PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

July 26, 2021

Christopher M. Wolpert
Clerk of Court

ALICIA HAMRIC, individually, as representative of the Estate of Robert Gerald Hamric, and as next friend of Ava Hamric, a minor,

Plaintiff - Appellant,

v.

WILDERNESS EXPEDITIONS, INC.,

Defendant - Appellee.

No. 20-1250

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CV-01442-NYW)

William J. Dunleavy, Law Offices of William J. Dunleavy, Allen, Texas (Stephen A. Justino, Boesen Law, Denver, Colorado, on the briefs), for Plaintiff – Appellant.

Malcolm S. Mead (Peter C. Middleton and Jacob R. Woods with him on the brief), Hall & Evans, Denver, Colorado, for Defendant – Appellee.

Before **TYMKOVICH**, Chief Judge, **HOLMES**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

Gerald Hamric, a Texas resident, joined a church group on an outdoor recreation trip to Colorado. The church group employed the services of Wilderness

Expeditions, Inc. ("WEI") to arrange outdoor activities. Before the outdoor adventure commenced, WEI required each participant, including Mr. Hamric, to complete a "Registration Form" and a "Medical Form." On the first day, WEI led the church group on a rappelling course. In attempting to complete a section of the course that required participants to rappel down an overhang, Mr. Hamric became inverted. Attempts to rescue Mr. Hamric proved unsuccessful, and he died.

Alicia Hamric, Mr. Hamric's wife, sued WEI for negligence. WEI moved for summary judgment, asserting the Registration Form and the Medical Form contained a release of its liability for negligence. Ms. Hamric resisted WEI's motion for summary judgment in four ways. First, Ms. Hamric moved for additional time to conduct discovery under Federal Rule of Civil Procedure 56(d). Second, Ms. Hamric moved for leave to amend her complaint to seek exemplary damages based on willful and wanton conduct. Third, Ms. Hamric filed a motion for leave to disclose an expert out of time. Fourth, Ms. Hamric argued Texas law controlled the validity of the purported liability release in the Registration Form and the Medical Form, and additionally that the release was not conspicuous as required by Texas law.

In a single order, a magistrate judge addressed each of the pending motions. The magistrate judge first declined to grant leave to amend the complaint due to Ms. Hamric's failure to (1) sustain her burden under Federal Rule of Civil Procedure 16(b) because the deadline for amendments had passed; and (2) make out a prima facie case of willful and wanton conduct as required by Colorado law to plead a claim seeking exemplary damages. Next, the magistrate judge concluded WEI was

entitled to summary judgment, holding the liability release was valid under both Colorado law and Texas law. Finally, the magistrate judge denied as moot Ms. Hamric's motions for additional discovery and to disclose an expert out of time.

We affirm the magistrate judge's rulings. As to Ms. Hamric's motion for leave to amend, a party seeking to amend a pleading after the deadline in a scheduling order for amendment must satisfy the standard set out by Federal Rule of Civil Procedure 16(b). But Ms. Hamric concedes she has never sought to satisfy the Rule 16(b) standard. Turning to the discovery motions, where this case hinges on the validity of the liability release and all facts necessary to this primarily legal issue appear in the record, we reject Ms. Hamric's contentions that further discovery or leave to belatedly disclose an expert were warranted. Finally, while the magistrate judge's summary judgment analysis was not free of error, we apply de novo review to that ruling. And, under de novo review, we conclude (1) relying on contract law to resolve the choice-of-law issue, as argued for by the parties, Colorado law, rather than Texas law, controls whether the Registration Form and the Medical Form contain a valid liability release; and (2) the forms contain a valid release for negligence by WEI, barring Ms. Hamric's action.

I. BACKGROUND

A. The Rappelling Excursion, Mr. Hamric's Death, and the Liability Release

Members of the Keller Church of Christ in Keller, Texas, scheduled an outdoor excursion to Colorado, contracting with WEI for adventure planning and guide services. WEI is incorporated in Colorado and has its headquarters in Salida,

Colorado. Jamie Garner served as the coordinator for the church group and the point-of-contact between the church members and WEI. The experience WEI provided included guides taking participants rappelling. WEI required all participants, before going on the outdoor excursion, to complete and initial a "Registration Form" and complete and sign a "Medical Form."[1]

The Registration Form has three sections. The first section requires the participant to provide personally identifiable information and contact information. The second section is entitled "**Release of Liability & User Indemnity Agreement for Wilderness Expeditions, Inc.**" App. Vol. I at 57, 83.[2] The text under this bold and underlined header reads, in full:

> I hereby acknowledge that I, or my child, have voluntarily agreed to participate in the activities outfitted by Wilderness Expeditions, Inc.
> I understand that the activities and all other hazards and exposures connected with the activities conducted in the outdoors do involve risk and I am cognizant of the risks and dangers inherent with the activities. I (or my child) and (is) fully capable of participating in the activities contracted for and willingly assume the risk of injury as my responsibility whether it is obvious or not.
> I understand and agree that any bodily injury, death, or loss of personal property and expenses thereof as a result of any, or my child's, negligence in any scheduled or unscheduled activities associated with Wilderness Expeditions, Inc. are my responsibilities.
> I understand that accidents or illness can occur in remote places without medical facilities, physicians, or surgeons, and be exposed to temperature extremes or inclement weather. I further agree and understand that any route or activity chosen may not be of minimum risk, but may have been chosen for its interest and challenge.

[1] Here, we summarize the Registration Form and the Medical Form. Copies of the full forms, taken from the Appendix submitted by Ms. Hamric, are attached to this opinion. We rely on the *full* forms, and all of the language thereon, when conducting our analysis. Further, as discussed *infra* at 25–27, Section II(C)(2)(b)(ii), while the Registration Form and Medical Form could be viewed as separate forms, Colorado law requires us to consider both forms together when conducting our analysis.

[2] Throughout our opinion, we cite simultaneously to the Registration Form or Medical Form attached to WEI's motion for summary judgment, App. Vol. I at 57–58, and the Registration Form or Medical Form attached to Ms. Hamric's response to WEI's motion for summary judgment, *id.* at 83–84. Although the language of the two sets of forms are identical, the clarity of the text varies somewhat, seemingly based on the proficiency of the respective copy machines used by the parties.

> I agree to defend, indemnify, and hold harmless Wilderness Expeditions. Inc., the USDA Forest Service, Colorado Parks and Recreation Department, and any and all state or government agencies whose property the activities may be conducted on, and all of their officers, members, affiliated organizations, agents, or employees for any injury or death caused by or resulting from my or my child's participation in the activities, scheduled and unscheduled, whether or not such injury or death was caused by my, or their, negligence or from any other cause. **By signing my initials below, I certify this is a release of liability.**

Id.[3] Immediately after this paragraph, the form reads, "Adult participant or parent/guardian initial here: ____ (Initials)." *Id*. The third and final section of the form is entitled: "**Adult Agreement or Parent's/Guardian Agreement for Wilderness Expeditions, Inc.**" *Id*. The text of this provision states:

> I understand the nature of the activities may involve the physical demands of hiking over rough terrain, backpacking personal and crew gear, and voluntarily climbing mountains to 14,433 feet in elevation. Having the assurance of my, or my child's, good health through a current physical examination by a medical doctor, I hereby give consent for me, or my child, to participate in the activities outfitted by Wilderness Expeditions, Inc. I have included in this form all necessary medical information about myself, or my child, that should be known by the leadership of the program. I assure my, or my child's, cooperation and assume responsibility for my, or my child's, actions. I understand that I am responsible for any medical expenses incurred in the event of needed medical attention for myself, or my child. I further agree that I will be financially responsible to repair or replace all items lost or abused by myself or my child. In the event of an emergency, I authorize my consent to any X-ray examination, medica1, dental, or surgical diagnosis, treatment, and/or hospital care advised and supervised by a physician, surgeon, or dentist licensed to practice. I understand that the designated next of kin will be contacted as soon as possible**. By signing my initials below, I certify this is a release of liability**.

