STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0815

Ann Massert,
Respondent,

vs.

Radisson Blue MOA, LLC, et al.,
Appellants.

Filed April 3, 2023
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CV-20-6878

Alicia N. Sieben, Cody C. Scharpf, Matthew J. Barber, Schwebel Goetz & Sieben, P.A., Minneapolis, Minnesota (for respondent)

Jeffrey M. Markowitz, Harrison E. Berg, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this appeal following a jury trial of respondent-plaintiff Ann Massart's[1] slip-and-fall negligence claim, appellant-defendants Radisson Blu MOA, LLC and Radisson Blu

[1] For this opinion, we utilize the spelling of the parties' names from their briefs, although it differs from the case caption.

MOA Management, LLC (together, the Radisson defendants) and their independent contractor NSG Hospitality Corporation (NSG), challenge the district court's decision to enter judgment jointly and severally against them for 60% of the jury's verdict. After the jury found Massart 40% at fault for her injuries, the Radisson defendants 20% at fault, and NSG 40% at fault, the district court determined that (1) the Radisson defendants are vicariously liable for NSG's negligence based on a land possessor's nondelegable duty to provide safe premises and (2) the Radisson defendants and NSG are jointly and severally liable under the common-scheme-or-plan exception to several liability. Because we discern no error in either of the district court's determinations, we affirm.

FACTS

Massart slipped and fell in the hotel lobby at the Radisson Blu Mall of America hotel, suffering injuries. The Radisson defendants are the owners and operators of the hotel. The lobby floor had recently been mopped by an employee of NSG, an independent contractor hired by the Radisson defendants to clean the hotel at night. Massart sued the Radisson defendants and NSG, alleging negligence, and the case proceeded to a jury trial.

The Radisson defendants and NSG shared counsel during the jury trial. Before the case went to the jury, their counsel requested that the special-verdict form separately ask about negligence for the Radisson defendants and for NSG, which the district court granted. Defense counsel agreed that certain issues, including the Radisson defendants' liability for NSG's negligence, would be decided by the district court following the verdict.

The district court instructed the jury about a land possessor's duty to protect entrants and an entrant's duty of reasonable care. The district court also instructed the jury that the Radisson defendants' duty of reasonable care

> includes an ongoing duty to inspect and maintain the premises to ensure entrants on their premises are not exposed to unreasonable risks of harm. If dangerous conditions are discoverable through reasonable efforts, they must provide Ann Massart with adequate warnings. Failing to provide Ann Massart with adequate warnings is negligence.

The district court did not instruct the jury about any duty that NSG owed Massart.

The district court provided the jury with the special-verdict form, asking it to address whether the Radisson defendants were negligent for failing to warn Massart of a wet floor, whether NSG was negligent for failing to warn Massart of a wet floor, and whether Massart was negligent at the time of her fall. The jury returned its special verdict, finding the Radisson defendants 20% at fault, NSG 40% at fault, and Massart 40% at fault. The jury found damages of $496,500.

Following the verdict, each side submitted a proposed order for judgment. Massart's proposed order stated that judgment should be entered solely against the Radisson defendants for $297,900, representing the total damages reduced by Massart's 40% fault. In her accompanying briefing, Massart alternatively asked that judgment be entered against the Radisson defendants and NSG for $297,900, jointly and severally. Appellants' proposed order, on the other hand, stated that the judgment should be entered against NSG alone for $198,600, representing NSG's 40% share of the fault. In their briefing, appellants argued that Massart could not recover from the Radisson defendants because the Radisson

defendants' 20% fault was less than Massart's 40% fault and aggregation of the Radisson defendants' fault with NSG's fault was inappropriate.

In its order for judgment, the district court concluded that (1) the Radisson defendants were responsible for NSG's negligence based on the Radisson defendants' nondelegable duty as the land possessor to Massart and (2) the circumstances satisfied the common-scheme-or-plan exception to the general rule of several liability. The district court ordered that judgment be entered against both the Radisson defendants and NSG, jointly and severally, for $297,900, and judgment in that amount was entered.[2]

The Radisson defendants and NSG appeal.

DECISION

Appellants challenge the $297,900 judgment against the Radisson defendants and NSG, jointly and severally; they assert that the judgment should be against NSG alone in the amount of $198,600, which represents 40% of the verdict. Appellants contend that the district court erred by determining that the Radisson defendants are liable to Massart and that joint and several liability, as opposed to several liability, was appropriate. With respect to both asserted errors, appellants advance both procedural and substantive arguments. We first address appellants' procedural arguments before turning to their substantive arguments.

[2] The $297,900 judgment was entered against only the Radisson defendants in favor of Massart, but, in their briefing, appellants construe the omission of NSG from the judgment as a clerical error.

