STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1935

Thumper Pond Resort, LLC d/b/a Thumper Pond Resort,
Appellant,

vs.

Stock Building Supply Midwest, LLC, et al., Defendants,

Kaashagen & Sons, Inc. n/k/a BJK Construction, Inc., Third Party Plaintiff,

Badger Midwest Holdings, LLC,
Respondent,

Integrity Mutual Insurance Company, intervenor,
Respondent.

Filed December 9, 2019
Affirmed
Rodenberg, Judge

Otter Tail County District Court
File No. 56-CV-16-3000

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George C. Hottinger, Samantha R. Alsadi, Erstad & Riemer, P.A., Minneapolis, Minnesota (for respondent Integrity Mutual Insurance Company)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Larkin, Judge.

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

RODENBERG, Judge

Appellant Thumper Pond Resort, LLC d/b/a Thumper Pond Resort appeals from the district court's summary judgment in favor of respondent-developer Badger Midwest Holdings, LLC (Badger) and respondent-insurer Integrity Mutual Insurance Company (Integrity), arguing that the district court erred by (1) determining that the sole "occurrence" within the meaning of Integrity's commercial general liability (CGL) policy was a roof collapse in 2015 despite the record containing evidence that the collapse was caused by progressive structural damage over a long period of time; (2) determining sua sponte that Badger owed appellant no duty of care in tort; and (3) denying appellant's motion to compel discovery and not imposing spoliation sanctions on Badger in considering the summary-judgment motion. We affirm.

FACTS

Appellant owns the Thumper Pond Resort, which includes a waterpark that opened in July 2006. On April 14, 2015, after the waterpark had closed for the day, the roof collapsed. No people were injured, but significant property damage occurred.

In September 2016, appellant sued multiple parties including Kaashagen & Sons, Inc. (KSI), Gorski & Associates (Gorski), and Badger. Appellants claimed that those defendants were responsible for the roof collapse because "the truss system was not installed properly, the subcontractors were not supervised properly, and the trusses and plates were not manufactured properly." Integrity, which once insured Gorski, intervened.

At the time the waterpark was constructed, Thumper Pond Inc. (TPI) owned the real property on which it was built. Despite their similar names, TPI and appellant have no legal relationship. In 2002, TPI contracted with Badger to develop the Thumper Pond Resort. Badger marketed itself as "a professional Hotel Development Corporation," but its principal role in this project was securing a hotel franchise. In October 2004, an assignment and assumption-of-franchise agreement was signed, releasing Badger from further responsibilities relating to the Thumper Pond Resort project. Badger performed no services after October 2004. Badger dissolved in 2016.

During summer 2004, TPI hired and entered into a construction agreement with KSI, which agreed to be the general contractor on the project. KSI then entered into a sub-contractor agreement with Gorski to be the rough-framing contractor and one of the parties responsible for installing the truss system. Gorksi was involved in the waterpark construction from late 2004 or early 2005. Gorski was insured under a CGL policy issued by Integrity for the policy period from September 12, 2005, through September 12, 2006.

Appellant was formed in 2009 and acquired ownership of the Thumper Pond Resort in 2010. Appellant owned the Thumper Pond Resort when the waterpark roof collapsed.

Appellant moved to compel discovery from Badger or for sanctions for spoliation of evidence. Appellant argued that Badger refused to provide requested discovery for almost a year, even though it had notice of imminent litigation before dissolution, and that appellant was prejudiced as a result. The district court denied the motions.

Both Badger and Integrity moved for summary judgment. Badger argued that it had no duty in tort related to the waterpark construction and, even if it did have a duty in tort,

that it did not breach that duty. Integrity argued that it had no duty to indemnify Gorksi in this action because there was no "occurrence" causing property damage during the CGL policy period. The district court granted both motions for summary judgment.

This appeal followed.

D E C I S I O N

The district court did not err in granting summary judgment in favor of Integrity because the sole "occurrence" was the 2015 roof collapse, which was outside the CGL policy period.

Integrity's occurrence-based CGL policy issued to Gorski provided coverage for "property damage" caused by an "occurrence" during the policy period. The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Appellant argues that the plain language of the CGL policy provided coverage for the roof collapse because the collapse was the result of progressive damage to the truss system that resulted from faulty work by Gorski. Therefore, appellant argues, the "occurrence" was a continuing one beginning during the Integrity CGL policy period.

