

32 Wm. Mitchell L. Rev. 1315

William Mitchell Law Review

2006

Recent Decisions of the Minnesota Supreme Court

[Paula Duggan Vraa](#)^{dl} [Steven M. Sitek](#)^{ddl}

Copyright (c) 2006 William Mitchell Law Review; Paula Duggan Vraa; Steven M. Sitek

PUBLIC POLICY CONSIDERATIONS FOR EXCULPATORY AND INDEMNIFICATION CLAUSES: YANG V. VOYAGAIRE HOUSEBOATS, INC.

I. Introduction	1316
II. Background	1316
A. Exculpatory Clauses	1316
1. Ambiguity in Scope or Release of Intentional Conduct	1318
2. Public Policy Considerations	1319
a. Disparity in Bargaining Power	1319
b. Type of Service Offered--Public or Essential in Nature	1320
B. Indemnification Clauses	1321
III. Yang v. Voyagaire Housboats, Inc.	1324
A. Facts and Procedural History	1324
B. The Minnesota Court of Appeals' Decision	1327
1. The Exculpatory Clause	1327
2. The Indemnification Clause	1328
C. The Minnesota Supreme Court's Decision	1328
1. The Exculpatory Clause	1329
2. The Indemnification Clause	1330
IV. Analysis	1331
A. Exculpatory Clauses	1331
B. Indemnity Clauses	1332
V. Conclusion	1333

***1316 I. Introduction**

Exculpatory clauses and indemnification clauses are used in many contracts to allocate risk between the contracting parties. Exculpatory clauses are a contractual waiver of the right to sue, executed before the loss occurs.¹ Indemnity clauses serve a different purpose: shifting a future loss to one of the contracting parties, regardless of fault.² Because both clauses alter the general tort concepts of negligence and comparative fault that would otherwise apply, they are generally disfavored and strictly construed against the benefited party.³ Such clauses can also be void if they violate public policy considerations.⁴

In *Yang v. Voyagaire Houseboats, Inc.*, the Minnesota Supreme Court held that exculpatory and indemnification clauses in a houseboat rental contract were unenforceable on public policy grounds.⁵ The court found that the rental of houseboats was a public or essential service because Voyagaire is a publicly-regulated resort and functions as an innkeeper through the rental of houseboats. Therefore, as a matter of public policy, a houseboat rental company cannot

circumvent its innkeeper duty to protect its guests by requiring guests to waive their right to sue the rental company for negligence, nor can the rental company shift liability for its own negligence onto guests it has a duty to protect.⁶

II. Background

A. Exculpatory Clauses

An exculpatory clause contractually waives one party's right to sue before that party knows whether a loss will occur.⁷ Exculpatory clauses or liability releases are generally disfavored because they are contrary to the general rule that a party can commence an action *1317 against another negligent party and bring that action to fruition.⁸ Despite the fact such releases are disfavored, Minnesota appellate courts have historically upheld these releases in the business and commercial context, such as commercial leases and construction contracts.⁹ These cases rely on principles of freedom of contract, i.e., that parties may protect themselves against liability resulting from their own negligence so long as the agreement does not contravene public policy or public welfare.¹⁰ Enforcing such agreements allows the parties to contractually bargain for and against assumption of risk.¹¹ Stated another way, exculpatory clauses distribute the risks inherent in the performance of such contracts so as to eliminate foreseeable disputes and reduce the cost of the underlying transaction.

More recently, Minnesota courts have upheld exculpatory clauses in cases involving recreational activities.¹² The general framework for evaluating exculpatory clauses was developed in *Schlobohm v. Spa Petite, Inc.*¹³ In *Schlobohm*, the Minnesota Supreme Court held that an injured patron of a health club, by signing a *1318 membership contract with an exculpatory clause, had validly waived her right to sue the health club.¹⁴ In determining whether the clause was valid, the court analyzed the relationship between the parties, the nature of the bargaining transaction, and the type of loss for which liability is disclaimed.¹⁵ The court held a liability release is unenforceable if it is either (1) ambiguous in scope or purports to release a party from liability for intentional, willful, or wanton acts;¹⁶ or (2) violates public policy.¹⁷

1. Ambiguity in Scope or Release of Intentional Conduct

An exculpatory clause is ambiguous in scope when it is susceptible to more than one reasonable interpretation.¹⁸ In examining ambiguity, courts follow traditional contract interpretation principles by analyzing the contract as a whole.¹⁹ In other words, when the injury is caused by an accident involving an integral aspect of an activity governed by the release, the injury is presumptively within the scope of a release.²⁰

Likewise, an exculpatory clause cannot release a party from intentional or willful misconduct.²¹ The *Schlobohm* decision was unclear as to whether an attempt to exculpate intentional misconduct results in the voiding of the entire clause or voiding only the portion of the clause attempting to exculpate intentional misconduct.²² Since *Schlobohm*, the decisions of the court of appeals *1319 have taken divergent approaches to this issue.²³

