STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1508

Ransford Frimpong,
Appellant,

vs.

Taylor Ridge 26 LLC,
defendant and third-party plaintiff,
Respondent,

vs.

Taylor Ridge Condominium Association, Inc., et al.,
third-party defendants,
Respondents.

Filed April 27, 2020
Affirmed
Reyes, Judge

Scott County District Court
File No. 70-CV-18-13012

Ransford D. Frimpong, Shakopee, Minnesota (pro se appellant)

Karen Cote, David M. Werwie & Associates, St. Paul, Minnesota (for respondent Taylor Ridge 26)

Timothy J. Leer, Brian M. McSherry, Lance D. Meyer, O'Meara, Leer, Wagner & Kohl, P.A., Minneapolis, Minnesota (for respondents Taylor Ridge Condominium Association, et al.)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Bryan, Judge.

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

REYES, Judge

Appellant challenges the district court's grant of summary judgment to respondents on appellant's negligence claim based on a slip-and-fall accident on an icy sidewalk. Appellant argues that the district court (1) misapplied Minn. Stat. § 515B.3-111 (2016) and erred by (2) determining that the ice hazard was open and obvious and (3) determining that the evidence did not sufficiently establish respondents' notice of the dangerous condition. We affirm.

FACTS

On January 27, 2018, appellant Ransford Frimpong slipped and fell on a sidewalk at the Taylor Ridge Condominiums (the premises). Frimpong is a tenant of a unit at the premises owned by respondent Taylor Ridge 26, LLC (Taylor Ridge).

The premises' unit owners are associated as third-party respondent Taylor Ridge Condominium Association Inc. (the association). The association is responsible for maintaining and repairing common elements within the premises, including the sidewalk connecting Frimpong's unit and the dumpsters. The association contracted with third-party respondent MBG Property Management Inc. (MBG) to maintain common elements, including the sidewalk.

On January 23, 2018, approximately 12 inches of snow fell on the sidewalk. On January 24, MBG shoveled, sanded, and salted the sidewalk. On January 26, the temperature rose to 42 degrees Fahrenheit, and no precipitation fell between January 24

and January 27. Sometime overnight between January 26 and 27, the temperature fell below 32 degrees, and ice formed on the sidewalk.

At approximately 6:30 a.m. on January 27, Frimpong left his unit to take his trash to a dumpster at the other side of the premises. Frimpong walked across a sidewalk "partially covered in ice," where "some ice patches extended multiple feet and covered the entire width of the sidewalk." Frimpong slipped, fell, and injured his foot.

Frimpong originally sued Taylor Ridge, which responded by impleading the association and MBG (collectively, respondents). Taylor Ridge then moved for summary judgment to dismiss Frimpong's claim with prejudice and sought to receive costs and disbursements. The association and MBG also moved for summary judgment, asserting the absence of a genuine issue of material fact.[1] Frimpong then moved for summary judgment, arguing the same grounds. The district court granted Taylor Ridge's summary-judgment motion, dismissing all claims against it with prejudice, granted third-party respondents' joint motion for summary judgment, and denied Frimpong's motion for summary judgment. This appeal follows.

[1] The district court determined that third-party respondents consented to jurisdiction by filing their motion, even though Frimpong never named them as parties. *See Comm'r of Nat. Res. v. Nicollet Cty. Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 31-32 (Minn. App. 2001) (acknowledging rule that party consents to jurisdiction by participating in any step of the case which assumes jurisdiction exists), *review denied* (Minn. Nov. 13, 2001).

D E C I S I O N

I. Frimpong withdrew his argument that the district court erred by dismissing claims against Taylor Ridge.

Frimpong initially argued Taylor Ridge's liability based on the district court misquoting Minn. Stat. § 515B.3-111. In his reply brief, however, Frimpong "dismissed as moot" this claim given that the district court interpreted third-party respondents' joint motion for summary judgment as consenting to jurisdiction. Because Frimpong withdrew the issue, we need not address it. *See Holland v. Dick Youngberg Chevrolet-Buick, Inc.*, 348 N.W.2d 770, 771 (Minn. App. 1984) (declining to address issue appellant withdrew).

II. The district court properly granted third-party respondents' motion for summary judgment.

Frimpong argues that the district court improperly granted summary judgment because (1) the ice was not open or obvious; (2) even if it was open and obvious, respondents should have anticipated his harm; and (3) respondents had constructive notice of the ice and failed to remove it within a reasonable amount of time, breaching their duty to remove it. We disagree.

