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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0186

Cory L. Hendricksen, as Trustee for the Heirs and Next of Kin of Ashton Hendricksen, decedent,
Appellant,

vs.

Tristan Jensen,
Respondent,

Jared Green,
Respondent on related appeal.

Filed September 23, 2019
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Martin County District Court
File No. 46-CV-17-879

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Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and Florey, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion for judgment as a matter of law (JMOL) or a new trial. We affirm the district court's denial of appellant's motion for JMOL. But because the district court erred by not instructing the jury on its prior summary-judgment decision that three persons were not at fault as a matter of law, we reverse and remand for a new trial. We affirm the district court's decision to grant appellant's motion to omit the non-parties from the special-verdict form. But we reverse the district court's summary-judgment decision to dismiss the claims against respondent Jared Green. Accordingly, we order a new trial on the issue of liability only.

FACTS

After graduating from high school in 2014, childhood friends Tristan Jensen and Jared Green bought an ice-fishing house that was advertised on Facebook. They bought the fish house from Garet Rogers, who had built it himself. The house had a rectangular shape with a v-shaped front end. To heat the fish house, Rogers installed a forced-air furnace under a cabinet in the front, v-shaped part of the fish house that was flush with the exterior wall.

During the winter after Jensen and Green purchased the fish house from Rogers, the furnace stopped working as a result of some burned-out wiring. Green and Logan Pytleski, who were staying in the fish house overnight to fish, rewired the furnace, and it continued to heat the fish house. When the wires burned up again during the 2016-2017 winter, Jensen and Green decided to remove the furnace to determine if it could be repaired. They took it to Len Krumholz, the owner of Day Plumbing and Heating in Fairmont. Krumholz inspected the furnace and recommended that they replace it. Green searched for a similar furnace online, found one that he believed would work, and Jensen ordered it.

On Saturday, January 14, 2017, the new furnace arrived at Jensen's home. Green was in South Dakota for the weekend. Immediately upon opening the packaging, Jensen realized that they had purchased the wrong furnace. Jensen called Krumholz and asked for advice on installing the furnace. Krumholz offered to take a look at the new furnace. But because Krumholz's shop was about to close for the day, Jensen did not take it to the shop.

The furnace's instruction manual indicated that the furnace should be installed flush with the wall of the fish house. But Jensen instead opted to install the furnace with space in between the exterior wall and the unit, leaving the cold-air intake and the exhaust outtake unattached to the ports in the exterior wall. To solve this problem, Jensen went to the local hardware store in Fairmont and purchased plastic tubing that he used to connect both the cold-air intake and the exhaust outtake with the exterior wall. When he was finished, Jensen called Pytleski, who was trained in electrical wiring, to wire the furnace. Pytleski returned early that evening and connected the furnace to the electrical wiring. They tested the furnace, and it worked. Pytleski then told Jensen that he and a mutual friend were going to fish in the fish house that evening. Jensen left the fish house around 7:00 p.m.

Around midnight, Ashton Hendricksen arrived at the fish house. Other friends stopped by throughout the night, and around 3:30 in the morning, Ashton Hendricksen, Pytleski, and four others went to sleep in the fish house. Although the furnace continued to heat the fish house, the plastic tubing that Jensen used to install the furnace did not withstand the heat of the exhaust. At some point during the night, the plastic tubing melted, releasing carbon monoxide into the fish house. Ashton Hendricksen died of carbon-monoxide poisoning in the early morning of January 15.

Appellant Cory Hendricksen, Ashton's father and trustee for her heirs, sued both Jensen and Green for wrongful death. During discovery, Hendricksen learned that Jensen's counsel planned to ask the jury to consider the fault of Pytleski and Rogers, although they were not named parties to the suit. To preempt the argument that the others were at fault, Hendricksen moved for summary judgment, asking the district court to rule that Pytleski and Rogers were not causally negligent in Ashton's death. Co-defendant Green also moved for summary judgment on the ground that he owed no legal duty to Ashton. Following a hearing, the district court granted both motions, dismissed the claim against Green, and ruled that Green, Pytleski, and Rogers would not appear on the special-verdict form. The district court ruled that Green, Pytleski, and Rogers were not negligent as a matter of law because Ashton's death was not foreseeable based on their alleged negligent conduct.

