Court of Appeals of Minnesota.

Fred TIMMERMAN, Appellant,

v.

Allen MANGUSON, et al., Respondents,

Northern States Power Company, Respondent.

No. C6-95-2565.

May 21, 1996.

Review Denied July 10, 1996.

Considered and decided by SHORT, Presiding Judge, SCHUMACHER, Judge, and MULALLY, Judge.

UNPUBLISHED OPINION

SCHUMACHER, Judge

*1 Appellant Fred Timmerman challenges the grant of summary judgment to respondents Allen Manguson, Beverly Manguson, and Northern States Power Company, alleging the district court erred in finding no gross negligence and no legal duty. We affirm.

FACTS

Timmerman has owned and operated a hog farm since 1970. NSP provides electrical power to the farm. The power lines run north across the Mangusons' farmland and continue onto Timmerman's land.

On the afternoon of July 10, 1994, limbs of a willow tree on the Mangusons' land broke, striking the power line and causing a power outage on Timmerman's farm. NSP's district representative, Wayne Wiese, investigated the site, found the burned tree limb that had struck the power line, and trimmed some branches back. He investigated the trunk of the tree from his position on the power pole; he did not see any signs of cracking or damage to the tree trunk.

Within 10 minutes after Wiese left the area, the power went out a second time. Wiese returned to the site and trimmed back the tree sufficiently so that,

if it continued to topple over, the tree would not hit the power lines again. The next morning, Wiese called another NSP representative to report the outages and suggest that they send in the tree trimming crew to clean up the area.

The second power outage left about 160 pigs in Timmerman's barn without ventilation. His automatic generator did not work and it took him about 20 minutes to get the manual generator started. Despite Timmerman's efforts, nearly all of the pigs in two of the five rooms in the barn died.

The insurance agent for Timmerman and the Mangusons, Steve Miller, investigated the tree site the next day and reported that the tree at issue was rotten and "undergrown * * * or there was a lot of trees in that area." Timmerman also presented the affidavit of expert Rodney Rye, a professional tree trimmer, who inspected the site of the fallen tree. He determined that the tree had been rotting for at least the past five years and posed a significant hazard to the power lines.

Timmerman sued NSP for gross negligence and the Mangusons for negligent maintenance and inspection. Both NSP and the Mangusons moved for summary judgment. The district court granted both motions, finding, as a matter of law, that NSP had not been grossly negligent and that the Mangusons owed Timmerman no legal duty.

DECISION

On review of summary judgment, this court must determine whether any issues of material fact exist and whether the district court erred in its application of the law. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 112 (Minn.1992). We view the evidence in a light most favorable to the nonmoving party, here Timmerman. Offerdahl v. University of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn.1988).

1. NSP's Rate Tariff 1.4 limits NSP's liability for power outages except in the case of gross negligence. It provides:

> CONTINUITY OF SERVICE. The Company will endeavor to provide continuous service but does not guarantee an uninterrupted or undisturbed supply of electric service. The Company will not be responsible for any loss or damage resulting from the interruption or disturbance of service for any cause other than gross negligence of the Company. The Company will not be liable for any loss of profits or other consequential damages resulting from the use of service or any interruption or disturbance of service.

*2 See also Computer Tool & Eng'g v. Northern States Power Co., 453 N.W.2d 569, 573 (Minn.App.1990) (holding tariff valid and enforceable), review denied (Minn. May 23, 1990).

Timmerman contends the record raises material fact issues that preclude summary judgment on gross negligence. We disagree. "Gross negligence is negligence of the highest degree." Terveer v. Norling Bros. Silo Co., 365 N.W.2d 279, 281 (Minn.App.1985), review denied (Minn. May 31, 1985). The supreme court has noted:

"Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected."

State v. Bolsinger, 221 Minn. 154, 159, 21 N.W.2d 480, 485 (1946) (quoting Altman v. Aronson, 121 N.E. 505, 506 (1919)).

Timmerman presented evidence that the tree and power lines at issue could not be viewed properly from the road, but required an on-site, on-foot inspection. He also presented evidence that NSP failed to trim the tree near the lines and allowed them to become overgrown with vines and vegetation.FN1 This evidence does not rise to the level of gross negligence. NSP did not demonstrate an "indifference to present legal duty" or act without "scant care" or "slight diligence." See id.

FN1. NSP contends that Rye's expert evidence was wholly inadmissible because it contained legal conclusions. Rye presented facts about the nature of trees and power lines at issue here. Although his legal conclusions that NSP had violated the standard of care was inadmissible, the district court could consider the remainder of his expert factual testimony contained in his affidavit. See Conover v. Northern States Power Co., 313 N.W.2d 397, 403 (Minn.1981) (presence of expert's legal conclusions does not invalidate all of his factual testimony).

NSP had most recently trimmed this tree in 1990 or 1991, within NSP's policy of trimming every four years. Since 1990, NSP has routinely checked the power lines at issue here in accord with the National Electric Safety Code (NESC). NSP representatives have viewed the power lines and trees from the road when driving through the area. NSP also trimmed portions of the tree after the first power outage to restore service.

Although the evidence suggests that NSP could have more diligently exercised its duties, that evidence only raises the question of ordinary negligence, for which NSP is not liable. See Rate Tariff 1.4. The district court properly concluded that NSP's conduct did not constitute gross negligence.

2. The existence of a legal duty is a question of law for the court to determine. Carlson v. Mutual Serv. Ins., 494 N.W.2d 885, 887 (Minn.1993). We review questions of law de novo. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn.1984).

Timmerman alleges the district court erred in ruling as a matter of law that the Mangusons owed no duty of care to Timmerman. We disagree. The Mangusons had no legal duty to protect Timmerman because they did not have

a “special relationship” in which Timmerman had entrusted his safety to the Mangusons. See Donaldson v. Young Women's Christian Ass'n, 539 N.W.2d 789, 792 (Minn.1995) (holding duty to protect exists only when plaintiff and defendant in “special relationship” where plaintiff entrusted safety and defendant accepted responsibility, and when injury is foreseeable). The parties' relationship as neighboring farmers does not fall into any of the limited number of “special relationships” that the supreme court has recognized. See id.(listing “special relationships”).

*3 Timmerman also contends the Mangusons had a duty to inspect and repair the tree or else warn him of the dangers on their land. See Peterson v. Balach, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972) (explaining duty of landowner). This theory of duty and liability does not apply here, however, because Timmerman was not an “invitee” or “licensee” on the Mangusons' property. Furthermore, even if the Mangusons knew the old tree was near the power lines, knowledge of a dangerous condition, by itself, without a duty to protect, is not sufficient to establish liability for negligence. Harper v. Herman, 499 N.W.2d 472, 475 (Minn.1993).

Given that no legal duty existed, the court will not consider foreseeability. Donaldson, 539 N.W.2d at 793. Without a legal duty, Timmerman's negligence claim against the Mangusons cannot stand. See Marlow v. City of Columbia Heights, 284 N.W.2d 389, 392 (Minn.1979) (holding that plaintiff's failure to establish any one element of negligence is fatal to claim). The district court properly determined as a matter of law that the Mangusons owed no legal duty to Timmerman.

Affirmed.