STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0322

Amanda M. Doub,
Appellant,

vs.

Life Time Fitness, Inc.,
Respondent,

Muska Electric Company,
Defendant.

Filed October 2, 2017
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-16-3001

Andrew J. Rorvig, Aaron S. Eken, McEllistrem, Fargione, Landy, Rorvig & Eken, P.A., Minneapolis, Minnesota (for appellant)

Brian A. Wood, William L. Davidson, João C.J.G. de Medeiros, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Smith, Tracy M., Judge.

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

PETERSON, Judge

In this appeal from the dismissal of her personal-injury claims against respondent, appellant argues that the district court erred by concluding that, in the context of an

exculpatory clause, a claim for gross negligence is not an independent tort action, distinct from a claim for ordinary negligence. We affirm.

FACTS

Appellant Amanda Doub was suddenly and unexpectedly burned by steam when she entered a steam room in a fitness center owned by respondent Life Time Fitness, Inc. Doub had previously used the steam room numerous times without any problems. A warning sign outside of the steam room did not warn of the potential for burns.

When Doub joined the fitness center, she signed a "Member Usage Agreement," which contained the following liability waiver:

> **3. <u>WAIVER OF LIABILITY.</u>** On behalf of myself . . ., I hereby voluntarily and forever **release and discharge Life Time from,** covenant and **agree not to sue Life Time for,** and **waive, any claims,** demands, actions, causes of action, debts, damages, losses, costs, fees, expenses or any other alleged liabilities or obligations of any kind or nature, whether known or unknown (collectively , "Claims") **for any Injuries** to me . . . in the Use of Life Time Premises and Services **which arise out of, result from, or are caused by any NEGLIGENCE OF LIFE TIME** [or] me . . . .
>
> **A. Negligence Claims.** I understand that Negligence claims include but are not limited to Life Time's (1) negligent design, construction (including renovation or alteration), repair, maintenance, operation, supervision, monitoring, or provision of Life Time Premises and Services; (2) negligent failure to warn of or remove a hazardous, unsafe, dangerous or defective condition; (3) negligent failure to provide or keep premises in a reasonably safe condition; (4) negligent provision or failure to provide emergency care; (5) negligent provision of services; and (6) negligent hiring, selection, training, instruction, certification, supervision or retention of employees, independent contractors or volunteers; or (7) other negligent act(s) or omission(s).

(Emphasis in original.)

Doub brought this action against Life Time and defendant Muska Electric Company asserting claims for negligence and gross negligence.[1] In her amended complaint, Doub alleged that "Life Time had a duty to use reasonable care to inspect and reasonably maintain its premises and to warn entrants to protect entrants from unreasonable risk of harm" and that "Life Time knew or should have known that the premises contained a serious hazard which could not have been discovered by entrants through reasonable observation." Life Time moved to dismiss the amended complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. Life Time argued that because the exculpatory clause in the member usage agreement is limited to claims for negligence, it is enforceable, and because Minnesota tort law does not distinguish between degrees of negligence, Doub's claims fall within the express terms of the exculpatory clause. Life Time also argued that Doub voluntarily assumed the risk of encountering hot steam by choosing to enter the steam room. The district court granted Life Time's motion to dismiss on the ground that, in the context of enforcing an exculpatory clause, Minnesota law does not recognize a gross-negligence claim as a separate, independent claim, distinct from an ordinary-negligence claim, and Doub could not overcome the valid exculpatory clause by pleading a claim for gross negligence. The district court did not address Life Time's assumption-of-the-risk argument.

[1] Doub claimed that improper electrical wiring caused the increased temperature and her injuries were the direct and proximate result of Muska Electric's careless, negligent, and grossly negligent maintenance and inspection of the steam room.

Doub appealed from the judgment of dismissal, and this court dismissed the appeal because Doub's claims against Muska Electric Company were still pending. *Doub v. Life Time Fitness, Inc.*, No. A16-1324 (Minn. App. Aug. 26, 2016) (order). After settling her claims against Muska Electric Company, Doub filed this appeal. She challenges only the dismissal of her gross-negligence claim.

D E C I S I O N

A defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e).

> In reviewing whether a complaint states a claim, we consider as true those facts alleged in the complaint, construing reasonable inferences in favor of the nonmoving party. A district court may dismiss under rule 12.02 if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded. We are not bound by legal conclusions stated in a complaint.

