STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1109

Heaven & Earth, Inc., et al.,
Appellants,

vs.

Ross Nesbit Agencies, Inc.,
d/b/a Paulet/Slater, Inc., et al.,
Respondents.

Filed January 11, 2011
Affirmed in part, reversed in part, and remanded
Huspeni, Judge[*]

Hennepin County District Court
File No. 27-CV-09-18702

Andrew L. Marshall, David A. Turner, Bassford Remele, P.A., Minneapolis, Minnesota (for appellants)

Rolf E. Sonnesyn, Aaron M. Simon, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Huspeni, Judge.

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

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

HUSPENI, Judge

This appeal is from summary judgment awarded in a tort action in which appellants claim that respondent insurance agency and respondent insurance agent, by amending appellants' policy to add appellants' landlord as a loss payee without appellants' knowledge or permission, started a chain of events that led to the loss of appellants' business. Appellants argue that the district court (1) erred by granting summary judgment in favor of respondents on the basis that there was no issue of material fact with respect to causation; and (2) abused its discretion by denying appellants' motion to amend the complaint to add a claim for punitive damages. We affirm the denial of appellants' motion to amend the complaint to add a claim for punitive damages, but because there is an issue of material fact with respect to causation, we reverse the district court's grant of summary judgment and remand for further proceedings.

FACTS

Appellant Gilbert Davison is the sole shareholder and president of appellant Heaven and Earth, Inc. (H&E).[1] H&E owned and operated the Quest nightclub, which occupied the first two floors of the Wyman Building in downtown Minneapolis. The Quest space was leased from Wyman Properties Limited Partnership (Wyman Properties), which assigned its interest in the lease to 110 Wyman, Inc. (110 Wyman). The terms of the lease required that 110 Wyman be named on H&E's insurance policy.

[1] Davison and H&E will collectively be referred to as "appellants."

The lease further provided that "[t]he proceeds of such insurance shall be used for the repair or replacement of the property so insured."

110 Wyman is owned by Swervo Development Corporation which, in turn, is owned by Nedal Abdul-Hajj. Both Davison and Abdul-Hajj are clients of respondent Ross Nesbit Agencies, Inc. (Ross Nesbit), a corporation that owns and operates respondent Paulet/Slater, Inc. (PSI). From its inception, H&E purchased insurance for the Quest from PSI. In October 2004, respondent Dana Privette became the insurance agent responsible for H&E's account. Privette, an employee of Ross Nesbit, subsequently procured insurance policies for H&E from Western Heritage Insurance Company (Western) which provided, among other things, "building and personal property coverage," and "business income (and extra expense) coverage." The building and personal property coverage included claims for damages to additions to the leasehold, indoor and outdoor fixtures, permanently installed machinery and equipment, personal property such as floor coverings, and appliances used for refrigerating, ventilating, cooking, dishwashing, or laundering. The business income (and extra expense) coverage included claims for lost net income and continuing normal operating expenses such as payroll and rent.

On July 31, 2006, a fire occurred on the roof and upper floors of the Wyman Building. A water pipe burst during efforts to extinguish the fire, resulting in substantial water damage to the building, including the Quest premises. H&E subsequently submitted claims to Western as a result of the fire and pursuant to its commercial property policy. Shortly thereafter, on August 3, 2006, Western issued an initial payment

of $50,000 to H&E pursuant to the business and personal property coverage contained in the commercial insurance policy.

At the time of the loss, 110 Wyman was not identified as having any interest in the property insurance policy purchased by H&E from Western. But after the fire Abdul-Hajj contacted Privette in early August 2006 and requested that 110 Wyman be added as a co-payee additional insured in connection with H&E's insurance policy. Abdul-Hajj's request was based on his understanding that the lease agreement required that 110 Wyman, as landlord, be named as an additional insured on H&E's policy. Abdul-Hajj wanted to ensure that as the landlord, 110 Wyman had some control over what was done with the funds issued for repair of the Quest premises.

On August 9, 2006, Western, at Privette's direction, issued Endorsement 2, which added 110 Wyman as a co-payee additional insured on the policy by endorsement. Western subsequently issued Endorsement 3 on September 13, 2006, amending the previously issued Endorsement 2 to identify 110 Wyman as landlord of the property rather than a mortgagee. Privette never informed Davison of the amendments to H&E's policy, nor did Davison ever authorize Privette to add 110 Wyman as either a mortgagee or a landlord to H&E's policy.

