IN THE COURT OF APPEALS OF IOWA

No. 16-0381
Filed November 22, 2017

KIRK JERVIK,
Third-Party Plaintiff/Appellant,

vs.

DPD, LTD., an Iowa Limited Liability Company, and C&L TILING, INC., d/b/a TIMEWELL DRAINAGE PRODUCTS & SERVICES,
Third-Party Defendants/Appellees,

Appeal from the Iowa District Court for Osceola County, Patrick M. Carr, Judge.

A plaintiff appeals the district court's decision that granted summary judgment to the defendants. **APPEAL DISMISSED.**

Curtis J. Krull of Krull Law Firm, LLC and Randy L. Waagmeester of Waagmeester Law Office, P.C., Rock Rapids, for appellant.

Daniel B. Shuck of Shuck Law Firm, Sioux City, for appellee DPD, Ltd.

J. Scott Bardole of Anderson & Associates, West Des Moines, for appellee C&L Tiling, Inc., d/b/a Timewell Drainage Products & Services.

Heard by Vogel, P.J., and Tabor and Bower, JJ. Carr, S.J. takes no part.

VOGEL, Presiding Judge.

Kirk Jervik appeals the district court's decision granting the summary judgment motions of DPD, Ltd, L.L.C. (DPD) and C & L Tilling, Inc., d/b/a Timewell Drainage Products and Services (Timewell). Jervik asserts the district incorrectly concluded that DPD and Timewell did not owe Jervik a duty of care on the day he was injured on the property owned by DPD and leased by Timewell. As an initial matter, both DPD and Timewell filed motions to dismiss Jervik's appeal as untimely. The supreme court ordered the timeliness issue to be submitted with the appeal. Because we conclude the motion Jervik filed following the district court's decision on the summary judgment motions was not a proper motion under Iowa Rule of Civil Procedure 1.904(2), the motion did not toll the time for Jervik to file an appeal, and Jervik's notice of appeal was untimely. We therefore dismiss this appeal as we lack subject matter jurisdiction.

I. Background Facts and Proceedings.

In 2012, DPD and the City of Sibley were in discussions with Timewell seeking to persuade Timewell to bring a manufacturing plant to Sibley to be located in a warehouse owned by DPD. As part of the negotiations, the City of Sibley agreed to install a new, larger transformer at the property to meet the electricity demands of Timewell's manufacturing operations and DPD agreed to acquire and have installed a new larger switchgear box. The lease between DPD and Timewell was signed in February 2013, but the City of Sibley had not yet been able to purchase a new larger transformer, so it borrowed a transformer from another city. DPD hired Current Electric, a sole proprietorship owned and operated by Jervik, to install the new switchgear box and to connect that switchgear box to the

borrowed transformer. This work was performed in April 2013, and Timewell then hired Jervik's company to complete electrical work in the leased building for Timewell's machinery.

Once the City of Sibley was able to obtain the new transformer, Jervik and his employees came back to Timewell's facility on July 20, 2013, to connect the new transformer to the new switchgear box and the previously existing smaller switchgear box. Two of Timewell's employees were present at the facility to permit the workers access to the building but did not otherwise direct the electrical work. After the new transformer was installed by the City of Sibley, the electricity was turned off by the city for Jervik and his employees to connect the transformer to the switchgear boxes. Jervik asked the city employees to energize the system once the connections were made to ensure everything was connected properly.

Jervik performed a test that determined the rotation of the system was "reversed." Jervik asked the city employees to de-energize the system, he performed the necessary adjustment in the smaller switchgear box, and he asked the city employees to energize the system to ensure it was functioning properly. The panel doors to the smaller switchgear box were not reinstalled before Jervik asked the city employees to energize the system. Once Jervik determined the system was functioning correctly, he attempted to reinstall the panel doors without requesting the system be de-energized. At that moment, an arc flash explosion occurred, which injured Jervik, two of his employees, and two Timewell employees.

