STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0789

Andrew Geist,
individually and as parent and natural guardian of minor, T.G.,
Appellant,

vs.

East Central Energy,
Appellant,

One Way Tree Service, Inc.,
Respondent,

Northland Process Piping, Inc., et al.,
Defendants.

Filed November 25, 2019
Affirmed
Worke, Judge

Kanabec County District Court
File No. 33-CV-17-211

Britton D. Weimer, William C. Weeding, Weimer & Weeding PLLC, Bloomington, Minnesota (for appellants)

Peter M. Waldeck, Jason M. Stoffel, Waldeck Law Firm P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Klaphake, 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

WORKE, Judge

Appellants argue that the district court erred by granting summary judgment to respondent. We affirm.

FACTS

In September 2014, 13-year-old T.G. climbed a tree and suffered an electric shock, presumably from coming into contact with appellant East Central Energy's (ECE) powerline. ECE thereafter inspected the tree and the powerline and discovered that the upper, primary powerline was not touching the tree, but the lower, neutral line was touching the tree.

In July 2017, appellant Andrew Geist, individually and as parent and natural guardian of T.G., sued ECE, the property owner, the lessee, and respondent One Way Tree Service Inc. (One Way), who was contractually responsible for vegetation management around ECE's powerlines. ECE filed a cross-claim against One Way, seeking indemnity and/or contribution. One Way moved for summary judgment.

Central to the summary-judgment motion was ECE and One Way's contract. In 2009, One Way entered into a contract with ECE for right-of-way vegetation management and clearing around ECE's powerlines. Under the contract, One Way was obligated to prune trees within a landscape[1] "to the extent, when necessary, that the growing points of the trees or limbs will remain a minimum of two feet from the nearest conductor until the

[1] A contractually defined term whose applicability is not contested.

next scheduled maintenance. The expected growth characteristics as well as pruning responses shall be taken into consideration pruning for the particular species." ECE also provided One Way with a sheet of specific guidelines for trimming individual species of trees, but it is unclear whether those guidelines were incorporated into the contract.

One Way trimmed the tree in 2010 pursuant to its contract with ECE. The employee who trimmed the tree could not recall how much clearance he provided at that time, but testified that it was in compliance with the six-year clearance guidelines provided by ECE. The One Way employee also testified that he flagged the tree for removal, but it was not removed because presumably the landowner either failed to respond to the removal notice or instructed One Way not to remove it. Therefore, One Way pruned the tree rather than removing it.

Under the contract, "an ECE representative will inspect a project for final acceptance and payment. After inspection by ECE, any deficient or defective work that has not been previously recorded on Variance Report shall be remedied at the contractor's expense prior to final payment." An ECE employee testified that the tree was flagged as deficient on his inspection report, but only due to a dead branch overhanging the line, which he agreed was not relevant to the 2014 incident. The project passed inspection as evidenced by the fact that One Way was paid for its services.

The district court granted One Way's motion for summary judgment after concluding that One Way owed no duty to T.G. following satisfactory completion of its work in 2010. The parties eventually settled the remaining claims. This appeal followed.

D E C I S I O N

Appellants[2] argue that the district court erred by granting One Way summary judgment. "We review the grant of summary judgment 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) (quotation omitted). "We review the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Summary judgment is not appropriate "when reasonable persons might draw different conclusions from the evidence presented." *Montemayor*, 898 N.W.2d at 628 (quotation omitted).

Geist's negligence claim

Geist asserts that factual disputes exist that should have precluded summary judgment on his negligence claim. In order to prevail on a negligence claim, a plaintiff must establish: "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted).

The district court determined that One Way owed no duty to Geist or T.G. following the completion of its work and ECE's approval of that work. "The existence of a duty of care is a threshold question because a defendant cannot breach a nonexistent duty." *Doe*

[2] In May 2019, the district court dismissed all remaining claims pursuant to the parties' stipulation. Appellants Geist and ECE are now represented by the same counsel.

169 v. Brandon, 845 N.W.2d 174, 177 (Minn. 2014). Appellate courts review the existence of a duty of care de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

Geist argues that there are disputed material facts regarding whether One Way was negligent in (1) trimming around the neutral line, (2) trimming around the primary powerline, and (3) following up with the property owners regarding its removal notice. Geist and the expert affidavit of Ronald May repeatedly cite One Way's contractual trimming and removal-tagging requirements to support the assertion that there are disputed material facts regarding Geist's tort negligence claim.[3] This confusion between tort and contract frequently occurs in the arguments presented to both the district court and this court.

Geist argues that One Way violated a duty to T.G. and himself when it breached a contractual requirement to have a minimum of two feet of clearance between the growing points of trees or limbs and conductors until the next scheduled maintenance. However, as nonparties to the contract, One Way owed no contractual duty to Geist or T.G., and ECE did not bring a cross-claim for breach of contract. And "a party is not responsible for damages in tort if the duty breached was merely . . . imposed by contract, and not imposed by law." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 584 (Minn. 2012) (quotations omitted). "Where a party cannot prove that the duty at issue arose independent

[3] May stated that "[i]t is the standard of the industry for electric utilities to enter into contracts with experts in the field of vegetation management . . . ." May then relied solely on the contractual standard of care and did not provide any facts regarding a standard of care that exists independent of the bargained-for provisions of the parties' contract. For example, he concluded: "Thus, One Way's non-compliance with the contract and contractual standard of care directly contributed to [T.G.'s] injuries."

of a contract, Minnesota law precludes [that party] from recovering in negligence based upon breach of [that duty.]" *Id*. (quotation omitted).

