STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0276, A12-0435

Associated Milk Producers, Inc.,
Appellant,

vs.

Compressor Services, Ltd.,
Respondent,

Atlas Copco Compressors, LLC,
Respondent (A12-0276),

American Air Products, Inc.,
d/b/a Clayhill 2,
Defendant,

Sullair Corporation,
Defendant,

Atlas Copco Compressors, LLC, et al.,
Defendants.

Filed September 17, 2012
Affirmed
Worke, Judge

Brown County District Court
File No. 08-CV-06-1040

Keith A. Hanson, Mark J. Hanson, Keith A. Hanson Law Firm, LLC, Hopkins, Minnesota; and

David F. Herr, Jesse D. Mondry, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota (for appellant)

Robert J. Terhaar, Michael S. Rowley, Megan D. Hafner, Terhaar, Archibald, Pfefferle & Griebel, LLP, Minneapolis, Minnesota (for respondent Compressor Services, Ltd.)

Daniel Q. Poretti, Nilan Johnson Lewis, P.A., Minneapolis, Minnesota (for respondent Atlas Copco Compressors, LLC)

Considered and decided by Worke, Presiding Judge; Stauber, Judge; and Toussaint, Judge.*

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

WORKE, Judge

In this negligence and products liability action, appellant Associated Milk Producers, Inc. (AMPI), challenges the district court's summary judgment in favor of respondent Compressor Services, Ltd., arguing that genuine issues of material fact exist regarding whether respondent's conduct was a proximate cause of the fire that destroyed AMPI's production facility.

Because AMPI failed to produce sufficient evidence that respondent's negligence was the proximate cause of the fire's origin or its unreasonable spread, or that respondent had a duty to warn AMPI about potential hazards, we affirm.

FACTS

On December 1, 2004, AMPI's butter manufacturing plant in New Ulm, Minnesota, was nearly destroyed by a fire that originated in its air compressor mezzanine. In the ensuing lawsuit, AMPI alleged that respondent negligently serviced one of the compressors, the Sullair compressor, and that this was a proximate and concurrent cause

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

of the origin and unreasonable spread of the fire. AMPI also alleged that respondent had a duty to warn or instruct AMPI about separator fires, oil leaks, and the use of non-recommended seals to repair the Sullair compressor.

In the months before the fire, respondent serviced the Sullair compressor on three or four occasions. AMPI requested service because of ongoing oil leaks from the Sullair compressor. This brand of compressor was subject to leakage problems, and Sullair Corporation had distributed various bulletins with recommendations for repairing oil leaks. Respondent did not make these available to its repair technicians or to AMPI, and its technicians did not follow the recommendations when repairing AMPI's Sullair compressor. Specifically, respondent's technician used silicon seals to repair leaks in the Sullair compressor; Sullair Corporation recommended against using this type of seal.

Although the initial repairs undertaken in August through October 2004 appeared to be successful, leaks began appearing again shortly before the December 1 fire. On December 1, AMPI maintenance workers discovered that the lubricating oil in the Sullair compressor was very low, and they noticed some pooling of oil around the Sullair compressor. Because it was late in the day, maintenance added two to three gallons of oil and planned to call respondent the next day for service. In order to add oil, the Sullair compressor had to be turned off. AMPI's facility required constant use of air compressors to run various pieces of machinery. Although the Sullair compressor was the main compressor for the plant, a compressor manufactured by defendant Atlas Copco Compressors, LLC, was kept idling on standby to provide extra air compression if needed. When the Sullair compressor was turned off, the Atlas Copco compressor

provided all the air compression for the plant. The Atlas Copco compressor was not as powerful as the Sullair compressor, and workers in the facility noticed a decrease in power; this resulted in the automatic shutdown of some manufacturing equipment. Nevertheless, the Atlas Copco compressor was running at a level within its specifications, not at a level thought to be dangerous for the compressor.

