STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0481

Sally Cooper Smith,
Appellant,

vs.

Steven C. Piechowski,
individually and dba SP Trucking, LLC,
Defendant,

Northstar Materials, Inc.,
dba Knife River Materials,
Respondent.

Filed December 4, 2023
Affirmed
Bratvold, Judge

Clay County District Court
File No. 14-CV-22-734

Brian Wojtalewicz, Wojtalewicz Law Firm, Ltd., Appleton, Minnesota; and

Clay Robbins III (pro hac vice), Wisner Baum LLP, Los Angeles, California (for appellant)

Peter W. Zuger, Morgan L. Croaker, Serkland Law Firm, Fargo, North Dakota (for respondent Northstar Materials, Inc.)

Matthew J. Barber, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota (for amicus curiae Minnesota Association for Justice)

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

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant was injured when a commercial truck rear-ended her car. Appellant sued the trucking company and the construction company that selected and contracted with the trucking company to transport materials. After appellant settled with the trucking company, the district court dismissed appellant's claims against the construction company on summary judgment. Appellant argues that the district court erred by determining that (1) the settlement with the trucking company "barred" her negligent-selection and negligent-infliction-of-emotional-distress claims against the construction company; (2) appellant could not show proximate cause as a matter of law; and (3) a circuity of obligation "barred" appellant's recovery. We first conclude that Minnesota has not adopted the tort of negligent selection, and we decline to do so here. Next, we conclude that appellant's negligent-infliction-of-emotional-distress claim fails because it depends on her negligent-selection claim, which Minnesota does not recognize. Thus, we affirm and need not consider the other issues appellant raised.

FACTS

The following summarizes the undisputed facts in a light favorable to appellant Sally Cooper Smith as the nonmoving party. On July 2, 2021, Smith was a passenger in a car driven by her husband; they stopped in a line of traffic at a red light in Grand Forks, North Dakota. A truck operated by defendant Steven C. Piechowski rear-ended Smith's car. Piechowski is the sole owner and operator of a commercial carrier business, defendant SP Trucking. Piechowski was driving a load of hot asphalt on behalf of respondent Northstar

Materials Inc., which does business as Knife River. The collision tore the roof off Smith's car, injuring her and killing her husband.

Before the accident, Knife River entered into an independent-truck-operator (ITO) hauling agreement with SP Trucking, dated January 2021 and effective May 2021. SP Trucking agreed to transport property for Knife River under terms providing that SP Trucking was "an independent contractor" and would "indemnify, defend and hold harmless Knife River . . . from and against any liability, loss or claim . . . caused by [SP Trucking's] performance" of the hauling agreement. The agreement also provided that SP Trucking was not "required" to indemnify Knife River from any claims "caused by the negligence, actions or omissions of Knife River."

In March 2022, Smith sued Piechowski, SP Trucking, and Knife River. Smith asserted three causes of action: one count of negligence against Piechowski, SP Trucking, and Knife River; one count of negligent hiring/retention against Knife River; and one count of negligent infliction of emotional distress (NIED) against Piechowski, SP Trucking, and Knife River.

During discovery, Smith obtained evidence that, before Knife River and SP Trucking signed the hauling agreement, the U.S. Department of Transportation Federal Motor Carrier Safety Administration (DOT) notified Piechowski in October 2020 that his new-entrant registration was "revoked" because he failed to agree to a safety audit. The DOT's notice also stated Piechowski's trucking operations were "placed out of service effective immediately" and he "must immediately cease all Interstate motor carrier operations." Knife River was not aware of DOT's notice to Piechowski until after Smith was injured. Knife

River had determined that SP Trucking had a valid license and insurance before it signed the hauling agreement.

In August 2022, Smith settled with Piechowski and SP Trucking, releasing them "from any and all" claims resulting from the July 2, 2021 accident. Under the *Pierringer* release,[1] Smith agreed to "indemnify and hold fully harmless" Piechowski and SP Trucking from all claims by "any other persons, parties, agencies or companies . . . which have made payment or who may in the future make payments to or on behalf of" Smith for any "losses, benefits or payment of any kind, incurred as a result of the [July 2, 2021] incident." The release also stated that it was "not intended to release . . . Knife River . . . for negligent hiring, negligent retention or any other legal liability" and was "intended to be construed as a *Pierringer* Release." Smith stipulated to a dismissal with prejudice of her claims against Piechowski and SP Trucking, and, accordingly, the district court dismissed those claims with prejudice.

