligence of the defendant was clearly and unambiguously expressed. This is evident in the release signed by the plaintiff, which stated, among other things, that she was aware of the inherent risks presented by snowtubing and that she nonetheless agreed to ''hold harmless and indemnify [the defendant] . . . for loss or damage . . . .'' Because I conclude that the exculpatory clause contained in the release in the present case reasonably put the plaintiff on notice that she was waiving all claims sounding in negligence against the defendant, I would uphold the trial court's grant of

summary judgment in favor of the defendant.

Moreover, as a matter of public policy, I believe that exculpatory clauses are appropriate in the context of recreational activities. Most, if not all, recreational activities are voluntary acts. Individuals participate in them for a variety of reasons, including to exercise, to experience a rush of adrenaline, and to engage their competitive nature. These activities, while surely increasing one's enjoyment of life, cannot be considered so essential as to override the ability of two parties to contract about the allocation of the risks involved in the provision of such activity. When deciding to engage in a recreational activity, participants have the ability to weigh their desire to participate against their willingness to sign a contract containing an exculpatory clause.[4] By articulating such a stringent standard, however, the majority makes it more difficult for those who sponsor certain recreational activities to allocate the risk involved in those activities.

Thus, because I believe that the release signed by the plaintiff in the present case reasonably put her on notice that she was waiving all claims sounding in negligence, I cannot agree with the majority opinion as set forth today. Accordingly, I respectfully dissent.

[1] I find curious the majority opinion's approach to this issue. First, the majority seemingly announces a new rule, namely, requiring exculpatory clauses to contain specifically the word "negligence." Next, however, the majority goes on to state in footnote 11 of its opinion, immediately following the announcement of the new rule, that they do not decide whether this rule will have any effect in future cases. I believe that the majority, therefore, suffers from a lack of confidence in the rule it seemingly articulates, which is thereafter belied in footnote 11. I question the effectiveness of this type of rule making and, accordingly, the announcement of the rule in the first instance. Specifically, ambiguous rule making such as this will confuse the reader, particularly, members of the bar, who must attempt to draft exculpatory agreements for their clients that will be enforced by the courts of this state.

[2] The majority distinguishes this case on grounds that the plaintiff and the defendant in *B & D Associates, Inc.* v. *Russell*, supra, 73 Conn. App. 66, were parties to a commercial lease and the fact that there was no evidence that the defendant "had significantly more bargaining power than the plaintiff." I do not find this distinction persuasive. First, there is no indication in the present case that the defendant had significantly more bargaining power than the plaintiff. See footnote 4 of this dissent. Second, the plaintiff testified at her deposition that she both read and understood the release signed in the present case. Thus, I would apply the reasoning employed by the Appellate Court in *B & D Associates, Inc.*, notwithstanding the fact that the case involved parties to a commercial lease rather than a participant in a recreational activity.

[3] See also *Krazek* v. *Mountain River Tours, Inc.*, 884 F.2d 163, 166 (4th Cir. 1989) (declining to formulate rule that requires use of "magic words" such as negligence in releases arising out of certain recreational activities); *Reed* v. *University of North Dakota*, 589 N.W.2d 880, 887 (N.D. 1999) (concluding that release language, which stated that plaintiff "assume[d] all responsibilit[ies]" he may incur as direct or indirect result of participation in road race, "clearly and unambiguously evidences an intent to exonerate [defendant] from liability for the injuries" sustained by plaintiff); *Schutkowski* v. *Carey*, 725 P.2d 1057, 1061 (Wyo. 1986) (concluding that absence of word negligence is not fatal to exculpatory clause if terms of contract "clearly show intent to extinguish liability").

[4] This consideration is especially relevant to the facts of the present case. Unlike other activities that require the provision of a certain facility, snowtubing occurs regularly at locations all across the state, including parks, backyards and golf courses. Thus, while the contract was mass produced

and designed to apply to thousands of customers, the parties were not in a bargaining position wherein the plaintiff had either to accept those terms or forgo the opportunity to snowtube. On the other hand, activities like parachuting require the provision of certain services or facilities, and thus the contract may need to be reviewed with greater scrutiny. Ultimately, however, given the voluntary nature of recreational activities, it is very difficult for a plaintiff to assert that a contract is one of adhesion, and thus in violation of public policy. See *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 353–55, 721 A.2d 1187 (1998) (contractual indemnity clause in preprinted lease contract not unconscionable); *Jones* v. *Dressel*, 623 P.2d 370, 374–75 (Colo. 1981) (preprinted contract used by skydiving company not contract of adhesion).