2. Public Policy Considerations

Even if the exculpatory clause is free from ambiguity, the courts will not enforce the clause if it violates public policy. A release violates public policy if there is either (a) a disparity of bargaining power between the parties to the agreement, or (b) the type of service being offered by the benefited party is either a public or an essential service.²⁴

a. Disparity in Bargaining Power

A disparity of bargaining power exists if an adhesion contract is drafted by a business and forced on an unwilling or unknowing public “for services that cannot readily be obtained elsewhere.”²⁵ An adhesion contract is generally a contract that is for a necessary service and presented on a “take it or leave it” basis.²⁶ A party must show there was a disparity in bargaining power, or “that there was no opportunity for negotiation and that the services could not be obtained elsewhere.”²⁷ The fact that a party had no opportunity to negotiate the terms of an exculpatory agreement by itself is not enough to show a disparity in bargaining power.²⁸ Courts also *1320 examine whether the party signing the release was a voluntary participant in the activity.²⁹

b. Type of Service Offered--Public or Essential in Nature

A public or essential service includes a service “generally thought suitable for public regulation.”³⁰ Services considered suitable for public regulation have included “common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, [and] employers and services involving extra-hazardous activities.”³¹ These types of service providers generally have a duty to take reasonable care to protect members of the public against foreseeable risk of danger.³²

A public or essential service may also include “services of great importance to the public, which were a practical necessity for some members of the public.”³³ The Schlobohm court did not list representative services that are of “practical necessity” to the public, but presumably this list would include activities similar to those which are generally regulated by statute and required by most members of the public, including hospital services, food and water services, utility companies, common carriers, and the provision of shelter.³⁴

The Schlobohm court did not comment on whether the service at issue must be both suitable for public regulation and of practical necessity to the public. Under either test, however, recreational activities generally “do not fall within any of the categories where the public interest is involved.”³⁵ Recreational activities include snowmobiling,³⁶ skiing,³⁷ horseback riding,³⁸ scuba-diving,³⁹ and *1321 skydiving.⁴⁰ Minnesota appellate courts have generally held there is no special relationship between parties involved in such activities because these activities involve personal enjoyment not affecting the public interest.⁴¹

B. Indemnification Clauses

Indemnity is a remedy that secures the right of one person to recover reimbursement from another upon the happening of an event.⁴² Indemnity essentially shifts the loss from one party to another, either because the parties have agreed in advance on who should bear the loss or because principles of fairness compel the shifting.⁴³ The right of indemnity can be contractual or it can arise under common law or statute.⁴⁴

Contractual indemnity has been used in a variety of commercial transactions as a method of allocating who should bear a particular loss that may occur in connection with the underlying *1322 commercial transaction at issue. Indemnity clauses are commonly used in commercial transactions, including commercial easements,⁴⁵ construction contracts,⁴⁶ product distribution agreements,⁴⁷ agency agreements, franchise agreements, and licensing agreements.⁴⁸

Minnesota recognizes two types of contractual indemnity clauses: (1) indemnity against a loss, where one party agrees to reimburse another in the event of a particular loss not within the control of either contracting party; and (2) indemnity against liability, where one contracting party agrees to protect the other contracting party in the event that a third person sues the protected contracting party.⁴⁹ In the latter situation, the indemnity clause will often provide that one of

the contracting parties (the “indemnitor”) will indemnify the other contracting party (the “indemnitee”) against claims brought by the third party, even if the claim was the result of the indemnitee’s fault or negligence.⁵⁰ Minnesota appellate courts have enforced such provisions in commercial contexts,⁵¹ although the legislature has limited its use in certain circumstances.⁵²

For a period of time, it was unclear whether an indemnity clause that shifted fault from one contracting party to another was *1323 subject to greater scrutiny than other contractual provisions.⁵³ About twenty-five years ago, the Minnesota Supreme Court pronounced that indemnity clauses that shifted fault are indeed subject to greater scrutiny, that is, such clauses are subject to “strict construction.”⁵⁴ Indeed, such a clause must contain an “express provision” that one party has agreed to indemnify another party for the first party’s own negligence, and “such an obligation will not be found by implication.”⁵⁵ Some indemnity clauses have been struck down because the strict construction test was adopted, while others have been upheld.⁵⁶

Even if an indemnity clause passes the strict construction test, it must also be consistent with public policy.⁵⁷ In certain *1324 circumstances, Minnesota appellate courts have refused to enforce an indemnity agreement when enforcement would be contrary to public policy objectives.⁵⁸ In *Zerby v. Warren*, a retailer violated a statute that forbade the sale of glue containing toluene to a minor, resulting in the death of the minor after he “sniffed” the glue.⁵⁹ The retailer attempted to enforce an indemnity agreement against the glue manufacturer.⁶⁰ The Minnesota Supreme Court refused to enforce the indemnity agreement, finding the statute created an absolute duty on the retailer and this fault could not be shifted through an indemnity agreement to another party.⁶¹ Likewise, the court of appeals has also refused to enforce fault-shifting indemnity clauses under other circumstances, based on public policy grounds.⁶²

Until the *Yang* decision, no Minnesota appellate court had addressed the use of fault-shifting indemnity agreements in the context of a consumer transaction.

III. *Yang v. Voyagaire Houseboats, Inc.*

A. Facts and Procedural History

In 2002, Lao Xiong contacted Voyagaire Houseboats to reserve a houseboat for a summer vacation with his girlfriend and her extended family.⁶³ Voyagaire is located on the shores of Crane Lake in northern Minnesota.⁶⁴ Voyagaire has “the largest houseboat rental operation in the Midwest,” and offers its “floating *1325 homes” for daily and weekly rental.⁶⁵ Xiong reserved a houseboat for a week and, as required by Voyagaire’s policy, paid a “couple thousand” dollars in advance for the houseboat.⁶⁶ The houseboat Xiong rented included “five double beds; a penthouse bedroom; toilet and shower facilities; a kitchen area, including a refrigerator, stove, microwave, and sink; air conditioning; [and] a built-in generator.”⁶⁷

