UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Beverly Dunn and
Joseph Dunn

v.

Case No. 24-cv-256-PB-TSM
Opinion No. 2025 DNH 098

Northern Extremes Sports &
Recreation, Inc.

MEMORANDUM AND ORDER

This case arises from a snowmobile accident in the Bretton Woods area of Carroll, New Hampshire. Beverly A. Dunn and Joseph P. Dunn sued Northern Extremes Sports and Recreation, Inc. ("Northern Extremes") to recover damages for injuries resulting from the accident. The Dunns allege multiple claims under New Hampshire state law, including negligence, unfair and deceptive trade practices, and loss of consortium. Northern Extremes has moved to dismiss Joseph Dunn's loss of consortium claim for failure to state a claim. See Doc. 7; see Fed. R. Civ. Proc. 12(b)(6). Dunn objects. See Doc. 14. For the reasons set forth below, I deny Northern Extremes' motion to dismiss.

I. BACKGROUND

A. The Snowmobile Accident

Northern Extremes is a New Hampshire-based outdoor adventure business that offers several activities to patrons, including guided snowmobile tours "perfect for first-time or novice riders." Doc. 1 at 1-2; see also Doc. 1-1 at 2. Guides teach and lead expeditions on snowmobile trails in the Bretton Woods area, near Mount Washington. Doc. 1 at 2.

In March 2023, the Dunns, residents of Massachusetts, signed up to participate in a Northern Extremes snowmobile ride with their thirteen-year-old son. Id. When they arrived for their guided tour, Joseph Dunn signed a document titled "Assumption of Risk." See Doc. 7-2. This document purports to release Northern Extremes from liability. Id. The agreement included the following language:

> THE UNDERSIGNED HEREBY IRREVOCABLY AND UNCONDITIONALLY RELEASE, FOREVER DISCHARGE, AND AGREE NOT TO SUE OR BRING ANY OTHER LEGAL ACTION AGAINST THE RELEASED PARTIES with respect to any and all claims and causes of action of any nature [. . .] in connection with the Participant's participation in the Activity, including but not limited to, claims of negligence, negligence per se, misrepresentation, premises liability, products liability, failure to warn, all tort claims, all statutory claims and violations, breach of warranty, and breach of contract.

Id. at 1-2 (underline added for emphasis).[1]

Neither of the Dunns had ever operated a snowmobile before. Doc. 1 at 2. Northern Extremes did not show them an instructional video or otherwise give them any formal training on the snowmobiles before the ride. One guide provided the Dunns with helmets and showed them the basic vehicle functions, including the start and stop mechanics. Doc. 1 at 4. Then, a guide took the Dunns out on their snowmobile excursion. Id. The couple rode separate snowmobiles. Joseph Dunn rode alone, but Beverly Dunn had their son with her as a passenger on the back of her snowmobile. Id. While riding on a trail, Beverly Dunn lost control of her snowmobile and crashed. Both she and their son were injured. Id. at 5. Joseph Dunn was not directly involved in the accident but observed it from his snowmobile. He rushed to his spouse and son after their crash and administered rudimentary first aid before emergency medical services arrived approximately forty-five minutes later. Id.

Following a nine-day hospital stay, Beverly Dunn required an additional month of home health care, including nursing and physical therapy. She progressed to outpatient physical therapy and continued

[1] Though Northern Extremes suggests in its briefing that Beverly Dunn also would have had to sign a similar "assumption of risk" liability waiver, see Doc. 7-1 at 1, it does not base its motion on the contention that she did so.

treatment for seven more months. In all, she was immobile for six months because her knee could not bear any weight. Id. at 5. As a result of her injuries, she could not drive her son to school, help him with homework, or assist with his daily school routine. Additionally, she could not cook meals for the family or carry out other household duties. Id. at 6.

