STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1683

Barbara Machacek, et al.,
Respondents,

vs.

Wedum Shorewood Campus, LLC
doing business as Shorewood Senior Campus,
Appellant.

Filed July 8, 2013
Affirmed in part, reversed in part, and remanded
Chutich, Judge

Olmsted County District Court
File No. 55-CV-10-7377

JoMarie L. Morris, Klampe, Delehanty & Morris, LLC, Rochester, Minnesota (for respondents)

Peter M. Waldeck, Waldeck Law Firm, P.A., Minneapolis, Minnesota (for appellant)

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

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

CHUTICH, Judge

On appeal from a jury verdict in favor of respondents Barbara Machacek (Machacek) and Ronald Machacek on their slip-and-fall claims, appellant Wedum Shorewood Campus, LLC (Shorewood) asserts that the district court erred by denying its

motion for judgment as a matter of law. Shorewood asserts that it had no duty to Machacek because icy conditions were open and obvious and that it had no notice of the conditions. Shorewood also argues that the district court erred by denying remittitur because the evidence did not support the jury's award for past medical expenses. Because the record contains evidence that reasonably supports the verdict, we affirm the trial court's refusal to overturn the jury's verdict and its order denying judgment as a matter of law. We reverse the district court's denial of Shorewood's motion for remittitur, however, and remand the issue of damages to the district court because the evidence does not support the amount of the jury's award.

FACTS

Shorewood owns and operates a large senior residential facility in Rochester. On Saturday, December 22, 2007, around 10:00 a.m., Machacek drove to Shorewood to visit her elderly parents. Snow covered the ground at the time, but the sidewalk Machacek used to enter the facility was clear of ice and snow. During her two-hour visit, the temperature dropped, but no new precipitation fell. After her visit, Machacek left Shorewood through the same door and walked down the same sidewalk that she had entered on. Approximately one-third of the way down the sidewalk, Machacek noticed ice beneath her feet and tried to walk as steadily as possible. She then slipped on the ice and broke her right arm.

Machacek and her husband filed a complaint against Shorewood, alleging that Shorewood's negligence caused her injury while she was on its premises. Ronald Machacek asserted a claim for loss of consortium. Shorewood moved for summary

judgment, arguing that Shorewood owed no duty of care to Machacek because the ice on the sidewalk was open and obvious and it had no notice of the icy conditions. The district court denied the motion for summary judgment, concluding that "whether the ice was in fact visible and whether Shorewood should have foreseen" the potentially dangerous condition was a fact question. The case proceeded to trial.

At trial, Machacek testified that she first noticed the ice about a "quarter to a third of the way down" the sidewalk when she first felt it under her feet. She then took one more step before falling backward and breaking her right arm. After her fall, Machacek testified that she sat up and saw the ice on the sidewalk.

Carrie Huntoon, a receptionist at Shorewood, testified that after she was notified of Machacek's fall, she called 911 to report the accident. Huntoon then went outside to assist Machacek. Huntoon walked very carefully on the sidewalk because it was icy. One of the paramedics testified that when he arrived at the scene "[i]t was icy and slick. . . . It was new ice that morning."

Shorewood had a maintenance crew on-site Monday through Friday, but only had a maintenance person on-call on the weekends. After Huntoon assisted Machacek, Huntoon contacted William Frank, the on-call maintenance person, to address the icy sidewalk conditions. Frank testified that, before Huntoon's call, no one had contacted him that day to report icy conditions at the facility. He further testified that, as the on-call maintenance worker, he was responsible for being aware of the weather conditions. Because of dropping temperatures the day of Machacek's fall, Frank was aware that a danger existed of melting snow refreezing on the sidewalk.

At the end of the Machaceks' case-in-chief, Shorewood moved for judgment as a matter of law, and the district court denied the motion. The jury returned its verdict finding both Machacek and Shorewood 50% negligent for the accident. It awarded Machacek $70,000 for past medical expenses and nothing for "[p]ast pain, disability and emotional distress." The jury also awarded Ronald Machacek nothing for his claim of loss of consortium.

Following the verdict, Shorewood renewed its motion for judgment as a matter of law, and in the alternative, remittitur. The district court denied Shorewood's post-verdict motions and entered judgment pursuant to the jury's verdict. Shorewood now appeals.

D E C I S I O N

I. Judgment as a Matter of Law

We review de novo the denial of a motion for judgment as a matter of law, viewing the evidence in the light most favorable to the prevailing party.[1] *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). Judgment as a matter of law is appropriate "when a jury verdict has no reasonable support in fact or is contrary to law." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007); *see also* Minn. R. Civ. P. 50.01(a). The district court's denial of judgment as a matter of law "must be affirmed, if, in considering the evidence in the record in the light most favorable to the

[1] In its appeal, Shorewood challenges the district court's denial of its motion for summary judgment and the district court's denial of its motion for judgment as a matter of law. Because "the standards for granting summary judgment and for granting judgment as a matter of law are the same," we only address the denial of Shorewood's post-verdict motion for judgment as a matter of law. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 545 n.9 (Minn. 2001).

prevailing party, there is any competent evidence reasonably tending to sustain the verdict." *Navarre v. S. Washington Cnty. Schools*, 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted).

