This opinion is nonprecedential except as provided by Minn.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
A21-1353

Brandon Grim,
Appellant,

vs.

City of Zumbro Falls,
Respondent.

Filed May 2, 2022
Reversed and remanded
Larkin, Judge

Wabasha County District Court
File No. 79-CV-21-28

Andrew L. Davick, Ava Marie M. Cavaco, Meshbesher & Spence, Ltd., Rochester, Minnesota (for appellant)

Evan C. Tsai, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges the summary-judgment dismissal of his negligence claim against respondent-city, which was based on an injury he sustained after he stepped off a city sidewalk and tripped on the city's double-stepped curb. Because the city did not establish that it is entitled to the protections of statutory immunity, and because there is a

genuine issue of material fact regarding whether the city should have warned of the potential danger resulting from the double-stepped curb, we reverse and remand.

FACTS

The relevant facts in this appeal from summary judgment are undisputed. In May 2018, appellant Brandon Grim went camping with his sons. After setting up camp, he drove to Buck Wild, a bar in Zumbro Falls, Minnesota, to buy some beer. He had been to the bar on prior occasions. He parked his vehicle on the street, across from the bar.

The sidewalk in front of the bar has a double-stepped curb design to defend against flooding from the nearby Zumbro River. Portions of the sidewalk had been painted yellow in the past, but at the time of the accident, the paint had faded.

At around 4:30 p.m., Grim injured himself when he tripped after exiting the bar with a case of beer in his hand. Grim explained in deposition testimony that as he walked off the sidewalk to approach his parked vehicle, he stepped on the edge of the top curb because it was "not visible." But when he approached the bar, Grim had safely stepped over the same curb where he ultimately tripped.

Grim sued respondent City of Zumbro Falls, alleging that the city knew or should have known of the danger posed by the curb, negligently failed to inspect and maintain the curb, and negligently failed to warn of its dangers. The city moved for summary judgment, asserting that it was entitled to statutory immunity under Minn. Stat. § 466.03 (2020), and that it was not liable as a matter of law because the curb was an open and obvious danger. The district court agreed with each of those assertions and granted summary judgment for the city. Grim appeals.

DECISION

Summary judgment is appropriate if the moving party shows that "there is no genuine issue as to any material fact" and that the moving party is "entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. But summary judgment is a "blunt instrument," and it should not be granted if "reasonable persons might draw different conclusions from the evidence presented." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (quotations omitted). Any doubt regarding the existence of a material fact is resolved in favor of the party against whom summary judgment was granted. *Id.*; *see also Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018) (stating that the evidence is viewed in the light most favorable to the nonmoving party and all doubts are resolved against the moving party). Likewise, "factual inferences must be drawn against the movant for summary judgment." *Senogles*, 902 N.W.2d at 42 (quotation omitted). Again, summary judgment is inappropriate if reasonable people can draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

We review a district court's grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). In doing so, we "view the evidence in the light most favorable to the party against whom summary judgment was granted to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law." *Id*.

Negligence is the failure to exercise the level of care that an ordinary person would under the same 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 of care was a proximate cause of the injury." *Id.* Generally, municipalities have a duty to keep their sidewalks in a safe condition. *Donald v. Moses*, 94 N.W.2d 255, 261 (Minn. 1959); *First Baptist Church of St. Paul v. City of St. Paul*, 884 N.W.2d 355, 364 (Minn. 2016); *Hoff v. Surman*, 883 N.W.2d 631, 634 (Minn. App. 2016).

I.

Grim contends that the district court erred in concluding that the city is entitled to statutory immunity as a matter of law. Application of statutory immunity is a legal question that we review de novo. *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000).

Generally, a municipality is subject to liability for torts "of its officers, employees and agents acting within the scope of their employment or duties." Minn. Stat. § 466.02 (2020). Statutory immunity is an exception to that general rule. *Minder v. Anoka County*, 677 N.W.2d 479, 483-84 (Minn. App. 2004). "Statutory immunity is based on the separation of powers and is intended to prevent judicial review, through the medium of a tort action, of executive and legislative policy-making decisions." *Id.* at 484.

Under statutory immunity, municipalities are immune from tort liability "based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6. In defining a "discretionary function or duty," "appellate courts distinguish between planning and operational decisions." *Minder*, 677 N.W.2d at 484. Planning decisions are protected as discretionary actions, while operational decisions relating to day-to-day operations are not protected. *Id.* To obtain the protection of statutory immunity, a municipality must show

that the alleged negligent conduct stems from a protected planning decision. *Conlin*, 605 N.W.2d at 402.

