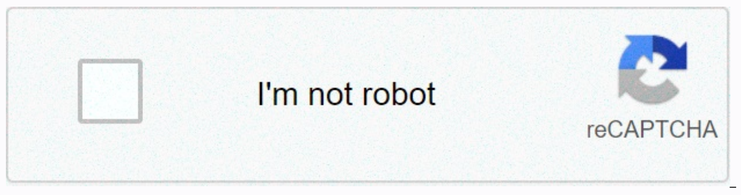

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State of Minnesota in Appeals A10-1907 Ironwood Springs Christian Ranch, Inc., Appellant, vs. Walk to Emmaus a/k/a Walk for Emmaus, Respondent. Filed June 27, 2011 Confirmed partially, partially reversed, and remanded in custody; proposal given To Schellhas, Judge Olmsted County District Court File No. 55-CV-09-7609 Considered and decided by Schellhas, Presiding Judge; Hudson, judge; and Worke, Judge. S Y L L A B U S SCHELLHAS, Judge Appellant initiated this case against the respondent for contributions to personal injury damages awarded to a retreat participant in a separate slip-and-fall case. The appellant challenges a summary judgment in favour of the respondent and claims that (1) as a holder of the land, as a rectangle owed to the retreat participant a legal duty to keep the premises safe, and (2) the respondent assumed a duty of care when it undertook the appellant-landowner's duty to salt and chop the ice in the location of the retreat participant's fall. We partially confirm, in part, and remand in custody for the trial. We also give the commission's proposal to strike material excluded by the district court. FACTS Appellant Ironwood Springs Christian Ranch, Inc. is a nonprofit organization that owns and operates a retreat facility. In January 2005, respondent Walk to Emmaus rented part of Ironwood's facility for a women's retreat. During the retreat, Ironwood's employees remained on the premises of the facility and performed continuous general maintenance. Josh Christenson served as Ironwood host. Jim Rottinger was the Emmaus employee in charge of the withdrawal. On Friday, January 28, Rottinger Christenson announced that there was ice outside the front door of the dining room. The ice was caused by snow melting on the roof and dripping to the ground in front of the door. This area was heavily raised by Emmau's staff and retreat participants. According to Rottinger, Christenson indicated that Rottinger should take care of the ice himself. This surprised Rottinger because Ironwood staff had previously taken care of any problems and he expected that Ironwood would take care of the ice. According to Christenson, he told Rottinger that he would be happy to take care of [the ice], but Rottinger told him there was no need because Emmau's staff would be happy to do so. Christenson showed The Rottinger the location of salt and ice cream, and the Rottinger salted and chopped the ice four or five times over the weekend and testified that he didn't see anyone from Ironwood treat the ice over the weekend. Christenson claims that in the confidence of Rottinger's statement that Emmau's staff would take care of the ice, he neither treated the ice nor asked any Ironwood weekend staff to treat the ice. But an Ironwood employee recalls seeing another Ironwood employee salting and shards away on the ice outside the main to the dining room. On Sunday, January 30, Jacky Larkin, a withdrawal, slipped on the ice, fell, hit her head and sustained serious injuries. Larkin sued Ironwood, and a jury awarded her damages of $705,000, distributing 42% error to her and 58% to Ironwood. Ironwood appealed and this court confirmed. Larkin v. Ironwood Springs Christian Ranch, Inc., No. A08-0645, 2009 WL 234620, at *1 (Minn. App. Feb. 3, 2009). After Ironwood initiated this contribution action against Emmaus, Emmaus moved to summary judgment, claiming that it did not owe Larkin a duty of care because (1) Ironwood remained in control of the premises, and (2) Emmaus did not assume Ironwood's duty of care when Rottinger salted and chopped the ice. The district court agreed and delivered a summary verdict. This appeal follows. QUESTION Did the district court make a mistake by concluding that Emmaus was not an owner of the land? Did the District Court conclude that Emmaus did not owe Larkin any duty of care because Emmaus did not take on Ironwood's duty, and neither Ironwood nor Larkin trusted Emmaus's assumption that Hanne was obliged to larkin to maintain his premises in a safe state? We first addressed Emmaus's proposal to strike from Ironwood's appendix a statement by Ironwood employee Daniel Ostergard, who worked over the weekend, that Larkin declined and documentation. The district court file contains Ostergard's statement and documentation. But the district court rejected Ironwood's motion to file the declaration because it was noble, and the court did not consider the declaration. Ironwood does not dispute the district court's denial of his motion to make the declaration. Instead, Ironwood opposes Emmaus's motion to strike, arguing that the question of whether the Ostergard declaration should be considered can be dealt with more fully in oral submissions and oral arguments. We disagree. Because Ironwood has waived his right to challenge the district court's denial of the proposal to submit the Ostergard Declaration, we are giving the motion to strike. See Balder v. Haley, 399 N.W.2d 77, 80 (Minn. 1987) (which states that issues not raised in briefs must be considered to