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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CITY OF SANTA BARBARA et al., Petitioners, v. THE SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent; TERRAL JANEWAY et al., Real Parties in Interest.	2d Civil No. B176810 (Super. Ct. No. 1111681) (Santa Barbara County) OPINION AND ORDER DENYING PEREMPTORY WRIT OF MANDATE

Katie Janeway, a disabled 14-year old child, drowned while participating in a recreational activities program for developmentally disabled children operated by petitioner City of Santa Barbara (City). Her parents, Maureen and Terral Janeway (Janeways), filed a wrongful death action alleging that the accident was caused by the negligence of the City and Veronica Malong, a program counselor. The City and Malong filed a motion for summary judgment, contending that a release agreement signed by Katie's mother barred liability. The trial court denied the motion, and we summarily denied the City's petition for an extraordinary writ of mandate directing the trial court to set aside its order and grant summary judgment. The Supreme Court granted review and directed us to order respondent court to show cause why the relief sought in the petition should not be granted. We have done so.

The principal issue in the case is whether the release signed by Katie Janeway's mother is valid under Civil Code section 1668 as interpreted by *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 (*Tunkl*). We conclude that, based on an analysis of the factors set forth in *Tunkl*, the release is valid and enforceable as a matter of law to the extent it releases the City and Malong from liability for acts of ordinary negligence in the operation of the City's recreational program for disabled children. Undisputed evidence establishes that the circumstances under which the release was executed by the Janeways did not have the characteristics of a contract of adhesion or pertain to an essential activity that was a matter of practical necessity to them. Therefore, although offering opportunities to disabled children is clearly beneficial to the public, the "public interest," as that term is used in *Tunkl*, would not be served by invalidating the release as to ordinary negligence.

We also conclude, however, that the release does not exculpate the City or Malong from liability for conduct constituting gross negligence, and that the record includes evidence creating a material triable issue as to whether the City or Malong acted with gross negligence. Public policy and the legitimate objective of the release dictate that we limit the scope of the release to ordinary negligence by the City, and exclude the more extreme and aggravated conduct that constitutes gross negligence.

Accordingly, we deny the writ and return the case to the trial court for further proceedings to determine whether the Janeways may recover damages against the City and Malong on the theory of gross negligence.

FACTS AND PROCEDURAL HISTORY

The City provides extensive summer recreational facilities and activities for children, including a summer camp for children with developmental disabilities called "Adventure Camp." Katie Janeway, who suffered from cerebral palsy, epilepsy, and other disabilities, participated in Adventure Camp in 1999, 2000, 2001, and 2002.

Adventure Camp is conducted from noon until 5:00 p.m. on weekdays for an approximately three-week period in July and August. Camp activities include swimming, horseback riding, bowling, skating, arts and crafts, group games, sports and

field trips. In 2002, as in prior years, swimming activities were held on two of five camp days each week in a City swimming pool.

In 2002, the application form for Adventure Camp included a release of all claims against the City and its employees from liability, including liability based on negligence, arising from camp activities.[1] Katie's mother Maureen Janeway signed the release on behalf of Katie. She signed similar releases covering Katie's participation in the Camp in prior years.

Maureen Janeway disclosed Katie's developmental disabilities and medical problems to the City, specifically informing the City that Katie was prone to epileptic seizures often occurring in water, and that Katie needed supervision while swimming. In addition, the City was aware that Katie had suffered seizures while attending Adventure Camp events in 2001. She had a seizure when sitting on the pool deck and another seizure at the skating rink. Paramedics were called after her seizure on the pool deck. Nevertheless, Maureen Janeway indicated that Katie was a good swimmer, and never sought to prevent or restrict her participation in the swimming portion of Adventure Camp.

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[1] In relevant part, the release provided: "THE UNDERSIGNED HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE THE CITY OF SANTA BARBARA, ITS EMPLOYEES, OFFICERS AND AGENTS (hereinafter referred to as 'releasees') from all liability to the undersigned, his or her personal representatives, assigns, heirs and next of kin for any loss, damage, or claim therefore on account of injury to the person or property of the undersigned, whether caused by any negligent act or omission of the releasees or otherwise while the undersigned is participating in the City activity or using any City facilities in connection with the activity. [¶] THE UNDERSIGNED HEREBY AGREES TO INDEMNIFY AND HOLD HARMLESS the releasees from all liability, claims, demands, causes of action, charges, expenses, and attorney fees . . . resulting from involvement in this activity whether caused by any negligent act or omission of the releasees or otherwise. [¶] THE UNDERSIGNED HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE while upon City property or participating in the activity or using any City facilities and equipment whether caused by any negligent act or omission of releasees or otherwise. The undersigned expressly agrees that the foregoing release and waiver, indemnity agreement and assumption of risk are intended to be as broad and inclusive as permitted by California law . . . ."