Scheffler v. City of Anoka, 890 N.W.2d 437, 449 (Minn. App. 2017) (quotations and citation omitted), *review denied* (Minn. Apr. 26, 2017). "In deciding a motion to dismiss, the court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged." *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 180 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Apr. 25, 2012).[2]

[2] The facts about Doub using the steam room numerous times and about the warning sign were stated in Doub's affidavit, but the district court did not rely on those facts in reaching its decision. *See Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) ("When matters outside the pleadings are presented to a court considering a motion to dismiss, and those external matters are not excluded by the court when it makes its determination, the motion to dismiss shall be treated as one for summary judgment. Minn. R. Civ. P. 12.02.").

Doub argues that the district court erred in concluding that the exculpatory clause in the member usage agreement bars her claim for gross negligence. Citing *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn. 1982), Doub contends that "gross negligence is something much greater [than ordinary negligence] and therefore outside the constraints of an exculpatory clause, which can only waive ordinary negligence." The exculpatory clause at issue in *Schlobohm* was part of a membership contract for a health spa, and it released the defendant health spa from claims for "all acts of active or passive negligence." *Id*. at 921-22. The plaintiff was injured while lifting weights at the spa, and she brought suit, alleging that the spa was negligent.[3] *Id*. at 922. The spa moved for summary judgment on the sole ground that the exculpatory clause relieved it from liability. *Id.* The district court denied the motion based on its conclusions that the contract was a contract of adhesion and the exculpatory clause was void as against public policy.[4] *Id.*

On appeal, the supreme court acknowledged the principle that, if an exculpatory clause "is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." *Id*. at 923. The supreme court then noted that the exculpatory clause in the plaintiff's membership contract "specifically purports to exonerate [the spa] from liability for acts of negligence and negligence only" and that the plaintiffs "make no claim that [the spa] or its employees acted willfully, intentionally or wantonly." *Id.* The supreme court held that the exculpatory

[3] The injured plaintiff's husband also asserted a claim for loss of consortium. 326 N.W.2d at 922.

[4] Doub does not argue that the exculpatory clause in the member usage agreement contravenes public policy.

clause, "being unambiguous and limited to a release of liability arising out of negligence only" was enforceable. *Id*. The supreme court reversed and remanded for entry of judgment in favor of the spa on its motion for summary judgment. *Id*. at 926.

Unlike the plaintiff in *Schlobohm*, who alleged only that the spa was negligent, Doub asserted claims for negligence and gross negligence. Doub argues that, under existing law, an exculpatory clause may provide a defense against a claim for negligence but not against a claim for gross negligence. The rule established in *Schlobohm*, however, states that an exculpatory clause will not be enforced if it purports to release the benefited party from liability for *intentional, willful or wanton acts*; it does not state that a release of claims for gross negligence is unenforceable.

Doub contends that, in *Beehner v. Cragun Corp.*, 636 N.W.2d 821 (Minn. App. 2001), *review denied* (Minn. Feb. 28, 2002), this court recognized that a gross-negligence claim exists in the context of an exculpatory clause.[5] But, although *Beehner* involved an exculpatory clause and an allegation of gross negligence, this court did not address whether Minnesota recognizes a cause of action for gross negligence in the context of an exculpatory clause.

[5] Doub also cites an unpublished decision of this court. *Hanson v. Bieloh*, 2007 WL 1893315, at *1-3 (Minn. App. 2007) (following *Beehner* and affirming summary judgment for respondents when release did not apply to claims for gross negligence and "appellant failed to present evidence that respondents' conduct was willful, wanton, or grossly negligent").

In *Beehner*, the plaintiff purchased a ticket to go on a guided horseback ride and signed a "Horse Rental Agreement and Liability Release Form for Individuals," which contained the following exculpatory clause:

> In consideration of THIS STABLE allowing my participation in this activity, under the terms set forth herein, I . . . do agree to hold harmless, release and discharge THIS STABLE . . . from all claims, demands, causes of action and legal liability, whether the same be known or unknown, anticipated or unanticipated, due to THIS STABLE's and/or ITS ASSOCIATES' ordinary negligence; and I do further agree that *except in the event of THIS STABLE's gross negligence and willful and wanton misconduct, I shall not bring any claims, demands, legal actions and causes of action, against THIS STABLE and ITS ASSOCIATES . . . .*

Id. at 825 (emphasis added).

The plaintiff was injured during the horseback ride when a dog frightened her horse, and she sued, alleging negligence in the operation of the trail ride. *Id*. at 826. Following discovery, the stable moved for summary judgment, arguing that the exculpatory agreement released it from any liability arising from its alleged negligence related to the operation of the trail ride. *Id*. The district court found that the exculpatory clause was enforceable and that no issues of material fact existed as to the stable's alleged gross negligence and granted summary judgment in favor of the stable. *Id*.