On June 8, 2002, the vacationing party, consisting of six adults and four children, made the four-hour trip as a group from Minneapolis to Crane Lake.⁶⁸ Upon arrival, Xiong met with the owner of Voyagaire, who presented Xiong with a houseboat rental agreement containing exculpatory and indemnification clauses.⁶⁹ This was the first time anyone from Voyagaire had ever mentioned the rental agreement, and after looking at the agreement, Xiong told the owner he did not understand it.⁷⁰ The agreement contained exculpatory and indemnification clauses which provided in relevant part:

In consideration for being permitted the use of Voyagaire Houseboats equipment, the Renter, Lao Xiong, his/her family, relatives, heirs and legal representatives do hereby waive, discharge and covenant not to sue

Voyagaire Houseboats * * *, any affiliated companies, or any of its officers or members for any loss or damage, or any claim or damage or any injury to any person or persons or property, or any death of any person or persons whether caused by negligence or defect, while such rental equipment is in my possession and/or under my use as in accordance to the terms stated in this agreement.

I agree to keep said equipment safe and return it to Voyagaire Houseboats station from which it was rented and in as good condition as when received, and in default thereof, I agree to pay all loss and damage they may sustain by reason of any such failure and I further agree at my cost and expense, to defend and save Voyagaire Houseboat[s] harmless on account of any and all suits or *1326 demands brought or asserted by reason of injuries to any person, persons or property whatsoever caused by the use or operation of said equipment while in my possession and to pay all judgments, liens or other encumbrances that may be levied against Voyagaire Houseboats or the said equipment on account of the use thereof. It is further understood and agreed upon that the undersigned will be liable for all fines, penalties, citations, warnings, and forfeitures imposed for violations of the law while the equipment is being held used or operated pursuant to this agreement. Renter agrees that the Owner maintains no control over Renter's use of vessel except as set forth in this Agreement. Therefore, Renter shall indemnify and hold harmless Owner from and against all claims, actions, proceedings, damage and liabilities, arising from or connected with Renter's possession, use and return of the boat, or arising at any time during the term of this rental.⁷¹ Voyagaire's owner told Xiong that

he did not understand the rental agreement either, but assured Xiong that an optional \$25 per day insurance fee “would cover everything that could happen to the boat.” Xiong “took his word,” accepted the insurance, and signed the rental agreement. If Xiong had not signed the agreement, Voyagaire would not have allowed him to rent the houseboat.⁷²

During “the evening of June 13 or the early morning of June 14, several members of the vacationing party began feeling drowsy and nauseated.”⁷³ Someone on the boat radioed for help, and Xiong and five other persons were taken to the hospital and treated for carbon-monoxide poisoning.⁷⁴

Xiong and the other members of the vacationing party sued Voyagaire for their injuries.⁷⁵ They claimed that Voyagaire was negligent in maintaining the houseboat in a safe and habitable *1327 condition; failing to properly inspect the houseboat; failing to comply with regulations regarding proper ventilation, safety equipment, and devices; and failing to warn of dangerous conditions aboard the houseboat, including exposure to carbon monoxide.⁷⁶ Voyagaire in turn:

[D]enied that it was negligent and alleged that Xiong's claims were barred by the exculpatory clause in the rental agreement . . . [and] brought a third-party action against Xiong, alleging that he had agreed to indemnify Voyagaire from any claim or lawsuit [including Voyagaire's negligence] arising from his use and operation of the houseboat.⁷⁷

Voyagaire and Xiong moved for summary judgment.⁷⁸ Voyagaire sought to enforce the exculpatory and indemnification clauses and Xiong argued the clauses were unenforceable.⁷⁹ The district court granted Voyagaire's

motion, dismissed Xiong's claims based on the exculpatory clause, and held Xiong was required to indemnify Voyagaire for its own negligence resulting in injuries to the other members of the vacationing party.⁸⁰

B. The Minnesota Court of Appeals' Decision

1. The Exculpatory Clause

The court of appeals applied the enforceability test the Minnesota Supreme Court laid out in *Schlobohm v. Spa Petite, Inc.* to Voyagaire's exculpatory clause.⁸¹ The court of appeals concluded the exculpatory clause was enforceable because “(1) Voyagaire does not provide a necessary or public service; (2) renting a houseboat is a recreational activity; (3) there was no disparity in bargaining power; and (4) the contract is not ambiguous.”⁸² With respect to the necessary public service prong, the court rejected the argument that by renting houseboats for multiple days, Voyagaire was *1328 furnishing sleeping accommodations to the public, analogous to the services provided by an innkeeper.⁸³ The court also concluded that houseboats do not fall within the definition of “resort” in the statutes, so they are not subject to public regulation as an innkeeper.⁸⁴

2. The Indemnification Clause

The court of appeals also enforced the indemnity clause, concluding “the indemnification clause is sufficiently clear, sufficiently broad, and is not void on public policy grounds.”⁸⁵ The court of appeals held the language in the indemnification clause was sufficiently broad to include claims for Voyagaire's own negligence.⁸⁶ Furthermore, because the indemnification clause included indemnification for any claims “arising at any time during the rental,” the plain language “show[ed] Voyagaire's intent to seek indemnification for any claim arising during the rental period,” regardless of whether the cause of the claim occurred before the renter actually took possession of the houseboat.⁸⁷ The court also concluded that the decisions outlining the strict construction test for fault-shifting indemnity agreements applied only to building and construction contracts.⁸⁸

C. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court reversed and held both the exculpatory clause and indemnification clauses were unenforceable on public policy grounds.⁸⁹ The court concluded that Voyagaire is an innkeeper providing a public service of offering sleeping accommodations.⁹⁰ An innkeeper “cannot circumvent its duty to protect its guests by requiring a guest to sign a rental agreement containing an exculpatory clause,” nor can it shift liability through an indemnity clause for their own negligence onto guests whom the innkeeper has a duty to protect.⁹¹

