[J-50-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

BARBARA LICHTMAN TAYAR,	:	No. 67 MAP 2010
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court dated September 4, 2008 at No.
	:	1160 EDA 2006 reversing the order of the
v.	:	Court of Common Pleas of Monroe
	:	County, Civil Division, dated March 31,
	:	2006 at No. 135 Civil 2005 and remanding
CAMELBACK SKI CORPORATION, INC.	:	the case
AND BRIAN MONAGHAN,	:	
	:	957 A.2d 281 (Pa. Super. 2008).
Appellants	:	
	:	ARGUED: May 11, 2011

OPINION

MADAME JUSTICE TODD **DECIDED: July 18, 2012**

In this appeal by allowance, we address, *inter alia*, whether it is against public policy to release reckless behavior in a pre-injury exculpatory clause. After careful review, we conclude that releasing recklessness in a pre-injury release is against public policy, and so we reverse the Superior Court in part, affirm in part, and remand.

I. Background

Appellant Camelback Ski Corporation, Inc. ("Camelback") operates a ski resort in Tannersville, Pennsylvania that offers various winter activities, including skiing and snow tubing. Before permitting its patrons to enjoy snow tubing, Camelback requires

each customer to sign a pre-printed release form ("Release"),[1] which states, in relevant part:

> CAMELBACK SNOW TUBING
>
> ACKNOWLEDGMENT OF RISKS AND AGREEMENT NOT TO SUE
>
> THIS IS A CONTRACT - READ IT
>
> I understand and acknowledge that snow tubing, including the use of lifts, is a dangerous, risk sport and that there are inherent and other risks associated with the sport and that all of these risks can cause serious and even fatal injuries. I understand that part of the thrill, excitement and risk of snow tubing is that the snow tubes all end up in a common, runout area and counter slope at various times and speeds and that it is my responsibility to try to avoid hitting another snowtuber and it is my responsibility to try to avoid being hit by another snowtuber, but that, notwithstanding these efforts by myself and other snowtubers, there is a risk of collisions.
>
> ***
>
> IN CONSIDERATION OF THE ABOVE AND OF BEING ALLOWED TO PARTICIPATE IN THE SPORT OF SNOWTUBING, I AGREE THAT I WILL NOT SUE AND WILL RELEASE FROM ANY AND ALL LIABILITY CAMELBACK SKI CORPORATION IF I OR ANY MEMBER OF MY FAMILY IS INJURED WHILE USING ANY OF THE SNOWTUBING FACILITIES OR WHILE BEING PRESENT AT THE FACILITIES, EVEN IF I CONTEND THAT SUCH INJURIES ARE THE RESULT OF NEGLIGENCE OR ANY OTHER IMPROPER CONDUCT ON THE PART OF THE SNOWTUBING FACILITY.

Release (Exhibit A to Appellants Motion for Summary Judgment) (R.R. at 14a).[2]

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[1] A similarly-worded release was contained on the back of Camelback's lift tickets. No issue concerning the lift ticket release has been raised.

[2] Although the language of the Release is taken verbatim from the record, the Release is not reproduced with the precise font sizes and form.

Camelback offers its customers two different methods of snow tubing. One set of snow tubing slopes grants snow tubers relatively uncontrolled access down the mountain and deposits them in a common receiving area. Alternatively, customers can enjoy two snow tubing slopes identified as "family" tubing slopes. These family tubing slopes are separated from the other snow tubing slopes, and the flow of snow tubers is controlled by a Camelback employee, who discharges them from the summit once the previous snow tubers have cleared the receiving area at the bottom. The receiving area for the family tubing slopes is segregated from the common receiving area connected to the other slopes.

On December 20, 2003, Appellee Barbara Lichtman Tayar ("Tayar") and her family visited Camelback's facility in the early afternoon.[3] After observing the snow tubing slopes for a period of time, Tayar and her family decided to join in, and, pursuant to Camelback's requirement, Tayar signed the Release. Tayar and her family elected to use the family tubing slopes, and completed four successful runs down the mountain, with Appellant Brian Monaghan ("Monaghan"), a Camelback employee, releasing them from the summit safely each time.

