STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0353

Michael A. Vitelli, et al.,
Appellants,

vs.

Joseph Knudson, et al., defendants,
Carlson Custom Homes, Inc.,
Respondent,
The City of Chaska, defendant,
Paul A. Thorp, et al.,
Respondents,
Halla Nursery, Inc.,
Respondent,
and Halla Nursery, Inc., defendant and third party plaintiff,
Respondent,
Carlson Custom Homes, Inc., defendant and third party plaintiff,
Respondent,

vs.

Definitive Landscaping, et al., Third Party Defendants,
and
Westfield Insurance Company,
Intervenor.

Filed April 7, 2009
Affirmed
Stauber, Judge

Carver County District Court
File No. 10CV0758

Craig A. Goudy, Cox, Goudy, McNulty & Wallace, P.L.L.P., 676A Butler Square, 100 Sixth Street North, Minneapolis, MN 55403 (for appellants)

Andrew R. Brown, Reding & Pilney, P.L.L.P., 8661 Eagle Point Boulevard, Lake Elmo, MN 55042 (for respondent Carlson Custom Homes)

Dyanna L. Street, Jesse R. Orman, Fabyanske, Westra, Hart & Thomson, P.A., Suite 1900, 800 LaSalle Avenue, Minneapolis, MN 55402 (for respondents Thorp, et al.)

R. Stephen Tillitt, Lynn Schmidt Walters, Gislason & Hunter, L.L.P., Suite 500, 701 Xenia Avenue South, Minneapolis, MN 55416 (for respondent Halla Nursery)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from partial summary judgment entered pursuant to Minn. R. Civ. P. 54.02, appellant-homeowners challenge the district court's conclusion on summary judgment that respondent-developers are not liable as a matter of law for alleged construction defects in appellants' home because of intervening and superseding causes. By notice of review, respondent-builders and respondent-landscapers contend that the district court erred in denying their motions for sanctions because appellants spoliated critical evidence without providing adequate advance notice of potential claims. We affirm.

FACTS

This case concerns real property legally described as Lot 6, Block 4 of the Autumn Woods East subdivision in Chaska (lot). In 1994, in anticipation of developing this subdivision, respondent Paul Thorp platted Autumn Woods East. Contemporaneously, Thorp entered into a development agreement with the City of Chaska (City) that was

incorporated into City's resolution approving the plat. The development agreement referred to "Paul Thorp" as "Developer," and noted that "standard lot drainage may be difficult to maintain in certain areas [throughout the subdivision]." As the developer of Autumn Woods East, Thorp commissioned surveyors and engineers to prepare a grading and development plan for the subdivision. This plan specified the elevations at which the homes on the various lots should be built. According to Thorp, this grading and development plan was approved by City.

On August 21, 2000, Thorp and respondent Carlson Custom Homes, Inc. (CCH) entered into a vacant lot purchase agreement, under which CCH agreed to purchase the lot "AS IS" from Thorp. After the necessary surveys were conducted to detail the drainage plan for the lot, Thorp and CCH closed on the purchase agreement. At about the same time, CCH entered into a new construction purchase agreement with respondents Joseph and Gabriella Knudson (Knudsons) wherein CCH agreed to build a house on the lot based on certain specifications. CCH then proceeded to build a single family residence on the lot with a "lookout" basement. In conjunction with the construction, CCH constructed a drainage swale that ran from the northeast corner of the house, around the rear of the house, and to the southwest corner of the lot to divert water from the house. Throughout the construction of the house, representatives from City regularly inspected the site and required changes to various construction components, including drainage surveys, pertaining to the lot.

In the spring of 2001, the Knudsons closed on the new-construction purchase agreement and occupied the house. Shortly thereafter, the Knudsons hired

Environmental Design to finish landscaping the lot. Almost three years later, appellants Michael and Jody Vitelli (Vitellis) purchased the lot and house from the Knudsons. The Vitellis hired respondent Halla Nursery, Inc. (Halla) to re-landscape the lot. As part of the landscaping project, Halla ran a downspout pipe to a length of drain tile that was installed by Halla and that exited to the existing rock-covered drainage swale on the northeast corner of the home.

On September 4, 2005, a storm dumped approximately 4.87 inches of rain on nearby Chanhassen. As a result of the storm, the Vitellis experienced water intrusion into the lower level of their home. In the days immediately following the storm, the Vitellis did not personally contact CCH about the water intrusion. But on October 4, 2005, counsel for the Vitellis sent a letter to CCH advising it of the water damage to the Vitellis' home that resulted from the September storm. Ms. Vitelli also contacted Ryan Perala of Halla after the September storm. Perala visited the lot a few days after the storm, but was unable to go inside the home because the Vitellis were not present. According to Perala, there was no standing water on the lot, and everything in the yard appeared normal. Nevertheless, Perala detached a gutter downspout from the drain tile in an effort to alleviate any potential drainage problems.

