STATE OF MINNESOTA
IN COURT OF APPEALS
A07-182

The Travelers Indemnity Company, et al.,
Respondents,

vs.

Bloomington Steel and Supply Company, et al.,
Defendants,

Jose Padilla,
Appellant.

Filed February 12, 2008
Affirmed; motion to strike portions of appellant's brief and appendix granted and motion for attorney fees denied
Willis, Judge

Hennepin County District Court
File No. 27-CV-03-019854

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Considered and decided by Willis, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

WILLIS, Judge

Appellant challenges the district court's grant of summary judgment to respondents, claiming that fact issues preclude summary judgment and that the district court erred in its application of the law. Respondents have moved to strike portions of appellant's brief and appendix, to strike a statement made by appellant's counsel at oral argument, and for attorney fees. We affirm, grant respondents' motion to strike portions of appellant's brief and appendix, find it unnecessary to rule on their motion to strike a statement made at oral argument, and deny their motion for attorney fees.

FACTS

On October 18, 2000, Cecil Reiners, an employee of and the sole shareholder, officer, and director of Bloomington Steel and Supply Company ("Bloomington Steel"), entered the Bloomington Steel workshop. Reiners overheard appellant Jose Padilla, an employee of another business that shared Bloomington Steel's workspace, speaking to a Bloomington Steel employee in Spanish. Reiners instructed Padilla to speak only in English and to leave the workshop.

Later that day, Reiners returned to the workshop. Padilla was still present, and he and Reiners began to argue. The argument ended when Reiners struck Padilla in the head with a two-by-four. The assault required Padilla to undergo emergency surgery to repair his fractured skull and multiple brain hematomas. Reiners later pleaded guilty to first-degree assault for the attack.

At the time of the assault, respondents Travelers Indemnity Company and Charter Oak Fire Insurance Company (collectively "Travelers") provided commercial general-liability coverage and umbrella liability coverage to Bloomington Steel.[1] The commercial general-liability policy requires Travelers to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage,'" but only if the "'bodily injury' or 'property damage' is caused by an 'occurrence.'" The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy excludes claims for bodily injury or property damage that is "expected or intended from the standpoint of the insured."

Padilla sued Reiners for assault and battery and sued Bloomington Steel on the theory of respondeat superior and on claims of negligent hiring, negligent retention, and negligent supervision. Bloomington Steel moved for summary judgment, and the district court denied the motion.

Travelers then commenced this declaratory-judgment action against Bloomington Steel, Reiners, and Padilla, seeking to establish that it was not obligated to indemnify Bloomington Steel in the suit brought by Padilla because the policy excluded expected acts. Also at about this time, Padilla, Reiners, and Bloomington Steel entered into a *Miller-Shugart* agreement by which Reiners and Bloomington Steel confessed to judgment and assigned to Padilla their rights to pursue Travelers.

[1] The terms of both polices are the same for purposes of this appeal.

Travelers moved for summary judgment, and the district court granted the motion, determining that the insurance policy's expected-acts exclusion precludes coverage for any damages that Bloomington Steel could be legally obligated to pay to Padilla for Bloomington Steel's negligent supervision and retention of Reiners.

On appeal from that ruling, this court affirmed. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 695 N.W.2d 408, 409 (Minn. App. 2005). But the supreme court reversed, stating that the district court erred by imputing Reiners's knowledge to Bloomington Steel solely because Reiners was Bloomington Steel's sole shareholder, sole director, and sole officer. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). The supreme court remanded the case with instructions for the district court to allow additional factual development to determine whether Bloomington Steel had knowledge of Reiners's violent tendencies. *Id*. at 897.

On remand, the parties took 19 depositions, including separate depositions of Reiners in his corporate and individual capacities. Both parties then moved for summary judgment. The district court denied Padilla's motion and granted Travelers' motion. Padilla appeals.

D E C I S I O N

We review de novo a grant of summary judgment to determine whether there are disputed issues of material fact or whether the district court erred in its application of the law. *See Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005); *Zip Sort, Inc. v. Comm'r of Revenue*, 567 N.W.2d 34, 37 (Minn. 1997). A district court properly

grants summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. A district court may grant a motion for summary judgment when reasonable persons may not draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). On appeal, we view the evidence in the light most favorable to the nonmoving party. *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 371 (Minn. 1995).

I. The district court properly granted Travelers' request for summary judgment because no genuine issues of material fact exist.

We first review Padilla's claim that genuine issues of material fact precluded summary judgment. On remand from the supreme court, the question before the district court involved two related inquiries: (1) did Reiners have a history of workplace violence, and, if so, (2) was Bloomington Steel aware of that history of violence? *See Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 897 (Minn. 2006).

