STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1551

Mary Jane Novitske,
Appellant,

vs.

Target Corporation, defendant and third party plaintiff,
Respondent,

vs.

Reliable Snowplowing, LLC,
Third Party Defendant.

Filed May 29, 2012
Affirmed
Huspeni, Judge[*]

Ramsey County District Court
File No. 62-CV-10-4979

James S. Ballentine, Robert J. Schmitz, Schwebel, Goetz & Sieben, P.A., Minneapolis, Minnesota (for appellant)

Christopher P. Malone, Andrea E. Reisbord, Cousineau McGuire Chartered, Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Huspeni, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUSPENI, Judge

Appellant challenges the district court's award of summary judgment to respondent. Because the district court properly concluded that there was no material fact issue regarding whether respondent had constructive knowledge of the ice patch upon which appellant fell, we affirm.

FACTS

At approximately 7 p.m. on February 8, 2008, appellant Mary Jane Novitske and her sister went shopping at a Target store owned by respondent Target Corporation. Her sister parked her vehicle in the middle of the parking lot near a cart corral. Novitske exited the vehicle and took about ten steps before slipping on a small patch of ice and falling to the ground.

Neither Novitske nor her sister saw the patch of ice prior to the fall, and both testified that they did not recall seeing any other snow or ice in the parking lot before or after the accident. Novitske testified that she had no recollection of how big the ice patch was, but observed after she had fallen that it was of a very particular quality: it was dark, smooth to the touch, and did not look like frozen snow or chunky ice. Novitske's sister testified that she looked at the area where Novitske had fallen and saw an eighteen inch by eighteen inch patch of what appeared to be "black ice." She could not tell what caused the icy area. Novitske was subsequently taken to the hospital by ambulance. She had broken her femur in three places.

Immediately after Novitske's fall, a Target cart attendant notified managerial employee John Ewers of Novitske's fall, and Ewers responded to the accident site. He inspected the area and described it in his incident report as "melted snow in between cars that had refroze." During his deposition, Ewers described the patch as a "somewhat slippery or icy surface kind of thing," and when asked if he actually saw ice, he testified "I rubbed my foot over it and it was a little slippery. I guess it wasn't actually ice. Possibly." Ewers further testified that it was an isolated glossy area "a couple of feet in diameter" near the cart corral. Ewers had no idea when it could have formed and stated that the surrounding area was "pretty well scraped clean." Following the incident, Ewers conducted a walk-through of the parking lot and determined that this was the only slippery area. Ewers instructed an employee to apply a deicing agent. He did not make a service call for the entire lot.

Novitske sued Target for negligence in the inspection, maintenance, and repair of the parking lot, as well as for negligent failure to warn of a dangerous condition. Target brought a third-party claim against its snow and ice removal contractor, which, in turn, brought fourth-party claims against its subcontractors. Target and the third-party defendant moved for summary judgment. Following a hearing, the district court granted Target's motion for summary judgment and denied that of the third-party, but held that the third-party claims were moot due to the summary judgment award for Target. This appeal follows.

D E C I S I O N

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. In opposing a motion for summary judgment, general assertions are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "A party need not show substantial evidence to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis omitted). Conversely, a "defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

On appeal from summary judgment, an appellate court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). A reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *Id.* at 76-77. An award of summary judgment will be affirmed if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

To establish a prima facie case of negligence, a plaintiff must show that a duty was owed, breach of that duty, causation, and damages. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). Summary judgment is appropriate when the record lacks proof of "any of the four elements of a prima facie case [of negligence]." *Id.* The existence of a legal duty "is an issue for the [district] court to determine as a matter of law." *Oakland v. Stenlund*, 420 N.W.2d 248, 250 (Minn. App. 1988), *review denied* (Minn. Apr. 20, 1988).

"A property owner has a duty to use reasonable care to prevent persons from being injured by conditions on the property that represent foreseeable risk of injury." *Rinn v. Minn. State Agric. Soc'y*, 611 N.W.2d 361, 364 (Minn. App. 2000). "But even when landowners owe persons a duty to keep and maintain their premises in a reasonably safe condition, they are not insurers of safety." *Id.* at 365. "The exercise of reasonable care for the safety of invitees requires neither the impossible nor the impractical . . . ." *Mattson v. St. Luke's Hosp. of St. Paul*, 252 Minn. 230, 233, 89 N.W.2d 743, 745 (1958). "Unless the dangerous condition actually resulted from the direct actions of a landowner or his or her employees, a negligence theory of recovery is appropriate only where the landowner had actual or constructive knowledge of the dangerous condition." *Rinn*, 611 N.W.2d at 365.

