STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0997

Renee Dianne Florek,
Respondent,

vs.

Randall Lee Vannet,
Appellant.

Filed March 25, 2019
Affirmed
Smith, Tracy M., Judge

Itasca County District Court
File No. 31-CV-15-2675

Christy L. Hall, Abigail Hencheck (certified student attorney), Gender Justice, St. Paul, Minnesota (for respondent)

Alan B. Fish, Dennis H. Ingold, Alan B. Fish, P.A., Roseau, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellant Randall Lee Vannet challenges the district court's denial of his motion for judgment as a matter of law, arguing that respondent Renee Dianne Florek's negligence-per-se claim based on violation of a criminal-sexual-conduct statute is not cognizable. We affirm.

FACTS

Florek and Vannet were in a romantic relationship for about four and a half years beginning late 2008. In 2015, Florek asserted three claims against Vannet: battery, negligence, and negligence per se. Florek later voluntarily dismissed the negligence claim, and the claims for battery and negligence per se were tried to a jury.

Florek testified that, on January 18, 2013, Vannet visited Florek in her home and the two had consensual intercourse. Florek said that she later took a sedative pain medication to ease cancer-related pain and that she was thereafter "unconscious." She testified that, when she next saw Vannet several days later, he asked her for sex. She declined his request, and he responded, "[T]hat's okay, babe, because last time I was here I took you two more times." Florek claimed that she was unaware of and had not consented to that sexual contact.

Vannet disputed Florek's version of events. He testified that, on January 18, the two had sexual intercourse a number of times—"[s]ort of an ongoing sleepy sex throughout the night"—but that the sexual contact was consensual and Florek was not physically helpless.

On the special verdict form, the jury answered, "No," to the question regarding battery: "Did Defendant intentionally cause harmful or offensive contact with Plaintiff on January 18, 2013?" The jury answered, "Yes," to the two questions regarding negligence per se: "Did Defendant intentionally sexually penetrate the Plaintiff on January 18, 2013?" and "Did the Defendant know or have reason to know that the Plaintiff was physically helpless at the time he sexually penetrated the Plaintiff?" The jury awarded Florek $5,000 in damages.

After trial, Vannet moved for judgment as a matter of law, arguing that the verdict was contrary to law because a negligence-per-se claim cannot be based on violation of the criminal-sexual-conduct statute. The district court denied the motion.

This appeal follows.

D E C I S I O N

A district court's decision to deny a motion for judgment as a matter of law is reviewed de novo. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018). Vannet argues that the district court erred by recognizing Florek's negligence-per-se claim. He also argues that the district court erroneously created a new cause of action for sexual abuse. We begin with negligence per se.

"Negligence per se is a form of ordinary negligence that results from violation of a statute. A per se negligence rule substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute is conclusive evidence of duty and breach." *Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 189-90 (Minn. 2005) (quotations omitted). Florek based her claim of negligence per se on violation of Minn. Stat. § 609.344, subd. 1(d) (2010), which prohibits a person from "engag[ing] in sexual penetration with another" when the person "knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless."

"For a statutory violation to satisfy the duty and breach elements"—in other words, for negligence per se to apply—"the person harmed by the violation must be among those the legislature intended to protect, and the harm must be of the type the legislature intended to prevent by enacting the statute." *Anderson*, 693 N.W.2d at 190. Vannet does not argue

that this test is not met—he does not challenge that Florek is a person intended to be protected by the statute or that the harm here was of the type that the statute is intended to prevent.

Instead, Vannet argues that violation of Minn. Stat. § 609.344, subd. 1(d), cannot be a predicate for a negligence-per-se claim because violation of the statute requires intentional conduct and intentional conduct cannot give rise to a negligence claim. He argues that, "[f]rom the beginning of this case, [Florek] alleged that [Vannet] *intentionally* sexually penetrated Florek twice while she was physically helpless or unable to consent." This alleged criminal sexual conduct, he asserts, could properly serve as the basis for the intentional tort of battery but could not be the basis of negligence per se.

Vannet acknowledges the absence of caselaw holding that violation of the criminal-sexual-conduct statute cannot constitute negligence per se. Instead, he draws from general negligence cases to support his argument. He relies particularly on *Murphy v. Barlow Realty Co.* which states that negligence "can only result from conduct uncontrolled by intent." 289 N.W. 563, 565 (Minn. 1939). In *Murphy*, the complaint alleged that the defendants "wil[l]fully and intentionally used improper materials and construction methods and purposely concealed the defective portions so that those foreseeably likely to use the premises would be lulled and deluded into belief of safety and security." 289 N.W. at 564. The supreme court decided that those allegations were "hardly short of intentional and fraudulent creation of a trap" and thus could not support a claim of ordinary negligence. *Id.* at 565. The defendants in *Murphy* intended more than just to commit the acts that

produced a defective building. They intended to cause a particular result—the plaintiffs being deceived regarding the safety of the building.

