STATE OF MINNESOTA

IN SUPREME COURT

A20-1318

Court of Appeals

McKeig, J.
Dissenting, Anderson, J., Gildea, C.J.

Carter Justice,

Appellant/Cross-Respondent,

vs.

Filed: September 21, 2022
Office of Appellate Courts

Marvel, LLC d/b/a Pump It Up Parties,

Respondent/Cross-Appellant.

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SYLLABUS

An exculpatory clause, like an indemnity clause, is subject to strict construction, such that a provision that purportedly releases a company from "any and all claims" is not enforceable against a claim for negligence where the provision does not sufficiently express a clear and unequivocal intent to release the company from the company's own negligence.

Reversed and remanded.

OPINION

MCKEIG, Justice.

At issue in this case is whether an exculpatory clause that purports to release respondent/cross-appellant Marvel, LLC from "any and all claims" related to use of its inflatable amusement play area is enforceable against a claim of negligence. Appellant/cross-respondent Carter Justice attended a party at Marvel's play area, and his mother signed a waiver on behalf of Justice and herself. Justice was subsequently injured when he fell from the top of an inflatable and hit his head on the carpet-covered concrete floor. After Justice turned 18, he sued Marvel, claiming that Marvel negligently operated the inflatables in its play area without adequate padding on the floor. We must determine whether the waiver signed by Justice's mother bars Justice's claim. Because the waiver does not specifically reference Marvel's own conduct or otherwise sufficiently express that Marvel was being released from liability for its own negligence, we conclude that the waiver—strictly construed—does not release Marvel from liability for its own negligence.

Accordingly, we reverse the district court's grant of summary judgment for Marvel and remand to the court of appeals.

FACTS

In February 2007, when Justice was 7 years old, he attended a birthday party at Pump It Up Parties, an inflatable amusement play area owned by Marvel, LLC.[1] Before Justice entered the play area, Justice's mother, Michelle Sutton, signed a waiver of liability on "her own behalf, and/or on behalf of the participant(s) identified below," naming Justice. The waiver contained a liability release—the core provision at issue in this case—in which Sutton agreed to "release and hold harmless MARVEL, LLC . . . from and against any and all claims, injuries, liabilities or damages arising out of or related to our participation in any and all Pump It Up programs, activities, parties, the use of the play area and/or inflatable equipment." The waiver stated that Sutton acknowledged the "inherent risks associated with participation in Pump It Up programs, parties, and/or use of the play area and inflatable equipment" and that she "knowingly and freely assume[d] all such risks, both known and unknown, including those that may arise out of the negligence of other participants." The waiver also noted that the agreement was "[i]n consideration of being allowed to enter into the play area and/or participate in any party and/or program at Pump It Up."

[1] Marvel, LLC was doing business as Pump It Up Parties at the time of Justice's injury. Marvel discontinued operations as Pump It Up in 2009 and is currently an inactive business entity.

When Justice was playing on an inflatable, he fell and hit his head on the concrete floor, which was covered with commercial grade carpet. Justice was taken to a hospital and treated in the intensive care unit. Justice suffered several injuries, including multiple skull fractures, a brain hemorrhage, a post-traumatic seizure, and a traumatic brain injury.[2]

When Justice turned 18, he sued Marvel on his own behalf, claiming that Marvel was negligent for not using pads on the floor near the inflatables. Justice alleged that he experienced "severe and permanent injuries" attributable to the traumatic brain injury that he suffered because of his fall.

Marvel moved for summary judgment, arguing, among other things, that the waiver signed by Sutton before Justice entered the play area is enforceable and bars Justice's negligence claim. Justice responded that the waiver is unenforceable because it violates public policy, as evidenced by the statute voiding negligence waivers for inflatables, Minn. Stat. § 184B.20, subd. 5(b) (2020). Marvel countered that Minn. Stat. § 184B.20, which was enacted after the waiver was signed, does not apply retroactively to void the waiver. Marvel also argued that the waiver does not violate public policy because there was no

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[2] Approximately 6 months later, Sutton and her husband (Justice's stepfather) signed an agreement with Marvel, in which Marvel agreed to pay the Suttons $1,500 for the Suttons' unreimbursed medical expenses for Justice's care. The parties agreed that "Justice seems to have recovered completely from the [a]ccident." Justice was not a party to this agreement. The Suttons promised to execute a full release of liability if Justice had no further medical complications in the next 6 months. The agreement also stated that the payment from Marvel "is an accommodation only and does not serve as an admission of any fault or legal liability for the [a]ccident." The contemplated full release was never signed.