The Sullair compressor was turned off for approximately 15-20 minutes; it went back online at about 5:15 p.m. At approximately 6:13 p.m., there was an explosion on the compressor mezzanine, and flames shot out of the Atlas Copco compressor. The fire spread from the compressor mezzanine, resulting in nearly total destruction of the facility.

AMPI sued respondent, Atlas Copco, American Air Products, Inc., and Sullair Corporation, alleging negligence and products liability. AMPI settled its claims with all parties, except respondent, before filing this appeal.

The parties employed a number of experts to determine the cause of the fire and its spread, including compressor experts, mechanical engineers, and fire-origin-and-spread experts. The experts examined various theories of origin and spread, but there was a broad consensus that the fire originated in the Atlas Copco compressor's separation element. The experts also agreed that the Atlas Copco compressor was not properly grounded, lacked temperature and pressure sensors that could have alerted AMPI to the problem, and was surrounded by combustible polyurethane foam, which became a "ladder fuel" to spread the fire to other combustible materials, such as walls, ceiling tiles,

and cardboard boxes.[1] AMPI's fire-origin-and-spread expert, Dr. Robert Schroeder, opined that the pooled oil resulting from the leaking Sullair compressor would have been a source of fuel for the fire, but that "it [was] not the driving force of the fire." To summarize the testimony of Schroeder and the compressor experts, the Sullair compressor was not the source of the fire; this was confirmed by the burn patterns and the degree of damage to the Sullair compressor, which showed that the fire originated elsewhere and was not burning as hotly when it reached the Sullair compressor. On the other hand, the Atlas Copco compressor had indicia of much higher heat, making it the likely source of the fire.

In February 2007, the district court reserved ruling on respondent's motion to dismiss for failure to state a claim or for summary judgment, but permitted respondent to renew the motion after further discovery. In January 2008, the district court denied respondent's second motion for summary judgment, concluding that there were genuine issues of material fact about whether the fire originated in the Sullair compressor and whether respondent's negligence in servicing the compressor resulted in excessive heat and a flash fire from the Sullair compressor. On October 20, 2010, the district court issued its order granting summary judgment to respondent.[2] The district court concluded that although there was evidence of negligence on respondent's part, the issue before it involved solely the element of proximate causation. The district court noted that AMPI's

[1] The complaint included two counts of negligence, one for the origin of the fire and one for the spread of the fire.

[2] In the same order, the district court granted summary judgment in favor of Sullair Corporation, but denied Atlas Copco's motion for summary judgment.

first claim was that the Sullair compressor was a proximate cause of the origin of the fire because it went offline; because it was offline, the Atlas Copco compressor had to work harder. The district court dismissed this as "but for" causation, which is insufficient to establish proximate causation. Second, the district court reviewed the deposition testimony of Dr. Schroeder, who plainly stated that the leaking oil from the Sullair compressor was not a significant factor in the spread of the fire: it provided ambient fuel but it was not a material cause of the spread of the fire. The district court concluded that AMPI had not produced sufficient material facts to rebut this testimony. Finally, the district court determined that respondent had no duty to warn AMPI about the Sullair compressor because it was not the source of the fire; the district court noted that AMPI's own theory of the case was that the fire originated in the Atlas Copco compressor.

On December 29, 2011, the district court entered final judgment on its October 20, 2010 order for summary judgment; on February 9, 2012, it entered judgment on its order awarding respondent costs and disbursements. AMPI appeals from both judgments; these appeals were consolidated by this court.

D E C I S I O N

Standard of Review

The district court must grant summary judgment if, based on the record before it, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. An appellate court reviews the district court record to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn.

2011). Evidence must be viewed in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But "when the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). In a negligence action, a party is entitled to summary judgment if there is a complete lack of proof in the record of one of the four necessary elements: (1) existence of a duty of care; (2) breach of that duty; (3) injury; and (4) the breach of duty proximately causing the injury. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). At issue here is whether the district court erred by concluding that AMPI failed to produce sufficient evidence to establish that the origin of the fire and the spread of the fire were proximately caused by respondent's negligence. Although proximate cause is a fact-intensive question and is generally a matter for a factfinder, it may be addressed as a question of law suitable for summary judgment "where reasonable minds can arrive at only one conclusion." *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995).