At the start of trial, the district court reiterated its ruling and instructed Jensen's counsel not to argue that Green, Pytleski, and Rogers were liable for Ashton's death. But the district court did permit Jensen's counsel to "ask questions regarding what happened on January 14th." Over the course of three days, the jury heard testimony from Jensen, Green, Pytleski, Rogers, Ashton's mother and father, two Martin County deputy sheriffs, Krumholz, the friend who discovered Ashton the next morning, an HVAC expert, and friends and community members who knew Ashton. Following deliberations, the jury returned a verdict that Jensen was not negligent. The jury also determined damages in the amount of one million dollars.

Hendricksen moved for JMOL or, in the alternative, a new trial on the issue of liability. Hendricksen argued that the jury's verdict is manifestly against the evidence and that errors at trial deprived him of a fair trial. The district court denied Hendricksen's posttrial motion. This appeal follows.

D E C I S I O N

Hendricksen challenges the district court's denial of his motion for JMOL or a new trial on liability. Jensen filed a notice of related appeal, arguing that if this court grants Hendricksen a new trial, we must reverse the district court's summary-judgment order that dismissed the claim against Green and prohibited the submission of the fault of Green, Rogers, and Pytleski on the special-verdict form. We first address Hendricksen's arguments. Because we conclude that a new trial is warranted, we also address Jensen's related appeal.

I.

A district court may grant JMOL "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01(a). JMOL should be granted "only in those unequivocal cases" when the verdict is "manifestly against the entire evidence" or contrary to the law applicable in the case. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted). We "review de novo a district court's decision to deny a motion for judgment as a matter of law." *In re Estate of Butler*, 803 N.W.2d 393, 399 (Minn. 2011). Upon review, we view the evidence in the light most favorable to the non-moving party. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018). "When the district court has denied a motion for judgment as a matter of law, we must affirm if, in the record, there is any competent evidence reasonably tending to sustain the verdict." *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 220 (Minn. 2014) (quotation omitted).

It is a rare case in which appellate courts reverse the district court's denial of JMOL. *See Jerry's Enters.*, 711 N.W.2d at 816. As its name indicates, JMOL is only granted when judgment must be decided as a matter of law. *See* Minn. R. Civ. P. 50.04 2006 advisory comm. cmt. But if reasonable jurors could conclude differently on questions of fact, JMOL is inappropriate. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

By way of example, *Gieseke* is one of the rare instances in which the supreme court determined that JMOL was appropriate, despite the district court's denial of a motion for JMOL. 844 N.W.2d at 223. In that case, the supreme court held that JMOL was appropriate because the plaintiff "failed to present evidence" to establish two of the required elements of tortious interference with prospective economic advantage—the existence of a reasonable expectation of economic advantage and damages. *Id.* at 222-23. Specifically, the plaintiff failed to identify even one third party with whom the plaintiff had a future economic relationship and, therefore, only presented speculative damages. *Id.* at 221. The supreme court concluded that, as a matter of law, the plaintiff could not establish a claim. *Id.* at 223.

Similarly, in *Butler*, the supreme court reversed the district court's denial of JMOL because, the supreme court held, the district court applied an incorrect legal standard regarding determining the intent of the decedent. 803 N.W.2d at 399. When the supreme court applied the correct legal standard, it concluded that only one possible conclusion existed for a reasonable jury to determine. It therefore directed entry of JMOL. *Id.*

In order to conclude that Hendricksen is entitled to JMOL, we must conclude that, as a matter of law, no reasonable juror could find that Jensen was not causally negligent in Ashton's death. Negligence occurs when a person fails to exercise reasonable care or the care that a reasonable person would use in the same or similar circumstances. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). The elements of negligence are the existence of a duty of care, a breach of that duty, an injury, and the breach of the duty was the proximate cause of the injury. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). Negligence is generally a matter "for the jury, and it is only in the clearest of cases that the question of negligence becomes one of law." *Renswick v. Wenzel*, 819 N.W.2d 198, 208 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Oct. 16, 2012).

