STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0354

Ashen S. Diehl,
Appellant,

vs.

3M Company,
Respondent.

Filed September 16, 2019
Reversed and remanded
Peterson, Judge[*]
Dissenting, Schellhas, Judge

St. Louis County District Court
File No. 69DU-CV-18-2662

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

James W. Balmer, Falsani Balmer Peterson & Balmer, Duluth, Minnesota (for appellant)

Jeanette M. Bazis, Kathryn N. Hibbard, Anna M. Tobin, Greene Espel PLLP, Minneapolis, Minnesota (for respondent)

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

Peterson, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this appeal from the dismissal of a products-liability action for failure to state a claim upon which relief can be granted, appellant argues that the district court erred by determining whether respondent had a duty to protect appellant from harm caused by a third person, rather than whether respondent had a duty as the manufacturer of a product. We reverse and remand.

FACTS

While walking on a public sidewalk in Duluth, appellant Ashen Diehl was hit by a car and severely injured. The car's driver, R.B., was intoxicated from inhaling the contents of a can of dust remover that was manufactured and sold by respondent 3M Company. R.B.'s intoxication caused him to improperly operate the car, and the car went out of control onto the sidewalk where it struck Diehl.

Diehl filed a lawsuit against 3M. In her complaint, Diehl alleged that 3M manufactured and sold the dust-remover product even though it "knew, or should have known, that [the product] is misused and abused by inhaling it to induce acute intoxication that incapacitates the abuser." Diehl alleged that 3M's "continued manufacture and sale of [the product] despite its knowledge of misuse and abuse of the product resulting in bodily harm to others is negligence" and that her injuries are the direct and proximate result of 3M's "manufacture and sale of an unreasonably dangerous product."[1]

[1] Diehl's complaint also asserted a strict-liability claim, which the district court dismissed as time barred. Diehl does not challenge the dismissal of that claim.

3M moved to dismiss Diehl's complaint pursuant to Minnesota Rule of Civil Procedure 12.02(e), arguing that it had no duty to protect Diehl from a third party's criminal conduct because no special relationship existed between Diehl and 3M and because its manufacture and sale of the product did not create an objectively foreseeable risk of injury to a foreseeable plaintiff. Diehl agreed that no special relationship existed between her and 3M but argued that 3M's own conduct of manufacturing and selling the dust-remover product when it knew or should have known that the product is inhaled to induce acute intoxication created a foreseeable risk of injury to a foreseeable plaintiff similarly situated to her.

The district court determined that no duty existed because 3M's manufacture and sale of a product that others might misuse were not "active misconduct" and were, instead, "nonfeasance" or "passive inaction, which is not enough to trigger a duty." The district court explained:

> 3M does not seem to have had any active role in [R.B.'s] conduct on the day of the accident. They simply put a product on the market, which was likely purchased by a wholesaler or distributor, then resold to a retailer, and [R.B.] picked up the dusting product there. 3M was not involved in that end of the sale, nor in [R.B.'s] misuse of the product, his decision to get behind the wheel of a vehicle after he inhaled those fumes, or his driving behavior leading up to when he struck [Diehl].

The district court also concluded that "[w]ith no duty of care possible, the [c]ourt need not go further into the foreseeability analysis." The district court granted 3M's motion to dismiss. Diehl appeals.

D E C I S I O N

Under Minn. R. Civ. P. 12.02(e), a pleading may be dismissed for "failure to state a claim upon which relief can be granted." "A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). Whether a complaint sets forth a legally sufficient claim for relief is reviewed de novo, and the reviewing court must "accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Id.* at 606. A reviewing court, however, must limit itself to considering only issues that were presented to and considered by the district court in deciding the matter before it. *Thompson v. Barnes*, 200 N.W.2d 921, 927 (Minn. 1972).

"As a general rule, 'a person does not owe a duty of care to another . . . if the harm is caused by a third party's conduct.'" *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018) (quoting *Doe 169 v. Brandon*, 845 N.W.2d 174, 177-78 (Minn. 2014)). But the supreme court has recognized two exceptions from this rule. "The first is when there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable. The second is when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Id*. at 201-02 (quotations and citation omitted). Because no special relationship existed between Diehl and 3M, only the second exception is relevant here.

