IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 24-0356

MARK MULLEE,

Appellant,

v.

WINTER SPORTS, INC., dba WHITEFISH MOUNTAIN RESORT,

Appellee.

APPELLANT'S REPLY BRIEF

On Appeal From
The Montana Eleventh Judicial District Court, Flathead County
The Honorable Amy P. Eddy, Presiding

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ARGUMENT

I. Mullee Did, in Fact, Argue that WSI Had a Duty to Maintain the Fence in the Trial Court.

WSI mistakenly argues that Mullee purportedly failed to raise the issue of duty in the District Court. \ Mullee repeatedly argued that WSI breached its legal duty and was negligent for its maintenance of the fence. Mullee's complaint clearly alleged that WSI "[f]ail[ed] to erect or install an appropriate fence or barrier", "fail[ed] to maintain fencing in an appropriate manner", "[a]llow[ed] fencing to become covered by snow and thus a hidden danger of dangerous hidden trap", "[f]ail[ed] to eliminate the risk through use of a permanent fence or guardrail", and "[f]ail[ed] to have high impact snow fencing". Complaint, ¶ 38. Mullee's expert, Stan Gale, opined (which was noted in Mullee's opposition to summary judgment) that:

- The industry standard of care is for ski areas to place safety fences on trails like the trail where Mullee was injured and these fences are not designed solely as directional markers. Mullee Expert Disclosure at Exh. B.
- Fencing is designed to "decelerate, catch, often entangle, and stop a skier from going off cliffs and into hazardous areas like creek beds". *Id.*
- B-Netting would not increase the risk of injury and could have been employed on the date Mullee was injured. *Id.*

- In fact, C-Netting/snow fencing (which was supposed to have been in place on that day) would have caught Mullee, which is further evidence that the fence was in fact down at the time Mullee arrived. *Id.*
- Contrary to Defendant's employees' testimony, ski areas regularly use permanent fences in locations such as where Mullee was injured. *Id.*

At summary judgment, Mullee argued that Defendant was negligent and breached its duty because (I) the fence was not properly maintained by Defendant and down at the time Mullee arrived; or, alternatively, (II) Defendant should have maintained a more effective fence that could have stopped Mullee from falling down the embankment. Mullee Opp. to Motion to Summary Judgment at p. 18. At the summary judgment hearing, the issue of duty was discussed extensively, and the Court acknowledged that Mullee had raised the issue of duty, commenting:

> [A]nd the way that I have read the Plaintiff's iteration of the claim at this point in time is not so much a duty to warn, but a duty to maintain sufficient safety fencing so that he would have been caught after he caught the ski tip.
>
> [WSI's Counsel]: That's correct.

Hearing Transcript at 7:20-08:01. Mullee responded at the hearing in part:

> And the Defense has produced no cases -- you know, they argue the other way around, but they've also produced no cases saying, you know, there's no duty here where -- you know, there's industry standard to put up a fence, and a fence that's sufficient to catch at least a slow-speed skier in this type of area, right? that's essentially our claim. Now, our claim is two-fold, right, whether there was a fence there and it was knocked down, right, by the Defendant, right, that's a negligent act,

> knocking down a fence that's supposed to be there where skiers are going by. Or if the fence was up -- a fence that's suitable enough or feasible enough to catch a skier – and Mr. Mullee testified he was going at a slow speed. They disagree, right, and obviously there's some dispute about what happened with the investigation, right, but we have factual basis to assert that claim that he was going a slow speed and that fence didn't catch him, right? And Mr. Gale opines that it's industry-standard, right, to put up a fence to at least stop or decelerate a skier.
>
> I do think it speaks to this duty here that it's not clear the level of danger that's below. Mr. Mullee said he was not aware of the degree of danger, right? He was vaguely aware of that fence being there historically, right, so indicating don't go off that trail, but it's unclear the degree of it. And Leon Syth, his longtime skiing buddy, will also testify he had no idea the degree of the danger that was down there.

Hearing Transcript at 28:09-30:16.

Thus, the issue of duty was analyzed and raised by Mullee in the District Court, and the issue is correctly before this Court on appeal.

II. WSI Failed to Make Any Substantive Argument That It Is Negligent for Its Snow Groomer to Knock Over the Fence Before Mullee's Fall and for It Ski Patrol to Fail to Check the Fence in the Morning.

WSI ignores that Mullee has also argued and created a dispute of fact that the Fence was not up at the time Mullee arrived because WSI failed to ensure the fence was up at the time Mullee arrived; either by knocking the fence over with a snow groomer or failing the check the fence on the ski patrol morning check. Mullee testified the fence already was down when he arrived, and photographs show fallen fencing covered by snow that was presumably down before Mullee arrived. Certainly, a reasonable jury could find WSI negligent for its snow groomer knocking

over the fence or for WSI's ski patrol failing to check and ensure the fence is up as they are required to do each morning.[1] Under these theories alone, the case should proceed to trial.