Based on the information provided by Maureen Janeway and Katie's history of seizures, the City took special precautions during the Adventure Camp swimming activities in 2002. The City assigned Veronica Malong to act as a "counselor" whose responsibility was to keep Katie under close observation during the Camp's swimming sessions. Previously, Malong, a college student, had worked for a year as a special education aide at the middle school Katie attended. Malong had observed Katie have seizures at the school, and received instruction from the school nurse regarding the handling of her seizures. Malong also received instruction during training sessions conducted by the City on handling seizures and other first aid matters.

Katie participated in the first swimming day at the 2002 Adventure Camp without incident. On the second day she drowned.

About an hour before her drowning, Katie suffered a mild seizure that lasted a few seconds while waiting to enter the pool's locker room. Malong observed the seizure and sent another counselor to report the incident to a supervisor. The supervisor stated that the report was never received. Malong watched Katie for about 45 minutes after the mild seizure. Then, receiving no word from her supervisor, Malong concluded that the seizure had run its course and it was safe for Katie to swim.

Malong sat on the side of the pool near the lifeguard watching the pool's deep end. In addition to the Adventure Camp participants, there were as many as 300 other children in the pool area. Malong watched Katie jump off a diving board and swim back to the edge of the pool. At Malong's insistence, Katie got out of the pool and rested for a few minutes. Malong then asked Katie if she wished to dive again, and Katie said that she did. Katie dove into the water, bobbed up to the surface, and began to swim towards the edge of the pool. As she did so, Malong momentarily turned her attention away from Katie. When she looked back, Katie had disappeared from her sight. Approximately five minutes later, lifeguards pulled Katie from the bottom of the pool. She died the next day.

Katie's parents, Terrall and Maureen Janeway, filed a wrongful death action alleging that the accident was caused by the negligence of the City and Malong. The City

and Malong moved for summary judgment and summary adjudication. The City argued that Adventure Camp was a recreational activity that did not involve the public interest and, accordingly, the release was enforceable under Civil Code section 1668 as interpreted by *Tunkl* and subsequent cases applying the *Tunkl* standards.

Respondent trial court denied petitioners' motion, concluding that there were material triable issues of fact regarding whether the release was valid under *Tunkl*, and whether the City and Malong acted with gross negligence. The trial court described *Tunkl* as invalidating any release that involved the public interest, and ruled that the City had not established that the Janeway release did not involve the public interest as a matter of law. The court analyzed the factors set forth in *Tunkl*, and concluded that while certain factors were present, the facts underlying other factors were disputed. The court also concluded that there was a triable issue of fact as to whether the City and Malong acted with gross negligence. The court denied the City's request for summary adjudication of other issues.

DISCUSSION

Standard of Review

A defendant moving for summary judgment must present evidence that no triable issue of material fact exists and that it is entitled to judgment on the complaint as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A triable issue exists if the evidence allows a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra,* at p. 850.) The trial court "does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself. [Citations.]" (*Aguilar, supra,* at p. 856.)

This court may review an order denying summary judgment by way of a petition for writ of mandate. (Code Civ. Proc., § 437c, subd. (m)(1).) A writ will issue when the erroneous denial of summary judgment will result in trial of a nonactionable claim. (*Travelers Cas. & Sur. Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.)

In reviewing an order denying summary judgment challenged by a petition for writ of mandate, we apply the same standard as would be applied if we were reviewing an appeal of the granting of summary judgment. (*West Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 946.) Because a motion for summary judgment or summary adjudication involves only questions of law, we review the ruling de novo. (*Travelers Cas. & Sur. Co. v. Superior Court*, *supra*, 63 Cal.App.4th at p. 1450.) We need not defer to the trial court's decision, and are not bound by the trial court's stated reasons, if any, supporting its ruling. (*Ibid.*)

Release is Valid and Enforceable as to Ordinary Negligence

The City and Malong contend that the release is enforceable as a matter of law under Civil Code section 1668 as interpreted by *Tunkl* because Adventure Camp provides nonessential recreational activities, and the Janeways were not compelled to sign the City's release in order to obtain recreation for their daughter. We agree.

As a general rule, "no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party . . . ." (*Tunkl*, *supra*, 60 Cal.2d at p. 101; *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598.) Civil Code section 1668, however, provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." There is no contention that there was any fraud, willful injury or violation of a statute in this case.