The district court and the court of appeals analyzed the effect of this agreement, concluding that it did not affect the parties' rights. That conclusion is not before us in this appeal.

disparity in bargaining power between the parties and providing inflatable amusements is not a public or essential service.

The district court granted Marvel's motion for summary judgment. As an initial matter, the court concluded that parents have the authority to sign liability waivers on behalf of their children. The court then concluded that the waiver is enforceable because it is unambiguous, does not purport to release Marvel from liability for intentional acts (in which case the waiver would be unenforceable), and does not violate public policy. The court also concluded that Minn. Stat. § 184B.20 does not apply retroactively to void the waiver in this case. Therefore, the court concluded, the waiver is enforceable, meaning that Justice's claim of negligence could not be pursued. Justice appealed.

The court of appeals affirmed the grant of summary judgment for Marvel. *Justice v. Marvel, LLC*, 965 N.W.2d 335, 349 (Minn. App. 2021). First, the court held that "a parent generally has authority, on behalf of a minor child, to enter into an agreement that includes an exculpatory clause." *Id.* at 342. Regarding the issue of whether the inflatables statute applied, the court of appeals held that Minn. Stat. § 184B.20 does not apply to the waiver here because the statute was enacted after the waiver was signed and there is no indication that the Legislature intended for the statute to apply retroactively. *Justice*, 965 N.W.2d at 345. The court held that the waiver does not violate public policy because "[t]here is no evidence in the summary-judgment record that the services Marvel provided were unavailable else where, and we may presume that Justice was not compelled to participate in the birthday party because the provision of inflatable amusement equipment is not a necessary service." *Id.* at 346. Further, the court recognized that "[a] business that

provides inflatable amusement equipment is well within the category of recreational activities for which exculpatory clauses are not prohibited." *Id.* But the court also recognized that under our precedent, "[a]n exculpatory clause is unenforceable if it is 'either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts.' " *Id.* at 347 (quoting *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982)). Against that standard, the court held that the waiver here is overly broad because it "purports to release claims of both ordinary negligence and greater-than-ordinary negligence, including claims based on intentional, willful or wanton acts." *Id.* But the court held that the waiver is enforceable as applied to Justice's claim of negligence. *Id.* Finally, in response to Justice's argument "that the district court erred by denying his motion to amend the complaint to add a request for punitive damages," the court of appeals held that the question was moot based on its affirmance of summary judgment for Marvel.[3] *Id.* at 349.

We granted Justice's petition for review, which raised numerous grounds for the waiver's unenforceability. We also granted Marvel's request for conditional cross-review on whether portions of the waiver were overbroad.

ANALYSIS

This case comes to us on review of the district court's grant of summary judgment for Marvel. Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ.

[3] We did not grant review of the district court's ruling on punitive damages.

P. 56.01. Fact issues exist "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Evidence is viewed in the light most favorable to the nonmoving party. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). We review grants of summary judgment de novo. *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013).

For Justice's claim to survive summary judgment, the waiver signed by his mother must be unenforceable. To determine whether the waiver is enforceable, we must first define the appropriate standard by which to judge exculpatory provisions and then analyze whether Marvel's release is enforceable under that standard. We address each of these issues in turn.

A.

Exculpatory clauses "are not favored in the law" because they "exonerat[e] a party from liability." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). Such provisions "will be strictly construed against the benefited party." *Id.* We have previously stated that this means that if an exculpatory "clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." *Id.* But we have never addressed how strict construction applies when an exculpatory clause purports to release all claims of liability without specific reference to negligent acts. This question is one of first impression.

In defining strict construction, it may be helpful for us to identify what strict construction is *not*. We have recognized that an alternative to strict construction is fair

construction. *See Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 123 N.W.2d 793, 799 (Minn. 1963). Unless a contract term violates the law or public policy, we held in *Loberg*, a "contract should have not an arbitrary, that is, an unduly liberal or harshly strict, construction, but a fair construction that will accomplish its stated purpose," considering "the manifest intention of the parties." *Id.* (citation omitted) (internal quotation marks omitted). We have since turned away from the rule of fair construction in cases involving exculpatory clauses in favor of strictly construing such clauses. *See Solidification, Inc. v. Minter*, 305 N.W.2d 871, 873 (Minn. 1981).

