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GREGORY D. HANKS *v.* POWDER RIDGE RESTAURANT CORPORATION ET AL.
(SC 17327)

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

Argued April 18—officially released November 29, 2005

William F. Gallagher, with whom, on the brief, was *David McCarry*, for the appellant (plaintiff).

Laura Pascale Zaino, with whom, on the brief, were *John B. Farley* and *Kevin M. Roche*, for the appel-

lees (defendants).

Opinion

SULLIVAN, C. J. This appeal[2] arises out of a complaint filed by the plaintiff, Gregory D. Hanks, against the defendants, Powder Ridge Restaurant Corporation and White Water Mountain Resorts of Connecticut, Inc., doing business as Powder Ridge Ski Resort, seeking compensatory damages for injuries the plaintiff sustained while snowtubing at the defendants' facility. The trial court rendered summary judgment in favor of the defendants, concluding that this court's decision in *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, 265 Conn. 636, 829 A.2d 827 (2003), precluded the plaintiff's negligence claim as a matter of law. We reverse the judgment of the trial court.

The record reveals the following factual and procedural history. The defendants operate 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 February 16, 2003, the plaintiff brought his three children and another child to Powder Ridge to snowtube. Neither the plaintiff nor the four children had ever snowtubed at Powder Ridge, but the snowtubing run was open to the public generally, regardless of prior snowtubing experience, with the restriction that only persons at least six years old or forty-four inches tall were eligible to participate. Further, in order to snowtube at Powder Ridge, patrons were required to sign a ''Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability'' (agreement). The plaintiff read and signed the agreement on behalf of himself and the four children. While snowtubing, the plaintiff's right foot became caught between his snowtube and the man-made bank of the snowtubing run, resulting in serious injuries that required multiple surgeries to repair.

Thereafter, the plaintiff filed the present negligence action against the defendants. Specifically, the plaintiff alleges that the defendants negligently caused his injuries by: (1) permitting the plaintiff ''to ride in a snow tube that was not of sufficient size to ensure his safety while on the snow tubing run''; (2) ''fail[ing] to properly train, supervise, control or otherwise instruct the operators of the snow tubing run in the proper way to run the snow tubing course to ensure the safety of the patrons, such as the plaintiff''; (3) ''fail[ing] to properly groom the snow tubing run so as to direct patrons . . . such as the plaintiff away from the sidewalls of [the] run''; (4) ''plac[ing] carpet at the end of the snow tubing run which had the tendency to cause the snow tubes to come to an abrupt halt, spin or otherwise change direction''; (5) ''fail[ing] to properly landscape the snow tubing run so as to provide an adequate up slope at the end of the run to properly and safely slow snow tubing patrons such as the plaintiff''; (6) ''fail[ing] to place

warning signs on said snow tubing run to warn patrons such as the plaintiff of the danger of colliding with the side wall of [the] snow tubing run''; and (7) ''fail[ing] to place hay bales or other similar materials on the sides of the snow tubing run in order to direct patrons such as the plaintiff away from the sidewalls of [the] run.''

The defendants, in their answer to the complaint, denied the plaintiff's allegations of negligence and asserted two special defenses. Specifically, the defendants alleged that the plaintiff's injuries were caused by his own negligence and that the agreement relieved the defendants of liability, ''even if the accident was due to the negligence of the defendants.'' Thereafter, the defendants moved for summary judgment, claiming that the agreement barred the plaintiff's negligence claim as a matter of law. The trial court agreed and rendered summary judgment in favor of the defendants. Specifically, the trial court determined, pursuant to our decision in *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 640–44, that the plaintiff, by signing the agreement, unambiguously had released the defendants from liability for their allegedly negligent conduct. Thereafter, the plaintiff moved to reargue the motion for summary judgment. The trial court denied the plaintiff's motion and this appeal followed.

The plaintiff raises two claims on appeal. First, the plaintiff claims that the trial court improperly concluded that the agreement clearly and expressly releases the defendants from liability for negligence. Specifically, the plaintiff contends that a person of ordinary intelligence reasonably would not have believed that, by signing the agreement, he or she was releasing the defendants from liability for personal injuries caused by negligence and, therefore, pursuant to *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 643, the agreement does not bar the plaintiff's negligence claim. Second, the plaintiff claims that the agreement is unenforceable because it violates public policy. Specifically, the plaintiff contends that a recreational operator cannot, consistent with public policy, release itself from liability for its own negligent conduct where, as in the present case, the operator offers its services to the public generally, for a fee, and requires patrons to sign a standardized exculpatory agreement as a condition of participation. We disagree with the plaintiff's first claim, but agree with his second claim.

