STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2226

Mark Olson,
as trustee for the next-of-kin of Samuel Olson
for the estate of Samuel Olson,
Appellant,

vs.

Warm Products, Inc.,
d/b/a Window Quilt Insulated Shade Company, et al.,
Respondents,

Laura Mattson,
Respondent,

Mark Gilbertson, et al.,
Respondents.

Filed July 22, 2013
Affirmed in part, reversed in part, and remanded
Schellhas, Judge
Concurring in part, dissenting in part, Hudson, Judge

St. Louis County District Court
File No. 69DU-CV-10-1732

Max H. Hacker, James S. Ballentine, Schwebel, Goetz & Sieben, Minneapolis, Minnesota; and

James G. Onder (pro hac vice), Onder, Shelton, O'Leary & Peterson, LLC, St. Louis, Missouri (for appellant)

Daniel A. Haws, Stacy E. Ertz, Murnane Brandt, St. Paul, Minnesota (for respondents Warm Products, Inc.)

Frank Yetka, Rudy, Gassert, Yetka & Pritchett, P.A., Cloquet, Minnesota (for respondent Laura Mattson)

William L. Davidson, Timothy J. O'Connor, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents Mark Gilbertson, et al.)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Stauber, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's summary-judgment dismissal of his wrongful-death claims against respondents, arguing that the court erroneously concluded that his claims are barred by the ten-year statute of repose in Minn. Stat. § 541.051, subd. 1(a) (2012).[1] Because we conclude that the statute of repose applies to appellant's product-liability claims, we affirm dismissal of those claims against respondent-company and respondent-former-landowner. But, because we conclude that the statute of repose does not bar appellant's premises-liability negligence claim against respondent-subsequent-landowners, we reverse the dismissal of that claim and remand for trial.

FACTS

Respondent Warm Products Inc., d/b/a Window Quilt Insulated Shade Company and The Warm Company (Warm) is a wholesaler of components necessary to construct its "Warm Window system," including its roman shade, for which it manufactures fabric

[1] We apply the 2012 version of Minn. Stat. § 541.051 based on "[t]he general rule . . . that appellate courts apply the law as it exists at the time they rule on a case," *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000), because the legislature has not changed Minn. Stat. § 541.051 since the cause of action in this case arose.

and purchases for redistribution all other components, including pull cords. Because its consumers are "primarily do-it-yourself home sewers" who buy "most of the product" from retailers, Warm provides instruction manuals on its shade construction.

From August 1986 to September 1998, Laura Mattson (Mattson) and her husband owned a resort. In 1994, Mattson purchased components to construct the Warm roman shade after seeing a "Warm Window display unit." Beginning in January 1995, following Warm's instruction manual, Mattson and her husband installed at least 13 Warm roman shades in their resort cabins. The installation involved wrapping the top of the shade around a wooden board and drilling at least three screws through the board into the wall above a window. In 1998, respondents Mark and Kimberly Gilbertson (Gilbertsons) d/b/a North Shore Cottages (the resort) purchased the resort from Mattson and her husband. Gilbertsons were aware of the roman shades and their cords and occasionally repaired parts of them related to the functioning of the cords.

In July 2009, Jenny Olson, her son Samuel Olson (Sam), and her friend stayed at the resort in a cabin in which a Warm roman shade was installed in the bedroom where Sam slept in a portable crib. Jenny Olson placed the pull cord of the roman shade over the top of the shade to prevent Sam from reaching it. During Sam's morning nap on July 16, Jenny Olson discovered Sam with the roman-shade cord around his neck. He was limp, had poor color, was rushed to a hospital, and died on July 17.

In March–April 2010, Sam's father, appellant Mark Olson, as trustee for the next-of-kin of Sam and for the estate of Sam, sued respondents Warm, Mattson, and Gilbertsons, alleging that the death of 16-month-old Sam on July 17, 2009, following his

strangulation on July 16, was caused by a defective roman shade that Warm "designed, manufactured and prepared for assembly" and Mattson assembled and installed at the resort owned and operated by Gilbertsons. Olson asserted claims of strict products liability against Warm and Mattson and premises-liability negligence against Gilbertsons. Warm, Mattson, and Gilbertsons cross-claimed for indemnification and contribution. Olson moved to amend his complaint to allege breach of post-sale duty to warn against Warm and requested leave to assert a claim for punitive damages. Warm, Mattson, and Gilbertsons moved for summary judgment. Olson opposed the motion.

After considering the parties' arguments and evidence in the form of affidavits, exhibits, and deposition testimony, the district court granted summary judgment to respondents, dismissing Olson's claims based on the ten-year statute of repose in Minn. Stat. § 541.051, subd. 1(a). The court declined to address additional summary-judgment grounds raised by Warm and Gilbertsons, and it did not rule on Olson's motion to amend his complaint.