At the summary-judgment motion hearing, Jensen's counsel admitted that Jensen owed Ashton a duty of care by stating that "there's a percentage of fault that is gonna be put on Tristan Jensen, because he had a duty." On appeal, Hendricksen argues that we should conclude that Jensen was negligent as a matter of law because he breached that duty by failing to act as a reasonable person. We address each of Hendricksen's assertions.

Failure to Comply with Manual Instructions

Hendricksen contends that Jensen was negligent because he reviewed the manual but failed to comply with the installation instructions and warnings. Hendricksen asserts that the jury should have used the manual for the reasonable-person standard because, absent other evidence, the manual set out the undisputed standard. Conversely, Jensen argues that the jury could have used the manual as evidence of the standard but was free to accept or disregard it.

Jensen relies on two cases involving motor-vehicle accidents in which the district courts allowed the jury to consider the state manual on traffic-control devices as a basis for determining negligence. On appeal, the supreme court held that, because the manual did not have "the force and effect of law," the district courts had discretion to admit the manual into evidence. *Ferguson v. Benson*, 244 N.W.2d 116, 120 (Minn. 1976); *Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 285 (Minn. 1974). The supreme court stated that the manual's admission into evidence was proper in light of the district court's instruction that the jury *could*, but was not required to, consider the manual in determining negligence. *Ferguson*, 244 N.W.2d at 120-21.

Here, the furnace installation manual, like the manual on traffic-control devices, did not have the force and effect of law. The jury could have but was not required to consider it in determining what a reasonable person would have done upon realizing that the furnace could not be installed according to the manual's instructions. It is possible that a reasonable juror could have found that Jensen was not negligent by failing to follow the instructions.

Installing the Furnace with Plastic Tubing

Hendricksen argues that a reasonable person would not have installed the furnace using plastic tubing. At trial, Jensen conceded that he made a "mistake" in using plastic tubing that could not withstand the exhaust's heat but argued that his mistake did not constitute negligence.

While this is a very close call, we must view the evidence in the light most favorable to Jensen and determine whether any competent evidence exists to support the jury's verdict. The jury heard conflicting testimony about Jensen's decision to install the furnace using plastic tubing. Krumholz testified that he spoke with Jensen on January 14, the day Jensen installed the furnace, and told him not to use plastic tubing to install the furnace. But on cross-examination at trial, Krumholz stated that he had no specific recollection that Jensen was the person he had spoken to on the phone.

When viewed in the light most favorable to Jensen, the jury could have discredited Krumholz's testimony that he told Jensen not to use plastic tubing. The jury also could have found that Jensen reasonably went to the local hardware store, found the best option within his knowledge at the time, and installed the furnace accordingly. While this court, sitting in the jury's position, may well have come to a different conclusion, the pertinent question is whether "no legally sufficient evidentiary basis [exists] for a reasonable jury to find" that Jensen acted as a reasonable person in using the plastic tubing. Minn. R. Civ. P. 50.01(a).

Denying Krumholz's Offer

Hendricksen argues that a reasonable person would have accepted Krumholz's offer to look at the furnace before installing it. It is undisputed that Krumholz told Jensen that he could bring the furnace to Day Plumbing and Heating. Because the shop was closing shortly after their phone call, Jensen explained that he "didn't have time to go show him." Wilmert Lake, where the fish house was located, is about ten miles from the town of Fairmont, where the shop is located. Again, this is a close call. But referring to our standard of review, if "reasonable jurors could differ on the conclusions to be drawn," judgment as a matter of law is not appropriate. *Bahr*, 766 N.W.2d at 919.

Carbon-Monoxide Detector

Hendricksen contends that a reasonable person would have ensured that the carbon-monoxide detector was properly functioning after installing a new furnace. It is undisputed that there was a carbon-monoxide detector in the fish house and that it had previously worked. But on the night of the incident, the battery was not in the detector. While the record is unclear with respect to who removed the battery, the jury heard testimony that the battery was often removed when people used the auger to drill holes in the ice because that activity often set off the alarm. On the previous weekend, friends of Jensen were at the fish house drilling holes when Jensen was not present. Jensen testified that when he left the fish house on January 14, he believed that the detector was in operable condition because it had always worked in the past. He did not check to confirm that the battery was in the carbon-monoxide detector. Based on this record, the jury could conclude that a reasonable person would have reasonably believed that the detector was operable on the night of January 14.

