STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1595

LeAnn Wilbourn,
Appellant,

vs.

Creative Homes, Inc.,
Respondent.

Filed September 20, 2021
Affirmed
Segal, Chief Judge

Washington County District Court
File No. 82-CV-20-876

Racey J. Rodne, McEllistrem, Fargione, Rorvig, & Moe P.A., Minneapolis, Minnesota (for appellant)

Christopher J. Van Rybroek, The Cincinnati Insurance Company, Coon Rapids, Minnesota (for respondent)

Considered and decided by Gaïtas, Presiding Judge; Segal, Chief Judge; and Worke, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

This appeal challenges the grant of summary judgment for respondent in this negligence action that arose after appellant slipped and fell on ice while leaving a real-estate open house. Appellant argues that the summary judgment must be reversed because the district court erred (1) in determining that the ice hazard was open and obvious, and

(2) by failing to consider whether a reasonable landowner would anticipate appellant's fall. We affirm.

FACTS[1]

On March 3, 2019, appellant LeAnn Wilbourn (wife) and her husband Dave Wilbourn (husband) attended an open house at a property for sale that was owned by respondent Creative Homes, Inc. The day was "really cold" and never got above zero degrees Fahrenheit. The property has three steps from the sidewalk up to a concrete walkway that leads to the front door of the home. The Wilbourns arrived at about 4:00 p.m. and entered the home through the front door. They spent 10 to 15 minutes touring the home then exited the same way they had entered. As wife walked down the stairs to the sidewalk, she slipped and fell on a patch of ice. She did not see the ice before she fell and did not see any sand or salt after she fell. Husband took a photo of the area, notified an employee of Creative Homes of the incident, and then took wife to the hospital. As a result of the fall, wife suffered a right shoulder injury and a fractured left ankle that required surgery.

Kim Wallisch, a real-estate agent with Creative Homes, opened the property on the morning of March 3. The opening process consisted of unlocking the doors, turning on the lights, and putting out a sign. There was no company policy that required her to treat the sidewalks, and she did not. A contractor had plowed and shoveled the property the day

[1] In accordance with the standard of review for summary judgment, the facts set out in this opinion are either undisputed or, if disputed, are as alleged by appellant or are viewed in the light most favorable to the non-moving party. *See STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

before and applied salt three days earlier.[2] After Wallisch opened the property, she went to a model home nearby. At about 4:30 p.m., husband went to the model home to inform Wallisch that his wife had slipped on ice while exiting the property and that he was taking her to get an x-ray. Wallisch called Nick Hackworthy, the president and owner of Creative Homes, to tell him what happened. At Hackworthy's request she went to the property, took a photo of the area, and emailed him a description of the incident. She put down salt and then returned to the model home.

In October 2019, wife commenced this negligence action against Creative Homes. She alleged that Creative Homes owed a duty to entrants of the property to use reasonable care to maintain a safe premises, and that Creative Homes had breached that duty by causing a hidden hazard to exist through negligent maintenance and inspection of the property and failed to remove or warn entrants of the hazard. Creative Homes served an answer denying liability and later moved for summary judgment.

Following a motion hearing, the district court granted summary judgment for Creative Homes. The district court determined that Creative Homes did not owe a duty to wife to warn her of the ice patch because it was open and obvious. Wife now appeals.

[2] On the day of the incident, Wallisch sent an email stating that the property was salted on February 28. During her deposition, she stated that she disagreed with the information in her email and believed that the property had been salted on March 2. Because this is an appeal from the grant of summary judgment, we use the February 28 date because it is more favorable to the nonmoving party.

DECISION

On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). Appellate courts view the evidence in "the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs.*, 644 N.W.2d at 76-77. A genuine issue of material fact exists when there is sufficient evidence that would "permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Wife argues that the district court erred in granting summary judgment for Creative Homes on her claim of negligence. "The basic elements necessary to maintain a claim for negligence are (1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury." *Schmanski v. Church of St. Casimir of Wells*, 67 N.W.2d 644, 646 (Minn. 1954). If the record lacks competent evidence to support any element of the claim, the defendant is entitled to summary judgment. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

The appeal focuses on the first element—the scope of Creative Homes's duty to wife. "Duty is a threshold question because a defendant cannot breach a nonexistent duty." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012) (quotation omitted). The existence of a duty is a question of law that this court reviews de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

Here, the district court determined that Creative Homes did not owe wife a duty to warn because the ice patch was open and obvious. Wife challenges this determination, claiming that there is a genuine issue of material fact and that, even if the ice patch was open and obvious, the district court erred by failing to consider whether Creative Homes should still have anticipated the harm. We address each of wife's arguments in turn.

