IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH KUCHTA, AN INDIVIDUAL,
Appellant,
vs.
SHELTIE OPCO, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A JOHN ASCUAGA'S NUGGET, D/B/A GILLEY'S NIGHTCLUB; AND WOLFHOUND HOLDINGS, LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Respondents.

No. 76566-COA

FILED

JUL 08 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Joseph Kuchta appeals a district court order granting Sheltie Opco, LLC's (Sheltie Opco) motion for summary judgment in a tort action. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

While socializing with friends at Gilley's Nightclub in Sparks, Nevada, a bar owned by respondent Sheltie Opco, Kuchta and his friends observed an employee riding a mechanical bull. As the employee was riding the bull, another employee used a joystick to control the bull's movements. After the employee demonstrated how easy and non-challenging it was to engage safely in a slow ride, she stepped off the bull.

Sometime later that night, Kuchta and his friends were considering riding the bull. Kuchta's group approached the same employee, who they had watched ride the bull earlier, and who was now operating the joystick and controlling the ride. Two different people within the group that Kuchta was part of conversed with the employee about riding the mechanical bull.

Viewing all factual allegations in a light most favorable to Kuchta, his friends told the employee that each person in their group wanted an easy ride, which based on a difficulty scale of one to ten, they described as a two (with one meaning not moving at all), which the employee said she could provide. The friends indicated that everyone in the group was a novice and wanted a ride similar to the ride the employee had demonstrated. Furthermore, they told the employee that everyone should be able to step off the bull once the ride concluded, just as the employee had been able to do earlier that night after her ride. The employee agreed to provide the type of a ride Kuchta's group requested. Thus, Kuchta's and the employee's understandings and expectations regarding Kuchta's ride were that it would be easy, at a level two or at a low speed, and that Kuchta would be able to dismount after the ride was finished.

Before any person could ride the mechanical bull, however, Gilley's required each patron to sign a previously prepared Assumption of Risk, Release, Indemnity, and Medical Treatment Authorization Agreement (Agreement), also known as a written waiver. The Agreement listed potential risks and possible injuries involved in riding the bull, including broken bones, and also released Sheltie Opco from any and all liability for injuries or negligence that occur from all risks, both known and unknown. Kuchta signed the Agreement, although the record does not reveal when it was signed in relation to the conversations described above.

According to Kuchta, once on the bull, the ride was initially slow, as had been requested. However, after approximately 20 seconds, the operator significantly increased the speed and violence of the bull's movements. Kuchta was thrown from the bull and suffered a fractured pelvis.

Kuchta sued Sheltie Opco alleging: negligence, negligence per se, negligent hiring and respondent superior, negligent supervision, negligent entrustment, and battery. Sheltie Opco moved for summary judgment on all claims, arguing there was no genuine issue of fact because Kuchta expressly assumed the risks of the ride and consented to the battery when he signed the Agreement before riding the bull. The district court granted Sheltie Opco's motion for summary judgment finding that Kuchta expressly assumed the risks of riding the bull by signing the Agreement, including consenting to the touching that was the basis for his battery claim.

On appeal, Kuchta argues that the district court erred in granting summary judgment because even though he signed the Agreement, under the doctrine of express assumption of risk, there are genuine issues of fact. He further contends that the district court erred in granting summary judgment to Sheltie Opco on his battery claim because battery is not covered by the Agreement. We agree that under the facts of this case, genuine issues of material fact remain as to Kuchta's negligence and battery claims, and therefore, we reverse and remand.

Standard of review

We review a district court order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file, viewed in the light most favorable to the non-moving party, demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

The district court erred by granting summary judgment to Sheltie Opco on the negligence claims

Kuchta argues that he did not expressly assume the risk because the operator specifically agreed to provide the requested slow ride (i.e., an intensity of two out of ten) and the operator instead ultimately conducted a wild ride exceeding his expectations. Sheltie Opco argues that the Agreement was a valid written waiver and that Kuchta understood the risks when he got on the bull. Specifically, he understood that the bull could "jerk[ ] and spin[ ] violently and unexpectedly" resulting in "broken bones." And, as counsel for Sheltie Opco pointed out at oral argument, Kuchta could have declined to ride the bull if he had any concerns about the possibility of injury as fully explained in the Agreement. Moreover, no one forced Kuchta to sign the Agreement and ride the bull.

In Nevada, an exculpatory agreement is a "valid exercise of the freedom of contract." *Miller v. A&R Joint Venture*, 97 Nev. 580, 582, 636 P.2d 277, 278 (1981). Though generally enforceable, exculpatory clauses in a contract must meet four standards before a party seeking to enforce the clause can be absolved of liability:

> (1) Contracts providing for immunity for liability for negligence must be construed strictly since they are not favorite[s] of the law . . . ; (2) such contracts must spell out the intention of the party with the greatest particularity . . . and show the intent to release from liability beyond doubt by express stipulation and no inference from the words of general import can establish it . . . (3) such contracts must be construed with every intendment against the party who seeks immunity from liability . . . (4) the burden to establish immunity from liability is upon the party who asserts such immunity . . . .

Agric. Aviation Eng'g Co. v. Bd. of Clark Cty. Comm'rs, 106 Nev. 396, 399-400, 794 P.2d 710, 712-13 (1990) (quoting *Richard's 5 & 10, Inc. v. Brooks Harvey Realty Inv'rs*, 399 A.2d 1103, 1105 (Pa. Super. Ct. 1979)).

Looking to the Agreement's exculpatory clause, it warns that any ride participant will:

> *FULLY RELEASE FROM ALL LIABILITY* ARISING FROM MY PARTICIPATION IN THE MECHANCIAL BULL RIDING PROGRAM the Nugget Hotel and Casino, Gilley's, and their respective owners . . . . I *AGREE NEVER TO SUE ANY RELEASEE* . . . for any cause of action arising from my participation in the MECHANICAL BULL RIDING PROGRAM . . . . *ALL PROVISIONS OF THIS AGREEMENT APPLY* IRRESPECTIVE OF AND *EVEN IN THE CASE OF [ ] NEGLIGENCE* . . . .

Even when strictly construed, the language in the Agreement expressly states, with particularity, Sheltie Opco's intent to release itself and others designated from any and all liability. The Agreement also specifically states that Sheltie Opco would be released from liability for any negligence on its part that may occur while a person rides the mechanical bull. Further, the parties concede that Kuchta voluntarily signed the Agreement, which included the exculpatory clause.

However, our inquiry does not stop here as it pertains to the waiver's validity; we must determine whether Kuchta expressly assumed the risks contemplated by the waiver. *Renaud v. 200 Convention Ctr. Ltd.*, 102 Nev. 500, 501, 728 P.2d 445, 446 (1986) (analyzing an exculpatory waiver under the doctrine of express assumption of the risk).[1] "Assumption of the risk is based on a theory of consent." *Id.*

---

[1]The dissent contends that the majority "read[s] [*Renaud*] broadly [so as] to overrule virtually the entirety of Nevada contract law in a way that requires reversal of this appeal." We disagree, specifically for the reasons set forth *infra* at notes 3 and 4 (explaining the applicability of the parol evidence rule, and that the dissent's interpretation of the rule is legally

Next, reviewing the Agreement's express waiver, it warns in relevant part:

> There is a significant risk that I will be seriously injured as a result of my participating in the MECHANICAL BULL RIDING PROGRAM, including permanent paralysis, head injury, broken neck, other broken bones and death, whether or not I am thrown from or fall from the MECHANICAL BULL . . . . I KNOWINGLY AND FREELY ASSUME ALL RISKS ARISING FROM MY PARTICIPATION IN THE MECHANICAL BULL RIDING PROGRAM, including all risks to my life,

---

erroneous and partially inconsistent with Nevada precedent and the traditional common-law). Moreover, the fact that *Renaud* was published in 1986 does not mean that this court can disregard its binding force nor is the applicability of its holding distinguishable as to the expectations of the parties. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring) ("[I]t is an established rule to abide by former precedents." (internal quotations omitted)).