Padilla contends that the district court on remand "erred when it determined there were no material issues of fact to submit to a jury." Because Padilla admitted to the district court that Reiners had a history of violence and that Bloomington Steel was aware of that history, we disagree. On November 20, 2006, the district court heard the parties' arguments on their cross-motions for summary judgment. Responding to a question from the bench, Padilla's counsel conceded that Reiners had a propensity for workplace

violence and that Bloomington Steel knew about it: "The question here is not whether [Reiners] has a propensity for violence, he clearly does, and there is knowledge that he has had bad behavior on the jobsite before . . . ." This concession, which stands in contrast to Padilla's argument on appeal, apparently resulted from Padilla's confusion about the legal standard that applied to the case. But the statement shows that no genuine dispute exists regarding whether Reiners had a propensity for violence and whether Bloomington Steel had knowledge of that propensity. *See Lundgren v. Eustermann*, 370 N.W.2d 877, 881 n.1 (Minn. 1985) (stating that stipulations and concessions of counsel may be considered by the district court when deciding a motion for summary judgment); *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 394 (Minn. App. 1987). Padilla's concession at the hearing, although not cited by the district court, shows that the record supports the district court's grant of summary judgment to Travelers without any further analysis of factual issues. *See State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 883 (Minn. 2006) (stating that summary judgment is proper when material facts are undisputed).

II. The district court correctly applied the law in evaluating whether Bloomington Steel expected Reiners to commit a violent act.

Padilla argues next that the district court, defying the supreme court's instructions, applied the incorrect legal standard in its analysis of whether Bloomington Steel "expected" that Reiners would commit a violent act. Specifically, Padilla claims that the district court analyzed Bloomington Steel's knowledge of Reiners's propensity for violence under an "objective should have known standard."

To determine whether an insurer is liable on a policy that excludes coverage for damage resulting from an act that is expected by the insured, this court "require[s] a certainty of harm on the part of the insured greater than general standards of foreseeability used to impose liability on the insured." *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 735 (Minn. 1997). The supreme court has stated that it is "the insured's actual expectation of damage that allows a defense to coverage" under a policy with an expected-acts exclusion. *Id.*

On remand, the supreme court framed the issue for the district court as whether "Bloomington Steel expected Reiners' assault of Padilla based on [Bloomington Steel's] actual and imputed knowledge of [Reiners's] other incidents of violence." *Travelers*, 718 N.W.2d at 897. In other words, the question is whether Bloomington Steel actually knew that Reiners had a propensity for violence, not whether Bloomington Steel should have known, for purposes of determining the applicability of the expected-acts exclusion to coverage.

The district court stated that, under its interpretation of the supreme court's opinion, it was required to decide if Bloomington Steel "had actual knowledge or, alternatively, was reckless, regarding what its sole shareholder, director, officer, and [its] employee knew about its employee Reiners' propensity for workplace violence." The district court elaborated that "the expectation of violence must be beyond foreseeable but need not be actual awareness, just recklessness." On the basis of these statements, Padilla claims that the district court applied something less than the actual-knowledge

standard required by the supreme court and that the district court's "interpretation of recklessness is a lesser standard that is easier to establish."

But examining the district court's analysis as a whole, we conclude that the district court correctly applied the law. Despite language in the district court's memorandum accompanying its order granting Travelers' motion for summary judgment that, allegedly, applied a lesser standard, the district court also stated that it believed that Bloomington Steel had actual notice of Reiners's violent tendencies. The district court stated that "the discovery undertaken by the parties leads this Court to its conclusion that Reiners, as Bloomington Steel's officer and director, *witnessed* Reiners, the corporation's employee, be violent on a number of occasions at the workplace." (Emphasis added.) Padilla's assertions on appeal notwithstanding, the district court based its decision on the correct legal standard, that is, that Bloomington Steel had actual knowledge of Reiners's propensity for violence because Bloomington Steel had witnessed Reiners's violent behavior.

Padilla also contends that the district court erred because "Travelers must prove more than the fact that Reiners had a propensity for violence in the past. Travelers must prove that Bloomington Steel had actual knowledge that Reiners would assault Padilla." This statement mischaracterizes the law. The relevant inquiry is whether Bloomington Steel had actual knowledge of Reiners's propensity for workplace violence, not whether Bloomington Steel actually knew that Reiners intended to attack Padilla. *See Travelers*, 718 N.W.2d at 896 ("But our resolution of this matter should not be construed to mean that Bloomington Steel cannot be charged with knowledge of Reiners' *propensity for*

violence . . . .") (emphasis added). The supreme court iterated the relevant inquiry when it stated how Travelers could show that Bloomington Steel expected the damage: "Whether Bloomington Steel expected Reiners' assault of Padilla based on its actual and imputed knowledge of *other incidents of violence* will be a fact-specific determination." *Id.* at 897 (emphasis added); *see also Domtar*, 563 N.W.2d at 735 (stating that the record contained no evidence that the insured expected "the same *general type* of damage for which [a state agency] now seeks remedial action") (emphasis added).

Because the district court did not err in its application of the law, it properly granted Travelers' motion for summary judgment.