This appeal follows.[2]

D E C I S I O N

An appellate court "review[s] de novo the district court's grant of summary judgment to determine whether genuine issues of material fact exist and whether the district court erred in applying the law." *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). An appellate court "view[s] the evidence in the light most

[2] Mattson did not file an appellate brief.

favorable to the party against whom summary judgment was granted." *McKee v. Laurion*, 825 N.W.2d 725, 729 (Minn. 2013).

Appellate Procedure

Warm argues that Olson's appendix contains documents inadmissible under Minn. R. Civ. P. 56.05. We disagree. Rule 56.05 requires that "[s]upporting and opposing affidavits . . . be made on personal knowledge, . . . set forth such facts as would be admissible in evidence," and "show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56.05 further provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." In the district court, Olson submitted all challenged documents, except a legislative report, as attachments to affidavits made by affiants alleging personal knowledge of that evidence. The absence of the legislative report from an affidavit did not render it inadmissible because it is legislative history, not evidence. *See Black's Law Dictionary* 635 (9th ed. 2009) (defining "evidence" as "[s]omething . . . that tends to prove or disprove the existence of an alleged *fact*" (emphasis added)).

Minn. Stat. § 541.051, subd. 1(a), Statute-of-Repose Time Bar

Olson argues that the district court erroneously concluded that his claims were barred by the ten-year statute of repose in Minn. Stat. § 541.051, subd. 1(a). An appellate court reviews de novo as a question of law the construction and application of Minn. Stat. § 541.051. *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 326 (Minn. 2010). Section 541.051, subdivision 1(a), sets forth the ten-year repose period that the district court applied to Olson's claims against Warm, Mattson, and Gilbertsons. Section

541.051, subdivision 1(e) and (d), provide exceptions to the repose period, and Olson argues that the exceptions apply to Warm and Gilbertsons, even if Minn. Stat. § 541.051, subd. 1(a), is otherwise applicable.

Section 541.051, subdivision 1(a), generally bars accrual of wrongful-death claims against listed persons "more than ten years after substantial completion of the construction" of an "improvement to real property" arising from the improvement's "defective and unsafe condition." The persons listed in Minn. Stat. § 541.051, subd. 1(a), include persons "performing or furnishing the . . . materials . . . of construction or construction of the improvement to real property or . . . own[ing] . . . the real property." The parties do not dispute that Sam's death occurred more than ten years after Mattson's 1994–95 purchase and installation of the roman shade at the resort and more than ten years after Gilbertsons' 1998 purchase of the resort from Mattson. And Olson does not dispute that Warm, Mattson, and Gilbertsons are persons specified in the statute. The parties dispute whether the roman shade is an improvement to real property and therefore subject to the ten-year statute of repose. Olson challenges the district court's determination that the roman shade is an improvement to real property and time-barred under Minn. Stat. § 541.051, subd. 1(a).

We must decide whether Warm, Mattson, and Gilbertsons have satisfied their burden of demonstrating that the roman shade is an improvement to real property. *See State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 886 (Minn. 2006) (stating that party seeking application of statute of repose in Minn. Stat. § 541.051, subd. 1(a), was required to demonstrate that statute applied "by presenting evidence that the natural gas

pipeline system qualified as 'an improvement to real property' and that the incident in question rose out of the 'defective and unsafe' condition of the system"). We conclude that Warm, Mattson, and Gilbertsons have satisfied their burden.

Appellate courts apply a "common-sense interpretation of the phrase 'improvement to real property,'" *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 286 (Minn. 2011) (quotation omitted), and should not strictly construe Minn. Stat. § 541.051, *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 871 n.3 (Minn. 2006). An "'improvement to real property'" is "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Siewert*, 793 N.W.2d at 286–87 (quotations omitted). The definition of "improvement to real property" includes "three main factors": "whether the addition or betterment is permanent, whether it enhances the capital value of the property, and whether it is designed to make the real property more useful or valuable, rather than intended to restore the property's previous usefulness or value." *Id.* at 287.