Before reaching the substance of the plaintiff's claims on appeal, we review this court's decision in *Hyson*. The plaintiff in *Hyson* was injured while snowtubing at Powder Ridge and, thereafter, filed a complaint against the defendant, White Water Mountain Resorts of Connecticut, Inc., alleging that the defendant's negli-

gence proximately had caused her injuries.[3] Id., 637–39. Prior to snowtubing at Powder Ridge, the plaintiff had signed an exculpatory agreement entitled ''RELEASE FROM LIABILITY.'' Id., 638 and n.3. The issue presented in *Hyson* was whether the exculpatory agreement released the defendant from liability for its negligent conduct and, consequently, barred the plaintiff's negligence claims as a matter of law. Id., 640. We concluded that it did not. Id.

In arriving at this conclusion, we noted that there exists ''widespread support in other jurisdictions for a rule requiring that any agreement intended to exculpate a party for its own negligence state so expressly''; id., 641–42; and that this court previously had acknowledged ''the well established principle . . . that '[t]he law does not favor contract provisions which relieve a person from his own negligence . . . .' '' Id., 643. Accordingly, we determined 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. This rule ''prevents individuals from inadvertently relinquishing valuable legal rights'' and ''does not impose . . . significant cost[s]'' on entities seeking to exculpate themselves from liability for future negligence. Id. Examining the exculpatory agreement at issue in *Hyson*, we observed that ''the release signed by the plaintiff [did] not specifically refer to possible negligence by the defendant'' but, instead, only referred to ''inherent and other risks involved in [snowtubing] . . . .''[4] (Internal quotation marks omitted.) Id., 640. Thus, ''[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.'' Id., 643. Accordingly, we concluded that the exculpatory agreement did not expressly release the defendants from liability for future negligence and, therefore, did not bar the plaintiff's claims. Consequently, we declined to decide whether a well drafted exculpatory agreement expressly releasing a defendant from prospective liability for future negligence could be enforced consistent with public policy. See id., 640 (''we do not reach the issue of whether a well drafted agreement purporting to have such an effect would be enforceable''); id., 643 n.11 (''we do not decide today whether a contract having such express language would be enforceable to release a party from liability for its negligence'').

As an initial matter, we set forth the appropriate standard of review. ''[T]he standard of review of a trial court's decision to grant a motion for summary judgment is well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law.'' (Internal quotation marks omitted.) *D'Eramo* v. *Smith*, 273 Conn. 610, 619, 872 A.2d 408 (2005).

I

We first address the plaintiff's claim that the agreement does not expressly release the defendants from liability for personal injuries incurred as a result of their own negligence as required by *Hyson*. Specifically, the plaintiff maintains that an ordinary person of reasonable intelligence would not understand that, by signing the agreement, he or she was releasing the defendants from liability for future negligence. We disagree.

''[T]he law does not favor contract provisions which relieve a person from his own negligence . . . .'' *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 643. ''[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 . . . .

''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. . . . 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 . . . .'' (Internal quotation marks omitted.) *B & D Associates, Inc.* v. *Russell*, 73 Conn. App. 66, 72, 807 A.2d 1001 (2002), quoting *Gross* v. *Sweet*, 49 N.Y.2d 102, 107–108, 400 N.E.2d 306, 424 N.Y.S.2d 365 (1979); see also *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 643 (''a party cannot be released from liability for injuries resulting from its future negligence in the absence of language that expressly so provides''). ''Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law.'' (Internal quotation marks omitted.) *Goldberg* v. *Hartford Fire Ins. Co.*, 269 Conn. 550, 559–60, 849 A.2d 368 (2004).

The agreement[5] at issue in the present case provides

in relevant part: ''I understand that there are inherent risks involved in snowtubing, including the risk of serious physical injury or death and *I fully assume all risks associated with [s]nowtubing*, even if due to the NEGLIGENCE of [the defendants] . . . including but not limited to: variations in the snow conditions; steepness and terrain; the presence of ice, moguls, bare spots and objects beneath the snowtubing surface such as rocks, debris and tree stumps; collisions with objects both on and off the snowtubing chutes such as hay bales, trees, rocks, snowmaking equipment, barriers, lift cables and equipment, lift towers, lift attendants, employees, volunteers, other patrons and spectators or their property; equipment or lift condition or failure; lack of safety devices or inadequate safety devices; lack of warnings or inadequate warnings; lack of instructions or inadequate instructions; use of any lift; and the like. . . . I . . . *agree I will defend, indemnify and hold harmless* [the defendants] . . . from any and all claims, suits or demands by anyone arising from my use of the Powder Ridge snowtubing facilities and equipment including claims of NEGLIGENCE on the part of [the defendants] . . . . I . . . hereby release, and agree that *I will not sue* [the defendants] . . . for money damages for personal injury or property damage sustained by me while using the snowtubing facilities and equipment even if due to the NEGLIGENCE of [the defendants] . . . .'' (Emphasis in original.)