On appeal, this court affirmed the district court's finding that the exculpatory clause was enforceable as consistent with public policy. *Id*. at 828. But this court reversed the summary judgment in favor of the stable and explained:

> Given [the] facts, viewed in the light most favorable to appellant, a jury could reasonably find that [the stable]

> committed greater-than-ordinary negligence by allowing the dog to accompany the horses.
>
> Because there is an issue of material fact concerning whether [the stable's] failure to restrain the dog constituted greater-than-ordinary negligence and whether, therefore, this conduct was within the scope of the exculpatory clause, the district court erred in granting summary judgment on this issue.

Id. at 830.

This court did not decide in *Beehner* that an exculpatory clause may not provide a defense against a claim for gross negligence.[6] To the contrary, this court cited *Schlobohm* for the principle that an exculpatory clause will be unenforceable if it "purports to release a party from liability for intentional, willful, or wanton acts." *Id.* at 827. Then, consistent with this principle, this court allowed the gross-negligence claim to proceed, not because an exculpatory clause that releases gross-negligence claims would not be enforceable, but because the exculpatory clause at issue in *Beehner* did not purport to release claims for gross negligence. If the fact-finder found that the stable's conduct constituted gross negligence or willful and wanton misconduct, the exculpatory clause would not bar the plaintiff's action.

Furthermore, the Minnesota Supreme Court long ago stated that "'[t]he doctrine that there are three degrees of negligence—slight, ordinary, and gross—does not prevail in this

[6] Unlike the exculpatory clause in *Schlobohm*, which released claims for "all acts of active or passive negligence," the exculpatory clause in *Beehner* released only claims due to "ordinary negligence." Because the exculpatory clause in *Beehner* did not purport to release claims for gross negligence, this court could not have held in *Beehner* that an exculpatory clause that releases claims for gross negligence is unenforceable. This issue simply did not arise under the facts in *Beehner*.

state.'" *Peet v. Roth Hotel Co.*, 191 Minn. 151, 156, 253 N.W. 546, 548 (1934) (quotation omitted). In *Peet*, a bailment case, the supreme court explained:

> It is evident that the so-called distinctions between slight, ordinary, and gross negligence over which courts have perhaps somewhat quibbled for a hundred years can furnish no assistance.
>
> Defendant's liability if any is for negligence. In that field generally, the legal norm is a care commensurate to the hazard, i.e., the amount and kind of care that would be exercised by an ordinarily prudent person in the same or similar circumstances. The character and amount of risk go far, either to decrease or increase the degree of care required. The value of the property, its attractiveness to light fingered gentry, and the ease or difficulty of its theft, have much to say with triers of fact in determining whether there has been exercised a degree of care commensurate to the risk, whether the bailment be gratuitous or otherwise. However unsatisfactory it may be, until legal acumen has developed and formulated a more satisfactory criterion, that of ordinary care should be followed in every case without regard to former distinctions between slight, ordinary, and great care.

Id. at 155-56, 253 N.W. at 548 (quotation omitted).

Minnesota caselaw recognizes that there is a difference between ordinary negligence and gross negligence, and the term "gross negligence" is frequently used in Minnesota.[7] *See State v. Bolsinger*, 221 Minn. 154, 159, 21 N.W.2d 480, 485 (1946) (stating that "[g]ross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple

[7] The exculpatory clause in *Beehner* explicitly drew a distinction between ordinary negligence and gross negligence, and this court stated in *Beehner* that "[g]ross negligence is 'very great negligence or absence of even slight care, but [it is] not equivalent to wanton and willful' conduct." 636 N.W.2d at 829 (quoting *Ackerman v. Am. Family Mut. Ins. Co.*, 435 N.W.2d 835, 840 (Minn. App. 1989)).

inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care." (quotation omitted)), *overruled on other grounds by State v. Engle*, 743 N.W.2d 592 (Minn. 2008). But a claim for gross negligence is not recognized as a distinct cause of action, separate from a cause of action for ordinary negligence. Instead, a cause of action for negligence is recognized, and what constitutes ordinary care is determined by the circumstances.

Also, Minnesota recognizes different degrees of negligence when directed to by statute. In *Bolsinger*, the supreme court stated: "Notwithstanding the rule in civil cases that degrees of negligence are not recognized in this state, it is our plain duty to recognize and give effect to degrees of negligence where a statute adopts them as a basis for fixing criminal responsibility." 221 Minn. at 165, 21 N.W.2d at 488. But because no statute is applicable to this case, we agree with the district court that Doub may not "side step the exculpatory clause by alleging something greater than 'ordinary negligence,'" and we affirm the dismissal of Doub's complaint for failure to state a claim upon which relief can be granted.[8]

Affirmed.

[8] Because we are affirming the dismissal under Minn. R. Civ. P. 12.02(e), we will not address Life Time's alternative argument that Doub voluntarily assumed the risk of encountering hot steam.