EXPRESS ASSUMPTION OF RISK/WAIVER/EXCULPATORY CLAUSES

50-STATE SURVEY
(INCLUDING THE DISTRICT OF COLUMBIA)
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Overview

In the Restatement (Second) of Torts, the discussion regarding express assumption of risk is explained as follows: “[t]he risk of harm from the defendant's conduct may be assumed by express agreement between the parties. Ordinarily such an agreement takes the form of a contract, which provides that the defendant is under no obligation to protect the plaintiff, and shall not be liable to him for the consequences of conduct which would otherwise be tortious.” (REST 2d TORTS § 496B.) American Jurisprudence states that “[a] valid release continues to be a complete bar to recovery in negligence actions in every jurisdiction.” (30 Am. Jur. Proof of Facts 3d 161 §3.) What courts consider to be a valid release, however, varies from state to state. In the following review, we identify those states that recognize the enforceability of exculpatory clauses. Given the disfavor with which such exculpatory clauses are generally viewed under the law, however, even the majority of states that recognize them to be enforceable impose stringent and exacting requirements for the clauses to be upheld. We also identify those states where such clauses are strictly unenforceable under any circumstance or where a specific set of underlying facts are presented (e.g., involving intentional conduct/gross negligence or infants). Therefore even though the discussion below sets forth the general rule for the enforceability or non-enforceability of these waivers in each state, the specific facts and circumstances must be evaluated and additional research may be required in certain instances.

Generally speaking, because exculpatory clauses are widely disfavored, the majority of state courts strictly construe the terms and conditions against the party seeking to enforce them, and require that the contract “clearly set out what negligent liability is to be avoided.” (See Ingersoll-Rand Co. v. El Dorado Chem. Co., 373 Ark. 226, 231–232 (2008).) This generally means that the courts require the release/assumption of a risk/exculpatory clause to be clear and unambiguous. It has been stated that “[t]he release must ‘clearly, explicitly and comprehensibly set forth to an ordinary person untrained in the law [] the intent and effect of the document.’” (See Cohen v. Five Brooks Stable, 72 Cal. Rptr. 3d 471, 481 (2008).) Some courts require that the word “negligence” be included and that the waiver explicitly state the type of negligence being waived to distinguish between losses resulting from inherent risks and those resulting from fault or wrongdoing See Slowe v. Pike Creek Court Club, Inc., 2008 Del. Super. LEXIS 377 (2008). (“Not only does [the liability waiver] fail to mention the word ‘negligence,’ it also lacks alternative language expressing that PCCC would be released for its own fault or wrongdoing. Slowe could reasonably assume that the effect of the release would have been to relieve PCCC of liability only for injuries or losses resulting from risks inherent in his use of the club and its premises, not for losses resulting from PCCC’s negligence. The waiver’s reference to ‘any and all’ injuries, without any reference to injuries caused by PCCC, is insufficient to undermine this assumption or indicate that the parties contemplated releasing PCCC for acts of negligence.”) Courts have also looked to the complexity of the language, the length of the waiver and the point size and location within the document to determine if an “ordinarily prudent and knowledgeable individual would have understood the provision as a release from liability for negligence.” (See Hall v. Woodland Lake Leisure Resort Club, 1998 Ohio App. LEXIS 4898, 15 (1998).) In addition, because some states have adopted laws regarding contributory negligence, the terminology also varies. For example, Idaho has eliminated the term “assumption of risk” and states that the correct terminology for this defense is “consent.” (See Davis v. Sun Valley Ski Educ. Found., 130 Idaho 400, 405 (1997).) Courts will also examine the waiver to see if it is consistent with public policy.

Several states cite to California’s Tunkl v. Regents of the University of California, 60 Cal. 2d 92 (1963) for the criteria that cause a provision to be void as against public policy. In Tunkl, six criteria were established to identify the kind of agreement in which an exculpatory clause is invalid as contrary to public policy:

“...[1] It 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 member 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 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 or exculpation, and makes no provision whereby a purchaser may pay additional 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.”

Generally, if the waiver is valid, it will apply only to ordinary negligence; “the vast majority of decisions state or hold that such agreements generally are void on the ground that public policy precludes enforcement of a release that would shelter aggravated misconduct.” (City of Santa Barbara v. Superior Court, 41 Cal. 4th 747, 760 (2007).) It should be noted, however, that Connecticut, for example, “does not recognize degrees of negligence and, consequently, does not recognize the tort of gross negligence as a separate basis of liability.” But the courts there have nevertheless limited the application of the releases to instances where considerations relating to public policy and good conscience are not implicated. (See Hanks v. Powder Ridge Restaurant Corporation et al., 885 A.2d 734, 748 (2005).)

In addition, state statutes affect the applicability of an exculpatory clause/waiver. For example, New York will not allow expression assumption of risk/waiver in the proprietary entertainment and recreation context (e.g., where the plaintiff paid a fee to use the facility) because of NY GOL § 6-326, and New Jersey found that a release signed by a decedent “with the express purpose of barring his potential heirs from instituting a wrongful death action in the event of his death . . . was void as against public policy” because of its Wrongful Death Act. (See New Jersey, infra.)

**NOTABLE EXCEPTIONS**

Arizona has held that, by statute, “the validity of an express contractual assumption of risk is a question of fact for a jury, not a judge.” (See Phelps v. Firebird Raceway, Inc., 210 Ariz. 403, 410 (2005).)