We conclude that the agreement expressly and unambiguously purports to release the defendants from prospective liability for negligence. The agreement explicitly provides that the snowtuber ''*fully assume[s] all risks associated with [s]nowtubing*, even if due to the NEGLIGENCE'' of the defendants. (Emphasis in original.) Moreover, the agreement refers to the negligence of the defendants three times and uses capital letters to emphasize the term ''negligence.'' Accordingly, we conclude that an ordinary person of reasonable intelligence would understand that, by signing the agreement, he or she was releasing the defendants from liability for their future negligence.[6]

The plaintiff claims, however, that the agreement does not expressly release the defendants from liability for their prospective negligence because the agreement ''define[s] the word 'negligence' solely by reference to inherent [risks] of the activity.'' We disagree. The agreement states that the snowtuber ''*fully assume[s] all risks associated with [s]nowtubing*, even if due to the NEGLIGENCE of [the defendants]'' and provides a nonexhaustive list of such risks. (Emphasis in original.) We acknowledge that some of the risks listed arguably can be characterized as inherent risks because they are innate to the activity, ''are beyond the control of the [recreational] area operator and cannot be minimized by the operator's exercise of reasonable care.'' *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672,

692, 849 A.2d 813 (2004). Other risks listed in the agreement, for example, ''lack of safety devices or inadequate safety devices; lack of warnings or inadequate warnings; lack of instructions or inadequate instructions'' are not inherent risks. The recreational operator has control over safety devices, warnings and instructions, and can ensure their adequacy through the exercise of reasonable care. Thus, a snowtuber who, by virtue of signing the present agreement, assumes the risk of inadequate safety devices, warnings or instructions, necessarily assumes the risk of the recreational operator's negligence.

We conclude that the trial court properly determined that the agreement in the present matter expressly purports to release the defendants from liability for their future negligence and, accordingly, satisfies the standard set forth by this court in *Hyson*.

II

We next address the issue we explicitly left unresolved in *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 640, namely, whether the enforcement of a well drafted exculpatory agreement purporting to release a snowtube operator from prospective liability for personal injuries sustained as a result of the operator's negligent conduct violates public policy. We conclude that it does and, accordingly, reverse the judgment of the trial court.

Although it is well established ''that parties are free to contract for whatever terms on which they may agree''; (internal quotation marks omitted) *Gibson* v. *Capano*, 241 Conn. 725, 730, 699 A.2d 68 (1997); it is equally well established ''that contracts that violate public policy are unenforceable.'' *Solomon* v. *Gilmore*, 248 Conn. 769, 774, 731 A.2d 280 (1999). ''[T]he question [of] whether a contract is against public policy is [a] question of law dependent on the circumstances of the particular case, over which an appellate court has unlimited review.'' (Internal quotation marks omitted.) *Parente* v. *Pirozzoli*, 87 Conn. App. 235, 245, 866 A.2d 629 (2005), citing 17A Am. Jur. 2d 312, Contracts § 327 (2004).

As previously noted, ''[t]he law does not favor contract provisions which relieve a person from his own negligence . . . .'' (Internal quotation marks omitted.) *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 643. This is because exculpatory provisions undermine the policy considerations governing our tort system. ''[T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . . It is sometimes said that compensation for losses is the primary function of tort law . . . [but it] is perhaps more accurate to describe the primary function as one

of determining when compensation [is] required. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer.'' (Citations omitted; internal quotation marks omitted.) *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 578–79, 717 A.2d 215 (1998). Thus, it is consistent with public policy ''to posit the risk of negligence upon the actor'' and, if this policy is to be abandoned, ''it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer.'' *Tunkl* v. *Regents of the University of California*, 60 Cal. 2d 92, 101, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

Although this court previously has not addressed the enforceability of a release of liability for future negligence, the issue has been addressed by many of our sister states. A frequently cited standard for determining whether exculpatory agreements violate public policy was set forth by the Supreme Court of California in *Tunkl* v. *Regents of the University of California*, supra, 60 Cal. 2d 98–101. In *Tunkl*, the court concluded that exculpatory agreements violate public policy if they affect the public interest adversely; id., 96–98; and identified six factors (*Tunkl* factors) relevant to this determination: ''[1] [The agreement] concerns a business of a type generally thought suitable for public regulation. [2] The party 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.'' Id., 98–101. The court clarified that an exculpatory agreement may affect the public interest adversely even if some of the *Tunkl* factors are not satisfied.[7] Id., 101.