Id. And, as with the second section, the form then provides a line for the participant or the parent or guardian of the participant to initial.

The Medical Form has four sections. The first section seeks information about the participant. The second section is entitled "**Medical History**." Initially, this section asks the participant if he suffers from a list of medical conditions, including allergies, asthma, and heart trouble. If the participant does suffer from any medical conditions, the form requests that the participant explain the affirmative answer. Thereafter, the section includes the following language:

> **Note:** The staff will not administer any medications, including aspirin, Tums, Tylenol, etc. If you need any over the counter medications, you must provide them. Be sure to tell your staff members what medications you are taking.
>
> List any medications that you will have with you: _____

[3] In quoting the forms, we seek to replicate the font size, spacing, and bolding of the text of the Registration Form and Medical Form completed by Mr. Hamric.

> **Note about food:** Trail food is by necessity a high carbohydrate, high caloric diet. It is high in wheat, milk products, sugar, com syrup, and artificial coloring/flavoring. If these food products cause a problem to your diet, you will be responsible for providing any appropriate substitutions and advise the staff upon arrival.
>
> * Doctor's signature is required to participate. No other form can be substituted. By signing below a physician is verifying the medical history given above and approving this individual to participate.

Id. at 58, 84. The form then includes a section titled "**Physician's Evaluation**." *Id.* This section seeks certification of the participant's medical capability to partake in the outdoor activities and asks the physician for contact information. It reads:

> The applicant will be taking part in strenuous outdoor activities that may include: backpacking, rappelling, hiking at 8-12,000 feet elevation, and an all day summit climb up to 14,433 feet elevation. *This* will include high altitude, extreme weather, cold water, exposure, fatigue, and remote conditions where medical care cannot be assured.
> **The applicant is approved for participation.**
>
> Physician Signature: _____ Date: _____
> Physician Name: _____ Phone Number: _____
> Office Address: _____ City: _____ State: ____ Zip: _____

Id. The final section of the form is entitled "**Participant or Parent/Guardian Signature – All sections of these forms must be initialed or signed**." *Id.* The text of the section reads:

> Individuals who have not completed these forms will not be allowed to participate. I have carefully read all the sections of this agreement, understand its contents, and have initialed all sections of page 1 of this document[.] I have examined all the information given by myself, or my child. By the signature below, I certify that it is true and correct. Should this form and/or any wording be altered, it will not be accepted and the participant will not be allowed to participate.

Id.

WEI made the forms available to Mr. Garner for downloading and completion by the individual church members several months prior to the booked trip. Mr. Hamric initialed both blanks on the Registration Form and signed the Medical Form, dating it April 5, 2017. Andrew Sadousky, FNP-C, completed and signed the "**Physician's Evaluation**" section of the Medical Form, certifying that Mr. Hamric was medically capable of participating in the outdoor activities listed on the form,

including rappelling. Mr. Hamric's signed forms were delivered to WEI upon the church group's arrival in Colorado in July 2017.

After spending a night on WEI property, WEI guides took the church group, including Mr. Hamric, to a rappelling site known as "Quarry High." Because the rappelling course had a section that WEI guides considered "scary," the guides did not describe a particular overhang at the Quarry High site during the orientation session or before taking the church group on the rappelling course. *Id.* at 203.

Several members of the church group successfully descended Quarry High before Mr. Hamric attempted the rappel. As Mr. Hamric worked his way down the overhang portion of the course, he became inverted and was unable to right himself. Efforts to rescue Mr. Hamric proved unsuccessful, and he died of positional asphyxiation.

B. Procedural History

In the District of Colorado, Ms. Hamric commenced a negligence action against WEI, sounding in diversity jurisdiction. As a matter of right, Ms. Hamric amended her complaint shortly thereafter. *See* Fed. R. Civ. P. 15(a)(1)(A) (permitting plaintiff to file amended complaint "as a matter of course" within twenty-one days of serving original complaint). The parties, pursuant to 28 U.S.C. § 636(c), consented to a magistrate judge presiding over the case. WEI answered Ms. Hamric's First Amended Complaint, in part raising the following affirmative defense: "Decedent Gerald Hamric executed a valid and enforceable liability release. Decedent Gerald Hamric also executed a medical evaluation form which Defendant relied upon. The

execution of these document [sic] bars or reduces [Ms. Hamric's] potential recovery." *Id.* at 31–32.

The magistrate judge entered a Scheduling Order adopting several deadlines: (1) August 31, 2019, for amendments to the pleadings; (2) January 31, 2020, for Ms. Hamric to designate her expert witnesses; and (3) April 10, 2020, for the close of all discovery. The Scheduling Order also noted WEI's defense based on the purported liability release, stating "[t]he parties anticipate that mediation . . . may be useful to settle or resolve the case *after* meaningful discovery and summary judgment briefing on the issue of the validity and enforceability of the liability release." *Id.* at 38 (emphasis added). Finally, the Scheduling Order concluded with language reminding the parties that the deadlines adopted by the order "**may be altered or amended *only upon a showing of good cause***." *Id.* at 42 (italicized emphasis added).

In November 2019, after the deadline for amendments to the pleadings but before the discovery deadlines, WEI moved for summary judgment based on its affirmative defense that both the Registration Form and Medical Form contained a liability release that barred Ms. Hamric's negligence claim. In support of its motion, WEI contended Colorado law controlled the interpretation and validity of the liability release. Ms. Hamric opposed summary judgment, arguing that because Mr. Hamric completed the forms in Texas, a Colorado court would apply Texas law and that, under Texas law, the liability release was not adequately conspicuous to be valid.

Ms. Hamric also sought to avoid disposition of WEI's motion for summary judgment and dismissal of her action by filing three motions of her own. First,

Ms. Hamric moved under Federal Rule of Civil Procedure 56(d) for additional time to conduct discovery, contending further discovery would, among other things, reveal details about Mr. Hamric's completion of the forms and whether Colorado or Texas law should control the interpretation and validity of the purported liability release. Second, in February 2020, Ms. Hamric moved pursuant to Federal Rule of Civil Procedure 15(a), for leave to file a second amended complaint to seek exemplary damages under § 13-21-102 of the Colorado Revised Statutes based on new allegations of WEI's willful and wanton conduct.[4] Ms. Hamric's motion to amend, however, did not cite Federal Rule Civil Procedure 16(b) or seek leave to amend the August 31, 2019, Scheduling Order deadline for amendments to the pleadings. Third, in March 2020, Ms. Hamric moved for leave to disclose out of time a "'Rappelling/Recreational Activities Safety' expert." App. Vol. II at 37. Ms. Hamric contended the expert's opinions about the training, knowledge, and rescue efforts of the WEI guides supported her contention in her proposed second amended complaint that WEI acted in a willful and wanton manner.

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[4] Under Colorado law:

> A claim for exemplary damages in an action governed by [§ 13-21-102 of the Colorado Revised Statutes] may not be included in any initial claim for relief. A claim for exemplary damages in an action governed by this section may be allowed by amendment to the pleadings only after the exchange of initial disclosures . . . and the plaintiff establishes prima facie proof of a triable issue.

Colo. Rev. Stat. § 13-21-102(1.5)(a).

The magistrate judge disposed of the four pending motions in a single order. Starting with Ms. Hamric's motion for leave to amend her complaint, the magistrate judge concluded Ms. Hamric (1) "failed to meet her burden under Rule 16(b) of establishing good cause to generally amend the operative pleading" and (2) had not made out a prima facie case of wanton and willful conduct. *Id.* at 94. The magistrate judge then turned to WEI's motion for summary judgment. The magistrate judge concluded WEI's affirmative defense raised an issue sounding in contract law such that principles of contract law controlled the choice-of-law analysis. Applying contract principles, the magistrate judge determined that although Texas law imposed a slightly more rigorous standard for enforcing a liability release, the difference between Texas law and Colorado law was not outcome-determinative and the court could, therefore, apply Colorado law. The magistrate judge read Colorado law as holding that a liability release is valid and enforceable "so long as the intent of the parties was to extinguish liability and this intent was clearly and unambiguously expressed." *Id.* at 106 (citing *Heil Valley Ranch v. Simkin*, 784 P.2d 781, 785 (Colo. 1989)). Applying this standard, the magistrate judge held the liability release used clear and simple terms such that, even though Mr. Hamric was inexperienced at rappelling, the release was valid and foreclosed Ms. Hamric's negligence claim. Therefore, the magistrate judge granted WEI's motion for summary judgment. And, having denied Ms. Hamric's motion for leave to amend and granted WEI's motion for summary judgment, the magistrate judge denied both of Ms. Hamric's discovery motions as moot.