The dissent also contends that the majority's analysis of *Renaud* "is revolutionary" and "far-reaching" because it replaces the objective terms of the contract with the subjective expectations of Kuchta. The dissent's assertion is without merit because our ruling only applies under the unique facts of this case. Kuchta alleged that his group had conversations with the bull ride operator regarding the intensity of the ride, after seeing her demonstrate a low intensity ride, and that the bull operator agreed to give a low-intensity ride. Thus, as alleged by Kuchta—and we resolve all factual inferences in his favor—the parties objectively communicated about the intensity of the ride, and only then, Kuchta decided to ride the bull. This circumstance is further confirmed by the affidavit of the bull operator, which the dissent apparently overlooked, which states that "I did not operate the bull in a fashion that was intended to exceed Plaintiffs' expectations of how intense the bull's motions would be," thereby strongly suggesting that the parties communicated an objective expectation concerning the intensity of the ride, which would be another term of the waiver, and not a rewrite or repudiation of the Agreement.

> health, safety and property, both known and unknown.

"Express assumption of risk['s] . . . vitality stems from a contractual undertaking that expressly relieves a putative defendant from any duty of care to the injured party; such a party has consented to bear the consequences of a voluntary exposure to a known risk." *Mizushima v. Sunset Ranch, Inc.*, 103 Nev. 259, 262, 737 P.2d 1158, 1159 (1987), *overruled on other grounds by Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 180 P.3d 1172 (2008). Generally, "[a]ssumption of the risk is based on a theory of consent." *Renaud*, 102 Nev. at 501, 728 P.2d at 446. For a party to assume the risk there are two requirements. "First, there must have been voluntary exposure to the danger. Second, there must have been actual knowledge of the risk assumed." *Id.* Actual knowledge of the danger by the party alleged to have assumed the risk is the essence of the express assumption of risk doctrine. *Id.* To determine whether the party signing had actual knowledge of the risks assumed, courts must consider "[(1)] the nature and extent of the injuries, [(2)] the haste or lack thereof with which the release was obtained, and [(3)] *the understandings and expectations of the parties at the time of signing*." *Id.* at 502, 728 P.2d at 446 (emphasis added).

Here, Kuchta's injuries were severe, but were injuries a person would associate with being thrown from a bull. Furthermore, there is nothing in the record to suggest that Kuchta was rushed into signing the exculpatory agreement. However, the third factor weighs heavily in Kuchta's favor. According to Kuchta's responses to Sheltie Opco's interrogatories,[2] the bull operator was told that they all wanted a slow ride,

---

[2]The dissent argues that "the scope of the waiver . . . depends upon Kuchta's verbal testimony, *proffered during a deposition many months after*

similar to the ride the operator had while demonstrating the use of the bull.[3] Kuchta and former co-plaintiff Rebecca Bodnar both alleged in their responses to Sheltie Opco's interrogatories that their rides on the bull

---

the fact." (Emphasis added.) It is unclear how the dissent reaches this conclusion; neither party filed *any* deposition transcript in the record on appeal, and instead, the majority's analysis relies upon interrogatory responses filed by Kuchta and Rebecca Bodnar, and an affidavit from Sheltie Opco. Furthermore, discovery was in the early stages in this litigation when summary judgment was granted.

[3]We conclude that the parol evidence rule would not necessarily bar the admission of this evidence because the Agreement itself does not include a clause that the express written waiver was a final statement of the parties' agreement. Here, the parties appeared to have agreed to a separate oral agreement concerning the speed of or difficulty of the ride that does not contradict the express terms of the waiver. *See Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004) ("[P]arol evidence is admissible to prove a separate oral agreement regarding any matter not included in the contract or to clarify ambiguous terms so long as the evidence does not contradict the terms of the written agreement."); *see also In re Cay Clubs*, 130 Nev. 920, 936, 340 P.3d 563, 574 (2014) (noting that the parol evidence rule only applies when the contracting parties agree that the written agreement is the final statement of the agreement). Thus, the parol evidence rule would not bar the admission of the alleged agreement with the bull operator—supplemental to the written waiver—that a slow or mild ride would be provided pursuant to the expectations of the parties. *See also Smart v. Nevins*, 298 A.2d 217, 219 (D.C. 1972) ("Parol evidence is admissible to show what the actual intent of the parties was at the time of executing a written instrument . . . ."). Here, there is no language in the waiver that would preclude such an agreement being made. Furthermore, an existing factual question remains as to whether the conversations regarding the intensity of the bull ride occurred before, after, or contemporaneously with the execution of the Agreement. An existing factual question also remains regarding whether the bull operator had actual or apparent authority to modify or supplement the waiver. *See, e.g., Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029 (1987). Thus, summary judgment was inappropriate.

started gently before the bull operator significantly increased the intensity, leading them to suffer injury. The bull ride operator, in an affidavit, states that she did not "operate the bull in a fashion that was intended to exceed Plaintiffs' expectations of how intense the bull's motions would be," thereby suggesting that expectations had been set for Kuchta's ride that may have been different than those described in the waiver.[4]

---

[4]The dissent avers, "Nevada will no longer be what it always has been," if the waiver in this case is not enforced. To support this proposition, the dissent contends that "[the] verbal conversation [here] . . . [wa]sn't 'parol evidence' . . . [because] the verbal conversation occurred before Kuchta signed the waiver, which means that the written contract supersedes any and all earlier alleged negotiations." We conclude that the dissent's proposition contradicts well-established law. "The parol evidence rule generally bars extrinsic evidence regarding prior or contemporaneous agreements that are contrary to *the terms of an integrated contract*." *Khan v. Baksh*, 129 Nev. 554, 558, 306 P.3d 411, 413 (2013) (emphasis added). Here, there was no integration or merger clause—and neither party argued that the waiver was integrated—to show that the waiver here was a final embodiment of the agreement between the parties. Thus, the dissent's assertion that the written contract supersedes all earlier negotiations is legally inconsistent with traditional common law and Nevada precedent. Thus, the dissent's accusatory rhetoric (i.e., this is "how contract law actually works" and "what 500 years of contract law tell us is this"), followed by a voluble discussion, begins with a flawed legal premise. *See Cay Clubs*, 130 Nev. 920 at 936, 340 P.3d at 574 (noting that the parol-evidence rule "applies only when the contracting parties agree that the written agreement is the final statement of the agreement." (internal quotations omitted)).