have renounced the appeal) (offer omitted); Brodsky v. Brodsky, 733 N.W.2d 471, 479-80 (Minn. App. 2007) (award of class-action proposal to strike material from the appellant's surcharge, which was struck by the district court because the appellant waived his right to challenge the issue by not dealing with it in its short case). II. Standard of Review Summary judgment is appropriate when the submissions, depositions, answers to interrogation, and admissions on file, along with the swearing, if any, show that there are no real questions about any material facts and that both parties are entitled to a judgment as a matter of Minn. R. Civ. P. 56.03. On appeal, an appeals court assesses the existence of real material facts and whether the district court erred in the application of the law. STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002). The court of appeal sees the evidence most favourable to the one against whom the summary judgment was handed down. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). In order to establish an immediate case of negligence, an applicant must prove that there was a charge due, breach of that obligation, causation and damages. Foss v. Kincade, 766 N.W.2d 317, 320 (Minn. 2009). Summary judgment is appropriate when the minutes lack evidence of any of the four elements of a prima facie case [of negligence]. Id. Whether a person has a duty of care is a matter for the court to decide as a matter of law. Stat v. Back, 775 N.W.2d 866, 869 (Minn. 2009) (quote omitted). III. Contributed to negligence Ironwood alleges that Emmaus is jointly and severally liable for Larkin for damages. The very essence of the effort for contributions is shared responsibility. Engvall v. so Line R.R. Co., 632 N.W.2d 560, 568 (Minn. 2001) (offer omitted). The doctrine of contributions is a just doctrine that requires people under a common burden to share this burden fairly. Spitzack v. Schumacher, 308 Minn. 143, 145, 241 N.W.2d 641, 643 (1976). The person who has paid more than his share shall be entitled to contributions from the other person to reimburse him for the profits thus paid. Id. (offer omitted). The doctrine of contributions applies when several persons are under one [c]ommon liability to [another and] equity . . . the burden between the parties in relation to their respective shares. American Auto. Ins. Co. v. Molling, 239 Minn. 74, 77, 57 N.W.2d 847, 850 (1953) (listing omitted). Where a holder fulfils the obligation that would otherwise be imposed on all the obligors, the remainder must be obliged to contribute to the extent that [one] fulfilled the obligation beyond what could be required of him with a change of time. Id. (offer omitted). But Minnesota's honored Joint Contribution Act does not warrant contributions from parties that are not accountable to the injured. Engvall, 632 N.W.2d at 568 (offer omitted). IV. The duties of a land possessor the District Court rejected Ironwood's argument that Emmaus, as a possessor of land, owed the same duty to Larkin, which made Ironwood, to keep the premises in safe condition. We also reject Ironwood's argument. Landowners have a duty of care for the safety of all . . . invited on site. Sutherland mod. Barton, 570 N.W.2d 1, 7 (Minn. 1997) (offer omitted). It is acknowledged that the person engaged in onshore activities on behalf of the possessor is subject to the same obligations as the possessor and that one who has control over the premises is under the same obligation as the owner to keep the premises in safe condition. Dishington v. A.W. Kuettel & Sons, Inc., 255 Minn. 325, 330, 96 N.W.2d 684, 688 (1959) (footnotes omitted). § 328E in the Restatement (Second) of Torts (1965) defines a possessor of land as: a) a person who is in occupation of the land with intent to control it, or b) a person who has been in occupation of land with intent to control it if no other person has subsequently occupied it with the intention of controlling it, or c) a person , entitled to immediate occupation of the land if no other person is in possession under § (a) and (b). The Minnesota Supreme Court has used the factual approach recommended by Restatement to determine the meaning of the word 'possessor.' Isler mod. Burman, 305 Minn. 288, 295, 232 N.W.2d 818, 821 (1975). In Isler, the Minnesota Supreme Court imposed duties by a land possessor at a church that sponsored and organized a snowmobile event on a farmer's land. Noting that the church planned the event, received permission from the owner to use farmland, took on the duty to inspect the land for dangers, invited the people who brought snowmobiles, and assured those involved that the party would be monitored and chaperoned by the church, the Supreme Court ruled that the church was a possessor of the land for the purpose of the snowmobile party. Id. at 294-95, 232 N.W.2d at 821. But Emmaus, unlike the church in Isler, did not occupy the land for the purpose of controlling it; Ironwood remained in control. Although Rottinger salted and chopped the ice four or five times over the weekend, Ironwood's staff remained on site throughout