STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0481

Sally Cooper Smith,
Appellant,

vs.

Steven C. Piechowski,
individually and dba SP Trucking, LLC,
Defendant,

Northstar Materials, Inc.,
dba Knife River Materials,
Respondent.

Filed February 18, 2025
Reversed and remanded
Bratvold, Judge

Clay County District Court
File No. 14-CV-22-734

Brian Wojtalewicz, Wojtalewicz Law Firm, Ltd., Appleton, Minnesota; and

Clay Robbins III (pro hac vice), Wisner Baum LLP, Los Angeles, California (for appellant)

Peter W. Zuger, Morgan L. Croaker, Serkland Law Firm, Fargo, North Dakota (for respondent Northstar Materials, Inc.)

Matthew J. Barber, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota (for amicus curiae Minnesota Association for Justice)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

This appeal stems from a motor-vehicle collision involving appellant, her deceased spouse, and an independent-contractor trucking company. The appeal is before us for a second time after the Minnesota Supreme Court vacated our previous decision. In that decision, we affirmed the summary-judgment dismissal of appellant's claims against the construction company that hired the trucking company on the ground that the supreme court had not yet recognized a cause of action for negligent selection of an independent contractor. Following our decision, the supreme court recognized that cause of action in *Alonzo v. Menholt*, 9 N.W.3d 148, 157 (Minn. 2024). The supreme court then directed us to reconsider our decision in light of *Alonzo*.

We have now considered issues that we did not reach in our previous decision and conclude that the district court erred with respect to each of the following determinations in granting summary judgment: (1) appellant's claims for negligent selection of an independent contractor and negligent infliction of emotional distress are vicarious-liability claims barred by a *Pierringer* release of appellant's claims against the trucking company; (2) appellant cannot prove the causation element of her claims because of the *Pierringer* release; and (3) applicable indemnification provisions create a circuity of obligation that precludes appellant from recovering damages. We therefore reverse and remand for further proceedings.

FACTS

The following summarizes the undisputed facts in the light most favorable to appellant Sally Cooper Smith as the nonmoving party. On July 2, 2021, Smith was a passenger in a car driven by her husband; they stopped in a line of traffic at a red light in Grand Forks, North Dakota. A truck operated by defendant Steven C. Piechowski rear-ended Smith's car. The collision tore the roof off Smith's car, injuring her and killing her husband.

Piechowski is the sole owner and operator of a commercial-carrier business, defendant SP Trucking LLC. Piechowski was driving a load of hot asphalt on behalf of respondent Northstar Materials Inc., which does business as Knife River. Before the accident, Knife River entered into an independent-truck-operator (ITO) hauling agreement with SP Trucking, dated January 2021 and effective May 2021. SP Trucking agreed to transport property for Knife River under terms providing that SP Trucking was "an independent contractor" and would "indemnify, defend and hold harmless Knife River . . . from and against any liability, loss or claim . . . caused by [SP Trucking's] performance" of the ITO hauling agreement. The agreement also provided that SP Trucking was not "required" to indemnify Knife River from any "death, injury, loss, damage, or claim, caused by the negligence, actions or omissions of Knife River."

In March 2022, Smith sued Piechowski, SP Trucking, and Knife River. Smith asserted three causes of action: one count of negligence against Piechowski, SP Trucking, and Knife River; one count of negligent hiring/retention against Knife River; and one count

of negligent infliction of emotional distress (NIED) against Piechowski, SP Trucking, and Knife River.

During discovery, Smith obtained evidence that, in October 2020, before Knife River and SP Trucking signed the ITO hauling agreement, the U.S. Department of Transportation Federal Motor Carrier Safety Administration (FMCSA) notified Piechowski that his new-entrant registration was "revoked" because he failed to agree to a safety audit. The FMCSA's notice also stated that Piechowski's trucking operations were "placed out of service effective immediately" and that he "must immediately cease all Interstate motor carrier operations." Knife River was not aware of FMCSA's notice to Piechowski until after Smith was injured. Knife River had determined that SP Trucking had a valid license and insurance before it signed the ITO hauling agreement.

