STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0167

Moshe B. Git,
Appellant,

vs.

AER Services, Inc.,
Respondent.

Filed March 18, 2013
Affirmed
Hooten, Judge

Dakota County District Court
File No. 19HA-CV-11-401

Alexander J. Wainberg, Kevin M. Morrison, Wainberg Morrison, LLC, St. Paul, Minnesota (for appellant)

Michael L. Puklich, Chanhassen, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Collins, Judge.*

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

HOOTEN, Judge

Appellant challenges the district court's dismissal of his breach-of-contract claim against his former employer, arguing that the district court erred in its interpretation of

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

his employment contract, applied an incorrect standard of gross negligence, and erroneously concluded that his conduct constituted gross negligence. He also argues that we should review whether he was terminated for reasons other than those presented at trial. We affirm.

FACTS

Respondent AER Services, Inc. is a corporation that provides kosher-meat-processing services, including the kosher certification of beef. "Kosher" is a designation applied to food prepared according to Jewish dietary law. *The Compact Oxford English Dictionary* 928 (2d ed. 1991). Appellant Moshe B. Git worked for AER for more than a decade as a "mashgiach." A mashgiach supervises and observes the packaging and shipping of meat to ensure compliance with Jewish law and the kosher process.

Certifying beef as kosher begins with a rabbi qualified to perform "shochet," or slaughtering of the cow. The carcass then proceeds to "bedikha" where two "bodekim" check the carcass's lungs for deformities. If the carcass is free of deformities, the bodekim mark it with red paint indicating that it is kosher. The carcass is sliced lengthwise into two pieces and tagged for USDA purposes. Both halves are weighed and logged into a computer. The first tags are removed and replaced with tags indicating weight and lot number. The halves are then placed into a cooler in chronological order. While in the cooler, plant employees separate the kosher and non-kosher carcasses. The carcasses remain in the cooler for at least 24 hours. AER employees testified that the tags indicating weight and lot number are removed at around 3:00 a.m. before the workday, but Git claimed that he did not know that this occurred.

Next, the carcasses proceed to the boning area where the meat is removed and placed into large containers called "combos." The mashgiach then closes the combos, marks them with kosher stamps, tags them with the supervising rabbi's name, and moves them to the area where they are to be shipped from the plant.

In July 2007, Git and AER entered into an employment contract. The contract limited AER's ability to terminate Git's employment. Git could only be terminated "for cause," which was defined as "gross negligence or willful failure or refusal to perform his specific Hashgacha duties." Git had "Hashgacha," or supervisory, "authority in all stages after the *bedikha*, including the marking done by the *bodekim*." The contract also described the process of reporting job-related concerns. If an issue relating to the kosher marking arose, Git was to contact certain AER employees in order to resolve it.

On May 28, 2010, Git worked his normal shift from 6:00 a.m. to noon. At around 3:00 p.m., bodek Meir Igel called Git to report that there may be an issue relating to the kosher process. On most Fridays, the Islamic process of halal slaughtering immediately follows the kosher slaughter. Igel was concerned that the last cows marked kosher may have been the first cows of the halal slaughter. An animal slaughtered by someone who is not Jewish cannot be kosher.

May 28 was a Friday. On all Fridays beginning at sundown and lasting until sundown the following day, Git and AER's other employees celebrate Shabbat and do not work. That week, Shabbat began at 8:29 p.m. on May 28 and ended on Saturday, May 29, at 9:43 p.m.

Git did not attempt to resolve the potential mixing of halal with kosher meat on Friday between 3:00 p.m. and 8:29 p.m., Saturday after 9:43 p.m., or any time on Sunday or Monday. Git believed that the issue could be resolved "without having to sound [the] alarm." He would simply check the tags of the carcasses in the cooler to see which were slaughtered last when he next reported to work four days later, on Tuesday, June 1.

When Git arrived at work on Tuesday, he met with the facility's plant management to identify the last carcasses marked kosher from Friday's slaughter. The plant manager indicated that this was impossible. Git then attempted to call Rabbi Aryeh Ralbag, the certifying rabbi with the ultimate authority to declare beef kosher or not kosher. He was unable to reach Rabbi Ralbag, but spoke with Rabbi Ralbag's son. Rabbi Ralbag's son said that his father would return Git's call.

