STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0038

Scoreboard Sportswear, Inc., et al.,
Appellants,

vs.

WelshCo, LLC,
Respondent,

Checkpoint Security Systems Group, Inc.,
Respondent,

Viking Automatic Sprinkler Co.,
Respondent.

Filed September 8, 2009
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-08-6452

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Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellants Elwin Fraley (Fraley) and Scoreboard Sportswear, Inc. (Scoreboard) challenge the district court's grant of summary judgment in favor of respondents WelshCo, LLC (WelshCo), Viking Automatic Sprinkler Co. (Viking), and Checkpoint Security Systems Group, Inc. (Checkpoint). Because the district court did not err in determining that the exculpatory clauses in the lease agreement between Scoreboard and WelshCo were enforceable, and that Viking and Checkpoint owed no duty to appellants, we affirm.

FACTS

Fraley owns Scoreboard, a wholesaler of sports memorabilia. Scoreboard is located in a one-story office building with a connected warehouse. The building, occupied by a number of businesses, is owned by WelshCo. Scoreboard rented a tenant space within the building and signed a lease agreement with WelshCo.

The entire building is equipped with a fire-suppression system consisting of numerous sprinkler heads monitored by a fire-alarm system. If water moves in the sprinkler pipes, a water-flow switch sends a signal to a phone dialer, which automatically phones the fire-monitoring company, which in turn contacts the local fire department.

WelshCo hired Viking to inspect and maintain the sprinkler system and Checkpoint to inspect and maintain the fire-alarm system. Viking conducted annual

inspections of the sprinkler system and Checkpoint conducted twice yearly inspections of the monitoring system. WelshCo signed contracts with both Viking and Checkpoint, but Viking and Checkpoint had no actual or contractual relationship with appellants.

In 2005 and 2006, both Checkpoint and Viking inspected the sprinkler and fire-alarm system and notified WelshCo that the water-flow switch was not working properly and needed to be replaced.

On or about July 10, 2006, a sprinkler head in the building's hallway, a common area, malfunctioned for an unknown reason. Water flowed from the sprinkler for an unknown period of time, flooding appellants' rental space and other tenants' spaces. Checkpoint was not notified of water flow by the dialer and therefore did not notify the fire department. Water continued to flow from the sprinkler head until another building tenant discovered the flooding and contacted the fire department. Fraley was at home at the time of the flooding and did not suffer direct physical injuries from the flooding. The fire marshal's report indicates that "it was determined that the sprinkler head malfunctioned," and that a "Checkpoint technician determined that the control board in the dialer box was faulty."

Appellants filed suit against respondents, alleging that Scoreboard "sustained extensive damage to inventory, cleanup, profits, and loss of business," and that Fraley "suffered consequential bodily injuries as a direct result of [respondents'] negligence" including "anxiety, chest pain, headaches, and difficulty sleeping," along with "emotional and mental distress" resulting from his physical injuries. Respondents moved for summary judgment, which was granted by the district court.

D E C I S I O N

On appeal from summary judgment, we ask 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). 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; *Asmus v. Ourada*, 410 N.W.2d 432, 434 (Minn. App. 1987). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

"A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). Thus, to survive summary judgment, appellants were required to establish a prima-facie claim of negligence.

I

The lease agreement between Scoreboard and WelshCo contained the following exculpatory provisions, found enforceable by the district court:

> **CASUALTY INSURANCE:**
>
> . . . .
>
> [15]c. . . . Tenant hereby waives and releases all claims, liabilities and causes of action against Landlord and its agents, servants and employees for loss or damage to, or

> destruction of, any of the improvements, fixtures, equipment, supplies, merchandise and other property, whether that of Tenant or of others in, upon or about the Premises resulting from fire, explosion or the other perils included in standard extended coverage insurance, whether caused by the negligence of any of said persons or otherwise. The waiver shall remain in force whether or not the Tenant's insurer shall consent hereto.
>
> . . . .
>
> **NON-LIABILITY:**
> 19. . . . Landlord shall not be liable for damage to any property of Tenant or of others located on the Premises, nor for the loss of or damage to any property of Tenant or of others by theft or otherwise. Landlord shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain or snow, or leaks from any part of the Premises or from the pipes, appliances, or plumbing works, or from the roof, ... Landlord shall not be liable for any latent defect in the Demised Premises. All property of Tenant kept or stored on the Demised Premises shall be so kept or stored at the risk of Tenant only and Tenant shall hold Landlord harmless from any claims arising out of damage to the same, including subrogation claims by Tenant's insurance carrier.