We first acknowledged the rule that exculpatory clauses are to be strictly construed in *Solidification v. Minter*. *Id.* In *Solidification*, the owner of a building signed a liability release providing that the contractor "will avoid all possible pumping grout into sewer, however, cannot accept responsibility should this occur." *Id.* The owner sued the contractor for negligence after he found that the sewer pipes were filled with grout. *Id.* at 872–73. We applied strict construction to the clause—applying it strictly against the contractor seeking exoneration—and held in favor of the owner because the provision did not clearly release the contractor from liability for its own negligence. *Id.* at 873 ("[W]e have held that indemnity clauses are to be strictly construed. The same rule of construction applies to exculpatory clauses."). We further recognized the rule of strict construction as applied to exculpatory clauses in *Schlobohm*, though we did not apply strict construction

because the claim was for negligence, and the release at issue specifically included negligence.[4] 326 N.W.2d at 922–23.

We have, however, had specific occasion to address the applicability of strict construction to the release of a negligence claim in our indemnity clause jurisprudence. There we have held that "[f]or an indemnity clause to pass strict construction, the contract must include an express provision that indemnifies the indemnitee for liability occasioned by its own negligence; such an obligation will not be found by implication." *Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 417 (Minn. 2018) (citation omitted) (internal quotation marks and alteration omitted). Indemnity clauses "need not include the word 'negligence,' but [they] must use specific, express language that clearly and unequivocally states the contracting parties' intent." *Id.* (citation omitted) (internal quotation marks omitted). Broad language that "necessarily includes the indemnitee's own negligence" does not survive strict construction; "indemnity cannot be established by implication." *Id.* at 417–18.

In *Dewitt*, a restaurant rented folding tables from a rental company for an event, at which one of the restaurant's patrons was injured when a table collapsed while he was

[4] Though the dissent claims that we are first recognizing that strict construction applies to exculpatory clauses in this case, we have previously so held in *Solidification* and *Schlobohm*. As we stated in *Schlobohm*, "[w]e extended th[e] rule of strict construction to exculpatory clauses in *Soldification*." 326 N.W.2d at 923. But we did not need to apply strict construction in that case because the claim at issue was for negligence, and "[t]he clause specifically purports to exonerate [the contractor] from liability for acts of negligence and negligence only." *Id.* Instead, the question in that case was whether the exculpatory clause's "enforcement in this case would contravene public policy" (and we held it did not). *Id.* at 923–26.

sitting at it. *Id.* at 414. The restaurant agreed to an indemnification provision that shifted to the restaurant the rental company's liability for "ANY AND ALL . . . CLAIMS . . . EXCEPT TO THE EXTENT DIRECTLY RESULTING FROM [the rental company's] INTENTIONAL MISCONDUCT." *Id.* at 418–19. The indemnity clause did not include the word "negligence" and did not "fairly apprise [the restaurant], in clear and unequivocal language, that the provision made [the restaurant] liable for claims against [the rental company] related to [the rental company]'s own conduct." *Id.* at 419. We held that the provision was unenforceable because "it did not link the broad language to [the rental company]'s own acts or omissions." *Id.* The exemption in the indemnification agreement for "intentional misconduct" "does not make the provision any more express regarding [the rental company]'s *negligence*."[5] *Id.*

We now hold that both indemnity clauses and exculpatory clauses are subject to the same standard of strict construction. Admittedly, we have previously suggested that the rule of strict construction may not apply to exculpatory clauses in the same manner as indemnity clauses. In a footnote in *Yang v. Voyagaire Houseboats, Inc.*, "we caution[ed] against too much reliance on our observation in *Schlobohm*" that indemnity and exculpatory clauses " 'are usually given the same treatment by the courts.' " 701 N.W.2d at 792 n.6 (quoting *Schlobohm*, 326 N.W.2d at 922 n.3). We noted that "[w]e examine the

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[5] We noted that, in contrast to the indemnity clause, the exculpatory clause in the rental agreement expressly included the rental company's own negligence by covering "ANY AND ALL CLAIMS ARISING FROM OR IN CONNECTION WITH *OUR NEGLIGENCE* (OTHER THAN OUR INTENTIONAL MISCONDUCT)." *Dewitt*, 910 N.W.2d at 420.

enforceability of exculpatory and indemnification clauses under different standards. Indemnification clauses are subject to greater scrutiny because they release negligent parties from liability, but also may shift liability to innocent parties." *Id.* But this footnote in *Yang* does not compel a conclusion different than our holding today.