There is conflicting testimony about what happened next. Git claims that he called Rabbi Ralbag a second time. Rabbi Ralbag told him that the meat was not kosher and instructed him to obliterate all kosher markings so that the plant would not be able to ship the meat as kosher. After doing so, there was nothing left for Git to do, so he left. As he was leaving, Yosef Ben-Zaken, another AER employee, informed Git that an investigation into the issue was underway, but indicated through his body language that he could leave. Later, Rabbi Ralbag informed Git that he had changed his mind and determined that the meat was kosher.

According to AER, Git told Ben-Zaken about the issue on Tuesday morning. Ben-Zaken then contacted Rabbi Moshe Fyzakov, AER's executive vice president and Git's supervisor. Over the next several hours, Ben-Zaken and Rabbi Fyzakov contacted other

AER employees and Rabbi Ralbag. At around 11:00 a.m., Ben-Zaken, while on the phone with Rabbi Fyzakov, informed Git that an investigation was ongoing to determine whether the meat was kosher. Nevertheless, Git left work. After the investigation, Rabbi Fyzakov contacted Ben-Zaken and stated that Rabbi Ralbag determined that the meat was kosher. Ben-Zaken contacted Git and told him the result of the investigation, but Git did not offer to return to the plant to close the combos. And because Git had already erased the kosher markings, most, if not all, of the meat had been shipped for sale as non-kosher meat.

Rabbi Fyzakov terminated Git's employment on June 1. AER sent Git a letter on June 7 notifying him that he had been fired for cause.

Git sued AER alleging breach of contract, among other claims. After a bench trial, the district court concluded that AER terminated Git for cause. This appeal follows.

D E C I S I O N

On appeal from a bench trial, we view the record in the light most favorable to the district court's judgment. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). A district court's findings of fact are accorded great deference and are not set aside unless clearly erroneous. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999); Minn. R. Civ. P. 52.01. Findings of fact are clearly erroneous if a reviewing court is "left with the definite and firm conviction that a mistake has been made," *Fletcher*, 589 N.W.2d at 101 (quotation omitted), or if they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole," *Rogers*, 603 N.W.2d at 656 (quotation omitted). A reviewing court will not disturb findings of fact if

there is reasonable evidence to support them. *Rogers*, 603 N.W.2d at 656. When reviewing mixed questions of law and fact, we correct erroneous applications of law, but review the district court's ultimate conclusions under an abuse of discretion standard. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002).

I.

Git contends that the district court incorrectly interpreted his contract. It does not appear that Git raised this issue in his pleadings, at summary judgment, at trial, or post-trial. We generally consider only those issues that the record shows were presented and considered by the district court in deciding the matter before it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). A party may not obtain review by raising the same general issue litigated below but under a different theory. *Id.*

But even if we considered Git's contract-interpretation claim, we would not reverse and remand for further proceedings. Contract interpretation is a question of law reviewed de novo. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). We look to the plain language of a contract to determine the parties' intent and, accordingly, assign unambiguous language its plain and ordinary meaning. *Savela v. City of Duluth*, 806 N.W.2d 793, 796–97 (Minn. 2011).

The employment contract states that "Git will have the Hashgacha authority in all stages after the *bedikha*, including the marking done by the *bodekim*." "Hashgacha authority" is not defined in the contract, but was defined at trial to mean "supervisory." Git testified that his supervisory authority and job duties entailed: (1) making "sure that

meat that's designated kosher, would be shipped as kosher and that nothing would interfere in between"; (2) watching "the stages of what's being done with the meat" and "around the entire area as to what's being done. . . . to make sure that the meat . . . wouldn't be contaminated with unkosher meat"; and (3) supervising "[f]rom the moment that . . . the meat left the station of the bodekim until . . . it was ready to be shipped." Git explained that his duties also required him to mark the combos with kosher signs, close the combos in preparation for shipment, and ensure that the rabbi's tag is placed on the combos. He agreed that he was a supervisor in the cooler and had supervisory authority after bedikha. Based on this record, we agree with the district court that Git was responsible for the supervision and observation of the meat packing and shipping process to ensure compliance with Jewish dietary laws and the overall kosher process, and that Git possessed Hashgacha authority over the kosher process, including the marking done by the bodekim.

The contract also states that

> If there is any issue with the Kosher marking done by the *bodekim*, Git agrees to contact the *bodek* who is in charge of the *bodekim* at the time and advise how to resolve the problem; if the issue cannot be resolved, Git agrees to contact Rabbi Fyzakov or another Rabbi in an effort to resolve the problem.

Git testified that if there was any issue with the kosher marking done by the bodekim, he was to contact the bodek in charge in order to resolve the problem. Again, we agree with the district court that in the event of an issue with the kosher marking by the bodekim, Git

was required to contact the bodek in charge and attempt to resolve the issue. If Git was unable resolve the problem, he was to contact Rabbi Fyzakov.

Git contends that his authority was limited in two ways. First, Git asserts that his job duties were limited to "creat[ing] rules for the way in which the cattle were marked **prior to** the process starting."[1] This is not supported by any evidence in the record and the plain language of the contract does not indicate any limitation of his authority to mere rulemaking.

Second, Git asserts that because the alleged mix-up took place during bedikha, rather than after, Git had no duty to act, precluding consideration of whether his conduct was grossly negligent. But Git fails to recognize the broad authority established in the contract and supported by his own testimony. The contract states that "Git will have the Hashgacha authority in all stages after the *bedikha*, including the marking done by the *bodekim*." Again Git testified that he made "sure that meat that's designated kosher, would be shipped as kosher and that nothing would interfere in between" and watched "to make sure that the meat . . . wouldn't be contaminated with unkosher meat." Here, Git was alerted to an issue that may have occurred prior to his supervisory authority. Nonetheless, the problem continued throughout the kosher process and into Git's realm

[1] On this issue, Git urges us to consider a confidential deposition that is not a part of the record. The record on appeal consists of the papers filed in the district court, exhibits, and transcripts of the proceedings. Minn. R. Civ. App. P. 110.01. We may not base our decision on matters outside of the record on appeal and will not consider matters not produced and received in evidence at trial. *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977); *Thiele v. Stich*, 425 N.W.2d at 582–83. AER utilized Git's confidential deposition at trial to impeach Git, but neither Git nor AER submitted it into evidence. And the deposition was not submitted into the record at earlier points in the litigation. For these reasons, we decline to consider the deposition.

of supervisory authority. Potentially non-kosher meat was marked kosher. The kosher marking of non-kosher carcasses is plainly an issue with the marking process, thus triggering the reporting requirements set forth in Git's employment contract. For these reasons, Git's job and reporting duties and supervisory authority were implicated by the events of May 28, and do not preclude analysis as to whether his conduct was grossly negligent.

II.

Git next argues that the district court applied an incorrect standard for gross negligence. Whether a district court applied the correct legal standard is a question of law reviewed de novo. *Am. Bank of St. Paul v. City of Minneapolis*, 802 N.W.2d 781, 785 (Minn. App. 2011).

When determining whether Git's conduct was grossly negligent, the district court relied on *High v. Supreme Lodge of the World*, 214 Minn. 164, 170, 7 N.W.2d 675, 679 (1943) and *State v. Bolsinger*, 221 Minn. 154, 159, 21 N.W.2d 480, 485 (1946). In *High*, the Minnesota Supreme Court defined gross negligence as "[n]egligence of the highest degree." *High*, 214 Minn. at 170, 7 N.W.2d at 679. The supreme court further elaborated in *Bolsinger* that

> 'Gross negligence' is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. . . . But it is something less than the willful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful

> possession of real estate liable to a trespasser whom he has injured.

221 Minn. at 159, 21 N.W.2d at 485 (quotation omitted). Moreover, Git's counsel acknowledged in his closing argument that both sides quoted *Bolsinger* as the applicable standard for gross negligence.