*1329 1. The Exculpatory Clause

In examining the exculpatory clause, the Minnesota Supreme Court reiterated the concept that exculpatory clauses are “‘not favored,’ and they are ‘strictly construed against the benefited party.’”⁹² The court focused on the public policy consideration of whether the rental contract was for a public or essential service.⁹³ The *Schlobohm* decision had specifically listed “innkeepers” as offering the type of services thought suitable for public regulation and thus considered innkeepers as offering an essential service for which a party cannot seek exculpation.⁹⁴ The court examined the statutory definition of “resort,” and concluded that the rental of houseboats for daily or weekly rental constitutes “resort” functions within the statutory framework.⁹⁵ As a resort offering sleeping accommodations to the public in its

lodge rooms as well as its houseboats, Voyagaire met the statutory definition of an “innkeeper.”⁹⁶ Following up on the reasoning of Schlobohm, the court concluded that an innkeeper provides a public service and has a duty to take reasonable action to protect its guests.⁹⁷ The court stated, “as a matter of public policy, Voyagaire cannot circumvent its duty to protect its guests by requiring the guests to sign a rental agreement containing an exculpatory clause that purports to release Voyagaire from liability for the resort’s negligence.”⁹⁸ Thus, the exculpatory clause was struck down on public policy grounds.⁹⁹

*1330 2. The Indemnification Clause

With respect to the indemnification clause, the court began with the general concept that indemnity clauses which seek indemnification for one’s own negligence are not favored and will not be enforced unless that intention is expressed in “clear and unequivocal terms.”¹⁰⁰ After noting that it had previously struck down indemnity clauses on public policy grounds, the court concluded that, “[a]s a matter of public policy, innkeepers cannot shift liability for their own negligence onto the guests they have a duty to protect.”¹⁰¹

The court also noted, in a “broader context,” the unfairness of holding a private individual liable for a business’s negligence that resulted in serious injury, where the private individual was not warned of the specific risks involved.¹⁰² In addition, there was no precedent in Minnesota or elsewhere upholding a fault-shifting indemnification clause under similar circumstances, and the court cited a Wyoming federal district court case for the proposition that the modern trend is to not enforce indemnity clauses of this type on public policy grounds.¹⁰³

While it focused on the public policy aspects of its decision, the court also concluded that the indemnification clauses at issue were not enforceable because the language was not “clear and unequivocal.”¹⁰⁴ In a footnote, the court noted that the indemnification clauses “do not contain language that (1) specifically refers to negligence, (2) expressly states that the renter will indemnify Voyagaire for Voyagaire’s negligence, or (3) clearly indicates that the renter will indemnify Voyagaire for negligence occurring before the renter took possession of the houseboat.”¹⁰⁵ The view advanced by the Minnesota Court of Appeals, which had concluded that the strict construction test of indemnification clauses was limited to building and construction contracts, was *1331 specifically rejected by the Minnesota Supreme Court here.¹⁰⁶

IV. Analysis

A. Exculpatory Clauses

The Yang decision represents a significant benchmark for evaluating whether an exculpatory clause will be enforced on public policy grounds. The dispositive factor for the high court was the type of service--sleeping accommodations--offered to the public, which supported labeling Voyagaire as an innkeeper. The court, in concluding it was appropriate to treat Voyagaire as an innkeeper, established that innkeepers have a duty to take reasonable action to protect their guests and cannot circumvent their duty by requiring guests to waive their right to sue for negligence. It is the first time that the high court struck down an exculpatory clause on public policy grounds.

On the other hand, the decision has limited reach. The Minnesota Supreme Court stayed very close to the analytical framework developed in the Schlobohm decision. Under Schlobohm, the public or essential services determination requires consideration of (1) whether the type of service is generally thought suitable for public regulation, and (2) whether the offered service is of practical necessity to the public.¹⁰⁷ In Yang, the court carefully analyzed the applicable statutes and first concluded that Voyagaire was subject to regulation as a “resort” under the governing statutes, and second, that Voyagaire--by offering sleeping accommodations to the public--was providing a public service and therefore

could not exculpate its fault.¹⁰⁸ In other words, the court found that both Schlobohm considerations--public regulation and necessary service--were present in this case and supported the voidance of the exculpatory clause.

The Minnesota Supreme Court did not address whether both factors must be present to void the use of an exculpatory clause for a particular service. It is likely, however, that most services of practical necessity to the public are already publicly regulated in one form or another. Therefore, there may be little practical *1332 problem with applying Schlobohm and Yang to further cases. However, there will always be close cases in which a service may fall within one category and not the other. For example, does the mere rental of camping equipment such as tents or sleeping bags constitute the offering of public or essential services? Conversely, can a publicly-regulated resort that offers sleeping accommodations and other recreational activities use an exculpatory clause for other functions of its resort operations, such as horseback riding or water skiing?¹⁰⁹ The answers to these questions remain to be seen in future cases.

B. Indemnity Clauses

The ruling on the indemnity clause has a broader reach. The high court summarily concluded that an innkeeper cannot, as a matter of public policy, shift its own causal fault onto guests that it has a duty to protect.¹¹⁰ But the court went further and commented that it is generally unfair and unprecedented to uphold an indemnity clause that would shift the negligence of a commercial entity onto a private individual, especially where the individual was not warned about the specific risks involved.¹¹¹ The comments by the court make sense: businesses understand risk, insure against risk, and typically have attorneys that advise them about risk. Private individuals, on the other hand, do not typically carry insurance for indemnity obligations they may undertake in the context of renting goods or purchasing services. The court, however, did not hold that any indemnity clause in any consumer contract could never be upheld, but the comments by the court suggest that such clauses should not typically be enforced.

