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Minnesota Supreme Court Justices Continue a Hands-off Approach to Foreseeability

By Nicholas G. Strafaccia

One of the few things all attorneys can agree on is the pleasure in reading the word GRANTED in reference to a previously filed summary judgment motion. Likewise, it is just as frustrating to see the words REVERSED when that decision is then reviewed by an appeals court. More and more, Minnesota defense attorneys are seeing their artfully crafted summary judgment motions being reversed by the Minnesota Supreme Court—specifically when those motions are designed to dismiss a client from a negligence action.

This article will briefly discuss the case *Fenrich v. The Blake School*, a decision released on November 21, 2018, by the Minnesota Supreme Court. The case exposes a new trend found within the Minnesota Supreme Court that Justice Anderson refers to as, "a major departure from [Minnesota Supreme Court] precedent."

AN OVERVIEW OF THE LEGAL ASPECTS WITHIN THE CASE

As a brief legal overview, this article analyzes a case that was originally dismissed at the summary judgment phase of litigation. This means a judge determined there were "no genuine issue as to any material fact" and the defendant was entitled to a ruling as a matter of law. Minn. R. Civ. P. 56.01. However, if there are genuine issues regarding important facts in the case, the judge would have denied the motion because only a jury can determine issues of fact.

When filing a summary judgment motion, a defendant can successfully obtain a dismissal if the record lacks proof of any of these four elements: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty was the proximate cause of said injury. *See Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). For the purpose of this article, we will solely focus on the first element—whether a duty of care exists.

As a general rule in Minnesota, if you walk down the street and see Stranger A being attacked by Stranger B and you decide to do nothing, you cannot later be sued by Stranger A because of your decision. Legally speaking, "[a] person does not owe a duty of care to another . . . if the harm is caused by a third party's conduct." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177–78 (Minn. 2014).

However, like all things legal, there are exceptions to the above rule. The exception this article discusses is referred to as the "own conduct" exception. This exception is defined as follows: a defendant owes a duty to a plaintiff for injuries caused by third parties when, "the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011).

Deciding what and who is "foreseeable" is the inquiry that the current Minnesota Supreme Court

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Congratulations

Tessa McEllistrem successfully won a Court of Appeals argument related to an arbitration award. The parties entered into binding arbitration, with the arbitrator awarding a monetary amount to Plaintiff, but noting causal negligence of 25 percent on the Plaintiff. The Plaintiff argued that comparative fault should not apply and that the award should not be reduced. We argued, and the district court held, that the four corners of the award were clear that comparative fault needed to apply to reduce the final award to the Plaintiff. The Court of Appeals upheld that ruling and held that no statutory provision existed to modify, correct or vacate the award, and that it was clear that the district court properly confirmed the arbitration award with the 25 percent comparative fault reduction.

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has started to focus their recent published opinions on. The court has held that when foreseeability is a "close call," the determination of whether a duty exists is one for the jury to determine at trial. *See Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623 (Minn. 2017); *see also Senogles v. Carlson*, 902 N.W.2d 38 (Minn. 2017). Thus, because a case needs a jury determination, the court reverses the previously granted summary judgment motion.

However, when the Minnesota Supreme Court looks at the facts of a case and determines that foreseeability is a close call, it is contrary to a commonsense look at the situation. As an example, the below case discusses how the court determined a jury should determine whether a school is liable to a driver that was hit by one of the school's students driving his own vehicle to a post season athletic competition.

FENRICH V. THE BLAKE SCHOOL, 920 N.W.2D 195 (MINN 2018)

In *Fenrich*, a 4-2 decision by the Minnesota Supreme Court reversed a summary judgment motion granted in favor of The Blake School. The court concluded that a trial must take place in order to determine whether The Blake School's own conduct created a foreseeable risk of harm to a foreseeable plaintiff—i.e. to determine if the "own conduct" exception applies to this case.

On November 12, 2011, around 11:00 AM, a sixteen-year-old student athlete known as T.M. crossed over the centerline of Highway 15 and collided with Gary and JeanAnn Fenrich's vehicle. Gary was killed and JeanAnn was severely injured. At the time of the accident T.M. was driving himself, two other student athletes and a volunteer coach to Sioux Falls, South Dakota, in order to participate in a regional competition. The students all were part of The Blake School's cross country running club and the volunteer coach was a recent grad.

After numerous settlements and motion practice, the only parties left in the litigation were Mrs. Fenrich and The Blake School. The trial court dismissed the claims against Blake determining that, as a matter of law, a school did not owe a duty of care to the members of the general public. The court of appeals affirmed the decision, but on different grounds, holding that the school's conduct did not create a foreseeable risk of injury to a foreseeable plaintiff. Mrs. Fenrich appealed again to the Minnesota Supreme Court.

The Minnesota Supreme Court explained that generally a person does not owe a duty of care to another if the harm is caused by a third party's conduct. The court disregarded other exceptions and focused its opinion on the "own conduct" exception: did the school's own conduct create a foreseeable risk of injury to a foreseeable plaintiff.