First, we recognize that the footnote in *Yang* was not essential to the outcome in the case because we held that both the exculpatory clause and the indemnification clause were unenforceable on public policy grounds. *Id.* at 793. And though we noted that different standards apply to indemnity clauses and exculpatory clauses, we did not provide any guidance on how exculpatory clauses are to be judged. *See id.* at 792 n.6.

Second, *Yang*'s understanding that indemnity clauses "may shift liability to innocent parties" applies with equal force to exculpatory clauses. *Id.* We fail to see why victims of negligence are not "innocent parties" when there are no claims of comparative fault. Absent an exculpatory agreement between the parties, an injured victim would be entitled to recover damages from the negligent party. *See* 57A Am. Jur. 2d *Negligence* § 44 (2022). An exculpatory clause completely bars recovery for an injured party. *Id.* In contrast, an injured party may still recover even if there is an indemnity agreement between two other parties; the indemnity agreement simply determines which of those two parties must pay the damages. *Id.* We do not see why indemnity clauses require "greater scrutiny" than exculpatory clauses based solely on the parties affected.

And third, indemnification clauses and exculpatory clauses are not so distinguishable as to require different analyses. The difference between an exculpatory clause and an indemnity clause is that generally, "[a]n exculpatory clause purports to deny

an injured party the right to recover damages from the person negligently causing the injury, while an indemnification clause attempts to shift the responsibility for the payment of damages to someone other than the negligent party." 57A Am. Jur. 2d *Negligence* § 43 (2022). But sometimes, an indemnification clause shifts liability "back to the injured party, thus producing the same result as an exculpatory provision." *Id.* And "[a]lthough there is a distinction between an exculpatory clause and an indemnity clause, they both attempt to shift ultimate responsibility for negligent injury and so are generally construed by the same principles of law." *Id.* We have previously recognized that both types of provisions are disfavored in the law. *See Schlobohm*, 326 N.W.2d at 923 (exculpatory clauses); *Dewitt*, 910 N.W.2d at 416 (indemnity clauses). We note that the reason to disfavor such provisions is that "they relieve one party of the obligation to use due care." 57A Am. Jur. 2d *Negligence* § 46 (2022). For these reasons, we apply the same standard of strict construction to both indemnity and exculpatory clauses.[6]

We also clarify that strict construction in the context of indemnity clauses (and therefore also in exculpatory clauses) does not require an initial determination that the provision is ambiguous. *See Dewitt*, 910 N.W.2d at 419 (holding that an indemnity

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[6] The dissent points out that indemnification clauses require greater scrutiny because a party may be subject to "ballooning liability" for injuries of others, using the scenario presented in *Yang* as an example. There, one member of Yang's party rented a houseboat and signed the rental agreement, which included a provision in which the renter agreed to indemnify the rental company. *Yang*, 701 N.W.2d at 786–87. Although the renter may have faced "ballooning liability" by agreeing to indemnify the rental company for the injuries to others in his party, in theory, the other nine members of Yang's party would still have at least been entitled to recover from *someone* under the indemnification clause. If they had instead signed exculpatory agreements, they would have been able to recover from no one.

provision that did "not expressly refer to 'negligence' " or "link the broad language to [the indemnitee]'s own acts or omissions" was not enforceable, without first finding that the provision was ambiguous). It is true that "strict construction" in one sense means resolving ambiguity by adopting "the narrowest, most literal meaning of the words without regard for context and other permissible meanings." *Strict Interpretation*, *Black's Law Dictionary* (11th ed. 2019). Such a rule requires more than one reasonable interpretation to choose between. But "strict construction" as applied to the type of provision at issue here means that we apply a higher standard of expression and clarity—"clear[] and unequivocal[]"—to determine whether we will entertain an interpretation in the first place. *See Dewitt*, 910 N.W.2d at 417 (citation omitted). In short, ambiguity cannot be the trigger for strict construction because an ambiguous provision, by definition, cannot also " 'clearly and unequivocally' state[] the contracting parties' intent." *Id.* (citation omitted).

