STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1303

Christina Ginther,
Plaintiff,

vs.

Enzuri Group, LLC, et al.,
Appellants on Related Appeal,

Independent Women's Football League,
Respondent on Related Appeal.

Filed October 5, 2020
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Dakota County District Court
File No. 19HA-CV-17-857

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Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Slieter, Judge.

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

BRATVOLD, Judge

This appeal is taken from the judgment entered following a jury verdict for plaintiff Christina Ginther on her business-discrimination claim against appellant Enzuri Group

LLC d/b/a MN Vixen (the team) and respondent Independent Women's Football League (the league). The team operates a women's tackle-football team; from 2012 until 2017, the team contracted with and played in the league. Appellant Laura Brown is the team manager, president, and sole shareholder. Brown managed the recruitment and selection of players for the team. The jury found that Brown did not discriminate against Ginther.

On appeal, the only remaining issues arise from the district court's order denying appellants' posttrial motion for judgment as a matter of law (JMOL) on their common-law indemnity claims against the league for attorney fees incurred in defending against Ginther's lawsuit. We conclude the district court properly denied JMOL on the team's indemnity claim and thus we affirm in part. But because the district court erred in denying JMOL on Brown's indemnity claim and did not determine whether Brown tendered her defense to the league, we reverse in part and remand for further proceedings consistent with this opinion.

FACTS

These facts summarize the evidence received during the jury trial. In October 2016, the team held tryouts for the 2017 season, and Ginther tried out for the team. Brown contacted Ginther and told her she could not join the team because league policy requires that all players be "born female." Ginther is a transgender woman.

In March 2017, Ginther sued the team, Brown, and the league (collectively, defendants) for business discrimination under the Minnesota Human Rights Act, Minn. Stat. § 363A.17(3) (2018). Ginther's complaint alleged that defendants "intentionally refused to do business with," "contract with," and "discriminat[ed]" against her because of

her sexual orientation. *Id.*; *see* Minn. Stat. § 363A.03, subd. 44 (2018) (defining "sexual orientation" as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"). Ginther sought money damages, punitive damages, and attorney fees and costs.

The team and Brown retained the same counsel, who prepared an answer and denied Ginther's allegations. They also cross-claimed against the league seeking common-law indemnity or contribution for any sum owed to Ginther, including attorney fees and costs. The league also denied the allegations in Ginther's complaint and cross-claimed against the team and Brown, seeking indemnity or contribution for any judgment for Ginther.

In April 2018, Brown moved to dismiss Ginther's complaint for failure to state a claim under Minn. R. Civ. P. 12.02(e), arguing that Ginther did not allege sufficient facts to support a business-discrimination claim against Brown individually. While that motion was pending, all parties moved for summary judgment. The district court denied Brown's motion to dismiss and all motions for summary judgment, stating first that the amended complaint sufficiently alleged facts about Brown's individual liability. The district court then determined that genuine issues of material fact remained for trial, including: the league's player-eligibility policy, whether a legitimate business purpose justified their actions, whether an agency relationship existed between Brown, the team, and the league, and, if so, what was the scope of the agency relationship.

The case proceeded to a jury trial, starting on December 10, 2018. The district court conducted the trial in three phases: liability, compensatory damages, and punitive damages. The jury found for Ginther and Brown in phase one and against the team and the league

during all phases. Because the jury found that Brown was not liable to Ginther, the district court declined to submit Brown's indemnity claim to the jury during phase two and decided to address it during posttrial motions.[1] The team asked the district court to submit its indemnity claim to the jury during phase two, and the district court agreed.

The jury's special-verdict findings are relevant to the issues on appeal, so we describe them in some detail. At the close of phase one, the jury found: (1) Brown did not intentionally refuse to do business or contract with Ginther because she is transgender; (2) Brown acted as the league's agent in recruiting and selecting players for the team; and (3) Brown acted within the scope of her agency. The jury also found: (4) the team intentionally refused to do business or contract with Ginther because she is transgender; (5) the team had no legitimate business purpose for doing so; (6) the team acted as the league's agent in recruiting and selecting players; and (7) the team acted within the scope of its agency. And the jury found (8) the league intentionally refused to do business or contract with Ginther because she is transgender.

