STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1640

Arch Insurance Company, as subrogee of Centre Rental, Inc.,
Respondent,

vs.

Michael Quistorff,
Appellant.

Filed October 3, 2022
Affirmed
Larson, Judge

Stearns County District Court
File No. 73-CV-20-4573

Cara C. Passaro, Stich, Angell, Kreidler & Unke, P.A., Minneapolis, Minnesota (for respondent)

John E. Mack, New London Law, P.A., New London, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larson, Judge; and John Smith, Judge.*

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant Michael Quistorff challenges the district court's decision to grant respondent Arch Insurance Company's motion for summary judgment in this subrogation

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

action. Quistorff argues the district court improperly granted summary judgment because: (1) the contract between Quistorff and the insured is not legally enforceable; (2) Arch Insurance failed to notify Quistorff before settling with its insured; and (3) Arch Insurance's insured spoliated evidence. We affirm.

FACTS

In June 2017, Arch Insurance issued an insurance policy to its insured Centre Rental Inc. covering equipment that Centre Rental rented to customers. The insurance policy's subrogation clause provided that upon Arch Insurance's payment for a loss under the policy, the "right[] to recover damages from another . . . are transferred to [Arch Insurance] to the extent of [their] payment."

On October 24, 2017, Quistorff signed an agreement to rent a 2017 Bobcat Compact Skid Steer Loader (skid loader) from Centre Rental and agreed to pay $783.28 for the rental (the rental agreement). The rental agreement, which covered the period Quistorff rented or possessed the skid loader, included both a clause for damages to the skid loader and an indemnification clause.

While in Quistorff's possession, and during the rental period, a fire significantly damaged the skid loader. A state fire marshal investigation "was unable to determine a definitive cause for the fire," however, the fire marshal "suspect[ed] [that] the most probable and or likely cause [was] sparks and or embers from [the] burn pile in [the] yard where [Quistorff] . . . burned both approved and prohibited materials [which] ignited [the] storage sheds on fire." As a result, the "[s]hed fires spread to [the] skid loader and adjacent dried vegetation." A private fire investigator also opined that "entrapped and smoldering

embers from an improperly extinguished burn pile in recent use" likely caused the fire. The investigator further found that "[t]here [was] no evidence of any electrical arcing or shorting to any conductor found within the [skid loader's] engine compartment."

An appraiser estimated the cost to repair the skid loader at $58,222.36. Because the skid loader was valued at $35,500, the appraiser deemed the skid loader a total loss. In January 2018, pursuant to the insurance policy, Arch Insurance paid Centre Rental $38,964.61 for the damaged skid loader. Around the same time, the skid loader was "hauled to [a] scrap yard and destroyed." The destruction occurred after Centre Rental made "multiple attempts to contact" Quistorff to examine the skid loader and Quistorff "never returned [the] calls."

In June 2019, Arch Insurance served a summons and complaint upon Quistorff. Arch Insurance, as Centre Rental's subrogee, sought repayment from Quistorff for the damage to the skid loader. In July 2021, Arch Insurance moved for summary judgment. Quistorff raised several arguments, but did not raise spoliation of evidence.

The district court granted summary judgment. Quistorff appeals.

DECISION

We review a district court's decision to grant summary judgment de novo to determine "whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). "Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is

no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 753-54; *see also* Minn. R. Civ. P. 56.03.

"[S]ummary judgment is a blunt instrument and is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotations omitted). The moving party has the burden to show the absence of material fact issues. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 874 (Minn. 2000). But the nonmoving party cannot rest on averments or denials. *See* Minn. R. Civ. P. 56.05; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). And the nonmoving party "cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial." *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

I.

Quistorff argues the district court erred when it determined the rental agreement was legally enforceable. First, we must address which contract clause controls the factual circumstances presented here. "The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). Contract interpretation is a question of law. *Id.* We review questions of law de novo. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

This appeal implicates two contractual clauses. The rental agreement provides in clause five:

> Upon termination of this agreement, [Quistorff would] promptly return [the skid loader] . . . to [Centre Rental] at [Centre Rental's] place of business in the same condition in which [the skid loader] was received, ordinary wear and tear excepted, and agree[d] to pay for any damage to or loss of [the skid loader] while in the possession and control of [Quistorff] . . . .

