STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0215

Jana Salinger, as parent and natural guardian
of Mia Messer, a minor, and
Daniel Messer and Jana Salinger, individually,
Appellants,

vs.

Chris Leatherdale and Rebecca Leatherdale
d/b/a Grace Farms MN, Inc., and
Chris and Rebecca Leatherdale, individually,
Respondents.

Filed October 1, 2012
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CV-11-5973

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

Troy A. Poetz, Matthew W. Moehrle, Rajkowski Hansmeier, Ltd., St. Cloud, Minnesota (for respondents)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUDSON, Judge

On appeal from summary judgment dismissing their negligence claim against respondents, appellants argue that the district court erred by concluding that no genuine issues of material fact exist regarding the application of the primary-assumption-of-risk doctrine and by granting summary judgment on whether respondents committed greater-than-ordinary negligence. By notice of related appeal, respondents argue that the district court erred by determining that genuine issues of material fact existed as to whether respondents committed greater-than-ordinary negligence and by determining that appellants properly pleaded claims of greater-than-ordinary negligence. We conclude that the district court erred by determining that no genuine issues of material fact existed as to primary assumption of risk but did not err by determining that genuine issues of material fact existed as to whether respondents committed greater-than-ordinary negligence. We additionally conclude that the district court erred by granting summary judgment on whether respondents committed greater-than-ordinary negligence, and we reverse and remand this determination. Finally, we conclude that, although appellants did not properly plead greater-than-ordinary negligence, any error in appellants' complaint was harmless.

FACTS

In June 2009, 12-year-old Mia Messer participated in a horse camp at respondent Grace Farms. Mia's father, appellant Daniel Messer, enrolled her at Grace Farms, believing she would have private lessons and would not participate in trail rides with

Capri, one of the horses at Grace Farms. Mia also stated that she intended only to participate in dressage[1] training while at the camp. Prior to Mia's participation in the horse camp, Daniel Messer signed a release and agreement to assume risk. The release and agreement stated, in part:

> Grace Farms MN, Inc. recognizes that riding and being around horses inherently carries risk o[f] serious injury or death. Horses are unpredictable animals and are easily frightened by sounds, sudden movements, unfamiliar objects, smells, persons or other animals. They may run, bite, buck, kick, or react unpredictably. Horses may also encounter natural hazards or collide with other objects, persons, or animals. Riders can also fall off of horses and injure themselves . . . .
>
> I am participating voluntarily in the sport of riding horses. I understand and am fully aware that riding and being around horses involves inherently dangerous risks of serious injury or death, and by participating I expressly assume all risks associated with my activities on the property . . . . I further agree to release and hold harmless Grace Farms MN, Inc. from any liability, responsibility or negligence for any claims, damages, or injuries caused by myself or my horse(s).

Shortly before camp began, the horse Mia typically rode was injured and could not be ridden. Mia instead chose to ride Capri. Mia received lessons under the supervision of respondent Rebecca Leatherdale to familiarize herself with Capri. All of these lessons took place in a fenced-in area. Daniel Messer stated in his deposition that he was aware that Capri had a tendency to run off and he would not have allowed Mia to ride Capri on a trail. However, appellants did not inform Leatherdale of any concerns or request that any limitations be placed on Mia's use of Capri during camp. After her lessons with

[1] Dressage is the "guiding of a horse through a series of complex maneuvers by slight movements of the rider's hands, legs, and weight." *The American Heritage Dictionary* 562 (3d ed. 1992).

Capri, Mia told her parents that she did not like riding Capri because she had difficulty controlling the horse and he could be fast at times.

On the third day of camp, Leatherdale took Mia and several other girls on a trail ride with their horses. Mia stated in her deposition that, before the trail ride, she told Leatherdale that she did not feel comfortable riding Capri on a trail and asked to switch to a more calm horse. Mia did not explain why she was uncomfortable riding Capri and Leatherdale did not ask, although Leatherdale had "seen him spook some" and knew that Capri liked to walk fast and be at the lead on trail rides. Leatherdale did not allow Mia to switch horses.