In sum, although we agree that "the jury could have reached a different conclusion . . . our role on appeal is limited." *Renswick*, 819 N.W.2d at 208. Because "we are satisfied that the evidence does not render [the jury's] factual conclusion baseless," we "will not substitute our judgment for the jury's." *Id.* We therefore affirm the district court's denial of Hendricksen's motion for judgment as a matter of law.

II.

Alternatively, Hendricksen argues that he is entitled to a new trial on the issue of liability. A party "is entitled to a new trial on a number of fairness-impeding mistakes." *Id.* at 204. Minn. R. Civ. P. 59.01 provides that a party may be granted a new trial based on a trial irregularity, a legal error, or a jury verdict unjustified on the evidence or the controlling law. We review a district court's denial of a motion for a new trial for an abuse of discretion. *Stoebe v. Merastar Ins. Co.*, 554 N.W.2d 733, 735 (Minn. 1996). "On appeal from a denial of a motion for a new trial, an appellate court should not set aside a jury verdict unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotation omitted). While this is a "less rigorous" standard than granting judgment as a matter of law, it is still "a demanding standard." *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680, 687 (Minn. 2004).

Negligence occurs when a person fails to exercise the care that a reasonable person would use in the same or similar circumstances. *Domagala*, 805 N.W.2d at 22. A person's conduct is measured against an objective standard. *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986) (providing that "[n]egligence is proved by measuring one's conduct against an objective standard"). Reasonable care is the "standard of conduct required by the law [and] is objective rather than subjective." *Olson v. Duluth, M. & I. R. Ry. Co.*, 5 N.W.2d 492, 496 (Minn. 1942) (quotation omitted). "The legal standard of conduct is not the opinion of the individual, but the conduct of an ordinarily prudent man under the circumstances." *Id.* at 496-97 (quotation omitted). The actor "is treated as though he were a reasonable man and, therefore, he is treated as though he knew those things which a reasonable man at the time and place would know even though the actor is himself excusably ignorant." *Peterson v. Minn. Power & Light Co.*, 288 N.W. 588, 590 (Minn. 1939) (quotation omitted).

To address Hendricksen's argument, we first note the unusual posture of this case. Prior to trial, Hendricksen learned that Jensen intended to argue that Pytleski and Rogers, although they were not parties to the suit, were at fault. In response, Hendricksen moved the district court to rule pre-trial that Pytleski and Rogers were not at fault. The district court considered Hendricksen's motion simultaneously with Green's summary-judgment motion for dismissal. The district court ruled that none of the three men, Green, Pytleski, and Rogers, was causally negligent as a matter of law in Ashton's death and, therefore, none would appear on the special-verdict form for the jury to consider. The district court dismissed Green, who had been a named party, from the suit.

Despite this, Jensen made arguments to the jury that were entirely inconsistent with the district court's pretrial rulings. And even more troubling is that the record demonstrates that Jensen presented the jury with a legally incorrect reasonable-person standard. Based on our careful review of the record, Jensen tried this case, without intervention by the district court, by encouraging the jury to adopt a subjective standard of a reasonable person.

Although we begin with his closing argument, the record shows that Jensen's erroneous characterization of the reasonable-person standard permeated the trial. During closing argument, Jensen's counsel told the jury to consider the liability of Green, Pytleski, and Rogers. He explained that Jensen "made a mistake" because he "bought the wrong tubing, installed the wrong tubing, and it melted." Despite this admission, Jensen's counsel argued that "making a mistake and committing negligence under the law are not the same thing." He then proceeded to compare Jensen's "mistakes" with the "mistakes" of others:

> Now, why have I talked about, uh, these other folks so much, in addition to [Jensen]? Well, they're his peer group and they were involved in this too. And one of the jury instructions that the Court just read, said a reasonable care is the care a reasonable person would use in the same or similar circumstances. And I would suggest to you that we've got a lot of examples here of other folks, and I'm not saying they were negligent, but a lot of examples of other folks that made mistakes in this case and that's his peer group, that's Tristan Jensen's peer group, people in similar life circumstances, of similar age, similar knowledge, similar experience, who also made mistakes . . . .