The decision also addresses the strict construction test applicable to indemnity agreements that seek to shift negligence from one party to another-- and specifically held that the indemnity clause at issue is not enforceable under the strict construction test.¹¹² This represents the first decision in almost ten *1333 years to reiterate the key requirements for ensuring that a fault-shifting indemnity clause is valid and enforceable; that is, there must be a specific reference to negligence, express assumption of the negligence of another, and clarity on the scope of the indemnity clause.¹¹³ The court concluded that the language did not "fairly apprise []" Xiong of an obligation to indemnify Voyageaire for the negligence of Voyageaire that occurred before the rental term began.¹¹⁴ The ruling calls into question some of the Minnesota Court of Appeals' decisions that did not apply the strict construction test with the rigor outlined in the Yang decision.¹¹⁵

V. Conclusion

While exculpatory clauses and indemnity clauses are helpful tools to allocate risk in appropriate circumstances, the Yang decision further defines the limits of these clauses imposed by public policy considerations. Exculpatory clauses will not be enforced when the transaction involves a public or essential service. Although some uncertainty may exist over whether the purchased service must be both publicly regulated and of practical necessity, the Yang decision confirms that such clauses are not appropriate for certain services such as innkeeping and will not be enforced.

Likewise, Yang is the first decision to consider the clarity and enforceability of a fault-shifting indemnity clause in a private consumer transaction. Not surprisingly, the high court concluded that fault-shifting indemnity agreements are not generally appropriate for consumer transactions. In addition, the court reiterated that fault-shifting indemnity clauses will be strictly construed and must contain an express assumption of fault.

Footnotes

- d1 Paula Duggan Vraa is a partner at Larson • King, LLP in St. Paul. She represented Lao Xiong before the Minnesota Court of Appeals and the Minnesota Supreme Court. She focuses her practice on appellate law and insurance coverage disputes. She graduated magna cum laude from William Mitchell College of Law in 1991. The views expressed in this article are her own views and not the views of the clients she represents.
- dd1 Steve Sitek is a partner at Rider Bennett, LLP in Minneapolis. He represented Lao Xiong at the trial court level in his capacity as third-party defendant. He graduated magna cum laude from Hamline University School of Law in 1999 and focuses his practice on commercial disputes, construction issues, and personal injury cases. The views expressed in this article are his own views and not the views of the clients he represents.
- 1 Black's Law Dictionary 608 (8th ed. 2004).
- 2 Id. at 784.
- 3 *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).
- 4 Id.; see also *Zerby v. Warren*, 297 Minn. 134, 143-44, 210 N.W.2d 58, 64 (1973) (holding that an indemnity agreement absolving seller of contact cement of liability is void because it violates the public policy that minors should not be sold such adhesives).
- 5 701 N.W.2d 783, 786 (Minn. 2005).
- 6 Id. at 792-93.
- 7 Black's, *supra* note 1, at 608.
- 8 Prosser & Keeton on Torts, § 92, at 656 (5th ed. 1984).
- 9 See, e.g., *Solidification, Inc. v. Minter*, 305 N.W.2d 871, 873 (Minn. 1981); *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 291 Minn. 97, 100, 189 N.W.2d 404, 407 (1971); *Indep. Sch. 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. N. Pac. Ry. Co.*, 227 Minn. 225, 230-31, 35 N.W.2d 127, 130 (1948).
- 10 “[P]ublic policy ‘requires that freedom of contract shall remain inviolate, except only in cases which contravene public right or the public welfare.’” *Arrowhead Elec. Co-Op. Inc. v. LTV Steel Mining Co.*, 568 N.W.2d 875, 878 (Minn. Ct. App. 1997) (quoting *Buck v. Walker*, 115 Minn. 239, 244, 132 N.W. 205, 207 (1911)).
- 11 See e.g., *Bunia v. Knight Ridder*, 544 N.W.2d 60, 62-63 (Minn. Ct. App. 1996) (citing *Restatement (Second) of Torts* § 496B cmt. a (1965) (“The risk of harm from the defendant's conduct may be assumed by express agreement between the parties.”)).
- 12 See, e.g., *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 926 (Minn. 1982) (injury at health club); *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 828 (Minn. Ct. App. 2001) (horseback riding); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 731-32 (Minn. Ct. App. 1986) (skydiving); *Dailey v. Sports World S., Inc.*, No. A03-127, 2003 WL 22234699, at *5 (Minn. Ct. App. Sept. 30, 2003), *aff'd* 683 N.W.2d 302 (Minn. 2004) (mem.) (scuba-diving class); *Ball v. Waldoch Sports, Inc.*, No. C0-03-227, 2003 WL 22039946, at *5 (Minn. Ct. App. Sept. 2, 2003) (snowmobile racing); *Kaltenbach v. Splatball, Inc.*, No. C7-99-235, 1999 WL 690191, at *3 (Minn. Ct. App. Sept. 7, 1999) (paintball game); *Saude v. Red River Racquet Club, Ltd.*, No. C2-89-500, 1989 WL 103262, at *2 (Minn. Ct. App. Sept. 12, 1989) (aerobic dance class).
- 13 326 N.W.2d at 920.
- 14 Id. at 926.
- 15 Id. at 923-26.
- 16 Willful or wanton conduct “is the failure to exercise ordinary care after discovering a person or property in a position of peril.” *Beehner*, 636 N.W.2d at 829 (citing *Bryant v. N. Pac. Ry. Co.*, 221 Minn. 577, 585, 23 N.W.2d 174, 179 (1946)).