And in clause seven, the rental agreement states:

> [Quistorff] agree[d] to indemnify and save harmless [Centre Rental] against all loss, damage, expense, and penalty arising from any action on account of any injury to person or property of any character occasioned by the operation, handling, or transportation of the [skid loader] during the rental period or while the [skid loader] is in the possession or control of [Quistorff].

Under clause five, the parties agreed Quistorff would "pay for any damage to or loss of" the rented property if he failed to return it in the same condition in which it was received. *See Laughren v. Barnard*, 132 N.W. 301, 302 (Minn. 1911) (enforcing a contractual clause to return horses "in the same condition as received, or as good"). Such clauses are "valid" under Minnesota law and interpreted using traditional contract interpretation principles. *See id.*; *see also Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 786-87, 789-93 (Minn. 2005) (quoting a similar clause before analyzing exculpatory and indemnification clauses in a houseboat rental agreement).

Clause seven is an indemnification clause where Quistorff arguably agreed to answer for liability or harm that Centre Rental might incur. *See Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 416 n.5 (Minn. 2018) (defining indemnity). "For an

indemnity clause to pass strict construction, the contract must include an express provision that indemnifies the indemnitee for liability occasioned by its own negligence; such an obligation will not be found by implication." *Justice v. Marvel, LLC*, ___ N.W.2d ___, ___, No. A21-1640, slip op. at 9 (Minn. Sept. 21, 2022) (quoting *Dewitt*, 910 N.W.2d at 417). "We also will not enforce an indemnification clause if it is contrary to public policy." *Yang*, 701 N.W.2d at 791.

Quistorff argues that clause seven, the indemnification clause, governs this case. We disagree. Here, Arch Insurance seeks to stand in Centre Rental's shoes to recover damages for Quistorff's failure to return the skid loader in the same condition Quistorff received it. *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 76-77 (Minn. 1997) (discussing that in a subrogation action, an "insurer stands in the shoes of the insured and acquires all of the rights the insured may have against a third party"). Arch Insurance does not seek to shift claim liability to Quistorff. *Compare Yang*, 701 N.W.2d at 791 (shifting claim liability), *with Laughren*, 132 N.W. at 302 (enforcing a contract term). Applying clause five's plain language, the parties unambiguously intended that Quistorff would pay for damage to, or loss of, the skid loader if it was not returned in same condition in which it was received. *Laughren*, 132 N.W. at 302 (relying on the parties' intent). The undisputed facts show that Quistorff did not return the skid loader in the same condition in which he received it. Quistorff offered no alternative interpretation and provided no evidence showing ordinary wear and tear damaged the skid loader. Thus, under clause five, Quistorff agreed to pay for the damage to the skid loader. And the mere presence of an indemnification clause, even if we were to accept Quistorff's argument that it is

unenforceable, does not negate this provision. *See Anderson v. McOskar Enterprises, Inc.*, 712 N.W.2d 796, 801 (Minn. App. 2006) (noting that an unenforceable provision does not invalidate the entire contract).[1]

Next, we must decide whether clause five, the damages clause, is legally enforceable. Quistorff "[c]omment[s]" that "clause [five] is illegal" because Centre Rental "does not have the right to require the lessor to pay for damages if the damage to the vehicle was the result of . . . gross negligence or illegal acts, such as replacing a part which is illegal or known to be defective." But Quistorff provides no legal support for this proposition and summary arguments without legal support are deemed forfeited. *Fannie Mae v. Heather Apartments Ltd. P'ship*, 811 N.W.2d 596, 600 n.2 (Minn. 2012).