Tayar's fifth adventure down the mountain began just as the others, with Monaghan giving her a slight push to start her down the slope. Once she reached the receiving area at the bottom of the slope, however, Tayar exited her snow tube and was immediately struck by another snow tuber coming down the family tubing slope. Camelback employees rushed to assist Tayar out of the receiving area, when yet another snow tuber narrowly missed striking her. At this point, several Camelback employees were yelling and gesturing up the mountain to Monaghan to stop sending

[3] The factual background described is as developed at the summary judgment stage of the proceedings.

snow tubers down the slope until they could safely remove Tayar from the receiving area. As a result of the collision, Tayar suffered multiple comminuted factures of her right leg, for which she underwent surgery and required two metal plates and 14 screws to stabilize her ankle.

Tayar filed a complaint against Camelback and Monaghan (collectively "Appellants") in the Court of Common Pleas of Monroe County on January 6, 2005. Appellants filed an answer and new matter, and thereafter moved for summary judgment, asserting Tayar's claims against Camelback and Monaghan were barred by the Release. On March 31, 2006, the trial court granted Appellants' motion, reasoning the Release covered Camelback and thereby released it from any liability associated with Tayar's injuries. Additionally, the court determined that it did not need to address whether the Release encompassed Monaghan in his personal capacity because, in any event, the release printed on the lift ticket relieved Monaghan of liability. See supra note 1. Further, while the court concluded the evidence demonstrated Monaghan acted negligently by sending snow tubers down the mountain too early, it did not suggest he acted recklessly or with gross negligence. Thus, the trial court determined the Release and lift ticket relieved Appellants of liability and compelled entry of summary judgment in their favor. Tayar appealed to the Superior Court.

On appeal, a three-judge panel affirmed in a divided decision. Thereafter, Tayar requested the Superior Court rehear the matter *en banc*, and her request was granted. Upon rehearing, the *en banc* Superior Court reversed the trial court in a 5-4 decision. Tayar v. Camelback Ski Corp., Inc., 957 A.2d 281 (Pa. Super. 2008). Construing the Release strictly against Appellants, the majority concluded the Release did not encompass Monaghan in his personal capacity because he failed to demonstrate the Release exculpated him with the "greatest particularity." Id. at 289. As the Release did

not mention employees, but only Camelback, the majority reasoned that reading the Release to encompass Monaghan in his personal capacity would require inserting language into the Release. The majority also determined that the Release encompassed only negligent conduct because its language was not specific enough to release acts of greater culpability: the Release "had to explicitly state that the releasor was waiving claims based upon allegations of recklessness and intentional conduct" in order for such conduct to be validly released. Id. at 292. Thus, the majority determined the Release was valid only with respect to Camelback, and relieved Camelback from liability for only negligent conduct. As the majority further found there existed a material question concerning whether Monaghan acted recklessly or negligently, the majority concluded the trial court erred by entering summary judgment in favor of Appellants, and remanded for further proceedings.

Judge Mary Jane Bowes authored a Dissenting Opinion, which was joined by Judge, now Justice, Orie Melvin, as well as Judges John T. Bender and Susan Peikes Gantman. Judge Bowes concluded the Release did release Monaghan from liability, reasoning a corporation may not act but through its employees, and noting Monaghan was acting within the scope of his employment when he sent the snow tubers down the mountain. Moreover, Judge Bowes concluded the Release was not against public policy and encompassed reckless conduct, as it referred to "negligence or any other improper conduct." Id. at 297 (Bowes, J., dissenting) (quoting Release). In any event, Judge Bowes viewed Monaghan's actions as nothing more than garden variety negligence, which was unquestionably covered by the Release. Accordingly, Judge Bowes would have affirmed the trial court's grant of summary judgment in favor of Appellants.

Appellants petitioned this Court for review, which we granted to address three issues: (1) whether employees are encompassed by a release which only mentions the employer; (2) whether public policy permits releases of reckless behavior; and (3) if so, the language necessary to achieve such a release.[4] Tayar v. Camelback Ski Corp., Inc., 607 Pa. 460, 8 A.3d 299 (2010) (order).

