STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2461

Brian Lindsay,
Appellant,

vs.

St. Olaf College, et al.,
Defendants,

Labconco Corporation,
Respondents.

Filed January 29, 2008
Affirmed
Klaphake, Judge

Rice County District Court
File No. C6-03-1557

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Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

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

KLAPHAKE, Judge

On July 11, 2002, appellant Brian Lindsay, an accomplished undergraduate student majoring in chemistry at St. Olaf College (St. Olaf), was severely burned while participating in a summer research program that required him to work in a laboratory under the direction of Patrick Riley, a chemistry professor. While he was attempting to quench a 2-liter, 3-neck flask that contained an unknown chemical compound, the flask exploded, and chemical debris sprayed out toward Lindsay, igniting his clothes.[1]

At the time of the explosion, the flask was located under a fume hood manufactured by respondent Labconco Corporation (Labconco) and distributed by respondent Wright Line, LLC (Wright Line). Respondent Himec, Inc. (Himec), a mechanical engineering company that specializes in heating, ventilation, and air conditioning, allegedly assisted in the installation and ventilation of the fume hood.

[1]According to Professor Riley, the quenching process consists of: (1) injecting a controlled stream of argon gas into the sealed flask to protect the chemical compound residue within from contact with volatile gases; (2) introducing toluene to raise the boiling point or "blanket" the chemical residue in the flask; (3) adding a mechanical stirring bar; (4) gradually injecting incremental amounts of isopropyl alcohol and/or water into the flask to control the release of gases from the compound and to neutralize the residue within the flask; and (5) venting the stream of argon and any released gases through a mineral drip that exits the building. The timing of the alcohol and water additions to the flask, as well as their proportions, is dictated by reactions that can be observed within the flask, such as release of gases in the form of bubbles or increased temperature.

Respondent EOG Environmental, Inc. (EOG) contracted with St. Olaf to provide annual removal of hazardous waste from the St. Olaf campus.

Lindsay initiated a negligence and product liability action against St. Olaf, Riley, Labconco, Wright Line, Himec, and EOG. All defendants moved for summary judgment. The district court denied the motions as to St. Olaf and Professor Riley, and that decision is the subject of a separate appeal before this court in *Lindsay v. St. Olaf College*, No. A06-2137 (Minn. App. Jan. 29, 2008). The district court granted summary judgment to the remaining four defendants, concluding that appellant failed to establish genuine issues of material fact for trial and respondents were entitled to judgment as a matter of law. Because we conclude that the district court properly granted summary judgment to respondents, we affirm.

D E C I S I O N

The district court shall grant summary judgment if the pleadings, discovery, and affidavits show that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in applying the law. *In re Collier,* 726 N.W.2d 799, 803 (Minn. 2007). The appellate court must consider the evidence in the light most favorable to the party against whom summary judgment was granted. *Gradjelick v. Hance,* 646 N.W.2d 225, 231 (Minn. 2002). "[E]vidence 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" does not constitute a material fact. *DHL, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "The party opposing summary judgment may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed later at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004).

A. Design and Installation Claims

Lindsay claims that the district court erred by granting summary judgment to Labconco, Wright Line, and Himec on his design defect and negligent installation claims. "For a products liability claim, the plaintiff must demonstrate that a product was defective at the time it left the defendant's control and that the defect caused injury to the plaintiff." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). In Minnesota, products liability law imposes liability on the distributor of a defective product as well as the seller. *Id.* A prima facie negligent design claim consists of a product in a defective condition that is unreasonably dangerous to the user, a defect that existed when it left the designer's control, and causation. *Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352, 356 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991); s*ee Bilotta v. Kelley Co.*, 346 N.W.2d 616, 621-22 (Minn. 1984) (setting forth jury instructions for design defect claim).

