**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A23-0445**

Ana Thompson,
Appellant,

vs.

VIP Floral, Inc.,
Respondent.

**Filed October 23, 2023**
**Affirmed**
**Wheelock, Judge**

Murray County District Court
File No. 51-CV-21-198

Vincent J. Moccio, Bennerotte & Associates, P.A., Eagan, Minnesota (for appellant)

Robert E. Kuderer, Erickson, Zierke, Kuderer & Madsen, P.A., Minneapolis, Minnesota; and

Gregory E. Kuderer, Erickson, Zierke, Kuderer & Madsen, P.A., Fairmont, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Frisch, Judge; and Wheelock, Judge.

**NONPRECEDENTIAL OPINION**

**WHEELOCK**, Judge

Appellant brought a negligence claim against respondent building owner for personal injuries she sustained when she slipped and fell on ice in the area of the building's parking lot during a visit to a store in the building. The district court granted summary

judgment in favor of respondent. Appellant argues that the district court (1) erred by dismissing her claim on summary judgment based on its determinations as a matter of law that the ice patch was an open and obvious danger and that respondent had no reason to anticipate that she would walk on the ice despite the danger and (2) abused its discretion by denying her motion to amend the complaint to add the store as a defendant to the case. We affirm.

## FACTS

Respondent VIP Floral Inc. owns a strip-mall building in Slayton. VIP Floral operates out of one unit in the building and leases the other unit to Heartland Eye Care. Under the terms of the lease, VIP Floral is responsible for snow removal.

Appellant Ana Thompson visited Heartland and injured her hip when she slipped and fell on ice in the parking lot. Thompson filed suit against VIP Floral, alleging that it was negligent in failing to keep the premises in reasonably safe condition by removing ice and snow, inspecting the premises for hazardous conditions, and warning persons about the potentially hazardous conditions. VIP Floral denied Thompson's allegations of negligence and moved for summary judgment. The following facts are taken from evidence filed in relation to VIP Floral's summary-judgment motion, which we view in the light most favorable to Thompson. *See Schroeder v. Simon*, 985 N.W.2d 529, 535-36 (Minn. 2023) ("In evaluating a grant of summary judgment, we must view the evidence in the light most favorable to the nonmoving party." (quotation omitted)).

Sometime between November 10 and 11, 2020, approximately five inches of snow fell in the Slayton area. The owner of VIP Floral could not recall the condition of the

parking lot on the morning of November 11, but he stated in his deposition, "If there was snow, we moved it. We do every morning for our own store as well as Heartland, so if it snowed, we moved it." The owner estimated that he would have cleared snow from the parking lot sometime before VIP Floral opened at 8:30 a.m. He also stated, "After we scrape the snow or shovel it off, we broadcast ice melt over a large percentage of the parking lot."

Thompson's son, J.T., drove her to Heartland on the morning of November 11 to pick up prescription eyeglasses. The store was scheduled to open at 9:00 a.m., but A.S., a Heartland employee, recognized Thompson and let her into the building early. J.T. testified in his deposition that snow had been "cleaned and pushed off to the side" of the parking lot.

Thompson spent a short time in the store, then left and walked back to the car using the same path she had used to enter the building. When she was near the front passenger-side door, she slipped and fell on an ice patch. J.T. got out of the vehicle to help his mother and then went inside the store to inform A.S. that Thompson had fallen in the parking lot.

Thompson could not recall in her deposition whether she saw any ice, snow, liquid, or other obstacle on the ground where she slipped and stated that she did not know what caused her to fall. However, J.T. observed the ice patch when he helped Thompson stand up. He stated that the ice patch was one to two feet wide and looked fresh and that there was "a little bit of snow on the sides, like just what they couldn't get between the rocks and

stuff." When asked whether the ice patch "was open and obvious" to him, he answered that it was.

After Thompson and J.T. left, A.S. used a shovel and ice melt to clear "a dusting of snow" from the edge of the parking lot, including in front of the parking space in which J.T. parked. A.S. saw an ice patch next to the parking space and applied ice melt to it. She stated in her deposition that the ice patch looked fresh and that she did not have any difficulty seeing it.

After learning that A.S. shoveled and used ice melt following the incident and that Heartland kept snow-removal materials and sometimes removed light snow from the cement path and edge of the parking lot in front of its store, Thompson moved to amend her complaint to add Heartland as a defendant under the theory that Heartland, in addition to VIP Floral, had assumed a duty to maintain the parking lot. VIP Floral filed a letter with the district court stating that it "raises no procedural or prejudicial objections" to the motion but arguing that Thompson "fail[ed] to establish a legal duty on Heartland Eye Care for maintenance of the area involved in this accident."