II. Analysis

A. Does the Release cover employees of Camelback?

Appellants first argue the Superior Court erred by concluding that Monaghan was not covered by the Release. Appellants note that it is well accepted that a corporation may not act but through its employees, and claim the intent of the Release, therefore, was to release both Camelback and its employees, specifically Monaghan. Appellants

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[4] In his Concurring and Dissenting Opinion ("CODO"), Justice Baer contends our review of the question of whether a release for reckless conduct is against public policy is infirm because the underlying issue of Monaghan's recklessness was not properly before the Superior Court. See CODO at 5-6. We disagree. Tayar raised the issue of whether there was a factual question regarding Monaghan's recklessness in her response to Appellants' summary judgment motion, see Brief in Opposition to Defendants' Motion for Summary Judgment at 13, and in her Pa.R.A.P. 1925(b) statement, see Plaintiff's Statement of Matters Complained of on Appeal, 5/11/06, at 1-2. Further, the issue was fully briefed before the three-judge Superior Court panel, see Brief for Appellant at 32-33; Brief for Appellees at 26-28, and the *en banc* panel of that court, see Brief for Appellant on Reargument at 37, 42-43; Brief for Appellees on Reargument at 35-36. Accordingly, we find no error in the Superior Court addressing this factual question, and thus no infirmity to our review of the public policy question encompassing that issue.

Justice Baer further contends that, even if he were to assume the issue was preserved, he would find that the Superior Court erred in reversing the trial court's conclusion that the summary judgment record did not present a factual question regarding whether Monaghan's conduct constituted recklessness. See CODO at 6-8. Respectfully, we did not grant allowance of appeal in this case to review that fact-intensive aspect of the Superior Court's decision.

allege the final phrase of the Release supports this conclusion, as it states that Tayar was releasing claims for injuries caused by negligence or other improper conduct "on the part of the snowtubing facility." Appellants aver that, because Camelback could not act but through its employees, a common sense reading of this statement serves to release employees acting in the course of their employment as well as Camelback itself. Lastly, Appellants note that Monaghan was, in fact, acting within the scope of his employment at the time of Tayar's injury, and, therefore, is indemnified by, and considered the same party as, Camelback for purposes of this suit.

Tayar avers the Release does not shield Monaghan. Tayar notes the Release refers only to "Camelback Ski Corporation," and never mentions employees. She alleges the Release did not describe, or even mention, injuries resulting from acts an employee could commit, contending the Release mentioned only risks inherent to the sport of snow tubing, or dangerous conditions which naturally exist on a snow tubing slope, the minimization and control of which is the responsibility of the property owner, *i.e.*, Camelback. For example, Tayar submits a skier injured by a negligently placed fence or barrier would be subject to the Release, because the placement of fences and barriers is controlled by Camelback itself, not its employees. Tayar argues that the Release's failure to mention employees corresponds to its description of dangers and injuries, as those descriptions referred to situations for which Camelback as the property owner was solely responsible. Further, Tayar contends, because the Release only described naturally occurring dangers and risks, the public was not put on notice that it was releasing Camelback's employees from overt, reckless conduct. For instance, Tayar argues the Release's reference to the "risk of collisions" pertained to the common receiving area, which was unregulated by Camelback employees, and did not notify the public of a risk of collision due to a Camelback employee sending a snow

tuber down the slope too early. She observes that, prior to this matter, Camelback used a different version of the Release, which did specifically mention employees. Yet, Camelback elected to remove all references to employees in the version of the Release at issue here. As such, Tayar claims Camelback made a deliberate decision to remove its employees from the protection of the Release. Additionally, Tayar contends the Release failed to inform the public with the greatest particularity that acts of employees were covered by the Release, asserting this Court would have to read the term "employee" into the Release in order to conclude it bars suits against Camelback employees.

In construing exculpatory clauses, we apply the standard set forth in Topp Copy Prods., Inc. v. Singletary, 533 Pa. 468, 626 A.2d 98 (1993), which provides that, in order for exculpatory language to be enforceable:

> 1) the contract language must be construed strictly, since exculpatory language is not favored by the law; 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; 3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and 4) the burden of establishing immunity is upon the party invoking protection under the clause.

Topp Copy, 533 Pa. at 471, 626 A.2d at 99.

In determining whether the Release relieved Monaghan of liability, we begin and end with the generally accepted premise that a corporation can only act through its officers, agents, and employees. See Weatherly Area Sch. Dist. v. Whitewater Challengers, Inc., 532 Pa. 504, 507, 616 A.2d 620, 621 (1992) (noting that governmental agencies, political subdivisions, and private corporations can act only "through real people — its agents, servants or employees."); Maier v. Maretti, 671 A.2d 701, 707 (Pa. Super. 1995) (concluding employees, agents, and officers of a

corporation may not be regarded as separate parties when acting in their official capacity). Indeed, under the doctrine of vicarious liability, the corporation, not the employee, is liable for acts committed by the employee in the course of employment. See Travelers Cas. & Sur. Co. v. Castegnaro, 565 Pa. 246, 252, 772 A.2d 456, 460 (2001) (concluding a principal is liable for the negligent acts and torts of its agents, as long as those acts occurred within the agent's scope of employment).