During phase two on damages, the jury found that Ginther sustained "mental anguish or suffering as a result of discrimination by [the team] and/or [the league]," and awarded $10,000 in compensatory damages. The jury denied the team's indemnity claim against the league, determined contribution was appropriate, and attributed 55% of the damages to the league and 45% to the team. Also during phase two, the jury found, in

[1] We note that Brown asked the district court to submit her indemnity claim to the jury, but Brown does not challenge the denial of this request on appeal.

separate interrogatories, that the team and the league "acted with deliberate disregard for the rights of [Ginther]."

During phase three on punitive damages, the jury awarded Ginther $10,000 in punitive damages solely against the league and awarded no punitive damages against the team. After the trial, the district court issued written findings of fact in an order that also stayed entry of judgment, pending the resolution of all posttrial motions.

While the parties filed several posttrial motions, only one is relevant in this appeal. The team and Brown moved for JMOL on their cross-claims for indemnity against the league. The team sought indemnity for the judgment, and both the team and Brown requested indemnity for the attorney fees incurred in defending Ginther's complaint. The district court denied all posttrial motions except Ginther's motion for attorney fees and costs. Thus, the district court directed entry of judgment for Ginther for (a) $10,000 in compensatory damages against the team and the league, allocating $4,500 to the team and $5,500 to the league, and (b) $10,000 in punitive damages solely against the league. The district court also awarded Ginther $100,000 in attorney fees and $15,324.68 in costs, allocating 45% to the team and 55% to the league.

This appeal follows.[2]

[2] The league appealed, challenging the district court's order denying its posttrial motion for JMOL or a new trial. The team and Brown, who have the same counsel on appeal, filed related appeals under Minn. R. Civ. App. P. 103.02, subd. 2, seeking review of the judgment. Ginther also filed a related appeal and sought review of the district court's order denying JMOL on her claim against Brown and the amount of the attorney-fee award. Ginther later settled with defendants and this court dismissed the league's appeal and Ginther's related appeal. This court also realigned the parties on appeal, with the team and Brown as appellants and the league as respondent.

D E C I S I O N

A party may move for JMOL during trial, seeking judgment on a claim or defense "that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Minn. R. Civ. P. 50.01(a). A party also may move for JMOL after trial, making or renewing the request in the alternative to its motion for new trial. *See* Minn. R. Civ. P. 50.01-02; *see Moore v. Hoff*, 821 N.W.2d 591, 595 (Minn. App. 2012) (explaining that JMOL is appropriate where the verdict is "contrary to the law applicable to the case"). "In applying this standard [for JMOL], (1) all the evidence, including that favoring the verdict, must be taken into account, (2) the evidence is to be viewed in the light most favorable to the verdict, and (3) the court may not weigh the evidence or judge the credibility of the witnesses." *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 55 (Minn. 2019) (quoting *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983)). Thus, we review a district court's decision to grant or deny a motion for JMOL de novo. *650 N. Main Ass'n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 486 (Minn. App. 2016).

As long as we can harmonize the jury's special-verdict answers "on *any* theory consistent with the evidence and the fair inferences drawn from the evidence, the verdict will not be disturbed." *Frauenshuh, Inc.*, 885 N.W.2d at 486 (quotations omitted); *see Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999) ("[A] special verdict form is to be liberally construed to give effect to the intention of the jury . . . ."). But appellate courts "may not sit as fact finders" and "are not empowered to make or modify findings of fact." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quotations and citations omitted).

Both issues on appeal involve indemnity, an equitable claim at common law. *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 616 N.W.2d 288, 292 (Minn. App. 2000) ("[I]ndemnity is an equitable doctrine that does not lend itself to hard-and-fast rules, and its application depends upon the particular facts of each case."), *review denied* (Minn. Oct. 25, 2000). Indemnity claims, like other equitable claims, may be submitted to the district court or to the jury. "[A] district court has the discretion to decide whether the fact finder in an equitable action will be the judge or a jury." *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 153 (Minn. 2001); *see also Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 819 (Minn. 2016) ("Generally, litigants have no right to a jury trial on the merits of equitable claims, and traditionally the judge serves as the trier of fact for such claims.").