Proximate and Concurrent Cause of Origin of Fire

AMPI argues that there are genuine issues of material fact about whether respondent's negligence was a proximate and concurrent cause of the origin of the fire. AMPI contends that the Atlas Copco compressor had to work harder because the Sullair compressor was offline so that oil could be added; because the Atlas Copco compressor was straining to keep up with the facility's demand for power, it overheated, shorted out because of improper grounding, and caught fire. AMPI asserts that had respondent not

been negligent in its repair of the Sullair compressor, the compressor would not have been shut down for the addition of oil, and the Atlas Copco compressor would not have overheated and caught fire.

"Under Minnesota law, a 'direct' or 'proximate cause' is a cause that had a substantial part in bringing about an accident, harm, or injury." *Curtis v. Klausler*, 802 N.W.2d 790, 793 (Minn. App. 2011), *review denied* (Minn. Oct. 18, 2011). The defendant's act must be a substantial factor in bringing about the injury. *Lubbers*, 539 N.W.2d at 401. The defendant's act must be one that, in the exercise of ordinary care, he would have anticipated would cause injury to others, even if he did not anticipate the particular injury. *Id.*

It is useful to contrast the concept of "proximate cause" with that of "but-for causation," which has been soundly rejected by Minnesota courts as a basis for tort liability. "But-for causation" involves the stringing together of a series of events to explain why an accident occurred; despite the sense of cascading doom, the string of events or the "but-for" causes lack legal significance. *Curtis*, 802 N.W.2d at 793. The supreme court has rejected the "but-for" analysis, saying that "it converts events both near and far, which merely set the stage for an accident, into a convoluted series of 'causes' of the accident." *Harpster v. Hetherington*, 512 N.W.2d 585, 586 (Minn. 1994). In *Harpster*, a neighbor was injured while caring for the homeowner's dog; the dog had escaped from the backyard because of a defective gate; the neighbor stood on the icy front steps to try to lure the dog home, and fell, injuring herself. *Id.* at 585. She premised her theory of recovery on the defective gate: but for the defective gate, the dog would not

have escaped, and she would not have stood on the icy steps. *Id.* at 586. The supreme court rejected this but-for analysis, concluding that the fact of the escape through the broken gate was "simply the occasion for plaintiff to go out on the icy front stoop, not a cause of her fall." *Id.*

AMPI's argument relies on but-for causation: but for respondent's negligent maintenance and repair of the Sullair compressor, it would not have leaked, it would not have been low on oil, maintenance workers would not have shut down the Sullair compressor to add oil, the Atlas Copco compressor would not have had to function as the only air compressor for 15-20 minutes and would not have overheated, and the improperly grounded compressor might not have started on fire. Just as the defective gate in *Harpster* prompted the plaintiff to step out on the icy front stoop, the leak in the Sullair compression may have created the occasion for the Atlas Copco compressor to malfunction, but it was not, as a matter of law, a substantial factor or a direct or proximate cause of the fire: the experts agree that the fire originated in the Atlas Copco compressor because it was improperly grounded and it was insulated with flammable materials.

AMPI suggests that respondent's negligence is a concurring proximate cause. "Concurring causes are direct [proximate] causes which act contemporaneously or so nearly together that the chain of causation is not broken, and together cause an injury which would not have resulted in the absence of either one." *Roemer v. Martin*, 440 N.W.2d 122, 123 n. 1 (Minn. 1989). In order to be a concurrent cause, an act (or failure to act) must be a direct cause of the injury. *Curtis*, 802 N.W.2d at 794. Again,