A second rainstorm occurred on October 4, 2005, that dumped additional rainfall in excess of four inches on the Chanhassen area. This storm caused additional water intrusion into the Vitellis' home. In an effort to determine the extent of their problems, the Vitellis had their drain tile scoped on October 10, 2005. Three days later, counsel for the Vitellis sent CCH a second a letter, informing it of the October 4th water intrusion,

and advising CCH that its insurance company needed to get involved because the results of the drain tile scope showed damages that "apparently happened during the construction process." Over the course of the next several weeks, the Vitellis completely renovated the affected area of the home. These renovations included replacing the original drain tile, regrading the backyard, and installing new sheetrock and a new exterior drain.

In March 2006, the Vitellis initiated this action, contending that they suffered damages in excess of $200,000 as a result of water intrusion into their home and necessary site remediation. The Vitellis asserted claims against the Knudsons, CCH, City, Thorp and his wife, Ann Thorp, (Thorps), and Halla. Following motions for summary judgment, the district court granted the motions brought by the Knudsons and City, dismissing the claims against those parties. The district court also granted the Thorps' motion for summary judgment, dismissing the Vitellis' negligence claims on the basis that superseding and intervening causation broke the chain of causation. Finally, the district court denied the summary judgment motions of Halla and CCH on their spoliation-of-evidence claims. Halla, CCH, and the Vitellis all filed motions for reconsideration, which were denied. The Vitellis subsequently filed this appeal, and CCH and Halla filed notices of review.

D E C I S I O N

Summary judgment must be granted if, based on the record before the court, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. This court reviews the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504

N.W.2d 758, 761 (Minn. 1993). There are no genuine issues of material fact if the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

I.

"The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 887 (Minn. 2006) (quotation omitted). A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any essential element of the claim. *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

Here, in granting summary judgment in favor of the Thorps, the district court concluded that:

> With respect to the motion of the Thorps, the Court is satisfied that many intervening and superseding events subsequent to the sale of [the lot] from the Thorps to [CCH] may have caused the water intrusion problems complained of by the [Vitellis]. In addition, because the [Lot] was sold to [CCH] "as-is" there could be no express or implied representations or warranties from the Thorps to [CCH] which could then be extended to the [Vitellis]. Direct responsibility for the drainage, location, and final elevation of the home was the responsibility of [CCH], not the original raw land developer. Accordingly the Thorps' renewed motion for summary judgment should be granted.

The Vitellis argue that summary judgment was not appropriate because none of the subsequent acts "qualify as an intervening and superseding cause that would negate the Thorps' negligence." Conversely, the Thorps argue that in addition to concluding

that intervening and superseding events absolved them from liability, the district court also concluded that the Thorps did not owe the Vitellis a duty. The Thorps argue that because they did not owe the Vitellis a duty, the Vitellis' negligence action fails and, therefore, this court can affirm without reaching the issue of intervening and superseding causation.

We agree. Although the Vitellis argue in their reply brief that the district court did not address the issue of duty, a review of the district court's order, although somewhat ambiguously, indicates otherwise. The district court's order states: "Direct responsibility for the drainage, location, and final elevation of the home was the responsibility of [CCH], not the [Thorps]." When read independently, this sentence supports the claim that the district court concluded that the Thorps did not owe the Vitellis a duty. We acknowledge that the word "duty" is not mentioned in the sentence. But the word "responsibility," which was used by the district court, is synonymous with the word "duty." Moreover, the Thorps specifically argued in their motion for summary judgment that they did not owe the Vitellis a duty. Thus, we conclude that the district court's decision included a determination that no duty was owed to the Vitellis by the Thorps.

The Thorps contend that because the Vitellis failed to raise the issue of duty in their main brief, the Vitellis have waived the issue. We agree. The only issue as to Thorps raised by the Vitellis on appeal concerns intervening and superseding causation. Although the Vitellis addressed the issue of duty in their reply brief, an issue initially raised in a reply brief is not an issue that is properly before the court. S*ee Braith v. Fischer*, 632 N.W.2d 716, 724 (Minn. App. 2001) ("[A]rgument fails because [it] appears

for the first time in [appellant's] reply brief, and is therefore not properly before us."), *review denied* (Minn. Oct. 24, 2001); *see also Reserve Life Ins. Co. v. Comm'r of Commerce*, 402 N.W.2d 631, 634 (Minn. App. 1987) (stating that when a new issue is raised in the reply brief, that portion of the brief should be stricken), *review denied* (Minn. May 20, 1987). Moreover, even if we were to consider the issue, we agree with the district court that the Thorps had no duty to the Vitellis. As the district court found, the relationship between the Thorps and the Vitellis, both contractually and by way of the "intervening and superseding events" subsequent to the Thorps' original sale to CCH, demonstrates that the direct responsibility for the drainage, location, and final elevation of the home was the responsibility of CCH and not the Thorps.