the weekend and performed ongoing general maintenance. Under his contract with Ironwood to use the facility, Emmaus was not required to carry out maintenance or to sand, salt or clear ice from the premises. Ironwood was responsible for providing safe walkways. Although Emmaus rented part of Ironwood's land for his retirement, Emmaus did not occupy the land with the intention of controlling it. The district court made no mistake in concluding that Emmaus was not an owner of the land because of the same duty of care as Ironwood, the owner. V. The assumption of a Duty of Care Minnesota has long recognized that someone who voluntarily undertakes a duty must exercise reasonable care or he will be liable for damages as a result of his failure to do so. Id. at 295, 232 N.W.2d at 822; see also Williams v. Harris, 518 N.W.2d 864, 868 (Minn. App. 1994), notification denied (Minn. 28 September 1994) (Minnesota acknowledges that although there is no In the first instance, if a person voluntarily assumes a duty, the duty must be performed with reasonable care, or the person will be liable for damages.). In Williams, that court invoked Abresch v. Northwestern Bell Tel. Co., a 1956 Supreme Court case, and declared that [l]ibildity to voluntarily assume a duty arises only if that conduct 'causes others to rely on such an assumption of duty and to refrain from taking other and more direct measures to protect themselves.' 518 N.W.2d to 868 (quoting Abresch, 246 Minn. 408, 416, 75 N.W.2d 206, 211-12 (1956)). In Abresch, the Supreme Court relied on the Restatement (First) of Torts § 325 (1934). 246 Minn. at 414, 75 N.W.2d at 210-11. Restatement (First) of Torts Section 325 provides, as follows: One who gratuitously undertakes with another to do an act or to provide services which he should recognize as necessary for the bodily safety of the other and thus leads the other in reasonable confidence in the performance of such an undertaking (a) refrain from taking the necessary steps to ensure his safety or to ensure the then available protective action of a third party or (b) to engage in conduct which is dangerous unless the undertaking is carried out is liable to the other person for bodily harm as a result of the fact that the actor has not taken reasonable care to carry out his business. In this case, the district court did not cite the restatement of Torts in its discussion of whether Rottinger took a duty of care. The district court seemed to trust Williams when it concluded that [t]here is no evidence that others, including Larkin, relied on any assumption of duty from Rottinger or that Larkin, the other retreat participants, or Ironwood staff refrained from taking other and more direct actions to protect themselves. On the basis of Williams, both parties limit their arguments to whether there are contested facts relating to the alleged acquisition by rottingers of Ironwood's obligation to maintain the retreat rooms in a safe state, i.e. whether the accommodation is safe. As we have previously noted, the analysis in Williams is based on Abresch. However, since its decision in Abresch, the Supreme Court has adopted the Restatement (Other) of Tort's Section 324A and has applied all three foundations of liability contained in Section 324A when assuming liability to a third party after a takeover of a duty. See Walsh v. Pagra Air Taxi, Inc., 282 N.W.2d 567, 570-71 (Minn. 1979) (adoption Restatement (Other) of Torts § 324A); Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 170-71 (Minn. 1989) (making all three grounds for imposing liability under the Restatement (Other) of Section 324A of tort); see also Bjerke v. Johnson, 742 N.W.2d 660, 674 (Minn. 2007) (Hanson, J., agrees) (noted all three bases for imposing liability under Restatement section 324A of Tort); Id. at 678-81 (Anderson, G. Barry, J., outlier) (analyze § 324A (a), (b) and (c)). Restatement (Other) of Tort's Section 324A (1965) provides, as follows: One who undertakes, gratuitously or for consideration, to provide services to another, which he should recognise as necessary to protect a third person or his property, is liable to the third person for physical harm as a result of his failure to exercise reasonable care to [perform][1] his business (a) his failure to exercise reasonable care increases the risk of such damage, or (b) he has undertaken to perform an obligation owed by the other person to a third party, or (c) the damage suffered due to the other or third party's trust in the undertaking. The question of whether a duty has been assumed[2] is a matter of fact. Abresch, 246 Minn. 416, 75 N.W.2d at 212. Emmaus submits that Section 323 of the Restatement (Other) of torts applies to this case, not Section 324A. Section 323 of the Restatement (Other) of Torts (1965) provides as follows: The person who undertakes, gratuitously or for consideration, to provide services to another whom he should recognise as necessary to protect the other person or things is subject to the other person for physical harm as a result of his failure to exercise reasonable care to carry out his business; if (a) his failure to exercise such care increases the risk of such damage, or (b) the damage suffered by the other's dependence on the undertaking. Section 323 deals with the responsibility of one who undertakes to provide services to another for harm to the other (not to a third party) as a result of his or her failure to exercise reasonable care. See Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 674 (Minn. 2001) (quoting Section 323 and stating that there was no obligation because the landlord providing security measures did not constitute a service necessary to protect the tenant's person or property). We reject Emmaus's argument that paragraph 323 applies to this case. The Minnesota Supreme Court pending both Sections 323 and 324A of Pagra. 