STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0412

James M. Erickson,
Appellant,

vs.

Darlene P. Klenck, et al.,
Respondents.

Filed August 19, 2019
Affirmed
Florey, Judge

Anoka County District Court
File No. 02-CV-17-2268

Kenneth G. Schivone, Falcon Heights, Minnesota (for appellant)

Mark A. Pilney, Stuart T. Johnson, Sam C. Pilney, Reding & Pilney, LLC, Lake Elmo, Minnesota (for respondents)

Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant-tenant challenges the district court's order granting summary judgment in favor of respondent-landlords, arguing that he has presented sufficient evidence to create a genuine issue of material fact regarding his common-law and statutory negligence claims. We affirm.

FACTS

Appellant James M. Erickson sued respondents Richard G. Klenck and Darlene P. Klenck, alleging negligence and violations of the covenants of habitability. The allegations stemmed from an incident where appellant fell in the residence he was leasing from respondents. Appellant alleged he sustained injuries from the fall such as dizziness, light-headedness, elbow pain, and nerve pain in his ankles and feet. On March 14, 2018, respondents moved for summary judgment.

The summary-judgment record established the following relevant, undisputed facts. Appellant and respondents entered into a written lease agreement regarding a residential property located in White Bear Lake (the house). This lease ran from August 13, 2008 to August 1, 2009 and contained a "Joint Inspection" clause in which the parties acknowledged the condition of the house. The parties entered into a second lease agreement that ran from August 1, 2009 to August 1, 2010. The leases contained a "holdover" clause which stated that if appellant remained in possession of the house after the expiration of the lease, with the consent of the landlord, then a new tenancy from month to month would be created and shall be terminated by either party with 30 days' notice.

Early in appellant's tenancy, an issue arose with the house's plumbing and sewer. Appellant notified respondents, who later resolved the issue. Appellant also complained to respondents about "a continuing problem with rodents, poor insulation of [the house], a malfunctioning refrigerator . . . , a water leak, and several other city code violations." Following appellant's complaint about the water leak, respondents removed dry wall to

inspect the plumbing connections in the bathroom. On January 23, 2014, appellant fell and sustained an injury in the bathroom of the house.

On October 24, 2015, appellant voluntarily vacated the house. On October 19, 2016, appellant initiated the present action by serving respondents with a summons and complaint. Appellant filed the complaint with the district court on May 8, 2017.

The district court denied respondents' motion for summary judgment, concluding that appellant's allegations of a leak in the bathroom created a genuine, material fact dispute. The district court stated that "[w]hether the water leak was caused by plumbing issues or by [appellant] is not clear" and that it was not clear "whether [respondents] had repaired the leak, if they repaired it negligently and if they had concealed a natural or artificial condition that could cause unreasonable risk of bodily harm." The district court also addressed appellant's allegations that respondents had violated the covenants of habitability, noting that actions "may be brought by a residential tenant of a residential building in which a violation is alleged to exist" and that respondents denied that appellant was a tenant when he served them with the summons and complaint. The district court stated, "Whether or not [appellant] was a residential tenant at the time he brought the suit is a material dispute of fact, and as such, summary judgment is not proper."

On June 1, 2018, after additional discovery had been completed, respondents filed a second motion for summary judgment. Respondents argued that appellant had "produced no evidence of a causal connection between the alleged fall and his alleged injuries and damages," had "failed to present any evidence that [they] breached a duty owed to him," and failed to provide expert-opinion evidence that would support a causal connection

between the alleged fall and his alleged injuries. Respondents also argued that appellant "failed to comply with the requirements of Minn. Stat. § 504B," which "provide[s] remedies for tenants who allege[] violations of the implied covenant of habitability."

Appellant submitted a memorandum and affidavit from his attorney opposing the summary-judgment motion. In his affidavit, appellant's attorney admitted that he submitted "the relevant reports and records" regarding appellant's injuries to an orthopedic surgeon for a medical opinion, but the surgeon "was unable to separate the effects of the current injury from a crush injury to the lower back [appellant] sustained as a young man and a later rear-end automobile accident which also caused injury to [appellant's] back."