Gorski entered into a subcontract agreement with KSI on December 31, 2004, to supply rough-carpentry labor, which included installation of the roof truss system. Gorski installed the roof truss system, but did not finish all of the work contemplated by the agreement. The last day of Gorski's work on the project is not revealed by the record, but Gorski was replaced by another subcontractor, Comstock Construction Inc. of Minnesota (Comstock). Before it signed a subcontract agreement with KSI, Comstock visited the waterpark-construction site and took photos showing that the roof trusses were already

installed. Comstock's subcontract agreement with KSI was dated February 18, 2005, and the last of the signatures on the Comstock subcontract agreement was dated March 4, 2005. Nothing in the record identifies any waterpark-construction work done by Gorski after February 2005.

In granting Integrity's motion for summary judgment, the district court concluded that, while appellant presented a genuine dispute of material fact surrounding when the chain of events leading to the roof collapse commenced, there exists no issue of material fact for purposes of determining whether coverage existed under Integrity's occurrence-based CGL policy. The district court determined that the sole "occurrence" was the 2015 roof collapse.

A grant of summary judgment is reviewed de novo to determine "whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods. Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (citation omitted). Questions of insurance coverage are questions of law and are therefore reviewed de novo. *Parr v. Gonzalez*, 669 N.W.2d 401, 405 (Minn. App. 2003). "General principles of contract interpretation apply to insurance policies." *Id.* at 406. "In interpreting insurance contracts, we must ascertain and give effect to the intentions of the parties as reflected in the terms of the insuring contract." *Jenoff, Inc. v. New Hampshire Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). A court must not "read an ambiguity into the plain language of a policy in order to provide coverage." *Farkas v. Hartford Accident & Indem. Co.*, 173 N.W.2d 21, 24 (Minn. 1969) (citation omitted).

Interpretation of the CGL policy issued by Integrity as applied to the question of whether the policy covers damages arising from the 2015 roof collapse hinges on the meaning of "occurrence" as used in the policy. In *Jenoff*, the supreme court explained that "Minnesota follows the general rule that an 'occurrence' within the meaning of an occurrence policy is not the time when the wrongful act was committed but the time when the complaining party was actually injured." 558 N.W.2d at 261. This is consistent with the supreme court's decision in *Singsaas v. Diedrich*, affirming a district court order "determining that bodily injuries, occurring after cancellation of a general liability insurance policy . . . but caused by negligence occurring while the policy was in effect prior to cancellation, were not covered by the policy." 238 N.W.2d 878, 879 (Minn. 1976). *Singsaas* also rejected the argument that a "gradual accident" resulting from a process that begins during the policy period amounts to an occurrence within the policy period when the damage-causing incident occurs outside of that period. *Id.* at 881.

Appellant attempts to distinguish *Singsaas*, arguing that the damage to the waterpark roof began when the trusses were installed. But this is the reasoning rejected in *Singsaas.* The occurrence causing the claimed property damage of which appellant complains was the 2015 roof collapse, which happened long after the end of Integrity's policy period.

While the record contains evidence indicating that the claimed faulty installation of the trusses was a factor in the roof collapse, appellant sued Gorski for damage caused by the 2015 roof collapse. Appellant argues that there were "occurrences" from the moment Gorski installed the trusses until the roof collapse. Taken to its logical extreme, this would

mean that any insurer of Gorski under an occurrence-based policy from the day work started until the roof collapse in 2015 would be on the risk. On the facts here, the undisputed end date of Gorski's work on the project was before the Integrity policy period, and the roof collapse was almost a decade after the end of the policy period. Under the reasoning of *Singsaas*, coverage for the 2015 roof collapse on these facts would impose insurance obligations wildly beyond the "underwriting intent" of either an insurer or an insured. *See Jenoff*, 558 N.W.2d at 262.

Application of *Singsaas* here avoids frustrating "the underwriting intent of the insurer" by putting it on the risk of future damage beyond the policy period; occurrence-based insurance ends at the expiration of the policy. *Id.* The occurrence-based CGL policy issued by Integrity to Gorski did not provide for limitless coverage, but rather for things amounting to an "occurrence" during the policy period. The 2015 roof collapse occurred nearly ten years after the end of the policy period.