"Constructive knowledge of a hazardous condition may be established through evidence that the condition was present for such a period of time so as to constitute constructive notice of the hazard." *Id.* "But speculation as to who caused the dangerous condition, or how long it existed, warrants judgment for the landowner." *Id.* "Appellant has the burden of proving constructive knowledge." *Id.*

> [I]t is the general rule that a business establishment or other inviter may, without violating its duty to exercise reasonable care for the safety of business guests or invitees, await the end of a freezing rain or sleetstorm and a reasonable time thereafter before removing ice and snow from its outside entrance walks, platform, or steps.

Mattson, 252 Minn. at 233, 89 N.W.2d at 745. "Since a storm produces slippery conditions as long as it lasts, it would be unreasonable to expect the possessor of the premises to remove the freezing precipitation as it falls." *Id.* "Reasonable care requires only that the possessor shall remove the ice and snow, or take other appropriate corrective action, within a reasonable time after the storm has abated." *Id.*

Novitske first argues that the district court erred when it concluded that Target owed no duty to her because her fall occurred in the midst of a precipitation event. There is merit in this argument.

In granting summary judgment to Target, the district court first stated:

> It is undisputed that a measurable winter weather event occurred on February 4, 2008, four days prior to [Novitske's] accident on February 8, 2008. Weather reports from the National Weather Service also indicate that in the days following the February 4, 2008 winter event, there were trace amounts of snowfall on February 6, 2008, and .2 inches of snow fell on February 7, 2008. There was also freezing precipitation reported on February 8, 2008, the day of the accident, with light snow falling throughout the entire day totaling .2 inches. The record demonstrates that the winter precipitation event continued from at least February 6, 2008 through the time of [Novitske's] accident on February 8, 2008. As such, under the controlling law of this jurisdiction, Target, without violating its duty to exercise reasonable care for the safety of invitees, was permitted to wait until the winter precipitation abated and a reasonable time thereafter before removing ice and snow from its parking area.

The analysis of the district court is flawed when it concluded that the "winter precipitation event continued from at least February 6, 2008 through the time of [Novitske's] accident on February 8." Our review of the record reveals that the parties presented disparate evidence regarding the amount of snow that fell on February 8. This disparity would create a material fact issue defeating summary judgment. Ewers testified that he did not recall precipitation or snow falling on February 8. Target submitted a weather report indicating that light snow fell throughout the day on February 8, but the levels were not measurable. Novitske submitted evidence that .2 inches of snow fell on February 8. Thus, although both parties submitted evidence that there was some precipitation on February 8, a dispute exists as to whether this snow fall amounted to a weather condition that would trigger *Mattson*'s general rule permitting landowners to wait until the end of a storm to remove snow and ice from the premises.

Because the district court must construe the evidence in the light most favorable to Novistke, the district court erred by concluding that "Target, without violating its duty to exercise reasonable care for the safety of invitees, was permitted to wait until the winter precipitation abated and a reasonable time thereafter before removing ice and snow from its parking area." Moreover, even assuming that a "snow event" occurred on February 8, a determination as to what "constitute[d] an exercise of reasonable care as applied to the circumstances" is a jury question. *See Frykman v. Univ. of Minn.-Duluth*, 611 N.W.2d 379, 381 (Minn. App. 2000) (quotation omitted).

Although we reject the summary-judgment award based on the presence of a snow event continuing into February 8, we recognize that summary judgment may be affirmed

if it can be sustained on any ground. *See Winkler*, 539 N.W.2d at 828. The district court considered an alternative basis upon which summary judgment could be awarded. We now address that alternative basis.

The district court observed that

> unlike the slick conditions described in both *Mattson* and *Frykman*, where the cause of the icy conditions was known to be a natural weather phenomenon, the actual cause and duration of the patch of ice on which [Novitske] fell is completely unknown. The source of the slick area was not identified, and it could have been the result of winter precipitation, a spilled beverage, or even condensation which formed as a result of warm automobile exhaust coming in contact with the pavement during below freezing temperatures. Additionally, there is no indication as to when this icy area formed, and as such, there is no proof that Target knew of the patch or had a reasonable period of time to discover and remedy the icy condition Any factual finding regarding the source or cause of an isolated slick spot would be completely speculative in nature.[1]

The district court's analysis in this regard is sound.