If statutory immunity is asserted, "the plaintiff has the burden to articulate specifically the claim that must be scrutinized to determine the immunity issue and to make some showing of fact to suggest the basis for the claim." *Gerber v. Neveaux*, 578 N.W.2d 399, 403 (Minn. App. 1998), *rev. denied* (Minn. July 16, 1998). Thus, when analyzing a claim of statutory immunity, the first step is to identify the precise government conduct that is the basis for the negligence claim. *Minder*, 677 N.W.2d at 484.

Here, Grim's negligence claim is not based on the city's double-stepped curb design itself. Instead, he argues that the city should have maintained the painted lines on the sidewalk and otherwise warned of the tripping hazard created by the double-stepped curb. As he notes in his brief to this court, "[t]he maintenance failure at issue is not to repair a whole sidewalk, a pothole, or a chunk of missing cement, it is to have lines of paint put onto a curb to warn sidewalk users that there is an unordinary walkway of which to be mindful."

As support for its claim of statutory immunity, the city submitted an affidavit from a city clerk and council member indicating that the city made a decision to limit sidewalk maintenance to snow and ice removal based on financial constraints. The affidavit stated:

> As a member of the City of Zumbro Falls City Council, I am also privy to discussions about how we can maintain the sidewalks of the City. We have discussed our ability to afford sidewalk maintenance. Given the expenses the City has and accrues because of flooding and other natural disaster, the City cannot afford to pay for regular sidewalk maintenance beyond snow and ice removal.

The affidavit also indicated that the city previously relied on community work service, imposed in criminal cases, as a source of labor to paint lines on the sidewalk, that the lines had been painted "three times in the past 20 years," and that "the last time the sidewalk was painted was in approximately 2008." The affidavit stated that the city had not received any complaints or reports of injuries regarding the sidewalk. The city also submitted copies of its annual budgets, which listed the city's revenues and expenses.

Our de novo assessment of whether the city is entitled to statutory immunity is influenced by the supreme court's decision in *Conlin*. In *Conlin*, a motorcyclist injured himself when he lost control on a street that had recently been oiled and sanded as part of a road-sealing process. 605 N.W.2d at 398-99. He sued the municipality, arguing that it failed to inspect, maintain, and warn of the dangerous street condition. *Id.* at 399. The municipality moved for summary judgment and offered affidavits in support. *Id.* The district court granted summary judgment for the municipality based on statutory immunity. *Id.*

The supreme court held that summary judgment was inappropriate because the municipality's affidavits were conclusory and did not explain how and why the decisions regarding the street-sealing project were made. *Id.* at 402-03. The supreme court stated that statutory immunity must be narrowly construed and that "allowing minimal averments in an affidavit to be sufficient evidence of a planning decision" creates "a risk that professional or scientific decisions, as well as nondecisions, will be bootstrapped into

planning decisions and thus protected by statutory immunity." *Id.* at 403. Therefore, the government must produce evidence regarding *how* it made its decision. *Id.* at 402.

"[A]lmost every act involves some measure of discretion, and yet undoubtedly not every act of government is entitled to statutory immunity." *Angell v. Hennepin Cnty. Reg'l Rail Auth.*, 578 N.W.2d 343, 346 (Minn. 1998) (quotation omitted). "Statutory immunity applies only when the challenged government activity originated from a balancing of political, social and economic factors." *Id.*; *see Minder*, 677 N.W.2d at 484.

In this case, there is evidence that the city previously relied on community work service, imposed in criminal cases, for labor to paint the sidewalk. Thus, there is evidence indicating that the city previously decided that painted lines were appropriate. Yet, the city's affidavit in support of statutory immunity does not meaningfully address the painted lines. Instead, the city generally asserts that it considered the financial impact of regular sidewalk "maintenance" and that "maintenance" would be limited to snow and ice removal. The affidavit does not indicate that the city considered any safety concerns specific to the double-stepped design of its curbs or the feasibility or costs of warning pedestrians of the potential tripping hazard resulting from the curb design.

For those reasons, the city's reliance on *Chabot v. City of Sauk Rapids* is unavailing. 422 N.W.2d 708 (Minn. 1988). In that case, the supreme court determined that statutory immunity applied to a city's financially driven decision to delay improvements to a holding pond. *Id.* at 708-09, 711. But in *Chabot*, evidence showed *how* the city arrived at the specific decision challenged by the plaintiff. For example, evidence showed that the city was confronted with numerous drainage issues with its storm sewer system, and the holding

pond in question was not a primary concern. *Id.* at 709. This case is distinguishable from *Chabot* because the city did not present evidence that it specifically considered whether to paint or provide other warnings of the double-stepped curb. *See also Christopherson v. City of Albert Lea*, 623 N.W.2d 272, 276 (Minn. App. 2001) ("[T]he record contains evidence that the city did engage in the weighing of issues that entitles it to immunity."). Instead, the city's affidavit in this case is conclusory, like the inadequate affidavits in *Conlin*.