Various states have adopted the *Tunkl* factors to determine whether exculpatory agreements affect the public interest adversely and, thus, violate public policy. See, e.g., *Anchorage* v. *Locker*, 723 P.2d 1261, 1265 (Alaska 1986); *Olson* v. *Molzen*, 558 S.W.2d 429, 431

(Tenn. 1977); *Wagenblast* v. *Odessa School District*, 110 Wash. 2d 845, 851–52, 758 P.2d 968 (1988). Other states have developed their own variations of the *Tunkl* factors; see, e.g., *Jones* v. *Dressel*, 623 P.2d 370, 376 (Colo. 1981) ("[i]n determining whether an exculpatory agreement is valid, there are four factors which a court must consider: [1] the existence of a duty to the public; [2] the nature of the service performed; [3] whether the contract was fairly entered into; and [4] whether the intention of the parties is expressed in clear and unambiguous language"); *Rawlings* v. *Layne & Bowler Pump Co.*, 93 Idaho 496, 499–500, 465 P.2d 107 (1970) ("express agreements exempting one of the parties for negligence are to be sustained except where: [1] one party is at an obvious disadvantage in bargaining power; [2] a public duty is involved [public utility companies, common carriers]"); while still others have adopted a totality of the circumstances approach. See, e.g., *Wolf* v. *Ford*, 335 Md. 525, 535, 644 A.2d 522 (1994) (expressly declining to adopt *Tunkl* factors because "[t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations"); *Dalury* v. *S-K-I, Ltd.*, 164 Vt. 329, 333–34, 670 A.2d 795 (1995) (same). The Virginia Supreme Court, however, has determined that all exculpatory agreements purporting to release tortfeasors from future liability for personal injuries are unenforceable because "[t]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct . . . can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it . . . ." (Internal quotation marks omitted.) *Hiett* v. *Lake Barcroft Community Assn.*, 244 Va. 191, 194, 418 S.E.2d 894 (1992).

Having reviewed the various methods for determining whether exculpatory agreements violate public policy, we conclude, as the *Tunkl* court itself acknowledged, that "[n]o definition of the concept of public interest can be contained within the four corners of a formula." *Tunkl* v. *Regents of the University of California*, supra, 60 Cal. 2d 98. Accordingly, we agree with the Supreme Courts of Maryland and Vermont that "[t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations." *Wolf* v. *Ford*, supra, 335 Md. 535; *Dalury* v. *S-K-I, Ltd.*, supra, 164 Vt. 333–34. Thus, our analysis is guided, but not limited, by the *Tunkl* factors, and is informed by any other factors that may be relevant given the factual circumstances of the case and current societal expectations.

We now turn to the merits of the plaintiff's claim. The defendants are in the business of providing snowtubing services to the public generally, regardless of prior snowtubing experience, with the minimal restriction

that only persons at least six years old or forty-four inches tall are eligible to participate. Given the virtually unrestricted access of the public to Powder Ridge, a reasonable person would presume that the defendants were offering a recreational activity that the whole family could enjoy safely. Indeed, this presumption is borne out by the plaintiff's own testimony. Specifically, the plaintiff testified that he ''trusted that [the defendants] would, within their good conscience, operate a safe ride.''

The societal expectation that family oriented recreational activities will be reasonably safe is even more important where, as in the present matter, patrons are under the care and control of the recreational operator as a result of an economic transaction. The plaintiff, in exchange for a fee, was permitted access to the defendants' snowtubing runs and was provided with snowtubing gear. As a result of this transaction, the plaintiff was under the care and control of the defendants and, thus, was subject to the risk of the defendants' carelessness. Specifically, the defendants designed and maintained the snowtubing run and, therefore, controlled the steepness of the incline, the condition of the snow and the method of slowing down or stopping patrons. Further, the defendants provided the plaintiff with the requisite snowtubing supplies and, therefore, controlled the size and quality of the snowtube as well as the provision of any necessary protective gear. Accordingly, the plaintiff voluntarily relinquished control to the defendants with the reasonable expectation of an exciting, but reasonably safe, snowtubing experience.