Those injured in the explosion sued everyone involved and there were various cross-claims and third-party claims filed. All claims asserted were resolved except for the claims Jervik asserted against DPD and Timewell for his own

injuries. DPD and Timewell both filed motions for summary judgment asserting neither owed Jervik a duty of care under the law. Jervik resisted the motions and after a hearing, the district court granted both motions for summary judgment, dismissing Jervik's claims on November 18, 2015.

Jervik filed a motion to "reconsider, amend, or enlarge the court's ruling" on December 3, 2015. Both DPD and Timewell resisted the motion asserting the court's summary judgment ruling was correct and that Jervik's motion was not a proper motion under rule 1.904(2). On February 1, 2016, the district court overruled the motion, concluding "the issues raised in Jervik's motion to reconsider had already been decided and rejected in its prior ruling." The court stated that it had "already rejected Jervik's arguments in its prior ruling" and the court would not "rehash the arguments."

Jervik filed a notice of appeal February 26, 2016, and DPD filed a motion to dismiss the appeal, joined by Timewell, asserting Jervik's motion did not toll the time for filing the notice of appeal under Iowa Rule of Appellate Procedure 6.101(1)(b). Jervik resisted the motion to dismiss asserting his motion was proper under rule 1.904(2), and the supreme court ordered the motion submitted with the appeal.

II. Appellate Jurisdiction.

In order to vest subject matter jurisdiction with the appellate courts, a party must file a notice of appeal within thirty days from the final order or judgment. *See* Iowa R. App. P. 6.101(1)(b); *see also Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016) (noting if the interlocutory appeal was untimely the supreme court did not have jurisdiction to consider the appeal). However, a timely and proper motion

filed under Iowa Rule of Civil Procedure 1.904(2) can toll the time for filing the notice of appeal.[1] Iowa R. App. P. 6.101(1)(b) ("[I]f a motion is timely filed under Iowa R. Civ. P. 1.904(2) or Iowa R. Civ. P. 1.1007, the notice of appeal must be filed within 30 days after the filing of the ruling on such motion"); *Homan v. Branstad*, 887 N.W.2d 153, 160 (Iowa 2016) ("To determine whether the filing of the rule 1.904(2) motion tolled the deadline to file their notice of appeal, we must determine (1) whether the plaintiffs timely filed the motion, and (2) whether the motion was proper.").

The district court's entered its final judgment dismissing Jervik's claims on November 18, 2015. On December 3, Jervik filed a motion under rule 1.904(2), which the district court denied on February 1, 2016. Jervik's notice of appeal was not filed until February 26. The notice of appeal was untimely and deprives this court of jurisdiction unless Jervik's motion under rule 1.904(2) was timely and proper. *See Homan*, 887 N.W.2d at 160.

Jervik's rule 1.904(2) motion was filed fifteen days after the district court entered its ruling on the motions for summary judgment, so it was timely filed. *See id*. (noting a motion under rule 1.904(2) must be filed by the deadline for filing a

[1] Both Iowa Rule of Civil Procedure 1.904 and Iowa Rule of Appellate Procedure 6.101 were recently amended to "clarify that any timely 1.904(2) motion will extend the deadline for filing a notice of appeal or an application for interlocutory appeal." *See* Iowa Sup. Ct., In re Adopting Amendments to Iowa R. Civ. P. 1.904 & Iowa R. App. P. 6.101 (Nov. 18, 2016). The amendments were made "[t]o obviate controversies over whether a rule 1.904(2) motion tolls the time of appeal." *See* Iowa R. Civ. P. 1.904 cmt. (2017). The new rules "supersede prior case law that held a timely rule 1.904(2) motion must also have been 'proper' to extend the time of appeal." *Id*. The new rules became effective March 1, 2017, more than a year after Jervik's rule 1.904(2) motion and notice of appeal were filed. Jervik does not assert that this new rule change should be retroactively applied to this case.

motion for a new trial under rule 1.1007, which is within fifteen days). Next, we must determine whether the motion was filed for a "proper purpose." *Id*.