"We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). We view the evidence in the light most favorable to the nonmoving party and uphold summary judgment "against a party who fails to establish the existence of an element essential to its case." *Rinn v. Minnesota State Agr. Soc.*, 611 N.W.2d 361, 364

(Minn. App. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986)).

In a negligence action, a defendant is entitled to summary judgement if "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). Determining the existence of a duty presents a question of law, which we review de novo. *See id.*; *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). The parties here dispute whether a genuine issue of material fact exists on the first two elements of Frimpong's negligence claim.

A. Frimpong slipped on open and obvious ice.

There is no common-law duty to warn a person of open and obvious risks. *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995). A condition is "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable [person] . . . 'exercising ordinary perception, intelligence and judgment.'" *Louis*, 636 N.W.2d at 321 (quoting Restatement (Second) of Torts § 343A cmt. b (1965)). "Generally, whether a condition presents a known or obvious danger is a question of fact." *Olmanson v. LeSueur Cnty.*, 693 N.W.2d 876, 881 (Minn. 2005). But the nonmoving party must produce specific, probative evidence that demonstrates the existence of a genuine issue of material fact. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 73 (Minn. 1997). A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *Id.* at 69-70. But when "the material facts are undisputed and as a

matter of law compel only one conclusion," summary judgment is appropriate. *Dempsey v. Jaroscak*, 188 N.W.2d 779, 782 (Minn. 1971).

The Minnesota Supreme Court has provided examples of obvious dangers, such as a low-hanging branch, a lake, a steep hill, a large planter, and a 20-foot pool of water. *Baber*, 531 N.W.2d at 496. By contrast, we have determined that a puddle covering a step is not objectively visible because someone distractedly walking down the stairs would not have seen it. *Rinn*, 611 N.W.2d at 364.

Here, Frimpong's deposition testimony is the only evidence regarding the sidewalk's condition when he fell.[2] He testified that *he* did not see the specific patch of "black ice" that he stepped on. However, he did not dispute the *objective* visibility of the ice. In fact, Frimpong testified that the light "was fine," that he saw ice covering large portions of the sidewalk, and that he tried to avoid other clearly visible ice on the sidewalk when he slipped. He stated, "Where I slipped was like the best part out of the worst. So I was avoiding, you know, thick ice, and I, I tiptoed into somewhere that I thought was dry, and that was not dry." As described in the deposition testimony, the long stretch of sidewalk, several feet wide and partially covered in ice, is more analogous to an objectively visible 20-foot pool of water than to a puddle covering a step. *See Rinn*, 611 N.W.2d at 364. Because Frimpong produced no specific, probative evidence genuinely disputing the objective visibility of the ice, the district court did not err by determining that the icy sidewalk presented an open and obvious danger to an objectively reasonable person.

[2] Frimpong also submitted a picture of the walkway he slipped on, but this picture does not represent the sidewalk condition at 6:30 a.m. on January 27, 2018.

B. Frimpong fails to show a genuine dispute of material fact as to whether respondents should have anticipated Frimpong's harm despite the open and obvious ice hazard.

Possessors of land like Taylor Ridge may be liable for harm caused by open and obvious conditions if they should have anticipated the harm. *Baber*, 531 N.W.2d at 495-96. A possessor may anticipate the harm if "to a reasonable [person] in his position the advantages [to be gained] would outweigh the apparent risk." *Peterson v. W. T. Rawleigh Co.*, 144 N.W.2d 555, 558 (Minn. 1966) (quotation omitted). Whether a possessor should have anticipated the danger is generally a fact question. *Olmanson*, 693 N.W.2d at 881.

The supreme court has held that a possessor should anticipate the danger that an obviously icy parking lot would pose to employees that needed to reach a loading dock as part of their job. *Peterson*, 144 N.W.2d at 558. The supreme court contrasted this scenario, when "the plaintiff's livelihood was involved," from that of a shopper who fell while reaching for an item, holding that harm could not be expected in the latter circumstance because the shopper "was under no such compulsion." *Jensen v. Allied Cent. Stores, Inc.*, 167 N.W.2d 739, 741 (Minn. 1969).

Here, Frimpong provided no reason why respondents should have expected him to negotiate the open and obvious danger. He provided no facts showing why his "livelihood was involved" or why he was under "such compulsion" to navigate the icy sidewalk to take out his garbage. *See Jensen*, 167 N.W.2d at 741. At most, Frimpong appears to contend, for the first time on appeal, that the advantages of reducing garbage-related health hazards outweigh the danger of slipping on ice. But Frimpong did not present this argument to the district court, and we may not consider theories not presented to the district court. *See*

Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). Because Frimpong does not assert the necessity of throwing his trash away at 6:30 a.m., he has not established a genuine dispute of material fact. *See DLH, Inc.*, 566 N.W.2d at 69.

