STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0511

Sirius America Insurance Company,
as subrogee of Josephine Gagne,
Appellant,

vs.

Stephanie Hauer,
Respondent.

Filed January 13, 2009
Affirmed
Lansing, Judge

St. Louis County District Court
File No. 69DU-CV-06-2429

Anthony U. Wacker, Baker Court, Suite 305, 821 Raymond Avenue, St. Paul, MN 55114 (for appellant)

Kenneth A. Kimber, Hanft Fride, P.A. 1000 U.S. Bank Place, 130 West Superior Street, Duluth, MN 55802-2094 (for respondent)

Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and Worke, Judge.

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

LANSING, Judge

In a negligence action arising from slippery road conditions, Sirius America Insurance Company, as subrogee of its insured, appeals the district court's determination

that Stephanie Hauer was not negligent and therefore not liable for damages to the car insured by Sirius. Because the district court applied the appropriate standard of care and the evidence supports its conclusion that Hauer was not negligent, we affirm.

F A C T S

Josephine Gagne, who is insured under a policy issued by Sirius America Insurance Company, sustained property damage to her car under heavy snow conditions in January 2006. Gagne was driving slowly on Third Street toward downtown Duluth, approaching the intersection of Third Street and Fifteenth Avenue, when she saw a car slide into the intersection about two car lengths ahead of her. To prevent a collision, Gagne swerved to the left. Gagne's car struck a snow bank and sustained more than $2,200 in damages.

Stephanie Hauer, the driver of the sliding car, lived on Fifteenth Avenue just south of Third Street. She was on her way home from class at the University of Minnesota Duluth and had driven down Nineteenth Avenue East, a downhill street that was plowed and passable. She turned right onto Fourth Street and left from Fourth Street onto Fifteenth Avenue, also a downhill street. But Fifteenth Avenue had not been plowed, and Hauer's attempts to stop her car were futile. She slid down Fifteenth Avenue and through the stop sign at the intersection of Third Street and Fifteenth Avenue.

While Gagne and Hauer were providing information to the police, another car slid uncontrolled down Fifteenth Avenue, nearly colliding with a westbound car on Third Street. The police filed a report but did not issue a citation to either Hauer or Gagne.

In a trial without a jury, the district court evaluated Hauer's driving conduct under the ordinary standard of reasonable care and found that the incident was "an unavoidable accident, caused by the conditions that day." The district court found that Hauer was not negligent in choosing to navigate Fifteenth Avenue because she "had no way of knowing until she got onto the roadway that Fifteenth Avenue would be as slippery as it apparently was." The district court concluded that Hauer was not negligent and entered judgment dismissing Sirius's subrogation claim. Sirius now appeals.

D E C I S I O N

To prove negligence, a plaintiff must establish that the defendant breached a duty owed to the plaintiff and that the breach was the proximate cause of plaintiff's damages. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999). When a case is tried by the court without a jury, review is limited to determining whether the findings of fact are clearly erroneous and whether the district court erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). The applicable duty of care is a question of law. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985). Whether a person's actions breach the duty of care is a fact question. *Schweich*, 463 N.W.2d at 729.

Minnesota drivers are held to a duty of "due care in operating a vehicle." Minn. Stat. § 169.14, subd. 1 (2008). Due care requires mitigating unreasonable risks, which means balancing "the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 621 (Minn. 1984). The district court summarized this duty

by saying that negligence occurs when a person "does something a reasonable person would not do" or "fails to do something a reasonable person would do."

The district court applied the correct duty to the facts in this case, and to the extent Sirius argues for the application of a stricter duty for unpredictable weather conditions, that argument must fail. Hazardous weather may require more precautions, but the standard for judging these precautions is still reasonableness. *See Brager v. Coca-Cola Bottling Co. of Fargo, Inc.*, 375 N.W.2d 884, 887 (Minn. App. 1985) (upholding finding of no negligence when driver's failure to anticipate localized conditions was "reasonable under the circumstances"). No more is required of a driver than to take reasonable steps to assess the hazard presented by weather and to use reasonable care based on that assessment. *See Lund v. Connolly*, 275 Minn. 127, 130, 145 N.W.2d 422, 424 (1966) (holding that driver is not liable for "unintended occurrence which could not have been prevented by the exercise of reasonable care").

The district court did not clearly err in finding that Hauer's actions showed reasonable care. The district court found that Hauer could not have reasonably determined how slippery Fifteenth Avenue was, and the evidence supports this finding. Hauer had driven on the downhill street four blocks east and parallel to Fifteenth Avenue, which was plowed and drivable, so it was reasonable to try driving on Fifteenth Avenue. And the fact that, within thirty-five minutes of the accident, another car slid down the same block tends to show that the extreme slipperiness of the road surface was difficult to discern. The district court also found that Hauer made reasonable attempts to stop her car immediately after it began to slide. She applied her brakes the entire way down Fifteenth

Avenue but was unable to stop the car until after she reached Third Street, which was level and plowed.

On appeal, Sirius argues that Hauer is presumed negligent because her driving conduct violated traffic statutes. Sirius did not allege the violation of any specific traffic statute in its complaint and did not ask the district court to rule on whether Hauer had violated any traffic statutes. Appellate courts generally consider only issues that the record confirms were raised and decided in the district court. *Toth v. Arason*, 722 N.W.2d 437, 443 (Minn. 2006). And a party may not "obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

The record establishes that Hauer was not cited for a traffic violation, which in any event would only provide "prima facie evidence of negligence." Minn. Stat. § 169.96(b) (2008). It is for the trier of fact to determine whether evidence tending to excuse or justify a violation rebuts the inference of negligence. *Marshall v. Galvez*, 480 N.W.2d 358, 361 (Minn. App. 1992). Thus, even assuming that the evidence establishes that Hauer disobeyed a stop sign, Minn. Stat. § 169.20, subd. 3(b) (2008), or failed to be aware of existing hazards, Minn. Stat. § 169.14, subd. 3 (2008), it is the district court and not the appellate court that must, in the first instance, determine this issue. Furthermore, even though the claim of a traffic-code violation was not raised, the district court's other findings support a conclusion that conditions excused or justified the two violations that Sirius belatedly seeks to put at issue.

Affirmed.