282 N.W.2d at 570. The court noted that[t]he city, without having any positive duty to assist with the preservation of private property, voluntarily committed to providing fire-protection services to airport users, while Pagra, an aviation support company, [b]y the terms of its operating agreement with the city, . . . agreed to carry out the fire safety obligation undertaken by the city. Id. at 569-70. The Court concluded that Section 323 applied to the city's activities of fire safety services for airport users, that

Section 324A applied to Pagra's business of the city's duty, and that [t] here [was] ample evidence that Pagra employees negligently performed their duty by not turning off fire before the plane was reduced to salvage value. Id. at 570-71. In this case, Ironwood owed Larkin's duty of care, and Emmaus allegedly took on Ironwood's duty. We conclude that whether Emmaus, like Pagra, took on Ironwood's duty to Larkin, it is covered by Section 324A. We also conclude that there are real material facts as to whether Emmaus took on Ironwood's duty. Although the parties do not dispute that Rottinger informed Christenson of the existence of ice cream on the spot, the parties dispute whether Emmaus took on Ironwood's duty to take care of the ice and whether Ironwood's staff took part in the ice during the retreat weekend. In view of the facts at issue'[w]hether, there was such a transfer of liability and whether [Emmaus] failed to exercise reasonable care in its execution actually involves questions which cannot be determined on the basis of a draft summary judgment.' Abresch, 246 Minn. 416, 75 N.W.2d at 212. And causation is generally a matter of facts left to the finder of facts. Paidar v. Hughes, 615 N.W.2d 276, 281 (Minn. 2000). Whether any offence by Emmaus of the duty allegedly intrjured by Emmaus caused physical harm to Larkin is a material matter of facts before a jury. VI. Liability Under The Restatement (Other) of Torts § 324A Under Section 324A, Emmaus is liable only if (a) the failure to exercise reasonable care increased the risk of injury, b) that it assumed an obligation owed to Larkin by Ironwood, or (c) the damage to Larkin was suffered because either Larkin or Ironwood relied on Emmaus's performance of the business. Ironwoods or Larkin's trust is necessary to determine liability under § 324A(c), but not under section 324A(a) or (b). We discuss Ironwood's claim for contributions under Section 324A (a, (b) and (c). In the Bjerke case, the Supreme Court concluded that a homeowner had a duty to protect a child who was invited from the sexual abuse of another adult resident of the home. 742 N.W.2d at 662-63, 665-67. The Supreme Court therefore did not rule on the existence of an obligation to protect under Section 324A of Section 324A of torts(other). Id. at the age of 667. However, three dissenting judges rejected the existence of a special relationship under Section 314A and therefore decided that it was necessary to decide whether a particular relationship existed under Section 324A. Id. at 676-77, 681 (Anderson, G. Barry, J., outlier, joined by Page, J. and Gildea, J.). In interpreting Section 324A(a), the dissent relied on cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806-07 (Minn. 1979), and Andrade v. Ellefson, 391 N.W.2d 836, 843 (Minn. 1986). Id. at 678-79. In Cracraft, quoting § 324A (a), the Supreme Court declared should be careful to avoid increasing the risk of injury. 279 N.W.2d at 807. Again citing Section 324A (a), in Andrade, the Supreme Court explained that if an alleged existing hazard had been detected, it may have prevented injury, but it is a failure to fall, not increase the risk of injury. 391 N.W.2d at 843. Based on Cracraft and Andrade, the disagreement concluded: Even assuming that Johnson actually committed to protect bjerke from third parties at Island Farm, Johnson's inaction did nothing to increase the risk of harm to Bjerke over what it would have been if Johnson had not engaged in that business. Johnson's intervention could have prevented Bjerke from suffering injury, but as we said in Andrade, this is a failure to fall, not increase the risk of injury. 