Moreover, the plaintiff lacked the knowledge, experience and authority to discern whether, much less ensure that, the defendants' snowtubing runs were maintained in a reasonably safe condition. As the Vermont Supreme Court observed, in the context of the sport of skiing, it is consistent with public policy ''to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible. [The] [d]efendants, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises, and train their employees in risk management. They alone can insure against risks and effectively spread the costs of insurance among their thousands of customers. Skiers, on the other hand, are not in a position to discover and correct risks of harm, and they cannot insure against the ski area's negligence.

''If the defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed, with the public bearing the cost of the resulting injuries. . . . It is illog-

ical, in these circumstances, to undermine the public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control.''[8] (Citations omitted.) *Dalury* v. *S-K-I, Ltd.*, supra, 164 Vt. 335. The concerns expressed by the court in *Dalury* are equally applicable to the context of snowtubing, and we agree that it is illogical to permit snowtubers, and the public generally, to bear the costs of risks that they have no ability or right to control.[9]

Further, the agreement at issue was a standardized adhesion contract offered to the plaintiff on a ''take it or leave it'' basis. The ''most salient feature [of adhesion contracts] is that they are not subject to the normal bargaining processes of ordinary contracts.'' *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 416, 538 A.2d 219 (1988); see also Black's Law Dictionary (7th Ed. 1999) (defining adhesion contract as ''[a] standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms''). Not only was the plaintiff unable to negotiate the terms of the agreement, but the defendants also did not offer him the option of procuring protection against negligence at an additional reasonable cost. See Restatement (Third), Torts, Apportionment of Liability § 2, comment (e), p. 21 (2000) (factor relevant to enforcement of contractual limit on liability is ''whether the party seeking exculpation was willing to provide greater protection against tortious conduct for a reasonable, additional fee''). Moreover, the defendants did not inform prospective snowtubers prior to their arrival at Powder Ridge that they would have to waive important common-law rights as a condition of participation. Thus, the plaintiff, who traveled to Powder Ridge in anticipation of snowtubing that day, was faced with the dilemma of either signing the defendants' proffered waiver of prospective liability or forgoing completely the opportunity to snowtube at Powder Ridge. Under the present factual circumstances, it would ignore reality to conclude that the plaintiff wielded the same bargaining power as the defendants.

The defendants contend, nevertheless, that they did not have superior bargaining power because, unlike an essential public service, ''[s]nowtubing is a voluntary activity and the plaintiff could have just as easily decided not to participate.''[10] We acknowledge that snowtubing is a voluntary activity, but we do not agree that there can never be a disparity of bargaining power in the context of voluntary or elective activities.[11] See *Dalury* v. *S-K-I, Ltd.*, supra, 164 Vt. 335 (''[w]hile interference with an essential public service surely affects the public interest, those services do not represent the universe of activities that implicate public concerns''). Voluntary recreational activities, such as snowtubing, skiing, basketball, soccer, football, racquetball, karate, ice skating, swimming, volleyball or yoga, are pursued

by the vast majority of the population and constitute an important and healthy part of everyday life. Indeed, this court has previously recognized the public policy interest of promoting vigorous participation in such activities. See, e.g., *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, supra, 269 Conn. 702 (important public policy interest in encouraging vigorous participation in skiing); *Jaworski* v. *Kiernan*, 241 Conn. 399, 409, 696 A.2d 332 (1997) (important public policy interest in promoting vigorous participation in soccer). In the present case, the defendants held themselves out as a provider of a healthy, fun, family activity. After the plaintiff and his family arrived at Powder Ridge eager to participate in the activity, however, the defendants informed the plaintiff that, not only would they be immune from claims arising from the inherent risks of the activity, but they would not be responsible for injuries resulting from their own carelessness and negligence in the operation of the snowtubing facility. We recognize that the plaintiff had the option of walking away. We cannot say, however, that the defendants had no bargaining advantage under these circumstances.

For the foregoing reasons, we conclude that the agreement in the present matter affects the public interest adversely and, therefore, is unenforceable because it violates public policy.[12] Accordingly, the trial court improperly rendered summary judgment in favor of the defendants.