Ms. Hamric moved for reconsideration, which the magistrate judge denied. Ms. Hamric timely appealed.

II. DISCUSSION

On appeal, Ms. Hamric contests the denial of her motion for leave to amend and the grant of summary judgment to WEI. Ms. Hamric also tacitly challenges the magistrate judge's denial of her discovery motions. We commence our analysis with Ms. Hamric's motion for leave to amend, holding the magistrate judge did not abuse her discretion in denying the motion where the motion was filed after the Scheduling Order's deadline for amendments to pleadings and Ms. Hamric did not attempt to satisfy Federal Rule of Civil Procedure 16(b)'s standard for amending a deadline in a scheduling order. Next, we discuss Ms. Hamric's two discovery motions, concluding the magistrate judge did not abuse her discretion by denying the motions because (1) WEI's motion for summary judgment presented a largely legal issue on which all facts necessary for resolution already appeared in the record; and (2) consideration of the proposed expert's opinions potentially capable of supporting allegations of willful and wanton conduct was mooted upon Ms. Hamric failing to satisfy Rule 16(b)'s standard for amending her complaint to allege such conduct. Finally, we analyze WEI's motion for summary judgment. Although the magistrate judge's decision was not free of error, the errors are not outcome determinative on appeal given our de novo standard of review. Exercising de novo review, we conclude Colorado law governs the validity of the liability release. And considering the entirety of both the Registration Form and the Medical Form, we conclude the liability release satisfies

the factors in Colorado law for enforceability. Therefore, we affirm the magistrate judge's grant of summary judgment.

A. Ms. Hamric's Motion for Leave to Amend

1. Standard of Review

"We review for abuse of discretion a district court's denial of a motion to amend a complaint after the scheduling order's deadline for amendments has passed." *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1247 (10th Cir. 2015). "An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances." *Id.* (quotation marks omitted). "A district court also abuses its discretion when it issues an arbitrary, capricious, whimsical or manifestly unreasonable judgment." *Id*. (internal quotation marks omitted).

2. Analysis

"A party seeking leave to amend after a scheduling order deadline must satisfy both the [Federal Rule of Civil Procedure] 16(b) and Rule 15(a) standards." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 989 (10th Cir. 2019). Under the former of those two rules, "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). To satisfy this standard a movant must show that "the scheduling deadlines cannot be met despite the movant's diligent efforts." *Gorsuch, Ltd., B.C. v. Wells Fargo Nat'l Bank Ass'n*, 771 F.3d 1230, 1240 (10th Cir. 2014) (internal quotation marks omitted). We have observed the "good cause" standard for amending deadlines in a scheduling order is "arguably [a] more

stringent standard than the standards for amending a pleading under Rule 15." *Bylin v. Billings*, 568 F.3d 1224, 1231 (10th Cir. 2009).

In moving for leave to file a second amended complaint, Ms. Hamric discussed Federal Rule of Civil Procedure 15 and how Colorado law did not permit a plaintiff to seek exemplary damages until after commencement of discovery. But Ms. Hamric did not advance an argument for amending the Scheduling Order as required by Rule 16(b). Nor does Ms. Hamric cite Rule 16(b) in her briefs on appeal, much less explain how she satisfied, in her papers before the magistrate judge, the Rule 16(b) standard. In fact, Ms. Hamric conceded at oral argument that, before the magistrate judge, she sought only to amend her complaint and "did not seek to amend the scheduling order." Oral Argument at 7:42–7:46; *see also id.* at 7:31–9:10. Ms. Hamric also conceded at oral argument that she had not advanced an argument on appeal regarding satisfying Rule 16(b).

This omission by Ms. Hamric is fatal to her argument. Specifically, when a party seeking to amend her complaint fails, after the deadline for amendment in a scheduling order, to present a good cause argument under Rule 16(b), a lower court does not abuse its discretion by denying leave to amend. *Husky Ventures, Inc. v. B55 Invs. Ltd.*, 911 F.3d 1000, 1019–20 (10th Cir. 2018). Even if a party who belatedly moves for leave to amend a pleading satisfies Rule 15(a)'s standard, the party must also obtain leave to amend the scheduling order. But Rule 16(b) imposes a higher standard for amending a deadline in a scheduling order than Rule 15(a) imposes for obtaining leave to amend a complaint. Thus, as *Husky Ventures* suggests, a party's

ability to satisfy the Rule 15(a) standard does not necessitate the conclusion that the party could also satisfy the Rule 16(b) standard. *Id.* at 1020; *see also Bylin*, 568 F.3d at 1231 (observing that Rule 16(b) imposes "an arguably more stringent standard than the standards for amending a pleading under Rule 15"). Accordingly, where Ms. Hamric did not attempt to satisfy the Rule 16(b) standard for amending the Scheduling Order, we affirm the district court's denial of Ms. Hamric's motion for leave to amend.

B. Ms. Hamric's Discovery Motions

After WEI moved for summary judgment, Ms. Hamric filed a pair of discovery-related motions—a motion for additional discovery before disposition of WEI's motion for summary judgment and a motion to disclose an expert out of time. The magistrate judge denied both motions as moot. After stating the applicable standard of review, we consider each motion, affirming the magistrate judge's rulings.

1. Standard of Review

We review the denial of a Federal Rule of Civil Procedure 56(d) motion for additional discovery for an abuse of discretion. *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1192 (10th Cir. 2015). Likewise, we review the denial of a motion to revisit a scheduling order and allow the disclosure of an expert out of time for an abuse of discretion. *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1253–54 (10th Cir. 2011). "We will find an abuse of discretion when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Ellis*,

779 F.3d at 1192 (internal quotation marks omitted). "A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made." *Id.* (quotation marks omitted).

2. Analysis

a. Motion for additional discovery

Before the April 10, 2020, deadline for discovery, WEI filed its motion for summary judgment based on the liability release. Ms. Hamric moved under Federal Rule of Civil Procedure 56(d) to delay resolution of WEI's motion for summary judgment, asserting additional discovery would allow her to learn further information about the liability release. The magistrate judge denied the motion as moot, concluding further discovery was not needed to assess the validity of the liability release.

Under Rule 56(d), a party opposing a motion for summary judgment may seek additional time for discovery. To do so, a party must "submit an affidavit (1) identifying the probable facts that are unavailable, (2) stating why these facts cannot be presented without additional time, (3) identifying past steps to obtain evidence of these facts, and (4) stating how additional time would allow for rebuttal of the adversary's argument for summary judgment." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1110 (10th Cir. 2017). "[S]ummary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5

(1986). "Requests for further discovery should ordinarily be treated liberally." *Cerveny*, 855 F.3d at 1110. "But relief under Rule 56(d) is not automatic." *Id.* And Rule 56's provision allowing a non-moving party to seek additional discovery before disposition on a motion for summary judgment "is not a license for a fishing expedition." *Lewis v. City of Ft. Collins*, 903 F.2d 752, 759 (10th Cir. 1990); *see also Ellis*, 779 F.3d at 1207–08 (affirming denial of Rule 56(d) motion where party "required no further discovery to respond to the . . . summary-judgment motion" and additional discovery sought was speculative).

