In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

DOUGLAS E. FERBET,	)	No. ED108495
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	18SL-CC00050
	)	
HIDDEN VALLEY GOLF AND SKI,	)	
INC. and PEAK RESORTS, INC.,	)	Honorable Mary Elizabeth Ott
	)	
Respondents.	)	Filed: December 15, 2020

James M. Dowd, P.J., Gary M. Gaertner, Jr., J., and Robin Ransom, J.

Introduction

Appellant Douglas Ferbet's recreational outing with his family on January 25, 2013 to Respondents' snow tubing hill in Eureka, Missouri ended abruptly when as he slid down the hill seated on a large rubber inner tube, his dangling right foot engaged with a crevice in the sliding surface of the slippery slope breaking his leg in two places. Now, Ferbet appeals the trial court's summary judgment entered in favor of Respondents Hidden Valley and Peak Resorts (Hidden Valley) on Ferbet's negligence claim in which he alleged that his injuries were caused by Hidden Valley's negligent maintenance of the tubing hill. Hidden Valley sought summary judgment based on release-of-liability language in an agreement Hidden Valley required Ferbet to sign before selling snow tubing tickets to him and his family just before they headed to the hill.

The trial court found the agreement enforceable and therefore that Ferbet had released Hidden Valley from his negligence claim based on the document's references both to specific risks involved in snow tubing and that Ferbet was releasing Hidden Valley from liability for injuries including those caused by Hidden Valley's own negligence.

We affirm the judgment, but our legal rationale is somewhat different than the trial court's. We agree with the trial court that while exculpatory clauses like the one here that purport to release a party from its own future negligence are disfavored, they are not prohibited by Missouri public policy, and to the extent Ferbet has adequately pled a negligence claim, the language of this agreement is sufficiently specific to encompass Ferbet's claim and, importantly, it also clearly and conspicuously states that even claims resulting from Hidden Valley's *negligence* are released. We also affirm because to the extent that the risk Ferbet claims caused his injury was a known and understandable *inherent* risk of snow tubing for which Hidden Valley owed Ferbet no duty, his claim is without merit under the doctrine of assumption of the risk.

Background

Hidden Valley's snow tubing operation, located on a hillside adjacent to its ski resort, consists of a series of parallel and adjacent lanes descending down the hill. Customers slide down the lanes while perched on rubber inner tubes provided to them by Hidden Valley. Hidden Valley maintains the surface of the lanes covered in snow and ice and separates the lanes from each other by raised rows of packed snow and ice.

At all relevant times, customers, in order to be permitted to buy tickets, were required to read and sign the following document, which we reproduce *verbatim* here, purporting to identify certain general and specific injury risks posed by snow tubing. The document also contains

language that purports to release Hidden Valley from liability for injuries sustained while snow tubing including for claims arising from Hidden Valley's own negligence:

POLAR PLUNGE SNOW TUBING
HIDDEN VALLEY SKI-TUBE-RIDE AREA, WILDWOOD, MISSOURI
ACKNOWLEDGMENT OF RISK AND AGREEMENT NOT TO SUE
THIS IS A CONTRACT! * * * * * * * * * * PLEASE READ!

1. I understand and acknowledge that snow tubing is a dangerous, risky sport and that there are inherent and other risks associated with the sport and that all of these risks can cause serious and even fatal injuries.

2. I understand that part of the thrill, excitement and risks of snow tubing is that the snow tubes all end up in a common, run-out area at various times and speeds and that [sic] is my responsibility to try to avoid hitting another snow tuber, and it is also my responsibility to try to avoid being hit by another snow tuber, but that notwithstanding these efforts by myself and other snow tubers, there is a risk of collisions.

3. I acknowledge that the risks of snow tubing include, but are not limited to, the following:

    - Variations in the steepness and configuration of the snow tubing chutes and run-out area;
    - Variations in the surface upon which snow tubing is conducted, which can vary from wet, slushy conditions to hard packed, icy conditions and everything in between;
    - Fence and/or barriers at or along portions of the snow tubing area, the absence of such fence and/or barriers and the inability of fences and/or barriers to prevent or reduce injury;
    - Changes in the speed at which snow tubers travel depending on surface conditions, the weight of snow tubers and the inter-linking of snow tubers together to go down the snow tubes runs;
    - The chance that a patron can fall out, be thrown out or otherwise leave the snow tube;
    - The chance that a snow tube can go from one run to another run, regardless of whether or not there is a barrier between runs, and the chance that a snow tube can go beyond the run-out area;
    - The chance that a snow tube can go up the run-out hill and then slide in the general run-out area;
    - Collisions in the run-out area and other locations of the snow tubing facility, with collisions happening between snow tubes, between a snow tube and another patron, between a snow tube and a snow tubing facility attendant, between a snow tubing patron who may or may not be in or on a snow tube at the time of the collision and other sorts of collisions; collisions with fixed

objects, obstacles or structures located within or outside of the snow tube facility;

