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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0152**

North Star Mutual Insurance Company,
Respondent,

vs.

Dean Doree,
Defendant,

Richard Terhaar, as Trustee for the
Next-of-Kin of Larry Drewes,
Appellant.

**Filed December 16, 2008
Affirmed
Minge, Judge**

Itasca County District Court
File No. 31-CV-07-2772

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55744 (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant trustee for decedent's estate challenges the district court's summary judgment determination that the motor-vehicle exclusion in respondent insurer's homeowner policy precluded coverage for a claim arising out of a highway accident. We affirm.

FACTS

On July 3, 2005, defendant Dean Doree was towing a pontoon boat on Highway 169 just south of Grand Rapids. While Doree was traveling approximately 40-50 miles per hour, he observed a motorcycle rider, later identified as Larry Drewes, approaching from the opposite direction. When Doree looked into his rearview mirror, Doree saw an inflated tube swing out from behind his vehicle and strike Drewes, knocking Drewes off his motorcycle. Drewes died as a result of his injuries.

The tube had been stored and was being transported inside Doree's pontoon boat. The tube was used to pull swimmers behind the boat. Doree testified that the inflated tube was tightly wedged in the pontoon boat between the rear seat and a railing. In response to a question whether the inflated tube could be described as "a little spring loaded," Doree answered, "yes." The tube weighed approximately 10-15 pounds and was attached to the pontoon boat by a long tow rope. Although Doree had transported the inflated tube in this manner in the past without it coming loose, he testified that it was his normal practice to secure the tube by weighing it down when traveling on the highway.

Doree testified that he did not have to weigh the tube down when the pontoon boat was in the water because the pontoon did not move fast enough for the inflated tube to blow out.

Appellant Richard Terhaar, as trustee of Drewes's estate, brought suit against Doree, alleging that Doree was negligent in operating his vehicle and in failing to properly secure the tube. The insurer of Doree's homeowner's insurance policy, respondent North Star Mutual Insurance Company, brought a declaratory judgment action, arguing that the incident is excluded from coverage based on a motor-vehicle exception. Doree's homeowner's insurance policy contains the following exclusion:

This policy does not apply to:

....

“bodily injury” or “property damage” which results from the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading, or unloading of “motorized vehicles”, trailers, or watercraft owned, operated or used by or rented or loaned to an “insured.”

North Star moved for, and the district court granted, summary judgment in favor of North Star. This appeal follows.

DECISION

On review of a summary judgment, we assess whether there are genuine issues of material fact and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The interpretation of insurance language is a question of law, which we review de novo. *Meister v. W. Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992).

I.

The first issue on appeal is whether the motor-vehicle exclusion applies to preclude North Star Mutual's obligation to indemnify Doree against the claimant. An appellate court will construe exclusions from insurance coverage narrowly. *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). "An insurer seeking to escape its duty to defend has the burden of establishing that all parts of the cause of action fall clearly outside the scope of coverage." *Metro. Prop. and Cas. Ins. Co. v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999).

Appellants argue that Minnesota's divisible, concurrent-cause doctrine extends homeowner's liability coverage to the July 3, 2005 accident, relying on a line of court decisions beginning with *Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917 (Minn. 1983). In *Noska*, the court held that a plaintiff may recover on the tortfeasor's homeowner's policy for injuries sustained through the use of a motor vehicle when "two independent acts, one vehicle-related and one nonvehicle-related" combine to cause the injury. *Id.* at 921. In *Noska*, the insured placed live embers into uncovered steel drums on a trailer and then drove the drums to a nearby landfill. *Id.* While driving, sparks flew from the barrels and ignited fires resulting in extensive property damage. *Id.* The court in *Noska* held that there was both a motor vehicle and non-motor-vehicle cause of the fires and that the homeowner's policy provided coverage for the non-motor-vehicle-related cause of the fire (placing live embers in an uncovered barrel) despite the fact that the fire also arose out of the use of the motor vehicle. *Id.*

In *State Farm Ins. Cos. v. Seefeld*, the court limited the application of *Noska*'s concurrent-cause doctrine to causes of injury that “*arose* independently of each other . . . *operated* in conjunction to bring about the loss . . . [and] *could have* operated independent of a motor vehicle to cause the loss.” 481 N.W.2d 62, 65 (Minn. 1992) (footnote omitted). In *Seefeld*, the injury resulted from the negligent design of a trailer that was being towed by an all-terrain vehicle. *Id.* In holding that the *Noska* concurrent-cause doctrine did not apply to extend the homeowner's coverage, the court in *Seefeld* stated, “we think that the remote possibility the injuries in this case could have been caused without the use of a motor vehicle is insufficient to bring the trailer's negligent design and construction under *Noska*'s concurrent-cause doctrine.” *Id.*

