STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1050

Lee Bergin, et al.,
Appellants,

vs.

Wild Mountain, Inc.
d/b/a Wild Mountain Ski Area,
Respondent.

Filed March 17, 2014
Affirmed
Hooten, Judge

Chisago County District Court
File No. 13-CV-11-695

James P. Carey, Marcia K. Miller, Sieben, Grose, Von Holtum & Carey, Ltd., Minneapolis, Minnesota (for appellants)

Brian N. Johnson, John J. Wackman, Peter Gray, Nilan Johnson Lewis, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

In this personal-injury action, appellants-skiers sued respondent-ski resort for damages resulting from a skiing accident. Appellants challenge the district court's grant of summary judgment in favor of respondent, arguing that the district court erred by (1)

denying their motion to amend the complaint to add allegations of reckless, willful, or wanton conduct; (2) determining that an exculpatory clause bars their claim of ordinary negligence; and (3) applying the doctrine of primary assumption of risk to bar their claim of ordinary negligence. Because respondent's conduct does not give rise to a claim of greater-than-ordinary negligence, and because the exculpatory clause is enforceable to bar a claim of ordinary negligence, we affirm.

FACTS

Appellants Lee and Cathy Bergin sued respondent Wild Mountain, Inc. d/b/a Wild Mountain Ski Area for injuries that Lee sustained while skiing at Wild Mountain. The Bergins sought damages for Lee's physical injuries, loss of wages and earning ability, loss of property, and medical expenses, as well as for Cathy's loss of services, companionship, and consortium. Following discovery, Wild Mountain moved for summary judgment. The pleadings and discovery reveal the following.

In March 2010, Robert Knight purchased over the internet 2010–2011 season passes to Wild Mountain for himself, the Bergins, and another individual. To complete the purchase, Knight agreed to a season-pass agreement which included a release of liability:

> I understand and accept the fact that alpine skiing and snowboarding in its various forms is a hazardous sport that has many dangers and risks. I realize that injuries are a common and ordinary occurrence of this sport. I agree, as a condition of being allowed to use the area facility and premises, that I freely accept and voluntarily assume all risks of personal injury, death or property damage, and release Wild Mountain Ski & Snowboard Area . . . and its agents, employees, directors, officers and shareholders from any and

> all liability for personal injury or property damage which results in any way from negligence, conditions on or about the premises and facilities, the operations, actions or omissions of employees or agents of the area, or my participation in skiing or other activities at the area, accepting myself the full responsibility for any and all such damage of injury of any kind which may result.
>
> In accordance with Minnesota law, nothing in this Release of Liability should be construed as releasing, discharging or waiving claims I may have for reckless, willful, wanton, or intentional acts on the part of Wild Mountain Ski & Snowboard Area, or its owners, officers, shareholders, agents or employees.

Knight did not ask Lee about the release of liability before agreeing to it. Lee wrote a check to Knight for the Bergins' season passes. In his deposition, Lee admitted that he authorized Knight to purchase the season passes, that he had purchased season passes to Wild Mountain since 2001 and had agreed to a release of liability each year, that he understood the release of liability, and that he would have authorized Knight to purchase the season passes had he known about the release of liability.[1]

On the morning of November 28, 2010, the Bergins arrived at Wild Mountain to pick up their season passes and ski. The season pass is a wallet-sized card with Lee's name and picture on the front and the following language on the back:

> I agree and understand that skiing and snowboarding involve the risk of personal injury and death. I agree to assume those risks. These risks include trail conditions that vary due to changing weather and skier use, ice, variations in terrain and snow, moguls, rocks, forest growth, debris, lift towers, fences, mazes, snow grooming, and snowmaking equipment, other skiers, and other man-made objects. I agree to always ski and

[1] The Bergins do not appeal the district court's determination that Lee is bound by the season-pass agreement even though he did not execute it himself.

> snowboard in control and to avoid these objects and other skiers. I agree to learn and obey the skier personal responsibility code.

The Bergins and their friends skied "The Wall," a double-black-diamond trail. At the top of The Wall, Lee observed that there were mounds of snow on the skiers' left side of the run. Thinking that the left side was not skiable terrain, Lee skied down the right side. Then, at the bottom of the hill in the flat transition or run-out area, Lee encountered a "mound of snow" that he could not avoid. He hit the snow mound, flew up six to ten feet in the air, and landed on his back and the tails of his skis. Lee estimated that the snow mound was "maybe a little bigger" and "maybe a little taller" than a sofa, and that "there was no sharp edges defining" it. After the fall, Lee underwent surgery on his back and is partially paralyzed.