- The use of the snow tubing carpet lift or tow, including falling out of a tube, slipping backwards, becoming entangled with equipment, railing and fencing, slipping and falling on the carpet lift and/or the adjacent deck and other risks.

4. I also acknowledge and understand that I am accepting AS IS the snow tube and any other equipment involved with the snow tubing activity, including lifts and tows, and further acknowledge and understand that NO WARRANTIES are being extended to me with respect to any aspect of the snow tubing facility.

5. I agree and understand that snow tubing is a purely voluntary, recreational activity and that if I am not willing to acknowledge the risk and agree not to sue, I should not go snow tubing.

6. I agree to allow the use of my image or likeness incidental in any photograph, live recorded video display or other transmission or reproduction of the event in any form to which this agreement admits me.

7. IN CONSIDERATION OF THE ABOVE AND BEING ALLOWED TO PARTICIPATE IN THE SPORT OF SNOWTUBING, I AGREE THAT I WILL NOT SUE AND WILL RELEASE FROM ANY AND ALL LIABILITY, HIDDEN VALLEY GOLF AND SKI, INC. OR PEAK RESORTS, INC., THEIR OWNERS, OPERATIONS, LESSORS, LESSEES, OFFICERS, AGENTS, AND EMPLOYEES IF I OR ANY MEMBER OF MY FAMILY IS INJURED WHILE USING ANY OF THE SNOWTUBING FACILITIES OR WHILE BEING PRESENT AT THE FACILITIES, EVEN IF I CONTEND THAT SUCH INJURIES ARE THE RESULT OF NEGLIGENCE ON THE PART OF THE SNOWTUBING FACILITY.

8. I further agree that I WILL INDEMNIFY AND HOLD HARMLESS HIDDEN VALLEY GOLF AND SKI, INC. AND PEAK RESORTS, INC. THEIR OWNERS, OPERATORS, LESSORS, LESSEES, OFFICERS, AGENTS, AND EMPLOYEES from any loss, liability, damages or cost of any kind that it may incur as the result of any injury to myself or to any member of my family or to any person for whom I am explaining that meaning of this agreement, even if it is contended that any such injury was caused by the negligence on the part of the snow tubing facility.

9. I understand and agree that this Agreement is governed by the laws of the State of Missouri. I further agree that if any part of this Agreement is determined to be unenforceable, all other parts shall be given full force and effect.

10. I have read and understand the foregoing Acknowledgement of Risks and Agreement Not to Sue. I understand by reading this that I may be giving up the rights of my child and spouse to sue as well as giving up my own right to sue.

* * *

On January 25, 2013, when Ferbet arrived with his family at the ticket window, he was presented with this one-page, single-spaced, form agreement. He signed and dated the agreement in the spaces designated at the bottom, purchased tickets, and then proceeded to the tubing hill. Hidden Valley provided Ferbet an inner tube to use to slide down any of the tubing lanes he chose. And during what would turn out to be Ferbet's last slide of the day, his right foot lodged into a crevice in the sliding surface fracturing his tibia and fibula when his momentum carried the rest of his body forward.

On December 27, 2018, Ferbet filed suit alleging that his injuries and damages were caused by Hidden Valley's negligent maintenance and operation of the tubing hill, specifically with respect to the dangerous condition of the sliding surface that he claims caused his injuries. After some discovery took place, Respondents filed their motion for summary judgment on the sole basis that Ferbet had released his claim against them by signing the above agreement.

In his response, Ferbet asserted that the release was unenforceable as against public policy. He also alleged that amusement park and recreational area operators such as Hidden Valley should be considered common carriers and therefore held to the highest degree of care, as opposed to ordinary care, and that an exculpatory clause should be unenforceable when the highest degree of care is owed.

