STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1782

Mary Ellen Spinler, et al.,
Appellants,

vs.

City of Brownsdale,
Respondent.

Filed June 15, 2020
Affirmed
Rodenberg, Judge

Mower County District Court
File No. 50-CV-18-48

Brandon V. Lawhead, Donaldson V. Lawhead, Lawhead Law Offices, Austin, Minnesota (for appellant)

Paul A. Merwin, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

Appellants Mary and Richard Spinler appeal from the district court's summary judgment dismissing their personal-injury and loss-of-consortium claims arising from injuries suffered by Ms. Spinler when she fell on respondent City of Brownsdale's

sidewalk. Because the defect in the sidewalk that appellants claim caused Ms. Spinler's fall was open and obvious, we affirm.

FACTS

On December 23, 2011, Ms. Spinler sustained injuries after she tripped and fell on a city sidewalk outside of the Brownsdale Post Office. Ms. Spinler and her husband, Mr. Spinler, sued the city for personal injuries and loss of consortium. They alleged that a hole or imperfection in the city sidewalk caused Ms. Spinler's fall. Ms. Spinler now lives in a long-term care facility because she suffers from an incurable brain disease unrelated to the fall. She did not appear for her noted deposition because of this medical condition.

At his deposition, Mr. Spinler testified that he was not with his wife when she fell. He does not believe that anyone other than his wife witnessed the accident. Mr. Spinler testified that, when Ms. Spinler arrived at the couple's home after she fell, he saw "blood and a cut in her eyebrow." He further testified that he asked his wife what happened, and she told him that she had stopped at the post office on her way home from work at approximately 2:30 p.m. As she walked toward the entrance of the building, she "caught [her] toe on [a] crater" in the sidewalk and fell against the side of the post office. Ms. Spinler then retrieved her mail and drove home. Upon seeing his wife's injuries, Mr. Spinler took her to see a doctor.

Mr. Spinler further recalled at his deposition that the weather on December 23, 2011, was cold, but that it was not snowing. According to Mr. Spinler, Ms. Spinler was unable to see the hole in the sidewalk because weeds had grown up around it. However, Mr. Spinler indicated that Ms. Spinler did not specifically tell him where the weeds were

in relation to the hole in the sidewalk. At some point shortly after the accident, Mr. Spinler took photographs of the hole in the sidewalk.[1] A hole is readily visible in the photographs, is at or near the edge of the sidewalk, and does not appear to be covered by grass or weeds. Mr. Spinler also testified that the hole in the sidewalk was visible to him when he visited the scene of the accident shortly after his wife's fall.

Mr. Spinler testified at his deposition that his wife's current medical condition results from "a Parkinson's-type disease" that renders her unable speak. He testified that, "as far as carrying on a conversation, it's nonexistent." Mr. Spinler testified that, when he visits his wife, "she'll mumble something, and I try to get it out of her what she said, and I don't get anything." When asked if Ms. Spinler can write, Mr. Spinler responded, "no."

The city moved for summary judgment, asserting that appellants were unable to establish the proximate cause of Ms. Spinler's injuries because she is unable to testify about what happened and, alternatively, asserting that the city had no duty to protect Ms. Spinler from the open and obvious condition of the sidewalk.

As part of their response to the city's motion for summary judgment, appellants filed five affidavits, including one signed by Ms. Spinler. Ms. Spinler's affidavit states, in pertinent part, that when she was approaching the post office on December 23, 2011, she "walked over a narrow strip of grass. The grass was tall, and it was growing up, so I

[1] Mr. Spinler stated in an affidavit submitted to the district court that he took the photographs three weeks after the incident. At his deposition, Mr. Spinler testified that he took the photographs one or two days after his wife's fall, consistent with the city's argument to the district court and on appeal. Regardless of the precise timing, there is no dispute that the photographs accurately depict the condition of the sidewalk in the area of Ms. Spinler's fall.

couldn't see the crater in the sidewalk that caused me to fall. I caught my toe on the crater, and I couldn't see the crater because of the tall grass/weeds in the crater [that] concealed it." The affidavit states that "I didn't know the crater was there because the sidewalk around the Brownsdale US Post Office had been replaced a couple of times within the last 2 years of the fall, so I didn't know why they didn't fix everything."

Another of the affidavits produced by appellants was that of Mr. Spinler, who stated that his wife told him that she "walked over [a] narrow strip of grass," and that "she caught her toe in the crater, which had about a 2 inch lip, but the depth was obscured because of the grass/weeds in the crater concealing it." The three other affidavits include one from a paralegal attesting that Ms. Spinler was of sound mind when she executed her affidavit, another from a former paralegal of appellants' counsel concerning statements provided to a claims adjuster working on behalf of the city, and one from appellants' counsel attesting to the accuracy of the attached transcript of Mr. Spinler's deposition testimony.