Through the affidavit supporting her Rule 56(d) motion, Ms. Hamric sought four areas of additional discovery. First, she sought discovery on "the drafting of the purported liability release forms" and the meaning of language on the forms. App. Vol. I at 94. Regardless of whether Colorado or Texas law applies, the four corners of the Registration Form and Medical Form, not WEI's thought process when drafting the forms, controls the validity of the liability release. *See B & B Livery, Inc. v. Riehl*, 960 P.2d 134, 138 (Colo. 1998) (requiring that intent of parties to extinguish liability be "clearly and unambiguously expressed" (quoting *Heil Valley Ranch,* 784 P.2d at 785)); *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993) ("[A] party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract."). Therefore, the drafting process employed by WEI and its understanding of the language of the forms is not relevant to whether the forms included sufficiently specific language to foreclose a claim for negligence.

Second, Ms. Hamric sought to discover information about WEI's process for distributing the forms and how the church group members, including Mr. Hamric, completed and submitted the forms. Ms. Hamric also requested time to discover matters related to the choice-of-law issue, including the "place of contracting," "the place of performance," and "the domicile, residence nationality, place of incorporation and place of business of the parties." App. Vol. I at 95. Information on these matters, however, was known to Ms. Hamric prior to the magistrate judge's summary judgment ruling. For instance, the record shows Mr. Hamric received and completed the forms in Texas a few months before the WEI-led excursion and that the church group provided WEI the completed forms upon its arrival at WEI's location in Colorado. Accordingly, there was no need to delay summary judgment proceedings to discover matters already known to the parties. *See Ellis*, 779 F.3d at 1207–08.

Third, Ms. Hamric, as part of a challenge to the authenticity of the forms, initially sought to discover information regarding anomalies and alterations on the forms attached to WEI's motion for summary judgment, as well as evidence of fraud by WEI. Subsequent to Ms. Hamric filing her motion for additional discovery, WEI provided her the original forms signed by Mr. Hamric, and she withdrew her challenge to the authenticity of the forms. Accordingly, by the time the district court ruled on WEI's motion for summary judgment and Ms. Hamric's motion for additional discovery, the requests for discovery regarding the authenticity of the forms was moot.

Fourth, Ms. Hamric sought time to discover "evidence of willful and wanton conduct by Defendant WEI and/or by its agents, servants and/or employees." *Id.* Discovery on this matter, however, became moot with the magistrate judge's denial of Ms. Hamric's motion for leave to amend her complaint to seek exemplary damages and add allegations of willful and wanton conduct, a ruling we affirm. *See supra* at 12–14, Section II(A).

Having considered each additional discovery request advanced by Ms. Hamric, we conclude the magistrate judge did not abuse her discretion by ruling on WEI's motion for summary judgment without permitting Ms. Hamric additional time for discovery. Accordingly, we affirm the magistrate judge's denial of Ms. Hamric's Rule 56(d) motion.

b. Motion for leave to disclose expert out of time

Ms. Hamric moved for leave to disclose a "'Rappelling/Recreational Activities Safety' expert" out of time. App. Vol. II at 37. Attached to the motion was a Federal Rule of Civil Procedure 26(a)(2) expert disclosure, offering opinions about the alleged negligent and/or willful and wanton conduct of WEI and its employees. The magistrate judge denied this motion as moot. Considering the magistrate judge's other rulings and our holdings on appeal, we conclude the magistrate judge did not abuse her discretion. Any opinion offered by the expert as to willful and wanton conduct lost relevance with the denial of Ms. Hamric's motion for leave to amend her complaint to add allegations of willful and wanton conduct and to seek exemplary damages—a ruling we affirmed *supra* at 12–14, Section II(A). And the expert's

opinion about WEI acting in a negligent manner lost relevance upon the magistrate judge concluding the liability release was valid and barred Ms. Hamric from proceeding on her negligence claim—a ruling we affirm *infra* at 19–37, Section II(C). Accordingly, we affirm the magistrate judge's denial of Ms. Hamric's motion for leave to disclose an expert out of time.

C. WEI's Motion for Summary Judgment

After stating our standard of review, we discuss Ms. Hamric's contentions that the magistrate judge (1) applied the wrong standard when considering WEI's affirmative defense based on the liability release and (2) resolved issues of disputed fact in favor of WEI. Although we conclude the magistrate judge's ruling is not free of error, the errors do not bind us because we need not repeat them when conducting our de novo review of the grant of summary judgment. Thus, we proceed to consider the validity of the liability release. In conducting our analysis, we hold that, where the parties contend contract principles provide the framework for our choice-of-law analysis, Colorado law governs the validity of the release.[5] And we conclude that, under Colorado law, the liability release is valid and enforceable so as to foreclose Ms. Hamric's negligence claim. Therefore, we affirm the magistrate judge's grant of summary judgment.

[5] Although Ms. Hamric's action sounds in tort law, on appeal, the parties do not contend that tort principles provide the framework for the choice-of-law analysis regarding the liability release. Thus, we reach no conclusion as to whether Colorado law or Texas law would govern if tort principles played a role in the choice-of-law analysis.

1. Standard of Review

We review the district court's rulings on summary judgment de novo. *Universal Underwriters Ins. Co. v. Winton*, 818 F.3d 1103, 1105 (10th Cir. 2016). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Anderson*, 477 U.S. at 250. "In reviewing a grant of summary judgment, we need not defer to factual findings rendered by the district court." *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018) (internal quotation marks omitted). For purposes of summary judgment, "[t]he nonmoving party is entitled to all reasonable inferences from the record." *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013). Finally, "we can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground." *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009) (internal quotation marks omitted).

2. Alleged Errors by the Magistrate Judge

Ms. Hamric argues the magistrate judge (1) applied the incorrect standard when considering WEI's affirmative defense and (2) resolved disputed issues of material fact in favor of WEI. We consider each contention in turn.

a. Standard applicable to affirmative defenses

Ms. Hamric contends the magistrate judge announced an incorrect standard of review and impermissibly shifted evidentiary burdens onto her, as the non-moving party. The disputed language in the magistrate judge's opinion states:

> When, as here, a defendant moves for summary judgment to test an affirmative defense, it is the defendant's burden to demonstrate the absence of any disputed fact as to the affirmative defense asserted. *See Helm v. Kansas*, 656 F.3d 1277, 1284 (10th Cir. 2011). Once the defendant meets its initial burden, *the burden shifts to the nonmovant to put forth sufficient evidence to demonstrate the essential elements of her claim(s)*, *see Anderson*, 477 U.S. at 248; *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999), and to "demonstrate with specificity the existence of a disputed fact" as to the defendant's affirmative defense, *see Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997).

App. Vol. II at 100 (emphasis added). Ms. Hamric takes issue with the emphasized phrase.

Nothing on the pages the magistrate judge cited from *Anderson* and *Simms* requires a plaintiff responding to a motion for summary judgment based on an affirmative defense to identify evidence supporting each element of her claim. *See Anderson*, 477 U.S. at 248 (requiring nonmoving party in face of "properly supported motion for summary judgment" to "'set forth specific facts showing that there is a genuine issue for trial'" (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968))); *Simms*, 165 F.3d at 1326, 1328 (discussing summary judgment standard in context of employment discrimination claim and burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). In fact, the standard announced by the magistrate judge would unnecessarily require a plaintiff, in response to a motion for summary judgment based on an affirmative defense, to identify evidence supporting elements of her claim never drawn into question by the defendant. Placing such a burden on a plaintiff is all the more problematic where, as here, the parties contemplated a bifurcated summary judgment

process initially focused on the validity of the liability release, and WEI filed its motion for summary judgment before the close of discovery.