Daniel Raedeke, the president of Wild Mountain, testified by affidavit that Wild Mountain started making snow on The Wall on November 25, three days before Lee's accident. On the morning of November 26, snowmaking ceased and The Wall was opened for skiing. According to Raedeke, "hundreds of skiers took thousands of runs down The Wall prior to" Lee's accident. Raedeke added:

> At the completion of snowmaking activities, there were some terrain variations at various points throughout the entire Wall run from top to bottom and side to side. Terrain variations from snowmaking are common at Minnesota (and Midwest) ski areas, particularly early in the season as ski areas rely on machine-made snow to get the areas open. It is very common for terrain variation to be encountered by skiers in Minnesota and elsewhere and they are generally well-liked, particularly by expert level skiers like [Lee].

Raedeke testified that "Wild Mountain received no reports of anything being hazardous or even out-of-the ordinary on The Wall."

The Bergins submitted the affidavits of two ski-safety experts, Seth Bayer and Richard Penniman. Bayer testified that Wild Mountain "engaged in snow-making activity, intentionally created the hazard [Lee] encountered by creating large mounds of man-made snow . . . then intentionally left the snow-making mound in the run-out or transition area." According to Bayer, Wild Mountain "knew or should have known that the snow-making mound in the transition area created a hazard and should have groomed out the mound or further identified the mound as a hazard." He added that Wild Mountain failed to follow professional safety standards in making and grooming the snow.

Similarly, Penniman testified that complying with professional safety standards "would have entailed grooming out the snow making mounds; putting fencing around the snow making mounds; and warning skiers of the mounds with a rope barricade and caution signs." He testified that "Wild Mountain's failure to have a consistent and structured snow making and grooming policy, which specifically addressed the [professional safety standard], caused or contributed to the unsafe decision to leave a large mound of man-made snow in the transition area between the bottom of The Wall ski trail and the chair lift." According to Penniman, "snow making mounds are not an inherent risk to the sport of skiing."

Following discovery and Wild Mountain's motion for summary judgment, the Bergins moved to amend their complaint to add a claim of greater-than-ordinary

negligence. In April 2013, the district court denied the Bergins' motion and granted summary judgment in favor of Wild Mountain. This appeal follows.

D E C I S I O N

I.

After a responsive pleading is served, "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Minn. R. Civ. P. 15.01. "We review a district court's denial of a motion to amend a complaint for an abuse of discretion." *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 714 (Minn. 2012), *cert. denied*, 133 S. Ct. 1249 (2013). "A district court should allow amendment unless the adverse party would be prejudiced, but the court does not abuse its discretion when it disallows an amendment where the proposed amended claim could not survive summary judgment." *Id.* (citations omitted).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact does not exist "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). On appeal, "[w]e view the evidence in the light most favorable to the party

against whom summary judgment was granted. We review de novo whether a genuine issue of material fact exists. We also review de novo whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002) (citations omitted).

The Bergins moved to amend their complaint to add the allegation that Lee's accident "was a result of the reckless, willful, or wanton conduct" of Wild Mountain. They assert that Wild Mountain "knew or should have known that a large, un-marked, un-groomed, mound of snow in the transition area between 'The Wall' and a chair lift . . . created a significant risk of physical harm to skiers." The district court concluded that, although Wild Mountain would not be prejudiced if the motion to amend was granted,[2] the motion must still be denied because the proposed claim "would not survive summary judgment, as [Wild Mountain's] conduct does not, as a matter of law, rise to the level of reckless, willful or wanton."

The Bergins argue that the district court erred as a matter of law by "[r]equiring [them] to move to amend the [c]omplaint." They assert that "Minnesota Rule of Civil Procedure 9.02 does not require plaintiffs to plead allegations of reckless, willful, or wanton conduct with particularity." *See* Minn. R. Civ. P. 9.02 (stating that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally"). Accordingly, they contend that the district court should have examined whether Wild Mountain committed greater-than-ordinary negligence based on the complaint and discovery.

[2] Wild Mountain does not challenge this finding on appeal.

The Bergins' reliance on rule 9.02 is misplaced. Although the Bergins were not required to plead a claim of greater-than-ordinary negligence with particularity under rule 9.02, they still had to plead it with "a short and plain statement . . . showing that [they are] entitled to relief" under Minn. R. Civ. P. 8.01, which they failed to do by pleading only a claim of "negligence and carelessness." *See L.K. v. Gregg*, 425 N.W.2d 813, 819 (Minn. 1988) (stating that pleadings are liberally construed to "give[] adequate notice of the claim" against the defending party); *cf. State v. Hayes*, 244 Minn. 296, 299–300, 70 N.W.2d 110, 113 (1955) (concluding that "both at common law and by virtue of long-established usage," the term "carelessness" in a criminal statute is "synonymous with ordinary negligence").[3]

Turning to the Bergins' substantive argument, they assert that "there are questions of fact regarding whether Wild Mountain engaged in reckless or willful or wanton conduct that . . . preclude summary judgment." "[R]eckless conduct includes willful and wanton disregard for the safety of others . . . ." *Kempa v. E.W. Coons Co.*, 370 N.W.2d 414, 421 (Minn. 1985).