I. The district court did not procedurally err by determining vicarious liability and joint and several liability.

Appellants assert that the district court committed procedural error by making factual findings both when determining that the Radisson defendants owed Massart a nondelegable duty, and thus were vicariously liable for NSG's negligence, and when determining that the circumstances in this case satisfied the common-scheme-or-plan exception to several liability. Appellants also argue that Massart waived her right to a determination of vicarious liability or joint and several liability because she failed to present those issues to the jury. In essence, appellants contend that only the jury, and not the district court, could decide those issues. We disagree.

The submission of a special-verdict form to the jury is governed by Minnesota Rule of Civil Procedure 49.01. That rule states that the district court "may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." Minn. R. Civ. P. 49.01(a). If an issue of fact is omitted from the special-verdict form, "each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury." *Id.* Therefore, so long as issues are raised by the pleadings or evidence, "[i]ssues of fact that are not submitted to the jury on the special verdict form are left to the district court to decide." *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 618 (Minn. 2008) (citing Minn. R. Civ. P. 49.01(a)).

Rule 49.01 squarely answers the question of whether the district court erred by making findings about the Radisson defendants' vicarious liability and the Radisson defendants and NSG's joint and several liability. These issues were presented via evidence

and testimony but were omitted from the special-verdict form, and neither party demanded their submission to the jury. In fact, during trial, appellants' shared counsel informed the district court that the Radisson defendants' liability for NSG's conduct was a "question of . . . law" and not "an issue that the jury decides" and likewise that whether NSG was an independent contractor was not an issue for the jury. Similarly, in their briefing in support of their proposed order for judgment, appellants made arguments about the evidence related to the imposition of liability—they did not argue that the district court could not make such determinations in the first place. Thus, the parties waived their rights to a jury trial on the issues of vicarious liability and joint and several liability, and the district court was authorized to make findings on these issues. *See Hill v. Okay Const. Co.*, 252 N.W.2d 107, 120 (Minn. 1977) (citing Minn. R. Civ. P. 49.01) ("[T]he trial court has the authority to make such additional findings supplementing a special verdict as are necessary to render a judgment.").

II. The district court did not substantively err by ordering judgment against appellants jointly and severally for $297,900.

We turn to appellants' substantive arguments that the district court erred by imposing judgment against the Radisson defendants and NSG, jointly and severally, for $297,900, or 60% of the verdict. They contend that the district court erred by determining that (1) the Radisson defendants are liable to Massart and (2) the common-scheme-or-plan exception to several liability applies. Appellants assert that the judgment should be against NSG only, for $198,600, which corresponds to NSG's 40% fault.

A. The Radisson Defendants' Liability to Massart

Appellants argue that the Radisson defendants are not liable to Massart because the jury found the Radisson defendants 20% at fault and Massart 40% at fault and thus Massart cannot recover from the Radisson defendants under Minnesota's comparative-fault statute. Under the comparative-fault statute, a person's "[c]ontributory fault does not bar recovery in an action . . . if the contributory fault was not greater than the fault of the person against whom recovery is sought." Minn. Stat. § 604.01, subd. 1 (2022). The district court determined that the Radisson defendants are vicariously liable for NSG's 40% fault. As a result, the Radisson defendants' total fault is 60%—that 40% fault added to the 20% fault apportioned to the Radisson defendants by the jury. The Radisson defendants argue that the district court's determination of vicarious liability is error.

The general rule is that an employer is not liable for its independent contractor's acts and omissions. *Conover v. N. States Power Co.*, 313 N.W.2d 397, 403 (Minn. 1981) (citing Restatement (Second) of Torts § 409). But that general rule has "a multitude of exceptions," collected in sections 416 to 429 of the Restatement (Second) of Torts, which impose certain nondelegable duties on the employer of an independent contractor. *Id.* at 403-04. The exceptions "rest on the policy grounds that an employer should not be permitted to escape a direct duty of care for the personal safety of another by delegating that responsibility to the independent contractor for the proper conduct of certain types of work." *Id.* at 404. Thus, the employer of an independent contractor is vicariously liable for the independent contractor's negligent performance of a nondelegable duty. *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992). Whether the Radisson defendants

owed Massart such a duty is a question of law that we review de novo. *See Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

The Minnesota Supreme Court has long recognized that possessors of land may owe entrants a nondelegable duty to maintain the premises in safe condition. In *Corrigan v. Elsinger*, the supreme court held that, "so long as [they] kept their place of business open to customers," the owner and the proprietor of a department store owed a duty "to such customers to keep the [place of business] in a reasonably safe condition, and free from danger to personal injury." 83 N.W. 492, 493 (Minn. 1900). Thus, even though the customer was injured by the negligent work of an independent contractor, the owner and the proprietor "could not thus avoid the duty they owed to plaintiff as one of their customers." *Id.* at 494. That proposition reflects section 425 of the Restatement (Second), which appellants acknowledge provides a basis for a nondelegable duty and thus vicarious liability:

> One who employs an independent contractor to maintain in safe condition land which he holds open to the entry of the public as his place of business . . . is subject to the same liability for physical harm caused by the contractor's negligent failure to maintain the land or chattel in reasonably safe condition, as though he had retained its maintenance in his own hands.