We have previously stated that a district court errs by requiring a party opposing summary judgment based on an affirmative defense to "establish at least an inference of the existence of each element essential to the case." *Johnson v. Riddle*, 443 F.3d 723, 724 n.1 (10th Cir. 2006) (quotation marks omitted). We reaffirm that conclusion today. To defeat a motion for summary judgment, a plaintiff, upon the defendant raising and supporting an affirmative defense, need only identify a disputed material fact relative *to the affirmative defense*. *Id.*; *Hutchinson*, 105 F.3d at 564; *see also Leone v. Owsley*, 810 F.3d 1149, 1153–54 (10th Cir. 2015) (discussing defendant's burden for obtaining summary judgment based on an affirmative defense). Only if the defendant also challenges an element of the plaintiff's claim does the plaintiff bear the burden of coming forward with some evidence in support of that element. *See Tesone*, 942 F.3d at 994 ("The party moving for summary judgment bears the initial burden of showing an absence of any issues of material fact. Where . . . the burden of persuasion at trial would be on the nonmoving party, the movant may carry its initial burden by providing 'affirmative evidence that negates an essential element of the nonmoving party's claim' or by 'demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.' If the movant makes this showing, the burden then shifts to the nonmovant to 'set forth specific facts showing that there is a genuine issue for trial.'" (first quoting *Celotex Corp.*, 477 U.S. at 330, then quoting

Anderson, 477 U.S. at 250)); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670–71 (10th Cir. 1998) (if summary judgment movant carries its initial burden of showing a lack of evidence in support of an essential element of plaintiff's claim, "the burden shifts to the nonmovant to go beyond the pleadings and set forth specific facts" supporting the essential element (internal quotation marks omitted)).

The magistrate judge's erroneous statement regarding Ms. Hamric's burden, however, does not foreclose our ability to further review the grant of summary judgment. Rather, in accord with the applicable de novo standard of review, we review WEI's motion for summary judgment under the standard that "should have been applied by the [magistrate judge]."[6] *Nance v. Sun Life Assurance Co. of Can.*, 294 F.3d 1263, 1266 (10th Cir. 2002) (quotation marks omitted).

b. Resolution of disputed issues of material fact

Ms. Hamric contends the magistrate judge impermissibly resolved two issues of disputed fact in WEI's favor. We discuss each asserted factual issue in turn, concluding factual disputes existed and the magistrate judge incorrectly resolved one of the disputes against Ms. Hamric. However, even if this factual dispute were material, we may proceed to analyze the validity of the liability release after resolving the dispute in Ms. Hamric's favor. *See Lincoln*, 900 F.3d at 1180 ("In

[6] While the magistrate judge incorrectly stated the standard governing WEI's motion for summary judgment, it is not apparent the magistrate judge's analysis and conclusion that WEI was entitled to summary judgment hinged on Ms. Hamric's failure to identify evidence supporting each element of her negligence claim. Rather, the magistrate judge correctly granted WEI summary judgment based on the liability release and WEI's affirmative defense.

reviewing a grant of summary judgment, we need not defer to factual findings rendered by the district court." (internal quotation marks omitted)).

i. Language of Registration Form and Medical Form

In moving for summary judgment, WEI's brief contained edited versions of the Registration Form and Medical Form that focused the reader's attention on the language most pertinent to Mr. Hamric's participation in the outdoor excursion and the release of liability. For instance, the version of the forms in WEI's brief left out phrases such as "(or my child)" and the accompanying properly-tensed-and-conjugated verb that would apply if the forms were completed by a parent or guardian of the participant, rather than by the participant himself. *Compare* App. Vol. I at 46, *with id.* at 57, 83.

Although WEI and Ms. Hamric attached full versions of the forms to their papers on the motion for summary judgment, the magistrate judge's quotation of the language in the forms mirrored that which appeared in WEI's brief. Ms. Hamric contends the magistrate judge, in not quoting the full forms, resolved a dispute of fact regarding the language of the forms in WEI's favor. It is not uncommon for a court to focus on the pertinent language of a contract or liability release when putting forth its analysis. In this case, Ms. Hamric claims the forms should be reviewed on the whole. Although there is no indication the magistrate judge did not review the forms in their entirety, despite her use of incomplete quotations, we attach full versions of the Registration Form and Medical Form completed by Mr. Hamric as an appendix to

this opinion. And we consider all the language on the forms when assessing whether the forms contain a valid liability release.

ii. Registration Form and Medical Form as single form

The magistrate judge viewed the Registration Form and the Medical Form as a single, "two-page agreement." App. Vol. II at 103; *see also id.* at 101 ("Adult customers are required to execute a two-page agreement with WEI before they are permitted to participate in WEI-sponsored activities. The first page of the agreement is a 'Registration Form', followed by a 'Medical Form' on page two."). Ms. Hamric contends the two forms are separate agreements, not a single agreement. While a jury could have concluded that the Registration Form and Medical Form were separate agreements, this dispute of fact is not material given applicable law regarding the construction of agreements that are related and simultaneously executed.

It is clear from the record that a participant needed to complete both forms before partaking in the WEI-lead excursion. Further, while the Medical Form required a signature and a date, the Registration Form required only that a participant place his initials on certain lines, suggesting the forms were part of a single agreement. However, the forms do not contain page numbers to indicate they are part of a single agreement. Further, language on the Medical Form is conflicting and ambiguous as to whether the two forms comprise a single agreement:

> Individuals who have not completed *these forms* will not be allowed to participate. *I have carefully read all the sections of this agreement, understand its contents, and have initialed all sections of page 1 of this document.* I have examined all the information given by myself, or my child. By the signature below, I certify that it is true and correct. Should

> this form and/or any wording be altered, it will not be accepted and the participant will not be allowed to participate.

App., Vol. I at 58, 84 (emphases added). Both the italicized language and the use of "forms" in the plural to describe the agreement support the conclusion that the Registration Form and the Medical Form are a single agreement. But the underlined language, using "form" in the singular, suggests the forms might constitute separate agreements. Otherwise the singular use of "form" would suggest the unlikely result that a participant could not alter the wording of the Medical Form but could alter the wording of the Registration Form.[7] *Accord Navajo Nation v. Dalley*, 896 F.3d 1196, 1213 (10th Cir. 2018) (describing the cannon of *expressio unius est exclusio alterius* as providing "that the 'expression of one item of an associated group or series excludes another left unmentioned'" and that "the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." (quoting *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017))). Thus, a reasonable jury could have found the Registration Form and the Medical Form were separate agreements.

We conclude, however, that this dispute of fact is not material to resolution of the primarily legal question regarding whether Mr. Hamric entered into a valid

[7] WEI has advanced inconsistent positions on whether the Registration Form and Medical Form comprised a single agreement. Although on appeal WEI argues the forms constitute a single agreement releasing liability, WEI's Answer to Ms. Hamric's Complaint treats the two forms as separate agreements, stating that "[d]ecedent Gerald Hamric executed a valid and enforceable liability release. Decedent Gerald Hamric *also* executed a medical evaluation." App. Vol. I at 32 (emphasis added).

liability release with WEI. Under Colorado law, it is well established that a court may, and often must, construe two related agreements pertaining to the same subject matter as a single agreement. *See Bledsoe v. Hill*, 747 P.2d 10, 12 (Colo. App. 1987) ("If a simultaneously executed agreement between the same parties, relating to the same subject matter, is contained in more than one instrument, the documents must be construed together to determine intent as though the entire agreement were contained in a single document. Although it is desirable for the documents to refer to each other, there is no requirement that they do so." (citing *In re Application for Water Rights v. N. Colo. Water Conservancy Dist.*, 677 P.2d 320 (Colo. 1984); *Harty v. Hoerner*, 463 P.2d 313 (Colo. 1969); *Westminster v. Skyline Vista Dev. Co.*, 431 P.2d 26 (Colo. 1967))).[8] Thus, although a jury could conclude the Registration Form and Medical Form technically constitute separate agreements, we consider the agreements together when determining if Mr. Hamric released WEI for its negligent acts.

[8] Although we conclude that Colorado law, not Texas law, controls the validity of the liability release, *infra* at 28–33, Section II(C)(3), Texas law likewise permits a court to read separate but related documents together when determining the intent of the parties, *see Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000) ("The City's argument ignores well-established law that instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times and the instruments do not expressly refer to each other, and that a court may determine, as a matter of law, that multiple documents comprise a written contract. In appropriate instances, courts may construe all the documents as if they were part of a single, unified instrument." (footnotes omitted)).