Minnesota courts have concluded that a variety of improvements to real property fall under Minn. Stat. § 541.051, subd. 1(a). *See Aquila*, 718 N.W.2d at 884 (natural-gas pipeline system); *Olmanson v. LeSueur Cnty.*, 693 N.W.2d 876, 879 (Minn. 2005) (golf-cart culvert); *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 452 (Minn. 1988) (crane); *Bulau v. Hector Plumbing & Heating Co.*, 402 N.W.2d 528, 529–30 (Minn. 1987) (fireplace), *superseded by statute*, Minn. Stat. § 541.051, subd. 1 (1988); *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 795–96 (Minn. 1987) (electrical system); *Ocel v.*

City of Eagan, 402 N.W.2d 531, 533–34 (Minn. 1987) (storm sewer system); *Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc.*, 691 N.W.2d 79, 84 (Minn. App. 2005) (water-purification systems); *Red Wing Motel Investors v. Red Wing Fire Dep't*, 552 N.W.2d 295, 297 (Minn. App. 1996) (sprinkler system), *review denied* (Minn. Oct. 29, 1996); *Kline v. Doughboy Recreational Mfg. Co., a Div. of Hoffinger Indus., Inc.*, 495 N.W.2d 435, 436–37 (Minn. App. 1993) (above-ground outdoor swimming pool); *Patton v. Yarrington*, 472 N.W.2d 157, 159−60 (Minn. App. 1991) (smoke detector), *review denied* (Minn. Aug. 29, 1991); *Citizens Sec. Mut. Ins. Co. of Red Wing v. Gen. Elec. Corp.*, 394 N.W.2d 167, 170 (Minn. App. 1986) (light fixtures and ballasts), *review denied* (Minn. Nov. 26, 1986); *see also Henry v. Raynor Mfg. Co.*, 753 F. Supp. 278, 282 (D. Minn. 1990) (garage-door opener); *Siewert*, 793 N.W.2d at 286–87 (noting when alleged real-property improvement was electrical distribution system that "[u]tilities and similar installations have generally been considered real property improvements.").

Whether the Roman Shade was Permanent

Olson argues that the roman shade was not a permanent addition to the resort because Warm designed and intended the roman shade to be easily removed and transported and Warm's design and intent should prevail with regard to the roman shade's lack of permanence when in conflict with its use by Mattson and Gilbertsons. But "the test is not whether something can be moved, but whether it meets the definition of improvement to real property." *Kline*, 495 N.W.2d at 438. And both the intent behind and use of an alleged real-property improvement are relevant to determining its permanence. *See Allianz*, 691 N.W.2d at 84 (concluding that water-purification systems were real-

property improvement when, "[e]ven though [they] could be removed, they were attached to the building and there [was] no indication that [the owners] planned to remove the systems" and "no showing [was made indicating] that the purification systems [were] designed or intended to be regularly removed or that their owners in fact do remove them"); *Massie v. City of Duluth*, 425 N.W.2d 858, 861 (Minn. App. 1988) (concluding that water slide was not real-property improvement or permanent when, "[w]hile it was bolted to concrete pads at the bottom of the pond, it was designed to be and was removed every winter for storage"), *review denied* (Minn. Sept. 16, 1988); *see also Sartori*, 432 N.W.2d at 452 (concluding that crane was permanent addition when it was "fabricated on the property[,] . . . [had] not been moved and there [was] no indication by either party that the owners intend[ed] to relocate it").

Olson argues that the roman shade is not an improvement to real property because it was not "integral to or incorporated into the property," relying on *Ritter v. Abbey-Etna Mach. Co.*, 483 N.W.2d 91, 93 (Minn. App. 1992), *review denied* (Minn. June 10, 1992). In *Taney v. Indep. Sch. Dist. No. 624*, we noted that in *Ritter* we "expanded on the high court's definition of an improvement, holding 'that in order for an improvement to be a permanent addition to or betterment of real property, it must be integral to and incorporated into the building or structure on the property.'" 673 N.W.2d 497, 504 (Minn. App. 2004) (quoting *Ritter*, 483 N.W.2d at 93), *review denied* (Minn. Mar. 30, 2004). Here, Mattson *incorporated* the roman shade into the cabin with at least three screws. *See Henry*, 753 F. Supp. at 281 (concluding that "garage door opener was a permanent addition to the [owner]s' home" when it "was permanently affixed to the

home"), *cited in Allianz*, 691 N.W.2d at 84 (construing *Henry* as standing for proposition that "a garage door opener is an improvement to real property"). The shade appears to have been *integral* to the resort cabin because its purpose was to help manage the cabin's climate and sunlight.

Moreover, in *Kline*, we expressly distinguished *Ritter*, "reject[ing] an interpretation of permanent improvement requiring in every case that an object be *incorporated* into an existing structure," reasoning that "[a] common sense definition of permanent improvement does not support this construction of *Ritter*." 495 N.W.2d at 437–39 (emphasis added) ("The holding in *Ritter* focuses on the applicability of Minn. Stat. § 541.051, subd. 1, to production equipment and machinery, which by its very nature is often installed inside a building."). Although we did not expressly reject *Ritter*'s language that an alleged real-property improvement needed to be *integral* to a building or structure, we implicitly did so, concluding that a home's *above-ground swimming pool* was an improvement to real property. *Id.* Nothing in *Kline* indicated that the pool was *integral* to the home. *Id.* at 435–41.