The intent required for violation of Minn. Stat. § 609.344, subd. 1(d), is different. As Vannet asserts, and as the special verdict questions required, to establish violation of the statute, Florek had to prove that Vannet intentionally sexually penetrated Florek when he knew or should have known she was physically helpless. The required intent is only to commit the act (sexual penetration)—intent to cause a particular result, such as the victim being harmed or offended, is not required. *See State v. Holloway*, 916 N.W.2d 338, 350 (Minn. 2018) ("[Section 609.344, subdivision 1,] require[s] the actor to have the general intent to engage in sexual penetration . . . with the complainant."). In criminal-law terms, criminal sexual conduct is a general-intent crime, not a specific-intent crime. "General intent is satisfied when a defendant intentionally engaged in the prohibited conduct." *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016) (quotation omitted). Specific intent is "an intent to cause a particular result." *State v. Shane*, 883 N.W.2d 606, 610 (Minn. App. 2016) (quotation omitted).

Because *Murphy* addressed a negligence claim based on intent to cause a particular result, not just an intent to act, it does not support Vannet's argument.[1] But Vannet also relies on a line of insurance cases involving intentional-act exclusions in liability policies.

[1] To the extent that Vannet argues that the only intent alleged was an intent to cause a particular result, the argument is unconvincing. The complaint does not allege that Vannet intended to harm or offend Florek by sexually penetrating her.

The supreme court has explained the effect and application of an intentional-act exclusion in an insurance policy:

> Where a comprehensive general liability policy contains an intentional act exclusion, there is no coverage for injury where the insured acts with the specific intent to cause bodily injury. The specific intent to cause injury requires that the insured intended the harm itself, not that the insured intended to act. Under this subjective standard, the intent to injure may be established: (1) by proof of an actual intent to injure, or (2) by inferring intent as a matter of law. . . .
>
> The general rule is that intent is inferred as a matter of law when the nature and circumstances of the insured's act are such that harm is substantially certain to result.

B.M.B. v. State Farm Fire & Cas. Co., 664 N.W.2d 817, 821 (Minn. 2003) (quotations and citations omitted).

The insurance cases cited by Vannet—*Lehmann*, *R.W.*, and *Auto-Owners*—all hold that the specific intent to harm is inferred as a matter of law when an insured sexually assaults another. *Estate of Lehmann v. Metzger*, 355 N.W.2d 425, 426 (Minn. 1984) ("In construing the 'intentional act' exclusion of liability insurance policies where the underlying claim is that the insured intentionally sexually assaulted the victim, an intention to inflict injury will be inferred as a matter of law."); *see also Auto-Owners Ins. Co. v. Todd*, 547 N.W.2d 696, 699 (Minn. 1996); *R.W. v. T.F.*, 528 N.W.2d 869, 873 (Minn. 1995). In other words, insurance law imputes to an insured the specific intent to cause harm when committing sexual assault; the general intent to commit the acts constituting sexual assault is automatically elevated to the specific intent to harm.

But Vannet fails to explain why a rule of interpretation for insurance policies should inform the applicability of negligence per se in cases where the tortfeaser has only an intent to act, not an intent to cause the intended result. Insurance policies are contracts, and courts have long developed various interpretive rules specific to insurance. And it has not been the courts' objective in developing insurance law to ensure consistent use of language with other substantive areas of law. *See Cont'l W. Ins. Co. v. Toal*, 244 N.W.2d 121, 125 (Minn. 1976) ("[T]he presumption in tort and criminal law that a person intends the natural and probable consequences of his intentional acts has no application to the interpretation of terms used in insurance contracts."). We are not persuaded that insurance law precludes Florek's claim.

The jury was asked to determine whether Vannet committed the intentional tort of battery by intentionally causing harmful or offensive contact with Florek. It decided that he did not—in other words, he did not intend the harm.[2] The jury was also asked whether Vannet intentionally sexually penetrated Florek while knowing or having reason to know that she was physically helpless. It decided that he did—in other words, he intended the sexual contact, even if he did not intend the harm. Vannet thus violated the criminal-sexual-conduct statute and, under the doctrine of negligence per se, breached a duty that he owed

[2] In the reply brief, Vannet argues that "the jury found that [his] contact with Florek was neither harmful nor offensive" without rendering any verdict on the issue of intent. Vannet's argument is not consistent with the award of damages for Florek's emotional distress. The only harmonizing construction of the special verdict is that Vannet did not have the necessary intent for battery. *See Daly v. McFarland*, 812 N.W.2d 113, 125 (Minn. 2012) ("A special verdict form is to be liberally construed to give effect to the intention of the jury and on appellate review it is the court's responsibility to harmonize all findings if at all possible." (quotation omitted)).

to Florek. *See Anderson*, 693 N.W.2d at 189-90. Vannet notes, and Florek agrees, that there is no case where a person who committed sexual assault was found liable on a claim of negligence. On appeal, the district court is not presumed to have erred; the party asserting error bears the burden to make it "appear affirmatively before there can be reversal." *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (quotation omitted); *see also Horodenski v. Lyndale Green Townhome Ass'n*, 804 N.W.2d 366, 372 (Minn. App. 2011). The absence of similar claims does not itself make it appear affirmatively that the district court erred by recognizing Florek's claims. Vannet fails to meet his burden on appeal.

Because the district court did not err by recognizing Florek's negligence-per-se claim, we need not address Vannet's argument that the district court created a new cause of action for sexual abuse. Negligence per se is not a new cause of action.

Affirmed.