The court began by determining what should be considered The Blake School's conduct. The lengthy and fact intensive analysis determined that the school assumed supervision and control over the student's trip to the competition. The analysis focused on facts such as the school's coaches encouraging participation, paying registration fees and coordinating travel and accommodations for the competition. However, it should also be noted that T.M. was driving his personal vehicle, the competition was not part of the normal league's schedule, the event was off school grounds, and the student had the full support of his parents. Regardless, the court focused on the fact that the school's coaches approved a sixteen-year-old student to drive other student athletes to a competition some 200 miles away.

Next, the court analyzed if those actions created a foreseeable risk to a foreseeable plaintiff. "When determining whether a danger is foreseeable, we look at whether the specific danger was objectively reasonable to expect." *Fenrich*, 920 N.W.2d at 205 (internal citation omitted). The published opinion then cited two recent cases, *Senoglees* (2017) and *Montemayor* (2017), in order to support the legal conclusion that when "foreseeability" is at least a "close call," the determination of whether a duty exists is an inquiry for the jury.

The court continued and claimed it "is not in any way remote or attenuated" to believe that teen drivers can get distracted by electronics/ other teens and cause accidents. *Id.* at 206.

Finally, the court concluded, "[i]n deciding whether summary judgment should have been granted on the issue of foreseeability, again, we must view all of the evidence and the reasonable inferences from it in favor of the non-moving party, Fenrich. When we apply that standard, we conclude that, in the circumstances of this case, whether T.M.'s driving created an objectively reasonable expectation of danger to the public is at least a 'close call,' and thus summary judgment was improper." The court remanded the case to be heard by a jury.

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OUR THOUGHTS

Justice Lillehaug, writing the *Fenrich* majority opinion, specifically states, "[c]ontrary to the dissent's assertion, we announce no new rule of law today, much less a major departure from our jurisprudence." *Id.* at 206. However, contrary to Justice Lillehaug's assertion, the impact of this case, and others like it, may have a drastic effect on future litigation.

The *Fenrich* case boils down to a student, driving his own vehicle, off school property, to a post-season athletic competition. The court concluded that whether the school owed a duty to the general driving public in relation to any contact they may have with this student was a "close call" and something a jury should decide. This expansion of a school's duty is troublesome. Furthermore, the Minnesota Supreme Court has given no indication as to how far this expansion of duty may go.

The Minnesota Supreme Court's unwillingness to make a decision regarding foreseeability in this case does not bode well for the defense bar in Minnesota. For whatever reason, the Justices are not comfortable in making these determinations. Because of this, plaintiffs' attorneys can drive up defense costs by joining third-parties that have remote connections to the litigation and appealing any dismissal of that party.

Alternatively, the federal bar is not following in the state supreme court's footsteps. Recently, United States District Court Judge Wilhelmina Wright (formally of the Minnesota Supreme Court) analyzed the "own conduct" exception, as defined in Minnesota state law, in *Davis v. Dollar Tree, Inc.*, No. 19-CV-1118 (WMW/HB), 2019 WL 174911 (D. Minn. Jan 11, 2019). The federal court held that after a Dollar Tree employee started a fight with a customer, it was not foreseeable that the customer would then return to the store with a gun and injure the plaintiff (another individual at the store). The court stated that the foreseeable injury must be objectively reasonable, but "not simply in the realm of any conceivable possibility." *Id.* at *3. In *Davis*, the Dollar Tree did not owe any duty to the plaintiff as a matter of law.

While it is unclear if the federal appeals courts will overturn this decision, it appears the federal courts are more willing to draw a line in the sand when determining when a legal duty is owed. Until more precedent is made, our suggestion on litigation concerning the "own conduct" exception is threefold.

First, remove the case to federal court when possible. Second, prior to filing a summary judgment motion arguing a lack of legal duty, take time to analyze whatever the current gap is in regards to a possible settlement. If the plaintiff is apt to appeal, it may be more cost effective to compromise and settle rather than run up costs on appeal—regardless of your confidence in how successful the motion will be. Third, if you find yourself in a situation where a district court has granted the summary judgment motion in your favor, take the following steps: file and obtain the taxation of costs for the matter, then contact plaintiff and offer to waive those costs along with offering some nominal amount (perhaps $10,000 depending on the matter) only if the plaintiff agrees to waive their right to appeal.

As always, if you have any questions or wish to discuss any aspect of this article further, please do not hesitate to contact the author. ●

Fire Never Seeps: One Fire is One Occurrence

By Nancy M. Younan

SECURA Ins. v. Lyme St. Croix Forest Co., LLC, 2018 WI 103

Whether an incident is classified as a single occurrence or as multiple occurrences can have serious implications for insurance companies. Most policies contain both per-occurrence and aggregate limits, so if the damage is an amount in excess of policy limits, establishing that there is more than one occurrence may increase the amount available if the aggregate limit is more than the per-occurrence limit. The occurrence classification can dramatically impact the money involved in a claim.

