STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0163

Steven Brown,
Respondent,

vs.

Casey's Retail Company,
d/b/a Casey's General Store,
Appellant.

Filed August 20, 2018
Affirmed
Johnson, Judge

LeSueur County District Court
File No. 40-CV-16-84

Michael B. Lammers, Heimerl & Lammers, Minneapolis, Minnesota; and

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota (for respondent)

James M. Susag, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes, Judge.

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

JOHNSON, Judge

Steven Brown slipped on a patch of ice, fell, and broke his ankle outside a Casey's General Store. After a court trial, the district court found that Casey's was negligent and

entered judgment in favor of Brown. We conclude that the district court did not err by finding that Casey's breached its duty of reasonable care. We also conclude that the district court did not err by awarding damages for past medical expenses and future medical expenses. Therefore, we affirm.

FACTS

The weather was "cold and damp" on the morning of January 20, 2015, in the city of Montgomery. When the manager of Casey's General Store, Amber Nelson, arrived for the beginning of her shift at 4:30 a.m., she did not see any ice on the parking lot. She typically walked around the premises to look for hazards after she finished her bookkeeping tasks at approximately 6:00 a.m.

At approximately 5:30 a.m., Brown drove to Casey's to purchase gasoline and coffee. He parked his sport-utility vehicle at pump number 1, grabbed his coffee cup, and walked in a hurried manner around the back of his vehicle toward the store. He slipped on a patch of ice near the pump, fell to the ground, and broke his ankle.

Nelson went outside to respond to the incident. She stayed near Brown until an ambulance arrived. In a written accident report, Nelson wrote that, after going outside, she saw ice and asked another employee to salt "right away" as a "precaution." Meanwhile, Brown called his wife on his cell phone. She drove to Casey's. As she approached Brown, who was lying on the ground, he called out to her, "Honey, slow down, slow down, the ice, the ice." Brown's wife saw "a large patch of ice that had ripples in it," which was larger than the area of Brown's body. She also observed that the emergency responders were slipping on the ice.

In February 2015, Brown commenced this action against Casey's. He alleged one cause of action: negligence. The case was tried to the district court on two days in July 2017. The parties presented conflicting evidence concerning how the ice formed near pump number 1 and how long it had been there. Brown's wife testified that she believed that the ice patch near pump number 1 formed because water was "dripping somewhat over the eave" of a canopy above pump number 1 and "from [a] downspout," which emptied into the parking lot. She testified that she did not believe that the ice patch could have been formed by a spilled beverage. Brown testified that he returned to Casey's after the accident and observed water flowing off the edge of the canopy and concluded that "that's probably where the ice came from." Brown also introduced a weather report stating that, at the Faribault municipal airport, which is approximately 20 miles from Montgomery, the temperature reached 39 degrees the day before the incident and dropped to as low as 30 degrees during the night. Casey's sought to prove that it did not have notice of the icy condition near pump number 1. Nelson testified that neither she nor any other store employee "had been notified of ice accumulation in the parking lot from water dripping over the edge of the canopy." Nelson also testified that she did not believe that the icy condition near pump number 1 was caused by water from a nearby snow pile or a spilled beverage.

Brown also introduced evidence concerning his injury. He testified that he had surgery to stabilize his broken ankle and that he was away from work for six weeks. He testified that he has difficulty hunting and fishing and struggles to maintain his family's home and vehicles as he did before the injury because doing those activities "stretches that

ankle too far and too much and . . . it's extremely painful." Casey's presented evidence that Brown continues to hunt and camp and that, although he was not insured when he broke his ankle, he has since obtained health insurance, which likely would provide coverage for the expenses of any future surgery.