The district court's order granting summary judgment to the "fume hood defendants" references four claims raised by Lindsay: (1) the fume hood was designed and installed to protect against explosions and failed to do so; (2) the fume hood was

designed and installed to ventilate flammable fumes and failed to do so, enhancing Lindsay's injuries; (3) the fume hood was improperly designed with a vertical sash rather than a horizontal sash or combination horizontal and vertical sash that would have protected Lindsay from the explosion; and (4) the fire extinguishers were negligently selected and installed with the fume hood.

(1) As to the first claim, the district court found that Lindsay failed to provide evidence that the three "fume hood defendants" had a duty to design or install a fume hood that would protect Lindsay from an explosion. A significant amount of evidence supports the district court's decision, including the fume hood's design specifications, other Labconco materials, and expert testimony about the standard uses for fume hoods. For purposes of summary judgment, however, we are not concerned with weighing this evidence, but rather with whether Lindsay offered material facts to show that the fume hood was designed to protect against explosions. *See Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007) ("Weighing the evidence and assessing credibility on summary judgment is error").

We agree with the district court's conclusion that Lindsay failed to establish material facts showing a causal link between the explosion of the flask and any defect in the fume hood. It is undisputed that the explosion originated in the flask. Lindsay provided no evidence showing that a defect in the design or installation of the fume hood caused the flask to explode. Thus, the district court properly granted summary judgment on the design defect and installation claim as it related to explosion of the flask. *See Osborne v. Twin Town Bowl, Inc.*, 730 N.W.2d 307, 310 (Minn. App. 2007) ("Although

proximate cause generally is a question of fact for the jury, where reasonable minds can arrive at only one conclusion, proximate cause becomes a question of law and may be disposed of by summary judgment"); *Drager v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 883 (Minn. App. 1993) (affirming grant of summary judgment to manufacturer of window screens because manufacturer had no legal duty to design product to prevent people from falling out windows), *review denied* (Minn. Apr. 20, 1993); *Rients v. Int'l Harvester Co.*, 346 N.W.2d 359, 362 (Minn. App. 1984) ("In any theory of products liability, the plaintiff must show a causal link between the alleged defect and the injury."), *review denied* (Minn. Oct. 30, 1984).

The only evidence that appears to support Lindsay's claim is the opinion of his expert, Robert Morris, an engineer with 40 years of experience in "fume hood design, manufacture, instruction, distribution, installation, and operation." In Morris' opinion, the purpose of a fume hood is "to protect the worker from leakage and spillage of fumes in the form of gases, vapors, liquids, liquid splash, powders, and explosions."[2] Morris relied on Labconco's sales materials and hood warning, as well as industry standards, in arriving at the opinion that Labconco's fume hood should have protected Lindsay from explosions. But these materials did not purport to offer protection against explosions, and most materials specifically exempted explosions from fume hood protection. Thus, Morris' opinion constituted a bald assertion without evidentiary support, and the district court properly found that it did not establish a material fact for trial. *See Dyrdal*, 689

[2] The other engineering expert for Lindsay, Robert Fischer, states that the purpose of a fume hood is "to protect the worker and prevent leakage and spillage of fumes in the form of gases, vapors, or liquids towards the operator."

N.W.2d at 783 (ruling that "unverified and conclusory allegations" do not constitute material facts); *DLH*, 566 N.W.2d at 70 (in determining whether material fact exists, district court is not required to "ignore its conclusion that a particular piece of evidence may have no probative value").

(2) Next, Lindsay claims that the district court erred in determining that he presented no evidence that "the presumed defect in the installed hood as to its exhaust capacity and spillage was a proximate cause of [his] injuries." In granting summary judgment on this claim, the district court concluded that Lindsay "presented no evidence that flammable fumes were present or were leaked in the fume hood in sufficient quantities to sustain combustion over and above that which resulted in the original explosion in the flask[,]" and that he offered no medical evidence to show that he suffered "enhanced injuries attributable to gases or chemicals that were not part of the immediate explosion in the flask."