The dissent then contends, "no term of the written waiver is facially ambiguous." We agree. However, no express term in the written waiver discussed the intensity of the bull ride. Thus, even if this contract was integrated, which it was not, the parol evidence here—i.e., the conversation between Kuchta's party and the bull operator regarding the *intensity* of the ride—would be admissible to supplement the written terms of the waiver without contradicting an existing term. *See Khan*, 129 Nev. at 558, 306 P.3d at 413 (explaining that parol evidence cannot contradict the terms of an

These conflicting allegations create a genuine dispute of material fact as to the expectations of the parties and as to whether the bull operator's conduct failed to meet those expectations.[5] Because Kuchta and

---

integrated contract); *see also Pentax Corp. v. Boyd*, 111 Nev. 1296, 1300, 904 P.2d 1024, 1027 (1995) ("Parol evidence is admissible to explain or supplement the terms of an agreement, but not to vary or contradict them." (internal quotations omitted)). Here, no portion of the waiver discussed the intensity of the bull ride, and the contract was not integrated. Thus, the dissent's assertion that the majority's analysis is contradicting the written terms of the waiver is wholly without merit. As such, parol evidence is admissible to supplement the waiver as to the intensity of the ride.

[5]The dissent contends that the majority's reading of *Renaud* assumes that the Supreme Court of Nevada is "hid[ing] elephants in mouseholes." The dissent, however, erroneously concludes that (1) the fact that the waiver here was not integrated is insignificant, (2) the waiver described the intensity of the ride, and (3) the agreed upon intensity of the ride was only a subjective understanding of Kuchta. Thus, the dissent by accusing the majority of somehow engaging in activism, chooses to ignore the plain reading of Renaud and its application to the facts of this case. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 118 (2007) (Scalia, J., dissenting) (noting that a legal text should be read for what it actually says instead of what judges think that it might mean). Here, the dissent has adopted its own reading of *Renaud* which requires it to (1) misconstrue the parol-evidence rule, (2) disregard that the waiver was not integrated, and (3) make a finding of fact that Kuchta solely and secretly believed that the waiver only covered a low intensity ride, even though the bull operator's affidavit essentially concedes that the parties had reached an agreement on the intensity of the ride. Thus, the dissent's assertion that our reading of *Renaud* will now require courts to look for evidence outside of the waiver in every case is unpersuasive. *See Martz-Alvarado v. Truax,* Docket No. 76860-COA (Ct. App., Order of Affirmance, May 20, 2020) (affirming summary judgment when the district court applied a waiver of liability in a commercial horse riding accident).

The dissent also contends that upon remand, the trial will have pragmatic concerns (i.e., "the trial will consist . . . of dueling uncorroborated, and self-serving testimony . . . [and] the jury will be asked to determine not

Sheltie Opco each presented consistent and conflicting facts regarding both parties' expectations of the ride, and knowledge of the risks involved in a level two-of-ten or easy ride, a trier of fact should have resolved this issue.[6] Thus, the district court erred by granting summary judgment in favor of Sheltie Opco as to Kuchta's negligence claims.[7]

---

what contractual terms Kuchta agreed to and signed, but only what inner thoughts he secretly harbored at the time."). We disagree. First, the respondents created this problem by showing potential customers a demonstration, engaging in verbal discussions as to the type of ride demonstrated and allegedly stating that it would be repeated, and by failing to include an integration clause in the signed waiver. Second, it is the province of the jury to make findings of fact as to the terms of a contract, which is inappropriate for this court to do on a summary judgment motion. *See, e.g., Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 216, 163 P.3d 405, 407 (2007) ("The parties' intentions regarding a contractual provision present a question of fact."). Finally, discovery may resolve these factual issues before trial.

[6]We note that discovery was still in the early stages when summary judgment was granted. Although Kuchta claimed at oral argument that he requested NRCP 56(f) relief, the district court order does not address it. Nevertheless, we note granting summary judgment this early on arguably precluded resolution of certain factual issues during discovery that may have been beneficial in further determining the parties' expectations associated with the bull ride. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117-18, 110 P.3d 59, 62 (2005) ("NRCP 56(f) permits a district court to grant a continuance when a party opposing a motion of summary judgment is unable to marshal facts in support of its opposition.").

[7]Kuchta also argues that he did not impliedly assume the risk. However, the district court did not base its decision on either theory of implied assumption of the risk, nor is it clear from the record before us whether this was argued below, thus we need not address it. *See N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 111 n.3, 807 P.2d 728, 730 n.3 (1991) (declining to address an issue on which the district court did not rule first). Nevertheless, we do note both primary and secondary implied assumption of the risk requires "(1) voluntary exposure

The district court erred by granting summary judgment in favor of Sheltie Opco on Kuchta's battery claim

Kuchta argues that the district court erred in granting summary judgment in favor of Sheltie Opco on his battery claim because the Agreement did not contemplate gross negligence or intentional misconduct. Sheltie Opco contends that uncontroverted facts show that Kuchta consented to any conduct resulting from the bull ride, and thus, summary judgment was appropriate on his battery claim.

"A battery is an intentional and offensive touching of a person who has not consented to the touching . . . ." *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. 544, 549, 376 P.3d 167, 171 (2016) (internal quotation marks omitted). "[G]eneral clauses exempting the defendant from all liability for negligence will not be construed to include intentional or reckless misconduct, or extreme and unusual kinds of negligence, unless such intention clearly appears." Restatement (Second) of Torts § 496B cmt. d (1965).

Here, Kuchta consented to a bull ride, but he claims he only consented to a mild ride, and therefore, any contact associated with a mild

---

to danger, and (2) actual knowledge of the risk assumed." *Clark Cty. Sch. Dist. v. Payo*, 133 Nev. 626, 630, 403 P.3d 1270, 1275 (2017) (internal quotation marks omitted). Here, there is a question as to voluntariness as Kuchta claims to have wanted a slow bull ride which was communicated to the bull operator. The bull operator stated she did not operate the bull in a manner to exceed his expectations. Thus, a genuine dispute of material fact exists as to whether Kuchta voluntarily assumed the risk for the type of bull ride the operator provided. We note, however, that in light of our resolution of the case pursuant to the Agreement and express assumption of the risk, we need not determine the applicability of the implied assumption of the risk to the facts of this case.

ride was allowed and could not be a battery. However, if the ride went beyond a mild ride, then there is a material question of fact as to the nature of the ride and to whether Kuchta consented to the resulting physical contact as the result of the unexpectedly rough ride. Further, Kuchta presented facts from two interrogatory responses that the bull rider intentionally increased the intensity of the bull machine, possibly attempting to throw him from the bull despite his understanding that the ride would be of mild intensity.[8] Sheltie Opco provided an affidavit from the bull ride operator that stated that she did not intentionally increase the intensity of the bull ride beyond Kuchta's expectations (which could also imply that she did in fact increase the intensity and understood his expectations). Viewing these assertions in a light most favorable to Kuchta, the nonmoving party, a rational trier of fact could find that the bull operator committed a battery by intentionally increasing the speed of the ride thereby deliberately failing to meet the agreed upon expectations.[9]

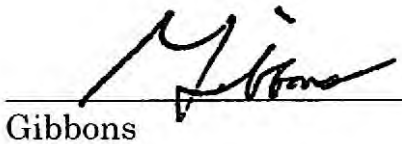
Based on the parties' conflicting factual assertions, it was inappropriate for the district court to grant summary judgment in favor of Sheltie Opco, as the trier of fact should resolve the conflict. Thus, the district court erred in granting summary judgment in favor of Sheltie Opco as to Kuchta's battery claim. Accordingly, we

---

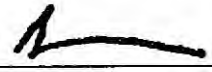
[8]Both express and implied assumption of the risk would not bar Kuchta's battery claim. *See, e.g., Fraenkel v. Islamic Republic of Iran*, 892 F.3d 348, 359 (D.C. Cir. 2018) ("[O]ne does not assume the risk that he will be the victim of an intentional tort.").