In November 2022, Knife River moved for summary judgment, arguing that (1) Smith's release of Piechowski and SP Trucking also released Knife River "because the release of an agent releases the principal," (2) Smith's negligent hiring/retention claim is a "derivative claim" that is barred by the release, and (3) "a circuity of obligation exists and bars [Smith's] claim against Knife River." Smith opposed summary judgment, arguing that the release did not bar Smith's "direct liability claim against Knife River for negligent

[1] A *Pierringer* release allows a plaintiff to settle with some, but not all, defendants. *Frey by Frey v. Snelgrove*, 269 N.W.2d 918, 922 (Minn. 1978). The settling defendants are dismissed, and the nonsettling joint tortfeasors are liable for only their "percentage of causal negligence." *Id.*

selection based on [Knife River's] own negligence"[2] and that the release did "not create a circuity of obligation" regarding her claims against Knife River. In its reply in support of summary judgment, Knife River argued that, as a matter of law, Smith could not show "a specific incompetent or unfit quality of SP Trucking" or "whether that specific quality" was the proximate cause of her injuries.

After a hearing, the district court granted summary judgment for Knife River. The district court first concluded that Smith's negligence and NIED claims asserted "vicarious liability claims" against Knife River for SP Trucking's negligence. Next, the district court reasoned that the settlement released these claims because "the release of the agent also releases the principal." The district court then determined that Smith's negligent hiring/retention claim failed because Smith "cannot prove an essential element in each tort." The district court stated that Smith would "first need to prove SP Trucking's negligence resulted in an injury to Smith" but that she "cannot do so because she released and dismissed SP Trucking from this action."

The district court also determined that Smith's negligent-selection claim failed. The district court noted that the "Minnesota Supreme Court has not expressly adopted the tort of negligent selection," but proceeded "as if Minnesota recognizes a claim for negligent selection." The district court cited federal caselaw from Illinois on negligent selection and concluded (1) that because Smith had released Piechowski and SP Trucking, she cannot

[2] In Smith's memorandum opposing summary judgment, she recharacterized her second cause of action as a "negligent selection claim" instead of a "negligent hiring/retention" claim. The district court determined that Smith pleaded negligent selection even though that phrase is not "specifically alleged" in her complaint.

prove "an incompetent quality" or "unsafe quality" of SP Trucking and (2) that Smith "failed to establish that Knife River's selection of allegedly incompetent SP Trucking was the proximate cause of her injuries."[3] Lastly, relying on precedent from this court, the district court determined that "Smith's indemnity obligations under the *Pierringer* release, combined with SP Trucking's indemnity obligations under the ITO Hauling Agreement, create[] a circuity of obligation and prevent Smith from maintaining a claim against Knife River."

Smith appeals.

DECISION

"Summary judgment is appropriate when 'there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Justice v. Marvel, LLC*, 979 N.W.2d 894, 898 (Minn. 2022) (citing Minn. R. Civ. P. 56.01). Appellate courts "review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party and resolving all doubts and factual inferences against the

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[3] The district court relied on *McComb ex rel. McComb v. Burgarin*, 20 F.Supp.3d 676, 678 (N.D. Ill. 2014), in which the decedent was struck and killed by a semi-tractor trailer that was hauling steel. The decedent's estate sued the steel company for negligent selection of the trucking company. *McComb*, 20 F.Supp.3d at 681. The federal district court analyzed the negligent-selection claim and stated that the plaintiff must prove

> (1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the employee's hiring or retention; and (3) that this particular unfitness proximately caused the plaintiff's injury.