Virginia “universally prohibits” any “provision[] for release from liability for personal injury which may be caused by future acts of negligence” and only allows releases of liability for property damage. (See Virginia, infra.)

Louisiana has a statute that states that “[a]ny clause is null” that limits liability based on intentional fault or gross fault or for physical injury.” (See Ostrowiecki v. Aggressor Fleet. Ltd., 2008 U.S. Dist. LEXIS 62713 (2008).)

Montana similarly prohibits exculpatory clauses that purport to release a party from negligence. In Montana, “it is statutorily prohibited for any contracts to have as their object, directly or indirectly, the exemption of anyone from responsibility for their own fraud, for their willful injury to the person or property of another, or for their willful or negligent violation of the law. § 28-2-702, MCA. The Haynes Court held that this statute rendered illegal any exculpatory clause or release of liability clause seeking to relieve a tortfeasor from liability for negligent conduct. Haynes, 517 P.2d at 377.” (Thompson v. Simantos, 2004 ML 3736 (2004).)

In Florida, natural guardians are authorized “to waive and release, in advance, any claim or cause of action against a commercial activity provider . . . which would accrue to a minor child for personal injury, including death, and property damage resulting from an inherent risk in the activity.” Fla. Stat. § 744.301(3) (2011) (emphasis added). In subsection (a), the statute defines inherent risk as “those dangers or conditions, known or unknown, which are characteristic of, intrinsic to, or an integral part of the activity and which are not eliminated even if the activity provider acts with due care in a reasonably prudent manner.” Id. The statute states, however, that although the negligence of the minor child or a participant in the activity is included in the inherent risk, “[a] participant does not include the activity provider or its owners, affiliates, employees, or agents.” Id. at (3)(a)(2). This language suggests that a commercial activity provider cannot be released from liability for its own negligence. The legislature made this amendment in response to a case which held that “a parent did not have the authority to execute a pre-injury release on behalf of a minor child when the release involved participation in a commercial activity.” (REST 2d Torts § 496B, Case Citations July 2007–June 2009 (citing Kirton v. Fields, 997 So.2d 349 (2008)).) The court noted that “[i]n holding that pre-injury releases executed by parents on behalf of minor children are unenforceable for participation in commercial activities, we are in agreement with the majority of other jurisdictions.” (Kirton v. Fields, 997 So.2d 349, 355 (2008).) With the amendment to § 744.301(3), natural guardians can now execute pre-injury releases, but in the limited circumstances detailed in the statute.

Other states and federal courts have also addressed the propriety of a parent or guardian’s execution of a pre-injury release on behalf of a minor child. See, e.g., Johnson v. New River Scenic Whitewater Tours, Inc., 313 F. Supp. 2d 621 (S.D.W.Va. 2004) (finding a parent could not waive liability on behalf of a minor child and also could not indemnify a third party against the parent’s minor child for liability for conduct that violated a safety statute such as the Whitewater Responsibility Act); Meyer v. Naperville Manner, Inc., 262 Ill. App. 3d 141, 634 N.E.2d 411, 199 Ill. Dec. 572 (Ill. App. Ct. 1994) (finding a parental pre-injury waiver unenforceable in a situation where the minor child was injured after falling off a horse at a horseback riding school); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979) (stating *in dicta* that a parent cannot release a child’s
cause of action); Smith v. YMCA of Benton Harbor/St. Joseph, 216 Mich. App. 552, 550 N.W.2d 262, 263 (Mich. Ct. App. 1996) (‘It is well settled in Michigan that, as a general rule, a parent has no authority, merely by virtue of being a parent, to waive, release, or compromise claims by or against the parent’s child.’); Hojnowski v. Vans Skate Park, 187 N.J. 323, 901 A.2d 381, 383 (N.J. 2006) (finding that where a child was injured while skateboarding at a skate park facility, ‘a parent may not bind a minor child to a pre-injury release of a minor’s prospective tort claims resulting from the minor’s use of a commercial recreational facility’); Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (extending the law that a parent could not execute a pre-injury release on behalf of a minor child to a mentally handicapped twenty-year-old student who was injured while training for the Special Olympics at a YMCA swimming pool); Munoz v. Il Jaz, Inc., 863 S.W.2d 207 (Tex. App. 1993) (finding that giving parents the power to waive a child’s cause of action for personal injuries is against public policy to protect the interests of children); Hawkins v. Peart, 2001 UT 94, 37 P.3d 1062, 1066 (Utah 2001) (concluding that ‘a parent does not have the authority to release a child’s claims before an injury,’ where the child was injured as a result of falling off a horse provided by a commercial business); Hiett v. Lake Barcroft Cmty. Ass’n., 244 Va. 191, 418 S.E.2d 894, 8 Va. Law Rep. 3381 (Va. 1992) (concluding that public policy prohibits the use of pre-injury waivers of liability for personal injury due to future acts of negligence, whether for minor children or adults); Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (Wash. 1992) (holding that the enforcement of an exculpatory agreement signed by a parent on behalf of a minor child participating in a ski school is contrary to public policy).