Here, the Superior Court majority concluded that, because Camelback is a separate legal entity, the Release's reference to Camelback did not encompass its employees. The absence of a specific reference to the term "employees" in this circumstance, however, does not alter the basic tenants of corporate law; and we will apply those foundational principles unless there exists express language to the contrary. Here, Tayar does not point to any such express indication that employees are removed from the protection of the Release. Rather, by referring to "Camelback Ski Corporation" and "the snow tubing facility," we conclude the Release expressed with sufficient particularity that it covered the acts of Camelback employees, as Camelback could not act, negligently, improperly, or otherwise, other than through its agents and employees. Further, Monaghan was clearly acting within the scope of his employment when he sent snow tubers down the slope. Accordingly, we conclude the Release encompassed the acts of Camelback employees, and specifically Monaghan.[5]

B. Does the Release encompass reckless conduct?

[5] Indeed, were we to conclude otherwise, it would appear to undermine much of the point of such a release from the corporation's perspective. That is, if claims against Monaghan were not barred by the Release (and barred only against Camelback), arguably Camelback nonetheless could be subject to claims of vicarious liability for the acts of Monaghan, and thus potentially exposed to similar liability as if there were no release.

In addressing whether the Release encompasses reckless conduct, we must first consider the broader question of whether it is against public policy for a pre-injury release to relieve a party of liability for reckless conduct. Appellants argue that such releases are enforceable, and do not violate public policy. Citing Leidy v. Deseret Enter., Inc., 381 A.2d 164 (Pa. Super. 1977), Appellants assert courts have concluded such releases were contrary to public policy in only four situations: (1) within the employer-employee relationship; (2) where one party is charged with a duty of public service; (3) where the release relieves liability for statutory violations; and (4) where the release limits consequential damages for consumer goods. Appellants submit the instant matter does not involve any of these scenarios, but, rather, concerns a private agreement between individuals relating to their private affairs. Appellants note that, in Chepkevich v. Hidden Valley Resort, L.P., 607 Pa. 1, 2 A.3d 1174 (2010), we stated that recreational sporting activities may be viewed differently in the context of exculpatory agreements, as each party is free to participate, or not, in the activity, and, therefore, is free to sign, or not, the release form. They argue Valeo v. Pocono Int'l Raceway, Inc., 500 A.2d 492 (Pa. Super. 1985), is persuasive, as, there, the Superior Court held the language of the release, which relieved the raceway of liability for injuries "whether caused by negligence or otherwise," was sufficient to bar a claim for gross negligence. Appellants claim there is no caselaw which suggests it is against public policy to permit a release of reckless conduct in a private, voluntary, recreational setting.

Second, concerning the specificity of the Release, Appellants aver the absence of the word "reckless" does not invalidate the Release with respect to reckless conduct. On the contrary, Appellants claim the Release contained language sufficient to encompass reckless behavior, as it purported to release Appellants from "negligence or

other improper conduct." Appellants contend the instant language is nearly indistinguishable from that involved in Valeo, where the Superior Court determined the release prevented a suit based on gross negligence. Additionally, citing Chepkevich and Zimmer v. Mitchell and Ness, 385 A.2d 437 (Pa. Super. 1978), Appellants allege that phrases such as "any liability" or "any and all liability" have been held to be sufficient to encompass negligent behavior. Therefore, they contend similar language should also encompass recklessness, as, Appellants argue, it would be clear to a reasonable person that such conduct was being released by that language. In the same vein, Appellants assert the phrase "negligence or other improper conduct" encompasses recklessness by reference to "other improper conduct." Indeed, Appellants query what the phrase "other improper conduct" refers to, if not recklessness. Moreover, Appellants note the Release informed Tayar that snow tubes end up in a common runout area at various times and speeds, and that it was her responsibility to avoid collision. Appellants contend, therefore, that Tayar was specifically informed of the risk of suffering her type of injury, and was notified she would not be able to sue Appellants for negligence or other improper conduct, including recklessness.