I. The district court did not err in determining the ice patch was open and obvious as a matter of law.

Generally, a landowner has a duty to use reasonable care for the safety of all entrants. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). But "this duty is not absolute." *Id.* at 319. "A property owner has a reasonable duty to protect persons from being injured by foreseeable dangerous conditions on the property, unless the risk of harm is obvious." *Rinn v. Minn. State Agric. Soc'y*, 611 N.W.2d 361, 364 (Minn. App. 2000) (quotation omitted). The risk of harm is obvious if the dangerous condition is objectively visible, and the condition and risk are apparent and recognizable to a reasonable person "exercising ordinary perception, intelligence and judgment." *Louis*, 636 N.W.2d at 321 (quotation omitted). This is an objective test, and "the question is not whether the injured party actually saw the danger, but whether it was in fact visible." *Id.*

Wife argues that there is a genuine issue of material fact on the question of whether the ice was objectively visible. She notes that the district court determined that the photograph taken by husband was an accurate depiction of the ice patch at issue, and argues that Hackworthy testified in his deposition that he could not see the ice patch when looking at the photograph. But Hackworthy did identify ice in the photograph during his

deposition. When asked if he saw ice at the bottom of the stairs, Hackworthy at first said, "I don't see ice there." But after wife's counsel drew a box around where she slipped, Hackworthy stated, "There is some ice within that box." He then marked multiple places inside the box where wife slipped. Notably, Hackworthy marked on the photograph areas at the bottom of the stairs near the location wife marked during her own deposition as the ice where she slipped.

Wife also challenges the district court's statement that the Wilbourns and Hackworthy "all testified at their depositions that they could see the ice in the Dave Willbourn Photograph." The record, however, reflects that the district court is correct that all three viewed the photograph taken by husband and marked where they could see ice in the photograph. And, while the Wilbourns stated that they did not see the ice patch while entering the property or before wife fell, they both testified that they could see the ice immediately after she fell. Husband also pointed out the ice patch to a third party visiting the open house right after wife fell. As noted above, "the question is not whether the injured party actually saw the danger, but whether it was in fact visible." *Id.* The ice patch was visible to the Wilbourns after wife fell and to the Wilbourns and Hackworthy in the photographs. This evidence is consistent with the district court's determination and we fail to discern a dispute of fact.

The other evidence in the record is also consistent with the district court's determination that the ice would have been objectively visible and that a person "exercising ordinary perception, intelligence and judgment" would have recognized the potential harm of ice. *Id.* Wife stated during her deposition that she was a lifelong Minnesotan who was

"very familiar" with the risk of ice during the winter. Wife observed packed-down snow near the stairs and stepped around it when she entered the building. It was still light out when the Wilbourns exited the home, and the temperature never reached above zero degrees Fahrenheit that day. *Cf. Frimpong v. Taylor Ridge 26 LLC*,[3] No. A19-1508, 2020 WL 1987037, at *2-3 (Minn. App. Apr. 27, 2020) (finding plaintiff's testimony that "*he* did not see the specific patch of 'black ice'" that caused his fall, did not create a genuine issue of material fact concerning whether the ice was open and obvious because he acknowledged that there was ice on the sidewalk that he avoided, but then "tiptoed into somewhere that [he] thought was dry, and that was not dry").

We therefore conclude that appellant has failed to demonstrate the existence of a genuine issue of material fact and that the district court did not err in determining, as a matter of law, that the ice patch was open and obvious.

II. The district court did not err by failing to consider whether Creative Homes should have anticipated the potential harm of the ice patch.