The district court defined the summary-judgment issues as "whether [respondents] breached a duty owed to [appellant]; whether [appellant] had complied with the requirements of Minnesota Statute § 504B, and if so, whether the statute of limitations had expired on [appellant's] claims." The district court noted that the same factual questions regarding appellant's injuries that were present in the first summary-judgment motion—the cause of the leak, whether respondents repaired the leak and if they did so negligently—were still at issue in the present motion. However, the district court concluded that because appellant's suit involved "medical factors of which an ordinary layperson cannot reasonably possess, like [his] light-headedness or nerve damage to his ankles and feet, [appellant] is required to have medical expert testimony" and that because appellant did not have such testimony, his negligence claim failed as a matter of law because he could not prove causation. The district court also concluded that appellant was not a tenant when he brought this action, and as such he "cannot seek remedies under Minnesota Statute

§ 504B." The district court granted respondents' motion for summary judgment. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by granting respondents' motion for summary judgment. The district court shall grant summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "A party need not show substantial evidence to withstand summary judgment." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 327 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007). Rather, to defeat a summary-judgment motion, the nonmoving party must present sufficient evidence to allow reasonable persons to find in the nonmoving party's favor. *Id.* On a motion for summary judgment, the district court must not weigh the evidence or make factual determinations. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

On appeal, this court reviews de novo both whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). In doing so, we must view the evidence in the light most favorable to the party against whom summary judgment was granted. *Id.*

I.

Appellant challenges the district court's conclusion that he could not prove the causation element of his common-law negligence claim, arguing that he "is qualified to

testify" regarding his injuries and that he "has the right to pursue his negligence claim in the absence of expert medical testimony of causation and damages."

"Negligence is the failure to exercise the level of care that a person of ordinary prudence would exercise under the same or similar circumstances." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). To succeed on a negligence cause of action, a plaintiff must prove four essential elements: "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty being the proximate cause of the injury." *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

The proximate-cause element is at issue in this case. "In the context of general tort liability, such as negligence actions, [the supreme court] long ago defined a proximate cause of a given result as a material element or a substantial factor in the happening of that result." *Frederick v. Wallerich*, 907 N.W.2d 167, 179-80 (Minn. 2018) (quotation omitted). If the central issue in a negligence claim "involves medical factors of which an ordinary layman cannot reasonably possess well-founded knowledge, there must be expert testimony, based on an adequate factual foundation, that the thing alleged to have caused the injury not only might have done so, but in fact did cause such injury." *Anderson by Anderson v. City of Coon Rapids*, 491 N.W.2d 917, 920 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993).

The district court, relying on *Anderson*, concluded that because appellant's lawsuit "involve[d] medical factors of which an ordinary layperson cannot reasonably possess, like [his] light-headedness or nerve damage to his ankles and feet, [appellant] is required to have medical expert testimony." And because appellant "was unable to provide medical

expert testimony that provides proof of the causal connection between the alleged fall and his alleged injuries," the district court determined that appellant was "missing the essential element of proximate cause for negligence" and dismissed his negligence claim.

Appellant argues that his negligence claim does not require medical testimony and in fact is quite simple: "The failure to repair [the water leak] and negligent efforts to repair are the proximate cause of [his] fall and his injuries as he describes them." He argues that "[t]his is a case in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition."

Although the alleged facts regarding the fall are straightforward, the proximate cause of the alleged injuries is not. Appellant attempted to obtain an expert medical opinion, but the orthopedic surgeon who reviewed his medical records "was unable to separate the effects of the current injury" from two prior, unrelated injuries that appellant had suffered. Appellant is certainly qualified to testify that he fell and that he suffers from particular injuries. But testifying regarding causation is another matter, particularly where some of the alleged injuries—dizziness, light-headedness, nerve damage—are not of the sort that a layperson reasonably could speak to and where the injured person has suffered prior significant injuries.

Appellant attempts to distinguish *Anderson* by noting that that case involved nitrogen dioxide exposure. He argues that "it would be necessary to have a medical opinion in such a case where a contaminant was alleged to cause injury," but that because there is no contaminant in his case, *Anderson* does not require expert testimony. However, this

court's decision in *Anderson* was not based on the nature of the act that caused the injuries, but rather on the difficulty in separating alleged injuries caused by the nitrogen dioxide exposure from preexisting medical conditions. 491 N.W.2d at 921. Moreover, in that case, the appellants presented two different expert medical opinions as to causation, which this court rejected, *id.*, whereas appellant here has provided no expert testimony.