Restatement (Second) of Torts § 425.

We conclude that NSG was performing the Radisson defendants' nondelegable duty to the public to maintain the hotel lobby in safe condition. Appellants do not challenge the district court's findings that Massart's fall "occurred in the public lobby of the hotel, where the hotel expected people to enter," that NSG was an independent contractor hired to clean

the floors, or that "the process of cleaning the floors creates a temporary risk." We are not persuaded by appellants' assertion that cleaning the lobby floors and adequately warning about that temporary risk is distinct from "keep[ing]" or "maintain[ing]" the lobby in safe condition. *See Corrigan*, 83 N.W. at 493-94; Restatement (Second) of Torts § 425.

To the contrary, finding a nondelegable duty here tracks persuasive caselaw from other jurisdictions analyzing a land possessor's nondelegable duty to maintain safe premises in the context of slip-and-fall cases. *See, e.g.*, *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 701-02, 704 (Iowa 1995) (holding that customer was entitled to a jury instruction about store's nondelegable duty to maintain safe premises when store hired an independent contractor to clear snow in its parking lot); *Valenti v. Net Props. Mgmt., Inc.*, 710 A.2d 399, 400-01 (N.H. 1998) (holding that plaintiff was entitled to a jury instruction about mall's nondelegable duty to maintain safe premises when store hired an independent contractor to maintain mall's entryways and floors). Thus, the district court did not err in determining that the Radisson defendants are liable to Massart for NSG's negligence based on the Radisson defendants' nondelegable duty to maintain the lobby in safe condition.

We are likewise unpersuaded by appellants' contention that the Radisson defendants' nondelegable duty to Massart does not include the duty to warn her about the wet floor.[3] To the contrary, the supreme court has explained that a possessor of land has a

[3] Appellants appear to create this distinction based on a misinterpretation of the reasoning in *Conover*. In that case, the supreme court held that a possessor of land who hires an independent contractor does not owe a nondelegable duty of care to the independent contractor's *employees* for the contractor's negligence. *Conover*, 313 N.W.2d at 407. Although appellants are correct that the supreme court distinguished between a land possessor's personal duty and a nondelegable duty in its analysis in *Conover*, that

duty "to use reasonable care for the safety of entrants on their land, including the duty to inspect their premises for dangerous conditions and to repair them or warn entrants about them." *Olmanson v. LeSeuer County*, 693 N.W.2d 876, 881 (Minn. 2005). Thus, part of the Radisson defendants' duty to Massart included providing Massart with adequate warning.

Finally, appellants argue that, regardless of the Radisson defendants' vicarious liability for NSG's fault, the Radisson defendants are not liable to Massart because the jury apportioned only 20% fault to them. They contend that the fault apportioned to one defendant can be "aggregated" with the fault apportioned to another defendant only if the defendants are in an economic joint venture. They rely on *Cambern v. Sioux Tools, Inc.*, in which the supreme court stated, "Absent proof of an economic joint venture, current Minnesota law is clear that defendants' fault is not to be aggregated in applying our Comparative Fault Statute." 323 N.W.2d 795, 798 (Minn. 1982). But the concept of aggregation is not relevant to the Radisson defendants' 60% fault. Because the Radisson defendants are vicariously liable for NSG's negligence, NSG's fault is (and always was) the Radisson defendants' fault. *See Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73-74 (Minn. 2012) (clarifying that, because a tortfeasor's liability is created when the tort is

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distinction was based on the circumstances of the case—namely, the independent contractor's own nondelegable duty to its employee to provide a safe workplace and the fact that the land possessor "should not be held vicariously liable to someone who is injured while under the direction and control, as an employee, of the very party who creates the danger." *Id.* at 405. Thus, *Conover* did not alter a land possessor's nondelegable duty to the public—it merely recognized that employees of an independent contractor, "who have to be on the jobsite and whose work exposes them to the very hazard contributing to their injury," are not part of that public. *See id.* at 404.

committed, liability does not depend on the jury's apportionment of fault); *cf. Larsen v. Minneapolis Gas Co.*, 163 N.W.2d 755, 765 (Minn. 1968) ("[T]he one guilty of the negligent conduct and the one to whom the negligence is imputed are to be treated as one party for purposes of determining the fair share of the verdict each defendant must pay."). As a result, the fact that the jury apportioned only 20% fault to the Radisson defendants is immaterial to the comparative-fault analysis.

