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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0389**

Benjamin Unke, et al.,
Appellants,

vs.

Michael Braun, et al.,
Defendants,

Neil Constine, et al.,
Respondents.

**Filed October 7, 2024
Affirmed
Larkin, Judge**

Dakota County District Court
File No. 19HA-CV-22-2893

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al.)

Considered and decided by Larkin, Presiding Judge; Smith, Tracy M., Judge; and
Harris, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellants challenge the district court's summary-judgment dismissal of their negligence claim against respondents. Because the undisputed facts show, as a matter of law, that respondents did not owe appellants a duty to protect against harm caused by a third party, we affirm.

FACTS

The relevant facts in this appeal from summary judgment are undisputed. On July 10, 2021, respondents Neil and Michelle Constine attended a social gathering at the home of defendants Michael and Gale Braun. While the Brauns and Constines were socializing on a second-floor deck, the Brauns' son and his friends were trying to ignite a bonfire in the yard below. Appellants Benjamin Unke and Chase Lehman were also guests at the gathering, and they were seated near the bonfire while others tried to light it.¹ The young adults were having a difficult time igniting the bonfire.

At some point, Neil Constine noticed that the Brauns' son had a can of gasoline. When Constine asked him what he was going to do with it, the Brauns' son said that he was going to use it on the bonfire. Constine told him to stop and that using gasoline on the fire was not a smart idea. The Brauns' son put the gasoline away, and it was not used on the fire. Neil Constine and Michael Braun discussed that gasoline should not be used on

¹ At the time of the gathering, Unke and Lehman had just finished their first year of college, and the Brauns' son had just returned from officer-candidate school. The Brauns' son and his friends were each at least 18 years old.

the fire. Constine commented that he had used denatured alcohol to burn scrap wood from woodworking, that it is used as a camping fuel, and that it burns cleanly. Braun said that he also woodworks and that he had used denatured alcohol in art projects to thin lacquer.

The Brauns' son and his friends were able to ignite the bonfire before dinner. After dinner, the bonfire had subsided, and the young adults were unsuccessful in their attempts to reignite it. Michael Braun left the deck, went to his garage, and got a can of denatured alcohol. Braun owned the denatured alcohol and had read its warnings that the product was flammable and that it should be kept away from sources of ignition, including heat, sparks, and flames.

Braun poured some denatured alcohol on the wood for the bonfire. Braun did not ask for input or instruction before doing so, and he did not tell anyone that he was going to do so. When the bonfire did not ignite, Braun poured more denatured alcohol on the wood. A flame shot up and followed the stream of alcohol into the can, which seemingly exploded. Braun jerked the can away, and the liquid splashed on Unke and Lehman, causing significant burns.

Unke and Lehman sued the Brauns and Constines for negligence. They alleged that Neil Constine had advised Michael Braun to pour denatured alcohol onto the bonfire and that Michael Braun negligently followed that recommendation. The Constines moved for summary judgment, arguing that they did not owe a duty of care to Unke and Lehman. They also argued that Michelle Constine did not do or say anything related to the negligence allegation in the complaint and that the claims against her were baseless.

The district court granted summary judgment for the Constines, reasoning that they did not owe a duty of care to Unke and Lehman and that, therefore, there was no genuine issue of material fact regarding Unke and Lehman's negligence claim against the Constines. Unke, Lehman, and the Brauns subsequently stipulated to dismiss the remaining claims, and the district court entered final judgment.

Unke and Lehman challenge the district court's grant of summary judgment for the Constines.

DECISION

Summary judgment is appropriate if the moving party shows that "there is no genuine issue as to any material fact" and that the moving party is "entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). But "[s]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019) (quotation omitted). "We review a grant of summary judgment de novo." *Id.* In conducting our review, we view the evidence in a light most favorable to the nonmoving party. *Id.*

"Negligence is generally defined as the failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011) (quotation omitted). The elements of a negligence claim are "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the

breach of the duty of care was a proximate cause of the injury.” *Id.* “In the absence of a legal duty, the negligence claim fails.” *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999). “The existence of a duty of care is a threshold question because a defendant cannot breach a nonexistent duty.” *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014).

“Minnesota law follows the general common law rule that a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party’s conduct.” *Id.* at 177-78. However, there are two exceptions to this general rule: (1) the “special relationship” exception and (2) the “own conduct” exception. *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 201-02 (Minn. 2018). If one of the two exceptions applies, “a negligent defendant may be held liable to a plaintiff for harm caused by a third party.” *Id.* at 202. The special-relationship exception applies “when there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable.” *Id.* at 201-02 (quotation omitted). The own-conduct exception applies “when the defendant’s own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.” *Id.* at 202 (quotation omitted).

In granting summary judgment for the Constines, the district court concluded that they did not owe Unke and Lehman a duty of care. Unke and Lehman argue that the Constines owed them a duty under the “own conduct” exception.