[9]We note that the dissent does not address the majority order as it pertains to the reversal of summary judgment as to Kuchta's battery claim, and therefore, it apparently concurs with the remand related thereto.

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[10]



_____, C.J.
Gibbons



_____, J.
Bulla

TAO, J. , dissenting:

Although ostensibly arising from a personal injury suit, the only question at issue in this appeal is whether Kuchta's tort claims were contractually waived, which presents a question of contract law. The majority reverses by concluding that a genuine issue of fact exists under NRCP 56. But this can only be true if the scope of the waiver contract isn't limited to its express words, but rather depends upon Kuchta's verbal testimony, proffered during a deposition many months after the fact, regarding his intentions — even though those supposed intentions are contained nowhere in the contractual words and actually contradict those words. Respectfully, I dissent.

I.

[10]Insofar as the parties raise arguments that are not specifically addressed in this order, including those pertaining to gross negligence, we have considered the same but conclude they need not be reached given this disposition. We note that this order reinstates all of Kutcha's claims for relief.

Liability waivers must mean something in Nevada, even if they might be allowed to mean less in other states. What Nevada has always represented is the opportunity to try things that aren't available anywhere else. One hundred fifty years ago, it was the chance to strike gold and silver ore in the desert. Then it became the chance to strike it rich on a roulette wheel or a slot machine. But more and more nowadays, it's the chance to experience an adventure that you simply can't have anywhere else. With an economy now driven largely by tourism, what Nevada offers are things that other states and cities do not. Gambling, of course. Concerts, shows, and world-class restaurants also. Convention space, surely. Quick marriages and no-fault divorces too. But, also, the chance, for some, to engage in derring-do — to fly a fighter plane in aerial combat; to ride a zipline over city streets and steep canyons; to engage in gun battles armed with simunition; to skydive 30,000 feet to the desert; to swim with dolphins in their habitat; to fire a real machine gun or ride in an armored tank; to bungee jump from a tower; to ride a roller-coaster suspended 500 feet in the air; to race luxury cars around a track at breakneck speed. One could argue that mining and gaming aren't our real stock in trade, but rather novelty.

But with some novel experiences comes some level of danger. Jumping out of an airplane is an activity fraught with risk no matter how carefully the parachute was packed. There's no way to entirely eliminate all of the risk from ziplines, bungee jumps, and rafting through whitewater rapids. If Nevada intends to remain the premier tourist destination in a fast-evolving and competitive world, then our law must permit some proprietors to operate businesses that are, at least at some level, inherently risky and dangerous. If we ever lose our reputation for remaining on the cutting edge, then there'll be no more reason for millions of tourists to visit.

And if that day ever comes, Nevada will no longer be what it always has been.

Liability waivers thus serve an important role in a state like ours: they allow proprietors to stay on the cutting edge by allowing them to operate with some level of risk, so long as they take the time to apprise their customers of those risks. Here, Kuchta signed a written liability waiver whose terms unambiguously cover the precise injuries he suffered (broken bones) and the precise way he incurred them (being thrown) using the precise apparatus (a mechanical bull) that the waiver precisely addressed. The district court granted summary judgment, concluding that this waiver barred his tort claims.

Let's briefly summarize the facts and the arguments that Kuchta makes in appealing from the district court's order. I'll return to analyze these arguments later in more detail, so for now just a synopsis will do. Viewing the facts in the light most favorable to Kuchta, he contends that he and his friends arrived at Gilley's, watched a demonstration of the mechanical bull, and then spoke with the ride operator who verbally agreed to provide him with a ride that equated to a difficulty level of 2 out of 10. The majority describes Kuchta's testimony as follows:

> Viewing all factual allegations in a light most favorable to Kuchta, his friends told the employee that each person in their group wanted an easy ride, which based on a difficulty scale of one to ten, they described as a two (with one meaning not moving at all), which the employee said she could provide. The friends indicated that everyone in the group was a novice and wanted a ride similar to the ride the employee had demonstrated. Furthermore, they told the employee that everyone should be able to step off the bull once the ride concluded, just as the

> employee had been able to do earlier that night after her ride. The employee agreed to provide the type of a ride Kuchta's group requested. (Order, page 2).

Kuchta and his friends then ate dinner. After dinner, they decided to get a ride, and Kuchta signed a written waiver stating as follows:

> I AM FULLY INFORMED OF ALL RISKS ARISING FROM MY PARTICIPATION IN THE MECHANICAL BULL RIDING PROGRAM, including the risks described in this paragraph. The mechanical bull jerks and spins violently and unexpectedly. There is a significant risk that I will be seriously injured . . . [i]ncluding permanent paralysis, head injury, broken neck, other broken bones, and death, whether or not I am thrown from or fall.

Note that, by signing this, Kuchta acknowledged that the mechanical bull "jerks and spins violently and unexpectedly" and that riding it created a "significant risk" of injury from being "thrown," including "broken bones." Note also that this isn't a generic catch-all waiver that purports to cover the entire panoply of any kind of negligence that could conceivably occur on the premises, such as wet floors, rotten food, or debris falling from the roof. Quite to the contrary, it's a narrow waiver that specifically covers one thing and one thing only, the mechanical bull and nothing else. After signing the waiver and mounting the bull, Kuchta was thrown from the bull in the very way that the waiver warned might happen, suffering one of the very injuries (broken bones) that the waiver warned might result. The district court granted summary judgment, concluding that the waiver covered Kuchta's injuries.

On appeal, Kuchta argues that the words of the written waiver do not mean what they seem to so plainly say, not because any words of the waiver actually agree with him, but rather because when the ride operator verbally agreed to provide a level 2 ride, he changed Kuchta's "understanding and expectations" regarding the meaning of the waiver. But as the cliche goes, apples are not oranges, and here the verbal conversation had nothing to do with the waiver. Note what's omitted from even the majority's summary of the verbal conversation: any mention of the waiver whatsoever. Just because the ride operator verbally agreed to try to provide a level 2 ride does not mean that he legally changed the waiver so that it only covered a level 2 ride and nothing more. Indeed, the truth at the heart of this case is that nobody (not even Kuchta) contends that the verbal discussion between Kuchta and the ride operator constituted a negotiation of the waiver; everyone agrees that it was only a conversation about the kind of ride Kuchta wanted. What Kuchta requested was a particular kind of ride, not a particular kind of waiver.