After a June 7, 2019 hearing on the motion, the trial court granted summary judgment based on its findings that the facts were undisputed that Ferbet had signed the agreement; that the agreement was enforceable and not against public policy; that its operative release language clearly and explicitly exonerated Hidden Valley for its negligence in causing Ferbet's injuries; and that Hidden Valley is not a common carrier subject to the highest degree of care. This appeal follows.

Standard of Review

On appeals from summary judgment, our review is essentially de novo and we review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Missouri Supreme Court Rule 74.04 governs summary judgment procedures. The trial court shall grant summary judgment "[i]f the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 74.04(c)(6); See also, *Id.* at 378. The trial court and this Court look to the pleadings, depositions, answers to interrogatories and admissions on file together with any affidavits to determine whether the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. *Miller v. River Hills Development*, 831 S.W.2d 756, 757 (Mo. App. E.D. 1992). But "[t]he key to a summary judgment is the undisputed right to a judgment as a matter of law; not simply the absence of a fact question." *Birdsong v. Christians*, 6 S.W.3d 218, 223 (Mo. App. S.D. 1999) (quoting *Southard v. Buccaneer Homes Corp.*, 904 S.W.2d 525, 530 (Mo. App. S.D. 1995)).

Where the defending party is the movant, it may establish a right to judgment by showing: (1) facts negating any one of the non-movant's elements; (2) that the non-movant, after an adequate period of discovery, has not been able and will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the non-movant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. *ITT*, 854 S.W.2d at 381.

Here, since Hidden Valley has asserted the release as an affirmative defense, we review de novo the legal and fact questions (1) whether the release before us is enforceable to release

Ferbet's claims as a matter of law, and (2) whether Hidden Valley has established as a matter of undisputed fact that the injury-causing negligent conduct alleged by Ferbet is within the purview of this release. *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 337 (Mo. banc 1996); see also *Abbott v. Epic Landscape Prods., L.C.*, 361 S.W.3d 13, 19 (Mo. App. W.D. 2011), as modified (Jan. 31, 2012).

Hidden Valley also asserted assumption of the risk as an affirmative defense. Although it did not seek summary judgment on that basis nor did the trial court rely on assumption of the risk in its grant of summary judgment here, our review is de novo and we may do so. See *ITT Commercial*, 854 S.W.2d at 387–88 (summary judgment may be "affirmed in this Court on an entirely different basis than that posited at trial"). In fact, for the reasons we provide below, we find it necessary to employ Hidden Valley's assumption of the risk affirmative defense in addition to the release in order to resolve this case.

Discussion

1. In Missouri, exculpatory clauses are disfavored but not void as against public policy.

In his first point, Ferbet alleges the trial court failed to address his affirmative avoidance that the exculpatory clause before us violates public policy and is therefore unenforceable. While we may agree and acknowledge that there continue to be strong policy arguments why these anticipatory releases are problematic, e.g., the party best positioned to prevent the harm is relieved of liability and instead the burden of loss is placed upon the party least able to prevent it, the public policy implications of such releases have been litigated, analyzed, and largely decided by our Supreme Court. See *Alack*, 923 S.W.2d at 334 ("Although exculpatory clauses in contracts releasing an individual from his or her own future negligence are disfavored, they are

not prohibited as against public policy.") In short, that public policy ship has sailed aboard the *S.S. Alack.*

Thus, our initial analysis is whether the release here complies with the dictates of *Alack* and its progeny to which we now turn. It is a "well-established rule of construction that a contract provision exempting one from liability for his or her negligence will never be implied but must be clearly and explicitly stated." *Id*. (citing *Poslosky v. Firestone Tire and Rubber Co.*, 349 S.W.2d 847, 850 (Mo. 1961)). In doing so, courts must ensure that the exculpatory clause complies with the bright-line test established in *Alack*, the seminal case on this question, requiring that the words "negligence" or "fault" or their equivalents be used conspicuously so that a clear and unmistakable waiver and shifting of risk occurs. *Alack*, 923 S.W.2d at 337.[1]