When a district court decides indemnity, as it did with Brown's claim, we review the district court's decision for an abuse of discretion. *See, e.g., Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr.*, 912 N.W.2d 652, 657 (Minn. 2018) (reviewing decision to award equitable relief for abuse of discretion). But the district court did not initially determine the team's indemnity claim. Rather, the jury denied the team's indemnity claim and the district court later denied the team's motion for JMOL on indemnity. The team does not claim on appeal that the district court erred in the jury instructions or the verdict form.[3] We therefore review de novo whether the district court erred by denying the team's

[3] The team requested that the district court submit its indemnity claim to the jury, both in its proposed jury instructions and proposed special-verdict forms. And the team did not object to either the final jury instructions on indemnity or the special-verdict interrogatory

motion for JMOL. *See Brown v. Lee*, 859 N.W.2d 836, 839-40 (Minn. App. 2015) (applying de novo review to determine *whether* equitable relief is available), *review denied* (Minn. May 19, 2015); *see Frauenshuh, Inc.*, 885 N.W.2d at 486 (applying de novo review to the denial of a motion for JMOL).

I. The team is not entitled to JMOL on its common-law indemnity claim against the league.

The district court rejected the team's motion for JMOL after determining that the jury's verdict denying indemnity is supported by Minnesota law and the record evidence. The district court reasoned that "the jury received sufficient evidence to find that [the team] and the [league] *jointly* contributed to the discrimination against [Ginther]." (Emphasis added.) The district court noted that the jury found the team was entitled to contribution

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on indemnity, nor did the team file a motion for new trial challenging how the district court submitted indemnity to the jury. The team's brief to this court also does not identify any issue challenging the jury instructions or verdict form on indemnity. But, in various arguments, the team's brief implies that the district court erred by submitting indemnity to the jury.

We decline to address these implied arguments on appeal because the team failed to preserve error in the jury instructions or verdict form during trial or in posttrial motions. And we do not decide trial issues not raised during trial or in posttrial motions. *See Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003) (clarifying only substantive questions of law properly raised and considered by the district court may receive appellate review without making a motion for new trial). If there was any error in submitting indemnity to the jury, we agree with the league that the team invited the error, which also precludes it from obtaining review. "[T]he doctrine of invited error [] precludes a party from asserting error on appeal which he invited or could have prevented in the court below." *In re Hibbing Taconite Mine & Stockpile Progression*, 888 N.W.2d 336, 344 (Minn. App. 2016) (quotation omitted); *see, e.g., Jackson v. Reiling*, 249 N.W.2d 896, 897 (Minn. 1977) ("Plaintiff cannot base his appeal on an instruction which his own counsel submitted to the trial court by stipulation.").

from the league but *not indemnity*. The district court explained that the team's actions "rose above derivative or vicarious liability" and concluded that indemnity was unavailable because "joint tortfeasors are not entitled to indemnity."

The team contends the district court erred because, under "black-letter principal-agent law," the league must indemnify its attorney fees incurred in defending against Ginther's complaint because the jury found that the team was the league's agent and acted within the scope of its agency on Ginther's discrimination claim.[4] The league responds that the team "ignore[s] the well-established [principle] that a co-tortfeasor that has committed an independent intentional tort is not entitled to common law indemnity." The league also asserts the district court correctly denied indemnity because the jury determined that the team acted in "deliberate disregard" of Ginther's rights. As a result, the league maintains that the team cannot establish it acted in good faith—a requirement to prevail on indemnity.[5]

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[4] In its brief to this court, the team also argues it is entitled to indemnity on a tort theory. We generally decline to decide claims based on theories raised for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that parties cannot "obtain review by raising the same general issue litigated below but under a different theory"). Below, the team stated in its motion for JMOL that it was "not seeking tort-based indemnity from the [league]." We therefore decline to consider this alternative theory.

[5] The league also claims that the team contractually waived any common-law right to indemnity when it agreed to play in the league and abide by the league's policies and constitution. The league relies on a provision of its own constitution, which states, "The [league] will not be responsible for any legal actions against member teams." A written contract must be sufficiently definite and specific enough to waive a party's right to common-law indemnity. *See, e.g., Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515-16 (Minn. 1997) (explaining that a "clear and unambiguous" indemnity clause showed the parties intended that their agreement provided for their

Indemnification is an equitable remedy that "shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another" who in fairness "should bear it instead." *Hanson v. Bailey*, 83 N.W.2d 252, 260 (Minn. 1957). "The law implies a promise of indemnity from a principal to his agent for any damages resulting from the acts of the agent in the good faith execution of that agency." *Hill v. Okay Const. Co., Inc.*, 252 N.W.2d 107, 120 (Minn. 1977). An agent may claim indemnity for all losses that flow from the resulting damages, including reasonable attorney fees incurred in the defense of a claim. *See O'Connell v. Jackson*, 140 N.W.2d 65, 69 (Minn. 1966) (awarding agent indemnity for "the reasonable value of attorney's fees in defending the action").