“Own conduct” refers to misfeasance, or “active misconduct working positive injury to others.” *Doe 169*, 845 N.W.2d at 178 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 56, at 373 (5th ed. 1984)). Nonfeasance, or “passive

inaction or a failure to take steps to protect others from harm,” is insufficient. *Id.* (quotation omitted). The distinction between misfeasance and nonfeasance depends on “whether the defendant has gone so far in what he has actually done” and whether he “has got himself into such a relation with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him.” Keeton, *supra*, § 56, at 375. “Whether an alleged tortfeasor’s ‘own conduct’ is misfeasance or nonfeasance is a question of law. But when there are genuine issues about what the defendant did or the responsibilities it assumed, a court may not be able to decide the question by summary judgment on a paper record.” *Fenrich*, 920 N.W.2d at 205 n.4 (citation omitted).

Viewing the summary-judgment record in the light most favorable to Unke and Lehman, there is no genuine issue of material fact regarding whether Neil Constine harmed them by engaging in “active misconduct.” Instead, the only reasonable view of the undisputed facts is that he did not do so. For example, in his deposition, Michael Braun testified that Constine did not tell him to use the denatured alcohol on the bonfire:

Q: After the gasoline was put away and that was no longer an issue, I understand that you and Neil Constine had a conversation to some extent, correct?

A: Correct.

Q: And Neil Constine told you that he has used denatured alcohol for woodworking, correct?

A: No.

Q: He didn’t tell you that?

A: Actually, maybe he said he used it for woodworking, but I thought he had said it’s good for, as a camping fuel, it’s a clean

burn. He might have said that he also used it for woodworking, yeah.

Q: He never told you that he has used it to start a bonfire, has he?

A: No. I don't know if I remember him saying that.

Q: He certainly never told you that you should use it on the firepit on July 10 at your home, did he?

A: *He never instructed me to go get it and put it on.*

Q: And you never told him that you were going to get it and put it on, did you?

A: *I did not announce to him I'm going to get it, no.*

Q: It was your own decision to use the denatured alcohol and try to get the fire going?

A: *It was my action to put the fuel on that.*

Q: I understand it was your action, because you were alone as you did it, but it was also your decision?

A: Of course, because it was my action.

(Emphasis added.)

In sum, although Braun stated that he would not have thought to use the denatured alcohol prior to his conversation with Neil Constine, he unambiguously testified that Constine did not instruct him to use denatured alcohol to ignite the bonfire and that it was his own decision to do so. Other parts of the summary-judgment record are consistent with Braun's deposition testimony. For example, in her deposition, Gale Braun testified that the conversation about denatured alcohol was a "discussion" and that when her husband retrieved the can, he did not say, "I'm going to go do this." And Neil Constine testified that he and Michael Braun "just kind of talked about what we use [denatured alcohol] for, not necessarily for a fire," and that they had "a pretty quick conversation." Neil Constine

agreed that the “conversation happened earlier in the evening, not necessarily in close proximity to when the fire happened.”

In arguing for relief on appeal, Unke and Lehman urge us to rely on affidavits that were submitted—pursuant to a stipulation of Unke, Lehman, and the Brauns—approximately nine months after the district court ruled in favor of the Constines on their motion for summary judgment. Specifically, Unke and Lehman heavily rely on Michael Braun’s post-ruling affidavit, in which he expressly contradicted his deposition testimony, claiming that Neil Constine “suggested” using denatured alcohol, that he “interpreted Mr. Constine’s comment[] . . . as a recommendation and/or advice that [he] use it to start the fire in the back yard that evening,” and that he “relied” on Constine’s comment. The Constines object that “[t]he subsequent affidavits of [the Brauns] do not constitute a finding of fact by the court or the jury, were not presented to the [district] court in connection with the motion for summary judgment and are not a proper basis of this appeal.”

We need not decide whether the post-ruling affidavits are properly before us in our de novo review because a party cannot create a genuine issue of material fact by submitting a self-serving affidavit that contradicts earlier damaging deposition testimony. *Banbury v. Omnitrition Int’l., Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). Because Michael Braun’s affidavit is a self-serving contradiction of his earlier deposition testimony, we do not consider it.

Unke and Lehman assert that, even without Michael Braun’s self-serving affidavit, the record reveals a genuine issue of material fact sufficient to avoid summary judgment. Specifically, they argue that a reasonable person could construe Neil Constine’s comment

regarding his previous use of denatured alcohol as “advice” to use denatured alcohol to safely ignite the bonfire. They argue that appellate courts have held that the own-conduct exception applies if a “person provides negligent advice on which another actor reasonably relies.”

As support, Unke and Lehman discuss *Isler v. Burman*, in which:

The evidence showed that the [defendant] church had planned [a] snowmobile party at which plaintiff was injured, had invited the people who brought snowmobiles, had received permission from the owner to use the land for the party, *had assumed the duty of inspecting the land to determine if it was free from hazards which would cause danger to those involved in snowmobiling*, and had assured those involved that the party would be supervised and chaperoned by the church.