As the group left the camp's arena and began the trail ride, Capri had a fast walk and went to the front of the line. He began trotting, but Mia was able to get Capri back to a walk. Mia then asked Leatherdale if she could switch horses and ride the horse that Leatherdale was riding. Leatherdale said no and stated in her deposition that she did so because she knew Mia's parents would not want her to ride that horse. Mia again asked Leatherdale to switch horses and Mia stated that Leatherdale said no because Mia's saddle was uncomfortable. Mia also asked if someone could use a rope to lead Capri.[2] Mia stated that Leatherdale said no, but Leatherdale stated that she said it would be safer to ride the horse. Mia stated that she told Leatherdale she was nervous and scared to ride Capri. The trail ride continued, and Leatherdale told Mia to be careful taking Capri over some logs, which Mia accomplished. Another girl on the ride asked Leatherdale if the

[2] The record is unclear as to whether Mia asked to lead Capri herself or asked if another girl who was walking with the group could lead Capri.

group could trot, and Leatherdale told her no because Capri might want to go faster than a trot.

When the group turned around to return to the barn, Capri began to trot and then to gallop. Mia stated in her deposition that she tried to stop him by leaning back in her saddle and using stop techniques taught to her by Leatherdale, but neither worked. Capri continued galloping and came to a split in the path. Not knowing which was the correct path and fearing she would be lost from the group, Mia jumped from the horse. Mia fell to the ground and Capri stepped on Mia before taking off. Leatherdale found Mia, who stated she was in a lot of pain, although her only apparent injury was a small cut. Leatherdale called her husband to bring his jeep and transport Mia to the barn, and emergency services were called. Mia sustained significant injuries and underwent multiple surgeries, including the removal of her gallbladder.

Appellants filed a lawsuit claiming that respondents' negligence and carelessness caused Mia's injuries. Respondents moved for summary judgment, arguing that appellants primarily assumed the risk of horseback riding and released respondents from liability by signing an exculpatory agreement. The district court granted respondents summary judgment, concluding that (1) the release and agreement signed by appellants contained a valid exculpatory clause that protected respondents against appellants' claims of ordinary negligence; (2) primary assumption of risk applied, and respondents therefore had no duty to protect plaintiff because appellants knew of the risk, appreciated the magnitude of the risk, and voluntarily chose to take the risk; (3) in addition to claims of ordinary negligence, appellants sufficiently pleaded gross negligence by alleging that

respondents were careless; (4) genuine issues of material fact existed as to whether Leatherdale knew of Capri's tendency to take off and whether Leatherdale's decision to not allow Mia to switch horses constituted greater-than-ordinary negligence; (5) these issues of material fact did not affect the grant of summary judgment "because they do not affect the application of the assumption of the risk theory to this case." Appellants requested reconsideration, which the district court denied.

This appeal and cross appeal follows.

D E C I S I O N

I

In reviewing a district court's grant of summary judgment, this court examines whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The nonmoving party must present evidence that is "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). We review de novo whether a genuine issue of material fact exists and 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, 77 (Minn. 2002).

Appellants argue that the district court erred by concluding as a matter of law that primary assumption of risk applied when Mia was injured by a horse while participating

in a trail ride at respondent's horse camp. They assert that genuine issues of material fact exist as to two exceptions to the primary-assumption-of-risk doctrine, precluding summary judgment.

Primary assumption of risk applies when a party voluntarily enters a relationship in which the party assumes well-known and incidental risks. *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974). The defendant has no duty to protect against these risks, and if injury arises from such risk, a plaintiff's claim of negligence is barred. *Daly v. McFarland*, 812 N.W.2d 113, 119 (Minn. 2012). Though the primary-assumption-of-risk doctrine has limited application, it "commonly applies to participants and spectators of inherently dangerous sports." *Id.* at 120. Whether a party has primarily assumed a risk is generally a jury question, unless the evidence is conclusive. *Hollinbeck v. Downey*, 261 Minn. 481, 486, 113 N.W.2d 9, 13 (1962). Primary assumption of risk is a complete bar to a plaintiff's recovery, unless an exception applies. *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 148–49 (Minn. App. 2002).

The elements of primary assumption of the risk are whether a person had (1) knowledge of the risk, (2) an appreciation of the risk, and (3) a choice to avoid the risk that the person voluntarily chose to take. *Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 104–05 (Minn. App. 1991), *review denied* (Minn. Mar. 27, 1991). Appellants assert that two exceptions to the primary-assumption-of-risk doctrine made it inapplicable: (1) the duty to act with reasonable care as to risks not inherent to horse riding and (2) enlargement of the risk.

Duty to act with reasonable care

Appellants assert that primary assumption of the risk does not apply here because respondents had a continuous duty of care as to risks that went beyond appellants' knowledge and appreciation of the risks inherent in Mia's participation in respondents' horse camp. Appellants rely on *Iepson v. Noren*, 308 N.W.2d 812 (Minn. 1981), and *Bakhos v. Driver*, 275 N.W.2d 594 (Minn. 1979), for the proposition that respondents retained an obligation to act with due care when embarking on the trail ride, which, they argue, makes the primary-assumption-of-risk doctrine inapplicable.