Kuchta tries to bootstrap the conversation about the ride into the contract about the waiver by arguing that it's "parol evidence" regarding his "understanding and expectations" of what the contract covered. But a verbal conversation about the kind of ride Kuchta requested isn't "parol evidence" for two reasons: first, the verbal conversation occurred before Kuchta signed the waiver, which means that the written contract supersedes any and all earlier alleged negotiations. Second, the kind of ride he requested isn't a term of the waiver contract. The kind of ride he wanted, and the kind of ride he agreed to waive, are two very different things, only one of which was ever the subject of the written waiver contract. Kuchta argues that merely because the ride he got was not the ride he requested, it

fell outside of the scope of the waiver. But the waiver says nothing remotely like that.

The proper analysis here is to compare the ride he got to the plain words of the waiver. The very question in this case (not the answer, but the question) is whether the ride that Kuchta actually got was encompassed within the scope of the waiver that he signed. Kuchta tries to mix up the question with its answer, and make it all a circularity, by arguing that the waiver must only cover the ride he asked for. But nothing in the written waiver (and nothing in the verbal conversation either) indicates that the scope of waiver was supposed to be a moving target that ratcheted up or down to whatever kind of ride Kuchta personally wanted and, likewise, ratchets up or down for every other customer who requests a different level of ride. Reading the contract that way means that it lacks any fixed or objective meaning whatsoever but instead changes its meaning for each different customer even though the words themselves remain exactly the same, reducing the contract to nothing more than a Rorshach ink blot having no intrinsic meaning apart from what any reader wants to see in it.

But this isn't how contract law tells us to read a contract. The district court interpreted the contract correctly as a matter of law — according to the objective meaning of its words — and I would affirm.

II.

Here's how contract law actually works and how this appeal should have been analyzed.

To start with, it's well-settled that interpreting the meaning of a contract is a question of law, not a question of fact. *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011). Disputes regarding the scope and meaning of a contract do not preclude summary judgment because such disputes present pure questions of law for

the court, not the jury, to resolve. "[I]n the absence of ambiguity or other factual complexities, contract interpretation presents a question of law that the district court may decide on summary judgment." *Galardi v. Naples Polaris LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (internal quotation marks omitted).

So, if there is no dispute over what the words of a contract consist of, and the only dispute is over what those words mean, the court is presented with a question of law that it may dispose of on summary judgment. Here, there are no factual disputes that a jury must sort out. The parties do not dispute what words the written waiver consists of; Kuchta does not, for example, contend that any pages are missing or any clauses are blurry or incomplete. The parties also do not dispute what the words of the verbal conversation between Kuchta and the ride operator consist of; I'll accept what Kuchta says to be true and agree with him that the operator agreed to try to provide a level 2 ride. There may exist some disagreement over what legal effect those words may have, if any; but there is no dispute regarding what the words of the conversation were. There are thus no factual disputes, only legal ones. The only thing left in dispute is what those words (both the undisputed words of the document and the undisputed words of the verbal conversation) mean about the scope of the waiver, which is a pure question of law that we must answer ourselves in this appeal de novo. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

To answer that purely legal question, we start with the words of the contract. *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013). "A basic rule of contract interpretation is that '[e]very word must be given effect if at all possible.'" *Id.*, 306 P.3d at 364 (quoting *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (alteration in

original). Those words will either be unambiguous, or they will be ambiguous. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). If the words are unambiguous, then we look no farther than the four corners of the written document for its meaning. *Id.*, 359 P.3d at 106. The court "has no authority to alter the terms of an unambiguous contract." *Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). Rather, an unambiguous contract "will be enforced as written." *Am. First Fed. Credit Union*, 131 Nev. at 739, 359 P.3d at 106. "[T]he words of the contract must be taken in their usual and ordinary signification." *Traffic Control Svcs., Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004). Only if the words are ambiguous do we venture outside of the document itself to examine such extrinsic things as parol evidence and settled rules of construction in order to determine the intent of the parties. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913-14, 193 P.3d 536, 544-45 (2008). An ambiguity must be inherent within the contractual term itself, and "does not arise simply because the parties disagree on how to interpret their contract." *Galardi*, 129 Nev. at 309, 301 P.3d at 366.

Kuchta contends that the conversation regarding the level 2 ride must be considered "parol evidence" of contractual meaning. But "parol evidence" is only admissible when some contractual term is facially ambiguous. "The parol evidence rule does not permit the admission of evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004). Further, even when such an ambiguity exists, courts can utilize parol evidence to clear up what those ambiguous words mean but they cannot use parol evidence "to add to, subtract from,

vary, or contradict" the words of the contract itself. *M.C. Multi-Family Dev., LLC*, 124 Nev. at 913-14, 193 P.3d at 544-45. "[P]arol evidence may not be used to contradict [express] terms." *Galardi*, 129 Nev. at 309, 301 P.3d at 366 (Quoting *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001)). Thus, even when admissible (i.e., only when there's an ambiguity), parol evidence is only meaningful to the extent that it clarifies and does not contradict or re-write the plain words of the contract itself. *Id.* And this is true whether the final document is integrated or not: if a contract is integrated then it may neither be supplemented nor contradicted by any additional evidence of any kind. If a contract is not integrated, then it may be supplemented by "consistent additional terms" but it still may never be contradicted by any extrinsic evidence. John D. Calamari & Joseph M. Perillo, Contracts § 3-2, "The Parol Evidence Rule", 135-36 (3d ed. 1987) (text cited as authority in *Matter of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 277 (1991).

Here, no term of the written waiver is facially ambiguous. Rather than identify some particular term that might be inherently ambiguous, Kuchta (and the majority) seem to contend instead that the entire contract was effectively re-written through the verbal conversation. But that's using "parol evidence" beyond its permissible purpose: not to clarify the meaning of an ambiguous term, but to change the scope and meaning of the entire contract. The majority uses the supposed "parol evidence" not to clarify the written words of the contract, but to make the entire contract mean only what the parol evidence says it means regardless of what the written words actually say. Not to illuminate the written words, but to replace them; not to make the written words clear, but to make them meaningless.

That isn't how "parol evidence" works. There are several layers of problems here. First, parol evidence can never be used to contradict a writing, whether or not the writing was integrated. *Galardi*, 129 Nev. at 309, 301 P.3d at 366. Yet that's exactly what Kuchta proposes. The written words, taken in their "usual and ordinary signification," are clear. *Traffic Control Svcs., Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004). They expressly inform Kuchta that the ride will be violent with "unexpected" movements that may cause injury, and Kuchta's signature acknowledges that he understood this. But Kuchta now says that he misunderstood this and the verbal conversation led him to "expect" a less-violent ride that couldn't cause injury. This isn't using extrinsic evidence to clarify the words of a contract; it's abusing extrinsic evidence to re-write the words of a contract to mean their exact opposite.

Second, the sequence of events matters. As the majority itself notes, the conversation between Kuchta and the rider operator occurred first. Only well after the conversation ended did Kuchta later sign the written waiver. And the law is clear that a written contract supersedes and obliterates all prior negotiations:

> "an earlier tentative agreement will be rejected in favor of a later expression. More simply stated, the final agreement made by the parties supersedes tentative terms discussed in earlier negotiations. Consequently, in determining the content of the contract, earlier tentative agreements and negotiations are inoperative."