In August 2022, Smith settled with Piechowski and SP Trucking, releasing them "from any and all" claims resulting from the July 2, 2021 accident. Under the *Pierringer* release,[1] Smith agreed to "indemnify and hold fully harmless" Piechowski and SP Trucking from all claims by "any other persons, parties, agencies or companies . . . which have made payment or who may in the future make payments to or on behalf of" Smith for any "losses, benefits or payment of any kind, incurred as a result of the [July 2, 2021] incident." The release also stated that it was "not intended to release . . . Knife River . . . for negligent hiring, negligent retention or any other legal liability" and was "intended to be construed

[1] A *Pierringer* release allows a plaintiff to settle with only some defendants. *Frey by Frey v. Snelgrove*, 269 N.W.2d 918, 922-23 (Minn. 1978) (citing *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963)). The settling defendants are dismissed, and the nonsettling joint tortfeasors are liable for only their "percentage of causal negligence." *Id.*

as a *Pierringer* Release." Smith, Piechowski, and SP Trucking stipulated to a dismissal with prejudice of Smith's claims against Piechowski and SP Trucking, and accordingly, the district court dismissed those claims with prejudice.

In November 2022, Knife River moved for summary judgment, arguing that (1) Smith's release of Piechowski and SP Trucking also released Knife River "because the release of an agent releases the principal," (2) Smith's negligent hiring/retention claim is a "derivative claim" that the release bars, and (3) "a circuity of obligation exists and bars [Smith's] claim against Knife River."

Smith opposed summary judgment, first arguing that the release did not bar Smith's "direct liability claim against Knife River for negligent selection based on [Knife River's] own negligence."[2] Smith also contended that the release and the indemnity obligations in the ITO hauling agreement did "not create a circuity of obligation" regarding her claims against Knife River. In its reply in support of summary judgment, Knife River argued that, as a matter of law, Smith could not show "a specific incompetent or unfit quality of SP Trucking" or "whether that specific quality" was the proximate cause of her injuries.

After a hearing, the district court granted summary judgment for Knife River. The district court first concluded that Smith's negligence and NIED claims asserted "vicarious liability claims" against Knife River for SP Trucking's negligence. Next, the district court

[2] In Smith's memorandum opposing summary judgment, she recharacterized her second cause of action as a "negligent selection claim" instead of a "negligent hiring/retention" claim. The district court determined that Smith pleaded negligent selection, even though that phrase is not "specifically alleged" in her complaint, and addressed it separately from the "negligent hiring/retention" claim.

reasoned that the settlement released these claims because "the release of the agent also releases the principal." The district court then determined that Smith's negligent hiring/retention claim failed because Smith "cannot prove an essential element in each tort." The district court stated that Smith would "first need to prove SP Trucking's negligence resulted in an injury to Smith" but that she "cannot do so because she released and dismissed SP Trucking from this action."

The district court also determined that Smith's negligent-selection claim failed. The district court noted that the "Minnesota Supreme Court has not expressly adopted the tort of negligent selection" but stated that it would proceed "as if Minnesota recognizes a claim for negligent selection." The district court cited federal caselaw from Illinois on negligent selection and concluded that, (1) because Smith had released Piechowski and SP Trucking, she cannot prove "an incompetent quality" or "unsafe quality" of SP Trucking and (2) Smith "failed to establish that Knife River's selection of allegedly incompetent SP Trucking was the proximate cause of her injuries."[3] Lastly, citing precedent from this court,