The defendants and the dissent point out that our conclusion represents the ''distinct minority view'' and is inconsistent with the majority of sister state authority upholding exculpatory agreements in similar recreational settings. We acknowledge that most states uphold adhesion contracts releasing recreational operators from prospective liability for personal injuries caused by their own negligent conduct. Put simply, we disagree with these decisions for the reasons already explained in this opinion. Moreover, we find it significant that many states uphold exculpatory agreements in the context of *simple* negligence, but refuse to enforce such agreements in the context of *gross* negligence. See, e.g., *Farina* v. *Mt. Bachelor, Inc.*, 66 F.3d 233, 235–36 (9th Cir. 1995) (Oregon law); *Wheelock* v. *Sport Kites, Inc.*, 839 F. Sup. 730, 736 (D. Haw. 1993), superseded in part by Haw. Rev. Stat. § 663-1.54 (1997) (recreational providers liable for simple negligence in addition to gross negligence); *McFann* v. *Sky Warriors, Inc.*, 268 Ga. App. 750, 758, 603 S.E.2d 7 (2004), cert. denied, 2005 Ga. LEXIS 69 (January 10, 2005); *Boucher* v. *Riner*, 68 Md. App. 539, 543, 514 A.2d 485 (1986); *Zavras* v. *Capeway Rovers Motorcycle Club, Inc.*, 44 Mass. App. 17, 18–19, 687 N.E.2d 1263 (1997); *Schmidt* v. *United States*, 912 P.2d 871, 874 (Okla. 1996); *Adams* v. *Roark*, 686 S.W.2d 73, 75–76 (Tenn. 1985); *Conradt* v. *Four Star Promotions, Inc.*, 45 Wash. App. 847, 852, 728 P.2d 617 (1986); see also *New Light Co.* v. *Wells*

Fargo Alarm Services, 247 Neb. 57, 62–65, 525 N.W.2d 25 (1994); 8 S. Williston, Contracts (4th Ed. 1998) § 19:23, pp. 291–97 (''[a]n attempted exemption from liability for a future intentional tort or crime or for a future willful or grossly negligent act is generally held void, although a release exculpating a party from liability for negligence may also cover gross negligence where the jurisdiction has abolished the distinction between degrees of negligence and treats all negligence alike''). Connecticut does not recognize degrees of negligence and, consequently, does not recognize the tort of gross negligence as a separate basis of liability. See, e.g., *Matthiessen* v. *Vanech*, 266 Conn. 822, 833 and n.10, 836 A.2d 394 (2003). Accordingly, although in some states recreational operators cannot, consistent with public policy, release themselves from prospective liability for conduct that is more egregious than *simple* negligence, in this state, were we to adopt the position advocated by the defendants, recreational operators would be able to release their liability for such conduct unless it rose to the level of *recklessness*. Id., 832 (recklessness is ''a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent'' [internal quotation marks omitted]). As a result, recreational operators would lack the incentive to exercise even *slight* care, with the public bearing the costs of the resulting injuries. See 57A Am. Jur. 2d 296, Negligence § 227 (2004) (" 'gross negligence' is commonly defined as very great or excessive negligence, or as the want of, or failure to exercise, even slight or scant care or 'slight diligence' "). Such a result would be inconsistent with the public policy of this state.

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

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

[1] This case originally was argued 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. Accordingly, Chief Justice Sullivan and Justice Zarella were added to the panel. They have read the record, briefs and transcript of the oral argument.

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

[3] We note that White Water Mountain Resorts of Connecticut, Inc., is also a defendant in the present matter and that the plaintiff in the present matter was also injured while snowtubing at Powder Ridge.

[4] That exculpatory agreement provided:

"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 aforementioned 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." (Internal quotation marks omitted.) *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 638 n.3.

[5] The complete agreement provides:

"Waiver, Defense, Indemnity and Hold Harmless Agreement,
and Release of Liability

"In consideration for the privilege of participating in snowtubing at Powder Ridge Ski Area, I hereby agree that:

"1. I understand that there are inherent risks involved in snowtubing, including the risk of serious physical injury or death and *I fully assume all risks associated with [s]nowtubing,* even if due to the NEGLIGENCE of White Water Mountain Resorts of Connecticut, Inc., d/b/a Powder Ridge Ski Area and its Affiliates, Officers, Directors, Agents, Servants and/or Employees, including but not limited to: variations in the snow conditions; steepness and terrain; the presence of ice, moguls, bare spots and objects beneath the snowtubing surface such as rocks, debris and tree stumps; collisions with objects both on and off the snowtubing chutes such as hay bales, trees, rocks, snowmaking equipment, barriers, lift cables and equipment, lift towers, lift attendants, employees, volunteers, other patrons and spectators or their property; equipment or lift condition or failure; lack of safety devices or inadequate safety devices; lack of warnings or inadequate warnings; lack of instructions or inadequate instructions; use of any lift; and the like.

