This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0953

Jenny Pachicano,
Appellant,

vs.

Julie Ward,
Respondent.

Filed January 31, 2022
Affirmed
Smith, John, Judge*

Olmsted County District Court
File No. 55-CV-20-297

Charles A. Bird, Jeremy R. Stevens, Bird, Stevens & Borgen, P.C., Rochester, Minnesota; and

Jeffrey A. Hanson, Hanson Law Firm, Rochester, Minnesota (for appellant)

Stacey E. Sorensen, Allan M. Tritch, Law Offices of John C. Syverson, London, Kentucky (for respondent)

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Smith, John, Judge.

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*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, JOHN, Judge

We affirm the district court's summary-judgment dismissal of appellant's premises-liability negligence claim because there are no genuine issues of material fact and the undisputed facts do not support appellant's claim that respondent should have anticipated appellant's harm from an open and obvious danger.

FACTS

Appellant Jenny Pachicano and respondent Julie Ward are sisters. Their parents bought a house in 1989. Pachicano lived in the house with her parents until March 1990. She returned to live in the house for several months in 2006 and approximately half of 2014. Ward lived in the house from 1989 to approximately 1998. She returned to live there in 2000 or 2001 and obtained ownership of the house from her mother prior to her mother's death in January 2015. On December 25, 2015, Pachicano attended a Christmas gathering at the house. While there, Pachicano slipped and fell down the stairs leading to the basement.

Pachicano sued Ward for the injuries she sustained in the fall. Both parties participated in depositions. Pachicano testified that the steepness of the stairs concerned her, describing the stairs as a "fat ladder" where "only about half of [her] foot fits on it and the rest hangs over the end" of the step. She also stated that the railing had previously come loose and had been resecured, a step split and was not repaired, and she had previously fallen down the stairs before from the third step from the bottom. She also testified that she had used the stairs daily while living at the house and had allowed her

small children to use the stairs but instructed them to do so carefully. At the time of her slip and fall on December 25, she was wearing non-slip shoes and stated the fall occurred because her shoe slipped on the metal strip that runs along the edge of the top of the stair. Ward testified that, before Pachicano's fall, another sister tightened the railing, put a support under a step when it began to crack widthways, and added black, stick-on grip tape to each step. Ward stated she thought the staircase was safe. She testified she could remember very little of Pachicano's fall and the events surrounding it.

Ward moved for summary judgment, arguing she did not owe Pachicano a duty of care and had no reason to anticipate Pachicano's harm. The district court granted Ward's motion, concluding that Ward did not owe Pachicano a duty of care because the stair's danger was known and obvious to Pachicano and Ward had no reason to anticipate Pachicano's fall.

DECISION

"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). "[W]e view the evidence in the light most favorable to the party against whom summary judgment was granted." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). And "all factual inferences must be drawn against the movant for summary judgment." *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955). "We do not weigh facts." *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005).

A district court may grant summary judgment in favor of a defendant in a negligence action "when the record reflects a complete lack of proof" on any one of these four elements: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, or (4) the breach of duty being the proximate cause of the injury. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). In this case, the district court granted summary judgment in favor of Ward on the first element, the existence of a duty of care. A "landowner generally has a continuing duty to use reasonable care for the safety of all entrants." *Id.* at 319. "Entrants" refers to both invitees and licensees. *Id.* at 318-19. Here, the parties do not dispute that Pachicano was an entrant. Thus, Ward generally had a continuing duty to use reasonable care for Pachicano's safety.

But that duty is not unlimited. The Restatement (Second) of Torts § 343A (1965), which the supreme court has adopted, creates an exception to the duty, and then "carves out an exception to the exception." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). A landowner is not liable to entrants when the "danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* (quotation omitted). Here, that means Ward, the homeowner, is liable to Pachicano, the entrant, for harm to Pachicano arising from an activity or condition on Ward's property, *except* if the danger was known or obvious to Pachicano, *unless* Ward should have anticipated the harm to Pachicano. *See id.* at 43. In other words, was the danger of falling down the basement stairs known or obvious to Pachicano and, even if it was, should Ward have anticipated the harm to Pachicano? The parties dispute only the latter question on appeal: whether Ward should have anticipated the harm to Pachicano.

Whether Ward should have anticipated the harm is an issue of foreseeability. *See id.* Whether a risk was foreseeable depends on "whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Whiteford ex rel. Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn. 1998). The foreseeability of danger "depends heavily on the facts and circumstances of each case." *Doe 169 v. Brandon*, 845 N.W.2d 174, 179 (Minn. 2014). "[W]hen the issue of foreseeability is clear, the court, as a matter of law, should decide it, but in close cases, the issue of foreseeability is for the jury." *Senogles*, 902 N.W.2d at 43; *see also Montemayor*, 898 N.W.2d at 629; *Domagala v. Rolland*, 805 N.W.2d 14, 27 & n.3 (Minn. 2011); *Bjerke v. Johnson*, 742 N.W.2d 660, 667-68 (Minn. 2007); *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984); *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 636-38 (Minn. 1978). Pachicano argues objective, reasonable persons might draw different conclusions from the evidence about whether Ward should have anticipated Pachicano's harm. We are not persuaded.

Here, even when viewing the undisputed facts and the reasonable inferences from them in favor of Pachicano, the party against whom summary judgment was granted, there was not an objectively reasonable expectation of danger that Ward should have anticipated. As the district court recognized, Ward knew Pachicano had previously lived in the house, used the stairs frequently, and never suffered any injury in the past from her repeated usage of the stairs. Pachicano encountered a known risk and had no less knowledge about the danger the stairs posed than Ward. Moreover, Ward did nothing to cause Pachicano to encounter the risk. The record indicates that Ward did not instruct or ask Pachicano to go

downstairs; instead, it was another sister who suggested Pachicano go to the basement. Based on this evidence, we are not convinced that "[a] reasonable fact[-]finder could conclude that, under these circumstances, it was foreseeable" to Ward that Pachicano would fall on the stairs. *Fenrich v. The Blake School*, 920 N.W.2d 195, 206 (Minn. 2018). Therefore, we conclude that reasonable persons would not "draw different conclusions" about whether Ward should have anticipated Pachicano's fall. *See Montemayor*, 898 N.W.2d at 629 n.3. Thus, this issue was appropriately decided by the district court on summary judgment. *Id.*; *see also Senogles*, 902 N.W.2d at 43.

Affirmed.