STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1786

Ellen Duncanson, et al.,
Appellants,

vs.

Biaggi's, Inc., et al.,
Defendants,
Twin City Outdoor Services, Inc.,
Respondent.

Filed July 5, 2011
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CV0919961

Michael J. Brose, Christine A. Rasmussen, Doar, Drill & Dkow, S.C., New Richmond, Wisconsin (for appellants)

Randi W. LaFleur, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Harten, 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

STAUBER, Judge

Appellants challenge the summary-judgment dismissal of their negligence action arising out of appellant-wife's slip and fall on an icy sidewalk. Appellants argue that the district court erred by concluding that (1) the danger was open and obvious and (2) respondent did not have actual or constructive knowledge of the condition. We affirm.

FACTS

On the evening of December 27, 2007, appellants Ellen and Lincoln Duncanson (the Duncansons), together with their daughter, drove to the Biaggi's Restaurant at the Shoppes at Arbor Lakes (Arbor Lakes) in Maple Grove to have dinner. The temperature was approximately 20-25 degrees, and although the parking lot was plowed, it was still snow-covered. The family arrived at the restaurant at about 6:50 p.m., and after parking their automobile, they walked from the parking lot to the sidewalk adjacent to the restaurant. While walking on the sidewalk, Ellen slipped and fell on a patch of ice and sustained injuries as a result of that fall.

In her deposition, Ellen testified that she is a lifelong resident of Minnesota and Wisconsin and is aware that parking lots and sidewalks can be slippery during the winter. Ellen also claimed that she did not notice the patch of ice until after she fell. According to Ellen, she looked down after she fell and noticed a three-foot patch of ice. Both Lincoln and the Duncansons' daughter also claimed that they did not notice the patch of ice until after Ellen fell.

Respondent Twin City Outdoor Services, Inc. (TCOS) was responsible for performing winter maintenance at Arbor Lakes for the winter of 2007/2008. In order to fulfill its obligations, TCOS agreed to

> provide all labor, equipment and supplies necessary for removal of snow and ice from all sidewalk areas, plow removal of snow from all parking fields, and elimination of all ice by chemical treatment as is possible during snow season conditions. During snow events that occur while Center is open, [TCOS] will provide sidewalk service to minimize risks associated with winter conditions.

At the time of the incident, Danny Shannon was employed by TCOS performing snow and ice removal. Shannon was on site at Arbor Lakes from 2:00 p.m. to 6:00 p.m. on the date of the incident. Although Shannon had no independent recollection of the date of the incident, he stated that he typically would have visited the area around the restaurant at least four times during his shift. By the time Shannon finished his shift, approximately 1,400 pounds of granular de-icer and 600 pounds of liquid de-icer had been applied to the sidewalks of Arbor Lakes, including the sidewalk leading to the restaurant. Steve Bartz, the owner of TCOS, testified that the large amount of de-icer was necessary that day because it was sunny and the temperature warmed up to 28 degrees, making it a "big drip day."

Approximately a year-and-a-half after the incident, the Duncansons brought suit against TCOS alleging that TCOS had actual or constructive notice of the dangerous condition of the sidewalk and had a duty to ensure their safety. Ellen sought damages for the personal injuries she sustained in her fall. Lincoln sought damages for loss of consortium.

TCOS moved for summary judgment on the basis that it had no duty to warn because the ice on the sidewalk was open and obvious and TCOS did not have actual or constructive notice of the condition. The district court granted the motion, finding that TCOS owed no duty to warn because the patch of ice was visible and, therefore, was an open and obvious hazard. The court also found that because Ellen fell less than an hour after Shannon finished his shift, there was not enough time to confer constructive notice on TCOS. The court further noted that "[i]t is impossible to remove all risk of falling on ice and snow." Thus, the district court dismissed the Duncansons' claims with prejudice. This appeal followed.

D E C I S I O N

A district court must grant a motion for summary judgment "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. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). No genuine issue of material fact exists if the evidence "merely creat[es] a metaphysical doubt as to a factual issue." *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 886–87 (Minn. 2006). This court applies a de novo standard of review to a grant of summary judgment, and views the evidence in the light most favorable to the nonmoving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). "We will affirm a district court's

grant of summary judgment if it can be sustained on any grounds." *Presbrey v. James*, 781 N.W.2d 13, 16 (Minn. App. 2010).

"The basic elements necessary to maintain a claim for negligence are (1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury." *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954). If the record lacks evidence sufficient to prove any of the elements of the claim, the defendant is entitled to summary judgment. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

I. Open and obvious

Generally, a landowner has a duty to use reasonable care for the safety of all entrants onto the land. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). The entrant on the land likewise has a duty to exercise reasonable care for his or her own safety. *Id.* at 319. "A property owner has a reasonable duty to protect persons from being injured by foreseeable dangerous conditions on the property, unless the risk of harm is obvious." *Rinn v. Minn. State Agric. Soc'y*, 611 N.W.2d 361, 364 (Minn. App. 2000) (quotation omitted). The risk of harm is obvious if the dangerous condition is visible, and the condition and risk are apparent and recognizable to a reasonable person exercising ordinary perception, intelligence, and judgment. *Louis*, 636 N.W.2d at 321.