In response, Tayar argues that, as far back as 1854, this Court has held that a pre-injury exculpatory release which attempts to release grossly negligent conduct will not be enforceable. See Pennsylvania R.R. Co. v. McCloskey's Adm'rs, 23 Pa. 526 (1854). Consistent therewith, Tayar notes the Superior Court, in Behrend v. Bell Tel. Co., 363 A.2d 1152 (Pa. Super. 1976), *vacated and remanded on other grounds*, 473 Pa. 320, 374 A.2d 536 (1977), held that a provision which purported to limit a telephone company's liability was valid as to negligent acts, but not to conduct found to be willful, malicious, or reckless. Furthermore, Tayar submits both federal courts and courts from

other states have determined that exculpatory clauses will not insulate defendants from grossly negligent or reckless behavior, and she contends that these courts agree on this point because to permit such releases would remove any incentive for defendants to adhere to even a minimal standard of care. Specifically, Tayar cites Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734 (Conn. 2005), wherein the Connecticut Supreme Court refused to enforce a release purporting to relieve a snow tubing facility of recklessness, reasoning that, otherwise, "recreational operators would lack the incentive to exercise even slight care, with the public bearing the costs of the resulting injuries." Brief of Appellee at 20. As further support, Tayar notes Section 195(1) of the Restatement (Second) of Contracts states that releases for intentional or reckless conduct are unenforceable as a matter of public policy. In fact, Tayar notes, Appellants were unable to cite to a single decision that upheld a pre-injury release for recklessness. In that regard, Tayar distinguishes the caselaw relied upon by Appellants by noting that those cases, save for Valeo, involved releases of negligent behavior and are thus inapposite. Further, even though the Valeo court upheld the release as it applied to claims of gross negligence, Tayar observes that the focus of that decision was whether the language of the release was specific enough to release gross negligence, and did not address the public policy concerns of doing so.

Next, Tayar contends that, even if it is not against public policy to release recklessness, the language of the Release was not specific enough to relieve Appellants from liability for her injury. Tayar argues the standard set forth in Topp Copy, quoted above, governs the enforceability of exculpatory provisions. Largely echoing her argument concerning whether Monaghan was encompassed by the Release, Tayar submits the Release fails to meet the Topp Copy standard because it

did not describe, with the greatest particularity, that she was releasing Camelback's employees for any actions, let alone reckless behavior.

Tayar distinguishes Zimmer, relied upon by Appellants. There, a skier was injured when the bindings on his rented skis did not disengage after he crashed coming down the mountain. The release signed by the skier before renting the skis specifically indicated that the bindings on the skis would not release in all situations and were not a guarantee of safety. The court found the release barred the claim against the ski resort because the release specifically described the type of injury suffered by the skier. Tayar argues that, while the release operated to bar the claim against the ski resort in Zimmer, here, the Release did not mention the specific harm and risk at issue, namely, that snow tubers would be sent down the family tubing slope too early and cause a collision. In essence, Tayar argues that the release in Zimmer satisfied the Topp Copy standard because its language was particular, whereas, here, the language of the Release is too broad and fails to describe the risks with the greatest particularity.[6]

Turning to our analysis, we note that, although exculpatory provisions are generally disfavored, such provisions are enforceable where three conditions are met. First, the clause must not contravene public policy. Second, the contract must be between persons concerning their private affairs. Third, each party must be a free

[6] An *amicus* brief has been filed by Sarah Scott, who has a petition for allowance of appeal currently pending before our Court which has been held pending resolution of the instant matter. Scott v. Altoona Bicycle Club, 437 WAL 2010. Scott generally agrees with Tayar that recklessness may not be released as a matter of public policy, and also submits there is a generally accepted recognition that recklessness constitutes a more severe form of misconduct than ordinary negligence, and, in light of that recognition, many states do not permit releases of reckless behavior. Further, Scott requests that we formally adopt Section 195 of the Restatement (Second) of Contracts, which, Scott contends, would align Pennsylvania with the many states that refuse to enforce exculpatory provisions purporting to release recklessness.

bargaining agent so the contract is not one of adhesion. Employers Liab. Assur. Corp. v. Greenville Business Men's Ass'n, 423 Pa. 288, 224 A.2d 620 (1966). Our instant focus is on the first of these three conditions: whether the Release contravenes public policy. In that regard, we note that avoidance of contract terms on public policy grounds requires a showing of overriding public policy from legal precedents, governmental practice, or obvious ethical or moral standards. See Williams v. GEICO Gov't Employees Ins. Co., __ Pa. __, 32 A.3d 1195 (2011). Indeed, in Williams, we noted that public policy was more than a vague goal, stating:

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy[.] . . . Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy. The courts must be content to await legislative action.