3. Choice-of-Law Analysis

At the heart of WEI's motion for summary judgment was whether Colorado or Texas law controls and whether the release is valid under the appropriate law. On appeal, Ms. Hamric contends "contract principles" control the choice-of-law analysis because WEI's affirmative defense "was a contract issue on a purported agreement to release liability." Opening Br. at 26–27. Ms. Hamric further contends that under contract principles in the Restatement (Second) of Conflicts of Laws, Texas law applies because Mr. Hamric was a Texas resident who completed the Registration Form and the Medical Form while in Texas. WEI agrees that if contract principles govern the choice-of-law issue, the Restatement (Second) on Conflict of Laws provides the appropriate factors for this court to consider. But WEI contends (1) the liability release is valid under both Colorado and Texas law and (2) the relevant factors in §§ 6 and 188 of the Restatement favor application of Colorado law if this court is inclined to resolve the conflict-of-law issue.

Outdoor recreation and tourism is a growing industry in Colorado, as well as several other states within our circuit. And many outdoor tourism outfitters, like WEI, require participants to complete forms containing liability releases. *See Redden v. Clear Creek Skiing Corp.*, ___ P.3d ___, 2020 WL 7776149, at *2 (Colo. App. Dec. 31, 2020); *Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945, 947–48 (Colo. App. 2011); *see also Dimick v. Hopkinson*, 422 P.3d 512, 515–16 (Wyo. 2018); *Penunuri v. Sundance Partners, Ltd.*, 301 P.3d 984, 986 (Utah 2013); *Beckwith v. Weber*, 277 P.3d 713, 716–17 (Wyo. 2012). With the prevalence and recurrence of

questions regarding the validity of liability releases in mind, and viewing the choice-of-law issue as sounding in contract law as urged by the parties, we consider whether the law of the state where the outdoor recreation company is based and the outdoor excursion occurs controls or whether the law of the state of residence of the participant controls.

a. Framework for choice-of-law analysis

"In a diversity action we apply the conflict-of-laws rules of the forum state." *Kipling v. State Farm Mut. Auto. Ins. Co.*, 774 F.3d 1306, 1310 (10th Cir. 2014). "This is true even when choice of law determinations involve the interpretation of contract provisions." *Shearson Lehman Brothers, Inc. v. M & L Invs.*, 10 F.3d 1510, 1514 (10th Cir. 1993). Accordingly, this court must look to Colorado choice-of-law rules to determine if Colorado or Texas law applies.

"Colorado follows the Restatement (Second) of Conflict of Laws (1971) . . . for both contract and tort actions," *Kipling*, 774 F.3d at 1310 (citing *Wood Brothers Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369, 1372 (Colo. 1979); *First Nat'l Bank v. Rostek*, 514 P.2d 314, 319–20 (Colo. 1973)). Absent a forum-state "statutory directive," the Restatement advises a court to consider seven factors:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws: Choice-of-Law Principles § 6 (Am. L. Inst. 1971). The commentary to § 6 identifies the first factor as "[p]robably the most important function of choice-of-law rules" because choice-of-law rules are designed "to further harmonious relations between states and to facilitate commercial intercourse between them." *Id.* § 6 cmt. d. Meanwhile, the second factor takes into account any special interests, beyond serving as the forum for the action, that the forum state has in the litigation. *Id.* § 6 cmt. e. As to the fourth factor—"the protection of justified expectations,"— the comments to § 6 note:

> This is an important value in all fields of the law, including choice of law. Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.

Id. § 6 cmt. g.

A more specific section of the Restatement addressing contracts lacking a choice-of-law provision provides additional guidance:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
> (2) In the absence of an effective choice of law by the parties . . ., the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws: Law Governing in Absence of Effective Choice by the Parties § 188.

b. Colorado law controls

We conclude that, under the Restatement, a Colorado court would apply Colorado law to determine the validity and enforceability of the liability release relied upon by WEI. First looking at § 6 of the Restatement, the liability release was drafted by a Colorado corporation to cover services provided exclusively in Colorado. Applying out-of-state law to interpret the liability release would hinder commerce, as it would require WEI and other outdoor-recreation companies to know the law of the state in which a given participant lives. Such a rule would place a significant burden on outdoor-recreation companies who depend on out-of-state tourists for revenue because it would require a company like WEI to match the various requirements of the other forty-nine states. This approach would not give WEI the benefit of having logically molded its liability release to comply with Colorado law, the law of the state where WEI does business. Furthermore, Ms. Hamric's primary argument for applying Texas law is that Mr. Hamric signed the forms in Texas. But a rule applying out-of-state law on that basis is likely to deter WEI from furnishing the liability release until a participant enters Colorado. And, while not providing participants the forms until arrival in Colorado might lessen WEI's liability exposure under out-of-state law, such a practice would not benefit participants because it would pressure participants into a last-minute decision

regarding whether to sign the liability release after having already traveled to Colorado for the outdoor excursion.

Colorado also has a strong interest in this matter. Colorado has a booming outdoor-recreation industry, in the form of skiing, hiking, climbing, camping, horseback riding, and rafting excursions. Colorado relies on tax receipts from the outdoor-recreation industry. And while many out-of-state individuals partake in these activities within Colorado, they often purchase their tickets or book excursion reservations before entering Colorado. If we applied Texas law because it is the state where Mr. Hamric signed the liability release, we would essentially allow the other forty-nine states to regulate a key industry within Colorado. Such an approach is impractical and illogical.

Further, the considerations and contacts listed in § 188 of the Restatement favor application of Colorado law. As to the first contact, in accord with the commentary, a contract is formed in "the place where occurred the last act necessary to give the contract binding effect." *Id.* § 188 cmt. e. Here, that act occurred when the church group provided the forms to WEI in Colorado; for, before the forms were provided to WEI, Mr. Hamric had not conveyed his acceptance to WEI and WEI did not know whether Mr. Hamric would complete the forms and agree to the liability release. *See Scoular Co. v. Denney*, 151 P.3d 615, 619 (Colo. App. 2006) (discussing means of accepting an offer and stating "general rule that communication is required of the acceptance of the offer for a bilateral contract"). The second contact consideration is not applicable because the terms of the Medical Form precluded

alteration, and there is no suggestion in the record Mr. Hamric attempted to negotiate the terms of the liability release before signing the forms. The third and fourth factors heavily favor application of Colorado law because WEI provides outdoor excursion services in Colorado, not Texas, and Mr. Hamric knew such when he signed the forms. Finally, the fifth factor is neutral because Mr. Hamric was a resident of Texas and WEI has its place of business in Colorado. With three factors favoring Colorado law, one factor inapplicable, and one factor neutral, the overall weight of the § 188 factors favors application of Colorado law.

Concluding that both § 6 and § 188 of the Restatement strongly support application of Colorado law, we hold that a Colorado court would choose to apply Colorado law, not Texas law, when determining whether the Registration Form and Medical Form contain a valid liability release. We, therefore, proceed to that analysis.

4. The Liability Release Is Valid under Colorado Law

Under Colorado law, "[a]greements attempting to exculpate a party from that party's own negligence have long been disfavored." *Heil Valley Ranch*, 784 P.2d at 783. But, such "[e]xculpatory agreements are not necessarily void," as courts recognize that "[t]hey stand at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts." *Id*. at 784. In assessing the validity of a release, "a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in

clear and unambiguous language." *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981); *see also Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004) (a release agreement "must be closely scrutinized to ensure that the intent of the parties is expressed in clear and unambiguous language and that the circumstances and the nature of the service involved indicate that the contract was fairly entered into").