Interestingly, in the context of voluntary or nonprofit endeavors, there are jurisdictions where pre-injury releases executed by parents on behalf of minor children have been found enforceable. These decisions typically involve a minor’s participation in school-run or community-sponsored activities. See, e.g., Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 274 Cal. Rptr. 647 (Cal. Ct. App. 1990) (finding the pre-injury release executed by the father on behalf of the minor child enforceable against any claims resulting from the child’s participation in a school-sponsored event); Sharon v. City of Newton, 437 Mass. 99, 769 N.E.2d 378 (Mass. 2002) (holding that a parent has the authority to bind a minor child to a waiver of liability as a condition of a child’s participation in public school extracurricular sports activities); Zivich v. Mentor Soccer Club, Inc., 82 Ohio St. 3d 367, 1998 Ohio 389, 696 N.E.2d 201, 205 (Ohio 1998) (concluding that a parent may bind a minor child to a release of volunteers and sponsors of a nonprofit sports activity from liability for negligence because the threat of liability would strongly deter ‘many individuals from volunteering for nonprofit organizations’ because of the potential for substantial damage awards).

CONCLUSION

Even setting aside the exceptions, it is virtually impossible to draft a release/waiver that is guaranteed to withstand judicial scrutiny in every state given the variations in standards for each state (which may warrant additional research for the particular state in any given circumstance). Moreover, because state statutes can affect whether or not an exculpatory clause will be enforced (for example, whether it will be effective against one’s heirs/assigns), a “one size fits all” approach is simply not feasible. A waiver/release that is clear, unambiguous and as thorough as possible may nevertheless be deemed sufficient for the vast majority of the jurisdictions that favor enforceability.
In Alabama, general releases exculpating one from liability for negligent conduct have been upheld as valid and not void as against public policy. *Young v. City of Gadsden*, 482 So.2d 1158 (Ala. 1985). In *Young*, which involved auto racing, the court held that participation in automobile races is a voluntary undertaking of a hazardous activity, and releases from liability, when voluntarily entered into, should be enforced. Alabama courts have also noted, however, that such releases “although valid and consistent with public policy as to negligent conduct are invalid and contrary to public policy as to wanton or willful conduct.” *Barnes v. Birmingham Int’l Raceway*, 551 So. 2d 929, 933 (1989).

But compare *Morgan v. South Cent. Bell Tel. Co.*, 466 So. 2d 107 (1985), where the court refused to enforce a waiver because of the grossly unfair and unbalanced bargaining power of defendant, applying the criteria discussed in the overview to this document in *Tunkl* in determining whether a clause is void as against public policy.

“As with any contract, a release of liability is only valid to the extent that it reflects a ‘conspicuous and unequivocally expressed’ intent to release from liability.” *Moore v. Hartley Motors*, 36 P.3d 628, 632-633 (2002). But if the release does not discuss or mention liability for general negligence and merely refers only to unavoidable and inherent risks of the activity, then negligence unrelated to those inherent risks are not released from liability. *Id.* at 633.

As noted in the overview to this document, pursuant to state statute, “the validity of an express contractual assumption of risk is a question of fact for a jury, not a judge.” *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 111 P.3d 1003, 1010 (2005). Thus, in Arizona, although these waivers may be enforceable, they will always be subject to a jury determination and can never be enforced via summary judgment.
In Arkansas, exculpatory contracts must clearly set out what negligent liability is to be avoided. Importantly, however, courts are not restricted to the literal language of the contract, and will also consider the facts and circumstances surrounding the execution of the release in order to determine the intent of the parties. *Jordan v. Diamond Equipment & Supply Co.* 362 Ark. 142, 149, 207 S.W.3d 525, 530 (2005). In addition, Arkansas courts have recognized three requirements for the enforcement of an exculpatory provision: “(1) when the party is knowledgeable of the potential liability that is released; (2) when the party is benefitting from the activity which may lead to the potential liability that is released; and (3) when the contract that contains the clause was fairly entered into.” *Finagin v. Ark. Dev. Fin. Auth.*, 355 Ark. 440, 458, 139 S.W.3d 797, 808 (2003).

In California, so long as the express agreement to assume the risk does not violate public policy, it will be upheld and will constitute a complete bar to a negligence cause of action. *(Knight v. Jewett, supra, 3 Cal. 4th 296, 308, fn. 4; Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 597-602 [250 Cal. Rptr. 299].)* *Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 1372 (1996).


“California courts require a high degree of clarity and specificity in a Release in order to find that it relieves a party from liability for its own negligence. The release must ‘clearly, explicitly and comprehensibly set forth to an ordinary person untrained in the law that the intent and effect of the document is to release his claims for his own personal injuries and to indemnify the defendants from and against liability to others which might occur in the future as a proximate result of the negligence of [the] defendants … ’ *(Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 319 [195 Cal. Rptr. 90]; see Scroggs v. Coast Community College Dist. (1987) 193 Cal. App. 3d 1399, 1404 [239 Cal. Rptr. 916] [‘The presence of a clear and unequivocal waiver with specific reference to a defendant’s negligence is a distinct requirement where the defendant seeks to use the agreement to escape responsibility for the consequences of his negligence.’].) This does not mean use of the word ‘negligence’ or any particular verbiage is essential *(see Sanchez v. Bally’s Total Fitness Corp. (1998) 68 Cal.App.4th 62, 66-67 [79 Cal. Rptr. 2d 902]), but that the release must inform the releasor that it applies to misconduct on the part of the releasee.* *Cohen v. Five Brooks Stable*, 159 Cal. App. 4th 1476, 1488-1489 (2008). A release for future gross negligence is unenforceable, however, in California. *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747 (2007).
Exculpatory agreements are enforceable but “[i]n no event will an exculpatory agreement be permitted to shield against a claim of willful and wanton negligence. Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981). Although an exculpatory agreement that attempts to insulate a party from liability for his own simple negligence is also disfavored, it is not necessarily void as against public policy… ‘as long as one party is not ‘at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other’s negligence.’ See Heil Valley Ranch v. Simkin, 784 P.2d 781, 784 (Colo. 1989) (citation omitted); Jones, 623 P.2d at 376. In determining the validity of such agreements, courts have held that they must closely scrutinize the clauses to ensure that the intent of the parties is expressed in clear and unambiguous language and that the circumstances and the nature of the service involved indicate that the contract was fairly entered into.” Chadwick v. Colt Ross Outfitters, Inc., 100 P.3d 465, 467 (2004).