"2. I, for myself and for my heirs, assigns, successors, executors, administrators, and legal representatives, *agree I will defend, indemnify and hold harmless* White Water Mountain Resorts of Connecticut, Inc., d/b/a Powder Ridge Ski Area, its Affiliates, Officers, Directors, Agents, Servants and Employees from any and all claims, suits or demands by anyone arising from my use of the Powder Ridge snowtubing facilities and equipment including claims of NEGLIGENCE on the part of White Water Mountain Resorts of Connecticut, Inc., d/b/a Powder Ridge Ski Area, its Affiliates, Officers, Directors, Agents, Servants and/or Employees.

"3. I, for myself and for my heirs, assigns, successors, executors, administrators, and legal representatives, hereby release, and agree that *I will not sue,* White Water Mountain Resorts of Connecticut, Inc., d/b/a Powder Ridge Ski Area, its Affiliates, Officers, Directors, Agents, Servants and/or Employees for money damages for personal injury or property damage sustained by me while using the snowtubing facilities and equipment even if due to the NEGLIGENCE of White Water Mountain Resorts of Connecticut, Inc., d/b/a Powder Ridge Ski Area, its Affiliates, Officers, Directors, Agents, Servants and/or Employees.

"*I have read this Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability and fully understand its terms.* I further understand that by signing this agreement that I am giving up substantial legal rights. I have not been induced to sign this agreement by any promise or representation and I sign it voluntarily and of my own free will." (Emphasis in original.)

[6] The plaintiff claims that the trial court improperly rendered summary judgment in the present matter because "there [was] a question of fact as to [the plaintiff's] understanding of the scope of the release." We reject this claim. "It is the general rule that a contract is to be interpreted according to the intent expressed in its language and not by an intent the court may believe existed in the minds of the parties." (Internal quotation marks omitted.) *Pesino* v. *Atlantic Bank of New York,* 244 Conn. 85, 94, 709 A.2d 540 (1998). Accordingly, where the language of a contract is clear and

unambiguous, ''[a] party may not assert as a defense to an action on [the] contract that [he] did not understand what [he] was signing.'' *John M. Glover Agency* v. *RDB Building, LLC*, 60 Conn. App. 640, 645, 760 A.2d 980 (2000).

Regardless, the plaintiff's deposition testimony establishes that he understood the scope of the agreement, but did not believe that the defendants would seek to enforce the agreement or that the agreement would be upheld as a matter of law. See part II of this opinion. Specifically, the plaintiff testified: ''I did not understand that I was saying it was okay for Powder Ridge to willingly kill me or injure me or my children or anyone else that participated in the ride, and it is my understanding of the form as it's written, that Powder Ridge has the right, from this document, to take my life, injure me, injure my children, without regard or responsibility. That is my understanding of the form now. At the time I read that, I did not believe that, and I had that understanding of the words as they're written and I did not believe that any organization would attempt to enforce language of that kind nor would any court uphold it.'' The plaintiff further testified: ''My son, who at that time was [twelve], read [the agreement] as well and he said, 'Dad, don't sign this thing.' And I looked at it and I said, 'It's so patently egregious, I don't see how it could be enforced.' He was right and I was wrong. 'Out of the mouths of babes.' ''

[7] In *Tunkl*, the plaintiff filed suit against a charitable research hospital for personal injuries allegedly incurred as a result of the negligence of two physicians employed by the hospital. *Tunkl* v. *Regents of the University of California*, supra, 60 Cal. 2d 94. Upon admission, the plaintiff was required to sign an exculpatory agreement that released the hospital from ''any and all liability for the negligent or wrongful acts or omissions of its employees . . . .'' (Internal quotation marks omitted.) Id. Applying the *Tunkl* factors, the court determined that the exculpatory agreement was unenforceable because it violated public policy. Id., 101–104.

[8] Exculpatory agreements, like the one at issue in the present matter, shift the costs of injuries from the tortfeasor to the person injured. As a consequence, health care insurance providers or the state, through its provision of medicaid benefits, absorb the costs of the tortfeasor's negligence. These costs necessarily are passed on to the population of the state through higher health care premiums and state taxes. Accordingly, in the present matter, it ultimately would be the population generally, and not the snowtube operators and their patrons, who would bear the costs if these agreements were to be enforced.