Rule 1.904(2) provides, in part: "On motion filed with or filed within the time allowed for a motion for a new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted." The rule "generally gives each party an opportunity to request a change or modification to each adverse judgment entered against it by the district court before deciding whether to incur the time and expense of an appeal." *Homan*, 887 N.W.2d at 161. However, a proper motion "does not merely seek reconsideration of an adverse district court judgment" or "merely seek to rehash legal issues adversely decided." *Id*. The motion is improper "if it seeks to enlarge or amend a district court ruling on a question of law involving no underlying issues of fact" or asks the court to amend or enlarge its decision "based solely on new evidence." *Id*.

The motion is considered proper if it "asks the district court to amend or enlarge either a ruling on a factual issue or a ruling on a legal issue raised in the context of an underlying factual issue based on the evidence in the record." *Id*. The motion is also properly filed if the district court failed to rule on an "issue, claim, or legal theory" the party raised. *Id.* The motion is necessary for that party to preserve error for a subsequent appeal by requesting the district court rule on the issue. *Id*.

In this case, Jervik asserts his rule 1.904(2) motion is proper because "the district court overlooked material facts about the defendants as possessors of land prior to any work being done at the facility" and "asked for an expansion on that

evidence." In addition, he asserts he "had to ask the district court to further explain" why the case law he cited in his resistance to the motions for summary judgment "was not relevant or controlling before it could be raised on appeal." In his rule 1.904(2) motion, Jervik asserted the district court erred:

> a. In finding there were no issues of material fact on any of the theories raised by Mr. Jervik;
> b. In finding the Defendants had not retained sufficient control over the work and worksite to owe a duty to Mr. Jervik;
> c. In concluding the Defendants had no duty to warn Mr. Jervik of an electrical shock;
> d. ln concluding that NFPA 70E does not create a duty in this case;
> e. ln concluding Mr. Jervik's owner/occupier or host employer liability arguments are unpersuasive or unsuccessful;
> f. In not specifically addressing Mr. Jervik's public policy argument;
> g. ln not accepting Mr. Jervik's argument that Timewell's OSHA violations created liability on the part of Timewell;
> h. ln not accepting Mr. Jervik's Lack of Contract for Safety Argument;
> i. In concluding that the work of connecting the switchgear to the transformer, without using [log out tag out] procedures, involved a peculiar risks or was inherently dangerous;
> j. In not adopting or accepting any additional arguments raised by Cody Reese or Current Electric in their Resistances to the Defendants' Motions for Summary Judgment.

Contrary to Jervik's assertion on appeal, nowhere in the motion did Jervik reference any "overlooked material facts" or ask the court to rule on an overlooked claim based on the case law he cited. Jervik filed a memorandum in support of his motion, but that memorandum likewise did not alert the district court to any facts that were overlooked or misconstrued. It also did not ask the court address a claim he raised that he believed the court did not address in its ruling. The memorandum simply reiterated the arguments Jervik made in his resistance to the motions for summary judgment and asked the district court to "reconsider" its ruling or advised

the court that Jervik "respectfully disagree[d]" with the court's decision. A rule 1.904(2) motion is not properly filed if it merely asks the court to reconsider the law previously cited and change the outcome to rule in the movant's favor. *See Homan*, 887 N.W.2d at 161 (noting the motion should not be filed to "merely seek reconsideration of an adverse district court judgment" or "merely seek to rehash legal issues adversely decided"). "[R]ule 1.904(2) is a tool for correction of factual error or preservation of legal error, not a device for rearguing the law." *Hedlund*, 875 N.W.2d at 726.

While not addressed in his appellate briefing, we note Jervik asserted in his motion that the district court did not "specifically address[] Mr. Jervik's public policy argument." The rule 1.904(2) motion is proper if the district court failed to rule on an issue, claim, or legal theory. *Homan*, 887 N.W.2d at 161. The motion filed for this purpose serves to preserve appellate error. *Id*. However, our review of the summary judgment filings of the parties and the district court's summary judgment ruling indicates that the court did rule on Jervik's public policy argument, and no such motion under rule 1.904(2) was needed to preserve error.