In addition, Civil Code section 1668 invalidates contracts exculpating a contracting party from liability for negligence when the transaction giving rise to the exculpatory contract affects the public interest. (*Tunkl*, *supra*, 60 Cal.2d at pp. 95-96; see also *Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 670.) In *Tunkl*, our Supreme Court recognized that the "social forces" which characterize the public interest "are volatile and dynamic" and that "[n]o definition of the concept of public interest can be contained within the four corners of a formula." (*Tunkl*, *supra*, at

p. 98.) Instead of attempting a formulaic definition, the court set forth six nonexclusive factors that characterize a transaction involving the public interest and where enforcement of a release would contravene that public interest. The *Tunkl* factors are: (1) the transaction "concerns a business of a type generally thought suitable for public regulation" (*ibid.*); (2) the party seeking exculpation performs a service "of great importance to the public, which is often a matter of practical necessity for some members of the public" (*id.* at p. 99); (3) the service is offered to the public at large (*ibid.*); (4) in the economic setting of the transaction, the party seeking exculpation has a "decisive" bargaining advantage because the service is "essential" (*id.* at pp. 99-100); (5) the person obtaining the service is required to sign a "standardized adhesion contract of exculpation" (*id.* at p. 100); and (6) the person obtaining the service bears the risk of the other party's carelessness (*id.* at p. 101).

As directed by *Tunkl*, courts have determined the validity of releases on a case-by-case basis, but with emphasis on whether the type of service being offered is essential to the public, and whether a disparity of bargaining power compels the party obtaining the service to sign the release as a contract of adhesion. (*Tunkl*, *supra*, 60 Cal.2d at pp. 99-100; see also *YMCA of Metropolitan Los Angeles v. Superior Court* (1997) 55 Cal.App.4th 22, 26.) *Tunkl* states that, in transactions exhibiting some or all of the enumerated factors, "the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk" but, rather, is forced to assume the risk of another's negligence because the service is essential. (*Tunkl*, *supra*, at p. 101.)

California courts have uniformly held that *Tunkl* does not invalidate releases of ordinary negligence for injuries arising from sports and recreational activity. Courts have upheld such releases reasoning that, although beneficial, sports and recreational activities are not services essential to the public and do not involve the public interest. (See, e.g., *Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 737 [health club]; *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 162 [swimming]; *Okura v. United States Cycling Federation* (1986) 186 Cal.App.3d 1462, 1467 [bicycling].) Accordingly, to require a party to sign an exculpatory release as

a condition of participation lacks the compulsion typically found in a contract of adhesion and would not impair the public interest or violate public policy. (See *YMCA of Metropolitan Los Angeles v. Superior Court*, *supra*, 55 Cal.App.4th at p. 26; *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1372.)

Releases have been enforced not only for high risk sports activities, but for less risky recreation and, importantly, where the recreational activity was directed at or included participation by children. (*Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253 [injury to eight-year old child]; *Sanchez v. Bally's Total Fitness Corp.* (1998) 68 Cal.App.4th 62 [health club]; *Randas v. YMCA of Metropolitan Los Angeles*, *supra*, 17 Cal.App.4th 158 [adult injured in YMCA swimming class]; *Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal.App.3d 1559 [injury to teenager].) Moreover, the enforcement of releases in the youth recreational setting has been analyzed as a method of serving the public interest by preserving the availability of such activities. "The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing-victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. [Plaintiff] agreed to shoulder the risk. No public policy forbids the shifting of that burden." (*Hohe*, *supra*, at p. 1564; see also *Randas*, *supra*, at p. 162.)

Here, although Katie Janeway was disabled, the reasoning and result of the numerous cases upholding releases required for participation in sports and recreational activities apply to Adventure Camp and compel the conclusion that the release signed by Maureen Janeway is valid and enforceable. Adventure Camp provides recreational activities for children and Katie Janeway was swimming when her accident occurred.

The Janeways contend that the recreational activity cases are inapposite because Adventure Camp is not merely a recreational program but also provides opportunities for developmentally disabled children to participate in mainstream life. For

this reason, the Janeways argue, Adventure Camp implicates different public policies and interests than a program providing summer recreation for all children.

In support of this argument, the Janeways cite the Lanterman Developmental Disabilities Services Act (Lanterman Act). (Welf. & Inst. Code, §§ 4500 et seq.) Although Adventure Camp is exempt from regulation under the Lanterman Act, the statute expresses legislative goals of integrating individuals with developmental disabilities into mainstream life, and ensuring that such individuals are accorded the same rights as others to participate in recreational and other programs that receive state funds. (Welf. & Inst. Code, §§ 4501, 4502; see *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389-391.)[2] The trial court also cited the policy goals of the Lanterman Act in reaching its legal conclusion that the recreational activities provided by Adventure Camp were of great importance to the public. (*Tunkl, supra*, 60 Cal.2d at p. 99.)

We do not question the importance to the public of the Lanterman Act and the ADA or their policy objectives of eliminating discrimination and integrating the disabled into mainstream society. But, the Janeways do not claim that their daughter was denied the benefit of these statutes in the operation of Adventure Camp.