Id. at 1200 (internal quotation marks omitted; alterations original). Further, "[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring." Id. (internal quotation marks omitted). The instant public policy question — whether recklessness can be released in a pre-injury exculpatory clause — is one of first impression for our Court.[7]

[7] We acknowledge that the Superior Court in Valeo approved a release that barred claims of gross negligence. However, the court did not cite to any authority supporting that proposition and, critically, did not address the public policy of permitting such a release. In any event, as gross negligence is not implicated in the instant matter, we (continued…)

Chepkevich is our most recent analysis of pre-injury releases as they pertain to ski resort facilities. There, the plaintiff was skiing with her six-year-old nephew and asked the lift operator to stop the lift so she and her nephew could board the lift. Although the lift operator agreed to do so, when the lift came behind the plaintiff and her nephew, the operator failed to stop the lift. As a result, the young boy did not board the lift properly and, when the plaintiff tried to help him on to the lift, she fell and injured her shoulder and hip. The plaintiff filed suit against the ski resort, alleging the lift operator was negligent in failing to stop the lift after promising to do so. The trial court granted summary judgment in favor of the ski resort, reasoning that the release signed by the plaintiff prior to her skiing that day barred her suit. Against a public policy challenge, we upheld the release, reasoning that Pennsylvania encourages the sport of skiing, and noting our courts previously upheld such releases for negligence.

Chepkevich did not, however, address whether a release for recklessness is against public policy. In ruminating on this question, we first consider where on the spectrum of tortious conduct recklessness falls. At one end of that spectrum, exculpatory clauses that release a party from negligence generally are not against public policy, and are enforceable provided certain criteria are met.[8] See Chepkevich; Topp Copy; Cannon v. Bresch, 307 Pa. 31, 35, 160 A. 595, 597 (1932) ("The covenant

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(…continued)
leave for another day the question of whether a release for gross negligence can withstand a public policy challenge.

[8] As discussed above, these specific criteria are that: (1) the contract language be strictly construed; (2) the contract must state the intention of the parties with the greatest particularity; (3) the language must be construed against the party seeking immunity; and (4) the burden of establishing immunity rests on the party seeking protection under the clause. Topp Copy, 533 Pa. at 471, 626 A.2d at 99. As these criteria concern the enforceability of an otherwise facially valid release, and address the sufficiency of language used in the agreement, they are more relevant to the third question granted for review. Thus, we will not address these specific criteria here.

in this lease against liability for acts of negligence does not contravene any policy of the law."); Wang v. Whitefail Mountain Resort, 933 A.2d 110 (Pa. Super. 2007) (upholding release for negligence as applied to snow tubing accident); Nissley, supra (upholding release to bar negligence claim); Zimmer, supra (same). On the other end of the continuum are releases for intentional conduct. It is elementary and foundational to our system of criminal and tort law that parties are not permitted to intentionally harm one another. Accordingly, releases for intentional tortious conduct are likewise prohibited. See AMJUR Contracts 286 (collecting cases); Restatement (Second) of Contracts § 195(1) (a term exempting a party from liability for intentional conduct is against public policy); 15 Corbin on Contracts § 85.18 (2003) (stating courts generally do not enforce agreements to exempt parties from tort liability for intentional conduct). Thus, while obviously distinct concepts, whether on this spectrum we conclude recklessness is more akin to intentional conduct, or more like negligence in character, can guide our inquiry.

Recklessness is distinguishable from negligence on the basis that recklessness requires conscious action or inaction which creates a substantial risk of harm to others, whereas negligence suggests unconscious inadvertence. In Fitsko v. Gaughenbaugh, 363 Pa. 132, 69 A.2d 76 (1949), we cited with approval the Restatement (Second) of Torts definition of "reckless disregard" and its explanation of the distinction between ordinary negligence and recklessness. Specifically, the Restatement (Second) of Torts defines "reckless disregard" as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1965). The Commentary to this Section emphasizes that "[recklessness] must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent." Id., cmt. a. Further, as relied on in Fitsko, the Commentary contrasts negligence and recklessness:

> Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires 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. . . . The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

Id., cmt. g; see also AMJUR Negligence § 274 ("Recklessness is more than ordinary negligence and more than want of ordinary care; it is an extreme departure from ordinary care, a wanton or heedless indifference to consequences, an indifference whether or not wrong is done, and an indifference to the rights of others"). Our criminal laws similarly distinguish recklessness and negligence on the basis of the consciousness of the action or inaction. See 18 Pa.C.S.A. § 302(b)(3), (4) (providing that a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk," while a person acts negligently when he "should be aware of a substantial and unjustifiable risk").