Factual Background

In May 2013, the Germann Road fire burned more than 7,000 acres over the course of three days. Logging equipment owned by Ray Duerr Logging, LLC, the insured, began the fire. The fire quickly spread from dry grass to a pile of jack pine and into the surrounding forest. At the time of the fire, Secura Insurance insured Duerr under a commercial general liability (CGL) policy. The policy contained a $2 million general aggregate policy limit and a $1 million per-occurrence limit. However, the CGL incorporated a "Logging and Lumbering Operations Endorsement" which reduced the per-occurrence policy limit to $500,000 for property damage due to fire, arising from logging or lumber operations.

Secura brought this declaratory judgment action to determine its coverage liability concerning Duerr. Secura argued that this fire was a single occurrence. Pursuant to the incorporated Logging and Lumbering Operations Endorsement, the $500,000 policy limit is applicable to single occurrences. The circuit court rejected this argument concluding that each seepage of fire onto another property constituted a separate occurrence for the purpose of the policy and that the $2 million policy limit is applicable. The court of appeals affirmed the circuit court's finding. It asserted that a new occurrence occurred each time the fire, fueled and expanded by the consumption of new materials, spread to a new piece of real property and caused damage. The Wisconsin Supreme Court reversed the court of appeals holding that the fire was a single occurrence and thereby subject to the $500,000 policy limit.

Cause v. Effect Theory

In explaining its decision, the Wisconsin Supreme Court laid out two competing principles of law—cause theory and effect theory—to guide the analysis for determining whether an event is a single occurrence or multiple occurrences. In Wisconsin, cause theory is the law. *SECURA Ins. v. Lyme St. Croix Forest Co., LLC*, 2018 WI 103. Pursuant to cause theory, "where a single, uninterrupted cause results in all of the injuries and damage, there is but one 'accident' or 'occurrence.'" *Id.* at ¶ 21 (citing *Welter v. Singer*, 126 Wis. 2d 242, 246, 376 N.W.2d 84, 85 (Ct. App. 1985)). Further, if the cause and result are "so simultaneous or so closely linked in time and space as to be considered by the average person as one event,' then only a single occurrence has taken place. *Id.* (citing *Wilson Mut. Ins. Co. v. Falk*, 2014 WI 136, 360 Wis. 2d 67, 857 N.W.2d 156). The alternative, effect theory, construes each accident from the perspective of the person who was injured. Under this theory, there is a separate occurrence when the separate property of each claimant is injured. The circuit court and court of appeals both intended to apply the cause theory, but in fact applied the effect theory. There are three cases upon which the Supreme Court rests its analysis.

Plastics Engineering

In *Plastics Engineering*, a company manufactured and sold asbestos containing products for over twenty years. *See Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 2009 WI 13, 315 Wis. 2d 556, 759 N.W.2d 613. Multiple claimants sued the company for bodily injury or wrongful death that arose from exposure to these products. *Id.* The court held that each claimant's repeated exposure is a single occurrence and so the collection of claimants constituted multiple occurrences. *Id.*

Welter

In *Welter*, a driver struck a bicyclist, stopped and then drove forward, dragging the bicyclist under the car. *See Welter*, 126 Wis. 2d 242, 376 N.W.2d 84. The driver stopped again and then moved the car forward again. *Id.* The driver then got out of the car and a second driver got in, who attempted to free the bicyclist from under the car by backing up. *Id.* The court determined that this is a single occurrence because the cause and result were so simultaneous and closely linked in time and space that an average person would consider to be one event. *Id.*

Falk

In *Falk*, the company spread liquid cow manure on farm fields as fertilizer. *Falk*, 360 Wis. 2d 67, 857 N.W.2d 156. Several neigh-

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bors alleged that the manure contaminated their wells. *Id.* In determining the number of occurrences for the purposes of a well contamination policy, the court held that there was an occurrence each time manure seeped into a unique well. *Id.* Because manure had to seep into each individual well in order to contaminate it, there were multiple occurrences. *Id.* Further, the court held that it could not be said to be so simultaneous or closely linked in time and space as to be considered one event because the manure seeped over the course of an unspecified period of time. *Id.*

Conclusion

While the court of appeals saw similarities between the manure seepage and the fire, the Supreme Court distinguished between the two sets of facts. The manure seepage occurred over an unspecified amount of time whereas the fire burned continuously for three days. The fire is one occurrence under the cause theory because the damage closely follows the cause in both time and space. *Secura* at ¶ 34. The Supreme Court held that courts are to look at the cause of the damage, not the effect on individual property owners. *Id.* ¶ 36. The court also cautioned that the court of appeals' conclusion would lead to arbitrary and unreasonable consequences by determining the number of occurrences solely from the number of owners whose property is damaged. *Id.* ¶ 38. If the fire had burned the same amount of land but only injured one person's property, it would be a single occurrence, but if multiple people's property was injured then the fire would constitute multiple occurrences even though the same amount of land burned. *Id.* This would require an insurance company to pay more despite the fact that the amount of land burned is the same. *Id.* Other jurisdictions have similarly held that a fire destroying the property of multiple claimants is a single occurrence. *Id.* ¶ 40. ●

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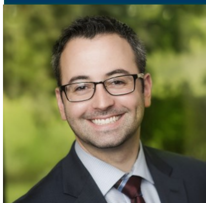

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