Jensen's counsel continued: "[I]n order to determine the reasonable person standard, we have to look at what other people did in this case." Jensen's counsel explained to the jury that Rogers, although he had no HVAC experience, built the fish house, installed the original furnace, and wired it by himself. Jensen's counsel "submit[ted]" to the jury that "the problem starts long before Tristan Jensen installs the furnace."

Jensen's counsel then focused on Green. Jensen reiterated that Green did not know whether he had selected the wrong furnace but reminded the jury that Hendricksen's expert witness verified that it was the wrong model. Jensen's counsel stated, "Again, we need to compare [Jensen's] actions to people like Jared Green in his peer group."

Jensen's attorney then concluded with Pytleski. He argued that Pytleski was physically less than the length of a pen from the tubing Jensen installed when he wired the furnace and noted that Pytleski had reviewed the same manual that Jensen did. On the issue of the carbon-monoxide detector, Jensen's counsel stated that Jensen had never spent the night in the fish house, while Pytleski had stayed overnight five or six times. Jensen's counsel argued that Pytleski "knew the house, and most importantly, unlike [Jensen], he knew that five other people were coming out there that night and staying the night." Jensen's counsel proceeded:

> [Pytleski] knew that five other people were gonna be staying the night. [Jensen] did not know that. And [Pytleski], and I'm not, again, I'm not saying [Pytleski] was negligent, but I'm talking about the actions in comparison with [Jensen], [Pytleski] did not confirm that the carbon monoxide detector that he knew was in there was functioning.

Jensen's counsel concluded his comparison by arguing, "How is Tristan Jensen's behavior somehow worse than some of the other actions here . . . ?"

Jensen's own characterizations of his arguments establish the incorrect nature of his version of the reasonable-person standard. Jensen argued, in response to one of many objections by Hendricksen, that he should be judged *in comparison with the conduct of his peers*. Jensen explained that his theory of the case was that "reasonable people make mistakes." And because Jensen's peer group—Green, Pytleski, and Rogers—also made mistakes, Jensen's mistakes were reasonable. But, as discussed above, the reasonable-person standard is an objective one. *Florenzano*, 387 N.W.2d at 174; *Olson*, 5 N.W.2d at 496. Jensen's conduct, therefore, should have been measured against what an objectively reasonable person would have done in the same circumstances, not the actual conduct of three other young men in their early 20s when faced with tangentially related circumstances. Jensen repeatedly emphasized that those three young men made "mistakes." But he then distinguished a mistake from negligent conduct.

The prejudicial effect of Jensen's argument was compounded by the district court's unwillingness, despite repeated requests by Hendricksen, to give the jury a curative instruction regarding the pretrial rulings. A similar case guides our analysis. In *Rahja v. Current*, the Minnesota Supreme Court ordered a new trial when it concluded that the jury was misled by the district court's "failing to affirmatively withdraw [an] issue" from the jury's purview. 119 N.W.2d 699, 702 (Minn. 1963).

In *Rahja*, the passenger in a car sued the driver for personal injuries arising out of a one-vehicle accident. *Id.* at 700. The driver asserted that the plaintiff-passenger shared fault for the accident. *Id.* at 701. The driver cross-examined the passenger in an effort to prove her contributory fault and then asked the district court to submit the issue to the jury by a proposed written instruction. *Id.* The passenger asked the district court to affirmatively withdraw the issue. The district court did neither and did not mention contributory negligence to the jury. *Id.* The jury returned a verdict in favor of the driver, and the district court denied the passenger's posttrial motions. *Id.*

On appeal, the supreme court reversed, holding that "it is incumbent upon the [district] court either to submit the issue—if justified by the evidence—or affirmatively to withdraw it by appropriate instructions. It is not enough to withdraw the defense indirectly by nonsubmission because that could—as it undoubtedly did in this case—mislead the jury." *Id.* at 702.

Here, the district court failed to affirmatively withdraw an issue that, we can only conclude, misled the jury. Throughout the trial, Hendricksen reminded the district court of its prior rulings that Green, Pytleski, and Rogers were not negligent as a matter of law and would not appear on the special-verdict form. In light of Jensen's theory of the case, Hendricksen asked the district court to instruct the jury on its prior rulings so that the jury was not confused by Jensen's arguments. But in response to each objection that Hendricksen made, the district court declined to affirmatively address Jensen's arguments, concluding that he was staying within the bounds of the district court's limits.