Calamari & Perillo, *supra* at 135. So the verbal conversation isn't "parol evidence" at all, but rather was nothing more than an early negotiation that never found its way into the written contract and now has no legal importance to what the parties signed later. (This, by the way, is the

problem with footnote 2 of the majority's order, which concludes that the verbal conversation constituted its own separate contract: if the alleged verbal agreement covered the same subject matter as the signed contract (i.e., it was a negotiation over the waiver rather than the ride), then the earlier unsigned agreement was legally superseded by the later signed writing. If it covered some other subject matter (i.e., it was not a negotiation of the waiver but only covered the ride), then it was not superseded, but it has no relevance to the signed contract. Beyond that, if indeed there existed a contract requiring the operator to provide a level 2 ride, then the failure to do so was a breach of contract, not a tort, and the majority order now thoroughly confuses the standard of care by violating the "fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72–73, 206 P.3d 81, 86 (2009). On remand, should the defendant be held to the words of the alleged oral contract, or the standard of a reasonable person, when only tort claims and no contract claims have been asserted? Good luck sorting that out.).

Third, even assuming that the verbal conversation is "parol evidence" at all (which it isn't, but let's skip past that hurdle), it proves nothing relevant to the waiver contract. Kuchta acknowledged during oral argument that the conversation did not overtly represent a negotiation of the waiver; indeed, the words of the conversation never reference the waiver at all, only the kind of ride Kuchta wanted. Rather, Kuchta only alleges that the conversation affected his "understanding and expectation" of what the waiver contract was supposed to mean. *See Renaud v. 200 Convention Cor.*

Ltd., 102 Nev. 500, 501, 728 P.2d 445, 446 (1986). What he's saying is this: the contract must be read to mean not what the words of the document say, but only what he intended them to mean in his mind. But under principles of contract law, whether we read the four corners of an unambiguous contract or whether we look at parol evidence outside of an ambiguous one, what we're looking for is not "intent" in the sense of the subjective intention of the parties (i.e., what the parties may have thought in their minds), but only the objective meaning conveyed by the words they used in the agreement. "[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, not on the parties' having meant the same thing but on their having said the same thing." *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981) (alteration in original, internal quotation marks omitted). In the oft-cited words of Holmes, "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-18 (1899). "[T]he words of the contract must be taken in their usual and ordinary signification," not twisted around to mean some personal peculiarity at odds with accepted English usage. *Traffic Control Svcs., Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004). That the words of a contract are interpreted objectively according to normal rules of grammar, rather than subjectively according to the parties' personal thoughts, has been the law for centuries. *See* Calamari & Perillo, *supra*, § 2-2, "Offer and Acceptance" at 26. "Objective manifestations of intent of the party should be viewed from the vantage point of a reasonable man in the position of the other party," not the party alleging that his own

words meant something else. *Id.* Thus, if one party offers to sell his car for $500 and the other says, "I accept," a contract is formed because of what they said, not what they thought; once they uttered the objective words of offer, acceptance, and consideration, a contract was created by operation of law. This is true even if one party later claims that he was only kidding. *Id.* at 27. The inquiry is not into what the parties may have intended in their minds to convey but rather the most reasonable meaning to be given to the words they utilized in the contract itself. The issue is not what Kuchta claims he meant, but what his words objectively conveyed to the other party, and the agreement must be "ascertained from the writing alone" (unless the writing is ambiguous). *Oakland-Alameda Cty. Coliseum, Inc. v. Oakland Raiders, Ltd.*, 243 Cal. Rptr. 300, 304 (Ct. App. 1988). But here, Kuchta proposes the opposite: that we ignore the words of the written document and instead make the contract only mean what was in his mind rather than what everyone signed on paper.

Finally, even if we skip past all of that and assume that parol evidence could be used the way that Kuchta proposes (even though it can't be, but let's ignore that for a moment), the content of both the document and the alleged "parol evidence" is wholly undisputed: nobody contests what words were written in the document or spoken during the conversation. So what we're left with is only a question of law regarding what those words mean, something that appellate courts are supposed to answer themselves as a matter of law and not leave to the jury. Thus, even if parol evidence was supposedly useable this way (again, ignoring settled principles of contract law), then the appropriate disposition is for us to just say, as a matter of law, whether the waiver contract covers the incident or not, without remanding a pure question of law back to the district court to

grapple with during a jury trial. "[I]n the absence of ambiguity or other factual complexities, contract interpretation presents a question of law [appropriate for] summary judgment." *Galardi,* 129 Nev. at 309, 301 P.3d at 366 (internal quotation marks omitted).

III.

Summing up, what 500 years of contract law tell us is this:

(1) a contract means what its words say and an unambiguous contract "will be enforced as written";

(2) what the contractual words say is what they objectively convey in their ordinary sense regardless of what the parties might have personally thought or intended in their heads;

(3) the final contract supersedes all earlier verbal negotiations;

(4) parol evidence may only be used to clarify a term that is ambiguous, and an ambiguity does not arise merely because the parties disagree on what they think the contract means;

(5) parol evidence may never be used to contradict an express term of a contract, whether the contract is integrated or not;

(6) parol evidence may never consist of earlier negotiations inconsistent with the final contract, whether the final document is integrated or not;

(7) when there is no dispute regarding what the words of the contract consist of (and there is no dispute regarding what any parol evidence admitted to clarify an ambiguity actually is), and the only remaining dispute is over what those undisputed words and parol evidence mean, then all that remains is a pure question of law for the court.

Applying these seven principles leads to an obvious and straightforward outcome. Here, nobody disputes what the words of the written waiver are; there's not even any dispute about what the words of the

"parol evidence" were, only what legal effect those words have or do not have. There's no dispute that the alleged verbal agreement was never intended to be final, never mentioned the waiver in any way, and occurred before the signing of the written waiver contract. There is no factual question left to work out. The only question before us is what all of the undisputed evidence means. That's a pure question of law that we, not the jury, are supposed to answer.

IV.

With no dispute about what words the contract consisted of, what remains is solely a question of contractual interpretation. *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011).

Here, the written words say that Kuchta waived the right to pursue any liability arising from broken bones that may result from being thrown from the "violent and unexpected" jerking of the mechanical bull. The parol evidence (assuming that the verbal conversation was any such thing) is that Kuchta asked for a level 2 ride and the operator agreed to try to provide one. None of this is in dispute. What does this all mean as a matter of law?

In the context of liability waivers, there are a couple of additional rules of construction to follow. In Nevada, an exculpatory agreement is a "valid exercise of the freedom of contract." *Miller v. A&R Joint Venture*, 97 Nev. 580, 582, 636 P.2d 277, 278 (1981). Though generally enforceable, exculpatory clauses in a contract must meet four standards before a party seeking to enforce the clause can be absolved of liability:

> (1) Contracts providing for immunity for liability for negligence must be construed strictly since they are not favorite[s] of the law . . . ; (2) such contracts must spell out the intention of the party with the

> greatest particularity . . . and show the intent to release from liability beyond doubt by express stipulation and no inference from the words of general import can establish it . . . (3) such contracts must be construed with every intendment against the party who seeks immunity from liability . . . (4) the burden to establish immunity from liability is upon the party who asserts such immunity . . . .

Agric. Aviation Eng'g Co. v. Bd. of Clark Cty. Comm'rs, 106 Nev. 396, 399-400, 794 P.2d 710, 712-13 (1990) (quoting *Richard's 5 & 10, Inc. v. Brooks Harvey Realty Inv'rs*, 399 A.2d 1103, 1105 (Pa. Super. Ct. 1979)).