Ms. Hamric challenges only WEI's ability to show "whether the intention of the parties is expressed in clear and unambiguous language."[9] "To determine whether the intent of the parties is clearly and unambiguously expressed, [the Colorado Supreme Court has] examined the actual language of the agreement for legal jargon, length and complication, and any likelihood of confusion or failure of a party to recognize the full extent of the release provisions." *Chadwick*, 100 P.3d at 467. In general accord with this statement, federal district courts in Colorado have discerned five factors from Colorado Supreme Court decisions to determine if a release is unambiguous: (1) "whether the agreement is written in simple and clear terms that are free from legal jargon"; (2) "whether the agreement is inordinately long or complicated"; (3) "whether the release specifically addresses the risk that caused the plaintiff's injury"; (4) "whether the contract contains any emphasis to highlight the

[9] Ms. Hamric also argues that the question of whether Mr. Hamric and WEI entered into a liability release was a question of fact for a jury. But Ms. Hamric withdrew her fact-based challenge to the authenticity of the forms. Further, under Colorado law, "[t]he determination of the sufficiency and validity of an exculpatory agreement is a question of law for the court to determine." *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981). And, where a liability release has force only if it is "clear and unambiguous," *id.*, the question of the existence of a liability release and its validity are one in the same because if the language relied on by a defendant does not form a valid release, then no liability release exists.

importance of the information it contains"; and (5) "whether the plaintiff was experienced in the activity making risk of that particular injury reasonably foreseeable." *Salazar v. On the Trail Rentals, Inc.*, Civil Action No. 11-cv-00320-CMA-KMT, 2012 WL 934240, at *4 (D. Colo. Mar. 20, 2012) (deriving factors from *Heil Valley Ranch*, 784 P.2d at 785; *Chadwick*, 100 P.3d at 467); *see also Eburn v. Capitol Peak Outfitters, Inc.*, 882 F. Supp. 2d 1248, 1253 (D. Colo. 2012) (citing factors set forth in *Salazar*). Each and every factor, however, need not be satisfied for a court to uphold the validity of a liability release, as the Colorado Supreme Court has upheld the validity of a release where the signor was a novice at the outdoor activity in question. *See B & B Livery, Inc.*, 960 P.2d at 138 (upholding liability release without finding every factor favored validity); *id.* at 139–40 (Hobbs, J., dissenting) (discussing signor's inexperience riding horses).

The first four factors taken from *Heil Valley Ranch* and *Chadwick* support the validity of the liability release in the Registration Form and Medical Form. The forms span a mere two pages, with language pertinent to the liability release in only four sections of the forms. And those four sections are generally free of legal jargon. For instance, in detailing the scope of the release, the Registration Form required the participant/signor to "hold harmless Wilderness Expeditions, Inc. . . . for any injury or death caused by or resulting from my or my child's participation in the activities."[10] App. Vol. I at 57, 83. And this language comes after the form describes

[10] The omitted language marked by the ellipses also required a signor/participant to hold federal and state agencies harmless for injuries or death

several of the risks associated with the activities, including "that accidents or illness can occur in remote places without medical facilities" and that "any route or activity chosen [by WEI] may not be of minimum risk, but may have been chosen for its interest and challenge." *Id.* The Registration Form also twice places bolded emphasis on the fact that a participant was releasing WEI from liability: "**By signing my initials below, I certify this is a release of liability.**" *Id.* Finally, although not explicitly a factor identified by Colorado courts, we observe WEI provided the church group with the forms, and Mr. Hamric completed the forms, months before the booked excursion. Thus, if Mr. Hamric personally had difficulty understanding any of the language on the forms, he had ample time to contact WEI for an explanation or consult legal counsel.

The sole factor clearly cutting against enforcement of the liability release is Mr. Hamric's lack of rappelling experience. However, as noted above, the Colorado Supreme Court has not found this consideration to be dispositive against the enforcement of a liability waiver. *See B & B Livery, Inc.*, 960 P.2d at 138–39. And, where the liability release between Mr. Hamric and WEI is otherwise clear, specific, and uncomplicated, Mr. Hamric's lack of experience rappelling is insufficient to defeat the release as a whole.

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that might occur as a result of WEI-led activities on federal or state land. Like the rest of the release, this language is plain and clear such that any reasonably educated individual would understand the nature of the release as to these third parties.

Accordingly, applying Colorado law, we hold the liability release is valid and its enforcement bars Ms. Hamric's negligence claim. Therefore, we affirm the magistrate judge's grant of summary judgment in favor of WEI.

III. CONCLUSION

We **affirm** the denial of Ms. Hamric's motion for leave to amend her complaint because the magistrate judge did not abuse her discretion where Ms. Hamric did not attempt to satisfy the Federal Rule of Civil Procedure 16(b) standard for amending the Scheduling Order. We also **affirm** the denial of Ms. Hamric's discovery motions, holding the magistrate judge did not abuse her discretion where the items Ms. Hamric sought to discover were either already in the record, were not necessary to determine the validity of the liability release, or went to Ms. Hamric's effort to obtain exemplary damages, which she could not pursue given the denial of her motion for leave to amend her complaint. Finally, applying de novo review to the choice-of-law issue and the issue regarding the validity of the liability release, we conclude Colorado law applies and the release is valid and enforceable under that law. Therefore, we **affirm** the magistrate judge's grant of summary judgment to WEI.

WILDERNESS EXPEDITIONS, INC.

REGISTRATION FORM

Group name: Keller church of Christ Coordinator's name: Jamie Graeber

Personal Information

Name: Grenald Hannic Participant's current age: 51

Address: 807 South Cruz Dr.

City: Keller State: TX Zip: 76248

Phone: 817 - 925 - 8685 Participant E-mail (very important): rghannic6183@gmail.com

Parent/Guardian name(s): _____

Phone: ___-___-___ Parent E-mail (very important): _____

Release of Liability & User Indemnity Agreement for Wilderness Expeditions, Inc.

I hereby acknowledge that I, or my child, have voluntarily agreed to participate in the activities outfitted by Wilderness Expeditions, Inc.

I understand that the activities and all other hazards and exposures connected with the activities conducted in the outdoors do involve risk and I am cognizant of the risks and dangers inherent with the activities. I (or my child) am (is) fully capable of participating in the activities contracted for and willingly assume the risk of injury as my responsibility whether it is obvious or not.

I understand and agree that any bodily injury, **death,** or loss of personal property and expenses thereof as a result of my, or my child's, **negligence in any scheduled or unscheduled activities associated with Wilderness Expeditions, Inc.** are my **responsibilities.**

I understand **that accidents or illness can occur in remote places without medical facilities, physicians, or surgeons,** and be exposed to temperature extremes or inclement weather. I further agree and understand that any route or activity chosen may not be of minimum risk, but may have been chosen for its interest and challenge.

I agree to defend, indemnify, and hold harmless Wilderness Expeditions, Inc., the USDA Forest Service, Colorado Parks and Recreation Department, and any and all state or government agencies whose property the activities may be conducted on, and all of their officers, members, affiliated organizations, agents, or employees for any injury or death caused by or resulting from my or my child's participation in the activities, scheduled and unscheduled, whether or not such injury or death was caused by my, or their, negligence or from any other cause. **By signing my initials below, I certify this is a release of liability.**

Adult participant or parent/guardian initial here: RGH (Initials)

Adult Agreement or Parent's/Guardian Agreement for Wilderness Expeditions, Inc.

I understand the nature of the activities may involve the physical demands of hiking over rough terrain, backpacking personal and crew gear, and voluntarily climbing mountains to 14,433 feet in elevation. Having the assurance of my, or my child's, good health through a current physical examination by a medical doctor, I hereby give consent for me, or my child, to participate in the activities outfitted by Wilderness Expeditions, Inc. I have included in this form all necessary medical information about myself, or my child, that should be known by the leadership of the program. I assure my, or my child's, cooperation and assume responsibility for my, or my child's, actions. I understand that I am responsible for any medical expenses incurred in the event of needed medical attention for myself, or my child. I further agree that I will be financially responsible to repair or replace all items lost or abused by myself or my child.

In the event of an emergency, I authorize my consent to any X-ray examination, medical, dental, or surgical diagnosis, treatment, and/or hospital care advised and supervised by a physician, surgeon, or dentist licensed to practice. I understand that the designated next of kin will be contacted as soon as possible. **By signing my initials below, I certify this is a release of liability.**

Adult participant or parent/guardian initial here: RGH (Initials)

ILDERNESS EXPEDITIONS, C.

