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FRANCESCA HYSON *v.* WHITE WATER MOUNTAIN RESORTS OF CONNECTICUT, INC.
(SC 16773)

Sullivan, C. J., and Borden, Norcott, Katz, Palmer, Vertefeuille and Zarella, Js.[1]

Argued March 13—officially released September 2, 2003

Jeffrey A. Rozen, for the appellant (plaintiff).

Christopher M. Vossler, with whom, on the brief, were *Beatrice S. Jordan* and *Alexandria L. Bufford*, for the appellee (defendant).

Opinion

SULLIVAN, C. J. The dispositive issue in this appeal is whether a document entitled "RELEASE FROM LIABILITY" and signed by the plaintiff, Francesca Hyson, precludes her from recovering damages in this negligence action against the defendant, White Water Mountain Resorts of Connecticut, Inc., for personal injuries sustained by the plaintiff while she was snowtubing at a facility operated by the defendant. On the basis of

the release, the defendant filed a motion for summary judgment. The trial court granted the motion and rendered judgment for the defendant, and the plaintiff appealed.[2] We conclude that the release signed by the plaintiff does not release the defendant from liability, or indemnify the defendant, for injuries resulting from its negligence. Accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are relevant to the disposition of this appeal. At all times relevant to this appeal, the defendant operated a facility in Middlefield, known as Powder Ridge, at which the public, in exchange for a fee, is invited to ski, snowboard and snowtube. On January 30, 1999, the plaintiff, in her capacity as patron and invitee of the defendant at Powder Ridge, was snowtubing on a hill designated and maintained by the defendant for that purpose on an inner tube provided by the defendant.

Prior to using the defendant's facilities, the plaintiff signed the putative release at issue.[3] In her amended complaint, the plaintiff alleged that she had suffered injuries to her hand and wrist when her inner tube failed to stop at the bottom of the hill but, instead, continued over a ''cliff.''[4] The plaintiff further alleged that her injuries had resulted from the defendant's negligence. Specifically, she claimed that the defendant: (1) permitted the slope at the bottom of the hill to be excessively slippery; (2) failed to maintain an adequate barrier at the bottom of the hill designed to stop patrons; (3) failed to stop inner tubes as they reached the bottom of the hill; and (4) failed to post any signs warning patrons of dangerous conditions at the bottom of the hill, namely, that the bottom of the hill ended in a cliff, below which the ground was rocky and hard.

The defendant denied having negligently caused injury to the plaintiff and asserted as special defenses that the plaintiff's claims were barred because she had signed the release, that she had assumed the risk of injury contractually, that any injuries to the plaintiff had been caused by her own negligence, and that her claims were barred by General Statutes § 29-212.[5] In addition, the defendant filed a counterclaim alleging that, by signing the release, the plaintiff had incurred a contractual obligation to hold the defendant harmless and to indemnify it for any damages resulting from her use of its facilities, including personal injuries to herself. Accordingly, the defendant claims that, in the event of a judgment in favor of the plaintiff, she would be obligated to indemnify it to the extent of any such judgment.

On the basis of the plaintiff's release, the defendant filed its motion for summary judgment, which the trial court granted. We now reverse the judgment of the trial court.

The plaintiff asserts that the release does not prevent

her recovery for two reasons. First, she maintains that the release does not relieve the defendant of liability for its negligence because negligence is not expressly mentioned in the document. Second, she contends that the enforcement of an agreement that purports to release a party from liability for its prospective negligence is contrary to public policy, without regard to the language used. Because we agree with the plaintiff that the language used in the release at issue does not release the defendant from liability for claims arising from its negligence, we do not reach the issue of whether a well drafted agreement purporting to have such an effect would be enforceable.

We note first that the release signed by the plaintiff does not specifically refer to possible negligence by the defendant. Instead, it refers to ''inherent and other risks involved in [snowtubing],'' provides examples of some such risks, none of which refers to possible negligence, and states that ''[a]ll of the inherent risks of [snowtubing] present the risk of serious and/or fatal injury.'' Following this language, the release states that the plaintiff agrees ''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.'' See footnote 3 of this opinion.

Neither this court nor the Appellate Court[6] has had occasion to determine whether an agreement purporting to release or indemnify the proprietor of a recreational facility or service prospectively may be applied to damages arising from that party's negligence in the absence of express language so indicating.[7] There is, however, widespread support in other jurisdictions for a rule requiring that any agreement intended to exculpate a party for its own negligence state so expressly.[8] See 2 Restatement (Second), Contracts § 195, comment (b) (1981) (''[l]anguage inserted by a party in an agreement for the purpose of exempting him from liability for negligent conduct is scrutinized with particular care and a court may require specific and conspicuous reference to negligence under the general principle that language is interpreted against the draftsman''); 1 E. Farnsworth, Contracts (2d Ed. 1998) § 4.29a, p. 587 (''[c]ourts have often found exculpatory clauses couched in general language insufficient to bar claims for liability for negligence''); but see 1 E. Farnsworth, supra, § 4.29a, pp. 587–88 (''not all courts have been so demanding'').[9]

Indemnification agreements give rise to the same issues and are interpreted in a similar fashion.[10] Thus, although ''[i]n 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.'' 41 Am.