But Minnesota courts have held that indemnity generally does not extend to joint tortfeasors, except in limited circumstances. *See Hendrickson v. Minn. Power & Light Co.*, 104 N.W.2d 843, 848 (Minn. 1960), *overruled in part by Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977). Relevant caselaw provides four rules or instances when a joint tortfeasor has a limited right to common-law indemnity, but only two rules are relevant in this appeal. *Hendrickson*, 104 N.W.2d at 848; *Tolbert*, 255 N.W.2d at 366.[6]

"exclusive right to indemnity"). Because the league's constitution is silent on indemnification, we conclude that the constitution is not sufficiently specific to be a waiver of the team's common-law right to indemnity.

[6] *Tolbert*, 255 N.W.2d at 363, overruled the fourth of five joint-tortfeasor rules from *Hendrickson*. The team asked the district court to instruct the jury on rules one and two from *Hendrickson*. In accord with Minnesota law and the team's request, the district court instructed the jury: "A party may generally recover for indemnity (1) where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged; or (2) where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged." This

Rule one permits a tortfeasor to obtain indemnity from the primary joint tortfeasor for derivatively incurred or vicariously incurred liability caused by the primary joint tortfeasor's conduct. *Hendrickson*, 104 N.W.2d at 848; *Tolbert*, 255 N.W.2d at 366. Similarly, rule two permits a tortfeasor to obtain indemnity when that tortfeasor has incurred liability by reasonably relying on a joint tortfeasor's representations. *Hendrickson*, 104 N.W.2d at 848; *Tolbert*, 255 N.W.2d at 366.

After being instructed on the relevant law, the jury found that the team "act[ed] as an agent of the [league]" and "within the scope of that agency" in its selection and recruitment of players. But the jury also found that the team "intentionally refused to do business or contract with [Ginther] because she is transgender," did not have "a legitimate business purpose for its actions," and acted "in deliberate disregard for [Ginther]'s rights" by clear and convincing evidence. The jury found the team had no right to indemnity from the league and also attributed 45% of Ginther's damages to the team and 55% to the league when awarding contribution to the team.

We conclude the district court correctly rejected the team's motion for JMOL on its indemnity claim for two reasons. First, the jury found that the team and the league are joint tortfeasors and the team does not challenge this finding on appeal. The jury's finding that the team has no right to indemnity rests on its implicit determination that neither rule one or two applied to the team, based on the jury instructions. *See Frazier v. Burlington N.*

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instruction states the two rules discussed in this opinion regarding a joint tortfeasor's limited right to indemnity. *See Hendrickson*, 104 N.W.2d at 84; *Tolbert*, 255 N.W.2d at 366.

Santa Fe Corp., 811 N.W.2d 618, 630 (Minn. 2012) ("We presume that juries follow the instructions they are given."). Based on the jury instruction on rule one, the jury implicitly found that the team's liability was not exclusively derivative or vicarious. The district court explained the jury's likely reasoning: "the jury received evidence that the team left the league shortly after it discriminated against [Ginther]" and, on this evidence, the jury reasonably found the team partly responsible because "it clearly had an option to terminate its involvement with the league rather than abide by its discriminatory policy." Based on the jury instruction on rule two and the evidence cited by the district court, the jury implicitly found that the team's discrimination against Ginther was not "at the direction, in the interest of, and in reliance upon" the league. *Hendrickson*, 104 N.W.2d 848. The district court therefore correctly concluded that the team is a joint tortfeasor and not entitled to indemnity under either rule one or two.

Second, the team has no right to indemnity because the jury found that it did not act in good faith and committed an "independent wrongful act." *See Hill*, 252 N.W.2d at 120 (requiring agent to act in good faith in order to obtain indemnity from principal); *New Amsterdam Cas. Co. v. Lundquist*, 198 N.W.2d 543, 549 (Minn. 1972); (same); *see also Jack Frost, Inc. v. Engineered Bldg. Components Co., Inc.*, 304 N.W.2d 346, 353 (Minn. 1981) (denying indemnity cross-claim for attorney fees where party seeking indemnity defended against its own "independent wrongful act" in a breach of express and implied warranty action); *Farr v. Armstrong Rubber Co.*, 179 N.W.2d 64, 72-73 (Minn. 1970) (explaining district court may properly deny indemnity for attorney fees when the party

seeking indemnity defends its *own* "separate wrongful acts" while also defending another's conduct).

