IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMESIA AUSTIN A/K/A JAMESIA GREER, AN INDIVIDUAL, Appellant, vs. SUN BUGGY FUN RENTALS, INC., A DOMESTIC CORPORATION, Respondent.	No. 87321-COA
JAMESIA AUSTIN A/K/A JAMESIA GREER, AN INDIVIDUAL, Appellant, vs. SUN BUGGY FUN RENTALS, INC., A DOMESTIC CORPORATION, Respondent.	No. 87719-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, VACATING IN PART, AND REMANDING

Jamesia Austin appeals from district court orders granting a motion for summary judgment and awarding attorney fees and costs in a personal injury action. Eighth Judicial District Court, Clark County; Jacob A. Reynolds, Judge.[1]

In 2018, Austin participated in an all-terrain vehicle (ATV) tour excursion in Las Vegas operated by respondent Sun Buggy Fun Rentals, Inc.[2] Prior to the tour, Austin signed paperwork at Sun Buggy's office, including a rental agreement containing a liability waiver and release. The waiver provided generally that Austin agreed to "RELEASE, WAIVE, AND

[1]These appeals have been consolidated for disposition.

[2]We recount the facts only as necessary for our disposition.

24-346044

RELINQUISH ALL CLAIMS AND LEGAL ACTIONS FOR PERSONAL INJURY, WRONGFUL DEATH, OR PROPERTY DAMAGE AGAINST SUN BUGGY" that arose as "A RESULT OF [HER] PARTICIPATION IN THE DUNE BUGGY/ATV ACTIVITIES." This release expressly applied even if Sun Buggy was "NEGLIGENT OR OTHERWISE AT FAULT." The rental agreement also contained a provision warning participants to watch out "for drifts, sand bowls, and cliffs."

In her deposition, Austin admitted that she did not read the paperwork before signing and initialing each page, but from past experience she was generally aware of the risks of riding an ATV and would have consented to assuming those general risks. She also testified that she did not understand Sun Buggy would be immune from liability if she was injured in an accident due to Sun Buggy's negligence. She claimed she was rushed into signing the forms because Sun Buggy told her she was "in the last group and had to go." After signing the forms, Austin, along with the other riders in her tour group, watched a safety video before being driven to a nearby desert dune area. Austin acknowledged that she was aware of cliffs in the area but claimed that the tour guide did not specifically warn the group about any cliff as they were riding on the trail.

Austin testified that during the tour, one of the other riders was having difficulty operating her ATV, which held up the group on at least two occasions. The tour guide then took Austin's ATV, apparently exchanged it for the ATV the rider was having difficulty operating, and gave that rider's ATV to Austin. Near the end of the tour, Austin's tour guide led them over a hill, and the trail turned to the left away from a cliff on the right. As Austin drove down the hill, her ATV "locked up," and she was

unable to steer or brake the vehicle. Austin's ATV drove over the cliff. She suffered significant but non-fatal injuries.

Austin filed a civil complaint against Sun Buggy in September 2020 alleging multiple claims, including negligence for providing her "an unsafe and mechanically compromised" ATV; premises liability; negligent hiring, training, supervision, and retention; product defect; res ipsa loquitur; and concert of action. After the close of discovery, Sun Buggy moved for summary judgment. Relying primarily on the liability waiver and Austin's deposition testimony, Sun Buggy argued that the waiver was enforceable despite Austin's failure to read the documents and that it precluded her claims as a matter of law. Austin opposed and responded that the liability waiver was unenforceable because, among other reasons, she did not assume the risk of her injuries under the facts and circumstances of this case.

Following a hearing, the district court granted summary judgment in Sun Buggy's favor on all claims, determining that the liability waiver was enforceable and that Austin assumed the risk of her injuries. Austin moved for reconsideration and the district court denied Austin's motion on the merits, finding that Austin assumed the risk of injury because "these risks are clearly and specifically spelled out in the waiver itself." Austin timely appealed the district court's summary judgment in Docket No. 87321.