Id. at 682. The federal district court granted summary judgment for the steel company after determining that the plaintiff could not establish that the alleged negligence was the proximate cause of the accident as a matter of law. *Id*. at 685.

moving party." *Staub ex rel. Weeks v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021). Summary judgment is inappropriate "when reasonable persons might draw different conclusions from the evidence presented." *Senogles ex rel. Kihega v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (quotation omitted).

Smith does not challenge the district court's dismissal of her claims against Knife River for negligence and negligent hiring/retention. Smith seeks reversal of the district court's dismissal of her claims against Knife River for negligent selection and NIED. We address these claims in turn.

I. The district court did not err by granting summary judgment to Knife River on Smith's negligent-selection claim because no precedent recognizes the tort of negligent selection of an independent contractor.

The parties disagree about whether Minnesota has recognized the tort of negligent selection. Smith argues that "[n]egligent selection claims are already recognized in Minnesota," citing *Lakeview Terrace Homeowners Association v. Le Rivage, Inc.*, 498 N.W.2d 68, 71 (Minn. App. 1993). Knife River argues that *Lakeview* did "not identify whether Minnesota has adopted" the tort of negligent selection.

The district court's summary-judgment order noted first that "[t]he Minnesota Supreme Court has not expressly adopted the tort of negligent selection" and then pointed out that the U.S. District Court for the District of Minnesota concluded that the Minnesota Supreme Court "would" recognize the tort of negligent selection, citing *Soto v. Shealey*, 331 F.Supp.3d 879 (D. Minn. 2018). The district court then analyzed Smith's negligent-selection claim as if Minnesota had recognized the claim and granted summary judgment to Knife River.

We consider whether Minnesota has recognized the tort of negligent selection. "As a general rule, an employer is not liable for the acts of an independent contractor"; however, "there are so many exceptions to the rule." *Lamb v. S. Unit Jehovah's Witnesses*, 45 N.W.2d 403, 406 (Minn. 1950). One of these exceptions, described in the Restatement (Second) of Torts, is the tort of negligent selection of an independent contractor:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

Restatement (Second) of Torts § 411.

Neither party contends that the Minnesota Supreme Court has adopted section 411 or recognized negligent selection as a tort. The supreme court has pointed out that there is "general acceptance in the common law of the tort of negligent selection of an independent contractor." *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007). Still, the supreme court stated that it has "not specifically adopted" the tort of negligent selection. *Id.*

We are not persuaded by Smith's reliance on precedent from this court. In *Lakeview*, a condominium association sued for damages caused by the collapse of a retaining wall between the condominium's parking lot and the adjacent property. 498 N.W.2d at 70. The association sued the independent contractor who built the wall, the prior owner of the adjacent property who hired the contractor, and the current owner of the adjacent property. *Id.* After a bench trial, the district court concluded, as relevant here, that the prior owner was not negligent in hiring the contractor, and this court affirmed. *Id.* at 71-73. This court

cited the Restatement (Second) of Torts as enumerating three exceptions to the general rule that employers are not liable for the acts of independent contractors: "(1) negligence of the employer in selecting, instructing or supervising the contractor; (2) nondelegable duties of the employer, arising out of some relationship toward the public or the particular plaintiff; and (3) work which is specifically, peculiarly, or inherently dangerous." *Id.* at 71 (quotation omitted). This court stated that the first exception, negligent selection, was "not applicable" and instead analyzed the prior owner's liability under the second exception, nondelegable duties. *Id.* at 71-72. Accordingly, we conclude that while this court in *Lakeview* identified negligent selection as an exception to the general rule that employers are not liable for the acts of independent contractors, this court did not recognize negligent selection as a tort under Minnesota law.