Nor do the Janeways identify how the public policy goal of providing equal opportunity to the disabled is undermined by permitting the shifting of the risk of injury resulting from ordinary negligence to the participants. (Cf. *Hohe v. San Diego Unified Sch. Dist., supra*, 224 Cal.App.3d at p. 1564.) The Lanterman Act and the ADA guarantee equal opportunity, not separate or preferential treatment. (See *Helen L. v. DiDario* (3d Cir. 1995) 46 F.3d 325, 329-330, fns. 7 & 8.) As the City and its amici

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[2] Although not cited by either party, the federal Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) was enacted for a similar purpose to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for" individuals with disabilities, including equal opportunity to participate in recreational activities. (42 U.S.C. § 12101 (a)(8); see *Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 748-758.)

argue, enforcement of the release furthers the public interest because it permits municipalities and private business to provide recreational services to children with developmental disabilities under the same terms as they provide services to other children. To prevent the City from requiring a release would compel the City to do more than provide equal opportunity.

Furthermore, the public importance of a transaction is only one part of one factor set forth in *Tunkl*. Although important, Adventure Camp is not an enterprise suitable for public regulation (*Tunkl* factor 1), does not provide essential services that are a *matter of practical necessity* to developmentally disabled children (*Tunkl* factor 2), and did not give the City a decisive bargaining advantage because of the absence of alternative means of obtaining recreation (*Tunkl* factor 4). (*Tunkl*, *supra*, 60 Cal.2d at pp. 98-101.)

The evidence shows that Katie voluntarily participated in a commendable, but optional, recreational program. No public policy mandating the availability of recreational equality for the disabled requires recreational facilities or programs to take any particular form or to include any specific type of activity. The Janeways were not faced with the choice of signing the City's release or leaving their daughter with no recreation during the summer months. Undisputedly, there were other parks, other pools, other providers of various sports and recreational facilities. Adventure Camp may have been the best program for developmentally disabled children in the Santa Barbara area, but there were countless alternatives that would have given Katie an opportunity for recreation. In fact, the relevant Adventure Camp activity concerned swimming in a public pool. Katie could have gone there without enrolling in Adventure Camp.

There is also no evidence permitting the conclusion that the release, to the extent it covers ordinary negligence, fell outside the Janeways' reasonable expectations or that it was unduly oppressive or unconscionable. (See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820.) Adventure Camp provided a recreational program for disabled children that was both inclusive and directed towards the individual needs of the children. The Janeways, like countless parents of children participating in recreational

activities with some level of inherent risk, were asked to give up their right to sue for negligence. And, although a participant in Adventure Camp may have been unable to reject the proffered release, the City on its own initiative provided special supervision for Katie that would seemingly be unavailable in a contract of adhesion.

The enforceability of the City's release becomes even clearer when it is measured against transactions where courts have invalidated releases under *Tunkl*. None of these cases have any material similarity to the instant case. None involved recreational services or any other governmental program offered to the public, and all involved services provided in an entirely different economic setting.

For example, in *Gavin W. v. YMCA of Metropolitan Los Angeles*, *supra*, 106 Cal.App.4th 662, the court invalidated a release required by a provider of child care services. The court concluded that child care services were subject to comprehensive regulation, were "without question . . . of vital importance to the public, and a matter of practical necessity" for millions of working parents. (*Id.* at p. 671.) The court also emphasized the serious shortage of day care facilities, and the absence of evidence of any realistic, affordable alternatives. (*Id.* at pp. 672-673.) In so concluding, however, the court recognized the distinction between a child care program and a program of recreational activities by focusing on the importance of child care to the financial needs of working parents. (*Id.* at pp. 672-673, 675.)

In *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, the court invalidated a release required by an auto repair shop. The court stated that auto repair services are a '"matter of practical necessity 'for nearly *all* not just *some*' members of the public,'" and could be characterized as a "vital, life-or-death function" in a society dependent on the automobile. (*Id.* at pp. 718-721, italics added.)

In *Tunkl* itself, the court invalidated a release required by a hospital as a condition to providing medical treatment. The court stated that it was hardly open to question that the services of the hospital constituted a practical and crucial necessity, and that the would-be patient is in no position to bargain with the hospital or find another hospital that did not require a release. (*Tunkl*, *supra*, 60 Cal.2d at p. 102; see also *Health*

Net of California, Inc. v. Department of Health Services (2003) 113 Cal.App.4th 224, 227 [distribution to insurer of Medi-Cal enrollees]; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551, 1554-1556 [lease of berth in yacht harbor]; *Vilner v. Crocker National Bank* (1979) 89 Cal.App.3d 732, 735-736 [banking services].)

Release Does Not Extend to Gross Negligence

The City and Malong contend that the release covers not only ordinary negligence, but also exculpates them from liability for acts of gross negligence.[3] They argue that Civil Code section 1668 and *Tunkl* do not distinguish between levels of negligence, the language of the release covers "any negligent act," and that California law does not recognize gross negligence unless the term is used in a statute. We disagree.