III. The Court Should Find That WSI Has Duties of Reasonable Care with Regard to Fencing on Its Resort and Mullee's Injury Was Foreseeable.

As discussed in Mullee's initial brief, persuasive out-of-state cases have repeatedly found that ski resorts do have a duty of care with regard to placement and maintenance of fencing. WSI misconstrues Mullee's argument as Mullee does not contend that WSI has an absolute duty to catch skiers at all times and in all places. However, WSI has a duty of reasonable care, and the Court should find that WSI has a duty of reasonable care to maintain its fencing, at a beginner run, where there was a steep drop off that is unclear to skiers, and WSI knew of the danger and skiers were not aware of the degree of the danger beyond the fencing. This case is an example of the high degree of danger presented as Mullee suffered life altering and permanent injuries here. WSI mistakenly argues that "it is impossible to foresee and physically protect against them", which ignores the fact the ski areas do, in fact, employ such fencing. Moreover, a defendant should not be relieved of any duty to employ reasonable care just because it is purportedly impossible to achieve a guaranteed result. Mullee simply contends that WSI should be held to a duty of reasonable care,

[1] As noted in Mullee's opening brief, the snow grooming check list initially had the area marked as groomed that day, even though WSI contends it was not.

which includes (I) not knocking over the fence with a snow groomer; (II) ensuring the fence was up before WSI opens the mountain to customers; and (III) using a fencing that will likely catch a skier going at a slow speed in this specific slow speed zone. A genuine dispute of fact exists that WSI failed to accomplish (I), (II) and/or (III).

WSI provides no legal authority in support of its contention that ski accidents generally are foreseeable, but specific ski accidents are not. The simple fact is that WSI had flagged the area where Mullee was injured as a potential hazard by generally employing the fence and having the policy that its ski patrol check the fence each morning. This establishes that a skier falling down the embankment and being injured was foreseeable to WSI. *See Fisher v. Swift Transp. Co. Inc.*, 2008 MT 105, ¶ 21 342 Mont. 335, 181 P.3d 60 (In determining foreseeability, the Court inquires "whether the defendant could have reasonably foreseen that his or her conduct could have resulted in an injury to the plaintiff."); *Meyer v. Big Sky Resort*, CV 18-2-BU-BMM, 2019 WL 6251800, *3 (D. Mont. Nov. 22, 2019) (citing *Waschle ex. rel. Brikhold-Waschle v. Winter Sports, Inc., 144 F.Supp.3d 1174 (D. Mont. 2015)*, 144 F.Supp.3d at 1181) ("a ski area operator may violate its duty of reasonable care ***if it has the ability to eliminate a risk***, through specific warnings or otherwise, ***and fails to do so***.") (emphasis added).

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Thus, this case should proceed to trial, and a jury could find that WSI failed to exercise due care in failing to maintain the fencing, which caused Mullee's injury.

IV. WSI Failed to Meet Its Burden at Summary Judgment to Create a Dispute of Fact Certain Damages Mullee Suffered.

In its response, WSI fails to identify any facts to date rebutting that the incident caused Mullee to suffer (I) a left acetabular fracture (pelvis) of the anterior and posterior column and a pelvic hematoma and chronic pain and stiffness in the left hip; (II) all future medical treatment and expenses as identified in Dr. Donaldson's report and Mr. Gibbs' life care plan; (III) $138,040.00 future medical expenses identified in Dr. Adair's report; and (IV) $164,992.75 in past medical expenses. WSI failed to contest these amounts in discovery and, at summary judgment, failed to provide material and substantial evidence setting forth specific facts to create a genuine issue of fact. *See Baumgart v. State, Dept. of Commerce*, 2014 MT 194, ¶ 14, 376 Mont. 1, 332 P.3d 225; *Renville v. Farmers Ins. Exch.,* 2004 MT 366, ¶ 22, 324 Mont. 509, 105 P.3d 280 (affirming grant of summary judgment on medical expenses where it was uncontroverted that the medical expenses "were causally related to the accident."). WSI's argument about Mullee's duty to prove these issues at trial and reasonableness is a red herring and ignores its burden at summary judgment to rebut the uncontroverted evidence. Fahrnow presented evidence of his injuries, and WSI failed to meet its burden to create a genuine dispute regarding these expenses at summary judgment. *See id.*

WSI also mistakenly argues that Dr. Donaldson's affidavit and prior disclosure are insufficient at summary judgment. Rule 56 allows the Court to consider expert "discovery and disclosure materials on file", and any evidentiary issue with the expert report was cured by Dr. Donaldson's affidavit. While WSI argues that Dr. Donaldson's affidavit fails to meet legal requirements, WSI also failed to submit "affidavits", but instead "declarations", of its witnesses in support of its summary judgment motion. Thus, if the Court cannot consider Dr. Donaldson's affidavit at summary judgment, then it should also not consider WSI's declarations.