In analyzing a defendant's "own conduct" under the second exception, the supreme court has drawn a distinction between misfeasance and nonfeasance. *Id*. at 203.

"Misfeasance is active misconduct working positive injury to others. Nonfeasance is passive inaction or a failure to take steps to protect others from harm. If a defendant's conduct is mere nonfeasance, that defendant owes no duty of care to the plaintiff for harm caused by a third party." *Id*. (quotations and citations omitted) (alteration in original).

The district court applied the general rule regarding harm caused by a third party's conduct and concluded that 3M did not owe a duty of care to Diehl because 3M's conduct was nonfeasance and a third party—R.B.—caused Diehl's harm. Diehl argues that the district court erred when it applied a duty analysis based on 3M's duty to protect her from harm caused by a third person, rather than on 3M's duty to her as a manufacturer in a products-liability action.

"Products liability is a manufacturer's . . . tort liability for any damages or injuries suffered by a buyer, user, or *bystander* as a result of a defective product. Products liability can be based on a theory of negligence, strict liability, or breach of warranty." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 581 (Minn. 2012) (quotation omitted) (emphasis added). When negligence is the basis for liability, "a plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). Duty is a threshold question "[b]ecause a defendant cannot breach a nonexistent duty." *Id.*

> In Minnesota, it is well settled that a manufacturer has a duty to protect users of its products from foreseeable dangers. But if the danger is not foreseeable, there is no duty. In determining whether a danger is foreseeable, courts look at whether the specific danger was objectively reasonable to

> expect, not simply whether it was within the realm of any conceivable possibility. That which is not objectively reasonable to expect is too remote to create liability on the part of the manufacturer. . . . When the issue of foreseeability is clear, the courts, as a matter of law, should decide it. In close cases, the question of foreseeability is for the jury.

Whiteford ex rel. Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998) (footnote omitted). The manufacturer's duty is not limited to product users; the duty is "to protect the [product's] users, *along with those who might be injured by [the product's] use or misuse*, from foreseeable danger." *Id*. at 919 (emphasis added). A manufacturer must exercise a degree of care in its "plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use." *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 621 (Minn. 1984) (quotation omitted).

Diehl alleged in her complaint that 3M manufactured and sold the dust-remover product despite knowing that the product presented a risk of bodily harm to bystanders exposed to the danger of people who inhale the product and become acutely intoxicated. The district court concluded that the "manufacture and sale of a product that others might misuse to get high is not active misconduct" and explained that "3M does not seem to have had any active role in [R.B.'s] conduct on the day of the accident." But the fact that 3M did not have an active role in R.B.'s conduct on the day of the accident does not mean that 3M did not have a duty.

The second exception from the rule that a person does not owe a duty of care to another if the harm is caused by a third party's conduct applies "when the defendant's own conduct creates a foreseeable risk of injury to the plaintiff." *Fenrich*, 920 N.W.2d at 202 (quotation omitted). When the district court concluded that no duty existed because 3M's manufacture and sale of a product that others might misuse were not "active misconduct," but rather "mere nonfeasance," it erred by considering only whether 3M had an active role in R.B.'s conduct on the day of the accident.

Even if R.B.'s conduct was the direct cause of Diehl's harm and 3M did not have an active role in R.B.'s conduct, the second exception applies if 3M's own conduct of manufacturing and selling the product created a foreseeable risk of injury to Diehl. *See Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 630 (Minn. 2017) (stating that "it is well established that manufacturers can be held liable despite intervening circumstances . . . if such circumstances were also foreseeable.").[2] Concluding that a manufacturer does not have a duty because the manufacturer was not involved with the product user's misuse of the product fails to recognize that a manufacturer has a duty to avoid any unreasonable risk of harm to anyone who is likely to be exposed to danger when the product is used in an unintended yet reasonably foreseeable use.[3]

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[2] Both negligence and misuse of a product are within the definition of fault under the comparative-fault statute. Minn. Stat. § 604.01, subd. 1a (2018).

