STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1968

Susan J. Davis,
Respondent,

vs.

St. Ann's Home,
Appellant,

vs.

Kent Gaidis, d/b/a Kent's Carpet,
Third-Party Defendant.

Filed January 15, 2008
Affirmed
Dietzen, Judge

St. Louis County District Court
File No. 69-DU-CV-05-845

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Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

DIETZEN, Judge

Appellant challenges the district court order denying its motion for posttrial relief and resulting judgment awarding respondent damages for injuries she sustained as a result of a slip and fall accident, arguing that it did not owe respondent any duty regarding open and obvious conditions at appellant's assisted-living facility, that respondent's claims are barred by the doctrine of assumption of risk, and that the district court erred in its application of the collateral source rule. We affirm.

FACTS

In January 2005, respondent Susan Davis was a resident on the sixth floor of an assisted-living facility owned and operated by appellant St. Ann's Home (St. Ann's). Davis had mobility impairments caused by replaced knees and back pain from a bone-on-bone degenerative condition that required her to use a walker.

For many years, St. Ann's hired third-party defendant Kent's Carpet to replace portions of carpet in the facility. At the time of the accident, Kent's Carpet was performing carpet replacement work on the sixth floor near the main elevators and was installing two pieces of carpet that were seamed but had an overlap of approximately three-quarters of an inch in height. Simultaneously, Davis was moving with her walker toward the elevator on her way to the dining room for the evening meal. When she approached the carpet-replacement work area, an employee of Kent's Carpet offered her assistance but she declined. Davis then proceeded to move her walker over the carpet

seam, but her walker snagged on a piece of the overlapped carpet, which caused her to fall and sustain injuries.

Davis commenced this action against St. Ann's alleging that it was negligent. Before trial, St. Ann's moved for summary judgment, arguing that it owed no duty to Davis because the condition was open and obvious and that Davis assumed the risk. The district court denied the motion.

At trial, Davis testified that at the time of the accident, she saw a carpet-layer "kneeling down working . . . on [the] carpet" and wondered why he was "doing carpet[ing] because it's suppertime." But he appeared to be "just finishing up." She then

> stopped and I looked it over good. I just didn't go running down the hall and go over it. I stopped, and then . . . he asked me if he could help me, and I looked it over some more and I thought, I don't think I need help because to me it looked like it was 3/4 of an inch or less [of overlapped carpet]. . . . So I didn't think I would have a problem at all because I hadn't had any problem with my walker. So when I went over it [with my walker] and then it fell, I was as surprised as anybody.

She testified that "[t]he walker got caught," despite the fact that she grasped her walker and "lifted it up to go over that . . . [three-quarters] of an inch" of carpet and thought she had cleared it.

At the close of Davis's case, St. Ann's moved for a directed verdict which was denied. St. Ann's presented testimony that Davis could have avoided the work area entirely by using the first dining room entrance, and that at the time of the accident one of the carpet-layers offered to assist Davis, but that she declined the offer of assistance.

The jury found Davis and St. Ann's negligent, assigned 85% of the fault to St. Ann's, and awarded Davis damages in the amount of $129,550. Of the total award, the jury set Davis's past hospital and medical expenses at $59,550. Medicare paid approximately $35,000 of Davis's medical bills and the $21,332 balance was written-off by Davis's medical providers. The district court entered judgment for $103,640.

St. Ann's moved for JMOL, or, alternatively, a new trial, arguing that the condition resulting in the fall was open and obvious and that Davis assumed the risk. St. Ann's also requested that the jury verdict be reduced to reflect the Medicare payments and medical provider write-offs. The district court denied St. Ann's motions. This appeal follows.

D E C I S I O N

I.

St. Ann's argues that the district court erred in denying its motion for directed verdict and later denying its motion for JMOL or, alternatively, a new trial. On review of the denial of a motion for a directed verdict, we make an independent determination of whether the evidence was sufficient to present a fact question to the jury and review the evidence in the light most favorable to the nonmoving party. *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997). Thus, we must accept as true the evidence favorable to the adverse party and all reasonable inferences which can be drawn from that evidence. *Claflin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242, 247 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). Further, we will affirm the denial of a motion for JMOL if there is any competent evidence in the record "reasonably tending to

sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted). "Unless the evidence is practically conclusive against the verdict, [this court] will not set the verdict aside." *Id.* (quotation omitted). "The evidence must be considered in the light most favorable to the prevailing party" and this court must not set aside the verdict "if it can be sustained on any reasonable theory of the evidence." *Id.* Similarly, this court will not disturb the district court's denial of a new trial absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). "[T]he verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict." *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn. App. 1992), *review denied* (Minn. Apr. 29, 1992).