After issuing Endorsement 3, Western advanced to H&E a check for $53,136.39 under the business income (and extra expense) coverage. But in the meantime, upon learning of the addition of 110 Wyman to H&E's policy, Davison complained to Privette about the unauthorized changes Privette made to H&E's insurance policy. Western

subsequently issued Endorsement 4 on September 18, 2006, voiding Endorsements 2 and 3 and removing 110 Wyman from H&E's insurance policy.

Despite the issuance of Endorsement 4, 110 Wyman alleged that it was entitled to the insurance proceeds and demanded that any further checks issued by Western be made jointly payable to 110 Wyman and the Quest nightclub. By letter dated September 20, 2006, counsel for Western informed 110 Wyman that "Wyman is not entitled to any direct payment of policy proceeds under the terms and conditions of [Western's] Policy." Counsel for 110 Wyman responded by letter the next day claiming that 110 Wyman had an interest in the insurance policy pursuant to Endorsement 2 and the terms of its lease with H&E. After Western reiterated its position that 110 Wyman was not entitled to any of the insurance proceeds under Western's policy, 110 Wyman threatened to sue Western if it issued a check for insurance proceeds to H&E without naming 110 Wyman as an additional payee.

On November 8, 2006, Western issued a check to H&E for $127,921.10 pursuant to the business and personal property coverage. But, according to Leslie Scappucci, the claims adjuster that handled H&E's claim, Western stopped making further payments on H&E's claim in order to protect the insured's interests. This decision was allegedly based upon Western's desire to address any claims made by any party that might have an interest in the proceeds. According to Scappucci, he believed that 110 Wyman potentially had a valid claim against H&E for the insurance proceeds based upon the lease agreement between 110 Wyman and H&E.

In December 2006, 110 Wyman filed an eviction action against H&E based upon H&E's failure to pay rent and failure to pay rent in a timely manner. The district court issued an order on December 15, 2006 compelling H&E to pay 110 Wyman $36,092.10 in outstanding rent by December 20, 2006, or face eviction. Despite being issued the check from Western for $53,136.39 as an advance on its business loss coverage, Davison decided not to pay the outstanding rent. According to Davison, he was advised by Western's independent adjuster Bill Conrad not to pay the outstanding rent because the matter regarding payment of insurance proceeds was unresolved. When H&E failed to make the requisite payment, H&E was evicted from the Wyman Building on December 22, 2006.

On the date it was evicted from the Wyman Building, H&E commenced litigation against Western and 110 Wyman regarding the processing of H&E's insurance claim. Privette, Ross Nesbit, and PSI,[2] were not named parties in this previous litigation. This litigation eventually settled after the district court found that 110 Wyman "was not a named insured, additional insured, loss payee or mortgagee under the Policy and therefore had no basis to recover directly from Western." A portion of the settlement damages were allocated to 110 Wyman pursuant to the terms of the lease.

In June 2009, appellants filed a complaint against respondents asserting the following causes of action: (1) breach of fiduciary duty (Count I); (2) negligence (Count II); (3) negligent misrepresentation (Count III); and (4) tortious interference with contractual relationship (Count IV). The complaint alleged that the causes of action arose

[2] Privette, Ross Nesbit, and PSI will collectively be referred to as "respondents" here.

from the improper issuance of Endorsements 2 and 3. Appellants later moved to amend the complaint to add a claim for punitive damages.

Respondents moved for summary judgment, arguing that appellants could not establish that the wrongful issuance of the endorsements listing 110 Wyman as a payee caused appellants any damages. The district court granted the motion, finding that the "record unequivocally shows that [Western's] delay in processing the insurance claim was unrelated to Endorsements 2 and 3," rather Western's decision to delay further payment pending its investigation was based upon its understanding that 110 Wyman's claim for the insurance proceeds arose out of the terms of the lease agreement between 110 Wyman and H&E. Thus, the district court concluded that appellants "cannot establish a causal connection between the issuance of Endorsements 2 and 3 and the failure of [appellants'] business." The district court also denied appellants' motion to amend the complaint to add a claim for punitive damages. This appeal followed.

D E C I S I O N

I.