- 17 [Schlobohm](#), 326 N.W.2d at 926.
- 18 *Id.*; see also [Collins Truck Lines, Inc. v. Metro. Waste Control Comm'n](#), 274 N.W.2d 123, 127 (Minn. 1979) (upholding an exculpatory clause because it has only a single reasonable interpretation).
- 19 [Beehner](#), 636 N.W.2d at 827.
- 20 [Malecha v. St. Croix Valley Skydiving Club, Inc.](#), 392 N.W.2d 727, 731 (Minn. Ct. App. 1986).
- 21 [Schlobohm](#), 326 N.W.2d at 923.
- 22 *Id.* [Schlobohm](#) stated that an exculpatory clause is unenforceable if the clause purports to release intentional conduct, suggesting that perhaps the mere attempt to release such conduct renders the entire clause unenforceable. However, the cases cited in [Schlobohm](#) from other jurisdictions suggest that an overbroad clause that included a release of intentional conduct would merely be narrowed to negligence claims only. *Id.* (citing [Jones v. Dressel](#), 623 P.2d 370, 376 (Colo. 1981); [Winterstein v. Wilcom](#), 293 A.2d 821, 824-25 (Md. Ct. Spec. App. 1972)).
- 23 Compare [Nimis v. St. Paul Turners](#), 521 N.W.2d 54, 57 (Minn. Ct. App. 1994) (concluding the release of all claims caused by negligence “or otherwise” was an attempt to release intentional misconduct and voided the entire exculpatory clause), with [Ball v. Waldoch Sports, Inc., No. C0-03-227, 2003 WL 22039946](#), at *3 (Minn. Ct. App. Sept. 2, 2003) (concluding any attempt to release intentional misconduct would result in voiding only the portion of the exculpatory clause which attempted to exculpate intentional misconduct). The Ball court relied upon a federal district court decision from Kansas and the [Restatement \(Second\) of Contracts](#) section 195(1). See [Wolfgang v. Mid-American Motorsports, Inc.](#), 898 F. Supp. 783, 787-88 (D. Kan. 1995).
- 24 [Schlobohm](#), 326 N.W.2d at 923; see also [Restatement \(Second\) of Contracts § 195\(2\) \(1981\)](#) (“A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if ... (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed.”).
- 25 [Schlobohm](#), 326 N.W.2d at 924.
- 26 *Id.*; see also [Walton v. Fujita Tourist Enters. Co.](#), 380 N.W.2d 198, 201 (Minn. Ct. App. 1986) (holding exculpatory clause unenforceable where travel agent was presented with a contract containing an exculpatory clause on a “take it or leave it” basis).
- 27 [Schlobohm](#), 326 N.W.2d at 924-25.
- 28 [Malecha v. St. Croix Valley Skydiving Club, Inc.](#), 392 N.W.2d 727, 730 (Minn. Ct. App. 1986).
- 29 See, e.g., [Schlobohm](#), 326 N.W.2d at 925; [Beehner v. Cragun Corp.](#), 636 N.W.2d 821, 828 (Minn. Ct. App. 2001); [Malecha](#), 392 N.W.2d at 730.
- 30 [Schlobohm](#), 326 N.W.2d at 925.
- 31 *Id.* (citations omitted).
- 32 See, e.g., [Connolly v. Nicolle Hotel](#), 254 Minn. 373, 380, 95 N.W.2d 657, 663 (1959).
- 33 [Schlobohm](#), 326 N.W.2d at 926.
- 34 Compare [Schlobohm](#), 326 N.W.2d. at 925-26 (noting that “[i]n Minnesota there is no statute regulating health clubs, gymnasiums or spas” while determining that an exculpatory clause was enforceable because the activity in question was not a public service), with [Malecha](#), 392 N.W.2d at 730-31 (holding that an exculpatory clause was enforceable because skydiving was not a public or essential service despite the presence of federal regulations of “parachute jumping”).
- 35 [Schlobohm](#), 326 N.W.2d at 925-26.
- 36 [Anderson v. Eby](#), 998 F.2d 858, 861 (10th Cir. 1993); [Ball v. Waldoch Sports, Inc., No. C0-03-227, 2003 WL 22039946](#), at *3 (Minn. Ct. App. Sept. 2, 2003).