In Connecticut, a party cannot be released from liability for injuries resulting from its future negligence in the absence of language that expressly so provides. “This rule ‘prevents individuals from inadvertently relinquishing valuable legal rights’ and ‘does not impose . . . significant costs’ on entities seeking to exculpate themselves from liability for future negligence.” Hanks v. Powder Ridge Rest. Corp., 276 Conn. 314, 320 (2005) (quoting Hyson v. White Water Mt. Resorts of Conn., 265 Conn. 636, 643 (2003)). “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, 836 A.2d 394 and n.10, 266 Conn. 822, 836 A.2d 394 (2003).” Hanks, 276 Conn. at 337. But Connecticut courts are careful not to allow the release to excuse a defendant from conduct that may violate public policy or be considered wanton.

“An express agreement to assume a risk can only be effective [in Delaware] if it is clear ‘that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm.’ Accordingly, while an exculpatory clause need not itemize every conceivable injury or loss intended to fall within its ambit, it must nonetheless ‘clearly, explicitly and comprehensibly’ state the risks the parties intend to cover, especially where it is claimed that a party has assumed risks not inherent to ‘the endeavor for which the release is signed.’” Slowe v. Pike Creek Court Club, Inc., 2008 Del. Super. LEXIS 377, 10-11 (2008) (footnotes omitted).
“A fundamental requirement of any exculpatory provision is that it be clear and unambiguous. *Maiatico v. Hot Shoppes, Inc.*, 109 U.S. App. D.C. 310, 312, 287 F.2d 349, 351 (1961) (‘exculpation must be spelled out with such clarity that the intent to negate the usual consequences of tortious conduct is made plain’; also recognizing that in most circumstances modern law ‘permits a person to exculpate himself by contract from the legal consequences of his negligence’). Cf. *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254, 666 A.2d 298, 305 (Md. 1996) (‘Because it does not clearly, unequivocally, specifically, and unmistakably express the parties’ intention to exculpate the respondent from liability resulting from its own negligence, the clause is insufficient for that purpose.’).” *Moore v. Waller*, 930 A.2d 176, 181 (2007). In addition, “any ‘term’ in a contract which attempts to exempt a party from liability for gross negligence or wanton conduct is unenforceable, not the entire [contract].” *Anderson*, 712 N.W.2d at 801 (quoting *Wolfgang v. Mid-American Motorsports, Inc.*, 898 F. Supp. 783, 788 (D. Kan. 1995) (which in turn quotes RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981) (‘A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.’) (emphasis added)).” *Id.* at 182.

Although viewed with disfavor under Florida law, exculpatory clauses are valid and enforceable when clear and unequivocal. *Borden v. Phillips*, 752 So. 2d 69 (2000). As noted in the overview to this document, in Florida, a parent may release the claims of a minor for inherent risks in commercial activities, but not for the negligence of the activity provider. Fla. Stat. § 744.301(3) (2011); but see *Kirton v. Fields*, 997 So. 2d 349 (2008).

Although exculpatory clauses are generally disfavored, exculpatory clauses are enforceable if they do not violate a statute, implicate a substantial public interest, or stem from unequal bargaining power between the parties. See Fujimoto v. Au, 95 Haw. 116, 155-56, 19 P.3d 699, 738-39 (2001). But see HRS § 663-1.54 (2011), which states that an owner or operator of a business providing recreational activities to the public will be liable for injuries caused by negligent acts or omissions, but not for inherent risks of the activity if a waiver that meets the requirements of the statute is signed by the patron.

Plaintiff’s express consent to a waiver or release is recognized to be a complete bar to recovery in Idaho. With one important exception, contractual assumption of risk operates as a total bar to recovery. “The exception is the general contract rule that contracts which violate public policy are not recognized. See, e.g., Whitney v. Continental Life and Accident Co., 89 Idaho 96, 403 P.2d 573 (1965); Worlton v. Davis, 73 Idaho 217, 249 P.2d 810 (1952).” Salinas v. Vierstra, 107 Idaho 984, 990 (1985).

“Although exculpatory agreements are not favored and are strictly construed against the party they benefit, parties may allocate the risk of negligence as they see fit, and exculpatory agreements do not violate public policy as a matter of law. An exculpatory agreement will be enforced if: ‘(1) it clearly spells out the intention of the parties; (2) there is nothing in the social relationship between the parties militating against enforcement; and (3) it is not against public policy.’” Evans v. Lima Lima Flight Team, Inc., 373 Ill. App. 3d 407, 412 (2007) (internal citations omitted).