[9] The dissent claims that ''[t]he *Dalury* court, like the majority in the present case, concluded that a recreational activity affected the public interest because of the considerable public participation.'' The dissent mischaracterizes both the conclusion of the Vermont Supreme Court in *Dalury* v. *S-K-I, Ltd.*, supra, 164 Vt. 335, and our conclusion today. In *Dalury*, the court did not rely solely on the volume of public participation in determining that exculpatory agreements violate public policy in the context of skiing. Rather, the court relied on the following relevant factors: ''(1) the ski area operated a facility open to the general public, (2) the ski area advertised and invited persons of every level of skiing ability onto its premises, (3) the ski area, and not recreational skiers, had the expertise and opportunity to foresee and control hazards and to guard against the negligence of its employees and agents, (4) the ski area was in a better position to insure against the risks of its own negligence and spread the cost of the insurance among its customers, and (5) if ski areas were permitted to obtain broad waivers of their liability, incentives for them to manage risks would be removed, with the public bearing the cost.'' *Spencer* v. *Killington, Ltd.*, 167 Vt. 137, 141, 702 A.2d 35 (1997) (discussing *Dalury*). Likewise, we conclude today that the agreement at issue in this case violates public policy, not solely because of the volume of public participation, but because: (1) the defendants invite the public generally to snowtube at their facility, regardless of snowtubing ability; (2) snowtubers are under the care and control of the defendants as a result of an economic transaction; (3) the defendants, not recreational snowtubers, have the knowledge, experience and authority to maintain the snowtubing runs in reasonably safe condition, to determine whether the snowtubing equipment is adequate and reasonably safe, and to guard against the negligence of its employees and agents; (4) the defendants are in a better position to insure against the risk of their negligence and to spread the costs of insurance to their patrons; (5) if we were to uphold the present agreement under the facts of this case, the defendants would be permitted to obtain broad waivers of their liability and the incentive for them to maintain a reasonably safe snowtubing environment would be

removed, with the public bearing the cost; (6) the agreement at issue is a standardized adhesion contract, offered to snowtubers on a ''take it or leave it'' basis, and without the opportunity to purchase protection against negligence at an additional, reasonable fee; and (7) the defendants had superior bargaining authority.

[10] The defendants also claim, and the dissent agrees, that the defendants did not have superior bargaining power because the plaintiff ''could have participated in snowtubing elsewhere, either on that day or another day.'' We are not persuaded. Snowtubing is a seasonal activity that requires the provision of specific supplies and particular topographic and weather conditions. Although the dissent correctly states that '' 'snowtubing occurs regularly at locations all across the state, including parks, backyards and golf courses' ''; we point out that, even when weather conditions are naturally appropriate for snowtubing, not all individuals are fortunate enough to have access to places where snowtubing is both feasible topographically and permitted freely. Moreover, the dissent argues that the plaintiff had ample opportunity to select a snowtubing environment ''based on whatever safety considerations he felt were relevant.'' As already explained in this opinion, however, the defendants, not the plaintiff, had the requisite knowledge and experience to determine what safety considerations are relevant to snowtubing. As such, it was reasonable for the plaintiff to presume that the defendants, who are in the business of supplying snowtubing services, provide the safest snowtubing alternative.

[11] We need not decide whether an exculpatory agreement concerning a voluntary recreational activity violates public policy if the *only* factor militating against enforcement of the agreement is a disparity in bargaining power because, in the present matter, there are additional factors that combine to render the agreement contrary to public policy. See footnote 9 of this opinion.

[12] We clarify that our conclusion does not extend to the risks inherent in the activity of snowtubing. As we have explained, inherent risks are those risks that are innate to the activity, ''are beyond the control of the [recreational] area operator and cannot be minimized by the operator's exercise of reasonable care.'' *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, supra, 269 Conn. 692 (distinguishing between inherent risks of skiing and ski operator's negligence); see also *Spencer* v. *Killington, Ltd.*, 167 Vt. 137, 143, 702 A.2d 35 (1997) (same). For example, risks inherent in the sport of skiing include, but are not limited to, the risk of collision with another skier or a tree outside the confines of the slope. See Public Acts 2005, No. 05-78, § 2. The risks inherent in each type of recreational activity will necessarily vary, and it is common knowledge that some recreational activities are inherently more dangerous than others.