To withstand strict construction, then, an exculpatory clause "must use specific, express language that 'clearly and unequivocally' states the contracting parties' intent," regardless of whether the provision "is 'so broad' that it necessarily includes the [released party's] own negligence."[7] *Dewitt*, 910 N.W.2d at 417 (citations omitted). We next examine Marvel's waiver in light of this rule.

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[7] The dissent argues that under this rule, "parties can still limit their liability by adding a few words to their contracts." But this point is true for indemnification clauses as well, and we were not troubled by that result in *Dewitt*. We further disagree that our holding today requires parties to "use the correct magic words" to properly limit their liability. We are not demanding that parties use certain words to make their exculpatory clauses enforceable. Rather, we insist that a party who wishes to limit their liability for negligence do so by using specific, express language that clearly and unequivocally states such an intent; no certain words are required to satisfy this standard.

B.

Applying strict construction to the waiver at issue, Marvel is correct that Justice's negligence claim is definitionally under the umbrella of "any and all claims." But Marvel's arguments do not consider our prior decisions that have required provisions that transfer liability from otherwise-responsible parties to "use specific, express language that 'clearly and unequivocally' states the contracting parties' intent." *Dewitt*, 910 N.W.2d at 417 (citation omitted). The issue here is not whether the waiver purports to release intentional acts or whether "any and all claims" includes a claim of negligence; the issue is that the waiver does not specifically provide that it releases Marvel from liability for its own negligent acts.

The waiver's failure to refer to negligence or Marvel's own acts or omissions distinguishes this case from *Schlobohm* and the case relied on by the court of appeals, *Anderson v. McOskar Enterprises*. Specifically, the waiver in *Schlobohm* referred to "all acts of active or passive negligence on the part of [the] company." 326 N.W.2d at 922. The court of appeals cited *Anderson v. McOskar Enterprises*, 712 N.W.2d 796 (Minn. App. 2006), to support its holding that though overbroad, Marvel's waiver released it from liability to Sutton and Justice for its own negligence. *Justice*, 965 N.W.2d at 347. But as in *Schlobohm*, the release in *Anderson* waived liability for "any act or omission, including negligence by [the company's] representatives." *Anderson*, 712 N.W.2d at 799.

The waiver in this case is more akin to the one at issue in *Dewitt*. Marvel's waiver includes an acknowledgement of the "inherent risks" involved with inflatables and states that Sutton assumes those risks, "including those that may arise out of the negligence of

other participants." But the waiver does not state whether Sutton was releasing Marvel for Marvel's own conduct, whether negligent or intentional. Where the waiver mentions negligence, it only refers to the "negligence of other participants," not Marvel's own negligence. The risk of other participants is a different type of risk than that of operator negligence. Operator negligence is the type of risk that this court requires to be explicitly rather than implicitly waived. *See Dewitt*, 910 N.W.2d at 417. In short, the waiver here does not "fairly apprise" the parties "in clear and unequivocal language" that Sutton was releasing Marvel from liability for its own acts and omissions. *See id.* at 419. Accordingly, the provision—strictly construed—does not release Marvel from liability for its own negligence.[8]

The district court, then, erred by granting summary judgment for Marvel. Because the court of appeals did not consider whether the district court erred by denying Justice's motion to amend his complaint to add a claim for punitive damages, we remand to the court of appeals to decide that issue on its merits before that court in turn remands the case to the district court for further proceedings.[9]

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[8] Because we hold that the waiver is unenforceable on this ground, we do not address the parties' other arguments about enforceability or overbreadth.