III. We decline to decide at what time an insured's expectation must be measured for purposes of an insurance policy's expected-acts exclusion.

Padilla argues that the district court "erred when it refused to decide the legal issue of at what time the insured's expectation must be measured" in negligent-supervision and negligent-retention cases. We decline to address this issue for two reasons. First, the district court did not address the question below. Therefore, this court would decide the issue without the benefit of a district-court ruling. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that appellate courts will not consider a legal question on appeal "even though the question was raised below, if it was not passed on by the [district] court"). Second, resolution of the issue is not determinative on the facts of this case. Regardless of whether the expectation is measured at the time that he assaulted Padilla or at some earlier time, Reiners was aware of his own violent tendencies. Because deciding the issue would not affect the outcome of the case, to do so now would

effectively be to offer an advisory opinion. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (explaining that appellate courts decide only actual controversies and will not issue advisory opinions).

IV. We grant Travelers' motion to strike portions of Padilla's appellate brief and appendix, determine that it is unnecessary to rule on Travelers' motion to strike a statement made by Padilla's counsel at oral argument, and deny Travelers' motion for attorney fees.

Travelers moves this court to strike portions of Padilla's appellate brief and appendix and a statement made by Padilla's counsel at oral argument. Travelers also has moved for an award of attorney fees. We consider each motion in turn.

A. Travelers' motion to strike portions of Padilla's appendix and brief.

Travelers moves to strike portions of Padilla's appendix because it contains materials not before the district court when it ruled on the cross-motions for summary judgment. Travelers also claims that those portions of the brief include "baseless and false allegations of alleged lawyer misconduct in obtaining non-party witness testimony under alleged false pretenses." Padilla did not file a brief in response to Travelers' motion but discussed the motion briefly in his March 30, 2007 reply brief.

The record on appeal is the papers filed in district court, the exhibits, and any transcripts of the proceedings. Minn. R. Civ. App. P. 110.01. Appellate courts "may not consider matters outside the record on appeal and will strike references to such matters from the parties' briefs." *Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007) (quotation omitted). Additionally, a motion to strike can be granted when the "brief is

used as a vehicle for disrespect, insult, and slanderous accusations." *State v. Gamelgard*, 287 Minn. 74, 82, 177 N.W.2d 404, 409 (1970).

1. Affidavit of Padilla's counsel.

To support his allegations of attorney misconduct, Padilla included in his appendix an affidavit from one of Padilla's attorneys who was present at the deposition of Albert Egurolla. The affidavit is dated December 6, 2006. The district court issued its order granting Travelers' motion for summary judgment on December 5, 2006. We strike this affidavit from the appellate record. *See Kluball v. Am. Family Mut. Ins. Co.*, 706 N.W.2d 912, 919 (Minn. App. 2005) (striking respondent's affidavit from appellate record when respondent had prepared it after district court had granted summary judgment).

2. Alleged attorney misconduct.

Travelers claims that portions of Padilla's brief contain allegations that counsel for Travelers misled two non-party deponents about whom Travelers' counsel represented. Other than the bald assertions in its brief that the deponents were misled at their depositions, Padilla offers no evidence of Travelers' alleged impropriety. Padilla did not obtain statements from either of the deponents to corroborate Padilla's allegations. And the only document that supports the allegations—the affidavit of Padilla's counsel—is not properly before this court. *See Gamelgard*, 287 Minn. at 82, 177 N.W.2d at 409 (noting the "well established" rule that the court will strike disrespectful, insulting, and slanderous accusations which find no support in the record or refer to matters entirely outside the record). Therefore, we strike the portions of Padilla's brief listed on page 18 of Travelers' motion.

B. Travelers' motion to strike a statement made at oral argument.

At oral argument, Padilla's counsel stated that he had filed complete copies of the deposition transcripts with the district court. Travelers moves to strike this statement as factually inaccurate. In response to Travelers' motion, Padilla's counsel acknowledges that he provided the district court with only deposition excerpts. We have limited our review, therefore, to those portions of the transcripts before the district court and determine that it is unnecessary to rule on Travelers' motion to strike.

C. Travelers' motion for attorney fees.

Travelers also seeks $3,016.50 in attorney fees incurred in bringing its motion to strike the allegations of attorney misconduct from Padilla's brief. On appeal, an award of attorney fees is within the discretion of the court. *See Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd* 504 N.W.2d 758 (Minn. 1993). We deny Travelers' motion because Travelers has not shown that Padilla made the allegations to delay the proceedings or to increase Travelers' costs. *See Glass Serv. Co. v. Progressive Specialty Ins. Co.*, 603 N.W.2d 849, 853 (Minn. App. 2000) (granting a motion to strike but refusing to award attorney fees because the brief did not "appear to have been written with the intent to delay proceedings or increase costs").

Affirmed; motion to strike portions of appellant's brief and appendix granted, and motion for attorney fees denied.