Timewell and DPD asserted public policy supported a finding that they did not owe a duty of care to Jervik because Jervik was an independent contractor. *See Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 698 (Iowa 2009) (noting the policy of the law that employers of independent contractors only have a limited duty of care was justified because the independent contractors control the work performed and have specialized knowledge and expertise that enables them to understand the work and the risks and take the necessary precautions). In response, Jervik asserted the public policy contained in Iowa Code section 88.1

(2014)—"It is the policy of this state to assure so far as possible every working person in the state safe and healthful working conditions"—justified placing a duty of care on Timewell and DPD to protect Jervik. The district court noted the parties' competing public policy arguments and determined the rule announced in *Van Fossen* was controlling. The court found Jervik's arguments "unpersuasive."

While the court did not articulate that it was rejecting the public policy contained in section 88.1 in favor of the public policy contained in *Van Fossen*, such a statement is not needed for error to be preserved. "Where the trial court's ruling . . . expressly acknowledges that an issue is before the court and then the ruling necessarily decides that issue, that is sufficient to preserve error." *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). We conclude the court's acknowledgement of Jervik's public policy argument, its decision to accept the alternative public policy argument of DPD and Timewell, and its ruling that dismissed Jervik's claims, adequately preserved the claim for appeal. Because the public policy issue was preserved, Jervik's motion under rule 1.904(2) was unnecessary.

In ruling on the rule 1.904(2) motion, the district court accurately articulated the law with respect to the justifications for filing a motion to amend, enlarge, or modify. It then concluded that the issues Jervik raised in his motion "had already been decided and rejected in [the court's] prior ruling." The court noted a motion under rule 1.904(2) is not proper if it is made "just to rehash legal issues" and then concluded, "Since this court had already rejected Jervik's arguments in its prior ruling, it will not rehash the arguments here."

We agree with the court's conclusions that Jervik's motion was filed for the improper purpose of seeking a "reconsideration of an adverse district court judgment" and seeking "to rehash legal issues adversely decided." *See Homan*, 887 N.W.2d at 161. Because the motion was not filed for a proper purpose, it did not toll the time for filing a notice of appeal. Jervik's notice of appeal filed on February 26, 2016, was untimely and deprives this court of jurisdiction to hear the appeal.[2]

APPEAL DISMISSED.

[2] Even if this court had jurisdiction to reach the merits of the appeal, we would conclude the district court correctly entered summary judgment. Jervik argues DPD and Timewell owed him a duty of care prior to the time that he began work on the property to do such things as conduct a job safety analysis and hire an electrical engineer to create a construction plan for the electrical work he performed. However, pursuant to *Robinson v. Poured Walls of Iowa, Inc.*, we look at who had control and possession of the property at the time of the injury, not at some point in time prior to the injury in question. 553 N.W.2d 873, 876 (Iowa 1996) (noting liability depended on whether defendant was a possessor of land at the time of the injury and courts look at "the degree of control exercised over the *work*"). Jervik, as the master electrician performing the electrical upgrade, was in control of the work and was in the best position to understand, appreciate, and protect himself from the risk of injury from electricity. *See McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 373-74 (Iowa 2012) ("Courts in other states have repeatedly found that in the absence of actual control, a property owner owes no duty to a contractor or a contractor's employee who suffers injury from being electrocuted on the property owner's premises. . . . *Jackson v. Petit Jean Elec. Co-op*., 270 Ark. 506, 606 S.W.2d 66, 68 (1980) (finding a utility had no duty to deenergize its lines or warn an electrical contractor of 'obvious hazards which are an integral part of the work the contractor was hired to perform'). . . . The party in control of the work site is best positioned to take precautions to identify risks and take measures to improve safety."). In addition, we agree with the district court's determination that the electrical work Jervik performed did not involve a peculiar risk nor was it inherently dangerous. *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 233 (Iowa 1974) ("We believe the presence near streets of electric transmission and distribution lines is a matter of common knowledge and a paving contractor can reasonably be expected to take precautions against contacting them."). We thus conclude the district court was correct to rule neither DPD nor Timewell owed a duty to Jervik at the time of the injury.