[3] The district court relied on *McComb v. Burgarin*, 20 F. Supp. 3d 676, 678 (N.D. Ill. 2014), in which the decedent was struck and killed by a semi-trailer truck that was hauling steel. The decedent's estate sued the steel company for negligent selection of the trucking company. *McComb*, 20 F. Supp. 3d at 681. The federal district court analyzed the negligent-selection claim and stated that the plaintiff must prove (1) that the steel company "knew or should have known" that the trucking company "had a particular unfitness for the position so as to create a danger of harm to third persons"; "(2) that such particular unfitness was known or should have been known at the time" the steel company selected the trucking company; and "(3) that this particular unfitness proximately caused the plaintiff's injury." *Id.* at 682 (quotation omitted). The federal district court granted summary judgment for the steel company after determining that the plaintiff could not establish that the alleged negligence was the proximate cause of the accident as a matter of law. *Id*. at 685.

the district court determined that "Smith's indemnity obligations under the *Pierringer* release, combined with SP Trucking's indemnity obligations under the ITO Hauling Agreement, create[] a circuity of obligation and prevent Smith from maintaining a claim against Knife River."

Smith appealed, arguing that the district court erred in its legal analysis of her claims.[4] We issued an opinion affirming the district court's dismissal of the claims on the ground that the Minnesota Supreme Court had not yet recognized a claim for negligent selection of an independent contractor. *Smith v. Piechowski*, No. A23-0481, 2023 WL 8368483, at *5 (Minn. App. Dec. 4, 2023), *vacated* (Minn. Sept. 17, 2024). We therefore did not reach Smith's arguments that the district court otherwise erred in its legal analysis of Smith's claims. *Id.* at *5 n.4. The supreme court granted Smith's petition for review of our decision and stayed the case pending final disposition in *Alonzo*.

In *Alonzo*, the supreme court held that "Minnesota common law recognizes a claim for negligent selection of an independent contractor." 9 N.W.3d at 157. The supreme court then issued an order that vacated our previous decision and remanded for our reconsideration in light of *Alonzo*.

[4] The Minnesota Association for Justice filed an amicus brief that attacks the district court's legal analysis, arguing that (1) negligent selection is a direct-liability tort, (2) a *Pierringer* release does not release direct-liability claims against a nonsettling defendant, (3) circuity of obligation does not apply to Smith's direct-liability claim, and (4) proximate cause is a fact question for the jury.

DECISION

"Summary judgment is appropriate when 'there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Justice v. Marvel, LLC*, 979 N.W.2d 894, 898 (Minn. 2022) (quoting Minn. R. Civ. P. 56.01). Appellate courts "review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party and resolving all doubts and factual inferences against the moving party." *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021). Summary judgment is inappropriate "when reasonable persons might draw different conclusions from the evidence presented." *Senogles ex rel. Kihega v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (quotation omitted).

Smith does not challenge the district court's dismissal of her claims against Knife River for negligence and negligent hiring/retention. But she seeks reversal of the district court's dismissal of her claims against Knife River for negligent selection and NIED. She argues that the district court erred by determining that (1) her claims are barred by a *Pierringer* release of claims against Piechowski and SP Trucking; (2) she cannot prove the causation element of her negligent-selection claim because of the *Pierringer* release; and (3) applicable indemnification provisions create a circuity of obligation that precludes her from recovering damages. We address each of these arguments in turn.

I. The district court erred in determining that the *Pierringer* release barred Smith's negligent-selection and NIED claims against Knife River.

Smith first argues that the district court erred in determining that her claims are barred by the *Pierringer* release of claims against Piechowski and SP Trucking. The district

court dismissed all three of Smith's claims on this basis, reasoning that (1) Smith cannot prove her negligent-selection claim because "she would first need to prove SP Trucking's negligence resulted in an injury to [her]," which she "cannot do . . . because she released and dismissed SP Trucking from this action" and (2) her claim for NIED "do[es] not involve any direct actions on behalf of Knife River, thus making [it a] vicarious liability claim[]." Smith asserts that her negligent-selection and NIED claims are direct-liability claims that are not precluded by the *Pierringer* release. We agree with Smith's view.