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

[3] We also note that the district court did not require the Bergins to move to amend their complaint. Following a hearing on the summary judgment motion, the district court sent a letter to the parties, stating that "[a]t the Summary Judgment Motion Hearing, [the Bergins] moved the Court to amend the Complaint" and that "[t]he Court will leave the record open" for them to file the motion. The district court simply responded to the Bergins' desire to amend the complaint without requiring them to do so.

> substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1965) (emphasis added); *see also* 4 *Minnesota Practice*, CIVJIG 25.37 (2006). "Willful and wanton conduct is the failure to exercise ordinary care after discovering a person or property in a position of peril." *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 829 (Minn. App. 2001), *review denied* (Minn. Feb. 28, 2002).

The Bergins argue that their expert affidavits support their claim of greater-than-ordinary negligence. We are not persuaded for three reasons.

First, "[a]ffidavits in opposition to a motion for summary judgment do not create issues of fact if they merely recite conclusions without any specific factual support." *Grandnorthern, Inc. v. W. Mall P'ship*, 359 N.W.2d 41, 44 (Minn. App. 1984). Bayer's testimony that Wild Mountain "knew" that the snow mound was hazardous is speculation because there is no evidence that Bayer knew Wild Mountain employees' state of mind before Lee's fall and injury.

Second, the Bergins misunderstand the "had reason to know" standard for establishing a claim of greater-than-ordinary negligence. The Bergins contend that they need not prove knowledge to establish a claim of greater-than-ordinary negligence and that it is enough that Wild Mountain "should have known" that the snow mound was hazardous. But knowledge separates the "had reason to know" standard from the "should have known" standard:

> (1) The words "reason to know" . . . denote the fact that the actor *has information* from which a person of

> reasonable intelligence or of the superior intelligence of the actor *would infer that the fact in question exists*, or that such person would govern his conduct upon the assumption that such fact exists.
>
> (2) The words "should know" . . . denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor *would ascertain the fact in question in the performance of his duty to another*, or would govern his conduct upon the assumption that such fact exists.

Restatement (Second) of Torts § 12 (1965) (emphases added). Accordingly, Bayer's testimony that Wild Mountain "should have known" that the snow mound was hazardous is insufficient to establish the state of mind necessary to establish a claim of greater-than-ordinary negligence.

Finally, the expert affidavits are insufficient to establish that Wild Mountain had reason to know that the snow mound was hazardous. According to Bayer and Penniman, the snow mound was hazardous because skiers do not expect a snow mound in the transition run-out area and because the lighting condition obscured the snow mound. Assuming that these alleged facts are true, nothing in the record suggests that Wild Mountain had knowledge of these facts from which to infer that the snow mound was hazardous. Rather, Raedeke's testimony shows that Wild Mountain received no complaints from hundreds of skiers who skied The Wall before Lee's accident. The expert affidavits are, at most, evidence that a reasonable person managing the ski operation would not have created, or would have marked, the snow mound in the run-out area. This evidence shows only ordinary negligence.

Because the evidence is insufficient to establish that Wild Mountain engaged in conduct constituting greater-than-ordinary negligence, the district court correctly determined that a claim of greater-than-ordinary negligence would not survive a motion for summary judgment. Accordingly, the district court acted within its discretion by denying the Bergins' motion to amend their complaint to add a claim of greater-than-ordinary negligence. *See Johnson*, 817 N.W.2d at 714 (stating that a district court "does not abuse its discretion when it disallows an amendment where the proposed amended claim could not survive summary judgment").

The Bergins also argue that the district court "did not address the evidence that created questions of material fact regarding Wild Mountain's reckless, willful, or wanton conduct." But the district court examined Wild Mountain's conduct and concluded that it "does not meet the standards for gross negligence, willful and wanton conduct, or reckless conduct (as defined by both parties)." The district court's discussion of Lee's knowledge of the inherent risks of skiing—while perhaps extraneous—does not indicate that the district court failed to analyze Wild Mountain's conduct.

II.

The Bergins argue that the district court erred by determining that the exculpatory clause bars the Bergins' claim of ordinary negligence. The interpretation of a written contract is a question of law reviewed de novo. *Borgersen v. Cardiovascular Sys., Inc.*, 729 N.W.2d 619, 625 (Minn. App. 2007). Under certain circumstances, "parties to a contract may . . . protect themselves against liability resulting from their own negligence." *See Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 922–23 (Minn. 1982)

(considering exculpatory clauses in construction contracts and commercial leases). "A clause exonerating a party from liability," known as an exculpatory clause, is enforceable if it: (1) is "unambiguous"; (2) is "limited to a release of liability arising out of negligence only"; and (3) does not violate public policy. *See id.* at 923. "An exculpatory clause is ambiguous when it is susceptible to more than one reasonable construction." *Beehner*, 636 N.W.2d at 827.