B. Procedural History

The Dunns assert three claims against Northern Extremes. In Count I, Beverly Dunn alleges Northern Extremes was negligent in its instruction and oversight, resulting in her injuries. Id. at 6-8. In Count II, she alleges that Northern Extremes engaged in unfair and deceptive trade practices when it advertised its tours as perfect for novice and first-time riders. Id. at 8-9; see also N.H. Rev. Stat. Ann. § 358-A:2. In Count III, Joseph Dunn alleges that he suffered loss of consortium as a result of Northern Extremes' negligence and the subsequent injuries to his spouse. See Doc. 1 at 9.[2] Northern Extremes has moved to dismiss Count III, asserting the affirmative defense of waiver in light of the "assumption of risk" agreement that Joseph Dunn signed. See Doc. 7-1. Dunn objects and argues that the loss of consortium

[2] The complaint contains a fourth claim, which has since been dismissed on the basis of the parties' mutual agreement. See Doc. 1 at 10; see also Doc. 21.

claim remains viable because it falls outside the scope of his waiver. See Doc. 14-1.

II. STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible if it pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

In testing a complaint's sufficiency, the First Circuit uses a two-step approach. See Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011). First, the complaint is screened for statements that "merely offer legal conclusions couched as fact or threadbare recitals of the elements of a cause of action." Id. (cleaned up). A claim consisting of little more than "allegations that merely parrot the elements of the cause of action" may be dismissed. Id. Second, the court credits as true all of the plaintiff's non-conclusory factual allegations and the reasonable inferences drawn from those allegations, and then determine if the claim is plausible. Id. The plausibility requirement "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of illegal conduct. Twombly, 550 U.S. at 556. The "make-or-break standard" is that those allegations and inferences, "taken as true,

must state a plausible, not a merely conceivable, case for relief." Sepulveda-Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 29 (1st Cir. 2010).

Ordinarily, "a complaint need not anticipate or overcome affirmative defenses." Schmidt v. Skolas, 770 F.3d 241, 248 (3d Cir. 2014). "Where a court grants a Rule 12(b)(6) motion based on an affirmative defense, the facts establishing that defense must: (1) be definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice to establish the affirmative defense with certitude." Gray v. Evercore Restructuring L.L.C., 544 F.3d 320, 324 (1st Cir. 2008) (cleaned up). In other words, before a motion to dismiss can be granted on the basis of an affirmative defense, the plaintiff must have affirmatively pleaded himself out of court by alleging "everything necessary to satisfy the affirmative defense." Hyson USA, Inc. v. Hyson 2U, Ltd., 821 F.3d 935, 939 (7th Cir. 2016) (cleaned up).

Normally, courts cannot consider documents or material outside the complaint when ruling on a motion to dismiss for failure to state a claim. However, the First Circuit has previously allowed consideration of outside materials in instances where the authenticity of the documents is not disputed by the parties. Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993); see also Foley v. Wells Fargo Bank, 772 F.3d 63, 74 (1st Cir. 2014).

III. ANALYSIS

In evaluating Joseph Dunn's claim and Northern Extremes' affirmative defense, I first briefly sketch the nature of New Hampshire state law on loss of consortium before turning to the question of whether the assumption-of-risk document signed by Dunn in this case effectively waived his loss of consortium claim.

A. Loss of Consortium

The New Hampshire Revised Statutes state "a wife or husband is entitled to recover damages for loss or impairment of right of consortium whether caused intentionally or by negligent interference." N.H. Rev. Stat. Ann. § 507:8-a. To prove a loss of consortium claim, a plaintiff must show that he or she has suffered loss of "service, society and sexual intercourse" arising from the defendant's tortious conduct. Brann v. Exeter Clinic, Inc., 127 N.H. 155, 161 (1985). In addition, New Hampshire treats loss of consortium claims as independent of the underlying tort: they are "separate and distinct" claims.[3] Id. at 160. In other words, a loss of consortium claim wholly belongs to the spouse, not the injured party. Id. Accordingly, the power to waive liability rests with the spouse of the injured party. Cf. Ahern

[3] In some other states, like Maine, for example, loss of consortium is derivative of the underlying tort claim. Brown v. Crown Equipment Corp., 960 A.2d 1188, 1195 (Me. 2008). The uninjured spouse's loss of consortium claim can be waived by the injured spouse. Id.

v. Laconia Country Club, Inc., 118 N.H. 623, 625 (1978) (explaining in the workers' compensation context that the viability of the injured party's claim is distinct from the viability of the spouse's loss of consortium claim).