Since the supreme court's *Seefeld* opinion, the court of appeals has considered the divisible, concurrent-cause doctrine in three published opinions. First, in *Austin Mut. Ins. Co. v. Klande*, this court declined to apply the divisible, concurrent-cause doctrine to extend homeowner's insurance coverage to an injury resulting from a parked, hot motorcycle, which fell on the owner's nine-year-old nephew who was climbing on the motorcycle, severely burning the boy. 563 N.W.2d 282, 284 (Minn. App. 1997). The claimant argued that the uncle was negligent in not properly caring for the boy. *Id.* Although the burns were caused by the boy's contact with the motorcycle muffler that was hot from recent highway driving, the claimant argued that the “negligent supervision claim create[d] a concurrent causation situation putting this case within the holding of . . . [*Noska*].” *Id.* at 284. This court concluded that *Noska* was inapplicable, holding that “[b]ecause the negligent supervision claim is so intertwined with and intimately

connected to the insureds' ownership and use of the motorcycle it cannot be said that the claim arose independently of the motorized vehicle related cause." *Id.*

The issue of concurrent cause was also considered in *Illinois Farmers Ins. Co. v. Duffy*, 618 N.W.2d 613 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001). In *Duffy*, the insured allowed his underage daughter to hold a party at his house and the insured purchased alcohol to be served at the party. *Id.* at 614. Two teenagers who attended the party left together in a motor vehicle. The intoxicated driver lost control of the vehicle, hit a tree, and was killed. *Id.* The insured and the claimant argued that "just as damages [in *Noska*] could have resulted from the live embers without the act of driving, so too the intoxicated minors could have been injured through the use of alcohol without a motor vehicle, such as from alcohol poisoning or sustaining injuries from a fight." *Id.* at 616. This court declined to apply the divisible, concurrent-cause doctrine and stated that "if there is only a 'remote possibility' that injury could have occurred from the concurrent cause without a motor vehicle, the doctrine will not be applied." *Id.* (quoting *Seefeld*, 481 N.W.2d at 65).

Finally, in *Midwest Family Mut. Ins. Co. v. Schmitt*, this court held that the divisible, concurrent-cause doctrine was not applicable and that the motor-vehicle exclusion in the homeowner policy precluded coverage because the possibility that the injury could have been caused by the non-motor-vehicle factor alone was implausible and too remote. 651 N.W.2d 843, 849 (Minn. App. 2002). The motor vehicle in *Schmitt* was a truck-mounted crane. The injury occurred when the motorized crane was being used to hoist a car off a truck bed with a chain that was wrapped around the car. *Id.* at 845. The

chain broke and the car fell on claimant. *Id.* Failure to inspect and use of a defective chain was the non-motor-vehicle cause. In *Schmitt*, this court said that “*Seefeld* makes clear that for the divisible, concurrent-cause doctrine to apply, the injured party must establish that the non-vehicle-related cause could have operated independently of a motor vehicle to cause the loss.” *Id.* at 848. In holding that the motorized-vehicle exclusion in the homeowner’s policy precluded coverage, we said that “if those possibilities are too remote, the doctrine will not be applied.” *Id.* at 849.

In our case, the district court held that there were two causes of the injury and those causes are not in dispute on appeal. The death of the motorist can be attributed to both the negligent operation of a motor vehicle and the negligent securing of the tube. As in *Seefeld*, it is clear that, although the two causes arose independently, they operated in conjunction to bring about the harm. The question for this court under *Seefeld* was whether the non-motor-vehicle cause could have operated independently to cause the harm. Appellants argue that the court erred in finding that negligent storage could not have cause the injury without the motor vehicle and that, in fact, the injury here could have resulted from the negligent storage alone. In support of their argument, appellants state that the tube was “spring loaded” and, like the embers in *Noska*, the tube could have blown out of the boat and into the road if the boat was simply parked next to the road. Appellants emphasize that the concession that the tube may have been “spring loaded” establishes an independent, concurrent basis for its causing the accident.

