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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0952**

Natural Process Designs, Inc.,
Appellant,

vs.

Lawrence Transportation Company,
Respondent.

**Filed July 7, 2009
Reversed
Ross, Judge**

Winona County District Court
File No. 85-CV-07-3612

Ken D. Schueler, Dunlap & Seeger, P.A., 206 South Broadway, Suite 505, P.O. Box 549,
Rochester, MN 55903 (for appellant)

Timothy P. Tobin, Lynn Schmidt Walters, Gislason & Hunter, LLP, 701 Xenia Avenue
South, Suite 500, Minneapolis, MN 55416 (for respondent)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Willis,
Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

Someone unplugged the electricity to a tenant's commercial space over the 2006 Thanksgiving weekend, cutting off power to freezers where the tenant stored valuable, perishable material necessary to its research and development business. The tenant, Natural Process Designs, Inc. (NPD), believes that one of its landlord's employees caused the power outage inadvertently, so NPD sued the landlord to recover damages for breach of contract and negligence. But the lease contains a broad exculpatory provision that shields the landlord from liability for "any act or neglect" by any other person. And caselaw supporting freedom of contract insists on the enforcement of exculpatory provisions unless the duty allegedly breached by the landlord is a "basic duty." This appeal requires us to decide whether a landlord's duty not to negligently or unreasonably interrupt a tenant's electrical service is the kind of "basic duty" that prevents the operation of a lease's exculpatory clause. Because we hold that it is, we reverse the district court's grant of summary judgment in favor of the landlord, Lawrence Transportation Company.

FACTS

The facts are straightforward, and, at least regarding the issues we must resolve on appeal, the facts are not disputed. Lawrence Transportation leases commercial space to NPD, which uses the space for research and development. NPD keeps perishable material used in its research and development projects in four separate freezers. These freezers depend on uninterrupted electricity. The lease requires Lawrence Transportation

to “provide and pay for electricity” for NPD’s space. NPD’s leased space is on the second floor of a large warehouse in Winona, and the switches controlling the power supply to the NPD space are in an area of the first floor controlled by Lawrence Transportation.

Sometime during the 2006 extended Thanksgiving weekend, someone, allegedly a person employed by Lawrence Transportation, negligently threw one or more of the switches that control the flow of electricity to NPD’s space. This disconnected the electrical power to two of NPD’s four freezers, turning them off and allegedly ruining the research value of the materials they contained.

The lease contains a broad exculpatory clause that is at the center of this appeal:

Article IX

LOSS OR DAMAGE TO PROPERTY

9.01 Risk of loss, Exclusion of Liability, Indemnification.

All personal property belonging to Lessee or to any other person located in or about the Leased Premises shall be there at the sole risk of Lessee or such other person, and neither Lessor nor Lessor’s agents or employees shall be liable for the theft or misappropriation thereof, nor for any damage or injury thereto, nor for death or injury of Lessee or any other persons or damage to property caused by but not limited to the following: water, snow, frost, steam, heat, cold, dampness, falling plaster, explosions, sewers or sewerage, gas, odors, noise, the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds or by any act or neglect of other tenants or occupants of the building, or of any other person, or caused in any other manner whatsoever.

NPD brought this action seeking damages from Lawrence Transportation on the legal theories of negligence and breach of contract. Lawrence Transportation responded with a motion for summary judgment, resting primarily on the lease’s exculpatory clause.

The district court agreed that the exculpatory clause prevented NPD from recovering from Lawrence Transportation, and it entered summary judgment in Lawrence Transportation's favor. NPD appeals.

DECISION

NPD challenges the district court's summary judgment decision. We review a district court's grant of summary judgment for any material factual disputes and to determine whether the district court correctly applied the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). NPD argues that the disputed language in the lease is ambiguous, that the exculpatory clause does not relieve Lawrence Transportation of liability, and that the clause should not be enforced as a matter of public policy because it would allow landlords to escape liability for breaching a basic duty.