Olson argues that a conclusion that the roman shade was an improvement to real property defies common sense. He argues that the roman shade was no more of a real-property improvement than "pictures hung on the wall[,]" "a clock, or a child's top heavy dresser equipped with anti-tipping straps for child safety." We disagree. Unlike the roman shade installed in the resort cabin, a picture and clock typically are not integrated in the property; they typically are hung on a wall by a nail or screw. They are not screwed into the wall with multiple screws. While a dresser equipped with anti-tipping straps may be

attached to a wall, the purpose of the dresser can be fulfilled in a free-standing mode without utilizing the straps. The record contains no evidence that shows that the roman shade can serve its purpose if not attached to a structure surrounding the window. *Cf. Integrity Floorcovering, Inc. v. Broan-Nu Tone LLC*, 503 F. Supp. 2d 1136, 1139–40, 1143–44 n.6 (D. Minn. 2007) (concluding that ventilation fan was real-property improvement not subject to equipment-or-machinery exception in Minn. Stat. § 541.051 when fan "serve[d] no purpose unrelated to its function as part of the structure" in contrast to a jute-picker machine that, "although physically attached to the real property, served a purpose unrelated to the building in which it was housed"), *aff'd sub nom. Integrity Floorcovering, Inc. v. Broan-Nutone, LLC*, 521 F.3d 914 (8th Cir. 2008).

We conclude that the roman shade was a permanent improvement to property, using a common-sense interpretation of "improvement to real property" under Minn. Stat. § 541.051, subd. 1(a). Substantial evidence supports a conclusion that the shade was a permanent addition to the resort cabin. The deposition testimony of Mattson and Mark Gilbertson shows that, after Mattson installed the roman shade in January 1995, no one removed it during the intervening 14 years preceding Sam's accident. Warm's instruction manual directed installers to screw the mounting board to a wall or window's inside with two-inch mounting screws screwed into wall studs or, if attaching the mounting board to something other than wall studs, using Molly screws or toggle bolts. Additionally, substantial evidence shows that the roman shade enhanced the capital value of the resort, involved the expenditure of labor and money, and was designed to make the resort more useful or valuable. In the bill of sale that Mattson gave to Gilbertsons in September 1998,

Mattson attributed a value of $675 for window treatments. Olson concedes on appeal that "Mattson expended time and money to assemble and install the Roman Shade."

Whether the Roman Shade Enhanced the Capital Value of the Real Property

Olson argues that the roman shade was not an improvement to real property under Minn. Stat. § 541.051, subd. 1(a), because it did not enhance the capital value of the property. Olson's argument is unavailing. Mattson testified that, after installing the roman shades, the resort's electric bills decreased and customers gave Mattson positive feedback on the roman shades' ability to darken a room.

Regardless, enhancement of the capital value of real property is only one factor and need not occur for an improvement to constitute an improvement to real property under Minn. Stat. § 541.051, subd. 1(a), when, as here, "examination of the other factors . . . compels a conclusion that the [addition] is an improvement to real property." *Thorp v. Price Bros. Co.*, 441 N.W.2d 817, 820 (Minn. App. 1989), *review denied* (Minn. Aug. 15, 1989); *see Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394, 400 (Minn. App. 2006) (following *Thorp*), *review denied* (Minn. Sept. 19, 2006).

We conclude that Olson's arguments that this factor does not favor a conclusion that the roman shade is an improvement to real property under Minn. Stat. § 541.051, subd. 1(a), are unpersuasive.

Whether the Roman Shade was Designed to Make the Real Property More Useful or Valuable

Olson argues that the roman shade did not make the real property more useful or valuable. But to be an "improvement to real property" under Minn. Stat. § 541.051, this

factor does not require that an improvement make the real property more useful or valuable. *Siewert*, 793 N.W.2d at 287. Rather, this factor requires that the improvement be "*designed* to make the real property more useful or valuable." *Id.* (emphasis added). No party disputes that Warm sells its shades to increase a property's energy efficiency or that Mattson purchased the roman shade for that purpose. Instead, Olson argues that the roman shade did not make the real property more useful or valuable because it merely restored the resort cabin to its previous usefulness or value by replacing the existing curtains. He bases his argument on an engineer's statement that "the Warm roman shade is not unique from other window coverings in enhancing energy efficiency or utility." But Olson's argument is merely speculative and therefore unpersuasive. "[M]ere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). The engineer's statement was not based on any knowledge about the curtains that the roman shade replaced; rather, the engineer relied on a general principle that "all window coverings improve the energy efficiency of a window system." And the engineer noted that the roman shade likely would somewhat increase the window system's energy efficiency. Mattson testified that, before selecting the roman shade, she compared its energy-efficiency with typical curtains, like those she replaced, and that the roman shade resulted in electric-bill reduction and positive customer feedback.