We have concluded that the release is enforceable as to ordinary negligence based on the factors set forth in *Tunkl*, and the City's legitimate interest in conducting its Adventure Camp program without an inordinate risk of liability. Public policy and the legitimate objective of the release, however, dictate that we limit the scope of the release to ordinary negligence. Accordingly, we conclude that, under the circumstances of this case, the release does not exculpate the City or Malong from liability for acts or omissions constituting gross negligence.

Under California law, gross negligence is defined as an act or omission that shows a failure to exercise even slight care or that constitutes an extreme departure from the ordinary standard of conduct. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186; *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.) It requires negligent conduct which is aggravated, reckless or flagrant so as to "connote[] such a lack of care as may be presumed to indicate a passive and indifferent attitude" towards the consequences of one's acts to the safety and welfare of others. (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729, disapproved on other grounds in *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th 826.)

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[3] The parties submitted supplemental letter briefs at our request concerning the issue of gross negligence.

The concept of gross negligence has been criticized, but the distinction between ordinary and gross negligence remains as "a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations." (*Donnelly v. Southern Pac. Co.* (1941) 18 Cal.2d 863, 871; see also *Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1240-1241.) A determination that gross negligence has occurred is a question of fact. Conduct that qualifies as gross negligence will vary according to the nature of the act, and the surrounding circumstances as shown by the evidence. (See *Donnelly*, *supra*, at pp. 870-871.)

In deciding that the release does not extend to gross negligence, we focus on different public policy interests than those considered in analyzing the release transaction under *Tunkl*. Here, a gravely disabled child was given the opportunity to participate in recreational activities that might otherwise be limited to children who are not disabled. The City has a legitimate interest in protecting itself from the risk of unlimited liability in offering the program. But, exculpating the City from liability for acts of gross negligence exceeds the protection reasonably necessary to protect the City in the operation of Adventure Camp, and would remove its obligation to adhere to even a minimal standard of care.

Clearly, there is a heightened public interest in protecting against negligent conduct as the level of negligence becomes more aggravated and extreme. Essentially, the greater the disregard for the safety of others, the greater is the public interest in restricting contractual exculpation. As a result, courts are skeptical of a release of liability for harm that is caused recklessly or through gross negligence. No California case has expressly invalidated—or validated—a release of liability for gross negligence, but the "present view" is that "there can be no exemption from liability for intentional wrong, gross negligence, or violation of law." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 660, p. 757; see also *Health Net of California, Inc. v. Department of Health Services, supra*, 113 Cal.App.4th at p. 234; *Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74.)

We recognize that the distinction between ordinary and gross negligence cannot be drawn with razor sharp precision, but reject the view that gross negligence lacks clear limits. The law is filled with difficult distinctions, yet our juries have managed to fulfill their role in making factual determinations based on them. There is no reason to believe that a jury will be unable to distinguish between ordinary and gross negligence, or that instructing the jury would be more difficult than instructing the jury in a variety of other circumstances where lines between liability and nonliability must be drawn with some acumen. (See *Pratt v. Western Pac. R. Co.* (1963) 213 Cal.App.2d 573, 579-580 [considered jury instruction under statute preventing common carrier from releasing liability for gross negligence].)

We also have no reason to believe that limiting the release to ordinary negligence will expose the City to unfair second-guessing, or deter the City from providing recreational activities for its residents with developmental disabilities. We are not dealing with a high-risk sporting activity where the inherent danger of the activity forms a principal motivation for participation. We are concerned with the supervision of vulnerable children engaged in an activity where simple enjoyment motivates participation. There may be circumstances where a release of gross negligence would be reasonable, but they are not the circumstances of this case.

Moreover, in several instances, the California Legislature has protected recreational or socially useful activities by granting immunity from liability for ordinary negligence while preserving liability for gross negligence. Such qualified immunity applies, for example, to liability of a public entity or employee for hazardous recreational activity on public property. (Gov. Code, § 831.7, subd. (c)(5).) "These statutes reflect the sound legislative judgment that, under a gross negligence standard, meritless suits will typically be disposed of by summary judgment; that when a case goes to trial the jury, instructed on this standard, will be less likely to confuse injury with fault; and that verdicts reflecting such confusion will be more readily reversed, whether by the trial or appellate court, than under an ordinary negligence standard." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1020 (conc. opn. of Werdegar, J.).)