To prevail on a negligence claim, a plaintiff must show: "(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). Shorewood contends that it owed no duty to Machacek because the ice was an open and obvious condition and because Shorewood did not have actual or constructive knowledge of the ice. Because a negligence claim fails in the absence of a legal duty, whether Shorewood owed a duty to Machacek is a threshold question and presents an issue of law that we review de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

A. Open and Obvious

Property owners generally owe visitors a duty to use reasonable care for their safety. *Olmanson v. LeSueur Cnty.*, 693 N.W.2d 876, 880 (Minn. 2005). This obligation includes the "ongoing duty to inspect and maintain [the] property to ensure entrants on the landowner's land are not exposed to unreasonable risks of harm." *Id.* at 881. "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).

"Despite the general rule requiring landowners to inspect, repair, and warn, there is an exception where the dangerous condition is 'known or obvious.'" *Presbrey v.*

James, 781 N.W.2d 13, 18 (Minn. App. 2010). If the condition is known or obvious, the landowner does not have a duty to warn "unless he should anticipate the harm." *Id.* A dangerous condition is obvious when the danger is objectively observable. *Id*.

"Generally, whether a condition presents a known or obvious danger is a question of fact," to be decided by the jury. *Olmanson*, 693 N.W.2d at 881. Machacek testified at trial that she did not see the ice until she had already fallen. But "the question is not whether the injured party actually saw the danger, but whether it was in fact visible." *Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001). Here, both the 911 responder and the Shorewood receptionist testified that the ice was clearly visible. *See id.* (stating that a condition is obvious if it is visible). Machacek also admitted that she felt the ice before she fell and was aware of the risk of slipping and falling on ice because "[she] had been raised and always lived in a winter place." The ice was readily apparent and the danger of slipping on patches of ice while walking outside in Minnesota during the wintertime is a well-known risk.

Despite the open and obvious nature of the ice, Shorewood nevertheless owed Machacek a duty of care because it should have anticipated the potential harm. "[E]ven if a danger is known and obvious, landowners may still be liable to their invitees if they 'should anticipate the harm despite such knowledge or obviousness.'" *Sutherland v. Barton*, 570 N.W.2d 1, 7 (Minn. 1997) (quoting Restatement (Second) of Torts § 343A (1965)). "A reason to anticipate the harm may arise when the landowner 'has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [woman] in [her] position the advantages of doing so would outweigh the

apparent risk.'" *Id.* (quoting Restatement (Second) of Torts § 343A cmt. f). If the landowner should anticipate the danger, the landowner is "not relieved of the duty of reasonable care which he owes to the invitee for his protection." *Van Gordon v. Herzog*, 410 N.W.2d 405, 407–08 (Minn. App. 1987) (quotation omitted). Whether a landowner should anticipate the danger, despite the danger being known or obvious, generally is a question of fact. *Olmanson*, 693 N.W.2d at 881.

Here, the testimony of Frank, Shorewood's on-call maintenance worker, demonstrated that Shorewood should have anticipated the danger of ice accumulation on the sidewalk. Frank testified that he would have been paying attention to the temperature on the day of Machacek's fall. He also admitted that when the outside temperature dropped like it did that day, there was a danger of melted snow refreezing on Shorewood's sidewalks, creating icy conditions. Considering this evidence in the light most favorable to the Machaceks, we conclude that Shorewood should have anticipated that the sidewalks would be icy. *See Navarre*, 652 N.W.2d at 21 (stating that judgment as a matter of law must be denied if there is "any competent evidence reasonably tending to sustain the verdict" (quotation omitted)). The district court did not err by denying Shorewood's motion for judgment as a matter of law.

B. Notice of Icy Conditions

Shorewood also contends that it owed no duty to Machacek because it had no knowledge of the icy sidewalks. Under Minnesota law, landowners have a duty to keep and maintain their premises in a reasonably safe condition. *Wolvert v. Gustafson*, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966). But "[u]nless 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.

If, after a reasonable inspection, the landowner has neither actual nor constructive knowledge of a dangerous condition, the landowner is not liable for injuries caused to entrants by the condition. *Olmanson*, 693 N.W.2d at 881. "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." *Rinn*, 611 N.W.2d at 365. "But speculation as to . . . how long [the dangerous condition] existed[] warrants judgment for the landowner." *Id.* A landowner's duty to clear ice is not triggered until after a reasonable length of time after the ice forms. *See Mattson v. St. Luke's Hosp.*, 252 Minn. 230, 234–35, 89 N.W.2d 743, 746 (1958).