Jur. 2d, Indemnity § 20 (1995). In keeping with the well established principle, however, that "[t]he law does not favor contract provisions which relieve a person from his own negligence"; *Griffin* v. *Nationwide Moving & Storage Co.*, 187 Conn. 405, 413, 446 A.2d 799 (1982); 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.[11] The release signed in the present case illustrates the need for such a rule. A person of ordinary intelligence reasonably could believe that, by signing this release, he or she was releasing the defendant only from liability for damages caused by dangers inherent in the activity of snowtubing. A requirement of express language releasing the defendant from liability for its negligence prevents individuals from inadvertently relinquishing valuable legal rights. Furthermore, the requirement that parties seeking to be released from liability for their negligence expressly so indicate does not impose on them any significant cost.[12]

Because the release signed by the plaintiff in the present case did not expressly provide that, by signing it, she released the defendant from liability for damages resulting from its negligence, the trial court improperly granted the defendant's motion for summary judgment.

The judgment is reversed and the case is remanded to the trial court for further proceedings according to law.

In this opinion PALMER, VERTEFEUILLE and ZARELLA, Js., concurred.

[1] This case was first argued March 13, 2003, before a panel of this court consisting of Justices Borden, Norcott, Katz, Palmer and Vertefeuille. Thereafter, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Chief Justice Sullivan and Justice Zarella were added to the panel, and they have read the record and briefs, and have listened to the tape recording of the original oral argument.

[2] The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] That document states:

"SNOWTUBING

"RELEASE FROM LIABILITY

"PLEASE READ CAREFULLY BEFORE SIGNING

"1. I accept use of a snowtube and accept full responsibility for the care of the snowtube while in my possession.

"2. I understand that there are inherent and other risks involved in SNOWTUBING, including the use of lifts and snowtube, and it is a dangerous activity/sport. These risks include, but are not limited to, variations in snow, steepness and terrain, ice and icy conditions, moguls, rocks, trees, and other forms of forest growth or debris (above or below the surface), bare spots, lift terminals, cables, utility lines, snowmaking equipment and component parts, and other forms [of] natural or man made obstacles on and/or off chutes, as well as collisions with equipment, obstacles or other snowtubes. Snow chute conditions vary constantly because of weather changes and snowtubing use. Be aware that snowmaking and snow grooming may be in progress at any time. These are some of the risks of SNOWTUBING. All of the inherent risks of SNOWTUBING present the risk of serious and/or fatal injury.

"3. I agree to hold harmless and indemnify Powder Ridge, White Water Mountain Resorts of Connecticut, Inc. and/or any employee of the afore mentioned for loss or damage, including any loss or injuries that result from damages related to the use of a snowtube or lift.

"I, the undersigned, have read and understand the above release of liability."

[4] The defendant disputes the characterization of the topography at the bottom of the hill as a "cliff," referring to it instead as a "snow mound" or a "berm."

[5] General Statutes § 29-212 provides: "Each skier shall assume the risk of and legal responsibility for any injury to his person or property arising out of the hazards inherent in the sport of skiing, unless the injury was proximately caused by the negligent operation of the ski area by the ski area operator, his agents or employees. Such hazards include, but are not limited to: (1) Variations in the terrain of the trail or slope which is marked in accordance with subdivision (3) of section 29-211 or variations in surface or subsurface snow or ice conditions, except that no skier assumes the risk of variations which are caused by the operator unless such variations are caused by snow making, snow grooming or rescue operations; (2) bare spots which do not require the closing of the trail or slope; (3) conspicuously marked lift towers; (4) trees or other objects not within the confines of the trail or slope; (5) boarding a passenger tramway without prior knowledge of proper loading and unloading procedures or without reading instructions concerning loading and unloading posted at the base of such passenger tramway or without asking for such instructions; and (6) collisions with any other person by any skier while skiing."

[6] Recently, the Appellate Court held that a lease for commercial property that provided that there "shall be no liability" on behalf of the defendant landlord to the tenant, but did not refer to negligence, "unmistakably evidences an intent to release the defendant from liability to the plaintiff, no matter how incurred, for the types of losses listed in [that section of the lease]," including losses resulting from the landlord's negligence. *B & D Associates, Inc.* v. *Russell*, 73 Conn. App. 66, 73, 807 A.2d 1001 (2002). The court stated, however, that "the plaintiff was a business entity and the defendant was a business person at the time the lease was executed, and . . . there is no evidence that the defendant had significantly more bargaining power than the plaintiff. Additionally, the evidence establishes that the plaintiff, not the defendant, paid to insure itself from losses caused by fire, further evidencing the parties' intent to relieve the defendant from liability." Id., 73 n.1. We do not today decide whether such language suffices to release landlords from liability for their negligence in the context of commercial leases.