In addition, the majority of courts in other states have concluded that exculpatory agreements cannot preclude claims for more extreme forms of negligence including gross negligence. Some of these cases equate gross negligence with willful and wanton misconduct which requires an act or omission that is so dangerous that the actor should know that it is highly probable that harm will result. (*Donnelly v. Southern Pac. Co., supra,* 18 Cal.2d at p. 870.) But, most of the cases conclude that public policy prevents enforcement of releases that cover gross negligence as that term is defined by California law. (See generally Nelson, *The Theory of the Waiver Scale: An Argument of Why Parents Should be Able to Waive Their Children's Tort Liability Claims* (2002) 36 U.S.F. L.Rev. 535, 569; King, *Exculpatory Agreements for Volunteers in Youth Activities--The Alternative to "Nerf (Register)" Tiddlywinks* (1992) 53 Ohio St. L.J. 683, 728; see also, e.g., *Boucher v. Riner* (Md.App. 1986) 514 A.2d 485, 488; *Harmon v. Mt. Hood Meadows, Ltd.* (Or.Ct.App. 1997) 932 P.2d 92, 95; *Xu v. Gay* (Mich.App. 2003) 668 N.W.2d 166, 169-270; *Vodopest v. MacGregor* (Wash. 1996) 913 P.2d 779, 785; *Russ v. Woodside Homes, Inc.* (Utah App. 1995) 905 P.2d 901, 904; *Sharon v. City of Newton* (Mass. 2002) 769 N.E.2d 738, 748.)

The City and its amici contend that, subject to *Tunkl*, Civil Code section 1668 only invalidates releases that exculpate a party for his or her fraud, *willful injury*, or violation of statutory law. They ask us to hold that releases of liability for negligence, including gross negligence, are permitted under Civil Code section 1668 unless another statute expressly provides otherwise. We decline to do so.

Civil Code section 1668 has not been strictly applied, or interpreted to authorize any and all releases that are not expressly invalidated. (*Farnham v. Superior Court, supra,* 60 Cal.App.4th at p. 74.) *Tunkl* itself went beyond the language of Civil Code section 1668 to invalidate releases of liability for negligence under certain circumstances, and observed generally that judicial interpretations of Civil Code section 1668 "have been diverse" and that some cases hold that the statute prohibits the exculpation of gross negligence. (*Tunkl, supra,* 60 Cal.2d at pp. 95-96.)

The City and its amici also claim that the release covers gross negligence because it expressly covers liability for a "negligent act and otherwise." But, to release gross negligence, the language used must be comprehensible in its essential details and clearly notify the other party of the scope of exculpation intended to the covered by the release. (See *Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 755; *Madison v. Superior Court*, *supra*, 203 Cal.App.3d at p. 598.) Here, the phrase "negligent acts and otherwise" arguably extends to all levels of negligence and beyond, but the language does not explicitly notify the Janeways that the release is intended to cover aggravated misconduct such as gross negligence. The Janeways can be charged with fully understanding that they were releasing the City from liability for injury caused by ordinary negligence in the care of a severely disabled person. We cannot conclude, however, that the Janeways reasonably believed they were releasing the City from an extreme departure from the ordinary standard of conduct. Nor can we conclude that the City itself clearly understood that its release was virtually without limitation.

Existence of Gross Negligence is a Triable Issue

In our request for supplemental letter briefs, we asked the parties to identify evidence that showed the existence of a triable issue concerning gross negligence as that term is defined under California law. The City and the Janeways both filed letter briefs.

The record supports the conclusion of the trial court that there was a material triable issue regarding gross negligence. There is evidence from which a trier of fact reasonably could conclude that the City and Malong were grossly negligent in their decision to allow Katie to participate in the swimming activities of Adventure Camp on the day of her death, and to use the diving board during those activities.

Undisputedly, the City and Malong were informed of Katie's propensity to suffer seizures while in the water, and took substantial precautions to provide close supervision for Katie in light of this propensity and her disabilities in general. Nevertheless, it is also undisputed that Katie suffered a seizure shortly after she came to the pool area on the day of her drowning, and there is disputed evidence that Malong failed to notify senior City staff of the seizure, and that the City failed to consider the

significance of this seizure on Katie's swimming activity that commenced minutes later. In addition, although mere inattentiveness in watching Katie in the swimming pool would constitute only ordinary negligence, the record shows that Katie was allowed to dive into the deep end of a crowded pool at a time when her counselor was not at her side and could not provide immediate assistance.

The petition is denied. The Janeways may continue prosecution of their case in the trial court based on a gross negligence theory of liability consistent with this opinion. Costs in this proceeding are awarded to the Janeways.

CERTIFIED FOR PUBLICATION.

PERREN, J.

I concur:

GILBERT, P.J.

COFFEE, J., Dissenting.

I agree with the majority's conclusion that the release in the instant case is valid under the factors set forth in *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92 (*Tunkl*), but dissent from the holding that the release is invalid as a matter of public policy to the extent it purports to release conduct that can be characterized as "gross negligence."

