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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0913**

Sandra D'Antonio, et al.,
Respondents,

vs.

Jennifer Lynn Martinez, et al.,
Appellants.

**Filed April 19, 2021
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CV-17-14727

Patrick T. Tierney, Daniel L. McGarry, Collins, Buckley, Sauntry & Haugh, P.L.L.P.,
St. Paul, Minnesota (for respondents)

Nicholas L. Klehr, Hugh E. Mulligan, Labore, Giuliani, Shackleford, Klehr & Jensen-Lea,
Ltd., Hopkins, Minnesota (for appellants)

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

In this appeal from judgment following a jury trial, appellants argue that the district court abused its discretion by excluding third-party building owner from the special-verdict

form and by denying appellants' request for a collateral offset for workers' compensation benefits paid to respondents. We affirm.

FACTS

Respondents Sandra D'Antonio (D'Antonio) and her husband brought a negligence action against appellants Jennifer Lynn Martinez (Martinez) and her husband after Martinez struck D'Antonio with her car while D'Antonio was walking across the driveway in front of the office building where they worked.

At trial, D'Antonio testified that she arrived at work on November 12, 2015, a little before 6:00 a.m., and the parking-lot lights were not on. They were usually on at this time. She testified, "I don't know when daylight savings time was. If it was that weekend, then that would have been the first day the lights wouldn't have been on." She did not know where the closest light would have been to the accident, but the lights usually illuminate the parking lot "pretty well." When asked whether she tried to "talk to somebody" about the lights not being on, she responded, "Yes."

D'Antonio walked toward the building while looking at the ground to see where she was going because of the darkness. She saw a car enter the parking lot, but believed that she could reach the sidewalk in time. Her eyes returned to the ground, and she did not look up again until the car was about three feet from hitting her. D'Antonio suffered a fractured leg that required three surgeries to repair and months of physical therapy.

Martinez testified that "it was pitch black outside" when she drove to work. There was no light illuminating the concrete barrier that she turned past when she hit D'Antonio.

Martinez did not know whether the parking-lot lights were on that day, but the lighting conditions impacted her visibility. There was some light “given off by the building itself.”

After testimony, the district court removed the building owner from the special-verdict form. The district court reasoned,

There could be a whole variety of reasons why those lights weren’t on. There is no evidence that that is at all potentially the negligence of the building owner. Specifically, these are all hypotheticals; right? But potentially, the building owners could not have had notice that the lights were not on when they were supposed to; the building owners could have had notice and they were working on the lights as we had this incident occur. There are too many issues at play that don’t give clear evidence as to whether the building owner and/or property were negligent. Further, we’re not even certain who the building owner and property managers are, and therefore, the questions on the verdict form will be taken off.

The district court further stated that “everybody agrees it was really dark and that the lights weren’t on. That, in itself, is not evidence of negligence.”

The jury found both parties negligent and apportioned 51% of the fault to Martinez and 49% to D’Antonio. The jury found damages of \$225,000 for past pain and suffering, \$134,076.13 for past health-care expenses, \$23,419.91 for past wage loss, and \$75,000 for future pain and suffering.

Martinez moved for a collateral offset pursuant to Minn. Stat. § 548.251 (2020), requesting the district court to deduct from the damages award \$157,496.04 that D’Antonio received from Travelers in workers’ compensation benefits. This would result in a \$153,000 award after deducting D’Antonio’s 49% contributory negligence.

The district court denied Martinez’s motion. The district court determined that two issues were before it: (1) whether the workers’ compensation benefits Travelers paid to D’Antonio are subject to subrogation rights, and (2) whether Travelers asserted its subrogation rights. In deciding the first issue, the district court stated that the work-relatedness of D’Antonio’s injury was not litigated at trial, and “[a] collateral source offset motion is not the proper place to argue this issue for the first time.” The district court did not make a finding on whether the injury was work related because “[t]here is nothing in case law or statute to allow the [district] court to make a *sua sponte* post-verdict ruling on whether the injury was ‘work related.’”

The district court also concluded that Travelers asserted its subrogation rights by mailing Martinez a formal notice of its subrogation claim six months before trial. Because the district court found that Travelers asserted its subrogation rights, it determined that it did not need to assess the merits of Martinez’s argument and denied her motion.

The district court entered judgment in favor of D’Antonio in the amount of \$233,322.98. This appeal followed.