In *Iepson*, a plaintiff riding a motor bike in the evening with its headlights off collided with the defendant driver of a truck who also was driving with his headlights off. *Iepson*, 308 N.W.2d at 814–15. Iepson stated that, before primary assumption of the risk applies, there must "be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct. It is not every deliberate encountering of a known danger which is reasonably to be interpreted as evidence of such consent." *Id.* (quoting W. Prosser, *Handbook of the Law of Torts* § 68 (4th ed. 1971)). Because the plaintiff did not consent "to relieve the [defendants] of their obligation to act with due care . . . (t)he continued existence of this duty makes the defense of primary assumption of risk inapplicable." *Id.* at 816 (quotation omitted). In *Bakhos*, appellant was injured when he fell from a tree while defendant was on the ground pulling on a rope attached to the limb that appellant was sawing. *Bakhos*, 275 N.W.2d at 595. *Bakhos* held that the appellant did not voluntarily choose to expose himself to the risk of the negligent actions of the respondent, which caused the fall. *Id.* "The fact that plaintiff had ascended the ladder to

saw the limb did not relieve defendant of his duty to exercise reasonable care in his handling of the rope." *Id.*

Appellants argue that, as in *Iepson* and *Bakhos*, although they voluntarily encountered risks inherent to horseback riding, respondents did not act with reasonable care when they exposed Mia to risks not inherent in horseback riding, specifically: failing to remove Mia from a horse that was known to spook easily and was behaving erratically—and that Mia asked twice to be removed from—and then disregarding her request to have the horse led by a rope. Therefore, they assert, primary assumption of the risk does not apply.

The district court distinguished *Iepson* and *Bakhos* and concluded that neither case applied because in *Iepson*, the defendant was in control of the truck, and in *Bakhos*, the defendant was in control of the rope, but that here, respondents were not in control of Capri. Respondents agree with the district court's reasoning, but they also contend that *Iepson* is inapposite because, as opposed to a motorbike fully controlled by the driver, Capri was an independent being, capable of taking his own action. And respondents assert that, unlike in *Bakhos*, appellants consented to the risk that Capri would act without warning because the release signed by Daniel Messer released respondents from claims of negligence and stated that "[h]orses are unpredictable animals and are easily frightened . . . [t]hey may run, bite, buck, kick, or react unpredictably." But respondents provide no authority for the proposition that signing a release absolves them of the duty to exercise reasonable care regarding risks not inherent to horseback riding. Thus, this exception to the primary-assumption-of-risk doctrine applies if there was evidence of risks to Mia that

went beyond the inherent risks contemplated by appellants when the release was signed and when appellants agreed to allow Mia to participate in respondents' horse camp.

A plaintiff assumes only the risks of which he had actual knowledge. *Wegscheider v. Plastics, Inc.*, 289 N.W.2d 167, 170 (Minn. 1980). In this case, appellants assert they knew only that Mia would be riding inside an arena, participating in dressage, and not on a trail. Additionally, negligent supervision is not considered an inherent risk of a sport. *See Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn. 1986) (stating negligent maintenance and supervision of skating rink not an inherent risk of roller skating). Because the evidence is viewed in the light most favorable to appellants, and whether a party assumed the risk is generally a question for the jury, we conclude that whether the risks Mia encountered on the trail ride were inherent in horseback riding presented a question of material fact for the jury.

Enlarged risk

Appellants also argue that primary assumption of the risk does not apply because respondents enlarged the risk. An enlarged risk is a risk in addition to the risk inherent in the activity in question. *Schneider*, 654 N.W.2d at 152. Appellants assert that respondents enlarged the risk by (1) taking Mia on a trail ride, outside the dressage area, and (2) not providing a safer option for Mia after she stated that she was uncomfortable riding Capri. Although the district court did not address appellants' argument that respondents enlarged the risk, we conclude that genuine issues of material fact also exist as to the enlarged-risk exception.

We initially inquire whether the trail ride presented a risk beyond the risk inherent to riding horses at respondents' horse camp. Daniel Messer testified that he did not know Mia would be going on a trail ride and would not have agreed to a trail ride, given what he knew about Capri's demeanor. Mia also stated that she intended only to participate in dressage-related riding while at the horse camp. Respondents counter that the release signed by appellants included language broad enough to encompass risks encountered on the trail ride because it did not limit the assumption of risk to specific activities on respondents' farm. Given the conflicting evidence, and taking the evidence in the light most favorable to appellants, a genuine issue of material fact exists regarding whether the trail ride enlarged the inherent risk.