Appellant relies on *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991), for his argument that no expert testimony is required in this matter. However, the plaintiff in *Orman* presented testimony from several doctors who treated her injury in addition to her own lay opinion as to the cause of that injury. 803 S.W.2d at 677. And in holding that plaintiff had presented sufficient evidence of causation, the Tennessee Supreme Court stated, "Viewing the medical proof in combination with the lay testimony, we are persuaded that there exists a rational connection between the Plaintiff's physical condition and the incident . . . ." *Id.* Thus, the court in *Orman* did not hold that no expert testimony was required, but rather that lay testimony combined with expert testimony was sufficient proof of causation. We will not follow the decision of a foreign jurisdiction where that decision is distinguishable from the case at hand, particularly where there is a published decision of this court directly on point.

In sum, given the character of the injuries that appellant allegedly suffered as well as his prior injury history, the district court did not err by finding that appellant did not have sufficient evidence to prove the alleged fall was the proximate cause of his alleged injuries.

II.

Appellant challenges the district court's conclusion that he cannot seek remedies for violations of the covenants of habitability, arguing that chapter 504B "does not prohibit [his] action to recover damages."

Minn. Stat. § 504B.161, subd. 1(a) (2018), establishes several covenants, known as the covenants of habitability, which are implied in every residential lease. *Fritz v. Warthen*, 213 N.W.2d 339, 340-41 (Minn. 1973). Parties to a lease may not waive the covenants and they are liberally construed. *Rush v. Westwood Vill. P'ship*, 887 N.W.2d 701, 706 (Minn. App. 2016), *review denied* (Minn. Mar. 14, 2017). The covenants provide, in relevant part, that the landlord promises that the premises will be fit for the tenant's intended use, to keep the premises in reasonable repair during the term of the lease, and to maintain the premises in compliance with applicable health and safety laws. Minn. Stat. § 504B.161, subd. 1(a)(1)-(2),(4). The covenants of habitability and the covenant for payment of rent are mutually dependent. *Id.*

The supreme court has stated that the legislature "clearly" intended for the covenants of habitability to guarantee adequate and tenantable housing. *Fritz*, 213 N.W.2d at 342. The supreme court has authorized tenants to enforce the covenants of habitability in three specific ways:

> (1) by asserting breach of the covenants as a defense to the landlord's eviction action for nonpayment of rent;
> (2) by continuing to pay rent and bringing an action to recover damages for breach of the covenants by the landlord; or

(3) by raising breach of the covenants as a defense to an action by the landlord for rent after vacating the premises and suspending rent payments.

Id. at 341.

This court has repeatedly held that the remedies applied by the supreme court to enforce the covenants of habitability "do not appear to extend liability of a landlord to money damages for injuries received by a tenant as a result of an unknown defect in the rented premises." *Meyer v. Parkin*, 350 N.W.2d 435, 438 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984); *see Rush*, 887 N.W.2d at 709 (holding that intended use of covenants of habitability is not to impose strict liability upon a landlord or expand a landlord's liability beyond that articulated in caselaw); *see also Broughton v. Maes*, 378 N.W.2d 134, 136 n.1 (Minn. App. 1985) (stating that enactment of covenants of habitability did not alter a landlord's tort liability), *review denied* (Minn. Feb. 14, 1986).

In his complaint, appellant alleges several violations of section 504B.161.[1] The district court determined that appellant was barred from seeking remedies under section 504B.161 because he was not a "residential tenant" when he served respondents with the summons and complaint, and under Minn. Stat. § 504B.395, subd. 1 (2018), only a residential tenant may bring an action alleging a violation of the covenants of habitability. We agree.

[1] Although the complaint cites violations of both "Minnesota Statutes Section 504B.161" and "Minnesota Statutes Section 504B.171," appellant later moved to amend the complaint, admitting that this was a "typographical error" and that he had intended to cite only section 504B.161. Respondents have consistently treated appellant's arguments as concerning section 504B.161, and we do as well.

Section 504B.395, the Tenant Remedies Action, provides that an action alleging violations of the covenants of habitability may be brought by "a residential tenant of a residential building." Minn. Stat. § 504B.395, subd. 1(a); *see* Minn. Stat. § 504B.001, subd. 14(2) (2018) (defining "violation" to include violations of the covenants of habitability). Chapter 504B defines "residential tenant" as "a person who is occupying a dwelling in a residential building under a lease or contract." Minn. Stat. § 504B.001, subd. 12 (2018). The supreme court has held that "residential tenant" also means "a tenant who holds the present legal right to occupy residential rental property pursuant to a lease or contract," even if that tenant is not a physical occupant of the property. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 627 (Minn. 2016).