A *Pierringer* release is used in a case with joint tortfeasors and allows a plaintiff to settle with only some defendants. *Frey*, 269 N.W.2d at 922. The settling defendants usually are dismissed, and the nonsettling defendants remain liable only for their "percentage of causal negligence." *Id.* "[A] release of the actively negligent party [via a *Pierringer* release] also releases the vicariously liable party." *Kellen v. Mathias*, 519 N.W.2d 218, 222 (Minn. App. 1994). But "[a] principal may have . . . independent liability for its own negligence"; thus, a "*Pierringer* release would only release a principal if its liability was *solely* vicarious." *Id.* at 223 (emphasis added). Accordingly, the *Pierringer* release into which Smith entered with Piechowski and SP Trucking only released claims against Knife River to the extent that they were based on Knife River's vicarious liability for SP Trucking's negligence. It did not release claims based on Knife River's direct liability.

The parties agree that the *Pierringer* release does not preclude Smith from asserting direct-liability claims against Knife River, but they dispute whether the claims Smith asserts are direct-liability claims. "Direct liability is the imposition of liability when one party has breached a personal duty to another party through his own acts of negligence."

Sutherland v. Barton, 570 N.W.2d 1, 5 (Minn. 1997). "In contrast, vicarious liability is the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons." *Id.* (quotation omitted). Applying this standard, we address in turn whether each of Smith's claims—negligent selection and NIED—are direct-liability claims that are not precluded by the *Pierringer* release.[5]

To prevail on her negligent-selection claim, Smith "must establish that the principal [Knife River] (1) breached [its] duty to exercise reasonable care in selecting a competent and careful contractor, and (2) that this breach of duty caused [Smith's] physical harm." *Alonzo*, 9 N.W.3d at 158. In recognizing this claim, the Minnesota Supreme Court relied on the Restatement (Second) of Torts § 411 (Am. L. Inst. 1965). *Id.* at 157. The Restatement makes clear that liability under section 411 must be based on the principal's own negligence, which is consistent with the definition of direct liability. *Compare* Restatement (Second) of Torts ch. 15, topic 1, intro. note (Am. L. Inst. 1965), *with Sutherland*, 570 N.W.2d at 5.

Minnesota courts have treated torts that are similar to negligent selection as direct-liability claims. For instance, in *Larson v. Wasemiller*, the supreme court explained that "[c]ourts that have allowed claims for negligent credentialing have, either implicitly

[5] Knife River also contends that Smith forfeited any NIED claim by failing to raise the claim in the district court. Smith responds, and we agree, that her arguments about direct liability applied to both the negligent-selection and NIED claims. And the district court addressed both claims in its summary-judgment order. Thus, we are persuaded that the NIED claim is properly before us on appeal. *Cf. Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those questions previously presented to and considered by the district court).

or explicitly, held that such claims are unrelated to the concept of derivative or vicarious liability." 738 N.W.2d 300, 309 (Minn. 2007); *see also M.L. v. Magnuson*, 531 N.W.2d 849, 856 n.3 (Minn. App. 1995) (contrasting respondeat superior with "negligent employment" torts to impose "direct liability on the employer"), *rev. denied* (Minn. July 20, 1995); *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. App. 1993) (explaining that theories of "negligent hiring and negligent retention[] are based on direct, not vicarious, liability"), *rev. denied* (Minn. Apr. 20, 1993). Based on the Restatement and Minnesota caselaw addressing similar tort claims, we conclude that a claim for negligent selection of an independent contractor is a direct-liability claim.

To prevail on her NIED claim, Smith "must prove the four elements of a negligence claim, as well as three additional elements specific to NIED claims." *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). "The four elements of negligence are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury." *Id.* The other elements of an NIED claim are that the plaintiff "(1) was within the zone of danger of physical impact created by the defendant's negligence; (2) reasonably feared for her own safety; and (3) consequently suffered severe emotional distress with attendant physical manifestations." *Id.* (quotation omitted).