As noted earlier, both Novitske and her sister testified that they did not recall seeing any other snow or ice in the parking lot before or after the accident. Novitske testified to observing, after she had fallen, that the patch of ice was of a very particular quality: it was dark, smooth to the touch, and did not look like frozen snow or chunky ice.

Ewers described the patch as "somewhat slippery or icy surface kind of thing," and when asked if he actually saw ice, he testified "I rubbed my foot over it and it was a

[1] This conclusion addresses whether Target had constructive knowledge of the ice patch. Novitske does not assert that Target had actual notice of the icy area.

little slippery. I guess it wasn't actually ice. Possibly." Ewers stated that the surrounding area was "pretty well scraped clean."

Novitske relies on *Gearin v. Wal-Mart Stores, Inc.*, 53 F.3d 216 (8th Cir. 1995), and *Lutz v. Lilydale Grand Cent. Corp.*, 312 Minn. 57, 250 N.W.2d 599 (1977), to support her argument that the district court "erred as a matter of law and fact when [it] held that the cause and duration of the ice patch were speculative." These cases are distinguishable. In *Gearin*, after a jury verdict for plaintiff, Wal-Mart argued that the plaintiff failed to present any evidence that Wal-Mart knew or should have known about the patch of ice. 53 F.3d at 217. The court disagreed, stating:

> [W]e conclude Gearin presented enough evidence to allow a reasonable jury to find that Wal–Mart should have discovered the ice and Wal–Mart had an opportunity to take corrective action before Gearin's accident. Gearin presented testimony that it had not snowed for two or three days before the accident, it had been very cold, the area where Gearin fell looked like cars had driven over it, and the parking lot was in substantially the same condition just after Gearin's accident as it had been several hours earlier that day. The denial of Wal–Mart's motion for judgment as a matter of law was proper.

Id. at 218. We note initially that foreign caselaw is not binding on Minnesota courts. *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984). Moreover, the *Gearin* court's discussion of the constructive-notice issue is simply too abbreviated to be instructive here. That court did not indicate what it deemed to be "very cold" or how this factored into the analysis. And the *Gearin* court never explained how the substantially unchanged condition of the parking lot tended to establish constructive notice.

Novitske argues that the presence of tire tracks in the area where she fell indicates that the ice patch had been present for a considerable length of time, such that Target should have discovered it. But the mere presence of tire tracks in a parking lot, without an indication of how frequent or infrequent the traffic was at the time of Novitske's accident, is not sufficient to meet her constructive-knowledge burden. And none of the witnesses present the evening of Novitske's fall testified to the existence of tire tracks over the icy area. Photos of tire tracks in the Target parking lot, generally, have none of the indicia of reliability that the tire tracks in *Gearin* might have had. In *Gearin*, the facts, which were never fully developed or set out in the opinion, apparently permitted reasonable minds to conclude that the icy condition had been present for an appreciable amount of time; here, the facts permit only speculation in that respect.

In *Lutz*, the plaintiff sustained injuries to her right elbow when she fell in a parking lot. 312 Minn. at 57, 250 N.W.2d at 599. Although plaintiff could not "specifically recall seeing ice on the spot where her fall occurred, she did note that the existence of ice was fully apparent and that as a result she exercised great care in traversing the parking lot." *Id.* at 58, 250 N.W.2d at 600. The parking lot owner challenged the sufficiency of the evidence to support the jury's finding that he was 100 percent casually negligent, and the supreme court concluded that "the jury was entitled to infer that the fall was the result of plaintiff's slipping on ice in the parking lot." *Id.* But in this case, it is undisputed that Novitske slipped on ice; the issue in this case is what caused the ice and how long it may have been there. *Lutz* is not instructive on those questions.

Novitske also urges that Ewers's incident report establishes the cause of the ice patch and serves as an "admission by Target." But the incident report merely speculates as to what caused the ice patch, namely "melted snow in between cars that had refroze." The incident report does not create a genuine issue of material fact. *See Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) ("[M]ere speculation, without some concrete evidence, is not enough to avoid summary judgment.") (quotation omitted)); *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (holding that for purposes of challenging summary judgments, evidence which creates mere metaphysical doubt does not create an issue of material fact).

In sum, because Novitske failed to present any concrete, non-speculative evidence as to the cause of the patch of ice and how long it had been present in the parking lot prior to her fall, she failed to meet her burden of establishing that Target should have known of the icy condition. The district court did not err by granting Target's motion for summary judgment.

Affirmed.