We conclude that the following circumstances confused and misled the jury: Jensen's inaccurate presentation of the reasonable-person standard; his repeated arguments that the jury should compare his conduct to the mistakes (i.e., fault) of three of his peer group; and the special-verdict form that asked the jury to decide the negligence of Jensen alone without any clarification or affirmative withdrawal of the issue of the others' potential fault from the jury's consideration. This suggested to the jury that the conduct of Green, Pytleski, and Rogers contributed to Ashton's death, but because the jury could not hold them responsible, it should not hold Jensen responsible. As the supreme court concluded in *Rahja*, "it would be unrealistic to conclude, under the circumstances disclosed by this record," that the jury was not influenced by Jensen's inaccurate portrayal of the reasonable-person standard and "that this did not lead to their finding of no liability." *Id.* For these reasons, we conclude that Hendricksen is entitled to a new trial on the issue of liability.

Because none of the parties challenged the jury's damages determination at the district court or raised the issue on appeal, the jury's damages determination stands on remand. Because a new trial is warranted, we do not address Hendricksen's additional arguments concerning evidentiary issues. Any remaining issues should be addressed by the district court on remand.

III.

Because we have determined that Hendricksen is entitled to a new trial, we next address Jensen's arguments raised by related appeal. Jensen argues that the district court erred by granting summary judgment to Green and by precluding Green, Pytleski, and Rogers from appearing on the special-verdict form.

A district court must grant a motion for summary judgment when "the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[1] Minn. R. Civ. P. 56.01. A genuine issue of material fact

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[1] The district court applied the former version of rule 56, which was recently "revamped" to more "closely follow" the federal rules. Minn. R. Civ. App. P. 56 2018 advisory comm. cmt. When promulgating amendments to rule 56, effective July 1, 2018, the supreme court specifically indicated that amended language on the standard for granting summary judgment reflects recent Minnesota caselaw. Order Promulgating Amendments to Rules of Civil Procedure, No. ADM04-8001 (Minn. Mar. 13, 2018). Because the legal standard is unchanged, we cite to the current version of rule 56.01, even though the district court's decision was issued before the amended rule took effect.

exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 564 (Minn. 2008). We review de novo the district court's legal conclusions on summary judgment and view the evidence in the light most favorable to the party against whom summary judgment was granted. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

> A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any of the four elements necessary for recovery: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury.

Louis v. Louis, 636 N.W.2d 314, 318 (Minn. 2001). And summary judgment is inappropriate on the issue of duty "when reasonable persons might draw different conclusions from the evidence presented." *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018) (quotations omitted).

Generally, a person does not owe a duty of care to another—for example, to aid, protect, or warn—if the harm is caused by a third party's conduct. *Doe 169 v. Brandon*, 845 N.W.2d 174, 177-78 (Minn. 2014). Minnesota law provides two exceptions to this rule. *Fenrich*, 920 N.W.2d at 201. The first is when a special relationship exists between the plaintiff and defendant and the plaintiff's harm is foreseeable. *Id.* at 201-02. And the second is when "the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala*, 805 N.W.2d at 23.

Before trial, the district court dismissed Hendricksen's claim against Green based on its determination that Green owed no duty to Ashton. The district court reasoned that

Green did not owe her a duty because he could not "be expected to foresee [the] injury or take any steps to avoid it when he did not know of any of the events leading up to it." In reaching this conclusion, the district court found that the only involvement Green had was selecting the furnace to be purchased. And because Green did not know that Jensen installed the furnace that day, was out of state that night, and did not know that guests were planning to stay overnight in the fish house, the district court found that Ashton's death was unforeseeable to Green.

We disagree with the district court's determination that Green had no duty to Ashton. As co-owner of the fish house, Green owed a duty to use reasonable care for the safety of those using the fish house, including Ashton. *See Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). Given the insidious nature of carbon-monoxide poisoning, the owners of the fish house held considerable power over the welfare of their guests. Ashton had no way of detecting the carbon-monoxide leak on her own, and was dependent on Green and Jensen as owners of the fish house to ensure that it was outfitted with the proper equipment and alarms to protect her from carbon-monoxide poisoning.