This conceptualization of recklessness as requiring *conscious* action or inaction not only distinguishes recklessness from ordinary negligence, but aligns it more closely

with intentional conduct. As a result, we are inclined to apply the same prohibition on releasing reckless conduct as we do for intentional conduct.

This view is supported by the conclusions of courts in other jurisdictions. As Tayar observes in her brief, 28 of our sister states have addressed whether enforcing releases for reckless behavior is against public policy.[9] Brief of Appellee at 16-20. Of those 28 states, only 2 permit recklessness to be released.[10] Of the other 26 states, 23 have determined that recklessness may not be released, and the majority of those cases involved voluntary recreational activities.[11] The remaining 3 states have

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[9] A few states include the term "gross negligence" when concluding actions of greater culpability than that of ordinary negligence may not be released. Yet, in so concluding, these states either cite to cases involving a party's inability to release reckless conduct, or cite to the Restatement (Second) of Contracts § 195(1), which provides that it is against public policy to permit releases of intentional and reckless behavior. See Moore v. Waller, 930 A.2d 176 (D.C. App. 2007) (in gross negligence case, after surveying other state cases, noting that other courts have generally not enforced exculpatory clauses that limit a party's liability for gross negligence, recklessness, or intentional torts); Zavras v. Capeway Rovers Motorcycle Club, Inc., 687 N.E.2d 1263 (Mass. App. 1997) (in gross negligence case, citing to Restatement (Second) of Contracts § 195); Alack v. Vic Tanny Int'l. of Mo., 923 S.W.2d 330 (Mo. 1996) (concluding culpable actions greater than ordinary negligence may not be released); Adams v. Roark, 686 S.W.2d 73 (Tenn. 1985) (discussing gross negligence, but citing to Restatement (Second) of Contracts § 195); Smith v. Golden Triangle Raceway, 708 S.W.2d 574 (Tex. Ct. App. 1986) (discussing gross negligence, but citing to Restatement (Second) of Contracts § 195).

[10] See Murphy v. North American River Runners, Inc., 412 S.E.2d. 504, 510 (W. Va. 1991) (in the context of white water rafting, noting a general clause in a pre-injury exculpatory agreement will not be construed to release reckless behavior, unless circumstances indicate that was the plaintiff's intention); L. Luria & Son, Inc. v. Honeywell, Inc., 460 So.2d 521 (Fla. Dist. Ct. App. 1984) (dismissing all claims but those involving intentional torts or fraud on the basis of release).

[11] See Barnes v. Birmingham Int'l Raceway, Inc., 551 So.2d 929 (Ala. 1989) (raceway); Kane v. National Ski Patrol System, Inc., 105 Cal. Rptr.2d 600 (Cal. Ct. App. 2001) (ski resort); Chadwick v. Colt Ross Outfitters, Inc., 100 P.3d 465 (Colo. 2004) (hunting); McFann v. Sky Warriors, Inc., 603 S.E.2d 7 (Ga.App. 2004) (simulated aerial combat); Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. Partnership, 166 P.3d 961 (Haw. 2007) (construction contract); Falkner v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941 (continued…)

concluded that, not only is it against public policy to release recklessness, but also that releases of negligence will not be enforced.[12] Accordingly, the overwhelming majority of our sister states find releases for reckless conduct are against public policy. See generally Restatement (Second) of Contracts § 195(1) ("A term exempting a party from tort liability for harm caused *intentionally or recklessly* is unenforceable on grounds of public policy." (emphasis added)); 15 Corbin on Contracts § 85.18 (2003) (stating courts generally do not enforce agreements to exempt parties from tort liability for intentional or reckless conduct); 8 S. Williston, Contracts § 19.24 (1998) ("An attempted exemption from liability for a future intentional tort or crime or for a future willful or grossly negligent act is generally held void."). Moreover, federal courts purporting to apply Pennsylvania law have barred the enforcement of releases for reckless behavior.[13] Similar to our