Moreover, this Court has already considered this exact same release in *Guthrie v. Hidden Valley Golf and Ski, Inc.*, 407 S.W.3d 642 (Mo. App. E.D. 2013) (Van Amburg, J., dissenting), in which a divided panel of this Court affirmed summary judgment in Hidden Valley's favor and found that the language in paragraph 7 releasing Hidden Valley from its future negligence was sufficiently clear and conspicuous. *Id*. at 648. There, Guthrie's foot was broken when another snow tuber collided with him in the run-out portion of the hill, the area where all of the snow tubers end their runs. *Id.* at 646. So, *Guthrie* differs somewhat from this case because of the

[1] We also note that *Alack* sought to distinguish between *ordinary* negligence and *gross* negligence in the context of exculpatory clauses with the former being disfavored but enforceable and the latter void as against public policy. *Id*. at 337 ("there is no question that one may *never* exonerate oneself from future liability for intentional torts or for *gross negligenc*e[.]" (emphasis added)). However, in *Decormier v. Harley-Davidson Motor Co. Group, Inc.*, the Supreme Court erased this distinction because "Missouri courts do not recognize degrees of negligence at common law." 446 S.W.3d 668, 671 (Mo. banc 2014). *Decormier* permits exculpatory clauses to shield parties from negligence but holds exculpatory clauses provide no protection for reckless conduct or for intentional torts. *Id.* Here Ferbet's claims against Hidden Valley were for ordinary negligence.

mechanism of injury which was a collision with another snow tuber, a risk the release covered repeatedly and extensively in paragraph 2 and again in the 8th bullet point of paragraph 3, while here the injury was allegedly caused by the condition of the premises.

i. Paragraph 7's release language satisfies *Alack's* bright-line test.

Nevertheless, we abide by our previous holding in *Guthrie* that the release language here satisfies *Alack's* conspicuity requirement. Paragraph 7, located three quarters down the one-page agreement, provides in all capital letters that snow tubing participants agree to release Hidden Valley for claims if injured while using or being present at the snow tubing facility "even if ... such injuries are the result of negligence on the part of" Hidden Valley.

ii. The word "negligence" is necessary, but we still construe the whole contract.

But our inquiry does not end with the mere inclusion of the word "negligence." If that was the case, Hidden Valley could have simply presented its customers with a 9-word declaration to sign: "I release Hidden Valley for all claims including negligence." *Alack* instructs that doing so would be insufficient because the agreement must not only pass the bright-line conspicuity test by employing the word "negligence" or its equivalent, but it also must notify the participant of the specific nature of the claims he or she is releasing. *Alack*, 923 S.W.2d at 337.

Hidden Valley seems to concede this by virtue of its 850-word agreement here in which it endeavors to comprehensively identify the risks associated with, inherent to, or that may arise during snow tubing. And while paragraph 7 sets forth the release language on which Hidden Valley relies, paragraph 7 does not stand alone in this contract. In fact, with its opening phrase "[i]n consideration of the above...," paragraph 7 incorporates the preceding six numbered paragraphs, the first four of which specifically address the types and nature of the risks involved

in snow tubing.[2] In this way, Hidden Valley has sought to define and identify the risks of injury from snow tubing for which it not only seeks to obtain a release from its customers but also requests its customers to assume those risks.

Since this is a contract, we apply our rules of contract interpretation to determine whether the language of the agreement should be construed to encompass Ferbet's specific claim of negligence and whether Hidden Valley is released from that claim. The Supreme Court in *Alack* framed the issue thusly: "There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving." *Id.* at 337-38. "Because standardized contracts address the mass of users, the test for reasonable expectations is objective, addressed to the average member of the public who accepts such a contract, not the subjective expectations of an individual adherent." *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 95 n.1 (Mo. App. E.D. 2008) (citations and quotations omitted).

The cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). The terms of a contract are read as a whole and are given their plain, ordinary, and usual meaning. *Id.; Alack*, 923 S.W.2d at 337-38. Courts prefer a contract construction that gives meaning to all contract provisions and we avoid construing the contract so as to leave portions meaningless and inexplicable. *Storey v. RGIS Inventory Specialists, LLC*, 466 S.W.3d 650, 655 (Mo. App. E.D. 2015). Under the doctrine of *contra proferentem*, the language of the contract is construed against the drafting party. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010). And this doctrine is enhanced in this case because we *strictly* construe

[2] But even if paragraph 7 had not included the phrase "[i]n consideration of the above...", our rule of contract interpretation require us to consider paragraph 7 in conjunction with the remaining portions of the contract including the paragraphs that seek to identify the risks involved in snow tubing.

contracts that seek to exonerate a party from acts of future negligence against the party claiming the benefit of that provision. *Alack*, 923 S.W.2d at 334.