V. The District Court Abused Its Discretion by Excluding Dr. Donaldson's Opinions Which Were Repeatedly Stated with a Reasonable Degree of Medical Certainty.

In its response, WSI engages in the same semantical nitpicking of Dr. Donaldson's report which this Court has expressly rejected as grounds to exclude medical expert testimony. The *Beehler* Court reasoned:

> It is well-noted that doctors are not lawyers and imposing strict legal terminology requirements improperly places form over substance. We have previously found that "the probative force of the opinion 'is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis.'" *Ford,* ¶ 42 (quoting *Miller v. Natl. Cabinet Co.,* 8 N.Y.2d 277, 168 N.E.2d 811, 813, 204 N.Y.S.2d 129 (1960)). Dr. Joseph's use of "speculate" or "suspicion" does not defeat the probative value of his opinion.

Beehler v. E. Radiological Assocs., P.C., 2012 MT 260, ¶37, 367 Mont. 21, 289

P.3d 131, ¶ 37 ("Regarding [a medical expert's] word choice, we must not let scrutiny of an expert's phrasing cloud the substantive appraisal of their testimony.") (citing *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 42, 365 Mont. 405, 282 P.3d 687). The simple fact is that Dr. Donaldson unequivocally opined in her report that her opinions were made with a reasonable degree of medical certainty and again unequivocally stated in an affidavit that her opinions were made with a reasonable degree of medical certainty. It is a clear abuse of discretion for the Court to exclude Dr. Donaldson's opinions.

VI. WSI's Disclosure of Dr. Scher Was Clearly Deficient.

With regard to WSI's disclosure of Dr. Irving Scher, the simple fact is that WSI provided no materials from Dr. Scher including the data and materials Dr. Scher generated on his site visit which support his purported opinions disclosed by defense counsel.[2] *Sharbono v. Cole*, 2015 MT 257, ¶ 12, 381 Mont. 13, 16, 355 P.3d 782 ("The underlying purposes of Rule 26 are to eliminate surprise and to promote effective cross-examination of experts."). To further hamper Mullee's ability to actually discover Dr. Scher's opinions, WSI did not make Dr. Scher available for a deposition until months after the discovery deadline and pretrial motions deadline.[3]

[2] WSI also mistakenly relies upon Mont. R. Evid. 705 which applies to trial testimony and is not the standard for disclosing expert opinions during discovery.

[3] While WSI states Dr. Scher was purportedly unavailable, Dr. Scher and WSI chose Dr. Scher to give expert opinions in this case while the scheduling order was in place. If Dr. Scher was truly unavailable, WSI should have chosen a different expert.

Dr. Scher should be excluded from testifying at trial, and litigants should not be allowed to disclose purported scientific expert opinions, without any of the actual materials and data generated by the expert, and then fail to produce the expert for a deposition within a reasonable time.

CONCLUSION

For the forgoing reasons, this Court should vacate the judgment, reverse the District Court's Order granting WSI's motion for summary judgment, and remand the case for trial.

In addition, the Court should reverse the District Court's Order precluding Mullee's experts from testifying on Mullee's future damages at trial and allow Mullee to present such testimony at trial.

Moreover, the Court should reverse the District Court's Order denying Mullee's Motion for Summary Judgment re: Damages and remand with instructions that the District Court find that Mullee suffered his claimed injuries, past medical expenses, and future medical expenses as a matter of law.

Lastly, the Court should reverse the District Court's Order denying Mullee's Motion *in Limine* regarding Dr. Irving Scher and remand with instructions that Dr. Scher should be precluded from testifying at trial.

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DATED this 18th day of October, 2024.

DRIGGS BILLS & DAY, P.C.
Attorney for Appellant Mark Mullee

By: /s/ Ian P. Gillespie
Ian P. Gillespie

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to M. R. App. P. 11, this brief is proportionately spaced, 14-point font, and contains 2,408 words, as counted by the undersigned's word processing software, excluding any Caption, Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and/or any Appendix.

DATED this 18th day of October, 2024.

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CERTIFICATE OF SERVICE

I, Ian Philip Gillespie, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-18-2024:

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