A. Open and Obvious Condition

A property owner "has a duty to use reasonable care for the safety of all entrants upon the premises." *Olmanson v. Le Sueur County*, 693 N.W.2d 876, 880 (Minn. 2005). "Reasonable care includes the duty to inspect and repair the premises and, at a minimum, to warn persons using the premises of unreasonable risks of harm." *Sullivan v. Farmers & Merchs. State Bank of New Ulm*, 398 N.W.2d 592, 594 (Minn. App. 1986), *review denied* (Minn. Mar. 13, 1987).

But a landowner's common-law duty to inspect, repair and warn is not absolute. *Olmanson*, 693 N.W.2d at 881. Minnesota has adopted Restatement (Second) of Torts § 343A(1) (1965), which states: "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." *Baber v. Dill*, 531 N.W.2d 493, 495-96 (Minn. 1995). The comments to the Restatement (Second) of Torts are instructive:

> The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

Restatement (Second) of Torts § 343A cmt. b (1965). Generally, whether a condition presents a known or obvious danger is a question of fact. *See, e.g., Louis v. Louis*, 636 N.W.2d 314, 321-22 (Minn. 2001) (holding that summary judgment was not appropriate because the known or obviousness of the danger posed by a swimming pool was a fact question). Minnesota has recognized a danger to be "obvious" as a matter of law only in limited circumstances. *See Baber*, 531 N.W.2d at 496 (citing Minnesota cases where dangers such as a lake, a 20-foot square pool of water, a large planter, and a low-hanging branch were deemed "obvious" as a matter of law).

St. Ann's argues that the dangerous condition of the carpeting was "known or obvious" and, therefore, it owed no duty to Davis and that the district court erred in allowing the issue to go to the jury. The district court denied St. Ann's motion for directed verdict and JMOL, concluding that there was sufficient evidence that St. Ann's owed a legal duty to Davis. We agree.

We conclude that there was sufficient evidence that the condition was not open and obvious, that Davis did not appreciate the risk and, therefore, that St. Ann's owed a legal duty. Here, the jury could have reasonably believed Davis's testimony that although the carpet seam was visible, it did not appear to be dangerous. The jury heard testimony that no barricades or caution tape surrounded the work area. Additionally, the jury was shown an example of the overlapping carpet seam and they could have reasonably concluded—based on their own perception of the carpet seam—that the hazard was not known or obvious. Viewed in the light most favorable to the verdict, there was competent evidence that the danger was not known and obvious. *See Omnetics, Inc., v. Radiant Tech. Corp.*, 440 N.W.2d 177, 183 (Minn. App. 1989) (holding that judgment notwithstanding the verdict is inappropriate where there is "any competent evidence reasonably tending to support the verdict").[1]

B. Anticipation of Harm

St. Ann's next argues that the district court erred in failing to conclude that St. Ann's could not have anticipated the harm. In Minnesota, "even if a danger is known and obvious, landowners may still be liable to an injured person if the landowner should anticipate the harm despite the injured person's knowledge or the obviousness of the condition." *Rinn v. Minn. State Agric. Soc'y*, 611 N.W.2d 361, 364 (Minn. App. 2000). Generally, whether the possessor could anticipate the danger is a fact question. *Olmanson*, 693 N.W.2d at 881.

[1] Effective January 1, 2006, Minn. R. Civ. P. 50 has been amended to adopt the "judgment as a matter of law" nomenclature in place of "judgment notwithstanding the verdict" and "motion for directed verdict."

The jury heard testimony that the average age of St. Ann's residents is 87, that many residents have mobility impairments requiring the use of a walker or wheelchair, and that some residents are legally blind. Additionally, the jury was told that the carpet was installed near the dining room around the time residents arrive for the 5:15 evening meal and that St. Ann's was aware that "the flow of traffic would be coming through those areas to get to the dining room." Viewed in the light most favorable to the verdict, the jury could have reasonably concluded that, based on evidence of the residents' characteristics and the timing and location of the project, St. Ann's should have anticipated the harm.