We additionally consider whether Leatherdale's conduct while on the trail ride enlarged the risk. Appellants assert that Leatherdale enlarged the risk to Mia by failing to allow Mia to change horses or have Capri led by a rope when Mia feared for her safety and expressed concern that she could not control Capri. Respondents argue that Leatherdale's actions were intended to reduce the risk to Mia. Leatherdale stated that it would be safer for Mia to ride Capri than leading him by a rope, and Leatherdale did not allow the group to trot so that Capri would not be inclined to go any faster. Leatherdale also provided Mia with guidance and instruction while on the trail. Again, taking the evidence in the light most favorable to appellants, a reasonable person could draw differing conclusions regarding whether Leatherdale's conduct enlarged the risk to Mia. Therefore, the district court erred in granting summary judgment on the basis that primary assumption of the risk applied to bar appellants' claims.

II

Appellants argue that the district court properly identified genuine issues of material fact in its greater-than-ordinary negligence analysis, but erred by concluding that the issues of material fact did not preclude summary judgment and by impermissibly weighing evidence. Respondents argue that the district court erred as a matter of law by applying the wrong standard in its analysis of whether greater-than-ordinary negligence existed.

The district court determined that the release agreement signed by appellants released respondents from ordinary negligence but not greater-than-ordinary or gross negligence. The district court concluded that genuine issues of material fact exist as to whether Leatherdale knew of Capri's tendency to take off and whether Leatherdale's decision to not allow Mia to switch horses constituted greater-than-ordinary negligence. But the district court also concluded that "these issues of material fact do not affect the granting of summary judgment because they do not affect the application of the assumption of the risk theory to this case." We agree with the district court that genuine issues of material fact exist regarding Leatherdale's knowledge of Capri's temperament and her decision to not let Mia change horses, and we affirm those conclusions. But we conclude that the district court erred by granting summary judgment on the applicability of greater-than-ordinary negligence, and we reverse the grant of summary judgment on this basis.

We agree with respondents that the proper standard for determining whether the district court erred in its greater-than-ordinary negligence determination is the standard of

willful or wanton conduct, otherwise known as the discovered-peril standard. "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). Therefore, addressing whether Leatherdale's conduct rose to the level of wanton and willful conduct requires a determination of when Mia was in peril.

Respondents argue that Mia was in peril only after the group was returning home, Capri encountered the logs, and Capri began to gallop.[3] Respondents assert that, at the point Capri began galloping, there is no evidence that Leatherdale could have done anything to prevent Mia's injury. Appellants, however, argue that Mia was in peril earlier, when she notified Leatherdale that she was scared to ride Capri and asked twice while on the ride to switch horses, in addition to asking if someone could lead Capri by a rope.

In support of their argument, respondents assert that Leatherdale had no knowledge that Capri posed a greater danger than any other horse, respondents did not choose Capri for Mia, and the release signed by appellants acknowledged the unpredictability of horses. However, both the choice of horse and the release language are irrelevant to determining at what point Mia was in peril. Respondents also argue that, although Leatherdale stated in her deposition that Capri was prone to spooking, she was speaking about breeds in general and not specifically about Capri. But we have reviewed

[3] Respondents assert that Capri's gallop was tied to encountering logs in the horse's path, but Leatherdale attributed the horse's gallop to knowing the group had turned around to go home.

Leatherdale's statements, and she spoke specifically to Capri's tendency to spook when she stated that "I've seen him spook in the arena, which usually means like cantering or trotting." Respondents also assert that, prior to the day of the incident, neither Mia nor her parents expressed concerns regarding Mia's use of Capri. But this assertion ignores the multiple times that Mia expressed concerns about riding Capri on the day of the incident when she stated that she was either uncomfortable or scared or asked to switch horses. Therefore, reasonable minds could draw different conclusions regarding when Mia was in peril and whether respondents' duty to exercise ordinary care arose under the discovered-peril standard. *See DLH, Inc.*, 566 N.W.2d at 71 (stating that nonmoving party at summary judgment must present evidence sufficient for reasonable persons to draw different conclusions).