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(Ill. Ct. App. 1989) (parachuting); Butler Mfg. Co. v. Americold Corp., 835 F.Supp. 1274 (D. Kan. 1993) (applying Kansas law) (fire alarm installation); Wolf v. Ford, 644 A.2d 522 (Md. 1994) (action against investment firm); Lamp v. Reynolds, 645 N.W.2d 311 (motorcycle racetrack); Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783 (Minn. 2005) (houseboat rentals); New Light Co., Inc. v. Wells Fargo Alarm Serv., 525 N.W.2d 25 (Neb. 1994) (fire alarm installation); Hojnowski v. Vans Skate Park, 901 A.2d 381 (N.J. 2006) (skateboarding park); Sommer v. Federal Signal Corp., 593 N.E.2d 1365 (N.Y. Ct. App. 1992) (fire alarm installation); Bowen v. Kil-Kare, Inc., 585 N.E.2d 384 (Ohio 1992) (stock-car race); Schmidt v. United States, 912 P.2d 871 (Okla. 1996) (horseback riding); K-Lines, Inc. v. Roberts Motor Co., 541 P.2d 1378 (Or. 1975) (products liability with respect to truck); Kellar v. Lloyd, 509 N.W.2d 87 (Wis. App. 1993) (raceway); Milligan v. Big Valley Corp., 754 P.2d 1063 (Wyo. 1988) (ski race); see also supra note 9.

[12] Hanks, supra (Conn.) (snow tubing); Dalury v. S-K-I, Ltd., 670 A.2d 795 (Vt. 1996) (skiing); Hiett v. Lake Barcroft Cmty. Ass'n, Inc., 418 S.E.2d 894 (Va. 1992) (triathlon).

[13] See Valley Forge Con. & Visitors v. Visitor's Serv., 28 F. Supp. 2d 947, 950 (E.D. Pa. 1998) (finding Pennsylvania would not apply an exculpatory clause to preclude recovery for willful or wanton misconduct); Fidelity Leasing Corp. v. Dun & Bradstreet, Inc., 494 F. Supp. 786, 789 (E.D. Pa. 1980) (finding exculpatory clause in Pennsylvania would not insulate a defendant from liability for gross negligence or recklessness); Public Serv. Enter. Group, Inc. v. Phila. Elec. Co., 722 F. Supp. 184, 205 (D. N.J. 1989) (finding that (continued…)

assessment above, these jurisdictions have reasoned that recklessness is more akin to intentional conduct, as recklessness, in contrast to negligence, requires conscious action rather than mere inadvertence. Accordingly, they conclude that permitting recklessness would remove any incentive for parties to act with even a minimal standard of care.

We agree. As illustrated above, were we to sanction releases for reckless conduct, parties would escape liability for consciously disregarding substantial risks of harm to others; indeed, liability would be waivable for all conduct except where the actor specifically intended harm to occur. There is near unanimity across jurisdictions that such releases are unenforceable, as such releases would jeopardize the health, safety, and welfare of the people by removing any incentive for parties to adhere to minimal standards of safe conduct. See Hall, 538 Pa. at 347-48, 648 A.2d at 760. We therefore conclude that, even in this voluntarily recreational setting involving private parties, there is a dominant public policy against allowing exculpatory releases of reckless behavior, which encourages parties to adhere to minimal standards of care and safety.

III. Conclusion

Accordingly, we reverse the Superior Court's order in part, affirm in part, and remand. We reverse the order of the Superior Court to the degree it concluded that Monaghan was not covered by the Release. We affirm the order to the degree it reversed the grant of summary judgment on the basis that the Release did not bar claims based on reckless conduct, and remanded for further proceedings; on this latter

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(…continued)
in Pennsylvania an exculpatory clause would not limit liability for grossly negligent, willful, or wanton behavior).

point, we are affirming on the alternative basis that, to the degree it released reckless conduct, the Release was against public policy.[14]

Jurisdiction relinquished.

Madame Justice Orie Melvin did not participate in the consideration or decision of this case.

Mr. Chief Justice Castille and Messrs. Justice Saylor and McCaffery join the opinion.

Mr. Justice Eakin files a concurring and dissenting opinion.

Mr. Justice Baer files a concurring and dissenting opinion.

[14] In light of this conclusion, we need not address Tayar's additional contention concerning how specific language in a release must be in order to cover recklessness.