STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0552

Pamela Kay Twetten,
Appellant,

vs.

American Legion Post 212,
Respondent.

Filed January 20, 2009
Affirmed
Connolly, Judge

Hubbard County District Court
File No. 29-CV-07-1264

Gary M. Hazelton, Hazelton Law Firm, PLLC, P.O. Box 1248, Bemidji, MN 56619 (for appellant)

Peter Lind, Waldeck & Lind, 1400 TCF Tower, 121 South Eighth Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

Appellant slipped into a hole in the ice while participating in an ice-fishing contest organized by respondent. She brought a negligence suit against respondent. The district

court granted respondent's motion for summary judgment, holding that (1) respondent did not owe a duty to appellant, (2) the dangers presented to appellant by the holes drilled in the frozen lake were known or obvious, and (3) the doctrine of primary assumption of risk applied and acted as a complete bar to appellant's recovery. Because the dangers presented to appellant by the holes were known or obvious, we affirm the district court's grant of summary judgment.

FACTS

On February 5, 2005, respondent American Legion Post 212 sponsored its seventh annual ice-fishing contest on Fish Hook Lake. Appellant Pamela K. Twetten was a participant in this contest. She paid a $30 entry fee for a ticket that enabled her to enter the area of the frozen lake that was reserved for the contest. Respondent was able to reserve an area of the lake for its contest because it obtained the necessary permit from the Minnesota Department of Natural Resources.

To prepare the lake for the contest, respondent cordoned off a section of the lake that was approximately one mile in circumference. Within this section of the lake, respondent arranged for the drilling of about 6,000 holes in the ice. Respondent also arranged for four food vendors to place lunch wagons within the perimeter of the contest. The contest organizers "generally try not to put a hole within 50 feet of where the vendor is going to be."

Appellant, an experienced ice-fisher, entered the contest around noon. After placing her fishing gear near a hole, appellant and her fiance, who also entered the contest with appellant, walked towards one of the lunch wagons. The lunch wagon that

appellant and her fiance approached was approximately 30 feet from the nearest holes in the ice. When they arrived at the lunch wagon, appellant and her fiance had to wait in a line of 15 to 20 people. Appellant acknowledges that the line "started curving down one of the rows where the holes were," and that "there [were] holes on both sides of [the] row." But she denies that she noticed this prior to the accident. She does admit that "I did not have fishing holes on my mind here at all; because we were in a food line and I did not think that we were going to be having to worry about fish holes on our right or left." Shortly after getting in line, appellant stepped into a hole in the ice and injured herself. Just before she stepped into the hole, appellant's fiance, who had noticed the holes surrounding them, was going to warn her to take care to avoid the holes.

On December 6, 2006, appellant brought a negligence claim against respondent. The district court granted respondent's motion for summary judgment, holding that (1) respondent did not owe a duty of care to appellant, (2) the dangers existing on the lake were known or obvious, and (3) the doctrine of primary assumption of risk applies and acts as a complete bar to appellant's recovery. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

We note at the outset that it is not necessary for our disposition of this case to determine whether respondent owed appellant a duty of care because, even if such a duty

exists, the known or obvious nature of the condition of the hole relieves respondent of any duty it otherwise owed to appellant.

In regards to known or obvious dangers, Minnesota has adopted the rule found in the Restatement (Second) of Torts § 343A (1965) which states:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

See Louis v. Louis, 636 N.W.2d 314, 319 (Minn. 2001) (applying § 343A). The test for obviousness is not "whether the injured party actually saw the danger, but whether it was in fact visible." *Munoz v. Applebaum's Food Market, Inc.*, 293 Minn. 433, 434, 196 N.W.2d 921, 922 (1972).

Generally, "when the danger is apparent, recovery is precluded." *Lawrence v. Hollerich*, 394 N.W.2d 853, 855 (Minn. App. 1986), *review denied* (Minn. Dec. 17, 1986). But there are "situations in which the possessor of land can and should anticipate that a dangerous condition will cause harm to someone notwithstanding its known or obvious danger." *Id.* In those cases, "the duty of reasonable care of the possessor requires him to warn the invitee or to take other reasonable steps to protect him against an obvious danger if the possessor has reason to expect that the invitee will nevertheless suffer physical harm." *Id.* at 856. However, "there are situations which are so obviously dangerous" that there is no duty to warn. *Peterson v. W. T. Rawleigh Co.*, 274 Minn. 495, 497, 144 N.W.2d 555, 558 (1966). Whether a danger is known or obvious is a matter that can be determined by a district court. *See Louis*, 636 N.W.2d at 321 ("[T]he

district court must determine if the activity or condition involved known or obvious dangers.").

In the present case, the district court granted summary judgment after it concluded that the danger complained of was known or obvious to appellant as a matter of law. We agree.

First, it is undisputed that the condition complained of in this case, the holes, were visible. While appellant claims not to have seen the specific hole that she fell in, she does not argue that it was obscured or not obvious. She just claims that she was not expecting the hole to be located where it was. Appellant's fiance even noticed the hole and was in the process of warning her when she fell in.

Second, the risk associated with a hole in the ice at an ice-fishing contest, which is falling in the hole, is so obvious that respondent was under no duty to warn appellant.[1] But even if this danger was not sufficiently obvious, respondent took reasonable steps to protect appellant from that danger. Respondent placed a boundary around the area of the lake in which the ice fishing holes were located, and it was only within this boundary that respondent placed the holes. Respondent also encircled the area on the ice that contained the food vendors with orange spray paint. No holes were drilled within this area. These

[1] Appellant was aware that there would be holes in the ice. Her own deposition testimony indicates that she was familiar with the risks inherent with ice fishing, she had attended an ice fishing contest on at least one prior occasion, and she knew that it was necessary to take precautions while ice-fishing.

reasonable steps were sufficient to warn appellant of the risks associated with the presence of holes on a frozen lake in an ice-fishing contest.

Affirmed.