[9] Justice asks us to vacate the portions of the court of appeals's decision that we do not address, but we decline to do so. When we have vacated court of appeals decisions without deciding the merits of the underlying issues, it has typically been because the court of appeals did not have authority or jurisdiction. *See, e.g.*, *Howard v. Svoboda*, 890 N.W.2d 111, 116 (Minn. 2017) (vacating a court of appeals decision for lack of appellate jurisdiction over an interlocutory order); *Powell v. Anderson*, 660 N.W.2d 107, 124 (Minn. 2003) (vacating a court of appeals decision because the judge was disqualified from hearing the appeal); *Pike v. Gunyou*, 491 N.W.2d 288, 289–90 (Minn. 1992) (vacating a court of appeals decision when it was "immediately apparent . . . that the appellate court's

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to that court for consideration of whether the district court erred in denying Justice's motion to amend the complaint to add a claim of punitive damages.

Reversed and remanded.

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opinion far exceeded the bounds of appropriate appellate review"). Justice does not point us to any case where we vacated a court of appeals decision on the merits as to issues that we did not address; his only citation is to a U.S. Supreme Court decision from 1950, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950).

Additionally, Marvel moved to strike a portion of Justice's brief that referred to legislative testimony from Pump It Up Management's director because it "is not part of the record on appeal and has never been presented to the district court or the court of appeals." Because our analysis does not rely on the director's testimony, we need not decide the merits of Marvel's motion to strike. Rather, we deny the motion as moot.

D I S S E N T

ANDERSON, Justice (dissenting).

When a contract purports to indemnify a party for the party's own negligence, our prior decisions have made clear that the indemnification clause will be strictly construed against the benefitted party. *Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 416–17 (Minn. 2018). Strict construction requires the contract to be clear and unequivocal and must *affirmatively* show that the indemnitor agreed to assume the liability of another. *Id.* at 417. When this does not occur, the indemnification clause is unenforceable even if the language is broad enough that, by implication, "it necessarily includes the indemnitee's own negligence." *Id*. But we have previously cautioned that indemnification clauses—clauses in which a party assumes liability for another's misconduct—and exculpation clauses—clauses in which a party forgoes an individual claim stemming from the misconduct of another—are not treated the same. *Yang v. Voyagaire Houseboats, Inc*., 701 N.W.2d 783, 792 n.6 (Minn. 2005). Although it is undisputed that the clause at issue here is exculpatory, the court collapses this distinction and holds that strict construction applies to exculpation clauses as well. This expansion of our existing law creates confusion where there is none, upsets settled expectations, and—because parties can still limit their liability by adding a few words to their contracts—ultimately provides no added guarantee of redress to injured parties. I further conclude that there is no other justification for holding this exculpatory clause unenforceable. Accordingly, I respectfully dissent.

Parties may contract to limit their exposure to liability. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). But contract terms that require a party to either

exculpate another for that person's own negligence, or to indemnify another for the other's negligence, are disfavored in law. *Id*. "An exculpatory clause is unenforceable if it is ambiguous in scope, purports to release the benefited party from liability for intentional, willful or wanton acts; or contravenes public policy." *Yang*, 701 N.W.2d at 789.

We have stated that, when dealing with "strict construction" clauses in indemnification provisions, "strict construction" is more than just determining whether the contractual language is broad enough that it "necessarily includes" the misconduct at issue. *Dewitt*, 910 N.W.2d at 417. Rather, the indemnification clause must *affirmatively* state the intent of the contracting parties "clearly and unequivocally." *Id.* (citation omitted).[1] In *Dewitt*, we considered a contractual term requiring a restaurant to indemnify the company from which it rented furniture for "any and all liabilities, claims, damages, losses, costs and expenses . . . resulting from or arising in connection with such possession, use, transportation and/or storage, regardless of the cause . . . except to the extent directly resulting from [the rental company's] intentional misconduct." *Id.* at 418–19 (capitalization omitted). The rental company argued that the broad language of the

[1] The court correctly notes that we have previously used the phrase "strict construction" when discussing exculpatory clauses as well. *See Schlobohm*, 326 N.W.2d at 923; *Solidification, Inc. v. Minter*, 305 N.W.2d 871, 873 (Minn. 1981). But we have never applied the heightened affirmative statement standard used in *Dewitt* to exculpatory clauses. In both *Schlobohm* and *Solidification*, we instead focused on the plain language of the contract: in *Schlobohm* we upheld the clause because the contract "demonstrate[d] an absence of ambiguity," 326 N.W.2d at 923, and in *Solidification* we declined to enforce the exculpatory clause because the contractual language was ambiguous and could have been read multiple ways, 305 N.W.2d at 873. Although any existing ambiguity must be construed against the benefitted party, and we have previously referred to this as "strict construction," this is the first time we have applied the "clearly and unequivocally"/affirmative-statement rule to an exculpatory clause.