C. Frimpong provided no evidence that respondents had constructive knowledge of or a reasonable opportunity to address the icy condition before he slipped.

When a possessor like Taylor Ridge has not caused a dangerous condition, but has actual or constructive knowledge of it, the possessor will be liable for it. *Wolvert v. Gustafson*, 146 N.W.2d 172, 172 (Minn. 1966). The existence of a hazard for a sufficient time establishes constructive knowledge. *Id.* A possessor does not have a duty to clear an icy hazard until a reasonable length of time passes since the ice formed. *Mattson v. St. Luke's Hosp.*, 89 N.W.2d 743, 746 (Minn. 1958). "But speculation as to who caused the dangerous condition, or how long it existed, warrants judgment for the [possessor]." *Rinn*, 611 N.W.2d at 365 (determining defendants did not have constructive notice of puddle that existed on step for half an hour at most and could have formed only moments before appellant slipped and fell). "Appellant has the burden of proving constructive knowledge." *Id.*

Frimpong bases his argument that respondents had constructive knowledge of the daily thawing and freezing on text messages from the premises' maintenance worker and the unit owner. But Frimpong only provides communications from *after* he fell. Frimpong offers no evidence to show that respondents had constructive knowledge of the icy sidewalk condition *before* he fell or on the morning that he fell.

Moreover, Frimpong provides no evidence that the ice existed long enough to establish a duty to remove it. Respondents removed ice on January 24, and the next precipitation event did not occur until after Frimpong slipped and fell on January 27. Frimpong provides no evidence of when the ice formed, and he may not meet his burden by merely speculating. *See Rinn*, 611 N.W.2d at 365.

Frimpong argues that respondents had a reasonable opportunity to address the condition by removing the ice in the early morning as opposed to in the early evening, as they had been doing. Frimpong contends that determining whether their inspection was reasonable is a question for the jury. But we need not reach this issue because Frimpong failed to establish a genuine dispute of material fact on when the ice formed or whether respondents had constructive knowledge of it. Even so, "[t]he exercise of reasonable care for the safety of invitees requires neither the impossible nor the impractical." *Mattson*, 89 N.W.2d at 745. Respondents cleared ice in the evenings, and Frimpong does not dispute the impracticality of removing ice before 6:30 a.m.

Frimpong contends that a separate district court order from a later case involving him and Taylor Ridge establishes that respondents breached their duty. In that case, the district court ordered rent abatement based on inadequate snow and ice removal. However, that case involves evidence and circumstances occurring after Frimpong's fall.

Frimpong also contends that the sidewalk was structurally defective and, pointing to evidence in the summary judgment record, that respondents acknowledged this defect by sand-jacking the sidewalk at some point in the past. Frimpong relies on a letter written from a past tenant asserting the slipperiness of the sidewalks when snow melted or when it

rained and appearing to imply that the sidewalk was structurally defective because of "a dip" causing water to pool and freeze. This letter merely expresses a speculative technical opinion unsupported by testimony, let alone expert testimony. *See* Minn. R. Evid. 701, 702 (requiring expert testimony to support opinions based on technical knowledge). Because we conclude that there are no genuine disputes of material fact as to whether respondents should have anticipated the risk from the open and obvious danger or whether respondents had constructive knowledge of the danger before Frimpong fell, we conclude that the district court properly granted summary judgment to respondents.

III. We have stricken Frimpong's argument on costs and disbursements.

We have previously granted third-party respondents' motion under Minn. R. Civ. App. P. 127 to strike Frimpong's argument that costs and disbursements should not be awarded to third-party respondents even if they are prevailing parties. Because Frimpong did not present this argument to the district court, it is not properly before us for the first time on appeal. *See Nieszner v. St. Paul Sch. Dist. No. 625*, 643 N.W.2d 645, 650 (Minn. App. 2002) (holding that court of appeals will not hear appeal from taxation of costs not presented to district court under Minn. R. Civ. P. 54.02).

IV. We have stricken Frimpong's argument that the district court judge erred by failing to recuse.

We have previously granted third-party respondents' rule 127 motion to strike Frimpong's assertion of district court bias. Because Frimpong did not file a motion in district court to remove the district court judge from any proceedings on remand due to

alleged bias or prejudice, the issue is not properly before us for the first time on appeal. *See* Minn. R. Civ. P. 63; Minn. R. Gen. Prac. 106.

Affirmed.