The district court held a hearing on the summary-judgment motion in December 2022 and a hearing on the motion to amend the complaint in January 2023. It issued an order denying the motion to amend the complaint on the basis of futility and subsequently issued an order granting the motion for summary judgment in favor of VIP Floral.

Thompson appeals.

## DECISION

Summary judgment is appropriate only when the district court record "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. 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 its application of the law. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). In doing so, we "view the evidence in the light most favorable to the nonmoving party . . . and resolve all doubts and factual inferences against the moving part[y]." *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015). "A genuine issue of material fact exists when there is sufficient evidence regarding an essential element . . . to permit reasonable persons to draw different conclusions." *St. Paul Park Refining Co. v. Domeier*, 950 N.W.2d 547, 549 (Minn. 2020) (quotation omitted).

The supreme court articulated the summary-judgment standard for negligence claims as follows:

> 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, and (4) the breach of duty being the proximate cause of the injury.

*Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (quotation omitted). Here, the parties dispute whether the evidence establishes the existence of a duty of care.

A landowner "has a continuing duty to use reasonable care for the safety of all entrants," but this duty is not without exception; indeed, a landowner "is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the [landowner] should anticipate the harm despite such knowledge or obviousness." *Louis v. Louis*, 636 N.W.2d 314, 319 (Minn. 2001) (quoting Restatement (Second) of Torts § 343A (1965)). A condition is obvious if a reasonable person would recognize both the condition and the risk it poses. *Id.* at 321. Courts apply an objective test to determine whether a condition is obvious: "the question is not whether the injured party actually saw the danger, but whether it was in fact visible." *Id.*

In the instant case, the district court determined that there was no genuine issue of material fact because "the only evidence in the record from those who were in a position to see the icy patch proximate to [Thompson's] fall is that the icy patch was obvious." The district court reasoned that VIP Floral was entitled to summary judgment as a matter of law because the undisputed facts established that the ice patch on which Thompson fell was an open and obvious danger and that VIP Floral had no reason to anticipate that Thompson would walk on the ice patch despite the danger.

Thompson contends that summary judgment was not appropriate because there is a genuine issue of material fact regarding whether the ice patch was an open and obvious danger. She argues that the district court "ignored the evidence that [she] produced to show that the ice patch she fell on was in fact *not* visible" and "erroneously resolved all doubts and factual inferences against" her. We are not persuaded.

Our assessment of the evidence leads us to the same conclusion as the district court. J.T. stated in his deposition that he observed "snow cleaned and pushed off to the side" in the grass next to the parking lot and that the parking lot was reasonably clear of snow with "patches of ice here and there" that he could see. He could see the ice patch "right away" when he looked at the ground where Thompson fell. He also agreed that the ice patch was open and obvious when asked. Similarly, A.S. confirmed that she had no difficulty seeing the ice patch and did not see any substance concealing it. No other evidence presented to the district court contradicts these statements, and thus, we discern no genuine issue of material fact regarding the open and obvious condition of the ice patch.

Thompson argues that the district court did not consider evidence indicating that she failed to see the ice patch. However, the question of whether the ice patch was open and obvious is not a subjective one—it does not depend on whether Thompson "actually saw the danger." *Louis*, 636 N.W.2d at 321. And Thompson did not claim in her deposition that she failed to see the ice patch because it was obscured in some way. She could not recall whether she saw anything on the ground where she fell, so her deposition testimony did not refute J.T.'s and A.S.'s statements that the ice patch was clearly visible.

Thompson also argues that the district court failed to infer that the "dusting of snow" A.S. described in her deposition could have "obscured the patch of ice when [Thompson] traversed the area." Thompson points out that J.T. and A.S. did not see the ice patch until after she fell and suggests that her fall "would have distributed the dusting of snow making [the ice patch] visible" to them only after the fall.

Thompson's argument relies on the premise that the district court is required to "resolve all doubts and factual inferences" in her favor. *Rochester City Lines*, 868 N.W.2d at 661. While this premise is correct, the district court considers only "the facts *and the reasonable inferences to be drawn from those facts*" in the light most favorable to the nonmoving party. *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021) (analyzing circumstantial evidence in a summary-judgment appeal to determine whether a genuine issue of material fact existed with respect to proximate cause). There must be "sufficient evidence . . . to permit reasonable persons to draw different conclusions" in order to establish a genuine issue of material fact. *St. Paul Park Refining Co.*, 950 N.W.2d at 549 (quotations omitted).