As recognized by the district court, record evidence supports the jury's implicit finding that the team discriminated against Ginther by enforcing the league's eligibility policy, but also by its *own* independent discriminatory act. The team discriminated against Ginther, rather than depart from the league. Equally important, the jury explicitly found that the team "acted with deliberate disregard" of Ginther's rights, a finding that the team does not challenge on appeal. According to the jury instructions, the jury's verdict represents a finding that the team "knew about facts or intentionally ignored facts that created a high probability of injury to the rights of others" and acted "conscious[ly]," "intentional[ly]" or "indifferent[ly]." *See* Minn. Stat. § 549.20, subd. 1 (2018); 4A *Minnesota Practice*, CIVJIG 94.10 (2018). Thus, the team intentionally discriminated against Ginther with deliberate disregard for her rights, and, for that reason, the team did not act in good faith.

In sum, we conclude that the district court did not err in denying the team's motion for JMOL on its indemnity claim against the league. We therefore affirm in part.

II. The district court abused its discretion by denying Brown's motion for JMOL on her common-law indemnity claim against the league.

A. The district court's denial of Brown's indemnity claim conflicts with the jury's verdict.

Brown maintains that she has a right to indemnity for attorney fees she incurred in defending Ginther's claim because the jury found she acted as the league's agent and within the scope of her agency when she told Ginther she was not eligible to play for the team.

The league disagrees, contending that Brown also committed an "independent wrongful act" by discriminating against Ginther because she was the one who communicated with Ginther and thus Brown cannot be considered "faultless." The league argues that the district court properly "weigh[ed] the equities" and acted within its discretion in rejecting Brown's request for indemnity. The relevant law on this issue has been discussed above.

Brown is correct that the jury found she acted as the league's agent and within the scope of her agency. The jury also found that Brown did *not* intentionally discriminate against Ginther. Thus, Brown is not a joint tortfeasor and therefore appears to have a valid indemnity claim as the league's agent and may seek indemnification for attorney fees and costs incurred in defending against Ginther's complaint. Much like the parties in *O'Connell*, Ginther's complaint sought damages for one claim, the jury found Brown acted as the league's agent on that claim, and the jury also found Brown did not commit an independent wrong. *See* 140 N.W.2d at 69.

Still, the district court denied Brown's indemnity claim because "Brown's actions, at some level, contributed to the discriminatory acts." This finding contradicts the findings in the jury's special verdict, the same verdict that the district court refused to set aside because it was supported by the evidence. Indeed, in denying Ginther and the league's posttrial motions to hold Brown liable and grant JMOL, the district court described the evidence supporting the jury's verdict for Brown. In particular, the district court noted that Brown testified she "attempted to clarify" whether Ginther was eligible to play and she challenged "the discriminatory nature of the [eligibility] language" adopted by the league, but the league "did nothing to fix the language."

A jury's factual findings "common to both claims at law and claims for equitable relief are *binding* upon the district court." *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007) (emphasis added). A district court abuses its discretion if its decision rests on "an erroneous view of the law" or is against the facts in the record. *Landmark Cmty. Bank, N.A. v. Klingelhutz*, 927 N.W.2d 748, 754 (Minn. App. 2019). We thus conclude that the district court abused its discretion by denying Brown's motion for JMOL on her indemnity claim against the league because doing so effectively contravened the jury's special verdict for Brown.[7]

B. Remand is required for the district court to determine whether Brown tendered her defense to the league.

In the district court and again on appeal, the league argues that three "threshold issues" preclude Brown's recovery on her indemnity claim. The district court did not reach any of the league's threshold issues, two of which raise legal questions. Because we have determined that Brown may seek indemnity against the league, we consider the three threshold issues and conclude that the two legal questions lack merit. But we remand the third threshold issue to the district court for further factual determinations. Each is discussed in turn.

First, the league argues that Brown inadequately pleaded her cross-claim for indemnity, stating that Brown's answer "included a standard claim for common law contribution/indemnification" but "no specific allegations" to support an indemnity claim

[7] Because we determine that Brown may seek agency-based indemnity, we need not consider Brown's alternative argument for tort-based indemnity, a theory that she raised in the district court and again in her brief to this court.

for attorney fees. We disagree. "Minnesota is a notice-pleading state and does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." *Walsh v. U.S. Bank, N.A*, 851 N.W.2d 598, 604-05 (Minn. 2014) (quotation omitted). Based on our review, Brown's cross-claim afforded sufficient notice of her intent to seek indemnity for damages and attorney fees from the league.