Here, all four requirements are met. Indeed, the majority seems to fully agree, as it does not conclude that the waiver contract is invalid or illegal, only that some dispute of facts exists regarding its meaning. So everyone agrees that the contract is valid; the only disagreement is over what it covers or does not cover.

It seems pretty clear to me that, whatever else this agreement covers, it covers what happened to Kuchta. Kuchta alleges in his lawsuit that, due to the unexpected and violent jerking of the bull, he was thrown and suffered broken bones. In other words, the appellant alleges that he suffered the exact injury (broken bones) from the exact outcome (being thrown from the bull) caused by the exact movement (unexpected and violent jerking) expressly warned about in the waiver. Kuchta's "parol evidence" (assuming it is any such thing) only shows that he asked for a level 2 ride, not that he asked for the waiver to only encompass a level 2 ride, so it tells us nothing about what the terms of the waiver contract were. The legal answer seems clear to me: Kuchta waived the right to sue for his injuries.

This all seems obvious under settled principles of contract law. So how does the majority come to a different conclusion? By reading *Renaud*

v. 200 Convention Ctr. Ltd., 102 Nev. 500, 501, 728 P.2d 445, 446 (1986) in an astonishingly broad way that demolishes and re-writes much of existing contract law in Nevada.

V.

Based upon *Renaud*, Kuchta argues (and the majority agrees) that summary judgment was inappropriate. But I don't read *Renaud* the way that either Kuchta or the majority do. There are two ways to read what *Renaud* supposedly says. The first is to read it broadly to overrule virtually the entirety of Nevada contract law in a way that requires reversal of this appeal. The second is to read it narrowly in a way that fits in quite nicely with existing principles of Nevada contract law, but requires affirmance of this appeal. The majority chooses the former, but I think it's the latter.

Before we get to the larger questions, here are some preliminary observations about *Renaud*. First, it's a 1986 case decided under the old summary judgment standard that was expressly overruled in *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1029 (2005), under which summary judgment could only be granted if no reasonable doubt exists that the plaintiff must lose and the "truth" is "clear." *See In re Hilton Hotel*, 101 Nev. 489, 492, 706 P.2d 137, 138 (1985) (overruled by *Wood*). Indeed, the opinion hinges on the overruled pre-*Wood* language: "summary judgment is appropriate only when it is quite clear what the truth is." *Renaud*, 728 P.2d at 446. It seems pretty clear to me that, just because summary judgment was improper in *Renaud* under the old standard — a standard that made summary judgment pretty much impossible to obtain, which is exactly why it was overruled, *see Wood*, 121 Nev. at 729-32, 121 P.3d at 1029-31 — that says nothing about whether we should follow its reasoning under the very different standard that exists today.

Second, the facts of *Renaud* are quite different than the facts of this case in a way that seriously undermines its relevance. The liability waiver at issue in *Renaud* was a blanket one that "purported to exculpate Flyaway of any liability for negligence that might occur while [plaintiff] was on its premises." 102 Nev. at 501, 728 P.2d at 446. The plaintiff contended that this release failed to apprise her of any specific risk associated with the free-fall simulator that injured her, a contention that was obviously quite true as the waiver failed to identify any particular risk of injury or even mention the simulator at all. Indeed, the waiver in *Renaud* consisted of the very "words of general import" that the Nevada Supreme Court disapproved in the four-prong test articulated in *Agric. Aviation Eng'g Co.*, 106 Nev. at 399-400, 794 P.2d at 712-13. Consequently, summary judgment was inappropriate (especially under the old pre-*Wood* standard) because a serious question existed whether the waiver apprised the plaintiff of the particular risks specifically associated with the free-fall simulator when it never even mentioned the simulator or any risks at all. There's no other way the case could have come out (which is probably why *Renaud* was so unimportant that it was issued as an unsigned per curiam opinion). If a waiver fails to even mention the apparatus that caused the injury, then there exists a dispute right on the face of the waiver itself as to what risks it identifies when the waiver itself says barely anything at all one way or the other. Under principles of contract law alone, let alone tort law, such a waiver contains a facial ambiguity necessitating the evaluation of parol evidence to determine what the contract was supposed to cover or not cover. *See M.C. Multi-Family Dev*, 124 Nev. at 913-14, 193 P.3d at 544-45. Thus, under either contract law or tort law, whenever a waiver is facially vague

and unclear, summary judgment was inappropriate because the waiver clearly failed to apprise the plaintiff of any risks in particular.

But that's not anything like the case at hand. In stark contrast to *Renaud*, the release at issue here was far from a blanket one purporting to absolve the landowner from "all" unspecified and unnamed potential liability in some vague and incredibly generic way without bothering to identify what those risks were. Rather, the release here was narrowly and specifically targeted to the mechanical bull that described its operation and listed its particular hazards in detail, including the very injuries (broken bones from being thrown) that the plaintiff actually suffered. Indeed, the waiver covered nothing but the mechanical bull, and only people wishing to ride the mechanical bull were required to sign it; patrons wishing only to have a drink at the bar weren't required to sign it and weren't asked to waive anything.

So there exist very different sets of facts between *Renaud* and this appeal. But the question becomes what that means: does *Renaud* apply only to vague blanket waivers that fail to identify any particular risks, or does it articulate a standard that broadly applies to all waivers including the narrow targeted one at issue here?

VI.

Renaud observes that two things are required for a plaintiff to have assumed the risk of an injury: "First, there must have been voluntary exposure to the danger. Second, there must have been actual knowledge of the risk assumed." *Renaud*, 102 Nev. at 501, 728 P.2d at 446. To determine whether the party signing a liability waiver had actual knowledge of the risks assumed, courts must consider "the nature and extent of the injuries, the haste or lack thereof with which the release was obtained, and the

understandings and expectations of the parties at the time of signing." *Id.* at 502, 728 P.2d at 446.

The majority agrees that the first two factors strongly favor affirmance, but concludes that summary judgment is not warranted as to the third because factual disputes exist. In other words, the majority interprets this language as a standalone three-part test that must be satisfied regardless of how detailed the language of the waiver happens to be. It becomes a test that exists apart from and outside of the contract itself, under which the words of the contract itself have no independent legal significance but are reduced to merely being one small piece of evidence among other evidence tending to prove the three prongs of the test. In addition to making it a standalone test, the majority interprets the three-part test as fundamentally factual. It becomes an inquiry focused upon what was said between the Kuchta and the ride operator regardless of what the waiver itself said or didn't say within its four corners; and when those understandings and expectations are disputed, summary judgment cannot be granted.

Indeed, that's how the majority order is structured: it recites the written words of the waiver on page 6, but then after launching into *Renaud*, it never cites those words again — they just disappear from the analysis for the rest of the order — instead only concluding that the third prong of the three-part test was factually disputed in a way having nothing to do with those words.

Well, that's one way to read *Renaud*. But it's not how I read it, and here's why: it deeply conflicts with long-settled principles of contract law.