Appellant also argues that the default judgment it ultimately obtained against Gorski is significant for purposes of ascertaining coverage under the Integrity policy because the facts underlying that judgment included that the collapse resulted from Gorski's faulty work in 2005—before the inception of the Integrity policy—that resulted in a process of structural weakening that culminated in the collapse on April 14, 2015. Those facts concerning the process by which Gorski's work resulted in damage say nothing about the timing of the "occurrence" for purposes of the Integrity CGL policy. That timing question is one of contract interpretation. Gorski's faulty workmanship is not at issue in this appeal. This appeal concerns the point at which there was an "occurrence" for coverage purposes.

The district court correctly determined that there is no material fact issue concerning whether there was an occurrence during the Integrity policy period. There was none.

The district court did not abuse its discretion in denying appellant's motions to compel discovery and to impose spoliation sanctions on Badger.

Appellant argues that the district court abused its discretion in denying its motion to compel production of documents requested through discovery. Moreover, appellant alleges that Badger was on notice of the roof collapse and that Badger destroyed files and corporate records despite a duty to produce records and respond to written discovery requests. It also urges the application of the *Patton* factors. *See Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (holding that a court must consider whether evidence was critical to a claim and the extent of prejudice to the opposing party in deciding whether to impose spoliation sanctions). Badger counters that the few documents that it has, given that it dissolved and has not been involved in the Thumper Pond Resort project for over a decade, were produced during discovery, and that spoliation sanctions are not appropriate in this circumstance.

A party has a duty to preserve evidence when that party knows or should know that litigation is reasonably foreseeable. *Miller v. Lankow*, 801 N.W.2d 120, 127-28 (Minn. 2011). Spoliation of evidence occurs when a party fails to preserve property for another party's use as evidence in pending or future litigation. *Id.* at 127; *see also Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998) (defining spoliation as the destruction of relevant evidence by a party). District courts have broad authority in deciding whether to impose sanctions for spoliation. *Patton*, 538 N.W.2d at 119. One of the factors relevant

to this analysis is the extent of prejudice to the party seeking the evidence. *Miller*, 801 N.W.2d at 132. We review a district court's decision regarding spoliation sanctions for an abuse of discretion. *Id.* at 127.

The district court found that the parties agree that Badger gave appellant the limited documents that it had at the time discovery was served in this litigation. The record supports that finding.

Alternatively, appellant argues that the district court ought to have imposed spoliation sanctions against Badger by application of the *Patton* factors. If spoliation sanctions had been imposed, that might have impacted the district court's summary judgment ruling.

Badger agrees that it disposed of some documents. And the record supports the district court's determination that the documents were destroyed before Badger was given notice of this litigation. There is nothing in the record indicating that any documents were disposed of because of appellant's claim against Badger. Badger's certified public accountant advised Badger that organizational documents could be purged after ten years. The district court determined that ten years was a reasonable and practical retention period. The district court acknowledged the impact that the requested documents might have had on the summary judgment ruling. Having determined 10 years to be a reasonable document-retention period and that approximately 13 years passed since TPI contracted with Badger, the district court concluded that even documents kept for the reasonable-retention period would have been destroyed before Badger was given notice of this litigation. The district court's findings and reasoning are supported by the record. Because

all of the documents in existence were produced by Badger during discovery, the district court acted within its discretion in denying both appellant's motion to compel and its motion for spoliation sanctions.

The district court did not err in granting Badger's motion for summary judgment.

Appellant contends that it was prejudiced by the district court's summary adjudication of its claims against Badger, arguing that it never had the opportunity to brief the issue of whether Badger owed appellant a duty in tort. Appellant argues that the district court's reasoning in ruling on Badger's summary-judgment motion went beyond the specific arguments relied on by Badger. Appellant therefore characterizes the district court's action as having been taken sua sponte.

A district court's grant of summary judgment is reviewed de novo to determine "whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor*, 898 N.W.2d at 628. The record is viewed "in the light most favorable to the non-moving party." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (citation omitted). A fact is material if it "is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976).

The district court has "inherent authority . . . to grant summary judgment sua sponte without notice to either party where there remains no genuine issue of material fact, one of the parties deserves judgment as a matter of law, and the absence of a formal motion *creates no prejudice* to the party against whom summary judgment is entered." *Modern Heating & Air Conditioning, Inc. v. Loop Belden Porter*, 493 N.W.2d 296, 299 (Minn. App. 1992)

(alteration in original). We therefore consider whether the district court acted sua sponte in granting Badger's motion for summary judgment and, if so, whether doing so prejudiced appellant. *See id.*

The record does not show that the district court acted sua sponte in deciding the issue of duty. Badger's motion for summary judgment clearly argued the issue. The first paragraph of Badger's motion stated, "There is zero evidence in the record that Badger . . . could or did have any duty to [appellant] whatsoever as concerns the roof over the waterpark or the ensuing collapse of the roof." On page seven of the motion, Badger argued the absence of "evidence that Badger had a duty as concerns the waterpark construction and there is no evidence that Badger breached any duty even if it did have one (which it did not)." And again on page eight of the motion Badger argued that the facts "do not establish any duty or breach of duty on the part of Badger as concerns [appellant]." The issue of duty was plainly before the district court.