Second, the league argues that Brown is barred from seeking indemnity under the league's constitution. We disagree. The league's constitution states that the league "will not be responsible for any legal actions against member teams." Even if we assume that this provision applies to Brown—whom Ginther sued individually and not as a "member team"—the constitution's language does not purport to bar Brown's right to common-law indemnity. We decline to add language to the league's constitution. *See Art Goebel, Inc.*, 567 N.W.2d at 516 (explaining that "clear and unambiguous" language must evidence the parties' intent to limit rights to indemnity); *see also Brodsky v. Brodsky*, 639 N.W.2d 386, 393 (Minn. App. 2002) ("[C]ourts cannot remake contracts or imply provisions through judicial interpretation.") (quotation omitted), *review denied* (Minn. Apr. 23, 2002).

Third, the league contends that Brown never tendered her defense of Ginther's lawsuit to the league. The league maintains Brown therefore deprived it of the "opportunity to control the litigation" because Brown waited until "the final days of litigation" before revealing she sought indemnification of her own attorney fees.

"Under Minnesota law, a tender of defense is a condition precedent to an obligation to indemnify." *Diebold, Inc. v. Roadway, Exp., Inc.*, 538 N.W.2d 150, 151 (Minn. App.

1995) (citing *Seifert v. Regents of the Univ. of Minn.*, 505 N.W.2d 83, 87 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993)). Tender of defense requires an agent to notify the principal of a legal action and to request a defense. *See, e.g.*, *Sorenson v. Safety Flate, Inc.*, 235 N.W.2d 848, 851 (Minn. 1975). "The purpose of this rule is to provide the party from whom indemnity is sought the opportunity to handle its own defense." *Hill*, 252 N.W.2d at 121. We have also clarified that "*both* tender and refusal are elements" of a litigant's cross-claim for indemnity of attorney fees. *Logefeil v. Logefeil*, 367 N.W.2d 114, 117 (Minn. App. 1985) (emphasis added).

Brown argues that she tendered her defense in two ways: "(1) by and through [the league's chief operating officer (COO)]; and (2) by and through her cross-claim against [the league] for indemnity." Brown asserts that she exchanged social-media messages with the league's COO and these message were sufficient tender of her defense. Brown filed a copy of the conversation as an exhibit in support of her motion for JMOL. The messages state that Ginther had filed a lawsuit, discuss whether Brown or the league had retained counsel, and refer to the league's insurance policy. Brown also offered to provide the league with a copy of Ginther's complaint. Brown's cross-claim against the league pleaded facts relating to Ginther's complaint.

Based on this record, we agree with Brown that she gave the league sufficient notice of Ginther's discrimination claim through her social-media messages to the COO. But the crux of the parties' dispute is whether Brown asked the league *to defend her interests*. Brown claims to have done so. Considering Brown cross-claim against the league, we observe that Minnesota caselaw has not squarely addressed whether a cross-claim, by itself,

suffices as a tender of defense. *See Jack Frost, Inc.*, 304 N.W.2d at 353 (reversing indemnity for attorney fees because, among other things, co-defendant did not tender defense, even though procedural history notes co-defendant filed indemnity cross-claim); *Logefeil*, 367 N.W.2d at 117 n.1 (stating that the supreme court has "implicitly held that service of a cross-claim for indemnification does not constitute tender of the defense") (citing *Hill*, 252 N.W.2d at 121). This case, however, is distinguishable from *Jack Frost* and *Logefeil* because Brown did more than just serve the league with her cross-claim. Brown's social-media messages with the league's COO raise a fact issue about Brown's tender that is ripe for the district court's determination. *See Dunn*, 745 N.W.2d at 555 (clarifying that appellate courts do not engage in fact-finding).

We therefore reverse the denial of JMOL on Brown's cross-claim for indemnity and remand for the district court to determine, consistent with this opinion: (1) whether Brown tendered her defense to the league and (2) whether the league refused to defend Brown. If the district court finds that Brown satisfied both conditions precedent, then it must determine the amount of reasonable attorney fees that Brown may recover.

Affirmed in part, reversed in part, and remanded.