In October 2017, the district court issued its findings of fact, conclusions of law, and order for judgment. The district court found that Casey's was negligent and that its negligence caused Brown's injuries. The district court also found that Brown was contributorily negligent and that he is responsible for 30 percent of the total fault. The district court found that Brown had proved damages of $51,158.27 for past medical expenses; $5,984.00 for lost wages; $9,625.00 for past pain, disability, embarrassment, and emotional distress; $24,000.00 for future medical expenses; and $143,500.00 for future pain, disability, and emotional distress, for a total of $234,267.27. After reducing Brown's damages for Brown's contributory negligence, the district court administrator entered judgment for Brown in the amount of $163,986.90. Casey's appeals.

D E C I S I O N

I. Negligence

Casey's argues that the district court erred by finding that it was negligent. Casey's contends that it did not breach its duty of reasonable care because it did not have actual or constructive knowledge of the icy condition near pump number 1. In an appeal after a court trial, this court seeks to "determin[e] whether the court's findings are clearly erroneous and whether it erred in its conclusions of law." *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990).

A plaintiff seeking to prove a negligence claim must establish "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of duty being the proximate cause of the injury." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). As a general rule, "a landowner has a duty to use reasonable care for the safety of all entrants upon the premises." *Olmanson v. LeSueur County*, 693 N.W.2d 876, 880 (Minn. 2005). That duty of reasonable care "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.* at 881. "If dangerous conditions are discoverable through reasonable efforts, the landowner must either repair the conditions or provide invited entrants with adequate warnings." *Id.* But if a dangerous condition is not discoverable through reasonable efforts, "such that the landowner has neither actual nor constructive knowledge of it," a landowner may not be held liable in negligence for injuries sustained by invited entrants. *Id.* Accordingly, "the burden is on plaintiff to establish that the operator of the premises had actual knowledge of the defect causing the injury or that it had existed for a sufficient period of time to charge the operator with constructive notice of its presence." *Wolvert v. Gustafson*, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966).

In this case, the district court expressed two reasons for finding that Casey's was negligent. First, the district court relied on evidence that the temperature on the previous day was "unseasonably warm with a high of 39 degrees," which likely caused snow and ice to melt, and that the temperatures dropped overnight to a low of 30 degrees, which likely caused the melted snow and ice to refreeze. The district court stated that "it was foreseeable that ice would form under the leaking pump island roof canopy during a thaw-

freeze cycle such as the one that occurred on January 19 and January 20, 2015." In essence, the district court reasoned that Casey's should have anticipated the formation of ice and taken action to prevent it or detect it before Brown arrived at 5:30 a.m. Second, the district court stated, "It also appears that, given the configuration of the ice as described by Plaintiff's wife, that the ice had existed for a sufficient period of time to have charged Defendant with constructive notice of a dangerous condition in its parking lot."

Casey's contends that the evidence is insufficient to establish negligence because Brown did not prove when or how the icy condition formed and that "it is impossible to ascertain how long it had existed, much less whether it had existed for a sufficient period of time to charge Casey's with constructive notice of its existence." We agree with Casey's that the district court's first reason for finding negligence is inconsistent with Minnesota law. A landowner has a duty of reasonable care if the landowner has "actual knowledge of the defect causing the injury" or if a dangerous condition has "existed for a sufficient period of time to charge the operator with constructive notice of its presence." *Wolvert*, 275 Minn. at 241, 146 N.W.2d at 173. A landowner does not have a duty of reasonable care merely because of the possibility that a dangerous condition may develop. A landowner's duty of reasonable care "includes an ongoing duty to inspect" its premises "to ensure entrants . . . are not exposed to unreasonable risks of harm." *Olmanson*, 693 N.W.2d at 881. An inspection may give rise to a duty to remedy a dangerous condition if the condition is "discoverable through reasonable efforts." *Id.* But a landowner does not have a duty to anticipate a dangerous condition and cannot be held liable for a dangerous

condition without actual or constructive knowledge of the condition. Thus, the district court's first reason for finding Casey's negligent is erroneous as a matter of law.