Smith bases her NIED claim on Knife River's alleged breach of its duty to select a competent independent contractor and asserts that she was in the zone of danger created by Knife River's negligence. Because we have concluded that the negligent-selection claim is a direct-liability claim, and because Smith's NIED claim is based on the same personal

duty owed by Knife River, we conclude that Smith's NIED claim is also a direct-liability claim.

Because both Smith's negligent-selection claim and her NIED claim are direct-liability claims, the district court erred by dismissing these claims on the ground that they are barred by the *Pierringer* release.

II. The district court erred by determining that Smith cannot prove causation because of the *Pierringer* release.

Smith next argues that the district court erred by determining that Smith cannot prove that Knife River's alleged negligence was the proximate cause of her injuries for purposes of her negligent-selection claim because she had released claims against Piechowski and SP Trucking through the *Pierringer* release. We agree with Smith that the district court erred in its analysis.

The supreme court discussed this issue in *Alonzo*. "[L]ike a traditional negligence claim, a cause of action for negligent selection of an independent contractor requires the plaintiff to prove that the principal's negligence was a proximate cause of their injuries." *Alonzo*, 9 N.W.3d at 159. "For a party's negligence to be the proximate cause of an injury, the injury must be a foreseeable result of the negligent act and the act must be a substantial factor in bringing about the injury." *Staub*, 964 N.W.2d at 620 (quotation omitted).

In recognizing the negligent-selection tort, the supreme court adopted the limitations on causation expressed in Restatement (Second) of Torts § 411. *See Alonzo*, 9 N.W.3d at 159. The supreme court first quoted extensively from comment b to section 411:

> On this point, the Restatement requires that the harm at issue "result from some quality in the contractor which made it

> negligent for the employer to entrust the work to [them]." Restatement (Second) of Torts § 411 cmt. b. In this way, if the contractor is incompetent given a "lack of skill and experience or of adequate equipment but not in any previous lack of attention or diligence," then the principal will only be liable for harm caused by that "lack of skill, experience, or equipment, but not for" harm caused "by the contractors' inattention or negligence." *Id.*

Alonzo, 9 N.W.3d at 159. And the supreme court explained the import of comment b:

> This causation requirement will limit the claim's availability to circumstances when the principal could have reasonably anticipated the harm, which must stem from a quality in the independent contractor that made it negligent for the principal to entrust the work to them. In other words, had the principal exercised reasonable care, the principal would have known of that quality and not hired the contractor, and the harm would not have occurred.

Id.

Here, before *Alonzo* was issued, the district court stated, as an alternative basis for granting summary judgment to Knife River on Smith's negligent-selection claim, that "Smith cannot prove an unsafe quality of SP Trucking that *caused* Smith's injury due to the release and dismissal of SP Trucking." This reasoning is erroneous because the very nature of litigation following a *Pierringer* release involves determining the negligence and comparative fault of a settling defendant so that its fault can be excluded from any judgment against the nonsettling defendant. *See Frey*, 269 N.W.2d at 923. As the supreme court explained in *Frey*:

> In almost every case the trial court should submit to the jury the fault of all parties, including the settling defendants, even though they have been dismissed from the lawsuit. If there is evidence of conduct which, if believed by the jury, would constitute negligence or fault on the part of the person inquired

> about, the fault or negligence of that party should be submitted to the jury.

Id. (quotation omitted). Because the district court erroneously determined that Smith cannot prove a negligent-selection claim after releasing claims against SP Trucking, it also erred by granting summary judgment to Knife River based on the proximate-cause element.

On appeal, the parties also advance arguments that focus on a different issue—whether Smith can show that the particular quality that made SP Trucking an unfit contractor for Knife River to select was what caused her injuries. *See Alonzo*, 9 N.W.3d at 159. This issue was not raised before the district court and was not the basis for the district court's causation ruling.[6] Moreover, neither the parties nor the district court had the benefit of the supreme court's decision in *Alonzo*, which addresses this aspect of causation in a negligent-selection claim. *See id.*

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[6] In its reply brief in support of its motion for summary judgment, Knife River argued:

> Here, [Smith] cannot prove a specific incompetent or unfit quality of SP Trucking and whether that specific quality caused [Smith's] injury due to the release and dismissal of SP Trucking. If SP Trucking had a specific incompetent or unfit quality that caused [Smith's] injury, [Smith] released and dismissed that specific incompetent or unfit quality. Knife River's alleged liability only derives from SP Trucking's incompetent or unfit quality. [Smith's] claim that SP Trucking was negligent is barred and, therefore, her claim against Knife River for negligently selecting SP Trucking is likewise barred. As such, this Court should grant summary judgment on Count II.