In light of the district court's conclusion that the Thorps did not owe the Vitellis a legal duty, the intervening and superseding causation issue is rendered moot because the Vitellis cannot establish the first element of a negligence claim. *See Gradjelick*, 646 N.W.2d at 230 (stating that a defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any essential element of the claim). Therefore, we need not address the issue of intervening and superseding causation.

II.

Spoliation of evidence is the destruction of relevant evidence by a party. *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 70 (Minn. App. 1998). A district court may sanction a party who destroys evidence if that party gains an evidentiary advantage due to its failure to preserve evidence after having had the opportunity to examine it. *Himes v.*

Woodings-Verona Tool Works, Inc., 565 N.W.2d 469, 470–71 (Minn. App. 1997), *review denied* (Minn. Aug. 26, 1997). The severity of the sanction depends on the prejudice suffered by the opposing party. *Hoffman*, 587 N.W.2d at 71. But a party can avoid sanctions for spoliation of evidence if the opposing party had sufficient notice of the claim, giving the party the opportunity to correct defects, prepare for negotiation or litigation, or "safeguard against stale claims being asserted after it is too late . . . to investigate them." *Id.* at 70 (quotation omitted). In the absence of clear error, this court will not reverse a district court's determination of the sufficiency of notice of a claim when deciding whether sanctions are appropriate for the spoliation of evidence. *Id.* at 71.

Here, in denying CCH's and Halla's motions for summary judgment, the district court concluded that "because the Court has found that the letter of October 4, 2005, was reasonable notice of the potential claims of the Vitellis, and because [CCH] took no immediate and timely action in response to this notice they cannot rely on the defense of spoliation in this action." With respect to Halla, the court concluded that "Halla did have an opportunity to inspect the [Vitellis'] property shortly after the initial water damage. Because of this, Halla cannot claim spoliation in seeking dismissal of the various claims remaining." Both Halla and CCH challenge the district court's conclusions in this appeal.

A. CCH

CCH contends that the district court erred in concluding that the October 4, 2005, letter constituted sufficient notice of the Vitellis' potential claims. We disagree. "[T]o be sufficient in content, a spoliation notice must reasonably notify the recipient of a breach

or a claim." *Hoffman*, 587 N.W.2d at 70. Here, the Vitellis' attorney sent CCH a letter on October 4, 2005, informing CCH of the water damage, and that "subsequent investigation revealed that there was a substantial water drainage problem at the home while it was being built which resulted in the installation of a drainage channel in the back of the home." The letter also stated that: "A landscape engineer has determined that the drainage channel was defectively designed and installed. It will have to be relocated and replaced." The letter further requested that "your insurance carrier or counsel contact me."

A second letter, sent on October 13, 2005, was even more specific. This letter provided:

> The Vitellis had another water intrusion in last week's storm. In order to attempt to determine the extent of their problems they had their drain tile scoped. One of them is partially crushed by and filled with concrete which apparently happened during the construction process. A number of the other ones are completely blocked such that the scope camera was unable to penetrate. The initial impression of the cost of repairs to the system are decidedly expensive. You need to get your insurance company involved.

A review of the letters demonstrates that CCH was informed of the damage and that the damage appeared to result from faulty construction. The letters also stated that the damage was extensive and potentially expensive to repair, which was sufficient to put CCH on notice. The request to involve CCH's insurer was further notice of a potential or pending claim. Accordingly, the two letters provided CCH with sufficient notice of the Vitellis' potential claim.

CCH also contends that the two letters did not provide the required notice of the destruction of relevant evidence. CCH argues that because the house was renovated and the lot re-graded shortly after the letters were sent, and the letters did not advise CCH of the potential destruction of evidence, the district court erred in denying the request for sanctions for spoliation of evidence.

Although not specifically stated in *Hoffman*, we agree that the notice requirement set forth in *Hoffman* must be given far enough in advance of the destruction of evidence to provide the alleged responsible party with the opportunity to inspect the evidence. Here, the record reflects that the Vitellis began remediation of the damage to their home within days after they incurred damage. Although the letters sent to CCH informed CCH of the damage, the letters did not indicate with any specificity that renovations would begin soon. Nevertheless, the record reflects that despite notice of the Vitellis' potential claims, CCH never asked to investigate the premises before the Vitellis' complaint was filed in March 2006. It was only after the complaint was filed that CCH asserted a right to investigate the alleged damage. Conversely, representatives from both Halla and City inspected the lot soon after the first incident of water intrusion into the Vitellis' home. Therefore, in light of CCH's failure to act timely, we cannot conclude that the district court abused its discretion in denying CCH's motion for summary judgment.

B. Halla

Halla also contends that summary judgment was not appropriate because, like CCH, they did not have adequate notice of the Vitellis' intention to destroy critical evidence. We disagree. Unlike CCH, a representative from Halla came to the lot and

investigated the damage. Because Halla actually inspected the lot, and performed some corrective measures, Halla's spoliation of evidence claim fails. Accordingly, the district court did not err in denying Halla's motion for summary judgment.

Affirmed.