The district court granted the city's motion for summary judgment and dismissed appellants' complaint with prejudice. It determined that appellants would not be able to provide admissible testimony at trial to prove the essential elements of their claim, and that there were therefore no genuine disputes of material fact and the city was entitled to judgment as a matter of law.

This appeal followed.

D E C I S I O N

Appellants argue that the district court erred by granting the city's motion for summary judgment based on the reasoning that appellants will be unable to prove the

proximate-cause element of their negligence claim because the only witness to the fall is now unable to testify at trial. Respondents contend that the city is entitled to summary judgment both because appellants failed to present admissible evidence of proximate cause and because the hole in the sidewalk was open and obvious.

The district court shall grant a summary-judgment motion "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). Instead, to defeat a summary-judgment motion, the nonmoving party must present sufficient evidence to allow a reasonable person to find in its 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). "[T]here must be evidence on which the jury could reasonably find for the nonmoving party." *Id.* at 71 (quotation omitted).

Appellate courts review de novo whether there is any genuine issue 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, 77 (Minn. 2002). In doing so, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *Id.* at 76-77.

Ms. Spinler's affidavit creates a genuine issue of material fact concerning the proximate cause of Ms. Spinler's fall.

The district court based its summary adjudication dismissing appellants' complaint on its determination that appellants could not prove the causation element of this negligence claim because of Ms. Spinler's inability to testify at trial about how she fell. Appellants challenge this approach, arguing that "[Ms.] Spinler's Affidavit . . . raises a genuine issue of material fact, which precludes summary judgment on the grounds that [appellants are] unable to establish proximate cause."

Negligence is the failure to exercise the care that persons of ordinary prudence usually exercise under similar circumstances. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). The elements of a negligence claim are "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty was a proximate cause of the injury." *Id.*

The district court's summary-judgment order focused on whether appellants would be able, in light of Ms. Spinler's medical condition unrelated to her fall, to prove that the alleged sidewalk imperfection was the proximate cause of her injury. "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). Proximate cause is generally a question of fact for the jury. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 115 (Minn. 1992). However, when reasonable minds

can arrive at only one conclusion, proximate cause may be decided by the court as a matter of law. *Id.*

The district court seems to have accepted as a fact that Ms. Spinler cannot communicate in any way, would be unable to effectively testify at trial, and that these conditions would continue without change and could not be accommodated by presenting Ms. Spinler's testimony through an interpreter or by other means. It therefore concluded that appellants cannot establish that the hole in the sidewalk was the proximate cause of her injuries. But in the context of this motion for summary judgment, the question is whether the record as constituted—including the affidavits produced by appellants in response to the summary-judgment motion—create a genuine issue of material fact concerning whether the hole in the sidewalk caused Ms. Spinler to fall. Ms. Spinler's affidavit states that she fell after she "caught [her] toe on the crater." Another affidavit attests to Ms. Spinler's competency when she signed her affidavit. For purposes of the summary-judgment motion, and viewing the record in the light most favorable to the nonmoving party, these affidavits suffice to create a genuine issue of material fact concerning whether the condition of the sidewalk was the proximate cause of Ms. Spinler's fall and resulting injury. Therefore, the district court's summary adjudication of proximate cause was premature.[2]

[2] Appellants present several intriguing alternative bases on which the record as constituted might support a finding of fact that the hole in the sidewalk caused Ms. Spinler's fall, including that Ms. Spinler's statements to her husband shortly after the fall were excited utterances and therefore admissible hearsay evidence under Minn. R. Evid. 803(2), that her statements to the claims adjuster working on behalf of the city would similarly be admissible hearsay evidence at trial as a business record under Minn. R. Evid. 803(6), and

The record establishes no genuine issue of material fact concerning whether the hole in the sidewalk was open and obvious.

An appellate court can affirm a grant of summary judgment on "alternative theories presented but not ruled on at the district court level." *Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394, 402 (Minn. App. 2006), *review denied* (Minn. Sept. 19, 2006); *see, e.g.*, *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995) (addressing an "alternative theory presented to, but not ruled on by, the court below"), *review denied* (Minn. Feb. 13, 1996). We do so here because the record as constituted supports the district court's summary dismissal of appellants' claims on an alternative ground.

The city argued to the district court and continues to argue on appeal that "[e]ven if appellants were able to present admissible evidence that the triangular gap in the city sidewalk proximately caused their damages," the city is still entitled to summary judgment because the hole in the sidewalk was open and obvious.