DECISION

Third-party building owner

Martinez first argues that the district court abused its discretion by removing the comparative negligence of the building owner from the special-verdict form. She argues that there was evidence of the building owner’s negligence and that caselaw requires the district court to allow the jury to consider the negligence of all parties to the transaction.

“District courts have broad discretion to decide whether to use special verdicts and what form special verdicts are to take.” *Poppler v. Wright Hennepin Coop. Elec. Ass’n*, 845 N.W.2d 168, 171 (Minn. 2014). “[T]he formulation of the verdict by the [district] court is a proper exercise of that discretion if the questions propounded fairly and adequately cover all of the issues of fact raised by the pleadings and proof.” *Hill v. Okay Constr. Co.*, 252 N.W.2d 107, 118 (Minn. 1977).

Martinez relies on this quote from *Lines v. Ryan*:

[I]t is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.

272 N.W.2d 896, 902-03 (Minn. 1978) (quotation omitted). But Martinez omitted the first part of this notion: “If there is evidence of conduct which, if believed by the jury, would constitute negligence (or fault) on the part of the person inquired about, the fault or negligence of that party should be submitted to the jury.” *Id.* at 902 (quotation omitted). In other words, potential tortfeasors should be included in considering comparative negligence if a party establishes a prima facie case for their negligence.

“The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). The district court abused its discretion by leaving the building owner off of the special-verdict form if there was sufficient evidence for a jury to find these elements

satisfied. *See Lines*, 272 N.W.2d at 902. Landowners have a duty of reasonable care for the safety of entrants on their premises. *Olmanson v. LeSueur Cty.*, 693 N.W.2d 876, 880 (Minn. 2005). This “duty of reasonable care includes an ongoing duty to inspect and maintain property to ensure entrants on the landowner’s land are not exposed to unreasonable risks of harm.” *Id.* at 881. But this duty does not make landowners insurers of safety. *Rinn v. Minnesota State Agr. Soc’y*, 611 N.W.2d 361, 365 (Minn. App. 2000). “Unless the dangerous condition actually resulted from the direct actions of a landowner or his or her employees, a negligence theory of recovery is appropriate only where the landowner had actual or constructive knowledge of the dangerous condition.” *Id.*

Martinez argues that the district court abused this discretion because “the issue of darkness and who was responsible for said darkness on the morning of the accident were raised by the proof at trial via undisputed testimony of all parties.” But the evidence is not sufficient to establish a *prima facie* case for negligence against the building owner. Martinez has not shown any evidence that the building owner breached his or her duty of care. There was no evidence of why the lights were not on other than D’Antonio’s belief that daylight savings changed the time the lights were activated. There was no evidence about whether the building owner knew about the lights not being on or whether they were taking steps to fix the lights. It is also not clear who was in charge of maintaining the parking lot. The testimony of the parties is not enough to establish whether the building owner breached his or her standard of reasonable care.

Collateral offset

Martinez next argues that the district court abused its discretion by denying her motion to reduce her damages by a collateral offset.

A district court should reduce the damages awarded to a plaintiff if the plaintiff has already received payments for that injury under the Workers' Compensation Act. Minn. Stat. § 548.251, subds. 1(1), 3(a). But a defendant is not entitled to collateral offset if a subrogation right for the amount paid has been asserted. *Id.*, subd. 2(1).

Martinez argues that Travelers did not assert its intervention interest, and that it is precluded from doing so because the injury is not work related and cannot be subrogated under *Kubiszewski v. St. John*, 518 N.W.2d 4, 7 (Minn. 1994). The district court concluded that it was not proper to determine whether D'Antonio's injury was "work related" in a collateral offset motion because Martinez was raising the issue for the first time in its posttrial motion. "We review a district court's application of the law de novo." *Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). "[A]n issue first raised in a post-trial motion is not raised in a timely fashion." *Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002), *review denied* (Minn. Oct. 15, 2002). The district court correctly refrained from determining whether D'Antonio's injuries were work related when Martinez first raised the issue in its posttrial motion.

The district court next determined that Travelers did assert its subrogation right by mailing Martinez a formal notice of its subrogation claim six months before trial. We review a district court's factual findings for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). Martinez concedes that Travelers asserted a

subrogation right by demanding reimbursement under the Workers' Compensation Act. Because Martinez raised the issue of whether D'Antonio's injuries were work related for the first time in a posttrial motion, and because Travelers asserted its subrogation right, Martinez is not entitled to a collateral offset.

Affirmed.