This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-168

Lower Sioux Indian Community,
Plaintiff,

vs.

Kraus-Anderson Construction Company,
Defendant and Third Party Plaintiff,

vs.

LaDue Construction, Inc., third party defendant,
Appellant,

Rightway Caulking Company, et al.,
Third Party Defendants,

EFCO Corporation, third party defendant,
Respondent.

Filed August 27, 2012
Affirmed
Muehlberg, Judge[*]

Renville County District Court
File No. 65-CV-08-271

Randall J. Bakke, Smith Bakke Porsborg Schweigert Armstrong, Bismarck, North Dakota (for appellant)

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

---

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

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.

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

MUEHLBERG, Judge

In this contribution and indemnity case, appellant challenges the district court's order granting summary judgment in favor of respondent. Because the district court did not err in determining that appellants presented no evidence creating a genuine issue of material fact regarding liability, we affirm.

FACTS

Lower Sioux Indian Community (LSIC) hired Kraus-Anderson Construction Company (KA) to build an addition onto LSIC's Jackpot Junction Casino hotel. Appellant LaDue Construction, Inc. (LaDue) was hired by KA as a subcontractor to install an External Insulation and Finish System (EIFS)[1] and United Glass, Inc. was hired to install windows. In May 1999, United Glass sought a bid from EFCO Corporation for windows for the addition. EFCO is a window manufacturer.

The addition was completed in 1999, and, in April 2005, LSIC discovered moisture intrusion into the addition. LSIC sued KA in December 2005. KA denied all liability and, in December 2007, asserted third-party claims for breach of contract, as well as contribution and indemnity, against its subcontractors, including LaDue and United Glass. KA asserted a third-party claim against EFCO for contribution and indemnity

[1] EIFS is a stucco-like cladding.

only. In December 2008, United Glass asserted cross-claims for contribution and indemnity against the other third-party defendants.

In January 2011, LaDue and two other subcontractors settled with KA and preserved their claims against United Glass and EFCO. KA then assigned its claims against United Glass and EFCO to LaDue and the two other subcontractors, at which point those subcontractors assigned all their claims against United Glass and EFCO to LaDue. United Glass and LaDue subsequently settled and United Glass also assigned its claims against EFCO to LaDue.

In March 2011, LaDue brought a cross-claim against EFCO for contribution and indemnity on the basis of breach of contract, breach of warranty, breach of implied warranty of fitness for a particular purpose, negligence, and products liability. EFCO moved for summary judgment, arguing that LaDue's contribution and indemnification claims should be dismissed because it failed to show that it overpaid relative to its liability, and that the remainder of LaDue's claims are barred by the statute of limitations. The district court agreed and granted summary judgment in favor of EFCO. This appeal followed.

D E C I S I O N

A motion for summary judgment shall be granted if "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. On appeal from an award of summary judgment, a reviewing court asks two questions: (1) whether there are any

genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). An appellate court reviews both questions de novo, viewing the evidence in the light most favorable to the party against whom judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77-78 (Minn. 2002); *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). An award of summary judgment will be affirmed if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

In opposing summary judgment, "general assertions" are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "In order to successfully oppose summary judgment, appellant must extract specific, admissible facts from the voluminous record and particularize them for the trial judge." *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988) (emphasis omitted), *review denied* (Minn. Mar. 30, 1988).

"[C]ontribution and indemnity are independent causes of action; they are venerable equity actions and part of our state's common law." *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). Contribution has two required elements: First, the common liability of two or more parties to the injured party, and second, "one of the several obligors satisfies the obligation that would otherwise fall on all of them" giving that obligor the right to seek reimbursement from the others "to the extent that he has discharged the obligation in excess of what could justly be claimed from him." *In re Individual 35W Bridge Litig. (35W Bridge I)*, 786 N.W.2d 890, 893

(Minn. App. 2010); *aff'd, In re Individual 35W Bridge Litig. (35W Bridge II)*, 806 N.W.2d 811, 815 (Minn. 2011) ("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."). It is intended to "allow[] 'one who has discharged more than his fair share of a common liability or burden to recover from another who is also liable the proportionate share which the other should pay or bear.'" *35W Bridge II*, 806 N.W.2d at 815 (quoting *Hendrickson v. Minn. Power & Light Co.*, 258 Minn. 368, 370, 104 N.W.2d 843, 846 (1960)). Indemnity applies when "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 (Minn. 1994).

I. Statute of Limitations

a. Contribution and Indemnity

As a preliminary matter, the issue of timeliness should be addressed. Although the district court did not find that LaDue's contribution and indemnity claim was untimely, LaDue argues that these claims are not barred by the statute of limitations. Under Minn. Stat. § 541.051, subd. 1(b) (2010), a defendant may bring third-party contribution and indemnity claims against third-party defendants within two years of when the cause of action accrues even if it brings such claims outside the ten-year period of repose in Minn. Stat. § 541.051, subd. 1(a) (2010), so long as the underlying liability claim arose within that ten-year period. "[A] cause of action [for contribution or indemnity] accrues upon the earlier of commencement of the action against the party seeking contribution or indemnity, . . . or settlement arising out of the defective and unsafe condition." Minn.