232 N.W.2d 818, 818 (Minn. 1975) (emphasis added). The supreme court held that the district court did not err in instructing the jury that the defendant owed plaintiff the duties of a possessor of land, reasoning that “one who undertakes to make an inspection of land for conditions which may be dangerous assumes the duty of making an adequate inspection and discovering those conditions which are discoverable by such reasonable inspection.” *Id.* at 819-21. Unlike the circumstances in *Isler*, there is no evidence that Neil Constine undertook to inspect the bonfire for dangerous conditions or that he assumed any responsibility for the safe ignition of the bonfire.

Unke and Lehman also discuss *Nickelson v. Mall of America Co.*, in which we held that “[w]hen a commercial landlord voluntarily hires a security force and informs a tenant’s employees that the security guards will intervene in physical altercations, the commercial landlord voluntarily assumes a duty to intervene on behalf of the tenant’s employees in

physical assaults.” 593 N.W.2d 723, 724 (Minn. App. 1999). We reasoned that “[i]t is well established . . . that one who assumes to act may thereby become subject to the duty of acting carefully, if he acts at all.” *Id.* at 726 (quotation omitted). Unlike the circumstances in *Nickelson*, there is no evidence that Neil Constine assumed to act in relation to the ignition of the bonfire.

Finally, Unke and Lehman discuss *Thelen v. Spilman*, in which the supreme court held that “[a] driver who, though under no legal duty to do so, voluntarily undertakes to signal a following driver that it is safe to pass is liable in damages for all reasonably foreseeable consequences if in giving the signal he does not exercise reasonable care for the safety of others.” 86 N.W.2d 700, 702 (Minn. 1957). The supreme court noted that “[i]t is a customary courtesy for drivers of big trucks which obscure the view ahead to signal following automobiles when the road ahead is clear of traffic and it is safe to pass” and that “[i]t is also customary for the driver of a following vehicle to take heed of such signal in determining whether it is safe to pass.” *Id.* at 705. Unlike the circumstances in *Thelen*, there is no evidence that Neil Constine’s limited comments regarding his use of denatured alcohol were the equivalent of a “customary courtesy” that would result in a “customary” response.

In sum, in the cases on which Unke and Lehman rely, the defendants expressly encouraged the plaintiffs to engage in a specific course of conduct, namely, to snowmobile on particular land, to rely on a private security service, or to pass a vehicle on a roadway. Unlike in those cases, here there is no evidence that Neil Constine expressly encouraged Michael Braun to use denatured alcohol to ignite the bonfire. Such express advice could

reasonably be viewed as active misconduct under the caselaw on which Unke and Lehman rely. But that is not what happened here. There is simply no evidence that Neil Constine actively advised or suggested that Michael Braun use denatured alcohol to ignite the bonfire on the Brauns' property.

The supreme court's determination in *Fenrich* is also instructive. In that case, the supreme court concluded that a plaintiff was capable of proving that a school engaged in misfeasance, and not nonfeasance, for the purposes of imposing a duty under the own-conduct exception. *Fenrich*, 920 N.W.2d at 205. The *Fenrich* court reasoned that a reasonable person could find that a school's conduct related to a student's harm-causing driving on the way to an athletic event was misfeasance because the school "went beyond passive inaction by assuming supervision and control over its athletic team's trip." *Id.* at 203. The supreme court noted that the "head coach strongly encouraged the entire team to participate," the assistant coach paid the registration fee, the coaches were involved in preparation, and the assistant coach "took active responsibility for coordinating transportation to, and lodging at," the athletic event. *Id.* at 204. Unlike the circumstances in *Fenrich*, there is no evidence suggesting that Neil Constine assumed "supervision and control" over the harm-causing event. *See id.* at 203.

Unke and Lehman argue that a jury should be allowed to decide whether Michael Braun reasonably interpreted Neil Constine's remarks as advice to use denatured alcohol to ignite the bonfire. Assuming without deciding that this argument identifies a genuine issue of fact, it is not a *material* issue of fact. Again, the dispositive issue is whether Neil Constine engaged in active misconduct giving rise to a duty of care under the own-conduct

exception. Given the level of conduct necessary to create a duty under that exception, as shown in the caselaw discussed above, we are not persuaded that an unintended interpretation of Constine's remarks would constitute the necessary level of misfeasance or active misconduct. Constine's limited remarks regarding his use of denatured alcohol simply do not compare to the type of conduct that appellate courts have recognized as misfeasance adequate to create a duty of care under the own-conduct exception.

Because the relevant facts are undisputed, whether Neil Constine's comments regarding denatured alcohol were misfeasance or nonfeasance is a question of law. *See id.* at 205 n.4. We conclude that Constine's limited comments regarding his previous use of denatured alcohol do not constitute misfeasance as a matter of law. And because the record therefore reflects a complete lack of proof regarding the essential duty element of the underlying negligence claim, summary judgment is proper. *See Lubbers*, 539 N.W.2d at 401 ("A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim.").

Affirmed.