Expert testimony was necessary to establish a causal link between non-ventilated fumes in the hood and their enhancement of Lindsay's injuries. *See Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 761 (Minn. 1998) (allowing admission of expert testimony "if scientific, technical, or other specialized knowledge will assist the trier of fact to determine a fact issue"); *see Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1260 (1982) ("under Minnesota law the plaintiffs' burden of proof should be deemed satisfied against the manufacturer if it is shown that the design defect was a substantial factor in producing damages over and above those which were probably caused as a result of the original [injury]").

Here, the chemical compounds that caused the initial explosion were unknown, and Lindsay's experts merely provided theoretical suggestions about how any fumes in the fume hood that were released during the quenching process or were present due to other chemicals in the vicinity might have aggravated his injuries. Morris gave the opinion that fumes present in the hood "caused or enhanced" Lindsay's injuries, and John Broadhurst, an expert in mechanical kinematics, the science of mechanical motion, gave the opinion that fumes present in the fume hood "likely substantially contributed to the injury[.]" More than a theoretical basis for an injury is required to survive a motion for summary judgment. *See Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 155 (Minn. 1982) (noting that an expert "should not be allowed to speculate").

The district court's second basis for granting summary judgment on the enhancement claim was that Lindsay failed to provide expert medical testimony linking his injuries to the presence of fumes unrelated to the original explosion. A medical expert witness must have both scientific knowledge and practical experience in the area in which the testimony is sought. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692 (Minn. 1977).

> Expert opinion is required to prove causation if the issue is outside the realm of common knowledge:
>
> > Where a question involves obscure and abstruse medical factors such that the ordinary layman cannot reasonably possess well-founded knowledge of the matter and could only indulge in speculation in making a finding, there must be expert testimony, based upon an adequate factual foundation that the thing alleged to have caused the result not only might have caused it but in fact did cause it.

Gross, 578 N.W.2d at 762 (quotation omitted) (affirming grant of summary judgment where plaintiff failed to offer evidence on cause of equine lameness in action against horse boarder); *see Walstad v. Univ. of Minn. Hosps.*, 442 F.2d 634, 639 (8th Cir. 1971) ("when the causal relation issue is not within the common knowledge of [a lay person] causation in fact cannot be determined without expert testimony"). Lindsay provided no medical expert witness opinions to differentiate the injuries caused by the explosion from any injuries related to the presence of fumes in the fume hood.

We conclude that the district court properly granted summary judgment in favor of Labconco, Wright Line, and Himec for both the defective design and negligent installation claims because Lindsay failed to present sufficient evidence to prove an essential element, causation. *See Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. App. 1994) (affirming grant of summary judgment as "mandatory" against party who failed to establish an essential element of a cause of action).

(3) The district court also granted summary judgment to Labconco and Wright Line on Lindsay's claim of negligent design of the fume hood sash. The court's order stated that the evidence was conclusive that St. Olaf was responsible for the decision to order a vertical sash rather than a horizontal sash. Labconco manufactured both types of sashes, as well as a combination horizontal and vertical sash. It is undisputed that St. Olaf Professor Gary Spessard was assigned the task of choosing a fume hood for the student laboratory. Based on his 35 years as a professional chemist working with fume hoods, Spessard evaluated the merits of one type of fume hood sash over another and

chose the vertical sash.[3] He stated that he did not consult with Labconco in choosing the vertical sash but did read their materials. Thus, because St. Olaf was solely responsible for any negligence in the selection of the vertical sash, the district court properly granted summary judgment to Labconco and Wright Line on this issue. *See Drager*, 495 N.W.2d at 883.