[3] There is no inconsistency between product-liability law based on negligence and the second exception to the third-person-conduct rule of negligence. When the plaintiff is a bystander to the use of a product, applying the principle that a manufacturer has a duty to avoid any unreasonable risk of harm to anyone who is likely to be exposed to danger when a product is used in an unintended yet reasonably foreseeable use is consistent with applying the second exception from the rule that a person does not owe a duty of care to

Accepting the facts alleged in the complaint as true, it was reasonably foreseeable that R.B. would misuse the dust remover and become acutely intoxicated. If it was also foreseeable that people who inhale the dust remover and become acutely intoxicated were a danger to Diehl, 3M had a duty to protect Diehl from the foreseeable danger. The district court, however, did not determine whether there was a foreseeable danger. The district court ended its analysis when it concluded that 3M did not have an active role in R.B.'s conduct on the day of the accident.

We, therefore, reverse and remand so that the district court can complete the analysis of whether 3M owed Diehl a duty. To complete the analysis, the district court must determine whether it is clear that it either was or was not objectively reasonable for 3M to expect a danger to Diehl when it manufactured and sold the dust-remover product or whether the question of foreseeability is for the jury.

Reversed and remanded.

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another if the harm is caused by a third party's conduct. Under either analysis, a manufacturer has a duty when its conduct creates a foreseeable risk of injury to a foreseeable plaintiff.

SCHELLHAS, Judge (dissenting)

I respectfully dissent from the majority's conclusion that the district court erred in dismissing appellant Ashen Diehl's complaint for failure to state a claim. In my view, the district court correctly reasoned that the complaint against respondent 3M Company alleges nonfeasance, not misfeasance.

The complaint alleges that 3M manufactured and sold a can of dust-removal product that a third party inhaled before losing control of his vehicle, leaving the roadway, and striking Diehl on the sidewalk. The complaint also alleges that 3M manufactured and sold its dust-removal product despite knowing that it is misused or abused to induce acute intoxication. Diehl contends that a proper legal analysis of her claims is framed under product-liability concepts, not third-party-harm concepts. Under the circumstances presented here, any distinction is immaterial. Under both analytical constructs, the critical question is whether 3M's alleged conduct in manufacturing and selling a dust-removal product could give rise to a duty to appellant.[4]

"A manufacturer has a duty to design its product to avoid an unreasonable risk of harm when the product is used as intended or misused in a reasonably foreseeable manner." *Montemayor v. Sebright Prod., Inc.*, 898 N.W.2d 623, 629 (Minn. 2017). A manufacturer's liability can extend to "damages or injuries suffered by a . . . bystander as a result of a defective product." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 581 (Minn. 2012).

[4] Diehl explains in her brief that the product at issue "is mainly designed as a compressed gas dust and lint remover to be sprayed into areas where dust has accumulated, such as audio-visual equipment, household items, keyboards and so forth."

But under Minnesota law, "a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177–78 (Minn. 2014). An exception to this rule applies when "the defendant's *own conduct* creates a *foreseeable risk* of injury to a *foreseeable plaintiff*." *Id*. at 178 (quotation omitted). "If . . . the 'own conduct' exception applies, a negligent defendant may be held liable to a plaintiff for harm caused by a third party." *Fenrich v. The Blake School*, 920 N.W.2d 195, 202 (Minn. 2018). "To determine foreseeability, 'we look to the defendant's conduct and ask whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury.'" *Montemayor*, 898 N.W.2d at 629 (quoting *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn. 2011)).

The existence of a duty of care is generally a question of law reviewed de novo. *Doe 169*, 845 N.W.2d at 177; *Domagala*, 805 N.W.2d at 22; *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007)). Foreseeability in the context of duty is also ordinarily subject to de novo review. *Fenrich*, 920 N.W.2d at 205; *Montemayor*, 898 N.W.2d at 629 ("When the issue of foreseeability is clear, the courts, as a matter of law, should decide it.") (quotation omitted)). Only when foreseeability is a "close case" does a fact question arise. *Montemayor*, 898 N.W.2d at 629.

In analyzing 3M's "own conduct," the first question is whether the complaint alleges misfeasance or nonfeasance. *Fenrich*, 920 N.W.2d at 203. "Misfeasance is active misconduct working positive injury to others." *Id*. (quotation omitted). In contrast, "Nonfeasance is passive inaction or a failure to take steps to protect others from harm." *Id*.

(quotation omitted). No duty of care arises for harm caused by a third party when the defendant's conduct is mere nonfeasance. *Id*.