Following summary judgment, Sun Buggy moved for attorney fees and costs, relying on an attorney fee provision in the rental agreement. The district court granted Sun Buggy's motion and awarded it attorney fees of $62,390, including post-judgment interest at the statutory rate. Austin

timely appealed the order awarding Sun Buggy attorney fees in Docket No. 87719.

On appeal from the order granting summary judgment, Austin argues the district court erred in determining that the liability waiver was enforceable and that it precluded her from bringing suit. She contends that there was no meeting of the minds as to the material terms of the liability waiver—and thus no contract—because she was rushed into signing the waiver without reading it. Alternatively, she argues that the liability waiver was unenforceable because she did not expressly assume the risks of the ATV tour for the accident that occurred. Because a genuine dispute of material fact remains as to whether Austin expressly assumed the risk of her injuries, we reverse the district court's order granting summary judgment on Austin's negligence claim.[3]

On appeal from the order awarding attorney fees, Austin argues that the district court abused its discretion because the attorney fee provision in the rental agreement was ambiguous and NRS 18.010(4), which the district court cited in its order, was not a valid basis on which to award

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[3]As noted, the district court also granted summary judgment on Austin's remaining claims. In its order, the court provided findings of fact and conclusions of law specific to each claim. However, Austin does not challenge these findings and conclusions on appeal, and thus any such arguments are waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived); *Hung v. Genting Berhad*, 138 Nev., Adv. Op. 50, 513 P.3d 1285, 1286 (Ct. App. 2022) (providing that when a district court provides multiple alternative bases to support its ruling and an appellant fails to challenge each ground on appeal, "this court will generally deem that failure a waiver of each such challenge"). Therefore, we affirm the portions of the district court's order granting summary judgment on these claims.

attorney fees. While we address these arguments, we ultimately vacate the attorney fees award because it was predicated on summary judgment and remand for further proceedings.[4]

Summary judgment was inappropriate on Austin's negligence claim

This court reviews a grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is only appropriate where, construing all evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact, and "the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted); *see* NRCP 56(a).

Austin argues that no valid contract was formed between herself and Sun Buggy because her failure to read the liability waiver precluded a meeting of the minds as to the contract's material terms. "Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). In Nevada, a liability waiver 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).

Generally, a party's failure to read a contract will not prevent its formation absent fraud or misrepresentation. *See Yee v. Weiss*, 110 Nev. 657, 662, 877 P.2d 510, 513 (1994) ("Courts have consistently held that one is bound by any document one signs in spite of any ignorance of the

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[4]Austin also argues that the attorney fee provision is an unenforceable term in an adhesion contract and procedurally and substantively unconscionable. Because we reverse on other grounds, we need not reach these issues. *See Miller v. Burk*, 124 Nev. 579, 588-89, 188 P.3d 1112, 1118-19 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar).

document's content, providing there has been no misrepresentation."). However, in order for a liability waiver to be enforceable, it must satisfy two different tests: first, it must meet the four-factor test under *Agricultural Aviation Engineering Co. v. Board of Clark County Commissioners*, 106 Nev. 396, 399-400, 794 P.2d 710, 712-13 (1990); second, the injured party must have expressly assumed the risk of injury as set forth in *Renaud v. 200 Convention Center Ltd.*, 102 Nev. 500, 501-02, 728 P.2d 445, 446 (1986). While the district court did not err in its analysis of the *Agricultural Aviation* factors, the court failed to address the *Renaud* factors. As discussed more fully herein, a genuine dispute of material fact exists regarding whether Austin expressly assumed the risk of injury pursuant to *Renaud*.

The district court did not err in finding that Sun Buggy's liability waiver satisfies Agricultural Aviation

To "be interpreted so as to relieve a person of liability that the law would otherwise impose," a liability waiver must meet certain requirements:

> (1) contracts providing for immunity from 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[,] . . . [and] (4) the burden to establish immunity from liability is upon the party who asserts such immunity.

Agric. Aviation, 106 Nev. at 399-400, 794 P.2d at 712-13 (omissions in original) (internal quotation marks omitted).