In the alternative, Smith urges this court to "formally adopt[]" section 411 of the Restatement (Second) of Torts, arguing that if the supreme court were "faced with the question of whether to formally adopt a negligent selection cause of action, it would do so." In a recent nonprecedential opinion, a different panel of this court declined to adopt the tort of negligent selection. *Alonzo v. Menholt*, No. A22-1796, 2023 WL 6206197, at *5 (Minn. App. Sept. 25, 2023). We likewise decline to adopt the tort of negligent selection here. As noted in *Alonzo*, this court "frequently has observed that only the Minnesota Supreme Court has authority to recognize new common-law doctrines for Minnesota," and "[f]or that reason, this court consistently has refrained from deciding whether a new cause of action should be recognized." *Id.* We note that the supreme court has stated that "[t]he function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v.*

Sefkow, 427 N.W.2d 203, 210 (Minn. 1988). Likewise, this court has repeatedly described its role as "an error correcting court." *Butler v. Jakes*, 977 N.W.2d 867, 874 (Minn. App. 2022) (stating that we do not change existing law); *Finn v. Alliance Bank*, 838 N.W.2d 585, 603 (Minn. App. 2013) (quotation omitted), *aff'd as modified*, 860 N.W.2d 638 (Minn. 2015).

This court may, and often does, decide issues of first impression. This court has explained that while "we are primarily an error-correcting court[, w]here our appellate courts have not clearly addressed the central issue in a case . . . it is our duty to note the direction of developments and to anticipate changes in the law." *Anderson v. Federated Mut. Ins. Co.*, 465 N.W.2d 68, 72 (Minn. App. 1991) (citation omitted), *aff'd*, 481 N.W.2d 48 (Minn. 1992). We have decided a wide range of issues as a matter of first impression. *See, e.g.*, *W. McDonald Lake Ass'n v Minn. Dep't of Nat. Res.*, 899 N.W.2d 832, 842 (Minn. App. 2017) (deciding "a matter of first impression" regarding "[w]hether the federal water-transfer rule applies in Minnesota"), *rev. denied* (Minn. Sept. 19, 2017); *In re Welfare of Child. of D.M.T.-R.*, 802 N.W.2d 759, 762 (Minn. App. 2011) (deciding "an issue of first impression" as to "[w]hether Minnesota courts have subject-matter jurisdiction over child-custody proceedings regarding children who are not United States citizens"); *Meder v Rapid Sports Ctr. Inc.*, 773 N.W.2d 341, 343 (Minn. App. 2009) (deciding a "first-impression case" about whether sales commissions received after an individual's discharge from employment affect the amount of unemployment benefits received under Minn. Stat. § 268.085, subd. 5 (2008)).

Still, this court generally declines to recognize new causes of action. *Wise v. Stonebridge Cmtys., LLC*, 927 N.W.2d 772, 776 (Minn. App. 2019) ("[I]t is not the function of this court to create new causes of action."); *see Femrite v. Abbott Nw. Hosp.*, 568 N.W.2d 535, 543 (Minn. App. 1997) (stating that because "Minnesota courts have never recognized the doctrine of strict liability for administrative services, . . . we decline to recognize this cause of action"), *rev. denied* (Minn. Nov. 18, 1997). For example, in *Stubbs v. North Memorial Medical Center*, 448 N.W.2d 78, 81 (Minn. App. 1989), *rev. denied* (Minn. Jan. 12, 1990), this court declined to recognize a new cause of action for the tort of invasion of privacy. In doing so, this court noted that "Minnesota has never recognized a cause of action for invasion of privacy" and that "[i]t is not . . . the function of this court to establish new causes of action." *Id.* at 80-81.

Caselaw suggests that at least one reason for the distinction between deciding questions of first impression and adopting new causes of action is that our role in "correcting errors" is inconsistent with "creating public policy." *City of Baxter v. City of Brainerd*, 932 N.W.2d 477, 483 (Minn. App. 2019) (quotation omitted) (declining to extend the law), *rev. denied* (Minn. Sept. 25, 2019). Of course, if the supreme court were to direct otherwise, we would address new causes of action along with other questions of first impression. *See Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003) ("This court is bound by decision of the Minnesota Supreme Court . . . .").

In considering Smith's negligent-selection claim, we observe that the supreme court has recognized the related torts of negligent hiring, retention, and credentialing. *See Larson*,

738 N.W.2d at 305-06, 313. When adopting negligent credentialing as a tort, the supreme court commented that doing so was "inherent in and the natural extension of well-established common law rights." *Id.* at 306. But while the direction of Minnesota common law may signal that a change is likely, the supreme court has not yet recognized the tort of negligent selection. *Id.* Thus, we decline to adopt the tort of negligent selection.