In sum, NSG was performing the Radisson defendants' nondelegable duty to Massart to maintain a safe lobby when it was cleaning the floors and the Radisson defendants are vicariously liable for NSG's negligent performance of that duty. Thus, the district court did not err by finding that the Radisson defendants' fault is 60%. Accordingly, Massart's fault is not greater than the Radisson defendants' fault, and the district court did not err by imposing judgment against the Radisson defendants for $297,900—the total damages diminished by Massart's 40% fault. *See* Minn. Stat. § 604.01, subd. 1 ("[A]ny damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering.").

B. Joint and Several Liability for All Defendants

Appellants also challenge the imposition of joint and several liability against NSG and the Radisson defendants. In Minnesota, joint and several liability is limited by Minnesota Statutes section 604.02 (2022). That statute provides that, "[w]hen two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each," subject to four exceptions when people are "jointly and severally liable for the whole award." Minn. Stat. § 604.02, subd. 1. The relevant exception

here is for "two or more persons who act in a common scheme or plan that results in injury." *Id.*, subd. 1(2). The application of this statute to the undisputed facts presents a question of law that we review de novo. *See Tester v. Am. Standard Inc.*, 590 N.W.2d 679, 680 (Minn. App. 1999).

We agree with Massart that the Radisson defendants and NSG "act[ed] in a common scheme or plan that result[ed] in injury," as required by the statute. Minn. Stat. § 604.02, subd. 1(2). It is undisputed that NSG entered into a contract to clean the Radisson defendants' hotel. That contract specified that, for the main lobby, the hard floors would be mopped daily. Appellants do not dispute that the NSG employee was mopping the lobby floor pursuant to that contract when Massart slipped and fell. And, as the jury found, NSG's and the Radisson defendants' failure to warn about the wet floor caused Massart's injury. As a result, joint and several liability is proper.

We are unpersuaded by appellants' arguments that the district court erred in finding that the common-scheme-or-plan exception applied. First, we reject appellants' contention that the district court's discussion of the Radisson defendants and NSG's common duty to Massart requires us to reverse the district court's imposition of joint and several liability. To the contrary, the supreme court's caselaw concerning joint liability has indicated that defendants' "common duty and joint opportunity to protect customers translates into equal and overall liability." *See Krengel v. Midwest Automatic Photo, Inc.*, 203 N.W.2d 841, 847 (Minn. 1973). As we concluded above, NSG was performing the Radisson defendants' nondelegable duty to Massart, and thus, as a matter of law, they shared a duty. And appellants do not dispute the district court's finding that Massart's fall "occurred in the

main lobby, directly in front of the Hotel's night desk clerk." As a result, we are not persuaded that the district court erred by relying on the Radisson defendants' and NSG's shared duty to Massart and finding a shared opportunity to warn her about the wet floor when imposing joint and several liability.

Second, we reject appellants' contention that the common-scheme-or-plan exception only applies to tortious acts, not tortious omissions, and thus does not apply to the Radisson defendants' and NSG's failure to warn Massart. The statute authorizes joint and several liability for "two or more persons who act in a common scheme or plan that results in injury." Minn. Stat. § 604.02, subd. 1(2). We disagree that persons acting in a common scheme may escape joint and several liability when their negligence is rooted in omissions, rather than acts, and do not find any basis for that reading in the statute's plain language.[4] Thus, the district court did not err in finding a common scheme or plan when the Radisson defendants and NSG failed to warn Massart about the wet floor, in violation of the Radisson defendants' duty to keep the lobby safe.

[4] Appellants rely on the Wisconsin Supreme Court's caselaw interpreting the Wisconsin common-scheme-or-plan exception to support their argument. Because the Wisconsin statute has different language and structure, that caselaw is of limited utility when analyzing the plain language of the Minnesota common-scheme-or-plan exception. *Compare* Minn. Stat. § 604.02, subd. 1(2), *with* Wis. Stat. § 895.045(2) (2022). More importantly, the Wisconsin Supreme Court's interpretation rested on its conclusion that the Wisconsin statute codified Wisconsin's "concerted action theory of liability." *Richards v. Badger Mut. Ins. Co.*, 749 N.W.2d 581, 594-95 (Wis. 2008). We decline to read Wisconsin's requirements for the "concerted action theory" into Minnesota's statutory common-scheme-or-plan exception. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *rev. denied* (Minn. Dec. 18, 1987).

In sum, the Radisson defendants are vicariously liable for NSG's fault, and joint and several liability for the whole award—60% of the verdict—is proper under the common-scheme-or-plan exception. Thus, the district court did not err by imposing joint and several liability in favor of Massart and against NSG and the Radisson defendants for $297,900.

Affirmed.