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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2066**

East View Information Services, Inc.,
Appellant,

vs.

Xigent Solutions, LLC,
Respondent.

**Filed August 20, 2018
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CV-17-7752

Kevin R. Coan, Kyle A. Eidsness, Hinshaw & Culbertson, L.L.P., Minneapolis, Minnesota
(for appellant)

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respondent)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges the district court's dismissal of its breach-of-contract and negligence claims. We affirm.

FACTS

Appellant East View Information Services, Inc. (East View) is a Minnesota corporation that provides native and translated foreign-information products and services to various organizations and businesses. Respondent Xigent Solutions (Xigent) is a Minnesota limited liability company that provides information technology (IT) products and support services to businesses.

In February 2014, the parties signed a contract in which Xigent agreed to provide East View with ad hoc technical consultation and support services upon East View's request. Thereafter, Xigent performed consulting services consistent with the terms of the contract.

Section 4.2 of the contract states that East View is responsible for “[p]erform[ing] backups of all systems affected by services performed in this [contract].” The section also includes an exculpatory clause stating that “Xigent is not responsible for lost data.”

In 2017, East View filed suit against Xigent for breach of contract and negligence, alleging that Xigent permanently deleted a substantial portion of East View's critical data while creating a complete backup of East View's “Production Storage Area Network” as requested. The district court granted Xigent's motion to dismiss both claims under Minn. R. Civ. P. 12.02(e). This appeal follows.

D E C I S I O N

Under Minn. R. Civ. P. 12.02(e), a pleading may be dismissed for “failure to state a claim upon which relief can be granted.” Whether a complaint sets forth a legally sufficient claim for relief is reviewed de novo, and the reviewing court must “accept the facts alleged

in the complaint as true and construe all reasonable inferences in favor of the nonmoving party.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). “A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Id.* at 603.

I. The district court did not err in dismissing the breach-of-contract claim.

East View argues that the district court erred in dismissing the breach-of-contract claim because the contract’s exculpatory clause is not valid and therefore Xigent is responsible for East View’s lost data. We disagree.

An exculpatory clause may be unenforceable if (1) it is ambiguous in scope; (2) it purports to release a party from liability for intentional, willful, or wanton acts; (3) a disparity in bargaining power existed between the parties to the contract; or (4) the exculpated party offers or provides either a public or an essential service. *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827 (Minn. App. 2001), *review denied* (Minn. Feb. 28, 2002).

East View claims that the exculpatory clause is not valid because it is ambiguous and purports to release a party from liability for intentional, willful, or wanton acts.¹ We address each issue in turn.

¹ East View also alleges that the exculpatory clause violates public policy. “An assignment of error on mere assertion, unsupported by argument or authority, is forfeited and need not be considered unless prejudicial error is obvious on mere inspection.” *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017), *review denied* (Minn. Apr. 26, 2017). Because East View fails to make a legal argument or cite to any authority, East View forfeited this argument.

A. The exculpatory clause is not ambiguous.

Whether a contract provision is ambiguous is a question of law that we review de novo. *Yang v. Voyageur Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). “An exculpatory clause is ambiguous when it is susceptible to more than one reasonable interpretation.” *Beehner*, 636 N.W.2d at 827.

East View argues that the exculpatory clause can be read to have conditional language, such as “Xigent is not responsible for lost data *if East View does not hire Xigent to back up its data*,” or “Xigent is not responsible for lost data *if data is lost on a system that is affected by services performed in the contract*.” (Emphasis added). But the contract’s exculpatory clause contains no such conditional language. And we cannot create or add exceptions to the contract or rewrite it on behalf of either of the contracting parties, which is essentially what East View asks us to do. *See Telex Corp. v. Data Products Corp.*, 271 Minn. 288, 295, 135 N.W.2d 681, 687 (1965).

East View also argues that the exculpatory clause is ambiguous because it is located in section 4.2 of the contract, which delineates East View’s responsibilities, rather than section 4.1, which delineates Xigent’s responsibilities. We do not agree, as this court reads contract terms “in the context of the entire contract.” *Employers Mut. Liab. Ins. Co. v. Eagles Lodge*, 282 Minn. 477, 477, 165 N.W.2d 554, 555 (1969). Placing the exculpatory clause in another location within the contract does not create a different interpretation of the clause that is reasonable, as it would be read in the same manner regardless of its location when read in the context of the entire contract. Moreover, the exculpatory clause

logically follows the clause providing that East View is responsible for backing up its data systems.