“A release or exculpatory agreement can be set aside if there is either fraud in the execution or fraud in the inducement. Bien v. Fox Meadow Farms Ltd., 215 Ill. App. 3d 337, 341, 574 N.E.2d 1311, 1315, 158 Ill. Dec. 918 (1991). Fraud in the execution occurs when the plaintiff was induced to sign the agreement not knowing it was a release, but believing it to be another type of document; fraud in the inducement occurs when the party is induced to enter into the release by false representations by the other party. Bien, 215 Ill. App. 3d at 342, 574 N.E.2d at 1315. However, a party has a general duty to read documents before she signs them, and her failure to do so will not render the document invalid. Bien, 215 Ill. App. 3d at 342, 574 N.E.2d at 1315.” Oelze v. Score Sports Venture, LLC, 401 Ill. App. 3d 110, 117 (2010).
“In Indiana, assumption of risk, or an enforceable express consent to hold another harmless and/or relieve them of duty, remains a complete bar to recovery.” Heck v. Robey, 659 N.E.2d 498, 504 n.6 (1995). “In the absence of legislation to the contrary, it is not against public policy in Indiana to enter into a contract that exculpates one from the consequences of his own negligence. Marshall v. Blue Springs Corp., 641 N.E.2d 92, 95 (Ind. Ct. App. 1994). However, in order to ensure a party's knowing and willing acceptance of this harsh burden, [courts] have held that such exculpatory clauses must specifically and explicitly refer to the negligence of the party seeking release from liability. See Powell v. Am. Health Fitness Ctr. of Fort Wayne, Inc., 694 N.E.2d 757, 761 (Ind. Ct. App. 1998); Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols, 583 N.E.2d 142, 146 (Ind. Ct. App. 1991). An exculpatory clause may be found sufficiently specific and explicit on the issue of negligence even in the absence of the word itself. See Moore, 583 N.E.2d at 146.” Avant v. Cmty. Hosp., 826 N.E.2d 7, 10 (2005).

“Under Iowa law, a contract need not expressly specify that it will operate for negligent acts if the clear intent of the language is to provide for such a release. See Hysell v. Iowa Public Service Co., 534 F.2d 775, 785 (8th Cir. 1976), citing Weik v. Ace Rents Inc., 249 Iowa 510, 514-15, 87 N.W.2d 314, 317-18 (1958). The words ‘any and all rights, claims, demands and actions of any and every nature whatsoever . . . for any and all loss, damage or injury’ is clearly intended to cover negligent acts.” Korsmo v. Waverly Ski Club, 435 N.W.2d 746, 748 (1988). In addition, “[t]he parties need not have contemplated the precise occurrence which occurred as long as it is reasonable to conclude the parties contemplated a similarly broad range of accidents. Schlessman v. Henson, 83 Ill.2d 82, 86, 413 N.E.2d 1252, 1254, 46 Ill. Dec. 139 (1980).” Id. at 749.

“An exculpatory contract for exemption from future liability for negligence, whether ordinary or gross, is not invalid per se. . . . However, such contracts are disfavored and are strictly construed against the parties relying upon them. . . . The wording of the release must be so ‘clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable.’” Cumberland Valley Contrs., Inc. v. Bell County Coal Corp., 238 S.W.3d 644, 649 (2007) (quoting Hargis v. Baize, 168 S.W.3d 36 (Ky. 2005)).

Article 2004 of the Louisiana Civil Code provides:

“Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

“Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.” La. C.C. Art. 2004 (2011)

In order for waivers or releases to be enforced, “they must ‘expressly spell out with the greatest particularity the intention of the parties contractually to extinguish negligence liability.’ Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 (Me. 1979) (internal quotation marks omitted).” Lloyd v. Sugarloaf Mt. Corp., 833 A.2d 1, 4 (2003).

“[R]eleases saving a party from damages due to that party’s own negligence are not against public policy. Hardy, 1999 ME 142, P3 n.1, 739 A.2d at 369 (citing Emery Waterhouse Co. v. Lea, 467 A.2d 986, 993 (Me. 1983)).” Id.
“In Maryland, for an exculpatory clause to be valid, it ‘need not contain or use the word “negligence” or any other “magic words.” Adloo v. H. T. Brown Real Estate, Inc., 344 Md. 254, 266, 686 A.2d 298 (1996); see also Sanchez v. Bally’s Total Fitness Corp., 68 Cal. App. 4th 62, 79 Cal. Rptr. 2d 902, 905 (1998)(same). An exculpatory clause ‘“is sufficient to insulate the party from his or her own negligence ‘as long as [its] language . . . clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant’s negligence . . . .” Adloo, 344 Md. at 266 (quoting Barnes v. New Hampshire Karting Assn., 128 N.H. 102, 509 A.2d 151, 154 (N.H. 1986)).” Seigneur v. National Fitness Inst., Inc., 132 Md. App. 271, 280 (2000).

“Three exceptions have been identified where the public interest will render an exculpatory clause unenforceable. They are: (1) when the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton, or gross negligence; (2) when the bargaining power of one party to the contract is so grossly unequal so as to put that party at the mercy of the other’s negligence; and (3) when the transaction involves the public interest. Wolf, 335 Md. at 531-32; Winterstein, 16 Md. App. at 135-36.” Id. at 282-283.

“In the determination of whether the enforcement of an exculpatory clause would be against public policy, the courts consider whether the party seeking exoneration offered services of great importance to the public, which were a practical necessity for some members of the public. As indicated above, courts have found generally that the furnishing of gymnasium or health spa services is not an activity of great public importance nor of a practical necessity.” Id. at 284.