Stat. § 541.051, subd. 1(c) (2010). Because KA and United Glass's claims against EFCO were timely under the statute and because KA and United Glass subsequently assigned LaDue the right to pursue their claims against EFCO, LaDue's cross-claim for contribution and indemnity against EFCO is timely.

b. Other claims by LaDue against EFCO

The district court determined that any separate claims LaDue made against EFCO for breach of contract, negligence, and products liability were barred by the statute of limitations. *See* Minn. Stat. § 541.051, subd. 1(a) (imposing two-year statute of limitations for contract and tort claims arising from damage to real property due to defects or unsafe conditions). It also determined that any separate claim LaDue made against EFCO for breach of warranty was barred by the statute of limitations in Minn. Stat. § 336.2-725, subds. 1, 2 (2010).

These are, however, merely legal theories underlying LaDue's contribution and indemnity claim, so the statute of limitations for these claims is not relevant. "[C]ontribution-indemnity is not based on contract or tort, although either may be secondarily involved, but on one party paying more than its fair share of a common liability." *City of Willmar*, 512 N.W.2d at 874. "[T]he nature of the common liability is of secondary importance to the fact of common liability itself." *Id.* This means, for example, that common liability may exist where a defendant's liability is for negligence while a third-party defendant's liability to plaintiff is for breach of warranty. *Id.* The same is true for indemnity. *Id.* "[I]t makes no difference that the injured plaintiff's claim against the party from whom contribution-indemnity is sought is barred by the statute of

limitations" because the claim brought by LaDue against EFCO for contribution and indemnity is "different in kind" from LSIC's injury. *Id.* at 874-75. LaDue may therefore advance its contribution and indemnity claim on the premise that the common liability it claims EFCO shares with it is based on various contract and tort claims regardless of the statute of limitations barring LaDue from pursuing any of those contract or tort claims against EFCO. But, while it may have been error for the district court to grant summary judgment on these claims, any such error was harmless because the statute-of-limitations determinations do not affect the merits of LaDue's contribution and indemnity claim.

2. Contribution and indemnity claim

The district court then granted summary judgment in favor of EFCO on LaDue's contribution and indemnity claim. In its brief to this court, LaDue focuses on the fact questions surrounding which documents actually comprise the contract between United Glass and EFCO. It argues that the district court engaged in "improper fact[] finding" when it determined which documents comprised the contract between EFCO and United Glass. But what terms the contract contained is only relevant if LaDue can show genuine issues of material fact regarding EFCO's liability.

To recover under a theory of strict products liability, "the plaintiff must establish (1) that the defendant's product was in a defective condition unreasonably dangerous for its intended use, (2) that the defect existed when the product left the defendant's control, and (3) that the defect was the proximate cause of the injury sustained." *W. Sur. & Cas. Co. v. Gen. Elec. Co.*, 433 N.W.2d 444, 447 (Minn. App. 1988) (quoting *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 623 n.3 (Minn. 1984)), *review denied* (Minn. Feb. 22, 1989).

And "where lapse of time and substantial opportunity for mishandling of a product by third parties make it equally probable a defective condition developed after leaving the defendant's control, . . . the principle[] of . . . strict liability will [not] support a finding of liability." *Id.* at 449.

In its order, the district court stated that "there is no evidence which is genuine and material to indicate EFCO is responsible for the payments made by LaDue or other parties for which LaDue received assignment of claims." It specifically noted that "LaDue—without evidentiary support—states that it 'should not have had to contribute any monies to the settlement of [KA's] claims.'" The district court also noted that "[t]here is no other evidence before the Court, including what monies were paid by the parties to settle [KA's] claims and why said amount is more than its fair share."

LaDue argued before this court that a jury must determine financial liability because for it to allege an exact dollar amount is merely a subjective determination of liability. But before a jury can determine financial liability, LaDue must present some evidence that EFCO is actually liable. And "there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.*

The record discloses that two experts conducted tests and submitted reports and neither determined that EFCO's product was defective. Geoffrey Jillson from Guy

Engineering Corporation noted that the EIFS treatment was applied into window openings, which "is contrary to the manufacturers installation instructions" and contributed to the leaking. Jillson also stated that the sealant was not properly adhered to the sealant joints, that flashing called for by the architect was not installed at the sloped areas of the EIFS below the windows, and that screws were inserted through the sill of the window contrary to the manufacturer's instruction to use F-clips, which the general contractor had in writing at the time of window installation. John Runkle at Architectural Testing concluded that the EIFS system was not properly installed and now has numerous cracks, that the sealant joints were improperly applied to the exterior of the building, that fasteners installed through the sills of the windows allow water to enter the building, and that only one of nine windows had signs of leaking that might possibly be attributed to a manufacturing problem. And Chad Morris, an EFCO employee, testified in his deposition that "[a]ny good [window] installer would know that you can't penetrate the [sill] of a sliding window" when securing it to the building.

LaDue did not present any additional evidence that would indicate that there is a question about whether EFCO is solely or primarily liable for the damage in the hotel addition. And because contribution and indemnity require a showing that EFCO bears actual liability, the district court did not err in granting summary judgment for EFCO.

Affirmed.