respondent's negligent act merely created an occasion for injury: the proximate cause of the destructive fire in AMPI's plant resulted from defects in the Atlas Copco compressor. There is no record evidence that the fire originated in the Sullair compressor; the negligent repair and maintenance of the compressor, which led to a leak, which caused the oil level to fall, which prompted maintenance workers to turn the compressor off so they could add oil, created a situation in which the Atlas Copco compressor could fail. But even viewing the evidence in the light most favorable to AMPI, which is our standard of review on summary judgment, there is no evidence that the negligent repair and maintenance of the Sullair compressor was a direct, proximate, or concurring cause of the fire's origin. *See Fabio*, 504 N.W.2d at 761. The district court did not err by concluding that AMPI failed to produce sufficient evidence that respondent's negligence was the proximate cause of AMPI's injury.

Proximate and Concurrent Cause of Spread of the Fire

AMPI asserts that the district court erred by concluding that there was no evidence that respondent's negligent repair of the Sullair compressor was a proximate cause of the unreasonable spread of the fire; AMPI contends that its expert's testimony that leaking atomized oil from the Sullair could have been a significant fuel source raises a genuine issue of material fact that makes this cause of action unsuitable for summary judgment.

AMPI offered expert testimony from several experts, including compressor experts; a mechanical engineer, who examined the two compressors to ascertain the origins of the fire; and fire-spread expert Schroeder. Both compressor experts opined that the Sullair's leaking oil was a cause of the spread of the fire, but both compressor experts

admitted in their depositions that they were not fire-spread experts and their expertise was confined to what occurred in the Atlas Copco compressor. Schroeder, who was hired by AMPI, was the only fire-spread expert.

Schroeder was deposed on July 25, 2007, when he felt he had not had enough time to thoroughly examine everything, and again on April 27, 2010. In 2007, Schroeder testified that

> oil has got to get into an [atomized] state in order for it to be problematic. Just leaking on the underside does not present a problem. . . . [T]here is a line of demarcation post fire that indicated there was oil in the [Sullair], so it just wasn't cascading out of that system. . . . I saw no indication that the oil reportedly coming out of the Sullair unit prior to the discovery of the fire played a role in spreading the fire.

In 2010, Schroeder testified that there was no indication that atomized fuel was spewing from the Sullair compressor. Schroeder stated that, in his opinion, the Sullair compressor did not contribute to the spread and growth of the fire, except insofar as any oil would act as fuel; he said, "[T]here will be some contribution to the body of fire as a result [of discharge of oil from the relief valve]. But it is not the driving force of the fire." Schroeder also noted that he did not observe significant oil accumulation in the area of the compressors or underneath the compressor mezzanine and described the insulating foam on the Atlas Copco compressor as the "ladder fuel" that permitted the fire to climb out of the compressor to ignite various other combustible materials, such as the walls, the shelves, the plywood ceiling, and, presumably, any pooled oil.

The district court accepted Schroeder as an expert in identifying the origin and spread of fires. The district court specifically noted that the other experts' knowledge was

of compressors, not of fire origin and spread. "A district court's evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the trial court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion." *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998). The supreme court described this as a "very deferential standard." *Id.* at 761. In *Gross*, which was an appeal from a summary judgment, the district court rejected the proffered expert opinion because the expert had not practiced in the subject area at issue. *Id.* at 760. Because, without that expert's testimony, the plaintiff had no qualified medical evidence to offer, the district court granted summary judgment. *Id.*

The district court here accepted the testimony of Schroeder and rejected that of the other experts based on their lack of qualification in the area of fire-spread causation. The district court stated

> [AMPI] has a burden at this stage of showing that there are specific facts in existence which create a genuine issue for trial. [AMPI] has not produced evidence that would permit a determination that the oil leaked from the Sullair compressor caused the fire to grow so as to bring about the damages that occurred.

According to *Gross*, it is within the district court's discretion, even at the summary judgment stage, to reject expert testimony that is not within the expert's area of expertise. *Id.* The district court stated that it chose to credit Schroeder's testimony because he was an acknowledged fire-spread expert and to reject the other opinions. Because there is a basis for its determination, the district court did not abuse its discretion.