Because we conclude that precedent does not recognize a cause of action for negligent selection, we also conclude that the district court did not err by granting summary judgment to Knife River on Smith's negligent-selection claim.[4] *See Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012) (stating that appellate courts may "affirm a grant of summary judgment if it can be sustained on any grounds").

II. The district court did not err by granting summary judgment to Knife River on Smith's NIED claim against it.

The district court dismissed Smith's NIED claim against Knife River after determining that it was a "vicarious liability claim[]" that did "not involve any direct actions on behalf on Knife River." The district court then concluded that Smith "released [Knife

[4] Accordingly, we need not consider whether the district court erred in its legal analysis of Smith's negligent-selection claim, as Smith argues in her brief to this court. The Minnesota Association for Justice (MAJ) filed an amicus brief in support of Smith's negligent-selection claim without stating whether the supreme court has recognized the tort. Instead, MAJ attacked the district court's legal analysis, arguing that (1) negligent selection is a direct-liability tort, (2) a *Pierringer* release does not release direct-liability claims against a nonsettling defendant, (3) circuity of obligation does not apply to Smith's direct-liability claim, and (4) proximate cause is a fact question for the jury. Because Minnesota has not recognized the tort of negligent selection, we need not discuss the merits of these issues.

River's] agent, SP Trucking, from all liability" and that therefore, she could not "maintain claims against the principal, Knife River."

On appeal, Smith argues that her NIED claim is a "direct liability claim[]" based on Knife River's "personal and independent negligence liability *for selecting* an unsafe carrier." (Emphasis added.) Knife River urges us to affirm the district court and argues that "Smith has not cited any caselaw to support her proposition that a NIED claim against an employer is anything other than a vicarious liability claim."

We begin by considering whether Smith's NIED claim is based on Knife River's negligence in selecting Piechowski and SP Trucking. In Smith's brief to this court, she argues that her "claims for negligent selection and NIED are *focused on Knife River's failure to properly vet SP Trucking*, not on SP Trucking's negligence in causing the crash." (Emphasis added.) Similarly, Smith's reply brief asserts that "her arguments for maintenance of her direct NIED claim *are inherent in and inextricably intertwined with her arguments against dismissal of her direct negligent selection claim*." (Emphasis added.) We therefore conclude that Smith's NIED claim is "inextricably intertwined" with her negligent-selection claim.

As detailed above, Minnesota has not recognized the tort of negligent selection, and we decline to do so here. Thus, the district court did not err by granting summary judgment to Knife River on Smith's NIED claim because Smith's NIED claim depends on her negligent-selection claim, which has not been recognized in Minnesota.

Because we conclude that the district court did not err in granting summary judgment in favor of Knife River on Smith's negligent-selection and NIED claims, we need not

address the district court's determination that Smith's claims against Knife River were also barred by a circuity of obligation and because she lacked evidence of proximate cause.[5]

Affirmed.

[5] We note that Smith's brief to this court challenges the district court's proximate-cause determination and cites two journal articles for the first time on appeal. In its brief to this court, Knife River asks this court to "exclude [Smith's] newly produced evidence [in her brief] . . . because it was not part of the record" and Smith "had the opportunity to present [this] evidence" below. In her reply brief, Smith argues that "Minnesota Rules of Evidence, Rule 201 permits this Court to take judicial notice of the two journal articles." Further, Smith notes that "Knife River first presented its proximate causation argument in its summary judgment reply brief," and thus, Smith did not have the opportunity to include the journal articles "as an exhibit to her opposition" memorandum in district court. Regarding the journal articles Smith cites, we note that "[a]n appellate court may not base its decision on matters outside the record on appeal." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). *But see In re Est. of Turner*, 391 N.W.2d 767, 771 (Minn. 1986) (denying motion to strike a publicly available statistical report because appellate courts "could refer to such a report in the course of [their] own research, if [they] were so inclined"). Because we conclude that Minnesota does not recognize the tort of negligent selection, we need not address either the district court's determination that Smith failed to establish proximate cause or Smith's argument that the issue was not properly before the district court.