(4) Labconco offered for sale a fume hood that included optional fire extinguishers, and Professor Spessard chose to purchase this option as an "extra measure of safety." Lindsay claims that "the presence of fire extinguishers in the fume hood would lead users to believe that the hood could safely accommodate flammable atmospheres and safely contain explosions and fires." Minnesota law does not recognize a cause of action for negligent inclusion of fire safety equipment. To the contrary, a party's failure to include fire safety equipment has been held to be negligent under certain circumstances. *See Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 571 (Minn. 1979) (ruling in claim against airport fixed base operator that jury could apportion negligence for operator's failure to have fire extinguishers available as preventive measure). Because this claim is without merit, the district court properly granted summary judgment to Labconco and Wright Line.

[3] Professor Spessard stated that "There are advantages and disadvantages to both arrangements. And with the horizontal sashes, yes, you can have a partition that goes from the top of the hood to the bottom that's solid, but on the other hand, the openings are completely open that are not covered by those horizontal sliding sashes. The vertical sash, you can open just the bottom part of the hood, you can still have the entire part protected. To me that seemed a better option than the other one."

B. Duty to Warn Claim

Lindsay further claims that the district court erred by failing to specifically address his duty to warn claim in its summary judgment order. "[F]ailure to warn is a cause of action separate from defective design." *Drager*, 495 N.W.2d at 884 (quotation omitted); *see Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924-25 (Minn. 1986) (noting that even where a design defect claim fails, a cause of action may be based solely on the manufacturer's failure to warn against foreseeable uses of a product). Whether a duty to warn exists is a question of law for the court. *Germann*, 395 N.W.2d at 924. The adequacy of a warning is a fact question. *J & W Enters., Inc. v. Economy Sales, Inc.*, 486 N.W.2d 179, 181 (Minn. App. 1992). Here, the fume hood contained a warning that stated, "This enclosure is not provided with explosion proof electrical equipment and should not be used with flammable or explosive atmospheres."

A product user's claim of negligence based on an inadequate product warning requires the product user to have read and relied on the warning. *Id.* "Absent a reading of the warning, there is no causal link between the alleged defect and the injury[,]" and a district court may properly grant summary judgment to the product manufacturer under such circumstances. *Id.*

Lindsay's duty to warn claim fails for two reasons. First, Lindsay stated that he did not remember whether he read any warning on the fume hood. *See id.* Second, Lindsay stated that his "understanding regarding the fume hood was that we could perform the tasks that Professor Riley had taught and instructed us in the fume hood." Based on this statement, Lindsay would not have acted differently had he read an

"adequate" warning. *See Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 276 (Minn. 1984) (plaintiff failed to establish causation element on duty to warn claim when evidence showed that warning "would not have induced" conduct in conformance with the warning).

For these reasons, we affirm the grant of summary judgment on Lindsay's duty to warn claim. Although the district court did not specifically address this claim in granting summary judgment, this court need not remand if a claim fails as a matter of law. *See Mullins v. Churchill*, 616 N.W.2d 764, 776 (Minn. App. 2000) (affirming district court's grant of summary judgment, despite a district court's failure to address a negligence claim, because respondents were entitled to summary judgment as a matter of law on that claim), *review denied* (Minn. Nov. 15, 2000); *see also Myers by Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (noting that appellate court will affirm summary judgment if it can be sustained on any grounds), *review denied* (Minn. Feb. 4, 1991).

C. Negligent Disposal Claim

Lindsay claims that EOG breached a legal duty to inspect St. Olaf's laboratories for hazardous wastes, to identify as hazardous the flask that exploded, and to advise St. Olaf to dispose of it. EOG had a "lab pack" agreement with St. Olaf that required EOG to package numerous small containers of hazardous waste into a drum and to annually remove the drum from the college premises for proper disposal. St. Olaf designated a room for hazardous waste storage until its annual disposal by EOG. All St. Olaf professors stated that, consistent with federal regulations, it was their duty to identify hazardous wastes for disposal; the EOG contract did not require EOG to make this

determination. Despite this evidence, Lindsay argues that EOG breached a common law duty by failing to identify and remove the flask.