Summary judgment is appropriate 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. On appeal from summary judgment, this court reviews de novo whether the district court erred in its application of the law and whether there were any genuine issues of material fact when viewing the evidence in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre*

& Benson, L.L.P., 644 N.W.2d 72, 76-77 (Minn. 2002). "When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party 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. Thus, to avoid summary judgment, the nonmoving party must present evidence that is "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).

"A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any of the four elements necessary for recovery: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). In order for a party's negligence to be the proximate cause of an injury "the act [must be] one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, . . . though he could not have anticipated the particular injury which did happen." *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992) (quoting *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 915 (Minn. 1983)). There must also be a showing that the defendant's "conduct was a substantial factor in bringing about the injury." *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980). 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. *Wartnick*, 490 N.W.2d at 115.

Appellants argue that the district court erred in granting summary judgment in favor of respondents because the evidence in the record establishes that there is an issue of material fact regarding causation.[3] We agree. "A plaintiff need only demonstrate a plausible causal linkage between a breach of duty and his or her injuries to allow a claim of negligence to be presented to a jury." *Jonathan v. Kvaal*, 403 N.W.2d 256, 260 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. May 20, 1987).

Here, the district court found that appellants "have not presented any evidence that [Western] considered the endorsements to be relevant to their determination to delay further payments to [H&E]." But the record indicates otherwise. Appellants produced several claim notes composed after Endorsements 2 and 3 were issued indicating that Western was "not sure" if Privette's action "commits us to protect [110 Wyman's]

[3]Appellants asserted four separate counts against respondents: (1) breach of fiduciary duty; (2) negligence; (3) negligent misrepresentation; and (4) tortious interference with a contractual relationship. All of these causes of action contain the element of causation. *See Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989) (noting that a negligence count alleges the same elements required for a claim of breach of fiduciary duty), *review denied* (Minn. Nov. 15, 1989); *Flynn v. American Home Prods. Corp.*, 627 N.W.2d 342, 350-51 (Minn. App. 2001) (stating that the elements of a negligent misrepresentation claim are (1) a duty of reasonable care in conveying information; (2) breach of that duty by negligently giving false information; (3) reasonable reliance on the misrepresentations, which reliance is the proximate cause of physical injury; and (4) damages); *Howard v. Minn. Timberwolves Basketball Ltd. P'ship*, 636 N.W.2d 551, 559 (Minn. App. 2001) (stating that for a claim of tortious interference with a contract to survive, a plaintiff must show (1) the existence of a contract, (2) that defendant knew of the contract, (3) that defendant intentionally procured a breach of the contract without justification, and (4) that plaintiff suffered injuries as a direct result of the breach), *review denied* (Minn. Feb. 19, 2002). For each count, the district concluded that appellants were unable to establish a causal connection between the issuance of Endorsements 2 and 3 and any damages alleged by appellants. Because the analysis for each count is the same, our discussion of causation is applicable to all four counts alleged by appellants.

interests." Moreover, after Endorsement 4 was issued, the record reflects that Western still considered the issuance of Endorsements 2 and 3 to be a basis to withhold the insurance proceeds. Specifically, appellants produced a letter written by Western's attorney to H&E's attorney on October 17, 2006 stating:

> Western has received payment requests from two parties claiming competing interests in the Improvements and Betterments insurance proceeds: Quest and 110 Wyman. Quest, as named insured, sought payment of the Improvements and Betterments proceeds for the damages to its leased premises. 110 Wyman requested to be a co-payee on the check stating that it, too, had rights under the policy, as landlord. It supported its claim by citing an endorsement to the policy it claimed was in place before the loss occurred, and upon which it relied. *It also cited a correcting endorsement. These endorsements were placed on the policy at the request and direction [of] the Paulet-Slater agency, Quest's insurance agent, acting with the apparent authority of Quest.* Western has confirmed that Paulet-Slater was not the agent of 110 Wyman.
>
> Western challenged 110 Wyman's claims and added an endorsement to the policy voiding the endorsements 110 Wyman cited to support its interest in the policy proceeds. Nonetheless, 110 Wyman *persists and has presented what it contends to be true facts regarding its alleged status under the insurance policy, upon which it claims an interest in the proceeds of the insurance policy*. Please understand that Western is not accepting the facts or contentions made by 110 Wyman. *But because 110 Wyman claims an interest, Western must treat its claims seriously.* Therefore, Western invited both 110 Wyman and Quest to a meeting at my office on October 3, 2006. It was unfortunate that Mr. Davison did not attend.

