STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1543

Cheryl Weeks, as Trustee for the
next of kin of Kathleen Weeks, deceased,
Appellant,

vs.

Jonathan Anthony Irvin, et al.,
Defendants,

Mathy Construction Company
d/b/a Monarch Paving Company,
Respondent.

Filed April 1, 2013
Affirmed
Cleary, Judge

Goodhue County District Court
File No. 25-CV-10-946

Paul D. Peterson, Harper & Peterson, P.L.L.C., Woodbury, Minnesota (for appellant)

Michael S. Kreidler, Louise A. Behrendt, Stich, Angell, Kreidler, Dodge & Unke, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith, Judge.

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

CLEARY, Judge

Appellant Cheryl Weeks, as trustee for the next of kin of decedent Kathleen Weeks, commenced this wrongful-death lawsuit against respondent Mathy Construction Company, doing business as Monarch Paving Company. Appellant alleged that respondent's negligent inspection and maintenance of a recreational trail that was under construction contributed to the death of decedent. Appellant challenges the district court's summary-judgment dismissal of the negligence claim, arguing that there are genuine issues of material fact for trial. Because there is no genuine issue of material fact for trial on the element of causation, we affirm.

FACTS

Between the spring and fall of 2007, respondent was the general contractor for the Minnesota Department of Natural Resources (DNR) on a project to construct a recreational trail between Red Wing and Hay Creek. The DNR wanted an existing earth-covered trail to be covered with a base of gravel and then paved. Respondent and the DNR executed a contract that specified respondent's responsibilities regarding the construction project. Prior to the 2007 Labor Day weekend, the trail was covered with gravel, which was then compacted and finely graded. Respondent intended to begin the paving of the trail after the holiday weekend.

Late at night during that Labor Day weekend, Jonathan Irvin was driving an all-terrain vehicle (ATV) on the trail. Decedent was a passenger on Irvin's ATV and was seated behind him. Gregory Ahern was driving a second ATV and had Tessa Stork as a

passenger. The two ATVs traveled along the trail for about one mile before turning back the way that they had come. Ahern's ATV was traveling in front of Irvin's ATV as they proceeded back down the trail. At some point while driving, Irvin turned his head to the side to talk to decedent. As Irvin was looking to the side, the ATV left the trail, traveled into the forest for some distance, became airborne, and landed upside-down. Ahern and Stork were approximately a quarter of a mile beyond where the accident occurred when they realized that they were no longer being followed, and they drove back to the scene of the accident. Decedent died from injuries sustained in this accident.

Appellant subsequently filed a complaint alleging that respondent's "negligent inspection and maintenance in the form of barricading, signage, and/or the removal of brush and other materials not designated to remain at the site" had contributed to the death of decedent. Respondent moved for summary judgment, arguing that the evidence failed to establish a genuine issue of material fact as to whether it had breached a duty of care and whether any alleged breach was a proximate cause of the decedent's death. Following a hearing, the district court issued an order granting respondent's motion for summary judgment and dismissing the claim of negligence against respondent. The court held that there was no genuine issue as to whether respondent had breached any duty to keep the public safe in the construction area and that respondent was entitled to judgment as a matter of law. This appeal followed.

D E C I S I O N

A district court's summary-judgment decision is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The

role of an appellate court when reviewing a grant of summary judgment "is to determine whether there are any genuine issues of material fact and whether the [district] court erred in its application of the law." *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). The appellate court may not weigh the evidence or make factual determinations, but must consider the evidence in the light most favorable to the nonmoving party. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The party moving for summary judgment has the burden to show that summary judgment is appropriate. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

However, a party opposing summary judgment "may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "A nonmoving party cannot defeat a summary judgment

motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

"The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). If there are no facts in the record that give rise to a genuine issue for trial on any one of these essential elements, summary judgment for the defendant is appropriate. *Id.*