C. Assumption of Risk

St. Ann's argues that Davis's claim was barred by the doctrine of primary assumption of risk. Minnesota recognizes two types of assumption of risk—primary and secondary. *Swagger v. City of Crystal*, 379 N.W.2d 183, 184 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986). The elements of both primary and secondary assumption of risk include whether the person had (a) knowledge of the risk; (b) an appreciation of the risk; and (c) a choice to avoid the risk but voluntarily chose to chance the risk. *Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 104-05 (Minn. App. 1991), *review denied* (Minn. Mar. 27, 1991). Primary assumption of risk arises "where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks. As to those risks, the defendant has no duty to protect the plaintiff and, thus, if the plaintiff's injury arises from an incidental risk, the defendant is not negligent." *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974). On the other hand, secondary

assumption of risk "is a type of contributory negligence where the plaintiff voluntarily encounters a known and appreciated hazard created by the defendant without relieving the defendant of his duty of care with respect to such hazard." *Andren*, 465 N.W.2d at 104 (quotation omitted).

St. Ann's does not present evidence that tripping on overlapping carpet is a well-known, incidental risk of walking in a hallway, which would require the application of primary assumption of risk. Similarly, St. Ann's cites no instances where primary assumption of risk has been applied in a landowner-resident context. Instead, St. Ann's relies on *Goodwin v. Legionville Sch. Safety Patrol Training Ctr., Inc.*, to argue that Davis was aware of the risk and could have avoided it. 422 N.W.2d 46, 50 (Minn. App. 1988) (involving the well-known risk of slipping and falling off a roof), *review denied* (Minn. June 23, 1988). But *Goodwin* is factually distinguishable because the risk of falling off a roof is well-known, obvious, and incidental to roofing. St. Ann's also relies on *Flynn v. Arcade Inv. Co.*, which involved an elderly woman who tripped and fell on a step in her doctor's office. 253 Minn. 107, 91 N.W.2d 113 (1958). But *Flynn* does not consider or discuss primary assumption of risk, and thus does not support St. Ann's position.

Based on this record, we conclude the district court did not err in denying St. Ann's motion for JMOL.

II.

St. Ann's contends that the district court erred in denying its motion to set-off the damages award by $21,332—the amount of medical bills written-off by Davis's medical

providers—on the ground that it is a collateral source under Minn. Stat. § 548.36 (2006). The collateral source statute requires that, upon proper motion, the district court reduce damage awards by "amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted." Minn. Stat. § 548.36, subds. 2(1), 3(a).

St. Ann's contends that including the $21,332 write-off in the damages award amounts to a windfall contrary to the purpose of the collateral source statute. *See Buck v. Schneider*, 413 N.W.2d 569, 572 (Minn. App. 1987) (purpose of the collateral source statute is to prevent "windfalls by plaintiffs at the expense of defendants"); *Johnson v. Farmers Union Cent. Exch., Inc.*, 414 N.W.2d 425, 432 (Minn. App. 1987) (collateral source statute "abrogates the common law right to be overcompensated for injuries"), *review denied* (Minn. Nov. 24, 1987). Statutory interpretation is a question of law which this court reviews de novo. *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001). If the meaning of the law is free of ambiguity, then we apply the law according to the plain and ordinary meaning of its terms. Minn. Stat. § 645.16 (2006).

The statute defines collateral sources as "payments related to the injury or disability." Minn. Stat. § 548.36, subd. 1. The dictionary definition of payment is "an amount paid" and pay is defined as "to give money to in return for goods or services rendered." *The American Heritage Dictionary of the English Language* 1291-92 (4th ed. 2000). The statute does not provide for amounts billed but written-off, and this court cannot "supply the omissions of the legislature." *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001) (quotation omitted). We conclude that no money was

paid or exchanged when the medical providers wrote-off the $21,332 and, therefore, the statute does not apply. *See Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005) (concluding that the gap between the amount billed and amount paid pursuant to a settlement agreement "was not a payment made to anyone and therefore is not a collateral source as defined by the statute"), *review denied* (Minn. Aug. 24, 2005).

Existing caselaw on collateral sources provides:

> If the plaintiff's special damages . . . such as hospital or medical expenses or loss of wages, are paid for by some third person, either as a gift or on the basis of some contractual obligation, this circumstance does not bar the plaintiff from recovering this item from the defendant, even though it may in effect accord to the plaintiff a double benefit or a double recovery.

Smith v. Am. States Ins. Co., 586 N.W.2d 784, 786 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). The common law rule explicitly permits double recovery, and, therefore, we reject St. Ann's argument that Davis impermissibly received a windfall. Thus, the district court did not err in denying St. Ann's motion for collateral source set-off.

Affirmed.