Austin argues that the waiver in this case does not spell out Sun Buggy's intention "with the greatest particularity" because it does not specify all of the risks that may be encountered on the ATV tour or what skills are required to safely participate. However, *Agricultural Aviation* requires the release to clearly specify the drafter's intent to release itself from liability, not to spell out with particularity every risk or provision of the waiver. *Id.* at 400, 794 P.2d at 713. Sun Buggy's waiver expressly showed its intent to release it from liability beyond doubt. Thus, strictly construing the waiver against Sun Buggy, the district court did not err in determining that the waiver and release satisfied the requirements of *Agricultural Aviation.*

The district court erred in finding that Austin assumed the risk of her injuries as a matter of law

Even if a liability waiver is valid under *Agricultural Aviation*, it may still nonetheless be unenforceable if the injured party did not expressly assume the risk of their injury. *Renaud*, 102 Nev. at 501-02, 728 P.2d at 446. Express assumption of risk "is founded on the theory of consent, with two main requirements: (1) voluntary exposure to danger, and (2) actual knowledge of the risk assumed. A risk can be said to have been voluntarily assumed by a person only if it was known to him and he fully appreciated the danger." *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 71-72, 358 P.2d 892, 894 (1961) (internal quotation marks omitted). In this case, the parties do not dispute that Austin voluntarily participated in Sun Buggy's ATV tour; however, Austin argues that she did not have "actual knowledge of the risks."

"[T]he essential element" of assumption of risk "is the *actual knowledge* of the danger assumed." *Renaud*, 102 Nev. at 501, 728 P.2d at 446. As the Nevada Supreme Court specified in *Anderson*, there is a legal

distinction between contributory negligence, which is "a defense when a party knows or by the exercise of ordinary care *should have known* a particular fact or circumstance, and assumption of risk, which operates only when the party actually knows the full scope and magnitude of the danger and thereafter voluntarily exposes himself to it." 77 Nev. at 72, 358 P.2d at 894.

The United States Supreme Court addressed the requirement of "actual knowledge" in the scope of the Employee Retirement Income Security Act of 1974 in *Intel Corp. Investment Policy Committee v. Sulyma*, 589 U.S. 178 (2020). In that case, the plaintiff received disclosures but testified that he did not read them, and the Supreme Court concluded that he did not have "actual knowledge" of the disclosures' contents. *Id.* at 180. Relying on general dictionary definitions of "actual knowledge," the Court stated that "to have 'actual knowledge' of a piece of information, one must in fact be aware of it." *Id.* at 184. This is distinguished from constructive or imputed knowledge, which is what "a reasonably diligent person would have learned." *Id.* at 185. Importantly, the petitioners in *Sulyma* argued that actual knowledge included "information that is sent to [Sulyma]," and the Court disagreed, reasoning that while disclosures may be relevant in determining whether the plaintiff gained actual knowledge, "if a plaintiff is not aware of a fact, he does not have 'actual knowledge' of that fact however close at hand the fact might be." *Id.* at 186.

In *Renaud*, the Nevada Supreme Court examined the actual knowledge requirement in relation to express assumption of risk in a negligence matter. The court held that when evaluating whether the injured party had actual knowledge of the risk,

> [i]t is necessary to evaluate all the circumstances as they existed at the time the release was

> obtained. Considerations should include (but are not limited to) the following: 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.

Renaud, 102 Nev. at 502, 728 P.2d at 446. These are predominantly factual considerations. *See id.* at 501-02, 728 P.2d at 446 ("Because actual knowledge of the risks assumed is an essential element of this defense, such a matter must be reserved for the factfinder.").

In this case, although Austin argued below that *Renaud* precluded summary judgment, the district court failed to evaluate the *Renaud* factors in its order granting summary judgment. This was error. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031 ("The substantive law controls which factual disputes are material and will preclude summary judgment . . . ."). When evaluating the *Renaud* factors in conjunction with Austin's deposition testimony, there was a genuine dispute of material fact as to whether Austin had actual knowledge—and thus assumed the risk—of her injuries for the type of accident in which she was involved.