391 N.W.2d at 843. Bjerke, 742 N.W.2d at 679 (Anderson, G. Barry, J., outlier). But here, if Ironwood relied on Rottinger's takeover of its duty, by not instructing its own employees to salt or chop the ice, Emmaus may have increased the risk of harm to Larkin. Emmaus claims that Ironwood's employee chopped ice cream over the retreat weekend, and that Ironwood therefore did not trust Emmaus's takeover of the service, but Rottinger saw no one from the Ironwood hoe. We conclude that there are real material facts with respect to Emmaus's alleged liability under Section 324A(a). In Pagra, the Supreme Court concluded that the city voluntarily committed to providing fire protection to airport users under Section 323 by providing the airport with firefighting equipment and a fire truck requiring the presence at the airport of personnel trained in firefighting, and providing equipment to contact the main fire station. 282 N.W.2d at 570. The Supreme Court also concluded that a company providing general aviation support services operating at the airport agreed, [b]y the terms of its operating agreement with the city, ... to carry out the fire protection obligation undertaken by the city under Section 324A. Id. at 569-71. In Erickson, the Supreme Court concluded that a security firm hired by a parking ramp owner to patrol the ramp voluntarily undertook to carry out the anchorage's duty to protect its customers under Section 324A(b). 447 N.W.2d at 166, 170-71. The security firm therefore owed a duty of care to an assault victim who was a customer of too lessee. Id. at 170-71. In the Bjerke case, the dispute stated that: the commentary and illustrations accompanying Section 324A(b) suggest that there was only a special relationship between Johnson and Bjerke under that provision if, in addition to committing to protect Bjerke from third parties on Island Farm, Johnson also intended to assume that duty of protection altogether, which otherwise rested with Bjerke's parents. 742 N.W.2d at 680 (Anderson, G. J., outlier). The dissent also noted that [o]ther courts have recognised that a particular relationship exists under Section 324A (b) only when a duty is assumed in its entirety. Id. (with reference to cases) but see Miller v. Bristol-Myers Co., 485 N.W.2d 31, 39 (Wis. 1992) (disa for example) to adopt the full assumption standard and that [a] parent company that assumes a duty to the subsidiary's employees should be held to a standard of reasonable care, even if its actions were only complementary to the subsidiary's practice). We agree with the disagreement in Bjerke and conclude that in order to impose liability under § 324A (b), one who assumes a duty that another to a third person must fully assume duty. In this case, Ironwood had a duty of care for the safety of all . . . invited on site. Sutherland, 570 N.W.2d at 7 (quote omitted). Emmaus's alleged takeover of service involves only one aspect of Ironwood's duty to the invitees – its duty to address the ice at the place where Larkin fell. See Bjerke, 742 N.W.2d at 677 (Anderson, G. Barry, J., dissenting) (noting that [t] he the extent of the obligation due under § 324A is defined by the scope of the business). On the basis of the contentious conversation between Rottinger and Christenson, we conclude that there are real material facts about Emmaus's possible acceptance of the duty and whether its acceptance of the obligation and whether it has forgiven that obligation if it is accepted. Because of the facts at issue, summary judgment is not appropriate. Christenson testified that he didn't treat the ice or asked weekend staff to treat the ice because Rottinger told him Emmaus would take care of it. Christenson's testimony suggests Ironwood's possible reliance on Emmaus's alleged takeover of duty. Whether anyone from Ironwood took to the ice over the weekend is disputed. There is therefore a real question of significant facts concerning Ironwood's dependence on Emmaus's alleged acquisition of customs duties and summary assessment is not appropriate. D E C I S I O N Because Emmaus did not occupy the land with intent to control it, the district court did not fail to conclude that Emmaus was not a possessor of land under the Restatement (Other) of Section 328E of the Tort and therefore does not owe the same duty of care as Ironwood to Larkin. We therefore confirm in part. However, because there are real material facts as to whether Emmaus assumed Ironwood's duty of care towards Larkin under § 324A(a), (b) or (c), we are summarily overturning the judgment to Emmaus and remand in custody for further proceedings in accordance with this Decision. Confirmed partially, partially reversed, and remanded in custody; resolution that has been given. [1] The journalist for this edition Restatement . . . has verified that the word 'protect' at this point is a typographical error and must read 'perform.' Hill v. U.S. Fid. & Guar. Co., 428 F.2d 112, 115 n.5 (5. Cir. 1970); see also Smith v. Allendale Mut. Ins. Co., 303 N.W.2d 702, 706 n.4 (Mich. 1981) (with reference to Hill); Miller v. Bristol-Myers Co., 485 N.W.2d 31, 38 n.7 (Wis. 1992) (with reference to Hill). [2] Minnesota courts use the terms obliging, taking on, assuming, and assuming interchangeably in this context. See, eg Pagra, 282 N.W.2d at 570.