The district court concluded that Wild Mountain's exculpatory clause is enforceable because it is unambiguous and bars only ordinary-negligence claims. The Bergins contend that the exculpatory clause is ambiguous because "there are questions of fact regarding whether the [season-pass card] was part of the exculpatory contract." They assert that the exculpatory clause and the language on the season-pass card "construed together are overly broad and ambiguous" because the season-pass card contains a non-exhaustive list of risks while the season-pass agreement expressly excludes greater-than-ordinary negligence from the scope of the exculpatory clause. We are not persuaded.

Because a contract ambiguity exists only if it is "found in the language of the document itself," we consider whether the season-pass card is a part of the season-pass agreement between Lee and Wild Mountain. *See Instrumentation Servs., Inc. v. Gen. Res. Corp.*, 283 N.W.2d 902, 908 (Minn. 1979). "It is well established that where contracts relating to the same transaction are put into several instruments they will be read together and each will be construed with reference to the other." *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 146, 82 N.W.2d 48, 54 (1957). Here, the contractual relationship between Lee and Wild Mountain was formed when the online

season-pass agreement was executed more than eight months before Lee picked up the season-pass card. As the district court correctly concluded, the season-pass card itself is not a contract. Although the season-pass card contains language emphasizing the inherent risk of skiing, it does not contain an offer by Wild Mountain to be legally bound to any terms. *See Glass Serv. Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 870 (Minn. App. 1995), *review denied* (Minn. June 29, 1995). And as a corollary, Lee could not have accepted an offer that did not exist. The season-pass card is an extrinsic document that does not create an ambiguity in the season-pass agreement.

The Bergins rely on *Hackel v. Whitecap Recreations*, No. 83-2203 (Wis. Ct. App. Sept. 4, 1984) (Westlaw). There, a skier was injured when he was "caught in a depression apparently caused by the natural drainage of water." No. 83-2203 at *1. The ski resort "denied liability on the basis of language printed on the lift ticket purchased by" the skier. *Id.* The Wisconsin Court of Appeals held that summary judgment was improper because "[w]hether the printed language on the ski ticket was part of the contractual agreement between the parties is a question of fact." *Id.* Based on *Hackel*, the Bergins argue that "there are questions of fact regarding whether the [season-pass card] was part of the exculpatory contract."

The Bergins' reliance on *Hackel* is misplaced. As an unpublished opinion issued before 2009, *Hackel* has neither precedential nor persuasive value in Wisconsin. *See* Wis. R. App. P. 809.23(3) (Supp. 2013). Even if it were, Wisconsin's adoption of a common-law rule is "not binding on us as authority." *See Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984) (examining other jurisdictions' standards of tort

liability). Substantively, the questions of fact that precluded summary judgment in *Hackel* are absent here. In *Hackel*, the only language alleged to be exculpatory was printed on the back of a lift ticket, which the skier did not sign. No. 83-2203 at *1. This language did not expressly release the ski resort from liability, but it listed the risks that the skier agreed to assume. *Id.* The Wisconsin court concluded that a fact issue exists as to whether the language could be construed to mean "that skiers assume inherent risks of the sport without relieving [the ski company] of its own negligence" or that "[t]he language might also be construed as an exculpatory clause." *Id.* at *2. Another question of fact that precluded summary judgment was "whether the [unsigned] ticket was intended as part of the contract." *Id.* at *1 n.1. Here, unlike in *Hackel*, neither the existence of an exculpatory clause nor the intention that it be a part of the contract is in question. It is undisputed that Lee agreed to the exculpatory clause in the season-pass agreement before receiving the season-pass card.

Even if the season-pass card and season-pass agreement are construed together, they do not create an ambiguity. "Terms in a contract should be read together and harmonized where possible," and "the specific in a writing governs over the general." *Burgi v. Eckes*, 354 N.W.2d 514, 518–19 (Minn. App. 1984). Accordingly, the season-pass agreement's specific language excluding greater-than-ordinary negligence from the scope of the exculpatory clause supersedes the season-pass card's general language on the inherent risks of skiing. The district court correctly determined that the exculpatory clause is limited to a release of liability arising out of negligence only and granted summary judgment in favor of Wild Mountain.

Because we conclude that an unambiguous and enforceable exculpatory clause bars the Bergins' claim of ordinary negligence, we decline to reach the issue of whether the doctrine of primary assumption of risk also bars the claim of ordinary negligence.

Affirmed.