The undisputed evidence in this case demonstrates that the Janeways were aware of the risks posed by their daughter's participation in recreational activities. While attending Adventure Camp in prior years, Katie had suffered seizures on the pool deck and at the skating rink. Additionally, evidence offered by the City in support of its summary judgment motion showed that when Katie was in fifth grade, she attended a pool party with her classmates and suffered a seizure in the pool. A teacher and a lifeguard rescued Katie from the pool, administered first aid, and revived her. Although the Janeways were not present during this incident, they were contacted and instructed the teacher to allow Katie to go back into the pool if she wanted to resume swimming. Notwithstanding these prior incidents, the Janeways enrolled Katie in the swimming portion of Adventure Camp and declined the City's offer to require that she wear a flotation device while in the pool.

The release executed by the Janeways provides that the City and its employees are released from all liability for personal injuries and damages caused by "any negligent act or omission . . . or otherwise." In addition, the Janeways agreed to assume the risk of "BODILY INJURY [or] DEATH . . . while . . . using any City facilities" whether caused by "any negligent act or omission . . . or otherwise." Finally, the Janeways agreed that the release was intended "to be as broad and inclusive as permitted by California law."

Civil Code section 1668 provides that it is against public policy to contract away one's responsibility for "fraud," "willful injury" or "violation of law."[1] California

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[1] All statutory references are to the Civil Code.

courts interpret the phrase "violation of law" in section 1668 to mean a violation of statutory law, not ordinary negligence. (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 670 (*Gavin W.*); *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 716.) Other than negligent violations of statutory law, section 1668 does not prohibit a release for ordinary or gross negligence.

In *Tunkl*, the California Supreme Court held that the enforceability of a release of negligence must be tested on the basis of whether the transaction at issue is one that affects the public interest. (*Tunkl*, *supra*, 60 Cal.2d at pp. 96-101.) If it does, the release is unenforceable; if it does not, the release is enforceable. California case law since *Tunkl* makes clear that it is *the type of transaction* and the relationship of the parties to the release, not the degree of culpability, that determines the enforceability of a release of negligence. (See, e.g., *Gavin W.*, *supra*, 106 Cal.App.4th at p. 670 ["[u]nder *Tunkl* . . . determining whether a release of liability affects the public interest, and is thus void as a matter of public policy, requires analysis of the transaction giving rise to the contract–*not* the allegedly negligent conduct by the party invoking the release"].) Under the approach mandated by *Tunkl*, whether or not the party seeking to absolve itself from liability is "grossly" negligent is not relevant. A release of negligence in a transaction that does not harm the public interest is valid against *any* negligence.

California courts have not squarely addressed the significance of gross versus ordinary negligence for purposes of enforcing a release under section 1668, not only because the sole relevant inquiry is the type of transaction, but also because the courts have abolished the common law distinction between gross negligence and ordinary negligence. Except for claims based upon statutes using the term "gross negligence," California courts have recognized that there is no separate cause of action for gross negligence. (*Continental Ins. Co. v. American Protection Industries* (1987) 197 Cal.App.3d 322, 330 [affirming order denying leave to amend to allege gross negligence on the ground that no such cause of action exists]; *Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 766, fn. 9.) *Continental* reasoned that, in light of the

adoption of comparative negligence in California, "any attempt to categorize gross negligence separately from ordinary negligence is unnecessary." (*Continental*, at p. 330.)

Refusing to enforce a release under section 1668 against a "gross negligence" claim would be tantamount to creating a cause of action for gross negligence. This would, in turn, open the courthouse doors to litigants seeking to avoid the effect of standard recreational releases in favor of public entities, eliminating the protection those entities require in order to conduct fiscally responsible recreational programs.

Allowing this case to proceed to trial based on a gross negligence theory despite the Janeways' prior contractual release of negligence liability would also rewrite section 1668. Section 1668 renders unenforceable contracts that purport to exempt one from responsibility for his own fraud, willful personal or property damage, or violation of law. The Legislature has not equated negligence of any "degree" with fraud, willfulness, or violation of law. This court should not act where the Legislature has chosen not to. Any change in the law should come from the Legislature, after balancing the interests of all interested persons.

Section 2175 distinguishes between ordinary and gross negligence by expressly prohibiting a common carrier from obtaining a release from its gross negligence.[2] Because sections 1668 and 2175 were enacted in the same year, the maxim of statutory construction *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another) indicates that the Legislature did not intend section 1668 to prevent service providers other than common carriers from obtaining a release from gross negligence. Even if the maxim is not applied, it is clear the Legislature understood the distinction. It expressly distinguished between degrees of negligence in a specific statute covering releases obtained by common carriers, but did not make the

[2] Section 2175 states that "[a] common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants."

same distinction in the more general section 1668 for service providers other than common carriers.