"It is settled Minnesota law that, under certain circumstances, parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence." *Anderson v. McOskar Enters., Inc.*, 712 N.W.2d 796, 799–800 (Minn. App. 2006) (quotation omitted). But exculpatory clauses are disfavored and should be strictly construed against the exculpated party. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005). "If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton

acts, it will not be enforced." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

1. Ambiguity[1]

Appellants claim that the district court erred in determining that the exculpatory provisions in the lease between Scoreboard and WelshCo was unambiguous. Whether a contract is ambiguous presents a question of law for this court's de novo review. *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979).

"A contract is ambiguous if it is reasonably susceptible to more than one construction." *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn. App. 1985), *review denied* (Minn. June 24, 1985). A lease should be construed as a whole, and "to give effect to the intention of the parties as manifested by the words used." *Orme v. Atlas Gas & Oil Co.*, 217 Minn. 27, 30, 13 N.W.2d 757, 760 (1944).

Appellants claim that the term "or otherwise" found in the exculpatory provisions creates an ambiguity because it is overbroad and purports to release WelshCo from liability for intentional, willful, or wanton acts.[2] They cite *Nimis v. St. Paul Turners*, in

[1] WelshCo claims that appellants did not challenge the enforceability of the exculpatory provisions on the basis of overbreadth in the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that this court will generally not consider matters not argued and considered by the district court). But the record establishes that appellants argued during summary-judgment proceedings that the exculpatory provisions were invalid and thus did not waive their claim on appeal.

[2] "Or otherwise" is found in the phrases: "Landlord shall not be liable for . . . the loss of or damages to any property of Tenant . . . by theft *or otherwise*," and "Tenant hereby waives and releases all claims, liabilities and causes of action against Landlord . . . for

which this court stated that the language "or otherwise" in an exculpatory provision "is ambiguous in scope as to whether it releases [respondents] for injuries caused intentionally, and therefore we will not enforce it." 521 N.W.2d 54, 58 (Minn. App. 1994). But this statement is dicta and not binding. *See State v. Timberlake*, 744 N.W.2d 390, 395 n.7 (Minn. 2008) ("Dicta are generally considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases." (quotation omitted)). The actual holding in *Nimis* stated that the exculpatory provision was unenforceable because it accompanied a one-year health-club membership, and thus terminated at the end of one year, before the injury had occurred. *Id.*

In *Schlobohm*, the supreme court held that an exculpatory provision was enforceable and not ambiguous even though it purported to release "any claims . . . whatsoever." 326 N.W.2d at 921–22, 926. And in a persuasive, unpublished case, this court observed that of the "cases that analyze exculpatory contracts using the term 'negligence or otherwise,' none of the cases has concluded that the term creates an ambiguity in scope." *Ball v. Waldoch Sports, Inc.*, No. C0-03-227, 2003 WL 22039946, at *4 (Minn. App. Sept. 2, 2003) (holding that exculpatory clause in release is enforceable even though it contained "or otherwise" language). We noted:

> "Otherwise" has been defined to mean "in another way; differently." Thus the release would exonerate [respondents] from claims whether caused by [their own] negligence . . . or "in another way." Negligence caused "in another way"

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loss or damage . . . whether caused by the negligence of any of said persons *or otherwise.*"

> suggests negligence by someone other than [respondents]. The meaning that [appellant] seeks to draw from the phrase would be more likely if "or otherwise" followed the word negligence rather than the word releases, resulting in a release from claims "whether caused by the negligence or otherwise of the releases."

Id. at *3 (citation omitted).

Here, the lease considered as a whole evinces an unvarying intent to release WelshCo from claims arising in negligence and does not create ambiguity as to whether WelshCo would be released for intentional acts. As a matter of law, the exculpatory provisions, standing alone, are not ambiguous.