A. Duty

The existence of a duty of care is a question of law that is reviewed de novo. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). "Minnesota case law imposes a mutual duty on contractors and the state to provide for the safety of motorists within a construction zone." *Williams v. Harris*, 518 N.W.2d 864, 868 (Minn. App. 1994) (citing *Cummins v. Rachner*, 257 N.W.2d 808, 813 (Minn. 1977)), *review denied* (Minn. Sept. 28, 1994). A contractor's duty to the public may also be delineated in a contract, although the contractor's duty of care may be broader under common law than is set forth in the contract. *See Williams*, 518 N.W.2d at 867–68 (citing *Dornack v. Barton Constr. Co.*, 272 Minn. 307, 317, 137 N.W.2d 536, 544 (1965)).

According to the contract in this case, respondent was "fully and solely responsible for the jobsite safety" of the "means, methods, techniques, sequences or procedures" used during construction. The contract contains several provisions addressing respondent's responsibility to maintain a safe construction area. The contract states that respondent "shall be responsible for initiating, maintaining and supervising all

safety precautions and programs in connection with the performance of the [c]ontract." "Prior to construction, [respondent] shall place, maintain and remove all traffic control devices as necessary to safely allow movement of the public around or through the project area." The contract also states that respondent "shall erect and maintain, as required by existing conditions and performances of the [c]ontract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities." And the contract states that respondent "shall erect and maintain fences and barricades whenever necessary to provide adequate protection for and from the public. Proper lights and signs shall be operated and maintained to protect the public from hazards resulting from [respondent's] operations."

The contract states that, as part of the construction project, respondent would "remove and dispose of the trees, brush, stumps, and roots" within the construction area that were not specifically designated to remain and would "prune low hanging, unsound, or unsightly branches from the trees and brush designated to remain." Respondent was also responsible for the removal and disposal of the resulting debris to an offsite location. The contract states that respondent "shall maintain a neat and orderly job site and shall promptly remove all debris and dispose of the debris legally off site."

The district court determined that respondent had no duty to the public in the location where the accident occurred because "the accident did not involve a construction area or work site" because no construction activity was actually occurring at the time of the accident. But respondent admits that the construction of the trail was not complete

prior to the 2007 Labor Day weekend and that its workers returned to the site after the weekend to pave the trail. No authority has been provided to support the proposition that respondent's duty to provide for the safety of the public in the construction zone existed only when construction activity was occurring. We conclude that respondent had an ongoing duty to the public during the Labor Day weekend.

B. Breach

Whether a breach of duty occurred is a question of fact. *Wear v. Buffalo-Red River Watershed Dist.*, 621 N.W.2d 811, 815 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). Appellant argues that respondent breached its duties by failing to erect and maintain safety devices to protect the public from hazards and debris on the trail.

There is conflicting evidence regarding whether there were hazards or debris on the trail on the night of the accident. Daniel Bissen, a project manager with respondent who oversaw the construction of the trail, testified during his deposition that, before weekends during the course of the construction project, steps were taken to inspect the trail to ensure that it was free of debris. Irvin testified that he did not recall seeing any debris on or overhanging the trail on the night of the accident and that he did not "experience any problems" with the trail while traveling on it. But Ahern testified that "[t]here was [sic], you know, piles of gravel in spots, trees still laying [sic] onto [the trail] in spots" and that the trail was "in fair shape" on the night of the accident. There is a genuine issue of material fact as to whether there were hazards or debris on the trail on the night of the accident.

There is also conflicting evidence regarding whether any safety or warning devices were in place on the trail on the night of the accident. Bissen testified that when respondent was done with construction operations for the day or week during the course of the construction project, barrels may have been placed at entrances to the trail "just to warn of construction activities" "[d]epend[ing] on the situation," and that warning signs were placed if there were particular hazards. He testified that, over the Labor Day weekend, "[t]here would have been barrels out there," but that he does not "remember any specifics" regarding what decisions were made about what to do with the trail for that weekend. Irvin testified that there were no barricades present when the ATVs entered the trail, and Irvin, Ahern, and Stork all testified that there were no signs present. There is a genuine issue of material fact as to whether there were any safety devices on the trail on the night of the accident.