Nonetheless, the district court's second reason for finding Casey's negligent is consistent with Minnesota law. Brown's wife testified that, when she arrived at Casey's to help her husband, she observed "a large patch of ice that had ripples in it." She testified that the ice "had sat and it had rippled, looked like it re-froze, rippled again, and re-froze and rippled again, like it got bigger and expanded as it went out." As to the source of the ice, Brown's wife testified as follows: "[I]t looked like [water] was coming from two different places. It looked like it was dripping somewhat over the eave [of the canopy], that caused . . . some of it to ripple in one area, and then it looked like it was also coming from the downspout, that was causing more ripples." Brown corroborated his wife's testimony by testifying that, weeks later, he saw water running off the edge of the canopy.

Brown's wife's testimony supports an inference that the icy condition near pump number 1 was present for more than a few minutes or a few hours. Her testimony supports an inference that the icy condition near pump number 1 was present for a matter of days. A fact-finder is permitted to rely on common experience. *See Schulz v. Feigal*, 273 Minn. 470, 475, 142 N.W.2d 84, 88 (1966) (reasoning that fact-finder may rely on inferences that are within "range of common experience"). It is common knowledge in Minnesota that snow and ice frequently melts and re-freezes. *See, e.g.*, *Bury v. City of Minneapolis*, 258 Minn. 49, 50, 102 N.W.2d 706, 707 (1960) (describing conditions arising from varying temperatures that "caus[ed] the snow to alternately thaw and freeze"). In addition, it is common knowledge in Minnesota that "allow[ing] ice and snow to accumulate . . . for . . .

a length of time [may] cause the formation . . . of slippery and dangerous ridges, depressions, hummocks, and irregularities." *See Hall v. City of Anoka*, 256 Minn. 134, 135, 97 N.W.2d 380, 382 (1959). In this case, Brown's wife described rippled ice that had developed over a period of time as water dripped onto existing ice and formed additional layers of ice. Brown's wife's testimony is sufficient to allow the district court to infer that the icy condition near pump number 1 had "existed for a sufficient period of time to charge [Casey's] with constructive notice of its presence." *Wolvert*, 275 Minn. at 241, 146 N.W.2d at 173. That inference is a sufficient basis for finding that Casey's breached its duty of reasonable care.

Casey's argues in the alternative that it did not have a duty to respond to the icy condition near pump number 1 because, as a matter of law, it was not required to respond to snow and ice accumulation while precipitation was occurring. Casey's alternative argument is based on the principle that if a winter storm creates a hazardous condition by the build-up of snow or ice, a landowner is not required to remove the snow or ice during the storm; rather, the landowner breaches its duty of reasonable care only if it "improperly permits an accumulation thereof to remain after a reasonable length of time for removal has elapsed." *Mattson v. St. Luke's Hosp.*, 252 Minn. 230, 234, 89 N.W.2d 743, 746 (1958); *see also Hedglin v. Church of St. Paul*, 158 N.W.2d 269, 272 (Minn. 1968). The district court rejected this argument on the ground that there was "no evidence [of] any ongoing precipitation at the Casey's Store in the hours before or after the accident." Furthermore, the district court did not find that the icy condition near pump number 1 was caused by recent or ongoing precipitation. Rather, the district court found, based on the

testimony of Brown and his wife, that the icy condition was caused by water that dripped from the canopy or ran down a downspout and refroze in a "thaw-freeze cycle." Accordingly, the so-called "ongoing precipitation" rule does not apply.

Thus, the district court did not err by finding that Casey's was negligent because it breached its duty of reasonable care toward Brown.

II. Damages for Medical Expenses

Casey's also argues that the district court erred in two respects in its findings concerning Brown's damages.

A. Mitigation of Past Medical Expenses

Casey's first argues that Brown is not entitled to damages for all of the past medical expenses he has incurred on the ground that he had a duty to mitigate his damages by seeking discounts from his medical providers.