Here, our task is to determine whether a reasonable person would clearly understand and be put on notice that he or she was releasing Hidden Valley from liability for a claim arising from an injury suffered as a result of Hidden Valley negligently maintaining in a dangerous condition the surface of the sliding area so that parts of the body extending from the tube would not become lodged in the sliding surface and cause injury.

The first three numbered paragraphs are the focus of our attention. In paragraph 1, Hidden Valley very broadly and generally puts customers on notice that snow tubing is dangerous and risky and that there are inherent and other risks associated with the activity that can cause injury or death. Paragraph 2 explains in detail the risk of collisions during snow tubing. And in paragraph 3 with its nine subparts, Hidden Valley identifies and notifies customers of a myriad of the risks they might face.

iii. Assumption of the risk - the nature of the risk determines whether a duty exists.

Hidden Valley's reference to "inherent risks" of the sport of snow tubing[3] presents an important legal concept that requires our attention because the extent to which the risk that caused Ferbet's injuries is an inherent risk to snow tubing will determine whether the release here even applies. Unfortunately, while Hidden Valley tells its customers in paragraph 1 that "there are inherent and other risks associated with the sport . . ." it does not identify or define in the contract which risks are inherent and which are the "other risks."

[3] Hidden Valley refers to snow tubing as a sport. We need not decide whether this is the case, or whether riding a roller coaster is a sport, whether descending the log flume at Six Flags is a sport or, for that matter, whether golf is a sport.

Our Supreme Court has defined a risk that is "inherent" to an activity as something "structural" or involving the "constitution or essential character" of the activity. *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 202 (Mo. banc 2014). And, generally, a participant is deemed to have assumed the risk of injury from the inherent risks of an activity that are known and understood, and the defendant is not liable for injuries stemming from such inherent risks because no duty is owed as to those risks. *Id.* at 197.

In the *Coomer* opinion, which doubles as an ode to the national pastime, Judge Wilson expounded on the history and current state of Missouri law regarding assumption of the risk. *Coomer* identified three types of assumption of the risk, "express assumption of the risk," "implied primary assumption of the risk," and "implied secondary assumption of the risk." *Id.* at 192. For our purposes, *implied primary* assumption of the risk and *express* assumption of the risk are helpful to illustrate the concept of inherent risks raised by Hidden Valley in the participation agreement with Ferbet and the impact of assumption of the risk on duty. *Implied primary* assumption of the risk bars a plaintiff from recovery when the plaintiff has knowingly and voluntarily encountered risk that is inherent in the nature of the defendant's activity. *Id.* at 192. In *express* assumption of the risk, which is directly applicable to this case, the plaintiff makes an express statement that he is voluntarily accepting a specified risk and is barred from recovering damages for an injury resulting from that risk. *Id.* at 191. The plaintiff's consent relieves the defendant of any duty to protect the plaintiff from injury and as a result, the defendant cannot be negligent. *Id.* at 193.

The rule that a defendant is not liable because it owes no duty for the known and understandable *inherent* risks of an activity "extends only to those risks" that the defendant "is powerless to alleviate without fundamentally altering" the activity. *Id.* But the defendant "still

owes a duty of reasonable care not to alter or increase such inherent risks." *Id.* at 197-198. *Coomer* illustrates this point with two examples. The first is the baseball spectator injured by a foul ball which he claimed he was prevented from seeing because he was being repeatedly jostled and distracted by the team's dinosaur mascot. *Id.* at 198 (citing *Lowe v. California League of Professional Baseball*, 56 Cal.App.4th 112, 65 Cal.Rptr.2nd 105 (1997)). While getting hit by a foul ball is an inherent risk to attending a baseball game for which implied primary assumption of the risk precludes recovery because the team owes no duty of care, the jury may hold the team liable if the negligence of the mascot altered or increased that otherwise inherent risk and that negligence causes the plaintiff's injuries. *Coomer,* at 198.

The second example *Coomer* cites is from *Sheppard v. Midway R–1 Sch. Dist*., 904 S.W.2d 257 (Mo. App. W.D. 1995), which involved a high school long-jumper injured during a competition by a bad landing in the landing pit. *Id.* at 259. The court held that even though the student cannot sue the school district for a bad landing because that is an inherent risk to long-jumping, the jury may hold the school district liable when that inherent risk is altered or increased by the defendant's negligence in preparing the landing pit. *Id.* at 264.