If the text in the release is clear and unambiguous, the release is enforceable and the parties’ intentions must be upheld. “A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity.” Cole v. Ladbroke Racing Michigan, Inc., 614 N.W.2d 169, 176 (2000).
Exculpatory clauses are enforceable “when limited to negligent conduct. See, e.g., Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982). See also Great Northern, 291 Minn. at 100, 189 N.W.2d at 407; Indep. School Dist. No. 877 v. Loberg Plumbing & Heating Co., 266 Minn. 426, 434, 123 N.W.2d 793, 798-99 (1963); Speltz Grain & Coal Co. v. Rush, 236 Minn. 1, 7, 51 N.W.2d 641, 644 (1952); Pettit Grain & Potato Co. v. Northern Pac. Ry. Co., 227 Minn. 225, 229-31, 35 N.W.2d 127, 130 (1948). In upholding indemnification agreements, the court has expressed its concern for protecting the public interest in the freedom of contract. Id.; Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 196, 288 N.W. 226, 227 (1939). To that end, the court has stated that a party may ‘properly bargain for indemnity against his own negligence where the latter “is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act.”’ Northern Pac., 206 Minn. at 197, 288 N.W. at 227-28.” St. Paul Fire & Marine Ins. Co. v. Perl, 415 N.W.2d 663, 666 (1987).

“[The law does not look with favor on contracts intended to exculpate a party from the liability of his or her own negligence although, with some exceptions, they are enforceable. However, such agreements are subject to close judicial scrutiny and are not upheld unless the intention of the parties is expressed in clear and unmistakable language. [citation omitted] ‘Clauses limiting liability are given rigid scrutiny by the courts, and will not be enforced unless the limitation is fairly and honestly negotiated and understandingly entered into.’ Farragut v. Massey, 612 So. 2d 325, 330 (Miss. 1992) (quoting 17 Am. Jur. 2d Contracts § 297, at 298 n.74 (1991). The wording of an exculpatory agreement should express as clearly and precisely as possible the extent to which a party intends to be absolved from liability. [citation omitted] Failing that, we do not sanction broad, general ‘waiver of negligence’ provisions, and strictly construe them against the party asserting them as a defense. See Leach v. Tingle, 586 So. 2d 799, 801 (Miss. 1991); State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So. 2d 1371, 1372 (Miss. 1981). In further determining the extent of exemption from liability in releases, this Court has looked to the intention of the parties in light of the circumstances existing at the time of the instrument’s execution.”’ Turnbough v. Ladner, 754 So. 2d 467, 469 (1999).

Public policy disfavors but does not prohibit releases of future negligence. Alack v. Vic Tanny Int’l, 923 S.W.2d 330 (1996) Missouri courts demand ‘that exculpatory language ‘effectively notify a party that he or she is releasing the other party from claims arising from the other party’s own negligence.’” 923 S.W.2d at 337.” Milligan v. Chesterfield Vill. GP, LLC, 239 S.W.3d 613, 616 (2007). They “require ‘clear, unambiguous, unmistakable, and conspicuous language in order to release a party from his or her own future negligence.’” [923 S.W.2d at 337.] Consumer contracts must conspicuously employ ‘negligence,’ ‘fault’ or equivalent words so that a clear and unmistakable waiver and shifting of risk occurs. Id.” Milligan, 239 S.W.3d at 616.
“In Montana, it is statutorily prohibited for any contracts to have as their object, directly or indirectly, the exemption of anyone from responsibility for their own fraud, for their willful injury to the person or property of another, or for their willful or negligent violation of the law. § 28-2-702, MCA.” Thus, “any exculpatory clause or release of liability clause seeking to relieve a tortfeasor from liability for negligent conduct is not valid. Haynes, 517 P.2d at 377.” Thompson v. Simanton, 2004 ML 3736, 24 (2004).

Exculpatory clauses may be upheld to insulate a party from ordinary negligence. *New Light Co. v. Wells Fargo Alarm Servs.*, 525 N.W.2d 25 (1994). But clauses purporting to insulate parties from gross negligence or willful misconduct may be viewed to be in contravention of public policy. Whether a contract violates public policy must be considered on the basis of the particular facts surrounding the agreement. Nebraska courts have defined public policy as: “that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. * * * The principles under which the freedom of contract or private dealings is restricted by law for the good of the community. . . . *OB-GYN v. Blue Cross, 219 Neb. 199, 203, 361 N.W.2d 550, 553 (1985). Accord *United Seeds, Inc. v. Hoyt*, 168 Neb. 527, 96 N.W.2d 404 (1959).* " New Light Co. v. Wells Fargo Alarm Servs., 525 N.W.2d 25, 30 (1994).

“Although New Hampshire law generally prohibits a plaintiff from releasing a defendant from liability for negligent conduct, in limited circumstances a plaintiff can expressly consent by contract to assume the risk of injury caused by a defendant’s negligence. See Dean v. MacDonald, 147 N.H. 263, 267, 786 A.2d 834 (2001). For a plaintiff to assume such risk, the release must ‘clearly and specifically indicate[] the intent to release the defendant from liability for personal injury caused by the defendant’s negligence . . . .’ Id. (quotation omitted). A defendant, however, will not be released from liability when the language of the contract raises any doubt as to whether the plaintiff has agreed to assume the risk of a defendant’s negligence. See Audley v. Melton, 138 N.H. 416, 418-19, 640 A.2d 777 (1994); Papakalos v. Shaka, 91 N.H. 265, 267-68, 18 A.2d 377 (1941). Because a plaintiff’s contract releases a defendant from liability under this theory, it completely bars a plaintiff’s recovery, and therefore the comparative fault statute does not apply. See Keeton, supra at 496-97.” Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 413-414 (2002).