Shorewood argues that no evidence in the record establishes when the ice formed, and therefore, the Machaceks failed to prove that Shorewood had constructive knowledge of the icy conditions because they existed for an extended period of time. Machacek testified that the ice formed sometime between 10:00 a.m., when she entered the facility, and noon, when she left. But the Machaceks presented no additional evidence, such as other witnesses or weather reports, to more precisely pinpoint when the ice formed during the two-hour window. Without any additional evidence to further pinpoint the time when the ice formed, Shorewood is correct that the Machaceks failed to prove constructive knowledge based on the length of the time the ice existed. *See, e.g.*, *Rinn*, 611 N.W.2d at

365 (finding that "30 minutes was not sufficient time to give respondents constructive notice" of the dangerous condition).

But proving that the icy conditions existed for a significant amount of time was not the only way for the Machaceks to prove that Shorewood had constructive notice of the icy conditions. *See id.* ("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." (emphasis added)). As previously noted, Shorewood's on-call maintenance worker, Frank, testified that it was his duty to be aware of weather conditions and also that falling temperatures created a danger of melted snow refreezing on Shorewood's sidewalks. When viewed in the light most favorable to the Machaceks and the jury's verdict, Frank's testimony demonstrates that Shorewood had constructive knowledge of the icy conditions.

Moreover, it was unnecessary for the jury to reach the issue of constructive notice if it determined that Shorewood did not reasonably inspect the property for dangerous conditions. *See Olmanson*, 693 N.W.2d at 881 ("If a *reasonable inspection* does not reveal a dangerous condition . . . under the theory of negligence the landowner is not liable for any physical injury caused to invited entrants by the dangerous condition." (emphasis added)). Here, no evidence in the record demonstrates that Shorewood conducted any inspection of the sidewalk Machacek used the morning of her fall, let alone a reasonable one. Huntoon testified that she looked at the sidewalk to the main entrance of the facility to ensure that it was clear of ice and snow, but she did not inspect the east entrance used by Machacek or the west entrance. Although Shorewood's campus

director testified that it was Shorewood's general unwritten policy to have a maintenance worker on the campus every morning to inspect the premises, several Shorewood employees specifically testified that there was no requirement for the maintenance worker to be physically present on-site on Saturdays or Sundays. And in fact, on the Saturday of Machacek's fall, no maintenance worker came to the Shorewood campus to assess the sidewalks until after she fell. Therefore, the district court did not err by denying Shorewood's motion for judgment as a matter of law.

II. Remittitur

Shorewood next challenges the district court's denial of its motion for remittitur, arguing that the jury's award of $70,000 to Machacek for past medical expenses is unsupported by the evidence. "The decision whether to grant a remittitur is within the [district] court's sound discretion." *Lundman v. McKown*, 530 N.W.2d 807, 832 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). "A motion for remittitur requires that the district court consider all of the evidence and determine whether the verdict is within the bounds of the highest sustainable award under the evidence." *Border State Bank of Greenbush v. Bagley Livestock Exch., Inc.*, 690 N.W.2d 326, 336 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Feb. 23, 2005).

A reviewing court does not set aside a jury verdict on damages "unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotations omitted). "An appellate court must reconcile the special verdict answers in a

reasonable manner consistent with the evidence and its fair inferences. The verdict should stand if the answers can be reconciled on any theory." *Id.* (quotation omitted).

The district court explained that the jury may have arrived at its verdict of $70,000 by considering how its comparative-fault allocation determination would affect Machacek's final recovery. The district court stated that it denied Shorewood's motion because:

> it is reasonable and appropriate to determine whether a verdict is supported by the evidence post collateral source offset deduction and comparative fault application. The deduction of the collateral source offset of $9,394.83 from the award, and application of comparative fault to the adjusted award of $60,605.15, results in a final award to Plaintiff in the amount of $30,302.59. Plaintiff's medical expenses totaled $46,707.59; as such, the final award is supported by the evidence and is not excessive.

We disagree with this approach. The district court should have determined whether the evidence supported the jury's verdict before considering the issues of comparative fault and collateral-source offset. *See Border State Bank*, 690 N.W.2d at 336 (stating that the district court must determine if the verdict is sustainable under the evidence).

Here, the jury awarded Machacek $70,000 for her past medical expenses. Such an award is "manifestly and palpably" contrary to the evidence even when viewed in the light most favorable to the verdict, because the Machaceks only presented evidence of past medical expenses totaling $46,707.59. Had the jury intended to award Machacek additional damages for past pain and suffering, it would have included those damages on the applicable section of the special verdict form. Therefore, the district court abused its

discretion in applying the collateral-source offset and comparative-fault adjustment before considering whether the evidence supported the verdict. Accordingly, we remand to the district court to remit the jury's verdict to $46,707.59 before applying the collateral-source offset and comparative-fault allocation.[2]

Affirmed in part, reversed in part, and remanded.

[2] The Machaceks argue that, if remittitur is granted, they should be entitled to additur for general damages. This issue is not properly before us on appeal because the Machaceks did not file a notice of related appeal pursuant to Minnesota Rule of Civil Appellate Procedure 103.02, subdivision 2, and therefore, they are not entitled to affirmative relief from this court. *See 301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass'n*, 783 N.W.2d 551, 561 n.2 (Minn. App. 2010) (stating that respondent's claim was not properly before this court because respondent had not filed a notice of related appeal, and refusing to address the claim).