Application of these principles to this case illustrates the circumstances to which the release here applies and those to which it may not and also the extent to which assumption of the risk principles may apply. It is for that reason that we have incorporated into our legal rationale these assumption of the risk principles even though the trial court relied solely on the release for its grant of summary judgment. Disposition of this case requires application of the release and of assumption of the risk.

Thus, if Ferbet's injury resulted from a known and understandable risk deemed to be inherent to the sport of snow tubing, and Hidden Valley did not negligently enhance or increase

that inherent risk, then the release language in paragraph 7 is not relevant nor applicable because Hidden Valley owed Ferbet no duty with respect to risks inherent to snow tubing. But if Hidden Valley negligently enhanced or increased that inherent risk, then the release language in the agreement is applicable and operative and we would look to the agreement as a whole to determine whether that enhanced risk was covered by the release. In addition, if Ferbet's injury was not the result of an inherent risk, but was the result of negligence on the part of Hidden Valley, then we apply the release and our analysis is whether that "other risk" was adequately covered by the release such that Ferbet was on notice that he was releasing Hidden Valley for its negligence in causing or creating the risk which resulted in his injury.

iv. The risks created by an uneven sliding surface on Hidden Valley's snow tubing hill are inherent to the activity of snow tubing.

We turn now to the crevice in the sliding surface that caused Ferbet's injury and we find that an uneven sliding surface and the potential risks it creates for snow tubers are inherent risks of snow tubing because they are "structural" to the activity and involve the "essential character" of snow tubing. *Coomer*, 437 S.W.3d at 202. The packed snow and ice surface is outdoors at the mercy of both the changing meteorological conditions and the continual battering from plunging snow tubes and tubers. As with traditional snow sledding, an uneven surface and its impact on the participant's experience and enjoyment seems to be part of the "essential character" of snow tubing.

But how uneven can the surface be and still be considered an inherent risk? Unfortunately, the record below is largely silent. We know little about the size or configuration of the spot on the surface in which Ferbet's foot became lodged. Ferbet described it as an area of riprap which seemed to be along the raised rows of packed snow and ice that separated the individual lanes. The agreement, for its part, not only identified these rows but mentioned that

snow tubers may slide up and over these rows into the next lane. We also know little about Hidden Valley's care and maintenance of the surface and whether Hidden Valley was aware of the danger of body parts becoming lodged in crevices in the surface or whether there had been any, and if so, how many prior similar instances like Ferbet's.

As the Supreme Court in *Coomer* recognized, a risk that is deemed inherent may become actionable if the risk is altered or enhanced by the negligence of the activity operator. *Id.* at 198. So, an uneven area that simply adds to snow tubers' thrill by pitching them up, and perhaps occasionally out, of the tube is one thing. But a divot that repeatedly and unexpectedly catches and fractures customers' limbs may go beyond being an inherent risk and become actionable because it is no longer a known and understandable risk that is part of the structure and essence of the activity.

While the paucity of this record certainly limits the concreteness of our factual findings, it does not prevent us from reaching the following legal conclusions and holdings, each of which ends in the demise of Ferbet's appeal: First, to the extent the crevice was merely a known and understandable risk inherent to snow tubing, then Hidden Valley owed Ferbet no duty and the release is inapplicable and irrelevant because there is no claim to release; Second, if the record had demonstrated that the crevice was so big and dangerous that it went beyond what would be deemed an inherent risk to snow tubing and instead would constitute a negligently maintained surface, then Hidden Valley would owe Ferbet a duty and in that circumstance, the release would be triggered. Looking to the contract, specifically, paragraph 3, we find it adequately notified Ferbet that there could be "[v]ariations in the surface upon which snow tubing is conducted, which can vary from wet, slushy conditions to hard packed, icy conditions and everything in

between." As a result, we find that to the extent the particular variation that resulted in Ferbet's injury was the result of Hidden Valley's negligence, then this release extinguished that claim.