The Duncansons argue that, when viewing the evidence in the light most favorable to them, the district court erred by concluding that the patch of ice was open and obvious. We disagree. Although the Duncansons claim that they did not see the patch of ice

before Ellen slipped and fell, "the question is not whether the injured party actually saw the danger, but whether it was in fact visible." *Id.*

Here, Ellen testified that she noticed the patch of ice after she fell and that the patch of ice was still visible when she left the restaurant later that evening. Moreover, both Lincoln and the Duncansons' daughter admitted that the patch of ice was visible. Further, the record reflects that the temperature at the time of the incident was in the low-to-mid-20s and the parking lot was covered in snow. These conditions would put a reasonable person on notice of potential icy conditions. The Duncansons and their daughter's testimony, along with the weather conditions on the date of the incident, indicate that the danger was visible and obvious. Thus, the district court did not err by concluding that no duty to warn was owed to the Duncansons. *See Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995) (stating that there is "no duty to an invitee where the anticipated harm involves dangers so obvious that no warning is necessary").

II. Actual or constructive notice

The Duncansons also contend that the district court erred by concluding that TCOS did not have actual or constructive knowledge of the condition. Minnesota law provides that although landowners owe persons a duty to keep and maintain their premises in a reasonably safe condition, they are not insurers of safety. *Wolvert v. Gustafson*, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966). "Unless the dangerous condition actually resulted from the direct actions of a landowner or his or her [agents], 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.

Moreover, a possessor's duty to clear snow and ice is not triggered until after a reasonable length of time after formation of the snow and ice. *See Mattson v. St. Luke's Hosp.*, 252 Minn. 230, 234–35, 89 N.W.2d 743, 746 (1958) (stating that "[i]t is only when the owner or possessor, having a duty to remove snow and ice, improperly permits an accumulation thereof to remain after a reasonable length of time for removal has elapsed that liability may arise for the unsafe and dangerous condition created" (quotation omitted)). The appellant has "the burden of proving either that defendant caused the dangerous condition or that it knew, or should have known, that the condition existed." *Messner v. Red Owl Stores*, 238 Minn. 411, 415, 57 N.W.2d 659, 662 (1953).

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. *Anderson v. St. Thomas More Newman Ctr.*, 287 Minn. 251, 253, 178 N.W.2d 242, 243–44 (1970). "But speculation as to who caused the dangerous condition, or how long it existed, warrants judgment for the landowner." *Rinn*, 611 N.W.2d at 365.

The Duncansons argue that TCOS had constructive knowledge of the patch of ice because the patch of ice had formed at a "well-known drip spot," and the weather on the date of the incident was conducive to melting and then refreezing. We disagree. At best, the record reflects that Bartz admitted that the area where the patch of ice was located was a "well-known drip spot." The record also indicates that Biaggi's assistant manager James Clark remembered that there were patches of ice on the sidewalk by the restaurant at the time Ellen fell. But even when viewing the evidence in the light most favorable to

the Duncansons, there is no evidence to suggest that TCOS had constructive knowledge of the condition. Clark's testimony simply indicates that he remembered patches of ice on the sidewalk around the time of the incident. The testimony offers no further detail as to the date or the time he noticed the patches of ice. Moreover, Bartz's testimony merely reveals that TCOS was aware that the spot Ellen fell was an area where dripping and re-freezing tended to occur. There is, however, no evidence indicating that TCOS was aware that ice had formed at the spot of the incident on the evening of December 27, 2007. In fact, Bartz testified that, to his knowledge, all necessary precautions were taken to avoid such patches of ice. Bartz's testimony is supported by evidence that 1,400 pounds of granular de-icer and 600 pounds of liquid de-icer were spread on the sidewalks of Arbor Lakes on December 27, 2007, in an effort to keep up with the melting and re-freezing that occurred on that date. And Shannon claimed that, although he had no recollection of the date of the incident, he testified that he typically would have visited the area around the restaurant at least four times during his shift. The record further reflects that Shannon was on site at Arbor lakes until 6:00 p.m., and the accident occurred only 50 minutes later at about 6:50 p.m. The record indicates that TCOS took all necessary precautions to avoid patches of ice and there is no evidence to suggest that TCOS was aware or should have been aware of this particular patch of ice on the date of the incident. As the district court logically noted, "[i]t is impossible to remove all risk of falling on ice and snow." Therefore, the district court did not err by concluding that TCOS did not have actual or constructive knowledge of the condition.

Affirmed.