The uncontested facts illustrate the remote possibility, if any, of this accident occurring without the motor vehicle. Doree’s testimony indicates that the tube weighed

10 to 15 pounds, and Doree did not have to weigh down the tube when the boat was on the water because the boat did not travel fast enough to blow the tube off the boat. Given the vibrations from the operation of a boat on water with waves and wind, the record indicates the tube was hard to dislodge. In order for the tube to pose a risk to motorists without the vehicle, the pontoon boat would have had to have been parked next to the road, on a day with a wind strong enough to blow an item weighing 10-15 pounds out of the boat and into the path of a motorcycle. We note that the witness did not directly testify to the “spring loaded” character of the tube. Rather, Doree acceded to this characterization by appellant’s counsel in the course of a deposition. Even accepting the possible “spring loaded” nature of the tube, the pontoon would have to have been parked so close to the road and the tube would have had to spring so far and with enough force to hit a motorcyclist on the road.

The supreme court in *Seefeld* held that the remote possibility that the injuries could have been caused without a motor vehicle was not enough. Here, the possibility that death would have resulted from the tube being blown or springing from a stationary object is highly remote. We conclude that, because the possibility of the combination of factors that would need to converge in order to create a dangerous condition is remote, the divisible, concurrent-cause doctrine is not applicable and the district court did not err in granting summary judgment.

II.

The second issue is whether the district court improperly weighed evidence in granting summary judgment. The general rule is that a motion for summary judgment

will 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 of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

“Proximate cause is a question of fact which normally must be left to the jury, and causation becomes a question of law only where different minds can reasonably arrive at only one result.” *Lyons v. SCNEI, Inc.*, 262 N.W.2d 169, 170 (Minn. 1978). Mere speculation and general assertions, without some concrete evidence, is not enough to avoid summary judgment. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995); *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). In reviewing whether the divisible, concurrent-cause doctrine applies, this court in *Schmitt* stated that “the district court may consider theoretical possibilities to explain how the accident could have occurred without a motor vehicle in determining whether to apply the divisible, concurrent-cause doctrine. But if those possibilities are too remote, the doctrine will not be applied.” *Schmitt*, 651 N.W.2d at 849 (citing *Seefeld*, 481 N.W.2d at 65; *Duffy*, 618 N.W.2d at 616).

Appellants argue the district court weighed the evidence surrounding the claim that the tube was spring loaded. However, as *Schmitt* indicates, this court has the ability to review a theoretical possibility and evaluate its remoteness on an appeal from summary judgment. The underlying facts of this case are not in dispute. Only Doree’s deposition, his statement to police and photographs of the boat are in the record. It is undisputed that the accident was caused by a tube flying from a pontoon boat being

towed by a vehicle. Further, it is undisputed that there were two concurrent causes of the injury: negligent driving and negligent storage. Appellants only challenge that the accident *could have been caused* in the absence of the motor vehicle. Appellants argue that it was inappropriate to “weigh” the plausibility or remoteness of their independent, non-motor-vehicle theory and that any weighing of the plausibility of the theory should have been left to a jury.

The supreme court and this court have upheld summary judgments where the district court and the court of appeals have evaluated the plausibility of a hypothetical non-motor-vehicle alternative scenario. In *Seefeld*, the supreme court held that the “remote possibility” of the accident occurring without the motor vehicle was insufficient to implicate the divisible, concurrent-cause doctrine. 481 N.W.2d at 65. In *Duffy*, the court of appeals rejected the claimant’s argument that the intoxicated minors could have been injured through the use of alcohol without a motor vehicle, concluding that the injuries suffered were directly linked to the motor vehicle. 618 N.W.2d at 616. Similarly, in *Schmitt*, this court reviewed the claimant’s independent-cause theory and concluded that “it was impossible to imagine” without factual support and too remote. 651 N.W.2d at 849. These cases demonstrate that a threshold evaluation of remoteness is appropriate in the summary judgment proceedings.

Because there are no issues of fact in dispute and because the only dispute is in regard to the “remoteness” or plausibility of a hypothetical non-motor-vehicle cause, appellant’s claim that the district court improperly granted summary judgment fails under the court’s analysis in *Seefeld*, *Duffy* and *Schmitt*.

III.

The third issue is whether the district court properly determined that other exclusions would apply to exclude coverage. Because we determine that the motor-vehicle exclusion relieves North Star of an obligation to indemnify Doree, we do not consider whether the other exclusions would also bar coverage.

Affirmed.

Dated: