STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0924

Mark D. Island, et al.,
Appellants,

vs.

Jason D. Ferguson,
Respondent,

Mesa Underwriters Specialty Insurance Co.,
Respondent.

Filed February 7, 2022
Affirmed
Gaïtas, Judge

Wabasha County District Court
File No. 79-CV-20-320

Ken D. Schueler, John T. Giesen, Dunlap & Seeger, P.A. Rochester, Minnesota (for appellants)

Peter M. Waldeck, Daniel C. Leitermann, Waldeck & Woodrow, P.A., Minneapolis, Minnesota (for respondent Jason D. Ferguson)

Joseph F. Lulic, Timothy L. Garvey, Brownson PLLC, Minneapolis, Minnesota (for respondent Mesa Underwriters Specialty Insurance Company)

Considered and decided by Slieter, Presiding Judge; Smith, Tracy M., Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

In this negligence action stemming from a fire, appellants Mark Island and his insurer Grinnell Mutual Reinsurance Co. (Grinnell) challenge the district court's grant of summary judgment in favor of respondents Jason Ferguson and his insurer Mesa Underwriters Specialty Insurance Co. (Mesa). Appellants argue that the district court improperly granted summary judgment because there is a genuine factual issue as to whether Ferguson negligently caused the fire. Additionally, appellants contend that the district court should have drawn an adverse inference against respondents because they failed to adequately preserve the fire scene for Grinnell's investigation. We conclude that the district court did not err by determining that there is no genuine factual issue regarding Ferguson's negligence or by rejecting appellants' adverse-inference request, and we affirm.

FACTS

Ferguson and Island owned neighboring buildings in downtown Mazeppa that shared a wall. In his building, Ferguson operated a tavern called WD's Bar and Grill. Island's building housed residential tenants and a small office.

Around 3:45 a.m. on March 11, 2018, someone reported that the buildings were on fire. Fire ultimately destroyed the two buildings, and both structures collapsed into their basements.

Several days later, the state fire marshal and an adjuster for Mesa inspected the fire scene. Representatives of Grinnell viewed the scene but did not enter the property at that time. The fire marshal and Mesa's adjuster both suspected that the fire started on the first

floor of WD's along the southern wall, where a pellet stove[1] owned by Ferguson had been located. During the fire, the flooring in this area collapsed, and the pellet stove fell into the basement, landing on top of unused pellets.

Ferguson had used the pellet stove to heat WD's, including overnight, for approximately ten years. On the night of the fire, an 18-year-old employee—who had worked at WD's for about six months and had been trained to use the pellet stove—was tasked with filling the stove with pellets at the end of his shift, between 11:00 p.m. and midnight.

On April 4, 2018, representatives of Mesa and Grinnell spoke by phone. Mesa's agent told Grinnell's agent that the cause of the fire was undetermined, that the company had no interest in conducting further investigation or incurring any further investigation expenses, and that the property would be returned to Ferguson as soon as that day. Grinnell's agent asked Mesa to maintain the fire scene so that Grinnell could inspect it and proposed that both insurers conduct a joint inspection of the fire scene. No agreement was reached on any of these issues during the phone call. Grinnell's agent followed up to discuss a joint inspection of the fire scene by leaving voicemails with Mesa's agent on April 5, 16, and 17. Mesa's agent did not return the calls.

[1] "Pellet stove" is defined as "[a] stove used for heating which burns pellets made of wood or other organic materials." *Pellet stove*, Lexico.com, https://www.lexico.com/definition/pellet_stove (last visited Jan. 31, 2022).

Ferguson and a family member went onto his property on April 10, 2018, with a front loader to remove a marble bench and possibly some scrap metal. The pellet stove was not removed.

On April 25, 2018, with Ferguson's permission, Grinnell's investigator inspected the site, including the pellet stove and its flue and venting components. The investigator did not request an additional site investigation or make any requests to retain items from the site. Grinnell's investigator concluded that the cause of the fire was unknown. One of Grinnell's agents later acknowledged, "I don't have any proof of anyone being at fault." What was left on Ferguson's property was demolished on April 30, 2018.

The fire marshal issued his final report in August 2018. It stated, "I am not able to identify a particular point of origin due to the severity of damage, nor can I identify a specific area of origin." Although he had "an inclination to believe the fire cause could have been related to the use of the wood pellet stove," he could not "prove that or even eliminate the possibility." The report ruled that the cause of the fire was "undetermined."

Appellants filed a complaint against respondents asserting, as relevant here, a negligence claim.[2] Respondents moved for summary judgment and the district court granted the motion.

This appeal follows.

[2] Appellants' complaint also included a claim of promissory estoppel, which appellants withdrew, and a claim for constructive bailment, the dismissal of which is not challenged on appeal.

DECISION

Appellants raise two arguments regarding the district court's summary-judgment dismissal of their negligence claim. First, they contend that the district court erred in granting summary judgment because the circumstantial evidence in the record supports an inference that Ferguson's negligence caused the fire. Second, they argue that even if the "circumstantial evidence were not enough," the district court should have inferred Ferguson's negligence from respondents' premature "destruction" of the fire scene—which occurred when Ferguson removed objects with a front loader before Grinnell's inspection.

1. The undisputed record evidence does not support appellants' negligence claim.

Summary judgment is proper if the movant shows, by citing to specific parts of the record, including depositions, documents, affidavits, admissions, and interrogatory answers, that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01, .03(a). A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). "[O]n a motion for summary judgment, the facts *and the reasonable inferences to be drawn from those facts* must be resolved in [the nonmoving party's] favor." *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021). "Any doubt as to whether issues of material fact exist is resolved in favor of the party against whom summary judgment was granted." *Lubbers*

v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (citing *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974)).

Appellate courts "review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). Reviewing courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

"Negligence is the failure to exercise the level of care that a person of ordinary prudence would exercise under the same or similar circumstances." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014) (citation omitted). To survive summary judgment on their negligence claim, appellants must point to evidence sufficient to show: (1) Ferguson owed a duty of care, (2) Ferguson breached that duty, (3) appellants suffered harm, and (4) Ferguson's breach was the proximate cause of that harm. *See Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 706 (Minn. 2012) (listing the elements of a negligence claim). "[W]hen the record reflects a complete lack of proof" on any of these four elements, a defendant is entitled to summary judgment. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001).

Here, the district court granted summary judgment because the record evidence is insufficient to prove that the pellet stove was the source of the fire and that Ferguson "committed an underlying negligent act." It concluded that, although Ferguson had a duty to avoid foreseeable fires that would spread to Island's building, the undisputed record

evidence could not establish that Ferguson breached that duty or that the fire was caused by any negligence. Rather, the district court observed, appellants' negligence claim was based on mere speculation.

Appellants argue that the district court erred because there are critical factual issues that a jury should decide. They contend that the record evidence establishes factual disputes about the origin of the fire, whether Ferguson's decision to put an 18-year-old in charge of the pellet stove made a fire reasonably foreseeable, whether leaving an unattended stove on overnight made a fire reasonably foreseeable, and whether other conditions, including the building's wood frame and the presence of additional pellets outside of the stove, made it reasonably foreseeable that a fire in the building would quickly spread. Appellants also argue that a reasonable jury could infer from the record evidence that Ferguson breached a duty of care in operating the pellet stove.

Ferguson responds that appellants failed to establish multiple elements of their negligence claim.[3] He argues that the record evidence does not show that he had a duty to guard against fire, that he breached any such duty, or that his actions caused the damage to Island's building.

[3] Ferguson and Mesa filed separate briefs in this appeal. Mesa's brief argues that appellants' arguments to this court do not apply to Mesa because the negligence claim concerns Ferguson alone and appellants have not challenged the district court's dismissal of the constructive-bailment claim. Appellants contend that Mesa waived the argument that the negligence claim is limited to Ferguson by failing to raise it before the district court. Because we affirm the district court's summary-judgment dismissal of the case, we do not address this separate issue.

In an action for a fire loss based on negligence, the burden of proof is on the plaintiff to establish the origin and cause of the fire. *See Rochester Wood Specialties, Inc. v. Rions*, 176 N.W.2d 548, 552 (Minn. 1970). A plaintiff must prove the origin of the fire "by proof and not by speculation or conjecture." *Silver v. Harbison*, 226 N.W. 932, 932 (Minn. 1929); *see also Rochester*, 176 N.W.2d at 552. Though inferences must necessarily be drawn in fire loss cases, "[t]he inferences must, nevertheless, be reasonably supported by the available evidence." *Raymond v. Baehr*, 163 N.W.2d 54, 55 n.2 (Minn. 1968). "[U]nverified and conclusory allegations" are insufficient to defeat a summary judgment motion. *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

Appellants' theory of the case is that Ferguson's pellet stove was the source of the fire. They further allege that Ferguson failed to exercise reasonable care in operating the stove, which ultimately caused the fire.

We disagree with appellants that the record evidence reasonably supports their theory that the pellet stove was the source of the fire. Even viewing the undisputed evidence and resolving the reasonable inferences from that evidence in appellants' favor, this claim is purely speculative. The undisputed evidence reasonably supports just one conclusion: that the source of the fire is unknown. Each of the experts—the fire marshal and fire investigators for both Mesa and Grinnell—concluded that the origin and cause of the fire was undetermined or unknown. Although the pellet stove was considered as a possible source of the fire during the investigation, other sources, such as the electrical system, were of interest to the fire marshal and investigators and could not be eliminated. The fire marshal could not rule out or confirm any other potential sources. And there is no

evidence that the pellet stove had any defect or history of problems. Thus, given the undisputed evidence, there is no "proof" that the pellet stove was the source of the fire. As the district court noted, appellants' theory about the origin of the fire is based entirely on speculation and conjecture, which is insufficient to support a negligence claim in an action for fire loss. *See Silver*, 226 N.W. at 932; *Rochester*, 176 N.W.2d at 552.

In turn, appellants' theory that the fire was caused by an act of negligence in relation to the pellet stove necessarily fails. "Mere proof of the happening of an accident is not enough to establish negligence or its causal relation to the damage." *State v. Paskewitz*, 47 N.W.2d 199, 204 (Minn. 1951) (citation omitted). To establish a negligence claim, a plaintiff must prove that a party's negligence caused or was a substantial factor in causing the injury or damage. *Staub*, 964 N.W.2d at 620-21. A plaintiff need not present eyewitness testimony or direct evidence of causation. *Id.* at 621. Inferences from circumstantial evidence can support the causation element of a negligence claim. *Id.* But circumstantial evidence must be more than "merely consistent with plaintiff's theory of the case." *Id.* at 621 (quotation omitted). "Where the entire evidence sustains, with equal justification, two or more inconsistent inferences so that one inference does not reasonably preponderate over the others, the complainant has not sustained the burden of proof on the proposition which alone would entitle him to recover." *Id.* at 622 (quoting *E.H. Renner & Sons, Inc. v. Primus*, 203 N.W.2d 832, 835 (Minn. 1973)). Whether a defendant's negligence caused the damage is generally a fact question for the jury. *Id.* at 621. But "when reasonable minds could reach only one conclusion," causation is a question of law. *Id.* (quoting *Canada ex rel. Landy v. McCarthy*, 567 N.W.2d 496, 506 (Minn. 1997).

Appellants' allegation that some act of negligence in relation to the pellet stove caused the fire—which is based entirely on speculation that the pellet stove was even the source of the fire—cannot reasonably preponderate over any other theory about the cause of the fire. Given the record evidence, it is equally likely that the fire originated elsewhere. Because, at most, the evidence is equally consistent with a theory that the pellet stove was the source of the fire and theories about any number of alternative sources, appellants cannot establish that negligence in operating or maintaining the pellet stove caused, or was a substantial factor in causing, the fire. Absent such evidence, appellants' claim fails on the element of causation as a matter of law.

In granting summary judgment, the district court also focused on the lack of any facts in the record that could support appellants' claim that Ferguson breached a duty of care. But without evidence of a causal link, appellants' alleged breaches of the duty of care cannot establish negligence. And because summary judgment is appropriate when the record is insufficient to support any element of a negligence action, we need not address the breach element. *Louis*, 636 N.W.2d at 318; *see also Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012) (noting that summary judgment will be affirmed "if it can be sustained on any grounds"). We conclude that the district court properly granted respondents' motion for summary judgment because appellants cannot establish the causation element of their negligence claim.

2. The district court did not abuse its discretion by rejecting appellants' spoliation claim.

Appellants argue that even if the "circumstantial evidence were not enough" to establish the elements of a negligence claim for the purpose of summary judgment, the district court should have inferred Ferguson's negligence from respondents' premature destruction of the fire scene. According to appellants, Mesa released the fire scene to Ferguson despite Grinnell's request that it be preserved. And then Ferguson "destroyed" the fire scene by removing some of his property with a front loader.

A party has a duty to preserve evidence when that party knows or should know that litigation is reasonably foreseeable. *Miller v. Lankow*, 801 N.W.2d 120, 127-28 (Minn. 2011). Spoliation of evidence occurs when a party "[f]ails to preserve property for [another party's] use as evidence in pending or future litigation." *Id.* at 127 (quotation and citation omitted); *see also Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998) ("Spoliation of evidence refers to the destruction of relevant evidence by a party . . . ." (quotation omitted)). "Breach of the duty to preserve evidence once such a duty arises may be sanctioned, under a court's inherent authority, as spoliation." *Miller*, 801 N.W.2d at 128.

One potential sanction for spoliation permitted in Minnesota is "an unfavorable inference to be drawn from failure to produce evidence in the possession and under the control of a party to litigation." *Willis v. Ind. Harbor S.S. Co.*, 790 N.W.2d 177, 184 (Minn. App. 2010) (quotation and citation omitted), *rev. denied* (Minn. Dec. 22, 2010). Where both parties have equal access to the evidence, "no unfavorable inference may be drawn

from the failure of one to produce it." *Kmetz v. Johnson*, 113 N.W.2d 96, 101 (Minn. 1962).

District courts have broad authority in deciding whether to impose sanctions for spoliation. *Patton v. Newmar Corp*., 538 N.W.2d 116, 119 (Minn. 1995). We review a district court's decision regarding spoliation sanctions for an abuse of discretion. *Miller*, 801 N.W.2d at 127. A party challenging the district court's sanction bears the "difficult burden of convincing an appellate court that the [district] court abused its discretion." *Patton,* 538 N.W.2d at 119. The burden is met "only when it is clear that no reasonable person would agree [with] the [district] court's assessment of what sanctions are appropriate." *Id.* (quoting *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992)).

The district court concluded that no spoliation had occurred and thus no adverse inference was appropriate. According to the district court, nothing in the record suggested "that the materials pulled from the burn site on April 10 hindered the investigation into the cause of the fire" and that "the pellet stove was not disturbed for [Grinnell's] April 25, 2018 inspection." Ultimately, the district court concluded that the argument for spoliation was too attenuated and "nothing in the record suggests that any *specific* evidence was removed or destroyed which related to the fire's origin."

The record supports the district court's conclusions. Appellants contend that the fire scene was destroyed by Ferguson's use of a front loader to remove a marble bench and possibly some scrap metal, which hindered their ability to show Ferguson's negligence. But appellants do not explain how these actions impacted their ability to investigate the

fire. Grinnell's investigator could not name anything specifically related to the cause of the fire that he expected was removed or disturbed when Ferguson used the front loader at the fire scene on April 10. Thus, appellants' argument that Ferguson's actions spoliated the entire fire scene and thereby hampered their investigation is unconvincing. Moreover, appellants do not articulate how the alleged spoliation affected their ability to pursue their negligence theory—that the origin and the cause of the fire was the pellet stove. The pellet stove remained on the property undisturbed until Grinnell's investigator inspected it. And the investigator had the opportunity to fully inspect the pellet stove and its flue and venting mechanisms on April 25, 2018. Because the record supports the district court's determination that appellants failed to show spoliation, we see no abuse of discretion.

Affirmed.