I

Lawrence Transportation maintains that the exculpatory language in section 9.01 of the lease unambiguously relieves it of any liability for harm resulting from the negligent acts of its employees. NPD maintains that the clause is ambiguous. Whether a contract is ambiguous is 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). But interpreting an ambiguous contract presents a factual question of the parties' intent. *Republic*, 279 N.W.2d at 354.

NPD contends that language in the third paragraph of section 9.01 renders the exculpatory language of the section's first paragraph ambiguous. The relevant portion of the lease's first paragraph provides, "All personal property belonging to Lessee . . . located in or about the Leased Premises shall be there at the sole risk of Lessee . . . and neither Lessor nor Lessor's agents or employees shall be liable . . . for any damage or injury thereto" The purportedly ambiguity-creating language of the third paragraph refers specifically to Lawrence Transportation's protection from liability caused by a disruption in utility service due to an inability to obtain the service from the source:

"Lessor shall not be liable to any one for cessation of any of the services that Lessor is required to provide under this lease, including but not limited to public utility services . . . due to inability to obtain fuel, electricity, service or supplies from the sources from which they are usually obtained, due to failures in the equipment used to provide such services, or for any reason beyond the control of the Lessor."

NPD argues that an ambiguity arises because the first paragraph of section 9.01 purports to exculpate Lawrence Transportation for the interruption in electrical service while the third paragraph does not exculpate Lawrence Transportation for the interruption in electrical service.

NPD's ambiguity argument is not persuasive. The allegedly conflicting contract provisions address distinct concerns, and they can be reasonably reconciled. The first paragraph of section 9.01 purports to bar Lawrence Transportation's liability for injuries that occur on the property from any act or neglect of any person. The third paragraph bars Lawrence Transportation's liability for utility service interruptions that occur at the source and that result from circumstances beyond its control.

NPD does not support its contention that the two paragraphs are ambiguous with any contrary and reasonable alternative construction. The contested language of the lease appears to be susceptible to only one reasonable interpretation. It therefore is not ambiguous. Because the third paragraph unambiguously refers to the cessation of services due to interruptions at the source of the service—a fact not alleged to have occurred here—that paragraph is not relevant to NPD’s claims.

NPD argues that the rule of construction *ejusdem generis* applies. That rule provides that when a list specifies classes of things that it then refers to only in general, the general statements apply only to the kind of things specifically listed. *Employers Liab. Assurance Corp. v. Morse*, 261 Minn. 259, 264–65, 111 N.W.2d 620, 624–25 (1961). Because the specific language regarding electrical service in the third paragraph does not shield Lawrence Transportation from liability, argues NPD, it controls over the general language in the first paragraph that broadly shields Lawrence Transportation from liability. Among other deficiencies, the argument fails because the third paragraph concerns a different situation than the one presented on our facts, which is covered by the first. The rule of *ejusdem generis* applies when a circumstance appears to be covered by two provisions—one general and one specific—leading to conflicting results and requiring a convention of construction to settle the conflict. As already explained, giving effect to the “general” language concerning the allocation of risk to personal property would not render the “specific” language concerning disruptions in electrical service meaningless. Both provisions can be given their full effect. The lease provision limiting Lawrence Transportation’s contractual liability for unplanned service interruptions at the

source does not concern, and does not control, the lease's general allocation of risk of loss caused by a third person.

We conclude that the first paragraph of section 9.01 unambiguously governs Lawrence Transportation's liability for NPD's loss. And as NPD acknowledges, that paragraph "purports to exculpate Lawrence [Transportation] from liability for the termination of electrical services." We therefore must decide whether public policy prevents enforcement of the exculpatory clause.