Further, even if Quistorff is correct that clause five is unenforceable against Centre Rental's "gross negligence or illegal acts," Quistorff points to no evidence in the summary-judgment record to support a finding that Centre Rental's gross negligence or intentional acts damaged the skid loader. Quistorff only claims that the damage to the skid loader *could have* been the result of an intentional act. Quistorff's argument rests on mere

[1] Both parties rely on caselaw regarding exculpatory clauses when addressing the indemnification clause's enforceability. *See Anderson*, 712 N.W.2d at 800; *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). "An 'exculpatory clause' is '[a] contractual provision relieving a party from liability resulting from a negligent or wrongful act.'" *Dewitt*, 910 N.W.2d at 420 n.7 (quoting *Black's Law Dictionary* 687-88 (10th ed. 2014)); *see also Black's Law Dictionary* 712 (11th ed. 2019) (same definition). The supreme court recently held that exculpatory and indemnification clauses "are subject to the same standard of strict construction." *Justice*, slip op. at 10. But the parties have not cited any case applying the *Schlobohm* public-policy analysis into an indemnification clause and we discern no reason to do so where the indemnification clause does not govern the case.

averments, not evidence, and is insufficient to defeat summary judgment. *Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352, 359 (Minn. App. 2016). Therefore, enforcing clause five does not violate the general rule that "[a] contract cannot release a party from intentional or willful acts." *In re Peer Rev. Action*, 749 N.W.2d 822, 829 (Minn. App. 2008), *rev. dismissed* (Minn. Aug. 21, 2008).

For these reasons, clause five governs this case and is legally enforceable. Therefore, the district court did not err when it granted summary judgment on the ground that the contract is legally enforceable.

II.

Quistorff next argues that Arch Insurance failed to provide timely notice of its subrogation claim prior to the settlement between Centre Rental and Arch Insurance. To support the argument, Quistorff cites *Group Health, Inc. v. Heuer*, 499 N.W.2d 526 (Minn. App. 1993). There, a plaintiff-insured entered a settlement agreement with tortfeasors. *Id.* at 528. After settlement, the insurance company provided notice of subrogation to tortfeasors. *Id.* The insurance company filed a subrogation claim, and the district court granted summary judgment in tortfeasors' favor. *Id.* at 529. We affirmed on the ground that tortfeasors "had no actual notice or knowledge of [the insurer]'s subrogation interest" prior to settlement between the insured and tortfeasors. *Id.* at 530.

Quistorff asserts that we should extend the *Group Health* principle to require "actual notice of subrogation to the tortfeasor prior to a settlement between the insurer and the insured." We decline to extend *Group Health*, and the case is inapposite because Quistorff

never settled with Centre Rental, the insured. Thus, Arch Insurance need not give Quistorff notice prior to bringing this subrogation action.[2]

III.

Quistorff finally argues that Arch Insurance lost its right to subrogation because Centre Rental destroyed the skid loader without informing Quistorff. Arch Insurance asserts that Quistorff forfeited this argument. Quistorff broadly responds that he raised the spoliation-sanction argument in his answer and at the summary-judgment hearing, and, therefore, the district court should have reached the issue.

Although Quistorff raised the spoliation-sanction argument in his answer, he failed to argue to the district court that it should deny summary judgment on that basis. A party opposing summary judgment has an obligation to present all legal arguments for denying the motion. Because Quistorff did not raise the spoliation-sanction argument at summary judgment, the district court did not consider whether it applied. "A reviewing court must generally consider only those issues that the record shows were *presented and considered* by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (emphasis added) (quotation omitted). Because the spoliation-sanction

[2] Quistorff also argues that it is inequitable to permit a subrogation action. We are not persuaded. Under the subrogation clause, Arch Insurance had the "right[] to recover damages . . . to the extent of [its] payment." Here, Arch Insurance paid for the loss of the skid loader and, upon doing so, the insurance policy's subrogation clause unambiguously provided that Arch Insurance could stand in Centre Rental's shoes to recover payment. *See Medica*, 566 N.W.2d at 76-77.

argument was neither presented to nor considered by the district court, we decline to address it.

Affirmed.