Geist argues that in professional-negligence actions, the contract between the parties can be used to define the duty of care for the professional. In support of this assertion, Geist relies on *Keiper v. Anderson*, 165 N.W. 237, 239 (Minn. 1917), but *Keiper* and the related cases cited by Geist do not support his argument that a contractual duty can be used to define the professional standard of care owed to a person who is not a party to the contract. In fact, in *Keiper*, the supreme court stated that "[i]t seems to us to make no difference whether the duty to use due care is one imposed directly by law, or exists because of the *contract relation of the parties*." 165 N.W.2d at 239 (emphasis added). Geist has no contractual relation with One Way, and therefore the contract between ECE and One Way is immaterial to Geist's tort negligence claim.

Geist argued to the district court that he was a third-party beneficiary of the contract between One Way and ECE and thus was entitled to rely on the contractual trimming and removal-notice requirements. The district court held that Geist was not a third-party beneficiary, and Geist did not appeal that determination. Therefore, evidence pertaining to One Way's obligations under its contract with ECE is not material to Geist's negligence action, and accordingly cannot create a dispute of material fact. On this basis, the district court did not err by granting One Way summary judgment on Geist's common-law negligence claim.

The district court also found that Geist failed to establish the threshold issue of the existence of a duty because, once One Way's work on the project was completed in 2010,

it lacked authority to reenter the property and inspect its work. Therefore, the duty to maintain the vegetation around the powerlines "fell primarily, if not entirely, on ECE."

In *Domagala*, the supreme court recognized that it has "imposed a duty of reasonable care to prevent foreseeable harm when the defendant's conduct creates a dangerous situation." 805 N.W.2d at 26. "Foreseeability of injury is a threshold issue related to duty that is ordinarily properly decided by the court prior to submitting the case to the jury." *Id*. at 27 (quotation omitted). "To determine whether an injury was foreseeable, we look to the defendant's conduct and ask whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury." *Id.* The district court did not specifically address the issue of reasonable foreseeability in its determination that One Way owed no duty to Geist or T.G. However, as stated in *Domagala*, reasonable foreseeability is related to the issue of duty. *Id*. at 26. "In close cases, the issue of foreseeability should be submitted to the jury." *Warren v. Dinter*, 926 N.W.2d 370, 378 (Minn. 2019) (quotation omitted); *see also Fenrich*, 920 N.W.2d at 205; *Senogles v. Carlson*, 902 N.W.2d 38, 48 (Minn. 2017); *Montemayor*, 898 N.W.2d at 630.

This is not a close case. As with the issue of duty, when viewed in the light most favorable to Geist, there is no evidence presented by Geist that pointed to a reasonably foreseeable risk of injury to T.G. Geist again states that genuine disputes of material fact exist regarding One Way's purported breach of its contractual obligations to ECE, and asserts that harm to T.G. was reasonably foreseeable as a result of that breach. Because Geist presented no evidence regarding the foreseeability of harm to T.G. in 2014 due to

One Way's purportedly negligent trimming in 2010, the district court's grant of summary judgment to One Way on Geist's negligence claim was not erroneous.

ECE's cross-claims

The parties argued ECE's cross-claim for indemnity during the summary-judgment hearing, but did not argue ECE's cross-claim for contribution. The district court did not specifically address ECE's cross-claims, merely ruling that the claims against One Way were dismissed with prejudice. A district court's silence on a motion is treated as a denial. *Palladium Holdings, LLC v. Zuni Mortg. Loan Tr. 2006-OA1*, 775 N.W.2d 168, 178 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010). ECE challenges the district court's denial of its cross-claims.

A claim for contribution-indemnity is an independent cause of action. *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). "[C]ontribution-indemnity is not based on contract or tort, although either may secondarily be involved, but on one party paying more than its fair share of a common liability." *Id*. "The elements of contribution are common liability of joint tortfeasors to an injured party and the payment by one of the tortfeasors of more than his share of that liability." *In re Individual 35W Bridge Litig.*, 806 N.W.2d 811, 815 (Minn. 2011) (quotation omitted). "Contribution is an equitable remedy . . . ." *Id*. Having affirmed the district court's grant of summary judgment to One Way on Geist's negligence claim, there is no common liability between One Way and ECE as joint tortfeasors, as judgment was entered in favor of One Way on the merits of Geist's claim. Therefore, the district court did not err by granting One Way summary judgment on ECE's cross-claim for contribution.

"Indemnity applies when, among other situations, a party fails to discover or prevent another's fault and, consequently, pays damages for which the other party is primarily liable." *City of Willmar*, 512 N.W.2d at 874. Unlike Geist's negligence claim or ECE's contribution claim, ECE's indemnity claim is secondarily governed by the terms of One Way and ECE's contract. According to the indemnification provision in the contract, "nothing herein shall be construed as making [One Way] liable for any injury, death, loss, damage, or destruction caused by the sole negligence of [ECE]."

Having affirmed the grant of summary judgment to One Way on Geist's negligence claim, the only remaining liability for One Way to indemnify in this action is Geist's negligence claim against ECE. Geist sued ECE and One Way as joint tortfeasors in negligence only. ECE then cross-claimed against One Way to indemnify any liabilities it may have to Geist. The district court granted One Way summary judgment on the merits of Geist's negligence claim, which, for the purposes of this appeal, leaves only Geist's negligence claim against ECE, which the parties settled. Thus, even though indemnification is an independent action, the only remaining liability that ECE seeks to indemnify itself against is a claim for its sole negligence, which One Way is not obligated to indemnify under the contract. Therefore, the district court did not err in granting One Way summary judgment on ECE's cross-claim for indemnification.

Affirmed.