(Emphasis added.)

In addition to the October 17, 2006 letter from Western's attorney, appellants produced an affidavit from 110 Wyman's attorney which states:

> Based upon the fact that Mr. Privette added my client to [H&E's] insurance policy by endorsement, I took the position that my client had claims against [Western] if [Western] issued a check to [H&E] without my client's name on it. Accordingly, I communicated to [Western's] lawyers, both orally and in writing, that if they issued a check without my client's name on it my client would bring suit against [Western].
>
> If Mr. Privette had not issued the endorsements adding my client to the insurance policy, I could not have taken the position that my client had any claims directly against [Western]. Instead, any claims that my client had through the lease or otherwise could only have been directed toward [H&E] as tenant under the lease.

The affidavit from 110 Wyman's attorney is supported by a letter he sent to Western's attorney on September 21, 2006, claiming that 110 Wyman is an additional insured under Western's insurance policy based upon the endorsements issued by Western. Specifically, the letter provides: "The purported 'Endorsement 4' has never been provided to my client. Thirty days notice must be provided under the Policy to effectuate any asserted changes affecting my client. While Endorsement 4 purports to be effective on February 10, 2006, it is dated September 18, 2006." This evidence, when viewed in the light most favorable to appellants, indicates that there is a genuine issue of material fact with respect to whether the issuance of the endorsements was a substantial factor in Western's decision to delay payment of the insurance proceeds.

Respondents argue that any reference to the endorsements made by Western, such as the references contained in the claim notes, were made before Endorsement 4 was issued. Respondents contend that after Endorsement 4 was issued, Western considered Endorsements 2 and 3 to be completely invalid with no real bearing on the distribution of

insurance proceeds. Thus, respondents argue that after Endorsement 4 was issued, Western's sole basis for the decision to delay payment of the insurance proceeds was based on the lease agreement.

We agree that the lease agreement may have been a factor in Western's decision to delay payment of the insurance proceeds. Indeed, a fact finder may ultimately determine that the lease agreement may have been the only factor in the decision. But the evidence in the record before us is not conclusive of that issue. Endorsement 4 was issued on September 18, 2006. After this endorsement was issued, Western sent the October 17, 2006 letter to H&E's attorney stating that the decision to delay the insurance payment was based in part on the issuance of Endorsements 2 and 3. Moreover, the representations made by 110 Wyman's attorney indicate that 110 Wyman's threats of litigation continued well after Endorsement 4 was issued, and these threats were based, at least in part, on the issuance of the endorsements. In fact, if the endorsements had not been issued, 110 Wyman may not have threatened litigation with Western because any claim to the insurance proceeds would have been against H&E pursuant to the terms of the lease agreement. Thus, respondents' claim that the record unequivocally supports the conclusion that issuance of Endorsement 4 extinguished any issue pertaining to the issuance of Endorsements 2 and 3 is not supported by the record.

We also note that Western's position that 110 Wyman was not entitled to insurance proceeds based upon the issuance of Endorsement 4 is not dispositive of the issue. Although the district court found that Western's position is the "operative perspective," common sense dictates that Western would assert that the issuance of

Endorsement 4 extinguishes any claim 110 Wyman would have on the insurance proceeds. To claim otherwise may subject Western to liability. Therefore, Western's self-serving position on the matter does not establish that there is no genuine issue of material fact regarding causation.

Respondents further claim that the issuance of the endorsements could not have been the proximate cause of any injuries alleged by appellants because the coverage dispute concerned H&E's building and personal property coverage, not H&E's business income (and extra expense) coverage, which was the coverage that paid H&E's rent. Respondents argue that any injury claimed by appellants resulted from appellants' eviction from the Wyman Building for failure to pay $36,092.01 in outstanding rent. And according to respondents, Western issued a check to H&E for $53,136.39 under the business income (and extra expense) coverage, which was sufficient to cover the outstanding rent. Thus, respondents argue that because the $53,136.39 check was sufficient to cover the outstanding rent, and H&E decided not to use that money to pay the outstanding rent, Western's failure to promptly pay insurance proceeds under the building and personal property coverage cannot be the proximate cause of appellants' claimed damages.