On appeal, Git urges us to adopt what he characterizes as a gross-negligence standard set forth in *Stringer v. Minn. Vikings Football Club, LLC*, 686 N.W.2d 545, 552 (Minn. App. 2004), *aff'd* (Minn. Nov. 17, 2005).[2] In that case, we affirmed the district court's conclusion that team employees were not grossly negligent in their duties because their "actions may reflect poor judgment or lack of reasonable care, but there is no basis to conclude that respondents disregarded the risk to [appellant] altogether in a manner 'equivalent to a willful and intentional wrong.'" 686 N.W.2d at 552 (quoting *State v. Chambers*, 589 N.W.2d 466, 478 (Minn. 1999)). That sentence quotes a portion of *State v. Chambers*, another Minnesota Supreme Court case. A reading of the relevant portion of *Chambers* is instructive: "Gross negligence has been defined as without even scant care but not with such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong." 589 N.W.2d 466, 478–79 (quotation omitted). Thus, it appears that the gross-negligence standard set forth in *Chambers*, and relied upon in *Stringer*, is the same as that in *Bolsinger* and *High*. *High* and *Bolsinger* remain authoritative case law, and no supreme court case or legislative act redefines gross

[2] The Minnesota Supreme Court affirmed *Stringer* on a separate issue and expressly declined to address whether the district court erred by granting summary judgment based on gross negligence. *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 763 (Minn. 2005).

negligence. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (noting that the task of extending existing law rests with the Minnesota Supreme Court or the legislature), *review denied* (Minn. Dec. 18, 1987). For all of these reasons, the district court did not utilize an incorrect legal standard.

III.

Git contends that the district court erred by concluding that his actions rose to the level of gross negligence. As an initial matter, Git incorrectly argues that a de novo standard of review applies when examining whether conduct is grossly negligent. Whether conduct constitutes gross negligence is a question for the trier of fact, in this case, the district court. *See State v. Al-Naseer*, 690 N.W.2d 744, 751 (Minn. 2005). Again, gross negligence is substantially and appreciably higher in magnitude than ordinary negligence, but something less than the willful, wanton, and reckless conduct. *Bolsinger*, 221 Minn. at 159, 21 N.W.2d at 485.

The district court concluded that Git was grossly negligent by failing to address the potential mixing of kosher and halal meat in a timely manner. This conclusion is supported by the district court's findings: Git had Hashgacha authority over the kosher process, including the marking done by the bodekim; at around 3:00 p.m. on Friday, May 28, 2010, an AER employee called Git to report an issue relating to the validity of the kosher process, specifically, cattle slaughtered by the halal slaughterer may have been marked kosher; the potential mixing of kosher and halal slaughter is an issue involving the kosher marking done by the bodekim; Git had five-and-a-half hours before the beginning of Shabbat to report the issue; and Shabbat ended at 9:43 p.m. on Saturday, but

Git did not report the issue to the bodek in charge or Rabbi Fyzakov, or anyone else until returning to work on Tuesday.

These findings are not clearly erroneous, but are supported by the testimony presented at trial, in large part, by Git. Notably, Git testified that he knew that halal meat may have been marked kosher on Friday, but refrained from doing anything until Tuesday. And Git agreed that the halal meat mixed with kosher meat could be an issue affecting whether the meat could be classified as kosher.

Git's conduct may not have been willful, wanton, or reckless. But we agree with the district court's well-reasoned analysis that by failing to do anything on Friday through Tuesday morning—with the exception of Shabbat—Git engaged in conduct substantially more egregious than mere negligence. Git's reliance on *Stringer* relative to this issue is inapposite. In that case, team employees began immediately tending to an extremely ill professional athlete. *Stringer*, 686 N.W.2d at 547–48, 552. Unfortunately, their efforts failed and the athlete died. *Id.* at 548. We held that the employees were not grossly negligent in part because they "took some actions to care for him," and we noted that some of those actions took place on the very day that the athlete began exhibiting distress. *Id.* at 552. Here, Git failed to take any action on the day that he was alerted of the potential mixing of halal and kosher meat, and failed to do so for several days thereafter. On this record, the district court did not clearly err by finding that Git's conduct constituted gross negligence.

IV.

Git argues that AER terminated him for reasons other than those presented at trial. But Git cites no authority in support of the assertion that an employer cannot later articulate reasons for terminating an employee. We decline to reach this issue in the absence of adequate briefing and will not address allegations unsupported by legal analysis or citation. *State, Dep't of Labor and Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919–20 n.1 (Minn. App. 1994).

Affirmed.