The complaint alleges that 3M manufactured and sold its dust-removal product despite knowing that it is misused or abused to induce acute intoxication. The district court concluded that 3M's conduct of manufacturing and selling its dust-removal product amounted to passive inaction, or nonfeasance, which does not give rise to a duty of care for harm caused by the driver. I agree. The claims in this case are easily distinguishable from *Fenrich*, in which the record supported a finding that defendant "went beyond passive inaction by assuming supervision and control over" a road trip that resulted in a fatal crash. *Id*. at 203.

But even if the district court erred in concluding that 3M's alleged "own conduct" constituted nonfeasance (which does not support a duty) rather than misfeasance (which could support a duty), the district court properly dismissed the complaint because any alleged misfeasance did not create a foreseeable risk to a foreseeable plaintiff. *See id*.; *Doe 169*, 845 N.W.2d at 178. "To determine whether the risk of injury to the plaintiff is foreseeable, we look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility. The risk must be clear to the person of ordinary prudence." *Doe 169*, 845 N.W.2d at 178 (quotation omitted).

The link between the danger (being struck by a vehicle on the sidewalk) and 3M's alleged conduct (manufacturing a household dust-removal product) is simply too attenuated and remote to support the existence of a duty. The foreseeability of the driver's

huffing 3M's dust-removal product while driving does not present a close case. *See Montemayor*, 898 N.W.2d at 629 (providing that only when foreseeability is a "close case" does a fact question arise). Because, as a matter of law, the specific danger is not "clear to the person of ordinary prudence," I disagree with a remand of this case to the district court. *See Doe 169*, 845 N.W.2d at 178.

Both *Fenrich* and this appeal involve serious car crashes giving rise to claims against parties other than the at-fault driver. In determining that a fact question existed about whether the defendant school in *Fenrich* owed a duty, our supreme court concluded that "[t]he possibility that teen drivers may be distracted by other teens and electronics is not in any way remote or attenuated" from the defendant school's encouragement and coordination of a 200-mile road trip with a 16-year-old driver at the wheel. *Fenrich*, 920 N.W.2d at 206. Here, in contrast, 3M had no relationship with the driver, no involvement in his decision to get behind the wheel, and no opportunity to supervise or control his behavior. Taken to its logical extension, the majority's analysis here could allow claims against the manufacturer of the cellphone with which the teen driver in *Fenrich* was "playing" at the time of the crash. *See Fenrich*, 920 N.W.2d at 200 n.2. Neither *Fenrich* nor any other Minnesota caselaw supports such a claim.

Moreover, caselaw from other jurisdictions supports my analysis that 3M owed no duty to Diehl as a matter of law. In *Williams v. Cingular Wireless*, the Indiana Court of Appeals affirmed a rule-12 dismissal of a personal-injury claim against a cellphone company arising from a collision. 809 N.E.2d 473, 475 (Ind. Ct. App. 2004). The complaint alleged that the company was negligent in furnishing a cellphone that could be used while

driving, that the other driver used the phone while driving, and that plaintiff was injured as a result. *Id*. The Indiana Court of Appeals concluded that the cellphone company owed no duty as a matter of law, concluding that, "Although it is foreseeable that cellular phone use while driving may contribute to a car accident, it is not foreseeable that the sale of a phone to a customer will necessarily result in a car accident." *Id*. at 479. And the Fifth Circuit recently affirmed the rule-12 dismissal of negligence claims arising from a retail store's sale of at least 60 cans of dust remover, in a 27-hour period, to a purchaser who inhaled the contents and died in the store's parking lot. *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 176–77 (5th Cir. 2018). The Fifth Circuit concluded that no duty of care was owed as a matter of law. *Id*. at 179.

I conclude that the district court did not err in dismissing the complaint in this case, even if the complaint alleges misfeasance, not nonfeasance as determined by the district court, because although the risk of a driver simultaneously abusing a dust-removal product and consequently striking a sidewalk pedestrian is within the realm of conceivable possibility, it is not objectively reasonable to foresee as a matter of law. In my view, the district court properly concluded that the complaint fails to state a claim as a matter of law. I would affirm the district court's dismissal of the action under Minn. R. Civ. P. 12.02(e).