Exculpatory clauses are generally enforceable, except in certain instances prohibited by statute pertaining to proprietary amusement and recreational activities. *Fazzinga v. Westchester Track Club*, 48 AD3d 410, 411 (2nd Dep’t 2007); General Obligations Law § 5-326. That statute renders “[a]greements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable.” Compare *Garnett v. Strike Holdings LLC, et al.*, 882 N.Y.S.2d 115, 116 (2009), where a commercial go-kart release was deemed unenforceable under the General Obligations Law.


“Generally, the law does not favor contracts exonerating parties from liability for their conduct. *Reed v. Univ. of North Dakota*, 1999 ND 25, P22, 589 N.W.2d 880. However, the parties are bound by clear and unambiguous language evidencing an intent to extinguish liability, even though exculpatory clauses are construed against the benefitted party. *Id.* When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. N.D.C.C. § 9-07-04; *Meide v. Stenehjem ex rel. State*, 2002 ND 128, P7, 649 N.W.2d 532. The construction of a written contract to determine its legal effect is a question of law for the court to decide, and, on appeal, this Court will independently examine and construe the contract to determine if the trial court erred in its interpretation of it. *Egelan v. Continental Res., Inc.*, 2000 ND 169, P10, 616 N.W.2d 861. The issue whether a contract is ambiguous is a question of law. *Lenthe Invs., Inc. v. Serv. Oil, Inc.*, 2001 ND 187, P14, 636 N.W.2d 189. An unambiguous contract is particularly amenable to summary judgment. *Meide*, 2002 ND 128, P7, 649 N.W.2d 532.” *Kondrad v. Bismarck Park Dist.*, 2003 ND 4, P6 (2003).
“Exculpatory contracts which clearly and unequivocally relieve one from the results of his own negligence are generally not contrary to public policy in Ohio. It is therefore well-settled law that a participant in a recreational activity is free to contract with the proprietor of such activity so as to relieve the proprietor of responsibility for damages or injuries to the participant caused by the negligence of the proprietor. There is an exception, however, which prohibits a proprietor from contracting to relieve itself from responsibility for willful or wanton misconduct.” Swartzentruber v. Wee-K Corp., 117 Ohio App. 3d 420, 424 (1997) (internal citations omitted).

Exculpatory clauses for personal injury are valid in Oklahoma and as long as they are clear and unambiguous - and enforcement would not be injurious to public health or morals or against public policy - such clauses will be upheld. See Schmidt v. U.S., 912 P.2d 874 (1996).

An agreement limiting liability for ordinary negligence is governed by principles of contract law and will be enforced in the absence of some consideration of public policy derived from the nature of the subject of the agreement or a determination that the contract may be viewed as one of adhesion. Mann v. Wetter, 100 Ore. App. 184, 187, 785 P.2d 1064, rev. denied, 309 Ore. 645, 789 P.2d 1387 (1990).
“An exculpatory clause is valid if three conditions are met: (1) the clause must not contravene public policy, (2) the contract must be between persons relating entirely to their own private affairs and (3) each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion. Even if an exculpatory clause is determined to be valid, however, it will still be unenforceable unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence. The standard for evaluating an exculpatory release is as follows: … 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 case of ambiguity, against the party seeking immunity from liability; and 4) the burden of establishing the immunity is upon the party invoking the protection under the clause.” Vinikoor v. Pedal Pennsylvania, Inc., 974 A.2d 1233, 1238 (2009) (internal citations omitted).


“‘To be valid, a release must be fairly and knowingly made.’ *Paterek v. 6600 Ltd.*, 465 N.W.2d 342, 344 (Mich. Ct. App. 1990) (citations omitted). A release is not fairly made and is invalid if the nature of the instrument was misrepresented or there was other fraudulent or overreaching conduct. *Id.* (Citation omitted). See also *Dombrowski v. City of Omer*, 199 Mich. App. 705, 502 N.W. 2d 707, 709 (Mich. Ct. App. 1993).” *Johnson v. Rapid City Softball Ass’n*, 514 N.W.2d 693, 697 (1994). “However, releases that are construed to cover willful negligence or intentional torts are not valid and are against public policy. *Id.* (citing *Winterstein v. Wilcom*, 16 Md. App. 130, 293 A.2d 821 (1972); SDCL 53-9-3). ‘Willful and wanton misconduct is something more than ordinary negligence but less than deliberate or intentional conduct.’ 293 A.2d at 829 (citing *Granflaten v. Rohde*, 66 S.D. 335, 283 N.W. 153 (1938)).” *Holzer v. Dakota Speedway, Inc.*, 610 N.W.2d 787, 793 (2000).