Appellants also contend that the indemnification clause in the lease, which "restricts damages to the Tenant unless due to the Landlord's negligence," conflicts with the exculpatory provisions, creating an ambiguity. The indemnification clause states:

> **COVENANTS TO HOLD HARMLESS**
> 18. Unless the liability for damage or loss is caused by the negligence of Landlord, its agents or employees, Tenant shall hold harmless Landlord from any liability for damages to any person or property in or upon the Demised Premises and the Premises, including the person and the property of Tenant . . . and from all damages resulting from Tenant's failure to perform the covenants of this Lease. All property kept, maintained or stored on the Demised Premises shall be so kept, maintained or stored at the sole risk of Tenant. . .

WelshCo argues that the indemnification provision is irrelevant because it "requires the Tenant to indemnify the landlord against claims arising from tenant's failure to perform the covenants of the lease, provided the damage was not caused by the negligence of the landlord," and here, "the Tenant is not being asked to indemnify the landlord." WelshCo's interpretation is correct. The indemnity provision anticipates a situation

where Scoreboard would be required to indemnify WelshCo in the event that someone or some property is injured or damaged because Scoreboard breached the lease, but not if WelshCo was negligent. The exculpatory provisions anticipate a situation where WelshCo was negligent in causing damage to Scoreboard's property. Therefore, the two provisions do not conflict because they address two different situations. Accordingly, we conclude that the district court did not err in holding that the exculpatory provisions were unambiguous.

2. Public-Policy Considerations

Appellants argue that the exculpatory provisions violate public-policy considerations. "An agreement that violates public policy is void." *Arrowhead Elec. Coop., Inc. v. LTV Steel Mining Co.*, 568 N.W.2d 875, 878 (Minn. App. 1997). "[E]ven if a release clause is unambiguous in scope and is limited only to negligence, courts must still ascertain whether its enforcement will contravene public policy." *Anderson*, 712 N.W.2d at 800. "In evaluating exculpatory clauses, the courts approach the policy considerations on a case-by-case basis." *Walton v. Fujita Tourist Enters. Co.*, 380 N.W.2d 198, 201 (Minn. App. 1986), *review denied* (Minn. Mar. 21, 1986). Clauses relieving landlords of liability for negligence create a question of balance between two important public interests: the interest in freedom of contract and the interest in requiring a landlord to fulfill basic duties. *Rossman v. 740 River Drive*, 308 Minn. 134, 136, 241 N.W.2d 91, 92 (1976). To determine whether a clause violates public policy, we consider any disparity in bargaining power between the parties, and the type of service

offered or provided. *Yang*, 701 N.W.2d at 789. We look to see if the contract was one of adhesion. *Id.*

Appellants argue that "there is a huge disparity between the parties as to their relative bargaining power" because "WelshCo is an extremely large entity and controls vast amounts of available warehouse and business property in the southwest metro area." They also contend that there were few "other real estate options that could provide the sufficient size and location," and that they "had no opportunity to negotiate any changes in the lease." But the record is completely devoid of facts regarding the parties' relative bargaining power, real-estate options available to appellant, or the nature and extent of the parties' negotiation efforts. Thus, appellants' claim that the lease constituted an adhesion contract fails, and the exculpatory provisions do not contravene public policy.

Appellants also claim that WelshCo provided services to the public and thus should be regulated like "common carriers, hospitals and doctors, public utilities, innkeepers, public warehousemen, employers and services involving extra-hazardous activities." *See Schlobohm*, 326 N.W.2d at 925 (listing types of services thought to be subject to public regulation). But the public is not involved in or affected by a commercial lease between two private parties, and the supreme court has held that parties to a commercial lease "may, without violation of public policy, protect themselves against liability resulting from their own negligence." *Id.* at 922–23; *see also Weirick v. Hamm Realty Co.*, 228 N.W. 175, 177 (Minn. 1929) ("A lease is a matter of private contract between the lessor and the lessee with which the general public is not concerned.

And if the parties see fit to contract that the lessor shall not be liable for damages resulting from his negligence . . . the law permits them to do so.").

The district court did not err in concluding that the exculpatory provisions in the lease agreement are enforceable and bar appellants' negligence claim against WelshCo.