Appellant satisfies neither of these definitions. When he served respondents with the summons and complaint in October 2016, appellant was not "occupying a dwelling in a residential building" because he had moved out of the house almost a year earlier. Similarly, he had no "present legal right to occupy" the house because he had ended his lease by giving notice and vacating the premises. Appellant was not a residential tenant of the house at the time he brought this action and therefore cannot bring a tenant remedies action under section 504B.395.

Appellant's claims under chapter 504B fail for a second reason. This court recently held that "the covenants of habitability do not support a negligence cause of action by a tenant against a landlord" under Minn. Stat. § 504B.161, subd. 1(a). *Wise v. Stonebridge Cmtys., LLC*, 927 N.W.2d 772, 776 (Minn. App. 2019). In *Wise*, a tenant sued her landlord for negligence after falling on the sidewalk outside her residence and sustaining injuries.

Id. at 774-75. The tenant argued that the landlord "had an unwaivable duty, under statute and common law, to repair and maintain the common areas of the premises." *Id.* at 775. This court, relying on *Fritz*, affirmed the district court's grant of summary judgment in favor of the landlord on the tenant's section 504B.161 claim, reasoning that negligence was not a permissible cause of action under section 504B.161. *Id.* at 775-76. This court noted that, "[i]n effect, [the tenant] ask[s] us to recognize a new statutory negligence cause of action" and stated that "it is not the function of this court to create new causes of action." *Id.* at 776.

Thus, even if appellant is a residential tenant or may otherwise bring a claim under chapter 504B, this court's decision in *Wise* bars him from bringing a negligence cause of action based on alleged violations of the covenants of habitability.[2] The district court did not err by granting summary judgment as to appellant's claims under chapter 504B.

III.

Appellant raises two additional arguments that are not properly before this court. Appellant argues that he "should not be held to the requirement of 30 days written notice of his intent to vacate [the house] because Respondents failed to give the notice required by" Minn. Stat. § 504B.181, subd. 2 (2018). He also argues that respondents unlawfully refused to return his security deposit.

[2] Although the district court did not address *Wise* in its summary-judgment order, we will affirm a grant of summary judgment if it can be sustained on any ground. *Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991).

30 Days' Written Notice

In its order granting summary judgment, the district court noted that the "holdover" clause in the leases that appellant signed allowed for the creation of a month-to-month tenancy and "stated that termination of the month to month lease can be effectuated by either party as long as a 30 day notice is given to the other party." The district court further stated that "though the parties disagree on whether or not [appellant] gave [respondents] a 30 day notice [before he moved out], both parties agree that [appellant] moved out on October 24, 2015." The district court used this move-out date, along with October 19, 2016, the date that appellant served respondents with the summons and complaint, to determine that appellant was not a tenant when this action was commenced.

Appellant argues that the 30-day notice requirement should not apply because respondents failed to inform him of his rights and responsibilities as a tenant. This issue is not properly before this court because appellant did not argue it before the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally will not consider matters not argued to and considered by the district court). Appellant admits that by citing to Minn. Stat. § 504B.181, he "went beyond the issues decided by the [district court]" because "[t]here has been no decision at the [district court] level on whether or not there was a violation of" that statute. Appellant states that he cited this statute "in anticipation of arguments that might have been made by Respondents." Thus, by appellant's own admission the notice issue was not argued to and considered by the district court, and we consider it waived.

Security Deposit

In his complaint, appellant alleged that he had requested the return of his security deposit when he moved out and that respondents refused to return the deposit. Appellant requested relief in the form of the return of the deposit "plus interest and penalties, as applicable, including [a] $500.00 statutory penalty." The district court did not address the security deposit in its order granting summary judgment.

Appellant argues that respondents unlawfully failed to return the security deposit, but fails to cite relevant statutory provisions or caselaw, to explain the responsibilities of a tenant and a landlord regarding the return of a security deposit, or to explain how respondents violated the law. Thus, appellant has also waived this argument. *See Brooks v. State*, 897 N.W.2d 811, 819 (Minn. App. 2017) ("[I]ssues not adequately briefed are waived."), *review denied* (Minn. Aug. 8, 2017); *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that mere assertions of error without supporting legal authority or argument are waived unless prejudicial error is obvious on mere inspection).

Affirmed.