Before we turn to Ferbet's remaining points, we briefly address paragraph 4 in which Hidden Valley seeks to exonerate itself by having the participant accept the snow tubing facility "AS IS" and that "NO WARRANTIES" are being made with respect to the snow tubing facility. These are terms of art with specific meanings in the context of the sale of goods and the sale of real estate. *Davis Indus. Sales, Inc. v. Workman Const. Co., Inc.*, 856 S.W.2d 355, 359 (Mo. App. S.D. 1993); *Harper v. Calvert*, 687 S.W.2d 227, 230 (Mo. App. W.D. 1984). But these concepts have no role in this case involving a business inviting a customer onto their premises for a fee to participate in a recreational activity. Hidden Valley's customers are not buyers and there is little if any opportunity for them to inspect the snow tubing facility before executing the release and paying their money or even before plunging down the hill.

In light of the above, we deny Ferbet's first point.

2. Hidden Valley was not a common carrier in that its tubing hill was not a commercial ride for hire.

Ferbet asserts that because they operate rides and slides, recreation area operators such as Hidden Valley should be considered common carriers and should therefore be held to the highest degree of care. Ferbet then alleges without citation to any authority that such a degree of care is inconsistent with the enforcement of an exculpatory clause. We disagree.

Missouri law applies a heightened degree of care *only* to a very small number of well-defined activities including common carriers, such as railroads, buses, commercial airlines, streetcars, and elevator operators; electric companies; users of explosives; users of firearms; and motor vehicle operators. *Chavez v. Cedar Fair, LP*, 450 S.W.3d 291, 296 (Mo. banc 2014). Otherwise, the applicable standard is the ordinary degree of care. *Id.* (citing *Lopez v. Three*

Rivers Elec. Co–op., Inc., 26 S.W.3d 151, 158 (Mo. banc 2000)) ("The common law ordinary negligence rule requires a defendant to exercise the degree of care of a reasonable person of ordinary prudence under similar circumstances, now commonly referred to as the 'ordinary degree of care.'").

In Missouri, neither the common carrier designation nor the application of the *highest* degree of care has ever been extended to amusement parks or recreation areas such as ski resorts or snow tubing hills. *Id.* at 296; see also *McCollum v. Winnwood Amusement Co.*, 332 Mo. 779, 59 S.W.2d 693, 697 (1933) (holding the operator of a place of public amusement operating has a duty of ordinary care to its patrons); *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388, 392 (Mo. App. W.D. 1999) (applying a duty of ordinary care when skiers were injured due to icy conditions). And, since this activity resembles both skiing and an amusement park ride, we decline Ferbet's invitation to do so. Hidden Valley owed Ferbet a duty of ordinary care in connection with its operation and maintenance of its snow tubing hill.

Point two is denied.

3. The summary judgment entered in this case fully disposed of Ferbet's affirmative avoidances and did not violate Ferbet's due process rights.

Ferbet claims the trial court's grant of summary judgment violated his due process rights because the court failed to address his numerous affirmative avoidances. We have reviewed Ferbet's affirmative avoidances and find they fall into two groups. The first group attacks the formation of the agreement here by raising such issues as duress and that Ferbet had not actually read or understood the document before signing it. The second group of affirmative avoidances broadly attacks the exculpatory clause on public policy grounds. And we conclude from our review of the record and in our opinion here that Ferbet's affirmative avoidances have been fully considered and resolved.

With respect to Ferbet's attacks on the contract's formation, the trial court's enforcement of the agreement necessarily signifies that the trial court found as a matter of law that this was a properly formed agreement when Ferbet signed it and dated it. *Austin v. Brooklyn Cooperage Co.*, 285 S.W. 1015, 1017 (Mo. App. 1926) ("It has been uniformly held that a person who can read, and is in no way prevented from reading a written contract before he signs it, is bound by its terms, and cannot void it on the ground that he did not know its contents when he signed it."). Ferbet testified that nothing prevented him from reading the document.

As for Ferbet's affirmative avoidances regarding the public policy considerations relevant to exculpatory clauses, we discussed at length above that Missouri case law is settled that though disfavored, exculpatory clauses are not prohibited as against public policy. *Alack*, 923 S.W.2d at 334. In effect, Ferbet's public policy arguments have been baked into the controlling precedent by *Alack* and its progeny. We decline Ferbet's invitation to ignore that precedent.

Point three is denied.

Conclusion

The trial court's grant of summary judgment is affirmed.

James M. Dowd, Presiding Judge

Gary M. Gaertner, Jr., J. and
Robin Ransom, J. concur.