Here, Joseph Dunn asserts a loss of consortium claim arising from the injuries to his spouse. Dunn alleges that he suffered a loss of his spouse's "companionship, love, comfort, affection, solace, and/or moral support, as well as the loss of his spouse's physical assistance in the operation and maintenance of the parties' home and care for their son." Doc. 1 at 9. Beverly Dunn was significantly incapacitated for months after her accident. She could not assist with her duties around the house, and her husband lost her companionship for an extended period. Id. On the facts pleaded in the complaint alone, this claim is plausible and would be adequate to deny a motion to dismiss. In response, however, Northern Extremes alleges that Joseph Dunn's waiver of liability bars a loss of consortium claim. See Doc. 17 at 2.

B. Waiver of Liability

In New Hampshire, "releases" or "waivers" of liability are considered exculpatory contracts. See Barnes v. New Hampshire Karting Ass'n, 128 N.H. 102, 106-07 (1986). Though exculpatory contracts are typically prohibited, courts will enforce them when (1) they do not violate public policy, (2) the plaintiff understood the import of the agreement or a reasonable person

would have understood the import of the agreement, and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract. Dean v. MacDonald, 147 N.H. 263, 266-67 (2001) (citing Barnes, 128 N.H. at 107).

In order for a plaintiff to release a defendant from liability through an exculpatory contract, such as a waiver, the specific claim at issue must have been within the contemplation of the parties at the time the agreement was formed. In evaluating the scope of the waiver, courts will typically construe language narrowly and against the defendant. Wright v. Loon Mountain Recreation Corp., 140 N.H. 166, 170 (1995).

Here, both Joseph Dunn and Northern Extremes acknowledge that the waiver signed by Dunn is a valid one that is enforceable and can be used to bar him from bringing certain claims against the company. See Doc. 14 at 2. (evincing plaintiff's agreement that Count IV fell within the scope of the waiver and should be dismissed). The parties disagree, however, on the question of whether the waiver as written covers Dunn's loss of consortium claim since the language states Northern Extremes is released from "all tort claims, all statutory claims and violations" that arise out of Joseph Dunn's "participation in the activity." Doc 7-2 at 1.

Northern Extremes argues that the waiver is broad enough to include a statutory claim, such as loss of consortium, even if not explicitly listed. See

Doc. 17 at 2. It is generally true that waivers need not be hyper-specific in order for a claim to the within the contemplation of the parties: "The language of the release need not refer to the precise injury that actually occurred in order for the defendant to be released from liability." Ladue v. Pla-Fit Health, LLC, 173 N.H at 630, 639 (2020).

Dunn, however, points out that the agreement, by its terms, limits his waiver to those claims that arise from his participation in the activity, not his spouse's or anyone else's participation. See Doc. 19 at 1 ("The [r]elease only bars Mr. Dunn's claims connected with his own participation in the snowmobiling tour, not a loss of consortium claim connected with Beverly Dunn's participation in the snowmobiling tour." (emphasis in original)). Dunn's argument here is persuasive.

Dunn's claim does not arise from his own participation in the activity and, therefore, falls outside of the scope of the waiver as written and as understood by a reasonable person. Id. at 1-2. The release's language repeatedly refers to claims related to his own participation in the activity, not claims derivative of another person's participation. Doc. 7-2 at 2. The claims specified in the waiver are "negligence, negligence per se, misrepresentation, premises liability, products liability, failure to warn, all tort claims, all statutory claims and violations, breach of warranty and breach of contract." Id. It does not include or even suggest that the signatory would be releasing

Northern Extremes from liability for this categorically different type of claim: a claim arising out of injury to a spouse, who was a separate participant in the activity. Dunn was not involved in his spouse's accident. If he had stayed home in Massachusetts that day, he could still assert a loss of consortium claim arising from his spouse's accident. The fact that he himself also chose to use a snowmobile that day and sign a waiver relating to his own participation in the activity does not destroy his loss of consortium claim.

IV. CONCLUSION

For the reasons explained above, I deny the motion to dismiss count III, see Doc. 7.

SO ORDERED.

/s/ Paul J. Barbadoro
Paul J. Barbadoro
United States District Judge

August 19, 2025

cc: Counsel of Record