Citing a passage from Witkin, the majority suggests that the present view in California is that there can be no exemption from liability for gross negligence. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 660, pp. 737-738.) This proposition, however, is not supported by the language of section 1668 or by California judicial decisions. The cases cited by Witkin involve fraud, intentional injury, or violation of a statute, all specifically listed in section 1668. The majority's citations to *Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 234, and *Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74, are similarly unpersuasive. Those cases did not involve the issue of whether a release of liability under section 1668 could encompass gross negligence. (Compare 8 Williston on Contracts (4th ed. 1998) § 19:23, pp. 292-297 ["a release exculpating a party from liability for negligence may also cover gross negligence where the jurisdiction has abolished the distinction between degrees of negligence and treats all negligence alike"].)

Significantly, this case was not pled as a "gross negligence" action. Rather, in their cause of action for wrongful death, the Janeways alleged that the City and Malong, "and each of them, carelessly, recklessly, negligently and unlawfully failed to maintain supervision of decedent." In opposition to the City's summary judgment motion, the Janeways presented no evidence of any violation of law that would render the release invalid under section 1668. Although there is support for construing the term "willful" in section 1668 to include conduct characterized as "wanton" or "reckless," the Janeways presented no evidence in opposition to the summary judgment motion demonstrating "willful," "wanton," or "reckless" conduct on the part of the City or Malong. (See, e.g., *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 728-729

[equating willful conduct with wanton and reckless disregard of possible results]; Rest.2d Torts, § 500, com. g, p. 590 [distinguishing reckless and negligent conduct].)[3]

The undisputed evidence showed that the Janeways did not request that any restrictions be placed on Katie's swimming activities. Malong observed Katie have a mild seizure that lasted only a few seconds while she was walking in the pool lobby area. Malong tended to Katie after the mild seizure, asked her if she had taken her medication, and then waited 45 minutes before letting her enter the shallow end of the pool. Allowing Katie to resume her camp activities after a mild seizure was consistent with Malong's prior experience with Katie at school. Because Katie appeared fine and cheerful, Malong allowed Katie to play in the shallow end of the pool. Twenty minutes later, Katie asked Malong if she could use the diving board. Malong sat on the side of the pool near the lifeguard assigned to the diving well to observe Katie. Malong watched Katie jump from the diving board and swim to the edge of the pool. Malong then insisted that Katie get out of the pool to rest. After 8 to 10 minutes, because of Katie's assurances and appearance of being fine, Malong allowed her to jump from the diving board again. Malong watched Katie jump from the board, come to the surface of the water, and begin

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[3] For example, the Restatement Second of Torts distinguishes "recklessness" from "negligence" and "gross negligence," as follows: "Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." (Rest.2d Torts, § 500, com. g, p. 590.)

swimming to the edge of the pool. According to the undisputed evidence, Malong's attention was then diverted and she turned her eyes away from Katie for no more than 15 seconds. When she looked back, she could not see Katie and immediately walked to the deep end of the pool to look for her. Malong asked another counselor swimming toward the diving board if he had seen Katie. Malong then got into the pool and swam to the shallow end and then back to the middle of the pool. She then heard the evacuation horn and saw Katie receiving first aid.

At the time of the incident, the pool was fully staffed with five lifeguards, four of whom were stationed on the pool deck. One of the lifeguards was assigned solely to the diving well area. Although the majority opinion refers to the pool as "crowded," the City presented evidence that the diving well area was a restricted area. Only one person was allowed to use the diving board at a time, and the board user was required to clear the diving well by swimming to the side of the pool before the next person was allowed to go off the diving board. The lifeguard assigned to watch the diving well noticed Katie's distress, jumped out of her tower, and got to Katie, along with another lifeguard, to administer first aid. The record contains no evidence that either the City or Malong acted "willfully," "wantonly," or "recklessly" as those terms are defined in the common law. Malong's brief inattentiveness in the presence of a lifeguard and alleged failure to report Katie's earlier mild seizure to a supervisor were not, as a matter of law, "willful," "wanton," or "reckless" acts sufficient to invalidate the release under section 1668.

In line with the legal truism that "hard cases make bad law," we can expect this case to be cited as precedent in a new wave of litigation involving issues that should be legislated rather than litigated. I would grant the petition for a writ of mandate and direct the respondent superior court to grant petitioners' motion for summary judgment.

CERTIFIED FOR PUBLICATION.

COFFEE, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Stephen P. Wiley, City Attorney, Janet K. McGinnis, Assistant City Attorney, Haight, Brown & Bonesteel, Peter Q. Ezzell and Nancy E. Lucas for Petitioners.

Dennis J. Herrera, City Attorney, Joanne Hoeper, Chief Trial Deputy and Donald P. Margolis, Deputy City Attorney, for League of California Cities and California State Association of Counties as Amicus Curiae on behalf of Petitioners.

California Park & Recreation Society, Jane H. Adams, Executive Director, as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Grassini & Wrinkle and Roland Wrinkle for Real Parties in Interest.