"In a negligence action, the plaintiff generally has the burden of proving, by a preponderance of the evidence, damages caused by the defendant." *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005). A plaintiff in a personal-injury action has a duty to mitigate his damages "after a legal wrong has occurred, but while some damage may still be prevented." *Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 17, 250 N.W.2d 185, 189 (1977). "[T]he amount of damages recoverable is limited to the extent that he acted reasonably to prevent his own loss." *Id.*

In this case, the district court found that Brown incurred $51,158.27 in past medical expenses, which is the sum of the amounts reflected on his medical bills. The district court did not expressly discuss whether Brown had a duty to mitigate his damages with respect

to past medical expenses. Casey's contends that, if this award of damages is not reduced, Brown may unfairly seek out and obtain discounts from his past medical providers "and put the difference in his pocket."

A plaintiff in a personal-injury action may not obtain damages for past medical expenses to the extent that the plaintiff's health-care insurer has negotiated and obtained discounts from the plaintiff's medical providers. *See Swanson v. Brewster*, 784 N.W.2d 264, 273-77 (Minn. 2010). That is so because a statute requires an award of damages to be reduced by the amount of collateral-source payments that are received by a plaintiff before a verdict, *see* Minn. Stat. § 548.251, subds. 1, 3 (2016), and a medical provider's negotiated discount is a payment for purposes of the collateral-source statute, *see Swanson*, 784 N.W.2d at 273-75. The collateral-source statute does not impose a duty of mitigation; it simply requires a deduction of any amounts that a plaintiff has received. *See* Minn. Stat. § 548.251, subds. 1, 3. The supreme court recognized in *Swanson* that health-care insurers, which pay large numbers of medical bills, typically have a practice of entering into agreements with medical providers for discounts on the bills that are issued for medical services. *See id.* at 277.

This case is significantly different from *Swanson* because Brown was not insured when he broke his ankle. Casey's does not cite any caselaw for the proposition that an uninsured plaintiff has a duty to mitigate his damages by undertaking his own negotiations for *ad hoc* discounts on the services he has received from his medical providers. We are unaware of any such caselaw. In addition, the evidentiary record in this case does not indicate that discounts were readily available to Brown. Casey's asserts that it cross-

examined Brown as to whether he had sought out discounts and elicited testimony that he had not done so. But Casey's did not introduce any extrinsic evidence that Brown's medical providers are likely to grant discounts to uninsured persons generally or to Brown in particular. In the absence of any caselaw supporting Casey's argument, and in the absence of any evidence that Brown did not "act[] reasonably to prevent his own loss," *Bemidji Sales Barn*, 312 Minn. at 17, 250 N.W.2d at 189, we decline to accept Casey's argument.

Thus, the district court did not err by not finding that Brown failed to mitigate his damages with respect to his past medical expenses.

B. Likelihood and Amount of Future Medical Expenses

Casey's also argues that Brown is not entitled to damages for future medical expenses on the ground that he did not prove that medical treatment is likely to be necessary in the future and did not prove the value of future medical services with sufficient specificity.

"In a civil action the plaintiff has the burden of proving future damages to a reasonable certainty," which ensures "that there is no recovery for damages which are remote, speculative, or conjectural." *Pietrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980). To establish damages for future medical care, a plaintiff must (1) demonstrate that "future damages in the form of future medical treatments will be required" and (2) establish the amount of the future medical expenses "by expert testimony." *Lind v. Slowinski*, 450 N.W.2d 353, 358 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990). Future medical expenses will not be allowed "without an estimate of what they might be" because future

medical expenses are "a matter which the [fact-finder] cannot compute blindly without expert testimony" and, thus, "cannot be left to . . . speculation." *Lamont v. Independent Sch. Dist. No. 395*, 278 Minn. 291, 295, 154 N.W.2d 188, 192 (1967). But a plaintiff need not establish future damages to an absolute certainty. *Pietrzak*, 295 N.W.2d at 507.