II

The elements of negligence are: "(1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury." *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982). The existence of a legal duty is a matter of law that this court reviews de novo. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

The district court held that Viking and Checkpoint owed no duty, contractual or otherwise, to appellants. Appellants claim that Viking and Checkpoint "owe a general duty not to commit any act or create any omission that results in damages to another." Appellants cite no authority for this proposition. A person "generally has no duty to act for the protection of another person, even if he realizes or should realize that action on his part is necessary." *Donaldson v. Young Women's Christian Assoc.*, 539 N.W.2d 789, 792 (Minn. 1995). "The existence of a legal duty depends on the relationship of the parties and the foreseeability of the risk involved." *Id.* "Usually, a special relationship giving rise to a duty to protect is found only on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection." *Id.* Here, there was no contractual relationship between

Viking and appellants or Checkpoint and appellants, and nothing in the record indicates that appellants were deprived of the normal opportunities of self protection so that Viking and Checkpoint foresaw a risk if they did not act to protect appellants. No special duty existed between appellants and Viking or Checkpoint, and thus, appellants failed to establish a prima facie case of negligence against Viking and Checkpoint. The district court did not err in granting Viking and Checkpoint's motions for summary judgment.

III

Fraley argues that the district court erred in finding that his emotional-distress claims fail as a matter of law, both under negligence and intentional infliction-of-emotional-distress theories. Fraley suffered from stress and anxiety before the flooding incident, and he claims that because the incident exacerbated his conditions, he was prescribed sleeping pills and a double dose of an antidepressant. He also claims that he experienced physical symptoms of anxiety after the flooding incident, including "chest pain, headaches, muscle spasms, and nausea."

"We have not been anxious to expand the availability of damages for emotional distress." *Lickteig v. Alderson, Ondov, Leonard & Sween*, 556 N.W.2d 557, 560 (Minn. 1996). "This reluctance has arisen from the concern that claims of mental anguish may be speculative and so likely to lead to fictitious allegations that there is a potential for abuse of the judicial process." *Id.*

Without citing any authority, Fraley claims that "[a]ggravation of an existing medical condition is a proper form of recovery in Minnesota." But aggravation of an existing medical condition is typically a measure of damages, not a cause of action. *See*

4A Minnesota Practice CIVJIG 91.40 ("A person who has a pre-existing disability or medical condition at the time of an accident is entitled to damages for aggravation of that pre-existing disability or condition. . . ."); *Leubner v. Sterner*, 493 N.W.2d 119, 120 (Minn. 1992) ("We hold there is no such thing as a medical malpractice cause of action for 'negligent aggravation of a preexisting condition.'"). In our view, Fraley's claims are more akin to a cause of action for negligent infliction of emotional distress.

To establish a claim for negligent infliction of emotional distress, a plaintiff must show that he: "(1) was within a zone of danger of physical impact; (2) reasonably feared for [his] own safety; and (3) suffered severe emotional distress with attendant physical manifestations." *K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995). The district court held that Fraley was not in the zone of danger and thus could not establish a prima-facie case of negligent infliction of emotional distress.

In Minnesota, the zone of danger is limited "to encompass plaintiffs who have been in some actual personal physical danger caused by defendant's negligence." *Id.* at 558. Here, Fraley was at home and not on site when the flooding occurred. He was not physically injured by the flooding, nor was he "in grave personal peril for some specifically defined period of time." *See id.* (stating that negligent infliction of emotional distress is "characterized by a reasonable anxiety arising in the plaintiff, with attendant physical manifestations, from being in a situation where it was abundantly clear that plaintiff was in grave personal peril for some specifically defined period of time"). Because Fraley was not in the zone of danger, the district court did not err in dismissing his claim for negligent infliction of emotional distress.

Although not alleged in his complaint Fraley also alleged intentional infliction of emotional distress during summary-judgment proceedings. The district court found that he could not establish a prima-facie claim because there was no evidence that respondents' conduct was "extreme and outrageous." *See Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438–39 (Minn. 1983) ("Four distinct elements of proof necessary to sustain a claim [of intentional infliction of emotional distress] may be implied from the Restatement definition: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe."). Nothing in this record indicates that respondents engaged in "extreme and outrageous" conduct that was "intentional or reckless," or that Fraley suffered "severe" distress. The district court did not err in dismissing Fraley's claim for intentional infliction of emotional distress.

Affirmed.