indemnification clause, coupled with the explicit carveout for intentional misconduct, showed that the contract clearly included any negligent acts on its part. *Id*. at 419. But we held that the language was not sufficiently clear: it did not affirmatively mention liability for negligence, and the terms limiting the indemnity to only those claims "resulting from or arising in connection with" the rental could, under strict construction, be construed as limiting the terms to not include the rental company's own negligent acts before the rental occurred. *Id.* We held that the agreement was equivocal and thus unenforceable. *Id.* at 420.

We have previously noted that indemnification and exculpatory clauses are "*usually* given the same treatment by the courts" given the frequently similar public policy concerns raised by each. *Schlobohm*, 326 N.W.2d at 922 n.3 (emphasis added). But we have also cautioned that indemnification clauses and exculpatory clauses are not identical. *Yang*, 701 N.W.2d at 792 n.6. Specifically, indemnity clauses are to be given a higher degree of scrutiny than exculpatory clauses because, although both release negligent parties from liability, indemnification clauses may also "shift liability to innocent parties." *Id.*

The court's primary argument for collapsing the distinction between exculpatory clauses and indemnification clauses is that an exculpatory clause leaves the victims to bear their own expenses, in a sense also shifting liability to an innocent party. But the victim—that is, the person who signed the waiver and was then injured—personally agreed to assume their own risk in exchange for access to the service provided. And further, although it does not arise in this dispute, the risk of shifting liabilities from indemnification reaches far more broadly. The heightened risk of shifting liability is clearly illustrated by *Yang*.

There, a group rented a large houseboat for a vacation. *Id.* at 786. Although the vacation party consisted of 10 individuals, the rental paperwork was only signed by the one individual who organized the outing. *Id.* at 786–87. The rental contract included an indemnification clause protecting the rental company. *Id*. All 10 members of the party were injured in a carbon monoxide leak and alleged that the rental company had negligently failed to maintain the carbon monoxide detector. *Id*. at 787–88. The rental company defended itself in part by bringing a third-party action against the contracting individual, asserting that he had agreed to indemnify the company for all expenses. *Id*. at 788. If the indemnification clause had been enforceable, the contracting individual would have been responsible not only for his own damages, but also the damages of *nine other people* and the full cost of any lawsuits. Although an exculpatory clause, as we have here, can release a negligent party from liability, it need not be viewed with the same degree of skepticism as an indemnification clause because it presents no risk of similar ballooning liability for the injuries of other parties. Put another way, an exculpatory clause is not a trap for the unwary in the same manner as an indemnity agreement.

Because an exculpatory clause is materially different from an indemnification clause, I would not apply our rule of strict construction. Rather, I look to the language of the contract between Justice and Marvel. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010) ("[W]e review the language of the contract to determine the intent of the parties."). Exculpatory clauses are still disfavored, and we resolve any ambiguities against the party that would benefit from the agreement. *See Schlobohm*, 326 N.W.2d at 923. But contractual language is only "ambiguous if it is susceptible to two or more reasonable

interpretations." *Dykes*, 781 N.W.2d at 582. "When the language is clear and unambiguous, we enforce the agreement of the parties as expressed in the language of the contract." *Id*.

The waiver contained in the contract here relieved Marvel for liability from "any and all claims, injuries, liabilities or damages." No party seriously argues that "any and all" means anything other than what it says, or that any party was confused by the phrase. Justice argued at the court of appeals that the waiver "plainly releases [Marvel] from every possible tort claim." And the court of appeals agreed, holding that the "plain language" of the release included all negligence claims. *Justice v. Marvel, LLC*, 965 N.W.2d 335, 347 (Minn. App. 2021). I agree that "any and all" means "any and all," and would hold that there is no ambiguity here.

In holding otherwise, the court risks upsetting the settled expectations of parties who thought they were bargaining for a complete release of liability, only to be told now that they were not clear enough. Further, the settled expectations upset by the court here extend well beyond just these two parties. These exculpatory general releases of liability are common in all sorts of routine and recreational activities in which one party releases another party "from any and all claims, injuries, liabilities or damages."