Wife next argues that, even if the ice patch was open and obvious, the district court erred because it failed to consider whether Creative Homes should nonetheless have anticipated the harm and provided a warning. Here, the district court determined that the ice patch posed a danger that was "so obvious" that no warning was necessary. In doing so, the district court relied on *Baber v. Dill*, 531 N.W.2d 493 (Minn. 1995). In that case, the supreme court observed:

[3] This nonprecedential opinion is being cited as persuasive authority. Minn. R. Civ. App. P. 136.01, subd. 1(c).

> A possessor of land . . . has no duty to an invitee where the anticipated harm involves dangers so obvious that no warning is necessary. The rationale underlying this rule is that no one needs notice of what he [or she] knows or reasonably may be expected to know.

Id. at 496 (quotation and citations omitted).

Wife argues, however, that the supreme court's opinion in *Louis* requires consideration of whether the landowner should have anticipated the harm when applying the open-and-obvious doctrine. 636 N.W.2d at 322. In *Louis*, the supreme court explained that, if the district court determines a danger is obvious, it "must then decide whether [the landowner] should nevertheless have anticipated the harm despite its known or obvious danger." 636 N.W.2d at 322. The court, however, went on to cite *Baber*, stating that "[w]e are mindful of the fact that certain conditions have been held to involve dangers so obvious that no warning was necessary." *Id.* at 321. The court distinguished the dangers mentioned in *Baber* because "the danger[s] associated with the condition at issue w[ere] found to be clearly visible, or in plain view, meaning the condition itself posed the obvious danger."[4] *Id.* at 322. The supreme court also explained, "In this case, the district court failed to consider whether the danger associated with the condition and the risk at issue involved such an 'obvious' danger. Accordingly, we choose not to answer this question." *Id.*

Thus, *Louis* recognized the principle from *Baber* that in some situations the "anticipated harm involves dangers so obvious that no warning is necessary." *Baber*, 531

[4] The referenced dangers included, "walking into a low hanging branch, walking down a steep hill, walking into a large planter, walking across a 20-foot square pool of water, and skydiving over a lake." *Id.* at 321-22.

N.W.2d at 496 (quotation omitted). And unlike the district court in *Louis*, the district court here expressly determined that the ice patch constituted such a danger. Minnesota courts have continued to recognize this distinction post-*Louis*. *See Gilmore v. Walgreen Co.*, 759 N.W.2d 433, 436 (Minn. App. 2009) (citing *Baber* and noting that "[t]he supreme court has acknowledged that the distinction between an obvious condition that requires anticipation of harm and an obvious condition that does not require anticipation of harm is a fine one" (quotation omitted)), *rev. denied* (Minn. Mar. 31, 2009).

As noted in *Baber*, the "rationale underlying" the rule that a landowner has no duty to warn where the "harm involves dangers so obvious that no warning is necessary" is that "no one needs notice of what he [or she] knows or reasonably may be expected to know." 531 N.W.2d at 496. As the district court observed, wife has lived in Minnesota her entire life, is aware of the dangers of ice, has slipped on ice before, and observed packed-down snow near the stairs. Additionally, she was aware that it was very cold—never reaching above zero degrees—on the day she slipped. Under these circumstances, she "reasonably may be expected to know" that ice could be a danger and therefore the danger was "so obvious" that there was no duty to warn.

Finally, we note that such a determination is in accord with nonprecedential decisions of this court, which have relied on *Baber* to affirm the summary-judgment dismissal of cases in which the plaintiff slipped and fell on ice. *See Weiland v. Centro Props. Grp.*, No. A12-0557, 2012 WL 3263914, at *3 (Minn. App. Aug. 13, 2012); *Duncanson v. Biaggi's, Inc.*, No. A10-1786, 2011 WL 2623386, at *3 (Minn. App. July 5,

2011). While these opinions are nonprecedential and therefore only of persuasive value, we agree with the analyses in these cases. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

We therefore conclude that the district court did not err as a matter of law when applying the open-and-obvious doctrine or in determining that the risk was so obvious that Creative Homes had no duty to warn of the potential danger. And because Creative Homes owed no duty to wife, the district court properly granted summary judgment, dismissing this negligence action.

Affirmed.