“Express assumption of risk refers to an express release, waiver, or exculpatory clause, by which one party agrees to assume the risk of harm arising from another party’s negligence. Such agreements are of a contractual nature and will generally be enforced by a court unless it is contrary to a sound public policy.” *Perez v. McConkey*, 872 S.W.2d 897, 900 (1994).
“An agreement purporting to absolve a party of the consequences of its own negligence is not enforceable unless it conforms to the twin fair notice requirements of (1) conspicuousness and (2) the express negligence doctrine. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 507 (Tex. 1993); *Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990). A contract which fails to satisfy either of the fair notice requirements when they are imposed is unenforceable as a matter of law. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004). However, if both contracting parties have actual knowledge of the contract’s terms, the fair notice requirements need not be satisfied. *Id.* (citing *Dresser Indus.*, 853 S.W.2d at 508 n.2).

“The conspicuousness requirement mandates that ‘something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it. *Id.* (quoting *Dresser Indus.*, 853 S.W.2d at 508); *Amtech Elevator Servs. Co. v. CSFB 1998-P1 Buffalo Speedway Office Ltd. P’ship*, 248 S.W.3d 373, 377 (Tex. App.--Houston [1st Dist.] 2007, no pet.). A term is conspicuous when it is written, displayed, or presented such that a reasonable person against which it is to operate ought to have noticed it. TEX. BUS. & COM. CODE ANN. § 1.201(b)(10) (Vernon Supp. 2008) (listing ways to make a term conspicuous).


Utah permits parties to “contract away their rights to recover in tort for damages caused by the ordinary negligence of others. *See Rothstein v. Snowbird Corp.*, 2007 UT 96, P 6, 175 P.3d 560; *Berry v. Greater Park City Co.*, 2007 UT 87, P 15, 171 P.3d 442 (’Utah’s] public policy does not foreclose the opportunity of parties to bargain for the waiver of tort claims based on ordinary negligence.’).” But pre-injury releases “are not unlimited in power and can be invalidated in certain circumstances.” Three such limitations are: “(1) releases that offend public policy are unenforceable, *Rothstein*, 2007 UT 96, P 6, 175 P.3d 560; (2) releases for activities that fit within the public interest exception are unenforceable, *Berry*, 2007 UT 87, P 16, 171 P.3d 442; and (3) releases that are unclear or ambiguous are unenforceable, *Rothstein*, 2007 UT 96, P 6, 175 P.3d 560.” *Pearce v. Utah Ath. Found.*, 2008 UT 13, P 14, 179 P.3d 760, 765.

Virginia NOT ENFORCEABLE

The Supreme Court of Virginia has unequivocally held that public policy forbids the enforcement of a release or waiver for personal injury caused by future acts of negligence. (See Johnson’s Adm’x v. Richmond and Danville R.R. Co., 86 Va. 975, 978, 11 S.E. 829, 830 (1890)). Hiett v. Lake Barcroft Community Assoc., 244 Va. 191, 194-195 (1992).

Washington ENFORCEABLE

“Generally, in the absence of an applicable safety statute, a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct may not recover for such harm, unless the agreement is invalid as contrary to public policy.” Murphy v. N. Am. River Runners, 186 W. Va. 310, 314-315 (1991) (internal citations omitted). “In particular, a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant’s intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff’s intention. Similarly, a general clause in an exculpatory agreement or anticipatory release exempting the defendant from all liability for any future negligence will not be construed to include intentional or reckless misconduct or gross negligence, unless such intention clearly appears from the circumstances.” Id. at 316 (internal citations omitted). “A clause in an agreement exempting a party from tort liability is, however, unenforceable on grounds of public policy if, for example, (1) the clause exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed, or (2) the injured party is similarly a member of a class which is protected against the class to which the party inflicting the harm belongs.” Id. at 315 (internal citations omitted).

Exculpatory contracts are valid and do not violate public policy. But “[e]xculpatory agreements that are broad and general in terms will bar only those claims that are within the contemplation of the parties when the contract was executed.’ Arnold v. Shawano County Agric. Soc’y, 111 Wis.2d 203, 211, 330 N.W.2d 773, 778 (1983), overruled on other grounds, Green Spring Farms, 136 Wis.2d at 317, 401 N.W.2d at 821. Courts construe such agreements strictly against the party seeking to rely on them. Arnold, 111 Wis.2d at 209, 330 N.W.2d at 777.” Kellar v. Lloyd, 180 Wis. 2d 162, 171 (1993). “A determination as to whether an exculpatory contract is void as contrary to public policy involves accommodating the tension between principles of contract law and tort law. The law of contracts protects the justifiable expectations of individuals who choose to enter into agreements. Tort law compensates individuals injured by the unreasonable conduct of others. Where the unreasonable conduct, even though dangerous, is within the contemplation of the parties to an agreement, the agreement is not necessarily void as against public policy.” Id. at 181-182 (internal citations omitted). But Wisconsin courts “have acknowledged that an exculpatory contract exempting a party from tort liability for harm caused intentionally or recklessly is void as against public policy.” Id. at 183 (internal citations omitted).
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677 Broadway
Albany, NY 12207-2996
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617.422.5300

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Chicago, IL 60603-5001
312.704.0550

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11th Floor
Las Vegas, NV 89101-6014
702.382.1414

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65 Fenchurch Street
London, England EC3M 4BE
+44 20.7553.8383

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215.627.6900

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San Diego, CA 92101-8484
619.321.6200

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525 Market Street
San Francisco, CA 94105-2725
415.433.0990

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700 11th Street, NW
Suite 400
Washington, DC 20001-4507
202.626.7660

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222 Lakeview Avenue
Suite 810
West Palm Beach, FL 33401-6140
561.515.4000

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