Olson suggests that we should give less weight to whether the roman shade was designed to make the real property more useful or valuable than to the other factors. He notes that in *Massie* and *Ritter* we did not expressly address that factor. But, in *Massie*,

we did not consider that factor because the improvement was "only used . . . for three months out of the year" and was "designed to be and was removed every winter for storage." 425 N.W.2d at 861. And, in *Ritter*, we did not consider whether the improvement was designed to make the real property more useful or valuable when we concluded that the improvement was not an "improvement to real property" under Minn. Stat. § 541.051, subd. 1(a), because it consisted of production machinery that "was not an integral part of [the] building." 483 N.W.2d at 93. Neither of these cases therefore supports Olson's suggestion that this court should give less weight to whether the roman shade was designed to make the real property more useful or valuable.

Olson also argues that the shade did not make the resort more useful or valuable because it was not necessary to conform to building codes. The argument is unavailing. That an improvement was made to real property to comply with building codes may favor concluding that the improvement was designed to make the property more useful or valuable. *See Taney*, 673 N.W.2d at 504–05 (stating that addition of panic-bar doors was "designed to make the property more useful and valuable by bringing it up to code"); *Integrity Floorcovering*, 521 F.3d at 918 (concluding that district court correctly found ventilation fan was "designed to make the property more useful and valuable," in part, because fan "was required by Minnesota building codes"); *see also Patton*, 472 N.W.2d at 160 (stating that addition of smoke detectors made property "more useful and valuable by enabling its owner to use or sell it as a rental property" because they placed duplex "in conformance with Minneapolis requirements for rental property"). But compliance with building codes is not required to render a real-property improvement an "improvement to

real property" under Minn. Stat. § 541.051, subd. 1(a). *See, e.g.*, *Sartori*, 432 N.W.2d at 452 (not mentioning building code, concluding that crane was real-property improvement when it "ma[de] the property more useful or valuable," was "designed to enable the mining operation to function more effectively," and "provide[d] long-term benefits by increasing the productivity of the mining operation"); *Allianz*, 691 N.W.2d at 84 (not mentioning building code, stating that water-purification systems "made the building more useful because the water was purified").

We conclude that the roman shade installed in the resort cabin in this case was an improvement to real property under Minn. Stat. § 541.051, subd. 1(a). Our conclusion is consistent with the plain text of Minn. Stat. § 541.051, subd. 1(a), and its purpose. In *Sartori*, the supreme court held that the legislature's "objective [behind Minn. Stat. § 541.051, subd. 1,] is a reasonable legislative objective" and stated that the legislature designed the statute's then 15-year repose period to serve purposes including to "avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed." 432 N.W.2d at 454; *see also In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 831–32 (Minn. 2011) (discussing Minn. Stat. § 541.051, stating that, "[a]fter a certain amount of time has passed, it is no longer equitable to require a party to litigate a stale claim"), *cert. denied*, 132 S. Ct. 2682 (2012).

The district court did not err by concluding that the repose period in Minn. Stat. § 541.051, subd. 1(a), bars Olson's claims against Warm, Mattson, and Gilbertsons.

Minn. Stat. § 541.051, subd. 1(d)−(e), Exceptions to Time Bar

The repose statute bars Olson's claims against Warm and Gilbertsons unless Olson can satisfy his burden to demonstrate that a statutory exception applies.[3] *See Aquila*, 718 N.W.2d at 886. An exception to the statute of repose in Minn. Stat. § 541.051, subd. 1(a), applies "only in exceptional circumstances." *Id.* (quotation omitted).

Applicability of Minn. Stat. § 541.051, subd. 1(e), Exception to Claims against Warm

Section 541.051, subdivision 1(e), excludes from the scope of the repose statute "the manufacturer or supplier of any equipment or machinery installed upon real property." Olson argues that the district court erred by concluding that the roman shade was not equipment or machinery and that the exception therefore does not apply to Warm. We disagree. In creating the exception in Minn. Stat. § 541.051, subd. 1(e), for equipment or machinery installed upon real property, "the legislature meant to distinguish building materials—'which are incorporated into construction work outside the control of their manufacturers or suppliers, at the direction of architects, designers, and contractors'—from machinery and equipment—which 'are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties.'" *Red Wing*, 552 N.W.2d at 297 (quoting *Cape Henry Towers, Inc. v. Nat'l*

[3] As to Mattson, Olson does not allege that any exception to the repose statute applies. Therefore, the repose statute bars Olson's claims against Mattson. *See Aquila*, 718 N.W.2d at 886 (in repose-statute case under Minn. Stat. § 541.051, adopting approach that "the burden of proving the exception lies with the parties who seek to claim the benefit of the exception"); *see also Integrity Floorcovering*, 521 F.3d at 919 (following *Aquila*, applying burden to equipment-or-machinery exception in Minn. Stat. § 541.051).