Here's the problem in a nutshell. If *Renaud* sets forth the standalone fact-based test that the majority proposes, then it requires the court to always, every single time, look outside of the four corners of the waiver to investigate the parties' understandings and expectations, whether the words of the contract are ambiguous or not. And that judicial investigation must include superseded earlier negotiations that would otherwise be evidence of nothing under contract law. Maybe summary judgment could still sometimes still be granted if no dispute exists regarding that evidence; but the evidence must always be admitted and at least considered in some way whether there was any textual ambiguity in the contract or not. That's a major re-writing of contract law, which starts with the fundamental proposition that contracts are enforced as written based upon the words contained within their four corners, and going outside of them is the exception, not the rule, an exception that only arises in the event of an ambiguity.

And there's more. If *Renaud* is indeed the standalone factual test that Kuchta proposes, then courts must always admit extrinsic evidence whether or not it qualifies as admissible "parol evidence" in contract law. Beyond that, here's what the court would use that extrinsic evidence to do: not to clear up the meaning of an ambiguity in the text (because under this test no such ambiguity would be required as a trigger anyway), but to determine what the parties thought and expected the waiver contract to mean in the first place regardless of the words used. But this violates the idea that "[t]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, not on the parties' having meant the same thing but on their having said the same thing." *Hotel Riviera,* 97 Nev. at 401, 632 P.2d at 1157 (alteration in

original, internal quotation marks omitted). Here, Kuchta reads *Renaud* as requiring the exact opposite: courts must read contracts not according to their words, but rather according to the personal "understandings and expectations of the parties at the time of signing." It replaces the objective test of contract law with an entirely subjective approach that focuses not upon the plain and ordinary meaning of the words of the document that everyone signed but, instead, upon what everyone thought regardless of the written words that they agreed upon. The old rule has long been that "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used," Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-18 (1899), and "the words of the contract must be taken in their usual and ordinary signification," *Traffic Control Svcs.*, 120 Nev. at 174, 87 P.3d at 1058. But the majority's new rule is that we ask not what words were used, but only what the parties imagined in their heads.

This is revolutionary. Make no mistake about how far-reaching this is. But it's the only way to reverse summary judgment here, because all of the factual disputes that Kuchta (and the majority) point to lie entirely outside of the four corners of the written contract and consist entirely of a prior, superseded verbal conversation that nobody even asserts was a negotiation of the waiver contract itself. And those supposed factual disputes serve not to clarify a term of the contract, but to contradict those terms.

In short, Kuchta and the majority read *Renaud* as supplanting (or at least creating an unprecedented major exception to) settled law: when

it comes to liability waivers, courts do something entirely different than they've done with every other contract since the time of Blackstone.

That's an incredibly broad reading of *Renaud*. But accepting it is the only way to reverse summary judgment in this case, because if we apply traditional contract law and stay within the four corners of the waiver itself — or, alternatively, even if we concede some kind of ambiguity but limit ourselves to parol evidence consistent with the written words in order to clarify the written words — Kuchta must lose. For what Kuchta now claims he believed about the waiver comes very close to representing the exact opposite of what its written words actually say: the written waiver says that the movements of the bull are "violent" and "unexpected" and may cause injury, but Kuchta now asserts that he had a specific expectation that the ride would be non-violent and could not cause injury.

VII.

Let's ask a practical question: under this standard, what kind of trial will this be? The answer is: not one in which the jury will be instructed to honor the written words of the waiver contract even if the words are clear and unambiguous. If any parol evidence is deemed admissible in the event of ambiguity, not one in which the jury will be instructed to consider only parol evidence that doesn't flatly contradict the written words or re-write the entire contract. In sum, not one in which the words of the contract matter much at all.

Instead, the trial will consist (as the interrogatory responses and deposition testimony before us currently do) of dueling, uncorroborated, and self-serving testimony regarding a single verbal conversation that occurred years ago that was never memorialized and never referenced in any way in the final writing, one that Kuchta himself agrees was not a negotiation of the terms of the waiver. In weighing that conversation, the

jury will be asked to determine not what contractual terms Kuchta agreed to and signed, but only what inner thoughts he secretly harbored at the time.

VIII.

I don't read *Renaud* that way. It's a two-page unsigned per curiam opinion, and nothing in it suggests that it was meant to broadly overrule so much clear and established law. It's axiomatic that we do not read statutes as if Legislatures decided to "hide elephants in mouseholes." *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001). I doubt that we ought to read *Renaud* as if the Nevada Supreme Court intended to do exactly that.

Instead, I read *Renaud* as saying something much simpler that overrules nothing and fits very happily within existing tenets of contract law. Courts must determine whether a waiver warns of the risk and injury at issue, just as *Renaud* says they must; but they do so within the context of settled law by examining the terms of the waiver itself. If the words of the waiver contain a sufficient warning, then no extrinsic evidence is needed and the inquiry stops there because the contract must be interpreted according to the four corners of its text as a matter of law. Only if the waiver is ambiguous as to what is covered can the court go outside of the four corners of the document to examine parol evidence to clear up the ambiguity.

Renaud itself was a straightforward application of this simple idea. In it, the waiver at stake was so generically written that it fails to mention the free-fall simulator at all, much less describe any particular injuries that could occur from using it. Thus, the written contract itself was silent on whether it covered either the plaintiff's particular injury or the risk that inflicted that injury. In that event, established principles of contract law dictate that the written waiver could either be read as ambiguous regarding whether it covered the free-fall simulator, or it could also be read,

as a matter of law, as not covering the free-fall simulator. In the first instance, parol evidence must be considered to resolve the ambiguity and, in the second instance, any evidence of a waiver, if there was one, must exist entirely outside of the written contract in the form of an oral contract. Either way, and especially under the old pre-*Wood* standard for granting summary judgment, summary judgment was not warranted because no such evidence had been presented or considered.

So I read *Renaud* not as some sweeping and revolutionary holding inconsistent with contract law in any way, but as a simple and straightforward application of clearly established law. If a waiver is so poorly worded or generic as to be ambiguous, then summary judgment cannot be granted absent consideration of parol evidence. On the other hand, if the written waiver is sufficiently clear and precise that its terms convey that there was "voluntary exposure to the danger as well as actual knowledge of the risk assumed" — including that "the nature and extent of the injuries" were of the kind warned about in the waiver, and the "understandings and expectations of the parties at the time of signing" are clearly conveyed in the document — then the only question presented is one of contract interpretation (a question of law). If the written words meet all of these tests, then as a matter of law the waiver operates to bar any claim arising from any injury specifically warned of in the waiver. *Renaud*, 102 Nev. at 501, 728 P.2d at 446.

Consequently, summary judgment was properly granted in this case. The waiver is specific and precise, there are no ambiguities in it, and it covered the very injuries suffered by the very means warned about in the waiver. I would conclude as a matter of law that summary judgment was properly granted as the only question before us is one of contract

interpretation, which presents a pure question of law. The only factual "disputes" that appellant cites relate to inadmissible extrinsic evidence lying outside of the contract that both pre-dates and contradicts the writing, and therefore are neither "genuine" nor "material." *See Wood*, 121 Nev. at 731, 121 P.3d at 1029 ("A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."). *See* NRCP 56 (summary judgment warranted when plaintiff not "entitled to judgment as a matter of law"). I would affirm and respectfully dissent.

_____, J.
Tao

cc: Hon. Scott N. Freeman, District Judge
Hanratty Law Group
Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
Washoe District Court Clerk