STATE OF MINNESOTA
IN COURT OF APPEALS
A10-221

Wayne Aronson,
Appellant,

vs.

Stephen McDowall,
Respondent.

Filed August 3, 2010
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CV-09-5662

Michael A. Bryant, Nicole L. Bettendorf, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

Patrick H. Elliott, Bradley C. Mann, Elliott Law Offices, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

CONNOLLY, Judge

In this negligence case in which appellant tripped and fell in respondent's driveway, appellant challenges the district court's grant of summary judgment in favor of

respondent. Appellant argues that genuine issues of material fact exist regarding the known-or-obvious-danger exception to respondent's general duty to use reasonable care to maintain his driveway in a safe condition. Because there are no genuine issues of material fact and the district court correctly applied the law in determining that respondent owed no duty of care to appellant, we affirm.

FACTS

On September 18, 2006, appellant Wayne Aronson, an employee of Granite City Moving & Storage (Granite City), went to respondent Stephen McDowall's house in St. Paul to move the belongings of respondent's friend and tenant, Scott Anderson, to a new residence in North Carolina. Appellant is a professional mover whose responsibilities with Granite City included loading and transporting belongings by truck across the continental United States. Appellant was hired by Granite City in March 2001; he had previously worked in the moving industry for different employers. Appellant had broken his left leg in a work-related accident in 2005, which resulted in recurring health problems.

When he arrived at respondent's house, appellant noticed a pothole in the driveway.[1] At his deposition, appellant stated that he moved his truck to create a path clear of the pothole because items could fall if his handcart hit the pothole. Appellant stated that he was "looking for the flattest, safest route." Although appellant was

[1] In his deposition, appellant referred to the surface irregularity as a "divot," which he described as "broken concrete." Respondent referred to it as a "depression" or "dip." Respondent later described it as "depressed concrete" and "an average size pothole" that was at least a few inches deep. We will refer to the irregularity as a pothole.

working for Anderson, respondent "noticed him moving the truck" to avoid the pothole. Respondent did not ask appellant why he moved the truck and did not warn him about the pothole.

Appellant and his girlfriend, with whom he subcontracted to help move Anderson's belongings, had to move 40 items from respondent's house to appellant's truck. The last item was a weight bench, and when appellant was carrying it to the truck, he stepped in the pothole and tripped and fell. Appellant's girlfriend ran into the house and told respondent to call 911, which respondent promptly did. An ambulance took appellant to a hospital; he was hospitalized for four days. Appellant suffered a compound fracture of his arm and lacerations to his face, some of which required stitches.

Appellant subsequently sued respondent for negligence, alleging that respondent failed to adequately maintain the safety of his driveway. Respondent moved for summary judgment, arguing that he did not owe a duty to appellant because the pothole was a known or obvious danger. Appellant argued that summary judgment was improper because respondent owed a duty to use reasonable care to maintain and repair the driveway and to warn of the potentially unsafe condition, and that there were genuine issues of material fact concerning whether appellant understood the danger posed by the pothole and whether respondent should have anticipated the injury despite the pothole's visibility.

The district court granted respondent's motion for summary judgment. It concluded that the danger posed by the pothole was known or obvious and that respondent therefore did not owe a duty to appellant. The court found that a "reasonable

person, who is alert enough to the hazardous [pothole] to reposition his truck to avoid it, is equally aware that the [pothole] may cause a person to trip and fall, thus posing a dangerous condition." The district court concluded that respondent should not have anticipated the harm despite the known or obvious danger: "Common sense dictates that when a person takes deliberate steps to move around a potentially dangerous situation, he has already seen and acknowledged the risk. There is no reason to expect that he will be harmed in the future as a result, or that a warning should be issued." The district court found no genuine issues of material fact and concluded that respondent was entitled to judgment as a matter of law.

This appeal follows.

D E C I S I O N

Summary judgment is appropriate when "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 judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal from summary judgment, we must determine whether there are any genuine issues of material fact, and whether the lower court erred in its application of the law." *Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). But to avoid summary judgment, the nonmoving party must present evidence that is "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable

persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

A plaintiff in a negligence action must prove four elements: "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). The defendant is entitled to summary judgment when the plaintiff fails to produce sufficient evidence on any of those elements. *Id.* Analysis of a negligence action brought against a landowner must begin with an inquiry into whether the landowner owed a duty to the entrant. *Baber v. Dill*, 531 N.W.2d 493, 495 (Minn. 1995). Whether a legal duty exists is a question of law. *Louis*, 636 N.W.2d at 318.

Possessors of land owe a general duty to exercise reasonable care for the safety of all entrants upon the premises. *Olmanson*, 693 N.W.2d at 880. The entrant also has a duty to exercise reasonable care, which may vary based on the circumstances. *Id.* at 881. The landowner's duty "includes an ongoing duty to inspect and maintain property to ensure entrants on the landowner's land are not exposed to unreasonable risks of harm." *Id.* If a dangerous condition on the premises is discoverable through reasonable efforts of the landowner, "the landowner must either repair the conditions or provide invited entrants with adequate warnings." *Id.*

But despite the general rule requiring landowners to inspect, repair, and warn, there is an exception when the dangerous condition is "known or obvious." *Id.* Thus, the owner does not need to warn the entrant of the known or obvious condition unless he should anticipate the harm even though the danger is known or obvious. *Id.* The duty to

warn only pertains to latent or hidden dangers. *Presbrey v. James*, 781 N.W.2d 13, 19 (Minn. App. 2010). "The rationale underlying this rule is that, generally, no one needs notice of what he knows or reasonably may be expected to know." *Louis*, 636 N.W.2d at 319 (quotation omitted).

A danger is obvious if the dangerous condition was in fact observable and "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." *Id.* at 321 (quotation omitted). A danger is known if the entrant is (1) aware of the condition itself and (2) appreciates the danger it involves. *Id.* If the danger is either known or obvious, the landowner does not owe a duty to the entrant unless he "should nevertheless have anticipated the harm despite its known or obvious danger." *Id.* at 322.

In this case, the pothole was clearly visible. It is undisputed that appellant was in fact aware of the pothole and took steps to avoid it. A reasonable person exercising ordinary judgment would have perceived that he could be injured if he stepped in the pothole and tripped and fell while carrying furniture. Thus, as a matter of law, the danger was obvious.

We find no merit in appellant's contention that respondent should have anticipated his injury despite the obvious danger. Appellant was a professional mover with years of experience, and respondent saw appellant notice the pothole and reposition his truck to avoid it. We recently held in *Presbrey* that a homeowner owed no duty to warn a deck-repair specialist of the risks involved in repairing a deck in inclement weather, reasoning in part that Presbrey's "experience made him *more* aware of the risks and potential

consequences of working in those conditions" than the homeowner. 781 N.W.2d at 19. Similarly, here appellant was at least as aware of the risks of carrying furniture to the moving truck with a pothole in the driveway as was respondent, and appellant *in fact* saw the pothole and took steps to avoid it. As our caselaw has repeatedly admonished, "no one needs notice of what he knows." *Louis*, 636 N.W.2d at 319 (quotation omitted).

Finally, appellant contends that caselaw pertaining to distracting circumstances diverting an entrant's attention is controlling. This argument was never presented to the district court, and we will not consider it for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts may not consider issues not litigated in district court and that a party may not shift theories on appeal).

Affirmed.