And unlike a holding based in public policy that would prevent this type of waiver in all circumstances, *see, e.g.*, *Yang*, 701 N.W.2d at 790–91 (holding an exculpatory clause relieving an innkeeper of the duty to take reasonable action to protect their guests was void as contrary to public policy), this holding presents a mere form management problem for companies like Marvel going forward. These companies may still contract to limit their

potential liability; the court merely holds that they must use the correct magic words to do so. Whether less sophisticated parties will know that they must invoke the appropriate phraseology to protect themselves from liability is doubtful.

I would also reject the other arguments raised by Justice. Minnesota Statutes section 184B.20, subdivision 5(b) (2020), prohibits liability waivers releasing the owner of inflatable amusement devices from their own negligence. But that statute was not passed until 2010, years after the waiver at issue here was signed. Act of May 14, 2010, ch. 347, art. 3, § 2, 2010 Minn. Laws 1055, 1100. And Justice's argument that section 184B.20 applies retroactively is unconvincing. "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21 (2020). Section 184B.20 does not state that it applies retroactively. Instead, the legislation that became section 184B.20 stated that the effective date of the law was not until several months after its passage. *See* Act of May 14, 2010, ch. 347, art. 3, § 2, 2010 Minn. Laws 1055, 1101. This is not clear and manifest evidence of retroactive effect.

Waivers for recreational services do not violate public policy. The Legislature's subsequent action limiting such waivers through section 184B.20 does not, as discussed, retroactively alter our analysis. We have previously enforced waivers for recreational services. *See, e.g.*, *Schlobohm*, 326 N.W.2d at 925. In *Yang*, we held that a houseboat rental agency could not disclaim liability for its own negligence because it served as an innkeeper providing a necessary public service—and we explicitly contrasted this role against that of providing "recreational equipment." 701 N.W.2d at 790–91. As a provider of access to inflatable play equipment, Marvel did not provide any essential services. Nor

did Marvel benefit from any imbalances in bargaining power because Justice could simply have not participated if the terms were unfair. Contractual liability waivers for recreational services do not categorically violate our public policy.

Nor does this specific liability waiver violate our public policy as applied here. It is true that a liability waiver is void if it "purports to release the benefited party from liability for intentional, willful or wanton acts." *Id.* at 789. The waiver here states it releases Marvel from "any and all" claims, without making any carveout allowing claims for intentional misconduct. But in *this* dispute, the waiver does not purport to release Marvel from any claims of intentional misconduct because Justice has not made any claims of intentional misconduct. Rather, Justice's entire lawsuit relies on claims of ordinary negligence.

Finally, I would hold that parents have the authority to sign liability waivers on behalf of their children. Justice asserts there is a "national rule" that parents do not have the authority to sign liability waivers on behalf of their minor children. But courts holding to the contrary are not unique. *See, e.g.*, *BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345, 360 (Md. 2013) ("[W]e will defer to a parent's determination that the potential risks of an activity are outweighed by the perceived benefit to the child when she executes an exculpation agreement."). And a child's parents are in the best situation to decide if participating in an activity is worth the risk of signing a liability waiver. Parents have a "fundamental right . . . to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). "[T]here is a presumption that fit parents act in the best interests of their children." *Id.* at 68. Accordingly, "there will

normally be no reason for the State to inject itself into the private realm of the family." *Id*. And we generally recognize that enforcing clear contractual terms furthers the public interest by preserving freedom of contract. *Schlobohm*, 326 N.W.2d at 923. I would therefore hold that the parents of Justice had the authority to sign a liability waiver on his behalf.

In sum, I would hold that a liability waiver covering "any and all" claims clearly and unambiguously covers negligence on the part of Marvel. And I would hold that this waiver was not covered by Minn. Stat. § 184B.20, subd. 5(b), was not contrary to public policy, and was not overbroad because although the waiver does not contain a specific carveout for intentional misconduct, it does not purport to relieve Marvel of liability for intentional misconduct because Justice raises no such claims. Finally, I would hold that it was not beyond the authority of Justice's parents to sign this waiver on his behalf. Accordingly, I would hold that the waiver is enforceable and relieves Marvel of any potential liability arising from these claims.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.