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) (stating that "no one needs notice of what he knows or reasonably may be expected to know" (quotation omitted)). In determining whether a condition is "obvious," courts use an objective test: "the question is not whether

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that her statements to her treating doctor about how she fell would fall within the medical-records exception to the rule against hearsay under Minn. R. Evid. 803(4). Appellants also maintain on appeal that some or all of the out-of-court statements of Ms. Spinler should be admitted under the "catchall" hearsay exception under Minn. R. Evid. 807. But we need not reach these exquisite evidentiary questions because, in light of Ms. Spinler's affidavit and viewing the evidence in the light most favorable to appellants as the nonmoving parties, that affidavit is sufficient to create a genuine issue of material fact on the causation question.

the injured party actually saw the danger, but whether it was in fact visible." *Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001). "[A] condition is not 'obvious' unless both the condition and the risk are apparent to and would be recognized by a reasonable [person] . . . exercising ordinary perception, intelligence and judgment." *Id.* (quotation omitted). Whether a condition presents a known or obvious danger is ordinarily, but not always, a question of fact. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005); *see Bisher v. Homart Dev. Co.*, 328 N.W.2d 731, 733-34 (Minn. 1983) (holding that a landowner did not breach a duty of care when the plaintiff tripped over a planter in a shopping mall because the planter was "obvious" and in "plain view").

Neither the district court in its summary-judgment order nor appellants on appeal address whether the hole in the sidewalk is open and obvious. But the city clearly preserved the issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (providing that appellate courts may consider issues presented to the district court). The record includes photographs of the scene of Ms. Spinler's fall, taken shortly after the incident and depicting the condition of the sidewalk on the date of the fall. Those photographs clearly show the complained-of defect in the sidewalk. And the city argued to the district court that the imperfection in the sidewalk was open and obvious, relieving it of any duty to warn of the defect.

Even viewing the facts in the light most favorable to appellants, the record reveals no fact question concerning whether the hole in the sidewalk was open and obvious. It was. Ms. Spinler fell on December 23, and the photographic evidence shows no growing vegetation at the time of the fall. The hole or imperfection in the sidewalk was clearly

evident to anyone who would have looked at the sidewalk. The photographs taken by Mr. Spinler do not show that the sidewalk was covered with any snow or ice—and appellants make no claim that the city negligently failed to remove snow or ice from the sidewalk. Importantly, Mr. Spinler agreed that when he visited the scene of the accident shortly after his wife's fall, the hole in the sidewalk was visible when he simply looked at it.

Ms. Spinler's affidavit asserts that she did not see the imperfection in the sidewalk. But not seeing a defect and being unable to see it are very different things. The record is devoid of evidence concerning where Ms. Spinler was looking at the time she fell. The record is undisputed that the accident occurred at approximately 2:30 p.m., when there would have been sufficient afternoon light to see the sidewalk and the imperfection in it. Ms. Spinler was not in any hurry at the time she sustained her injuries and had time to notice the hole had she looked at the sidewalk. The hole in the sidewalk was open and obvious.

Similar to the facts in this case, the plaintiff in *Johnson v. State* failed to look down as she walked over a sidewalk and tripped as a result. 478 N.W.2d 769, 770 (Minn. App. 1991), *review denied* (Minn. Feb. 27, 1992). In that case, the plaintiff sued the state for failing to repair a raised sidewalk joint on a sidewalk leading to a travel information center located at a rest stop. *Id.* The estimated height of the rise was "less than an inch to an inch and one-half." *Id.* at 770-71. This court held that the district court properly granted summary judgment because, among other considerations, the defect in the sidewalk was a

visible condition. *Id.* at 773. Specifically, we noted that "[w]hen a brief inspection would . . . reveal[] the condition, it is not concealed." *Id.*

Applying this same reasoning, summary judgment is proper here. Even a cursory downward glance would have revealed the hole in the sidewalk. Nothing precluded Ms. Spinler from seeing the open and obvious defect in the sidewalk. Because the defect was clearly visible to Mr. Spinler when he visited the scene after Ms. Spinler sustained her injuries, because it is clearly evident in photographs taken shortly after the incident, and because any out-of-season vegetative growth did not conceal the defect, the city owed no duty to persons using the sidewalk to warn of this open-and-obvious sidewalk defect.

Although we disagree with the district court's reasoning in support of the grant of the city's motion for summary judgment, the summary dismissal of appellants' claims was nevertheless proper on an alternative legal basis. We therefore affirm the district court.

Affirmed.