In her deposition, Austin testified extensively regarding the rental agreement that she signed, including the liability waiver. She stated repeatedly that she was rushed and hurried to sign the agreement because Sun Buggy told her that she was in the last tour for the day, it was getting ready to close, and there was an event being planned where the ATVs were located. Austin further testified that Sun Buggy "made it very clear" and "expressed" that there was no additional time for her to read the rental agreement. She also stated that she expected to receive an ATV in good condition, that Sun Buggy properly maintained their vehicles, and the tour would not be dangerous.

In addition, during her deposition, Sun Buggy read various provisions of the rental agreement to Austin, asked if she understood it, and asked if she would have signed the agreement had she read that provision. In one instance, after being read a provision which stated that Austin's use of an ATV was at her own risk, Austin answered that she would have signed the contract anyway. However, in four other instances, Austin answered that, had she read the provisions, she would not have signed the contract. Sun Buggy asked Austin, "[n]ow that you've read the agreement, would you have signed this agreement and participated in any activities," to which Austin responded, "[n]o."[5] According to Austin, she was also unaware of several provisions in the rental agreement until they were read to her at the deposition, and she did not understand the extent of the waiver because Sun Buggy emphasized the presence of wildlife on the tour more than the potential dangers.

Here, the first *Renaud* factor—"the nature and extent of the injuries"—favors Sun Buggy. Austin's injuries, while extensive, are the type of injuries that would be expected from an ATV accident. *See Renaud*, 102 Nev. at 502, 728 P.2d at 446. However, the second factor—"the haste . . . with which the release was obtained"—strongly favors Austin based on her extensive deposition testimony that she was rushed to sign the agreement. *See id.* As noted above, she also testified that had she read the

[5]The district court's order relied heavily on the portion of Austin's deposition where she stated that she would have still signed the contract after being read one of the provisions. However, the district court was required to view the evidence in a light most favorable to Austin, and the court erred to the extent it used this admission while failing to account for the several other instances when Austin testified that she would not have signed the rental agreement. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

rental agreement, she would not have signed it. Finally, the third factor—"the understandings and expectations of the parties at the time of signing"—also favors Austin. *See id.* She testified that she expected to receive a functional ATV and that Sun Buggy performed the necessary maintenance on their vehicles, and she further stated that she did not understand the extent of the liability waiver or that it purported to shield Sun Buggy from liability for the type of accident that occurred.[6]

Given Austin's testimony regarding the haste with which Sun Buggy encouraged Austin to sign the release and her different expectations and understandings at the time she signed the waiver, there was a genuine dispute of material fact as to whether Austin assumed the risk of her injuries under *Renaud*. Therefore, we conclude that summary judgment was improper. *See id.* ("[B]ecause there was a dispute as to whether Ms. Renaud knowingly and voluntarily assumed the risks associated with the [activity], the matter was not appropriate for a determination as a matter of law" and "it is necessary for the fact finder to hear testimony and assess credibility."). Accordingly, we reverse the district court's order granting summary judgment on Austin's negligence claim.

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[6]Sun Buggy argues that Austin did not ask for more time and voluntarily signed the agreement without reading it. However, construing the evidence in a light most favorable to Austin, she testified that Sun Buggy expressed to her that there was no additional time to read the agreement. Further, the existence of a signed liability waiver may be relevant to determining whether Austin had actual knowledge of its contents, but it is insufficient to establish that she expressly assumed the risk of the tour as a matter of law. *See Sulyma*, 589 U.S. at 186; *Renaud*, 102 Nev. at 501, 728 P.2d at 446 ("We do not agree that the release itself was sufficient to establish such a fact as a matter of law.").

Because the award of attorney fees to Sun Buggy was predicated on the granting of summary judgment, we necessarily vacate the fee award

After granting summary judgment, the district court awarded Sun Buggy attorney fees in the amount of $62,390 based on an attorney fee provision in the rental agreement:

> Renter expressly agrees to indemnify and hold Owner harmless of, from and against any and all loss, costs, damages, attorney's fees and/or liability in connection with the enforcement of this agreement, including among other things expenses incurred in collecting or attempting to collect delinquent payments due Owner. In the event that legal action is taken by Owner to recover possession of th[e] vehicle and/or to enforce any terms, conditions and/or provisions thereof, Renter agrees to pay all costs and reasonable attorney's fees of Owner in connection therewith.