In this case, the district court found that Brown "will need future medical care for his ankle and arthritis and more likely than not will require a debridement surgery." The district court found that Brown proved damages for future medical expenses in the amount of $24,000.00. The district court's findings concerning future medical expenses are based on the testimony of Brown's medical expert, Dr. Gulli, who testified that it is "more likely than not" that Brown will require an arthroscopic debridement surgery. Dr. Gulli further testified that the expense of such a procedure likely would be "in the $20,000 range." The district court's finding concerning the amount of future medical expenses also is based on the evidence provided by Dr. Simonet, a physician retained by Casey's to perform an independent medical examination. Dr. Simonet wrote in his report that Brown likely would require an out-patient procedure to remove hardware from his ankle, which would cost "approximately $3,000-4,000."

Casey's challenges the district court's findings on three grounds. First, Casey's contends that Dr. Gulli did not testify that Brown is reasonably certain to require debridement surgery. In a written report that Dr. Gulli prepared before trial, he stated "that it is unlikely that Mr. Brown will require any significant future care due to the injury sustained on January 20." Dr. Simonet agreed with Dr. Gulli's initial assessment and stated that Brown will not require a debridement surgery because he does not have "significant

post-traumatic arthritis of his ankle" and that, even if he did develop such symptoms, "arthroscopic debridement [would not] help that." But at trial, Dr. Gulli testified that Brown was experiencing problems with his ankle, that "he's only 39," and that "it's only going to get worse over time and probably will need more work done on that ankle in the future." The district court expressly found Dr. Gulli's trial testimony to be credible.

The existence of future damages must be proven to a reasonable certainty. *Canada by Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997). "Reasonable certainty" means that "such damage is more likely to occur than not to occur." *Pietrzak*, 295 N.W.2d at 507. The applicable caselaw illustrates that the reasonable-certainty standard may be satisfied by evidence that is less certain than absolute certainty. For example, in *Dornberg v. St. Paul City Ry. Co.*, 253 Minn. 52, 91 N.W.2d 178 (1958), the supreme court affirmed a future-damages award based on a physician's testimony that the plaintiff "would eventually have to have surgery in the form of a hip fusion" because "the additional injury definitely increased the possibility that a fusion might be necessary in the future." *Id.* at 57, 60, 91 N.W.2d at 183, 185. Similarly, in *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576 (Minn. 1977), the supreme court affirmed a future-damages award based on a physician's testimony that, "chances are . . . he is going to have to have something done to the knee during [his] lifetime." *Id.* at 580-81, 582. Likewise, in *Kwapien v. Starr*, 400 N.W.2d 179 (Minn. App. 1987), this court upheld a future-damages award based on a physician's testimony that the plaintiff's condition "was permanent and essentially 'incurable'" and that she would be "required to undergo physical therapy or similar treatment to relieve her pain for the rest of her life." *Id.* at 184. In light of these cases, Dr. Gulli's testimony is sufficient to prove

with reasonable certainty that Brown will need debridement surgery in the future and, thus, will incur future medical expenses.

Second, Casey's argues that Brown is not entitled to damages for future medical expenses on the ground that his evidence does not establish the amount of the expenses of a future surgery. Dr. Gulli testified that an arthroscopic debridement surgery would cost approximately $20,000. Dr. Gulli qualified his testimony somewhat by stating that he has "limited personal experience" with the costs of that medical procedure. Nonetheless, the estimate that Dr. Gulli provided made it unnecessary for the district court to speculate about the expenses of a future debridement surgery. His testimony is sufficient to prove the amount of future medical expenses. *See Lamont*, 278 Minn. at 295, 154 N.W.2d at 192; *see also Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 397-99 (Minn. 1977).

Third, Casey's argues that Brown is not entitled to damages for future medical expenses on the ground that he obtained health insurance in 2016 and, thus, may not be required to pay for a future surgery with his personal funds. Casey's did not introduce any evidence about the terms of Brown's health-insurance policy, such as its scope of coverage and the existence of any exclusions. In the absence of such evidence, the district court was permitted to rely on Brown's evidence that he is likely to require medical services and will be responsible for paying the resulting medical bills.

Thus, the district court did not err in its findings concerning Brown's future medical expenses.

Affirmed.