MEDICAL FORM

Participant's name: Gerald Hannic

D.O.B.: 01-15-1966 Age: 51 Gender: Male ✓ Female ___ Height: 6ft Weight: 300

Health Insurance Company: Cigna Policy Number: ___

Personal Physician: Andrew Sadovsky FNP-c Physician's Phone 817-632-5400

Medical History - Check response that accurately describes your health history.

Yes	No		Yes	No	
	X	Allergies: food, medicines, insects, plants		X	Hemophilia/bleeding disorder
	X	Asthma/Respiratory problems		X	Hernia
	X	Do you have an inhaler?		X	High blood pressure
	X	Cancer/Leukemia		X	Low blood pressure
	X	Convulsions/seizures/fainting spells		X	Kidney trouble
	X	Epilepsy		NA	Menstrual problems
	X	Diabetes		X	Serious illness in the past 12 months
	X	Headaches		X	Surgery in the past 12 months
	X	Heart trouble		X	Emotional or mental problems

Explain any "Yes" answers: ___

Note: The staff will not administer any medications, including aspirin, Tums, Tylenol, etc. If you need any over the counter medications, you must provide them. Be sure to tell your staff members what medications you are taking.

List any medications that you will have with you: Ibuprofen,

Note about food: Trail food is by necessity a high carbohydrate, high caloric diet. It is high in wheat, milk products, sugar, corn syrup, and artificial coloring/flavoring. If these food products cause a problem to your diet, **you will be responsible for providing any appropriate substitutions** and advise the staff upon arrival.

♦ Doctor's signature is required to participate. No other form can be substituted. By signing below a physician is verifying the medical history given above and approving this individual to participate.

Physician's Evaluation

The applicant will be taking part in strenuous outdoor activities that may include: backpacking, rappelling, hiking at 8-12,000 feet elevation, and an all day summit climb up to 14,433 feet elevation. This will include high altitude, extreme weather, cold water, exposure, fatigue, and remote conditions where medical care cannot be assured.
The applicant is approved for participation.

Physician Signature: Andrew Sadovsky FNP-c Date: 3-21-17

Physician Name: Andrew Sadovsky FNP-c Phone Number: 817-632-5400

Office Address: 8739 Davis Blvd-A City: Keller State: TX Zip: 76248

Participant or Parent/Guardian Signature – All sections of these forms must be initialed or signed

Individuals who have not completed these forms will not be allowed to participate. I have carefully read all the sections of this agreement, understand its contents, and have initialed all sections of page 1 of this document. I have examined all the information given by myself, or my child. By the signature below, I certify that it is true and correct. Should this form and/or any wording be altered, it will not be accepted and the participant will not be allowed to participate.

X Robert Gerald Hannic 04-05-17X ___

Participant's signature Date Parent or Guardian signature Date
(for participants under 18 yrs. of age only)

WILDERNESS EXPEDITIONS, INC.

REGISTRATION FORM

Group name: Keller church of Christ Coordinator's name: Janie Graveer

Personal Information

Name: Grenald Hannic Participant's current age: 51

Address: 807 South Cruz Dr.

City: Keller State: TX Zip: 76248

Phone: 817-925-8685 Participant E-mail (very important): rghannic6183@gmail.com

Parent/Guardian name(s): _____

Phone: ___-___-___ Parent E-mail (very important): _____

Release of Liability & User Indemnity Agreement for Wilderness Expeditions, Inc.

I hereby acknowledge that I, or my child, have voluntarily agreed to participate in the activities outfitted by Wilderness Expeditions, Inc.

I understand that the activities and all other hazards and exposures connected with the activities conducted in the outdoors do involve risk and I am cognizant of the risks and dangers inherent with the activities. I (or my child) am (is) fully capable of participating in the activities contracted for and willingly assume the risk of injury as my responsibility whether it is obvious or not.

I understand and agree that any bodily injury, death, or loss of personal property and expenses thereof as a result of my, or my child's, **negligence** in any scheduled or unscheduled activities associated with Wilderness Expeditions, Inc. are my responsibilities.

I understand that accidents or illness can occur in remote places without medical facilities, physicians, or surgeons, and be exposed to temperature extremes or inclement weather. I further agree and understand that any route or activity chosen may not be of minimum risk, but may have been chosen for its interest and challenge.

I agree to defend, indemnify, and hold harmless Wilderness Expeditions, Inc., the USDA Forest Service, Colorado Parks and Recreation Department, and any and all state or government agencies whose property the activities may be conducted on, and all of their officers, members, affiliated organizations, agents, or employees for any injury or death caused by or resulting from my or my child's participation in the activities, scheduled and unscheduled, whether or not such injury or death was caused by my, or their, negligence or from any other cause. **By signing my initials below, I certify this is a release of liability.**

Adult participant or parent/guardian initial here: RGH (Initials)

Adult Agreement or Parent's/Guardian Agreement for Wilderness Expeditions, Inc.

I understand the nature of the activities may involve the physical demands of hiking over rough terrain, backpacking personal and crew gear, and voluntarily climbing mountains to 14,433 feet in elevation. Having the assurance of my, or my child's, good health through a current physical examination by a medical doctor, I hereby give consent for me, or my child, to participate in the activities outfitted by Wilderness Expeditions, Inc. I have included in this form all necessary medical information about myself, or my child, that should be known by the leadership of the program. I assure my, or my child's, cooperation and assume responsibility for my, or my child's, actions. I understand that I am responsible for any medical expenses incurred in the event of needed medical attention for myself, or my child. I further agree that I will be financially responsible to repair or replace all items lost or abused by myself or my child. In the event of an emergency, I authorize my consent to any X-ray examination, medical, dental, or surgical diagnosis, treatment, and/or hospital care advised and supervised by a physician, surgeon, or dentist licensed to practice. I understand that the designated next of kin will be contacted as soon as possible. **By signing my initials below, I certify this is a release of liability.**

Adult participant or parent/guardian initial here: RGH (Initials)

ILDERNESS EXPEDITIONS, C.

MEDICAL FORM

Participant's name: Gerald Hamric

D.O.B.: 01-15-1966 Age: 51 Gender: Male ✓ Female ___ Height: 6ft Weight: 300

Health Insurance Company: Cigna Policy Number: _____

Personal Physician: Andrew Sadovsky FNP-c Physician's Phone 817-632-5400

Medical History - Check response that accurately describes your health history.

Yes	No		Yes	No	
	X	Allergies: food, medicines, insects, plants		X	Hemophilia/bleeding disorder
	X	Asthma/Respiratory problems		X	Hernia
	X	Do you have an inhaler?		X	High blood pressure
	X	Cancer/Leukemia		X	Low blood pressure
	X	Convulsions/seizures/fainting spells		X	Kidney trouble
	X	Epilepsy		NA	Menstrual problems
	X	Diabetes		X	Serious illness in the past 12 months
	X	Headaches		X	Surgery in the past 12 months
	X	Heart trouble		X	Emotional or mental problems

Explain any "Yes" answers: _____

Note: The staff will not administer any medications, including aspirin, Tums, Tylenol, etc. If you need any over the counter medications, you must provide them. Be sure to tell your staff members what medications you are taking.

List any medications that you will have with you: Ibuprofen

Note about food: Trail food is by necessity a high carbohydrate, high caloric diet. It is high in wheat, milk products, sugar, corn syrup, and artificial coloring/flavoring. If these food products cause a problem to your diet, **you will be responsible for providing any appropriate substitutions** and advise the staff upon arrival.

♦ **Doctor's signature is required to participate. No other form can be substituted. By signing below a physician is verifying the medical history given above and approving this individual to participate.**

Physician's Evaluation

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The applicant is approved for participation.

Physician Signature: Andrew Sadovsky FNP-c Date: 3.21.17

Physician Name: Andrew Sadovsky FNP-c Phone Number: 817-632-5400

Office Address: 8739 Davis Blvd-A City: Keller State: TX Zip: 76248

Participant or Parent/Guardian Signature – All sections of these forms must be initialed or signed
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X Robert Gerald Hamric 04-05-17 X _____ _____

Participant's signature Date Parent or Guardian signature Date
(for participants under 18 yrs. of age only)