Reasonable persons could draw different conclusions regarding whether Green's conduct in selecting the furnace to be purchased and installed in the fish house he co-owned with Jensen constituted a breach of that duty. During his deposition, Jensen testified that Green told him that the furnace Green selected "was a little different" from the original furnace and that Jensen would need to cut a hole in the cabinet in order to install it in the fish house.

Jensen's expert testified that the furnace that Green chose was not appropriate for the design of the fish house. Although Green was in South Dakota the weekend that Jensen installed the furnace, Green was aware that Jensen ordered the furnace after Green selected it, knew that the fish house was on the lake, and knew that guests were in the fish house based on a SnapChat he received around 9:30 p.m. Because a genuine issue of material fact exists whether Green breached his duty to Ashton, we reverse the district court's summary-judgment dismissal of the claim against Green.

Jensen also argues that the district court erred by not including Pytleski and Rogers on the special-verdict form. Jensen argues that, upon remand for a new trial, the jury should be able to consider the potential negligence of Pytleski and Rogers.

"[I]n allotting negligence, 'a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they [are] parties to the lawsuit.'" *Radel v. Bloom Lake Farms*, 553 N.W.2d 109, 112 (Minn. App. 1996) (quoting *Lines v. Ryan*, 272 N.W.2d 896, 902-03 (Minn. 1978)), *review denied* (Minn. Oct. 29, 1996). In *Radel*, this court affirmed the district court's decision to include a third-party defendant on the special-verdict form, even though the third-party defendant had been dismissed from the suit at the close of evidence. *Id.* at 111-12. In that case, we stated that the district court "not only had a reasonable basis for including the [dismissed third party] on the form, it was *required* to do so." *Id.* at 112 (emphasis added). The apportionment of negligence "must include all whose negligence may have contributed to the arising of the cause of action." *Lines*, 272 N.W.2d at 903 (quotation omitted).

The same rationale applies to potentially liable third persons who are not parties to the suit. In *Staab v. Diocese of St. Cloud*, Staab was injured when she fell from her wheelchair when leaving the defendant's property. 813 N.W.2d 68, 71 (Minn. 2012). Staab's husband, who was pushing her wheelchair when it rolled through a door and over an unmarked five-inch drop off, was not a party to the lawsuit but was listed on the special-verdict form. *Id.* The jury apportioned 50% fault to Staab's husband and 50% fault to the defendant. *Id.* Upon review, the supreme court held that the defendant must pay 50% of Staab's damages, which corresponded to its share of fault. *Id.* at 80.

The district court determined that Rogers and Pytleski were not negligent as a matter of law and therefore would not appear on the special-verdict form. It determined that Ashton's death was unforeseeable to Rogers as there was no evidence that Rogers had any difficulty finding a furnace that could be properly installed to heat the fish house and the original furnace did not leak carbon monoxide. We agree. As the district court noted, the design of the fish house did not preclude Rogers from installing a furnace that functioned properly. And his construction of the fish house and subsequent sale to Jensen and Green does not render Jensen's subsequent conduct of installing the wrong furnace by using plastic tubing foreseeable to Rogers. Therefore, the district court properly determined that Rogers was not negligent as a matter of law.

The district court also ruled that Ashton's death was not foreseeable to Pytleski. Because "Jensen acknowledged Pytleski did not assist in either the selection of the tubing nor the installation of the furnace beyond the electrical work," the district court concluded that there is no conduct on Pytleski's part to be considered for liability. We agree.

Pytleski's only involvement, according to Jensen's deposition testimony, was in wiring the furnace. Pytleski did not go to the local hardware store with Jensen. Pytleski did not assist Jensen in selecting the tubing to be used. By the time Pytleski returned to the fish house that evening, Jensen had finished installing the furnace. Even viewing Jensen's statements in the light most favorable to him, Pytleski's mere statement that the installation "should be good" does not constitute conduct that could render Pytleski potentially liable for negligence. Accordingly, we affirm the district court's summary-judgment decision that Rogers and Pytleski were not negligent as a matter of law. On retrial, Rogers and Pytleski should not appear on the special-verdict form, and the district court must instruct the jury that it has determined as a matter of law that neither Rogers nor Pytleski were negligent.

Affirmed in part, reversed in part, and remanded.