Existence of a legal duty is a question of law. *Laska v. Anoka County,* 696 N.W.2d 133, 138 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). A legal duty may be demonstrated by a contract between the parties, a duty set forth by statute or the common law, or the conduct of the parties. *ServiceMaster of St. Cloud v. GAB Business Servs.*, 544 N.W.2d 302, 307 (Minn. 1986).

Lindsay argues that a duty "turns on the foreseeability or probability of injury[,]" and that it was foreseeable, based on EOG's prior voluntary inspections at St. Olaf, that the flask would be present in the laboratory where Lindsay was injured. This assertion ignores that there are two requirements for a duty to exist under these circumstances: the existence of a special relationship as well as the foreseeability of harm. *Errico v. Southland Corp.* 509 N.W.2d 585, 587 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994).

Under the common law, "a person does not have a duty to give aid or protection to another or to warn or protect others from harm caused by a third party's conduct." *Becker v. Mayo Found.,* 737 N.W.2d 200, 212 (Minn. 2007). "An exception to this general rule arises when the harm is foreseeable and a special relationship exists between the actor and the person seeking protection." *Id.* (footnote omitted); *see Erickson v. Curtis Inv. Co.,* 447 N.W.2d 165, 168-69 (Minn. 1989). When the duty arises, the injured party is typically "particularly vulnerable" and the party who holds the duty has "considerable power over" the injured party's welfare. *Donaldson v. Young Women's*

Christian Ass'n, 539 N.W.2d 789, 792 (Minn. 1995); *see H.B. by Clark v. Whittemore,* 552 N.W.2d 705, 708 (Minn. 1996) (noting that duty premised on special relationship typically arises when there is "some degree of dependence"); *see also* Restatement (Second) of Torts § 314A (1965) (recognizing four types of special relationships, including common carrier and passenger, innkeeper and guest, land possessor who holds land out to public and invitees, and other situations where one party is either required by law to take custody of another party or circumstances exist where a party, by voluntary action, deprives the other party of normal opportunities for protection). But "the law has been cautious and reluctant to impose such a duty upon a business enterprise," and "a mere merchant-customer relationship is generally not enough." *Errico,* 509 N.W.2d at 587.

Lindsay offered no evidence to establish that St. Olaf was either vulnerable or dependent on EOG. The record evidence shows only that St. Olaf professors had the duty to identify hazardous waste and did not rely on EOG to identify hazardous waste. Further, it is undisputed that St. Olaf intended to reuse the flask and would have reserved the flask from hazardous waste disposal, so that any negligence on the part of EOG was superseded by St. Olaf's actions. *See Hedlund v. Hedlund,* 371 N.W.2d 232, 236-37 (Minn. App. 1985) (affirming summary judgment for implement dealer when any negligence of a dealer in failing to maintain a tractor before its sale to farmer was superseded by the negligence of farmer who, despite being aware of tractor's mechanical problem, operated it in a negligent manner and injured another); *see Tandeski v. Barnard,* 265 Minn. 339, 346, 121 N.W.2d 708, 713 (1963) (noting "an independent act is

considered an intervening, superseding cause, excusing any prior negligence, if an actor who had the time and the ability to make a conscious choice makes a choice that leads to a result which would not have occurred except for that conscious choice").

Lindsay argues that contrary to the rules of summary judgment, the district court weighed and discounted the opinion of Roy Scharrer, a former EOG sales employee with no background in chemistry, who stated that "a waste removal company exercising ordinarily prudent care . . . would have physically inspected the [St. Olaf] facilities, including laboratories, stockrooms, storage rooms, and any place in which chemicals or materials were located." The district court dismissed this opinion as Scharer's "own equivocal, personal application of his purported standard of care." "An affidavit from an expert cannot create a duty where none exists[,]" and a district court properly granted summary judgment when a plaintiff's expert's affidavit did not create a genuine issue of material fact because the expert provided an opinion on breach of duty where no duty existed as a matter of law. *Safeco Ins. Co. of America v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). The district court properly granted summary judgment to EOG.

Affirmed.