Gypsum Co., 331 S.E.2d 476, 480 (Va. 1985)). Warm's roman shade was a building material that was incorporated in the construction of the resort cabin, not machinery or equipment. Mattson, not Warm, constructed the subject roman shade by using some parts supplied by Warm and other parts supplied by other sources. And the record contains no evidence that Warm performed any quality control of the roman shade during or after Mattson's construction of it.

We conclude that the district court properly granted Warm summary judgment and dismissed Olson's products-liability claims against Warm because Warm's roman shade did not fall within the repose-statute exception in Minn. Stat. § 541.051, subd. 1(e).

Applicability of Minn. Stat. § 541.051, subd. 1(d), Exception to Claims against Gilbertsons

Section 541.051, subdivision 1(d), excludes from the scope of the repose statute "actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession." Olson argues that the district court erred by concluding that that exception does not apply to Olson's claim of premises-liability negligence against Gilbertsons. We agree. Olson claims that Gilbertsons, as landowners, breached a duty that proximately caused Sam's injury and death. "The intent of the exception [in Minn. Stat. § 541.051, subd. 1(d), for maintenance, operation, or inspection of the real-property improvement] appears to be . . . to leave undisturbed the limitation period for ordinary landowner's liability." *Ocel*, 402 N.W.2d at 534; *see Olmanson*, 693 N.W.2d at 881−82 ("The statute of repose does not bar claims that [landowners'] duty has been breached, because under

the plain language of Minn. Stat. § 541.051, subd. 1([d]), owners or other persons in possession retain their ordinary landowner liability for negligent maintenance, operation, and inspection of real property improvements.").

> A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any of the four elements necessary for recovery: (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). In this case, Sam died after strangulation on the roman-shade cord installed in the resort cabin. To satisfy his burden of proof that an exception in Minn. Stat. § 541.051, subd. 1(d), applies, Olson must "prove that at least a question of material fact existed with respect to [Gilbertsons'] negligence." *Aquila*, 718 N.W.2d at 886. An appellate court "may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). "[T]o establish that there is a disputed material fact, the party against whom summary judgment was granted must present specific admissible facts showing a material fact issue." *Id.* (quotation omitted). An appellate court "resolve[s] all inferences in favor of the nonmoving party." *J.E.B. v Danks*, 785 N.W.2d 741, 751 (Minn. 2010).

Olson argues that Gilbertsons had a duty of care as landowners and innkeepers, treating innkeeper liability as a subtype of landowner liability. But landowner liability and innkeeper liability are separate and distinct bases of liability when, as here, the party alleging landowner liability predicates that allegation on premises liability. *See Louis*,

636 N.W.2d at 320 (rejecting "[a]ppellant's attempt to import the language used in the line of special relationship cases into this premises liability case," noting that "[w]e have consistently recognized that a duty based on a special relationship theory is separate and distinct from a duty based on a premises liability theory"); *cf. Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 673 (Minn. 2001) (indicating that innkeeper-guest relationship is a special relationship that "gives rise to a duty to protect"). A landowner's duty to an entrant is only to "use reasonable care *for the safety* of all entrants upon the premises," *Olmanson*, 693 N.W.2d at 880 (emphasis added), whereas "[i]nnkeepers generally have a duty to take reasonable action *to protect* their guests," *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 790 (Minn. 2005) (emphasis added). Moreover, while the supreme court has clarified that landowner liability falls within the subdivision 1(d) exception to the statute of repose, *Olmanson*, 693 N.W.2d at 881–82, no appellate court has held that innkeeper liability falls within the exception.

Because the analyses of the district court and the parties are based on landowner-liability rather than innkeeper liability, as a separate basis of liability, we limit our analysis to landowner liability.

"Any legal analysis of an action brought against a landowner alleging negligence must begin with an inquiry into whether the landowner owed the entrant a duty." *Louis*, 636 N.W.2d at 318. "Since 1972, [the Minnesota Supreme Court has] consistently held that a landowner has a duty to use reasonable care for the safety of all such persons invited upon the premises." *Id.* (quotations omitted); *see also Olmanson*, 693 N.W.2d at 881 ("[O]wners of the land[] had an ongoing duty under common law to use reasonable

care for the safety of entrants on their land, including the duty to inspect their premises for dangerous conditions and to repair them or warn entrants about them."); *Szyplinski v. Midwest Mobile Home Supply Co.*, 308 Minn. 152, 156, 241 N.W.2d 306, 309 (1976) (noting landowners' "duty toward invitees to exercise reasonable care to investigate and discover dangerous conditions"). "This rule imposes the duty of reasonable care on both the landowner and the entrant." *Louis*, 636 N.W.2d at 319.