Appellant also contends that the district court improperly found that a developer owes no duty in tort to appellant as a subsequent owner of the waterpark.

The existence of a duty of care is a threshold question because a defendant cannot breach a nonexistent duty. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). Whether a duty of care exists is a question of law reviewed de novo. *Id.* Duty is usually a legal question for the court to decide. *Montemayor*, 898 N.W.2d at 629. In close cases, however, duty issues may present a question for the jury.[1] *Senogles*, 902 N.W.2d at 43.

[1] Four recent opinions of the Minnesota Supreme Court have identified such a "close case" concerning a claimed legal duty. *See Warren v. Dinter*, 926 N.W.2d 370 (Minn. 2019);

Appellant produced an expert affidavit asserting the industry-recognized duty of developers. But we agree with the district court that this did not create a fact issue concerning the existence of a legal duty in tort. Importantly, appellant has no legal relationship to TPI, with whom Badger contracted. Badger had no contract with appellant. Its contract was with TPI. Moreover, Badger's active involvement ended in 2004 when Badger, as the franchisee, and TPI, as the successor franchisee, entered into an assignment and assumption of franchise agreement.

Accordingly, the question becomes whether a developer, who contracted with a previous owner of the property, owes a general duty of due care to a party with whom the developer had no contract—in other words a duty in tort. This is a distinctly legal question for the court. Badger had neither a contractual relationship nor any special relationship with appellant. If Badger had hired the general contractor for the waterpark, as appellant claimed in its complaint, such a special relationship may have existed. But it is clear from

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Fenrich v. The Blake School, 920 N.W.2d 195 (Minn. 2018); *Senogles*, 902 N.W.2d 38; *Montemayor*, 898 N.W.2d 623. The supreme court held in each case that a jury question remained for resolution concerning duty, but the manner in which the duty question is properly to be put to the jury for resolution remains unresolved. *See SRRT Properties v. Nova Consulting Group, Inc.*, No. A19-0523, 2019 WL 5152463, at *10-11 (Minn. App. Oct. 14, 2019) (Jesson, J., concurring) (observing that a district court, having determined that foreseeability was for the jury to decide, should have submitted a special interrogatory to the jury specifically concerning the foreseeability question that the district court had determined was a "close" one). We need not resolve that question here. This case involves a question of whether a developer owes a duty in tort to a successor owner of a property previously owned by an entity with which the developer had a contract. It does not involve a hospital-admissions duty in the absence of a physician-patient relationship, as in *Warren*, 926 N.W.2d at 385-87, a special duty, as in *The Blake School*, 920 N.W.2d at 201-02, an obvious danger, as in *Senogles*, 902 N.W.2d at 47-48, or foreseeability, as in *Montemayor*, 898 N.W.2d at 629.

the record that Badger did not hire the general contractor. Instead, the record admits of no conclusion other than that Badger suggested the general contractor to TPI (and not appellant) which then hired and entered into a construction agreement with the general contractor. Badger and the general contractor that TPI hired had common owners, but were distinct and different legal entities. Had Badger contracted with appellant, a contractual duty may have existed. But Badger's contract was with TPI, not appellant. We agree with the district court that Badger owed no legal duty to appellant.

Whether a developer might in any future circumstance owe a duty to third parties is not the issue here. At the time Badger worked for TPI, appellant did not own the property and did not even exist. The record is devoid of any evidence of any duty Badger had to appellant. The district court did not err in its grant of summary judgment to Badger.

Integrity's remaining motion to strike is moot.

After appellant filed its reply brief, Integrity moved to strike sections of appellant's reply brief on two grounds: (1) misrepresentation and mischaracterization of Integrity's arguments, and (2) that appellant's reply brief exceeds the proper bounds of a reply brief. In a special term order, we denied Integrity's motion to strike on the ground of mischaracterization and misrepresentation and deferred ruling on the second ground for relief. The remaining motion to strike is moot in light of our resolution of this appeal.

Affirmed.