II

NPD argues that the exculpatory clause shielding Lawrence Transportation from liability for harm to personal property should not be enforced because Lawrence Transportation's provision of electrical service to NPD is a basic duty. Exculpatory clauses are disfavored and should be strictly construed against the purportedly exculpated party. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005). Some duties of landlords should outweigh the freedom to contractually eliminate a landlord's tort liability. *Vermes v. American Dist. Telegraph Co.*, 312 Minn. 33, 40–41, 251 N.W.2d 101, 105 (1977); *Rossmann v. 740 River Drive*, 308 Minn. 134, 136–37, 241 N.W.2d 91, 92 (1976). Clauses purporting to relieve landlords of liability for negligence initiate a balancing between two important public interests: the interest in freedom to contract and the interest in requiring a landlord to fulfill basic duties. *Rossmann*, 308 Minn. at 136, 241 N.W.2d at 92. Exculpatory clauses in leases are therefore unenforceable if they are contrary to public policy and the interest in contractual freedom

does not predominate. *Id.* at 136–37, 241 N.W.2d at 92–93 (describing the analysis as a “balancing test”).

Whether a landlord’s duty is so fundamental and important to abrogate a contracted-for allocation of risk depends on the lease’s context. *See Vermes*, 312 Minn. at 40, 251 N.W.2d at 105 (considering a landlord’s duty to a commercial tenant). We must first identify what duty Lawrence Transportation ostensibly breached, and then determine whether that duty is so important that it justifies interfering with the freedom of these parties to contract. *Rossman*, 308 Minn. at 137, 241 N.W.2d at 93.

NPD and Lawrence Transportation both characterize the relevant duty as Lawrence Transportation’s obligation *under the lease* to provide electrical service. This misses the mark because the lease requires Lawrence Transportation to “provide and pay for electricity,” and the allegedly tortious conduct was not the failure to provide and pay for the electricity. Rather, it was the negligent disruption of electrical service by a person whom Lawrence Transportation employed. The agreed-upon contractual duties to arrange and pay for electricity are distinct from a potentially basic duty that is incumbent on landlords generally, even when the lease is silent regarding the duty. In this case, we construe that duty as the landlord’s obligation to refrain from unreasonably disrupting this commercial tenant’s essential utility services. This duty does not depend on whether the landlord or the tenant has the contractual obligation to pay for the utility services.

We must therefore decide whether a landlord’s obligation to refrain from unreasonably disrupting a tenant’s essential utility service is so important that a generic exculpatory clause should not protect a landlord that breaches the obligation. It is readily

apparent to us that essential utilities such as gas, water, and electricity are of general importance to real property leased for most uses. And in this case, NPD goes even further by insisting that Lawrence Transportation knew that uninterrupted electrical service was critical to NPD's business because NPD had previously explained that it must maintain constant electrical power to operate its freezers. The record supports that supposition at least as we construe all reasonable factual inferences in favor of NPD, the party opposing summary judgment.

Similarities between this case and *Vermes* inform our judgment that Lawrence Transportation's breach of its duty to refrain from unreasonably disrupting NPD's essential utility service is a basic duty that is not subject to the broad exculpatory provision. Both cases involve a commercial lease and property damage from allegedly negligent conduct. In *Vermes*, the supreme court defined the landlord's duty as the duty to "sufficiently inform" a prospective commercial tenant of a property's suitability for the tenant's specifically intended purpose. 312 Minn. at 40, 251 N.W.2d at 105. So in both cases the allegedly breached duty existed outside the four corners of the lease. The prospective tenant in *Vermes*, a jewelry store, entered into a lease with the landlord but later suffered loss when burglars easily entered the store after hours and stole jewelry worth \$47,185.03. Both cases therefore involve only property loss. In both cases, the property loss was the sort of harm that the landlord should have reasonably foreseen based on specific knowledge of the tenant's intended use. And both cases involve a broadly stated exculpatory clause designed to shield the landlord from all liability arising from negligence.

For these reasons, we hold that Lawrence Transportation had a basic duty to not interfere unreasonably with NPD's electrical service, regardless of whether the obligation to obtain and pay for the service belonged to the landlord or the tenant. We therefore hold that the broad exculpatory provision cannot be enforced to relieve Lawrence Transportation of liability for the negligent interruption of NPD's electricity service.

The parties dispute whether the interruption was the product of negligence attributable to Lawrence Transportation. This presents a triable issue. Because the contract's exculpatory provision is not enforceable, Lawrence Transportation may be liable for damages caused by the service interruption. We therefore reverse the district court's grant of summary judgment.

Reversed.