We recognize that the $53,136.39 check issued under the business income (and extra expense) coverage would have been sufficient to cover the outstanding rent. But the ultimate damages claimed by appellants include the inability to rebuild and remodel the nightclub, activities that would have been facilitated by payment of the proceeds of the building and personal property coverage that Western withheld. The record reflects

that at the time of the December eviction proceedings, Western was delaying payment of these proceeds. In light of this delay, the amount of the insurance proceeds to be paid to appellants was unclear. In fact, appellants were unsure whether the insurance proceeds would be paid at all. The uncertainty involving the insurance payments under the building and personal property coverage was the alleged damage sustained by appellants because without the knowledge that appellants would have the necessary funds available to rebuild the nightclub, further action, such as payment of rent, was put on hold by appellants in order to curb the risk of additional loss. Consequently, the delay in payment of the insurance proceeds payable under the building and personal property coverage would have been the proximate cause of the alleged damages claimed by appellants. Appellants have presented evidence that creates an issue of material fact as to whether Privette's conduct was the first domino in an unbroken chain of events that lead to appellants' alleged damages. This is a question to be resolved by the trier of fact; summary judgment was improperly awarded.

II.

Appellants contend that the district court erred by denying their motion to amend the complaint to include a claim for punitive damages. Whether to allow a complaint to be amended to include a claim for punitive damages is discretionary with the district court, and an appellate court will reverse only if there is a clear abuse of that discretion. *Utecht v. Shopko Dep. Store*, 324 N.W.2d 652, 654 (Minn. 1982); *LaSalle Cartage Co. v. Johnson Bros. Wholesale Liquor Co.*, 302 Minn. 351, 357-58, 225 N.W.2d 233, 238 (1974).

A plaintiff in a civil lawsuit may not plead a claim for punitive damages in its initial complaint. Rather, a plaintiff seeking punitive damages must move to amend the pleadings to add a punitive-damages claim. Minn. Stat. § 549.191 (2008). The motion is properly granted only when the moving party presents a prima facie case that will reasonably allow the conclusion that clear and convincing evidence will establish that the defendant deliberately disregarded the rights or safety of others. Minn. Stat. §§ 549.191, .20 (2008); *McKenzie v. N. States Power Co.*, 440 N.W.2d 183, 184 (Minn. App. 1989). A prima facie case is established when evidence is presented, which if unrebutted, sustains a fact or supports a judgment. *McKenzie*, 440 N.W.2d at 184. "'[P]rima facie' does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages." *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990), *review denied* (Minn. Oct. 5, 1990). "Clear and convincing evidence" refers to evidence that is "more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). When the motion to amend and supporting affidavits do not reasonably allow the conclusion that clear and convincing evidence will establish that the defendant acted with deliberate disregard for the safety of others, denial of the motion is proper. *McKenzie*, 440 N.W.2d at 184.

A defendant acts with deliberate disregard for the rights or safety of others if the defendant

> has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1. Neither negligence nor gross negligence is sufficient to satisfy the deliberate-indifference standard required for punitive damages. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn. 1990) (grossly negligent conduct insufficient to establish punitive-damages claim); *Utecht*, 324 N.W.2d at 654 (negligent conduct is insufficient to establish punitive-damages claim).

Appellants argue that they made a prima facie showing that respondents engaged in specific conduct that rises to the level of a deliberate disregard for appellants' rights. To support their claim, appellants point to the following facts: (1) Abdul-Hajj, a client of Ross Nesbit, contacted Privette and asked to be added to H&E's property policy; (2) Privette assured Abdul-Hajj that 110 Wyman would be added to the policy; (3) Privette added 110 Wyman to H&E's policy without notifying appellants of the change; (4) Privette's actions took place after the fire occurred at the Wyman Building; and (5) Privette acknowledged that he was required to obtain appellants' consent prior to making the change to the insurance policy and that "he made a mistake" by adding 110 Wyman to the policy. Thus, appellants argue that the district court abused its discretion by denying their motion to amend the complaint to add a claim for punitive damages.

We disagree. There is no evidence that Privette possessed any improper motive when he added 110 Wyman to H&E's policy. And, although Privette admitted that he should not have altered the policy, the admission was made after reflection upon all the

events occurring after the alteration. There is no indication of deliberate disregard for the safety of others at the time the decision to alter the policy was made. Therefore, in light of our standard of review, we conclude that the district court did not abuse its discretion by denying appellants' motion to amend the complaint to add a claim for punitive damages.

Affirmed in part, reversed in part, and remanded.