STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2013

Steven Elliot Rousseau,
Appellant,

vs.

St. Peter Regional Treatment Center, et al.,
Respondents.

Filed August 14, 2017
Affirmed
Halbrooks, Judge

Nicollet County District Court
File No. 52-CV-15-651

Steven E. Rousseau, North St. Paul, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Janine Kimble, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Randall, 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

HALBROOKS, Judge

Appellant challenges the district court's grant of summary judgment to respondents. We affirm.

FACTS

On March 20, 2015, appellant Steven Elliot Rousseau was en route to an appointment at respondent St. Peter Regional Treatment Center (SPRTC). While walking on the sidewalk, he tripped on a two-inch rise in the sidewalk and fell, injuring his back, hands, and wrists. It was a sunny day, and there were no visibility issues.

Rousseau sued respondents SPRTC and the Minnesota Department of Human Services (DHS), alleging negligence based on their failure to inspect and maintain the sidewalk. Following discovery, respondents moved for summary judgment, claiming that (1) they owed no duty to Rousseau because the rise in the sidewalk presented an open and obvious danger, (2) Rousseau failed to present evidence that respondents had notice of the rise in the sidewalk, and (3) Rousseau's claims were barred by statutory immunity. Rousseau opposed the motion, arguing that he had met the elements of negligence and that statutory immunity did not apply. The district court granted summary judgment to respondents based on its conclusion as a matter of law that the rise in the sidewalk was open and obvious and that there was no genuine issue of material fact presented regarding whether respondents should have anticipated the potential harm to Rousseau. The district court also addressed respondents' immunity defense, determining that respondents were

"immune from suit under discretionary authority whether analyzed by the statutory immunity or official immunity." This appeal follows.

D E C I S I O N

Rousseau contends that the district court erred because the danger posed by the rise in the sidewalk was not open and obvious. "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 . . . ." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). A prima facie case of negligence requires evidence of (1) a duty owed by the defendant, (2) a breach of that duty, (3) causation, and (4) injury. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982). Whether a duty exists in a negligence case is a question of law, which we review de novo. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

Generally, a landowner has a duty to use reasonable care for the safety of those who enter the owner's land. *Louis*, 636 N.W.2d at 319. But "[a] possessor of land is not liable to his invitee 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) (quotation omitted). "[W]here the anticipated harm involves dangers so obvious that no warning is necessary," a possessor of land does not owe an invitee a duty of care. *Id.* at 496.

Whether a danger is obvious is an objective test. *Louis*, 636 N.W.2d at 321. "[T]he question is not whether the injured party actually saw the danger, but whether it was in fact

visible." *Id.* A condition is obvious if "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.* (quotation omitted).

Here, the rise in the sidewalk was approximately two inches. When Rousseau tripped, it was sunny, he did not have any visibility issues, he was looking forward, and he was not distracted. After he fell, Rousseau was able to see the rise, as was the nurse who assisted him. We conclude that a reasonable person in Rousseau's position would have recognized the condition of the sidewalk and the risk it posed.

We next determine whether the condition was so obvious that no warning was necessary. *See Baber*, 531 N.W.2d at 496. The supreme court has addressed this issue in multiple contexts, including injuries involving a raised brick border around a planter, an icy parking lot, and an uneven concrete slab. *See Bisher v. Homart Dev. Co.*, 328 N.W.2d 731, 732 (Minn. 1983); *Peterson v. W. T. Rawleigh Co.*, 274 Minn. 495, 496, 144 N.W.2d 555, 557 (1966); *Johnson v. R. E. Tapley, Inc.*, 272 Minn. 19, 19-20, 136 N.W.2d 538, 539-40 (1965).

In *Bisher*, the plaintiff sustained injuries when she tripped and fell on a low brick border that surrounded a planter at a shopping center. 328 N.W.2d at 732. The jury found Bisher 43% causally negligent and the defendant 57% causally negligent and awarded $10,000 in damages. *Id.* The district court granted judgment notwithstanding the verdict to the defendant. *Id.* at 733. The supreme court affirmed, holding that the defendant was not negligent, in part because the planter was in plain view and the change in elevation was clearly visible. *Id.* at 733-34.

In *Johnson*, the plaintiff sustained injuries when she missed a 5.5-inch step and fell from a cement slab. 272 Minn. at 20, 136 N.W.2d at 540. Johnson was awarded damages, and the defendant appealed, contending that Johnson's inattention caused her injuries. *Id.* at 20, 22-23, 136 N.W.2d at 540, 542. The supreme court reversed the district court's denial of the defendant's motion for a directed verdict, stating, "Absent other factors, such as poor illumination or noncontrasting colors, ordinary changes in elevation do not excuse the failure to see what is in plain sight." *Id.* at 23, 136 N.W.2d at 542.

Here, the rise in the sidewalk is similar to the brick border in *Bisher* and the concrete slab in *Johnson*. *See Bisher*, 328 N.W.2d at 732; *Johnson*, 272 Minn. at 20, 136 N.W.2d at 540. The rise in the sidewalk was in plain view and Rousseau was able to see the rise clearly after he fell. The record does not contain—and Rousseau has failed to allege—any facts indicating that respondents should have anticipated Rousseau's harm or that the condition was not obvious. As in *Bisher* and *Johnson*, the change in the sidewalk's elevation does not excuse Rousseau's inattention. *Bisher*, 328 N.W.2d at 733-34; *Johnson*, 272 Minn. at 23, 136 N.W.2d at 542.

In *Peterson*, the plaintiff—defendant's 69-year-old employee—sustained injuries after slipping on the ice in a parking lot. 274 Minn. at 495-96, 144 N.W.2d at 557. A jury awarded Peterson damages, and the district court denied a motion for judgment notwithstanding the verdict. *Id.* at 495, 144 N.W.2d at 557. Upon review, the supreme court stated that the defendant "should have foreseen that its elderly distributors would . . . attempt to negotiate the area . . . despite the slippery conditions" and that "it was the defendant's duty either to make the area safe for pedestrian travel or take appropriate

measures to prevent the lot from being accessible." *Id.* at 497-98, 144 N.W.2d at 558. The supreme court concluded that it was proper to submit the negligence issue to the jury. *Id.* at 498, 144 N.W.2d at 558. Rousseau's case is distinguishable from *Peterson* because the sidewalk's hazard was a change in elevation, not a slippery surface. *See id.* at 496, 144 N.W.2d 557.

We conclude that summary judgment was proper in this case because the rise in the sidewalk was so obvious that no warning was necessary. *See Baber*, 531 N.W.2d at 496. We do not reach the issue of immunity because the record was not sufficiently developed. *See Nw. State Bank v. Foss*, 287 Minn. 508, 511, 177 N.W.2d 292, 294 (1970) (stating that the scope of appeal "is determined by the proceedings prior to the entry of judgment"); *see also* Minn. R. Civ. App. P. 103.04 1998 advisory comm. cmt. ("As a general proposition, appellate review is limited to review of the facts and legal arguments that are contained in the trial record.").

Affirmed.