- 37 See *Potter v. Nat'l Handicapped Sports*, 849 F. Supp. 1407, 1409 (D. Colo. 1994) (finding that there is no public duty which would prevent enforcement of an exculpatory clause required by a ski race organizer because skiing is “neither a matter of great public importance nor a matter of practical necessity”); *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 35 P.3d 383, 388 (Wash. Ct. App. 2001) (finding that “skiing is a private and nonessential activity”); see also *Finkler v. Toledo Ski Club*, 577 N.E.2d 1114, 1117 (Ohio. Ct. App. 1989) (finding that the defendant ski club was not liable for plaintiff’s death from an accident on a canoe trip because plaintiff had knowingly signed a liability waiver).
- 38 *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827-28 (Minn. Ct. App. 2001).
- 39 *Dailey ex rel. Tabriz v. Sports World S., Inc.*, No. A03-127, 2003 WL 22234699, at *5 (Minn. Ct. App. Sept. 30, 2003), aff’d 683 N.W.2d 302 (Minn. 2004) (mem.).
- 40 *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 730 (Minn. Ct. App. 1986).
- 41 See *Clanton v. United Skates of Am.*, 686 N.E.2d 896, 900 (Ind. Ct. App. 1997) (involving injuries at a roller-skating rink and suggesting that to hold the release unenforceable would increase the cost of these activities and limit the public’s opportunity to participate in them).
- 42 *Hendrickson v. Minn. Power & Light Co.*, 258 Minn. 368, 370, 104 N.W.2d 843, 846 (1960), overruled in part by *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 368 n.11 (Minn. 1977).
- 43 *Hendrickson*, 258 Minn. at 371-72, 104 N.W.2d at 847; *Tolbert*, 255 N.W.2d at 366.
- 44 *Tolbert*, 255 N.W.2d at 366; see, e.g., *Minn. Stat. § 181.970, subd. 1* (2004) (employer shall indemnify its employees under certain circumstances); *Minn. Stat. § 323A.0401(c)* (partnership shall indemnify its partners for certain losses or against certain liabilities); *Minn. Stat. § 466.07, subd. 1* (municipality shall indemnify its employees and officers under certain circumstances).
- 45 See, e.g., *N. Pac. Ry. Co. v. Thornton Bros. Co.*, 206 Minn. 193, 288 N.W. 226 (1939).
- 46 See, e.g., *Nat’l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690 (Minn. 1995); *Van Vickle v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238 (Minn. Ct. App. 1996).
- 47 See, e.g., *Zerby v. Warren*, 297 Minn. 134, 143, 210 N.W.2d 58, 64 (1973); *Osgood v. Med., Inc.*, 415 N.W.2d 896 (Minn. Ct. App. 1987).
- 48 See, e.g., *Lake Cable Partners v. Interstate Power Co.*, 563 N.W.2d 81 (Minn. Ct. App. 1997).
- 49 See *Aetna Cas. & Sur. Co. v. Bros*, 226 Minn. 466, 469, 33 N.W.2d 46, 48 (1948) (“Contracts of indemnity may provide for indemnity against loss or damage or for indemnity against liability.”).
- 50 *Johnson v. McGough Constr. Co.*, 294 N.W.2d 286, 288 (Minn. 1980), superseded in part by statute, *Minn. Stat. § 337.02* (2004). Some contractual indemnity clauses merely restate the principles of common law that each party is responsible for their own fault. See, e.g., *Ford v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 294 N.W.2d 844, 846-47 (Minn. 1980) (stating that as long as a party “is not ‘actively’ or ‘primarily’ negligent, the courts have allowed recovery under the [indemnity] clause”).
- 51 *N. Pac. Ry. Co. v. Thornton Bros. Co.*, 206 Minn. 193, 195-98, 288 N.W. 226, 227-28 (1939); *DeVries v. City of Austin*, 261 Minn. 52, 110 N.W.2d 529 (1961).
- 52 See *Minn. Stat. § 337.02, .05* (limiting the enforcement of certain indemnity clauses in building and construction contracts).
- 53 Compare *N. Pac. Ry. Co.*, 206 Minn. at 196, 288 N.W.2d at 227 (“If a contract transgresses the law or contravenes public policy, it is void. If it does neither, the parties are within their rights and the contract should have not an arbitrary, that is, an unduly liberal or harshly strict, construction, but a fair construction that will accomplish its stated purpose.”), with *Christy v. Menasha Corp.*, 297 Minn. 334, 337, 211 N.W.2d 773, 775 (1973) (reading indemnity clause as sufficiently broad to indemnify party for injuries resulting from negligent acts).

- 54 Nat'l Hydro Sys. v. M.A. Mortenson, 529 N.W.2d 690, 694 (Minn. 1995) (citing Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979), superseded by Minn. Stat. § 337.02 (1994), as recognized in Katzner v. Kelleher Constr., 545 N.W.2d 378, 381 (Minn. 1996)).
- 55 See id.
- 56 Compare Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985) (holding indemnity agreement in standard architectural contract was “equivocal at best”), and Fire Ins. Exch. v. Adamson Motors, 514 N.W.2d 807, 809 (Minn. Ct. App. 1994) (finding agreement to indemnify lessor “from and against any and all losses” was ambiguous and did not explicitly indemnify lessor for its own negligence), with Lake Cable Partners v. Interstate Power Co., 563 N.W.2d 81, 84-87 (Minn. Ct. App. 1997) (explaining that an indemnity clause to indemnify against all claims which may be brought against licensor “including negligence on the part of [licensor]” was not ambiguous and thus, does not require strict construction against the party).
- 57 Minnesota appellate courts have not precisely defined the public policy considerations for enforcement of contracts. Some contracts are expressly prohibited by statute. See Minn. Stat. §§ 337.02, .05 (2004) (indemnity agreements in construction contracts are void except in limited circumstances); see also Minn. Stat. § 363A.02, subd. 1(a)(1) (securing employee's rights to be free from discrimination under the Minnesota Human Rights Act). In other cases, the contract is not prohibited by statute but still struck down on public policy grounds. Generally, public policy is “evidenced by the trend of legislation, judicial decisions, or the principles of the common law. It embraces all acts or contracts which ‘tend clearly to injure the public health, the public morals, confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or private property, which every citizen has the right to feel.’” Holland v. Sheehan, 108 Minn. 362, 365, 122 N.W. 1, 2 (1909) (quoting Goodyear v. Brown, 155 Pa. 514 (1893)). By the same token, the power of a court to declare a contract void on public policy grounds is “delicate and undefined” and should be exercised only when the case is free from doubt. Hart v. Bell, 222 Minn. 69, 76, 23 N.W.2d 375, 379 (1946).
- 58 See, e.g., Zerby v. Warren, 297 Minn. 134, 143-44, 210 N.W.2d 58, 64 (1973).
- 59 Id. at 144, 210 N.W.2d at 64.
- 60 Id. at 143, 210 N.W.2d at 64.
- 61 Id. at 144, 210 N.W.2d at 64.
- 62 Lake Cable Partners v. Interstate Power Co., 563 N.W.2d 81, 87 (Minn. Ct. App. 1997) (upholding indemnity clause in commercial context but holding, for “public policy reasons,” that such indemnity obligation does not extend to shifting liability for punitive damages); D.W. Hutt Consultants, Inc. v. Constr. Maint. Sys., Inc., 526 N.W.2d 62, 65 (Minn. Ct. App. 1995) (refusing to enforce indemnity agreement where general contractor did not purchase required worker's compensation coverage and attempted to shift its financial responsibility to its employee to another subcontractor).
- 63 Yang v. Voyageaire Houseboats, Inc., 701 N.W.2d 783, 786 (2005).
- 64 Id.
- 65 Id.
- 66 Id.
- 67 Id.
- 68 Id.
- 69 Id.
- 70 Id.
- 71 Id. at 786-87.