Olson argues that genuine issues of material fact exist regarding whether Gilbertsons had actual or, at least, constructive knowledge of the dangerous condition of the roman shade's lift cord. We agree. Mark Gilbertson testified that, before Sam's death, he was aware "in a general sense" of blind-cord hazards, stating, "I think everybody kind of knows that in general . . . that cords can be dangerous to . . . children." And Kimberly Gilbertson was aware that dangling cords might be a hazard to small children and indicated that she and Mark Gilbertson had knowledge of and had previously repeatedly repaired a part of the roman shades through which "the strings went."

Relying on *Fisher v. Cnty. of Rock*, 580 N.W.2d 510 (Minn. App. 1998), *rev'd on other grounds*, 596 N.W.2d 646 (Minn. 1999), Gilbertsons argue that the negligent-maintenance exception in Minn. Stat. § 541.051, subd. 1(d), does not apply to Olson's negligence claim against them because the claim arises from the defective and unsafe condition of the roman shade, not Gilbertsons' negligent maintenance of it. Gilbertsons' reliance on *Fisher* is misplaced. Fisher sued Rock County for failure to install guardrails, arguing that the failure fell within the negligent-maintenance exception in Minn. Stat. § 541.051. *Fisher*, 580 N.W.2d at 511. This court concluded that "[a]dding sloping

guardrails to a bridge designed and constructed without them is not the maintenance but the improvement of real property" and that the statutory exception did not apply. *Id.* at 511–12. In this case, Gilbertsons' duties, as landowners, included the duty to "inspect their premises for dangerous conditions and to repair them or warn entrants about them." *Olmanson*, 693 N.W.2d at 881.

"The common-law duty to inspect, repair, and warn is not absolute," and "[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." *Olmanson*, 693 N.W.2d at 881 (quotation omitted). "Generally, whether a condition presents a known or obvious danger is a question of fact." *Id.* And "[t]he question of negligence is ordinarily a question of fact and not susceptible to summary adjudication." *Canada By Landy v. McCarthy*, 567 N.W.2d 496, 505 (Minn. 1997); *see Van Tassel v. Hillerns*, 311 Minn. 252, 256, 248 N.W.2d 313, 316 (1976) ("The proposition is well-established that it is only in the clearest of cases that the question of negligence becomes one of law." (quotation omitted)); *Gallagher v. BNSF Ry. Co.*, 829 N.W.2d 85, 95 (Minn. App. 2013) ("Whether appellant's injuries were caused by any alleged breach is a question of fact.").

We conclude that at least a genuine issue of material fact exists regarding whether the danger of the roman shade was known or obvious to Jenny Olson prior to the incident. She testified that she had never seen a roman shade before visiting the resort cabin. She also testified that, although she placed the pull cord on the roman shade high out of Sam's reach, she did not know that the pull cord was attached to other cords

behind the roman shade. A behavioral-analysis consultant concluded that the shade was "unreasonably dangerous due to its defective design" for reasons including "multiple rows of completely exposed lift cords" that are "easily accessible to infants and children when the shade is in the down position," which create a more-than 15.6-inch loop. The consultant also concluded that the roman shade was "unreasonably dangerous due to its inadequate warnings" and opined that its inadequate instructions caused it to present "an unreasonable strangulation/asphyxiation hazard."

We conclude that Olson has shown the existence of a genuine issue of material fact regarding Gilbertsons' negligence and that he has satisfied his burden to show that the exception under Minn. Stat. § 514.051, subd. 1(d), applies to his premises-liability negligence claim, and that that claim is not time-barred under Minn. Stat. § 541.051, subd. 1(a). We therefore conclude that the district court erred by granting summary judgment to Gilbertsons on Olson's premises-liability negligence claims.

We affirm the summary-judgment dismissal of Olson's products-liability claims against Warm and Mattson but reverse the summary-judgment dismissal of Olson's premises-liability negligence claim against Gilbertsons and remand for trial.

Affirmed in part, reversed in part, and remanded.

HUDSON, Judge (concurring in part and dissenting in part)

I concur with the majority's conclusion that the statute of repose does not bar appellant's premises-liability negligence claim against respondent-landowners. But, contrary to the majority opinion, I likewise conclude that the statute of repose does not bar appellant's product-liability claims against respondent-company Warm Products, Inc. Accordingly, I dissent from that portion of the majority opinion dismissing appellant's claims against Warm Products, Inc., and would remand those claims, as well.