"[C]ircumstantial evidence must justify a reasonable inference as to the issuable facts. It is not enough that there may be some basis for bare conjecture, speculation, or suspicion." *Martelle v. Thompson*, 167 N.W.2d 376, 379 (Minn. 1969). In a civil case, when a party bearing the burden of proof seeks to establish a fact via circumstantial evidence, the inference the party wishes to draw from the evidence must "reasonably preponderate" over other inconsistent inferences that can be drawn from the evidence as a whole. *Staub*, 964 N.W.2d at 622 (citing *E.H. Renner & Sons, Inc. v. Primus*, 203 N.W.2d 832, 834 (Minn. 2021)); *see also Hagsten v. Simberg*, 44 N.W.2d 611, 613 (Minn. 1950) ("In a civil case, to warrant recovery on circumstantial evidence, the evidence must 'outweigh' other hypotheses . . . in the sense that evidence sustaining the hypothesis contended for must preponderate against the others, but it need not 'exclude' them in the sense of conclusive demonstration of impossibility." (quotation omitted)).

Here, Thompson seeks to establish an issue of material fact via circumstantial evidence: that the ice patch was covered with snow and was not visible prior to Thompson's fall even though it was open and obvious after her fall.

But the inference that a "dusting of snow" obscured the ice patch prior to Thompson's fall does not preponderate over the inference that the ice patch was open and obvious; at best, the evidence is merely consistent with Thompson's conjecture that the ice patch could have been covered with snow. A.S. stated that a "dusting of snow" was present and that she shoveled the edge of the parking lot, including in front of the parking space in which J.T. parked. She could not recall whether a "dusting of snow" covered the concrete walkway to Heartland's entrance. She did not state that a "dusting of snow" covered the ice patch or any other surface of the parking lot. J.T. testified, in describing the "fresh ice" of the patch, that there was "a little bit of snow on the sides, like, just what they couldn't get between the rocks and stuff."

Thompson's assertion that a "dusting of snow" could have obscured the ice patch is thus, at best, speculation and, "without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (stating that "evidence [that] is more speculative than probative" is insufficient to overcome summary judgment). We therefore conclude that there was no genuine issue of material fact regarding the open and obvious condition of the ice patch, and the district court did not err in its summary-judgment determination on this basis.

Thompson next argues that summary judgment was not appropriate because a genuine issue of material fact existed as to whether VIP Floral had reason to anticipate the

danger of Thompson falling despite the open and obvious condition of the ice patch. The district court determined that "[t]he risk under the circumstances of this case was so obvious that [VIP Floral] did not have a duty to warn [Thompson] of the potential danger" and that VIP Floral "should not have anticipated" that Thompson would be injured.

A landowner owes no duty to warn "where the anticipated harm involves dangers so obvious that no warning is necessary." *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995). However, "even for obvious dangers, a [landowner] has a duty to warn if harm to an invitee should be anticipated despite the obviousness of the danger." *Id.* A landowner should anticipate harm despite the obviousness of the danger when it is foreseeable that an invitee would "proceed to encounter the known or obvious danger because to a reasonable [person] . . . the advantages of doing so would outweigh the apparent risk." *Sutherland v. Barton*, 570 N.W.2d 1, 7 (Minn. 1997) (quotation omitted).

The supreme court has distinguished certain circumstances in which a landowner should anticipate harm despite an open and obvious danger. In *Peterson v. W.T. Rawleigh Co.*, the supreme court held that the defendant was liable to a distributor who slipped and fell on ice in the defendant's parking lot because "a jury could find defendant should have foreseen that its . . . distributors would come to the loading dock for its products and attempt to negotiate the [parking lot] despite the slippery conditions." 144 N.W.2d 555, 558 (Minn. 1966). Conversely, in *Jensen v. Allied Central Stores, Inc.*, the supreme court held that the defendant was not liable to a customer who fell on a stairway next to a display rack. 167 N.W.2d 739, 741 (Minn. 1969). It reasoned that the injured customer in *Jensen*, unlike the injured distributor in *Peterson*, did not have a compelling reason to traverse the

area where the open and obvious danger existed. *Id.* Therefore, the defendant had no reason to anticipate the customer's harm. *Id.*

In the instant case, the ice patch in question covered a relatively small area of the parking lot—making it easy to avoid the dangerous condition—and Thompson had no "compelling reason" to cross that portion of the parking lot rather than take a different route into and out of the store. Thus, we conclude that VIP Floral had no reason to anticipate the harm from Thompson falling on the open and obvious patch of ice in the parking lot, and we affirm the district court's decision to grant summary judgment in favor of VIP Floral.[1]

**Affirmed.**

[1] Based on our conclusion that summary judgment was appropriate as a matter of law, we do not reach Thompson's second argument that the district court abused its discretion by denying her motion to amend the complaint to add Heartland as a defendant to the case.