Respondents argue, in the alternative, that even if Leatherdale knew of Capri's tendency to take off on trail rides, this knowledge constitutes honest misjudgment, which does not rise to the level of willful and wanton conduct. *See Bryant v. N. Pac. Ry. Co.*, 221 Minn. 577, 590, 23 N.W.2d 174, 181 (Minn. 1946) (stating that "[w]illful and wanton negligence cannot be predicated upon honest misjudgment"). Respondents point to evidence that the farm had a limited number of horses on the day Mia asked to switch horses and the extensive training Leatherdale provided Mia to support their contention that Leatherdale's conduct amounted to no more than a miscalculation. However, Leatherdale's knowledge of peril to Mia encompassed more than what she knew about Capri's tendency to take off and also included, as the district court concluded, whether

Leatherdale committed more than ordinary negligence when she did not allow Mia to switch horses.

Next, appellants argue that the district court erred by granting summary judgment on the issue of whether respondents committed more-than-ordinary negligence despite finding that genuine issues of material fact exist. Appellants assert that conduct that constitutes more-than-ordinary negligence, which negates application of contractual assumption of the risk, also negates application of common law primary assumption of risk. Our caselaw supports the contention that primary assumption of risk deals only with ordinary negligence. *See Beehner*, 636 N.W.2d at 829 ("In a dispute over the applicability of an exculpatory clause, summary judgment is appropriate only when it is uncontested that the party benefited by the exculpatory clause has committed no greater-than-ordinary negligence."); *see also Daly*, 812 N.W.2d at 119 (stating that primary assumption of risk addresses whether a defendant was negligent and, if primary of assumption of risk applies, negates a defendant's negligence). Therefore, the district court erred when it concluded that primary assumption of the risk was applicable despite its simultaneous conclusion that there are genuine issues of material fact on whether respondents' conduct exceeded ordinary negligence. Accordingly, we reverse the district court's grant of summary judgment on this basis.

III

Respondents, on cross-appeal, claim that the district court erred by determining that appellants properly pleaded claims of greater-than-ordinary negligence. Minn. R. Civ. P. 8.01 requires that a complaint "contain a short and plain statement of the claim

showing that the pleader is entitled to relief." This standard is not rigid but should put the defendant on notice of the claims against him. *L.K. v. Gregg*, 425 N.W.2d 813, 819 (Minn. 1988). Pleadings are to be liberally and broadly construed. *Midwest Family Mut. Ins. Co. v. Schmitt*, 651 N.W.2d 843, 846 (Minn. App. 2002).

Appellants' complaint stated that Mia sustained severe injuries "as a direct and proximate result of the negligence and carelessness of the" respondents and that appellants "incurred medical expenses as a direct and proximate result of the negligence and carelessness of" respondents. The district court determined that respondents were given adequate notice to a claim beyond ordinary negligence because appellants alleged "carelessness" and, although the release waived negligence, it did not waive greater-than-ordinary or gross negligence.

Respondents argue that appellants' use of the word "carelessness" in their complaint did not put respondents on notice of a claim for greater-than-ordinary negligence. Respondents rely primarily on an unpublished case, *Resnick v. Life Time Fitness, Inc.*, in which this court stated that pleading "careless and negligent acts . . . plainly asserts only a claim for ordinary negligence." No. A09-1372, 2010 WL 2265869, at *4 (Minn. App. June 8, 2010).[4] Appellants argue that *Resnick* is procedurally distinguishable as a judgment on the pleadings.

We conclude that the mere use of the word "carelessness" in appellants' complaint did not put respondents on notice of a greater-than-ordinary negligence claim, even when

[4] Although unpublished opinions do not constitute precedent, they may have persuasive value. *State v. Zais*, 790 N.W.2d 853, 861 (Minn. App. 2010), *aff'd*, 805 N.W.2d 32 (Minn. 2011).

appellants' complaint is liberally construed. *Cf. State v. Hayes*, 244 Minn. 296, 300, 70 N.W.2d 110, 113 (1955) (concluding that "careless" as used in statute "must be construed in accordance with its recognized meaning . . . as . . . synonymous with ordinary negligence"). However, as appellants note, respondents must assert that any such error caused them prejudice to warrant reversal. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) ("Although error may exist, unless the error is prejudicial, no grounds exist for reversal."). Respondents do not assert that they were prejudiced by appellants' pleading and instead ask this court to conclude that the district court erred by determining that appellants satisfied notice-pleading standards and dismiss as a matter of law appellants' claims related to greater-than-ordinary negligence. Respondents provide no authority for such a determination. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971) (stating that assignment of error not supported by authority is waived). Because respondents did not assert prejudice resulting from the district court's error in determining that appellants properly pleaded greater-than-ordinary negligence, we conclude that any error was harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Affirmed in part, reversed in part, and remanded.