The Minnesota Supreme Court has instructed that we use a common-sense approach when determining whether something is an improvement to real property. *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 286 (Minn. 2011). And common sense dictates that a curtain screwed into the wall is not an improvement to real property. The history of Minn. Stat. § 541.051 (2012) shows that "the legislature intended to protect a narrow class of individuals—architects, designers, contractors, and material suppliers—from exposure to indefinite liability for defects in design and construction of buildings." *Ritter v. Abbey-Etna Mach. Co.*, 483 N.W.2d 91, 93 (Minn. App. 1992), *review denied* (Minn. June 10, 1992). In addition, one of the original concerns behind the statute of repose was that, after a certain amount of time has passed with respect to construction projects, it becomes difficult to sort out liability issues. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988). Thus, the type of construction projects the statute is meant to protect are those involving products so incorporated into the structure that it is difficult to prove causation and the source of damages. *See Integrity Floorcovering, Inc. v. Broan-Nutone, LLC*, 521 F.3d 914, 919 (8th Cir. 2008) (observing that, when an item

such as a ventilation fan is hard-wired into a building, "[e]stablishing whether the fire was caused by the fan, the electrical connection to or near the fan, or some other source entirely, could be difficult"). Neither of these concerns is present here. The majority's holding is therefore at odds with one of the principal policy objectives of the statute of repose.

A review of the Minnesota cases holding an item to be an improvement to real property shows that, in virtually every case, the item in question permanently altered the real property in some substantive manner. Stated otherwise, the improvement was integral to the building or structure on the property. As appellants aptly note, to reach the correct result here, we need only play the old Sesame Street game "One of These Things is Not Like the Others." *See Sesame Street: Episode 1* (Children's Television Workshop Nov. 10, 1969). Consider: (a) *Patton v. Yarrington*, 472 N.W.2d 157, 159–60 (Minn. App. 1991) (smoke detectors attached to the ceiling and "permanently wired" into the electrical system), *review denied* (Minn. Aug. 29, 1991); (b) *Integrity Floorcovering v. Broan-Nutone, LLC*, 503 F. Supp. 2d 1136, 1138–39 (D. Minn. 2007) (bathroom ventilation fan "incorporated into" building ventilation system and "hard-wired into" building electrical system), *aff'd*, 521 F.3d 914 (8th Cir. 2008); (c) *Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc.*, 691 N.W.2d 79, 84 (Minn. App. 2005) (water purification system "plumbed into" building water system); (d) *Citizens Sec. Mut. Ins. Co. of Red Wing v. Gen. Elec. Corp.*, 394 N.W.2d 167, 169–70 (Minn. App. 1986) (electrical ballasts were "substantial affixed part" of building electrical wiring system and "accessible only by removing part of the ceiling"), *review denied* (Minn. Nov. 26, 1986);

(e) *Henry v. Raynor Mfg. Co.*, 753 F. Supp. 278, 281 (D. Minn. 1990) (automatic garage-door opener was "permanent addition" and "permanently affixed" to home); (f) *Kline v. Doughboy Recreational Mfg. Co.*, 495 N.W.2d 435, 438 (Minn. App. 1993) (partially in-ground pool constructed by excavating soil on property, attached to ground with cement footings, and deck built around it); (g) *Merritt v. Mendel*, 690 N.W.2d 570, 573 (Minn. App. 2005) (new roof); (h) *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 868, 870 (Minn. 2006) (steel anchor used to "support the utility pole via a guyline" as part of cable "fiber-optic communication system"); (i) *O'Connor v. M.A. Mortenson Co.*, 424 N.W.2d 92, 94 (Minn. App. 1988) (stairway), *review denied* (Minn. July 28, 1988); (j) *Farnham v. Nasby Agri-Sys., Inc.*, 437 N.W.2d 759, 762 (Minn. App. 1989) (grate that was a "critical part" of a grain mill's auger system), *review denied* (Minn. May 12, 1989); and (k) *Williams v. Tweed*, 520 N.W.2d 515, 518 (Minn. App. 1994) (mounted wood covering of an abandoned septic tank overlaid with earth and grass), *review denied* (Minn. Oct. 27, 1994). And then there is the roman shade at issue here. Although it was screwed into the wall, it is substantively different in character and kind from the other listed improvements. It defies common sense to contend that a cabin owner who nails a curtain above a window frame has made an integral, permanent improvement to real property, and thus the majority's holding is a significant, unwarranted expansion of the application of the statute of repose.

Tellingly, the Mattsons and the Gilbertsons themselves initially considered the roman shades to be *personal property.* The 1998 bill of sale for the North Shore Cottages included an addendum entitled "Inventory of Personal Property." Listed along with the

10 color TVs, the toasters, refrigerators, and other miscellaneous items, were the window treatments valued at $675.00. The vagaries of complex civil litigation have now morphed simple window treatments into improvements to real property. But in the real, common sense world, window treatments are not improvements to real property for purposes of the statute of repose and accordingly, I would remand appellant's claims against Warm Products, Inc. for trial.

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Judge Natalie E. Hudson