Finally, East View relies on the district court's ruling² to argue that the exculpatory clause's use of the term "lost data" is ambiguous because it can mean either "data that is temporarily misplaced" or "data which is deleted or permanently unrecoverable." This argument lacks merit.

In determining whether a contract is ambiguous, "a court must give the contract language its plain and ordinary meaning." *Current Tech Concepts, Inc. v. Irie Enters. Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). Courts may look to dictionaries to determine the plain and ordinary meaning of a contract term. *See e.g., Bank Midwest, Minn., Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 180 (Minn. 2004). The American Heritage Dictionary defines "lost" as "[n]o longer in the possession, care, or control of someone or something." *The American Heritage Dictionary of the English Language* 1034 (4th ed. 2006). Black's Law Dictionary defines it as property "beyond the possession and custody of its owner and not locatable by diligent search." *Black's Law Dictionary* 1089 (10th ed. 2014). In both definitions, the temporary or permanent nature of the loss is not part of the plain and ordinary meaning of the word. Rather, it is a difference without a distinction. As such, East View's two proposed interpretations are not reasonable.

² In its order dismissing East View's breach-of-contract and negligence claims, the district court determined that the term "lost data" is unambiguous, noting that "[a] quick Internet search for this term reveals an almost uniform set of definitions, all of which include data that is temporarily misplaced and data which is deleted or permanently unrecoverable." The district court's ruling does not support East View's position.

We conclude that neither the exculpatory clause nor the term “lost data” is ambiguous.

B. The exculpatory clause does not purport to release Xigent from liability for willful, wanton, or intentional conduct.

East View asserts that the exculpatory clause is not valid because it purports to release Xigent from liability for willful, wanton, or intentional conduct. We are not persuaded.

An exculpatory clause cannot release a party from liability for intentional, willful, or wanton acts, *Beehner* 636 N.W.2d at 827, but a clause that is broad enough to cover the negligence of the benefitted party is enforceable. *Otis Elevator Co. v. Don Stodola’s Well Drilling Co.*, 372 N.W.2d 77, 78 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). And an exculpatory clause need not explicitly refer to “negligence.” *Id.* In *Otis Elevator*, this court held that an exculpatory clause that purported to release a party from responsibility for “damage to property caused by seller’s act or omission during the performance of the work,” but did not use the word negligence, was enforceable. *Id.*

The exculpatory clause here is similar to the clause in *Otis Elevator* and is broad enough to cover lost data caused by Xigent’s alleged negligence and is therefore enforceable. Because the exculpatory clause is valid and enforceable, Xigent is not liable for East View’s lost data, and the district court did not err in dismissing the breach-of-contract claim.

II. The district court did not err in dismissing the negligence claim.

Appellant contends that the district court erred by dismissing East View's negligence claim. This argument lacks merit.

The elements of negligence are: "(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). To prevail on a negligence claim brought along with a breach-of-contract claim, an appellant must demonstrate a duty *independent* of the duty established by contract. *D & A Dev. Co. v. Butler*, 357 N.W.2d 156, 158 (Minn. App. 1984); *see also Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 584 (Minn. 2012) (providing that "when a contract provides the only source of duties between the parties, Minnesota law does not permit the breach of those duties to support a cause of action in negligence." (quotation omitted)).

In setting forth its cause of action for negligence, East View alleged that Xigent "had a duty to use reasonable care at all times while at [East View]'s place of business and when accessing [East View]'s electronic devices, backup servers, network, and electronically stored information." And it alleged that "[Xigent] also had a duty to hire and train competent IT professionals, and supervise its employees and contractors to ensure they were meeting industry standards."

As the district court properly found and the record reveals, these duties were established by the contract, and East View failed to plead Xigent's extra-contractual duty. Although East View claims that discovery might reveal that Xigent's misconduct occurred outside of the contract's scope, this court is not permitted to go outside of the pleadings on

a motion to dismiss for failure to state a claim. *N. States Power Co. v. Franklin*, 265 Minn. 391, 396, 122 N.W.2d 26, 30 (1963). Therefore, the district court did not err in dismissing East View's negligence claim.

Affirmed.