[7] This issue has been addressed on numerous occasions by the Superior Court. "The majority of [Superior Court cases] that have recently addressed this issue . . . take the position that specific language, i.e., the word 'negligence,' must be used to waive effectively claims for negligence against facility operators." *Foley* v. *Southington-Cheshire Community YMCAs, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV00 502023 (March 28, 2002) (31 Conn. L. Rptr. 673, 673–74), citing, inter alia, *Bashura* v. *Strategy Plus, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV95 0050871 (November 20, 1997) (21 Conn. L. Rptr. 59, 61); *Slauson* v. *White Water Mountain Resorts of Connecticut, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV99 0432460 (May 30, 2001) (29 Conn. L. Rptr. 605, 606).

Indeed, on several recent occasions, the Superior Court has held that the defendant in the present case was not released from liability for its negligence by a plaintiff's signing of a release that did not expressly so provide. See *Longley* v. *White Water Mountain Resorts of Connecticut, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV02 0460229 S (December 10, 2002) (33 Conn. L. Rptr. 505, 507); *Potts* v. *White Water Mountain Resorts of Connecticut, Inc.*, Superior Court, judicial district of New London, Docket No. CV99 0550961 (August 24, 2001) (30 Conn. L. Rptr. 301, 302) ("'law disfavors exculpatory contracts because they tend to allow conduct below the acceptable level of care' "); *Slauson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 29 Conn. L. Rptr. 606 ("such a rule [requiring express reference to negligence] does not impose a great burden on the operator"); *Malin* v. *White Water Mountain Resorts of Connecticut, Inc.*, Superior Court, judicial district of New Haven, Docket No. 432774 (March 16, 2001) (29 Conn. L. Rptr. 374, 375) ("law does not favor contract provisions which relieve a person for his own negligence . . . antipathy has deep roots in Connecticut jurisprudence" [citation omitted; internal quotation marks omitted]).

[8] See, e.g., *Wenzel* v. *Boyles Galvanizing Co.*, 920 F.2d 778, 781 (11th Cir. 1991) (under Florida law, "clause simply disclaiming liability in general

terms is insufficient''); *Adloo* v. *H.T. Brown Real Estate, Inc.*, 344 Md. 254, 257, 686 A.2d 298 (1996) (''clause must not simply be unambiguous but also understandable''); *Alack* v. *Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330, 337 (Mo. 1996) (requiring ''clear, unambiguous, unmistakable, and conspicuous language''); *Gross* v. *Sweet*, 49 N.Y.2d 102, 110, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979) (waiver of ''any and all claims . . . for any personal injuries'' not sufficient to cover negligence); *Dresser Industries, Inc.* v. *Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex. 1993) (''fair notice requirements of conspicuousness and the express negligence doctrine'' apply both to indemnity agreements and to exculpatory provisions).

[9] See, e.g., *Krazek* v. *Mountain River Tours, Inc.*, 884 F.2d 163, 166 (4th Cir. 1989) (declining to require use of specific ''magic words'' such as negligence); *Heil Valley Ranch, Inc.* v. *Simkin*, 784 P.2d 781, 785 (Colo. 1989) (''use of the specific [term] 'negligence' . . . not invariably required''); *Schutkowski* v. *Carey*, 725 P.2d 1057, 1058, 1062 (Wyo. 1986) (provision to ''release and discharge . . . all persons . . . directly or indirectly liable, from any and all'' claims sufficient to cover negligence).

[10] In the present case, because the party whose injuries gave rise to the claim for damages at issue is the party who signed the release, the indemnification provision operates as an exculpatory clause.

[11] As stated previously, we do not decide today whether a contract having such express language would be enforceable to release a party from liability for its negligence. Contrary to the dissent's assertion, we do not believe that, by declining to decide cases that are not before us, we are engaging in ''ambiguous rule making.''

[12] *Foley* v. *Southington-Cheshire Community YMCAS, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV00 502023 (March 28, 2002) (31 Conn. L. Rptr. 673, 673–74); *Slauson* v. *White Water Mountain Resort of Connecticut, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV99 0432460 (May 30, 2001) (29 Conn. L. Rptr. 605, 606). 606. The dissent maintains that our ruling that a party may not obtain a release from liability for its negligence, at least in the absence of an express provision to that effect, will have ''grievous consequences in our state, particularly within the context of recreational activities . . . .'' The dissent does not articulate what those grievous consequences might be, other than to assert that this ruling ''makes it more difficult for those who sponsor certain recreational activities to allocate the risk involved in those activities.'' Today's decision, however, applies not to the allocation of *all* risks involved in recreational activities, but only to attempts by providers of recreational activities to allocate to patrons the risk that a patron will be harmed by the provider's negligence. Furthermore, because our decision today does not impose unclear or burdensome requirements on those who want to draft releases, even this allocation is made more difficult only insofar as patrons who are otherwise willing to sign releases such as that in the present case become unwilling to do so when informed that those releases are intended to release the releasees from liability for the releasees' negligence.