- 72 Id. at 787.
- 73 Id.
- 74 Id.
- 75 Id. at 787-88. Don Russo of Law Offices of Don Russo, P.A., in Miami, Florida, and Elizabeth Russo of the Russo Appellate Firm, P.A., in Miami, Florida, both represented Lao Xiong as the plaintiff in the suit that he brought against Voyagaire. In Yang, Lao Xiong was a third-party defendant represented by the authors.
- 76 Id. at 788.
- 77 Id.
- 78 Id.
- 79 Id.
- 80 Id.
- 81 *Yang v. Voyagaire Houseboats, Inc.*, Nos. A03-1842, A03-2000, 2004 WL 2049843, at *2 (Minn. Ct. App. Sept. 14, 2004) (citing *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (1982)).
- 82 Id. at *4.
- 83 Id. at *2-3.
- 84 Id.
- 85 Id. at *6.
- 86 Id.
- 87 Id.
- 88 Id. at *5-6.
- 89 *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 786 (Minn. 2005).
- 90 Id. at 790.
- 91 Id. at 791-92.
- 92 Id. at 789 (citing *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982)).
- 93 Id. at 789-91.
- 94 *Schlobohm*, 326 N.W.2d at 925 (citing *LaFrenz v. Lake County Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977)); see also *Winterstein v. Wilcom*, 293 A.2d 821, 824 (Md. Ct. Spec. App. 1972) (“It is also against public policy to permit exculpatory agreements as to transactions involving the public interest, as for example with regard to ... innkeepers.”).
- 95 *Yang*, 701 N.W.2d at 790 (construing Minn. Stat. § 157.15, subd. 11 (2004)).
- 96 Id. (construing Minn. Stat. § 327.70, subds. 3-4 (2004)).
- 97 Id. (citing *Connolly v. Nicollet Hotel*, 254 Minn. 373, 380, 95 N.W.2d 657, 663 (1959)).
- 98 Id. at 791.
- 99 Id. In a footnote, the court also noted that the circumstances under which the exculpatory clause was signed “suggest that there was some disparity in bargaining power between Voyagaire and Xiong,” when the evidence is viewed in the light most

favorable to Xiong. *Id.* at 789 n.3. However, the court did not rest its decision on this second prong of the public policy considerations. *Id.*

100 *Id.* at 791 (quoting *Nat'l Hydro. Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn. 1995)).

101 *Id.* at 791-92.

102 *Id.* at 792.

103 *Id.* at 793 (citing *Madsen v. Wyo. River Trips, Inc.*, 31 F. Supp. 2d 1321, 1325 (D. Wyo. 1999) (declining to enforce fault-shifting indemnity clause in river rafting contract, noting that the “unprecedented attempt to hold a private citizen to an indemnity contract for a service that he himself purchased will not stand”)).

104 *Id.* at 792 n.5.

105 *Id.*

106 *Id.* (citing *Yang v. Voyageur Houseboats, Inc.*, Nos. A03-1842, A03-2000, 2004 WL 2049843, at *5 (Minn. Ct. App. Sept. 14, 2004)).

107 *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925-26 (Minn. 1982).

108 *Yang*, 701 N.W.2d at 790-91.

109 The Minnesota Court of Appeals addressed a similar, but not identical, issue in *Beehner v. Cragun Corp.*, 636 N.W.2d 821 (Minn. Ct. App. 2001). The *Beehner* court upheld an exculpatory clause because the two distinct entities, a resort and riding stables, were not a joint venture. 636 N.W.2d at 833. Thus, the court left unanswered the question of whether the exculpatory clause would have been voided had the resort owned the riding stables.

110 *Yang*, 701 N.W.2d at 790-91.

111 *Id.* at 792.

112 *Id.* at 791 n.5.

113 *Id.*

114 *Id.*

115 See, e.g., *Bogatzki v. Hoffman*, 430 N.W.2d 841, 845 (Minn. Ct. App. 1988) (upholding an indemnity clause that made an employee injured on the employer's premises liable for the employee's own negligence); *Osgood v. Med., Inc.*, 415 N.W.2d 896, 902-03 (Minn. Ct. App. 1987) (upholding an indemnity clause relating to a heart valve component).

32 WMLR 1315