This argument appears to turn on the existence of the *Pierringer* release rather than the lack of a nexus between any unfit quality and Smith's injuries that Knife River now attempts to assert. The district court adopted this aspect of Knife River's analysis almost verbatim.

Under these circumstances, we conclude that arguments about this different causation issue are not properly before us. *See Thiele*, 425 N.W.2d at 582 (stating that appellate courts generally address only those questions previously presented to and considered by the district court). Nothing in this opinion shall preclude the district court from allowing further dispositive-motion practice to address the issue, and we express no opinion on the merits of the issue.[7]

III. The district court erred by determining that Smith's negligent-selection and NIED claims are barred by a circuity of obligation.

Smith last argues that the district court erred in determining that her claims are barred because of a circuity of obligation. The district court determined, as another alternative basis to dismiss Smith's claims, that a circuity of obligation exists because SP Trucking has indemnity obligations to Knife River under the ITO hauling agreement and

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[7] Smith's brief to this court cites two journal articles for the first time on appeal to provide evidence about the FMCSA's "new entrant program" and empirical data about "new entrant safety performance," among other things. Smith claims that this research reveals that Knife River's "failure to properly vet SP Trucking" was a proximate cause of Smith's damages. In its brief to this court, Knife River asks this court to "exclude [Smith's] newly produced evidence [in her brief] because it was not part of the record" and Smith "had the opportunity to present [this] evidence" below. In her reply brief, Smith argues that "Minnesota Rules of Evidence, Rule 201 permits this Court to take judicial notice of the two journal articles." Smith also notes that "Knife River first presented its proximate causation argument in its summary judgment reply brief" and thus Smith did not have the opportunity to include the journal articles "as an exhibit to her opposition" memorandum in district court.

As to the journal articles Smith cites, "[a]n appellate court may not base its decision on matters outside the record on appeal." *Id.* at 582-83. *But see In re Est. of Turner*, 391 N.W.2d 767, 771 (Minn. 1986) (denying motion to strike a publicly available statistical report because appellate courts "could refer to such a report in the course of [their] own research, if [they] were so inclined"). We therefore do not consider the journal articles. As discussed above, we also decline to address the parties' arguments about SP Trucking's alleged particular unfitness.

Smith has indemnity obligations to SP Trucking under the *Pierringer* release. Smith asserts that the district court erred because the ITO hauling agreement does not require Piechowski and SP Trucking to indemnify Knife River for its own negligence. We agree.[8]

"A circuity of obligation is created when, by virtue of pre-existing indemnity agreements or obligations, the plaintiff is in effect obligated to indemnify the defendant for claims including the plaintiff's own claims." *Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 118 (Minn. 2011) (quotation omitted). Because Smith's claims for negligent selection and NIED are direct-liability claims, SP Trucking will not be required, under the ITO hauling agreement, to indemnify Knife River for damages stemming from Smith's claims. This is because the ITO hauling agreement provides that SP Trucking "shall not be required to indemnify Knife River . . . from any death, injury, loss, damage or claim, caused by the negligence, actions or omissions of Knife River . . . , its employees or agents." We thus conclude that the district court erred by granting summary judgment to Knife River on the ground that a circuity of obligation exists.

Reversed and remanded.

[8] Smith also argues that her indemnity obligations under the *Pierringer* release extend only to medical liens. Because we agree that the ITO hauling agreement breaks the circuity of obligation, we need not address this alternative argument.