C. Causation

To prove proximate causation, there must be a showing that "the defendant's conduct was a substantial factor in bringing about the injury." *Lubbers*, 539 N.W.2d at 401 (quotation omitted). "Generally, proximate cause is a question of fact for the jury; however, where reasonable minds can arrive at only one conclusion, proximate cause is a question of law." *Id.* at 402. Appellant argues that the accident was caused by Irvin's ATV hitting part of a tree that was encroaching onto the trail.

Irvin testified that he is "not sure" how his ATV ended up off of the trail. Ahern testified that "there was one tree down" in the location of the accident, but that he does not recall "whether it was actually physically on the trail." He could only say that the

tree "started at pretty much onto the [trail] or next to the [trail] and continue[d] into the woods a little ways" and that "it had at least reached the edge of the trail." When specifically asked whether the tree was lying over the trail, Ahern responded: "Yeah. I don't know. Couldn't say for sure." Ahern stated that he did not "have any problems with any kind of debris or anything on the trail" while he was traveling on it. Both ATVs had traveled unimpeded down the path and past the future accident site before turning back the way that they had come.

Even if there was evidence that a tree was encroaching onto the trail, Ahern could not say whether Irvin's ATV came into contact with the tree while the ATV was on the trail. Ahern was not present when the accident occurred. He testified that he was "assuming" that the tree caused the accident and that it was his "thought" that the tree was "something that [Irvin] must have encountered" to trigger the accident. But he admitted that he does not know whether Irvin "was technically off the trail when he caught the tree." Ahern also stated that, when he and Irvin talked about the accident, Irvin "didn't know what had happened" with respect to whether Irvin "actually came into contact with the tree before he lost control of his ATV."

Appellant's assertions that there was part of a tree on the trail in the location of the accident and that this tree caused the ATV accident are speculative and unverified. Irvin does not know what caused the accident. Ahern does not know whether the tree was on the trail itself or whether the ATV came into contact with the tree before leaving the trail. Thus there is no evidence in the record from which appellant can prove the element of causation.

Appellant contends that the ATVs would never have entered the trail, and thus the accident would not have occurred, if respondent had erected appropriate safety devices or barricaded the entrances to the trail completely. Appellant's argument that the accident was caused by the ATVs' presence on the trail is based on "but for" causation, rather than proximate causation. "But for" causation, or the theory that a defendant's actions created "the occasion for" the injury and that the injury "would not have happened but for [the] defendant's tortious act," has been expressly rejected as the test for causation in this state. *Kryzer v. Champlin Am. Legion No. 600*, 494 N.W.2d 35, 37 (Minn. 1992) (quotation omitted); *see also Harpster v. Hetherington*, 512 N.W.2d 585, 586 (Minn. 1994) (stating that "[t]he problem with the 'but for' test . . . is that with a little ingenuity it converts events both near and far, which merely set the stage for an accident, into a convoluted series of 'causes' of the accident").

Appellant argues that "but for" causation "is still a key factor in determining whether an act was a 'substantial factor.'" Appellant cites *George v. Estate of Baker*, 724 N.W.2d 1, 10–11 (Minn. 2006), which reiterated that "but for" causation is insufficient to establish liability in this state, but stated that "[b]ut-for causation, however, is still necessary for substantial factor causation because if the harm would have occurred even without the negligent act, the act could not have been a substantial factor in bringing about the harm." It may be true that the accident would not have occurred if the ATVs had not been on the trail at all. However, appellant must point to negligent conduct that was a *substantial factor* in bringing about the accident, not merely to conduct that created the occasion or set the stage for the accident.

Because there is no genuine issue of material fact for trial on the element of causation, the district court did not err by granting a summary-judgment dismissal of the negligence claim against respondent.

Affirmed.