In sum, the city failed to present sufficient evidence to establish that it is statutorily immune from liability stemming from Grim's fall.

II.

Grim contends that the district court erred in concluding that the city was not liable as a matter of law because its double-stepped curb was an open and obvious danger.

The supreme court has adopted Restatement (Second) of Torts § 343A(1) (1965) to define a landowner's duty in regard to obvious dangers: "A possessor of land is not liable to his invitees for physical harm caused to them by any . . . condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Baber v. Dill*, 531 N.W.2d 493, 495-96 (Minn. 1995) (quotation omitted). The rationale behind the rule is that "no one needs notice of what he knows or reasonably may be expected to know." *Id.* at 496 (quotation omitted). Whether a condition presents a known or obvious danger, and whether a landowner should anticipate injury despite a condition's open and obvious nature, are ordinarily fact questions. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005).

Whether a condition's danger is known is a subjective test that depends upon the entrant's actual appreciation of the danger. *Senogles*, 902 N.W.2d at 44. Viewing the evidence in a light most favorable to Grim, reasonable persons could not disagree regarding whether the potential danger stemming from the double-stepped curb was known to Grim. He acknowledged in deposition testimony that he had been to the bar on prior occasions, including twice in the year prior to the accident. In fact, he acknowledged regularly visiting the bar. He also acknowledged that before entering the bar on the day of the accident, he stepped over the same curb where he ultimately tripped. He admitted that he "negotiated the curb, and then the ramp or the slope on the sidewalk." He admitted that he was paying attention and "walking normal" when he entered. On this record, we conclude, de novo, that there is no genuine issue of material fact regarding Grim's knowledge of the potentially dangerous double-stepped curb. We therefore do not consider whether the potential danger was obvious.[1] *See id.* at 43-44 (describing the "known" subjective test and the "obvious" objective test as alternative grounds for avoiding liability).

We next consider whether the city should have anticipated the potential harm from the double-stepped curb despite Grim's knowledge of the curb design. *See Baber*, 531 N.W.2d at 495-96. In some cases, a land possessor should anticipate harm from a dangerous condition despite the condition being known to the invitee. Restatement (Second) of Torts § 343A cmt. f (1965); *see Peterson v. W.T. Rawleigh Co.*, 144 N.W.2d

[1] Although the district court relied on the "obvious" prong of the "known or obvious" standard for determining liability, our review is de novo. *Dukowitz*, 841 N.W.2d at 150. Moreover, the parties and district court referenced Grim's subjective knowledge of the double-stepped curb, indicating that they recognized the relevance of his knowledge.

555, 557-58 (Minn. 1966) (quoting cmt. f). "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered . . . ." Restatement (Second) of Torts § 343A cmt. f (1965). Indeed, "distracting circumstances are factors which the jury might consider in excusing a plaintiff who did not look where he was stepping." *Krengel v. Midwest Automatic Photo, Inc.*, 203 N.W.2d 841, 844-45 (Minn. 1973) (stating principle in the context of tripping hazard caused by changed elevations in commercial store areas).

Whether the city should have anticipated the harm is an issue of foreseeability. *Senogles*, 902 N.W.2d at 43. "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." *Id.* (quotation omitted). "The foreseeability of danger depends heavily on the facts and circumstances of each case." *Id.* (quotation omitted). When the issue of foreseeability is clear, it may be decided as a matter of law, but in close cases, the issue of foreseeability is for the jury. *Id.*

The summary-judgment record contains pictures showing that the double-stepped curb was less visible when stepping off the sidewalk and onto the street in front of the bar than when walking from the street onto the sidewalk. At his deposition, Grim testified that the double-stepped curb was not visible when he exited the bar. He also testified that he was carrying a case of beer. Such a distracting circumstance—as well as others that are commonly present when walking to and from a car parked on a city street in a commercial area—might be considered by a jury as a basis to excuse Grim's failure to look where he

was stepping. Viewing the evidence in a light most favorable to Grim, a genuine issue of material fact exists regarding whether the city should have anticipated the potential harm despite Grim's knowledge of the double-stepped curb.

In conclusion, the city did not produce sufficient evidence to warrant application of statutory immunity as a matter of law. *See Conlin*, 605 N.W.2d at 403 (stating, "statutory immunity should be narrowly construed"). And although we conclude that Grim knew of the double-stepped curb and its potential tripping hazard, reasonable minds could disagree regarding whether the city should have nonetheless anticipated harm and provided a warning. *See DLH, Inc.*, 566 N.W.2d at 69 (stating that "summary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented"). We therefore reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.