At the summary judgment stage, AMPI had to make a sufficient showing to establish the elements essential to its cause of action, on which it would bear the ultimate burden of proof. *DLH*, 566 N.W.2d at 69. Here, in order to withstand summary judgment, AMPI had to produce sufficient evidence that respondent's negligence was the proximate cause of the unreasonable spread of the fire. *See Louis*, 636 N.W.2d at 318. AMPI failed to make a sufficient showing: the acknowledged expert, Schroeder, testified that the Sullair compressor did not cause the unreasonable spread of the fire, and the other expert witnesses acknowledged that they were not experts in the spread of fires. The district court did not err by granting summary judgment on AMPI's claim of negligence based on unreasonable spread of the fire. *See DLH, Inc.*, 566 N.W.2d at 71 (stating that no issue of material fact exists if "the nonmoving party presents evidence 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.")

Duty to Warn

AMPI contends that the district court erred by granting summary judgment on its duty-to-warn claim. In its complaint, AMPI alleged that respondent, as a distributor of the Sullair compressor, had a duty to warn about dangerous defects and deficiencies in design, including its propensity to leak oil. In its summary judgment memorandum, the district court did not explicitly address AMPI's duty-to-warn claim against respondent; rather, it discussed AMPI's duty-to-warn claim against defendant Sullair Corporation. The district court noted that (1) AMPI's theory of the case was that the fire did not start

in the Sullair compressor and therefore Sullair had no duty to warn about compressor fires in the Sullair compressor because that is not what happened; (2) Sullair did not have a duty to warn about fires in non-Sullair compressors; and (3) the failure to warn was not a proximate cause of the fire. Although the district court mentioned only Sullair Corporation, the same reasoning applies to respondent, who was a Sullair distributor.

Whether a manufacturer or distributor of a product has a duty to warn is a legal question. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986).

> In determining whether the duty exists, the court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability.

Id. Generally, the duty is to warn of foreseeable dangers; courts examine whether the specific danger or hazard was "objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998).

AMPI made three failure-to-warn claims against respondent: (1) duty to warn of the potential for separator fires; (2) duty to warn or instruct on prevention and repair of oil leaks; and (3) duty to inform AMPI about use of non-recommended seals.

Respondent's duty to warn extends only to the products it distributes; it would have no duty to warn about separator fires in general. *See id.* at 918 (stating that a manufacturer has a duty to protect users of its product from foreseeable dangers). The separator fire here originated in the Atlas Copco compressor; the connection between the

injury and the failure to warn is too remote to be a basis for liability. *See Germann*, 395 N.W.2d at 924.

AMPI argues that respondent should have informed it or provided it with copies of a service bulletin about leaks in Sullair compressors; this service bulletin stated that one should not try to tighten or adjust connections after using Loctite sealant. Again, because the injury here was caused by a fire in the Atlas Copco compressor, the connection between the injury and the failure to warn is too remote to be a proximate cause of the injury. *See id.*

AMPI states that respondent should have informed it that they were using non-recommended seals, apparently claiming that respondent had a duty to warn AMPI that it was negligently performing repairs to the Sullair compressor. But AMPI has not established a connection between the use of non-standard seals and the fire, except insofar as it asserts but-for causation.

Although the district court did not individually address the duty-to-warn claims against respondent, it granted summary judgment on all of AMPI's causes of action against respondent. The district court's decision was not erroneous; AMPI has failed to produce sufficient evidence to withstand summary judgment on this claim.

Costs and Disbursements

When AMPI moved to consolidate these appeals, it indicated to this court that its appeal from the district court's order awarding costs and disbursements was taken solely to preserve its right to obtain reversal of the order should it prevail in the appeal from summary judgment. AMPI neither briefed nor argued the issue of costs and

disbursements. Failure to address an issue on appeal constitutes waiver of that issue. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006). We therefore affirm the district court's award of costs and disbursements.

Affirmed.