In its order awarding Sun Buggy attorney fees, the district court found that "[t]his action was clearly connected to the enforcement of the agreement as summary judgment was granted . . . . Accordingly, an award of attorney fees is appropriate."[7]

"An award of attorney fees and costs is appropriately vacated when a portion of the underlying order is reversed." *Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 293 (Ct. App. 2023). Because we reverse the district court's order granting summary judgment on Austin's negligence

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[7]The district court's order also cites NRS 18.010(4), though it is unclear if the court relied on this as an independent ground to award attorney fees. As noted, Austin argues that the district court abused its discretion by citing NRS 18.010(4) because this subsection was not a valid basis on which to award attorney fees. We conclude that NRS 18.010(4) is facially inapplicable. The subsection does not create an independent right to attorney fees—rather, it merely specifies that NRS 18.010(2) and (3) do not apply when a contract entitles the prevailing party to attorney fees.

claim, the district court's decision to award fees might change on remand. *See Iliescu v. Reg'l Transp. Comm'n of Washoe Cnty.*, 138 Nev., Adv. Op. 72, 522 P.3d 453, 462 (Ct. App. 2022) (vacating an award of attorney fees because the underlying judgment was reversed in part).

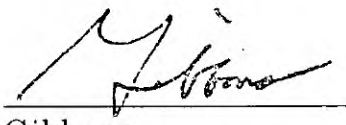
Further, Austin argues that the attorney fee provision was ambiguous under *C & A Investments, LLC v. Jiangson Duke, LLC*, Nos. 79881 & 83279, 2022 WL 6881816 (Nev. Oct. 11, 2022) (Order Affirming (Docket No. 79881), and Affirming in Part, Reversing in Part, and Remanding (Docket No. 83279)). We agree. The attorney fee provision at issue in *C & A Investments*, like the provision in the rental agreement here, provided that fees may be awarded in an action "to enforce" the agreement. *Id.* at *4. The supreme court found this provision was ambiguous because it was susceptible to more than one reasonable interpretation, namely "(1) that a party may recover attorney fees only when filing an action to enforce the [agreement] or (2) that a party also may recover attorney fees when the [agreement] is used as a defense, such as here." *Id.* (citing *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007)). The same reasonable interpretations likewise apply to the attorney fee provision in Sun Buggy's rental agreement.[8]

"In interpreting a contract, the court shall effectuate the intent of the parties . . . ." *Anvui*, 123 Nev. at 215, 163 P.3d at 407 (internal

[8]Sun Buggy argues that this court should not consider *C & A* because Austin did not cite to that particular authority in the district court. However, Sun Buggy concedes that Austin argued the attorney fee provision was ambiguous, and so we conclude that her argument was properly preserved for appeal. *Rives v. Farris*, 138 Nev. 138, 142, 506 P.3d 1064, 1068 (2022) ("[I]t is well-established that a timely objection alone is sufficient to raise and preserve an issue for appellate review.").

quotation marks omitted). Although any ambiguity "should be construed against the drafter," the parties' intent "regarding a contractual provision present[s] a question of fact." *Id.* at 215-16, 163 P.3d at 407. The district court did not make findings regarding the parties' intent in this case, and we decline to do so in the first instance. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Therefore, we vacate the district court's order awarding Sun Buggy attorney fees. On remand, before it may grant attorney fees under this fee provision, the district court must make the necessary factual determinations in light of the attorney fee provision's ambiguity.[9] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, AND VACATED IN PART, AND REMAND this matter to the district court for proceedings consistent with this order.



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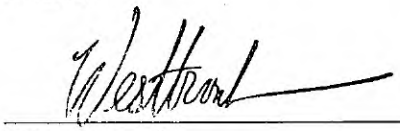

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Westbrook

[9]Insofar as the parties raise other issues not specifically addressed in this order, we conclude that they do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Jacob A. Reynolds, District Judge
Persi Mishel, Settlement Judge
Christian Morris Trial Attorneys
Kravitz Schnitzer Johnson Watson & Zeppenfeld, Chtd.
Eighth District Court Clerk