STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1417

Peter Pape,
Appellant,

vs.

Macks, LLC, d/b/a Best Western Soldiers Field Tower & Suites; et al.,
Respondents.

Filed April 19, 2011
Affirmed
Halbrooks, Judge

Olmsted County District Court
File No. 55-CV-09-7630

James P. Ryan, Jr., DeAnna J. Schleusner, Ryan & Grinde, Ltd., Rochester, Minnesota (for appellant)

Peter M. Waldeck, Waldeck & Lind, PA, Minneapolis, Minnesota (for respondents)

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's grant of summary judgment to respondents dismissing his negligence claim arising out of injuries appellant suffered when a glass shower door fell and struck his foot. Because appellant has not presented

evidence sufficient to create a genuine issue of material fact regarding whether a reasonable inspection would have revealed the alleged defect in the shower door and because respondents were not exercising exclusive control over the shower door at the time the accident occurred, we affirm.

FACTS

In early September 2006, appellant Peter Pape stayed at the Best Western Soldiers Field Tower & Suites, which is owned and operated by respondents Macks, LLC, d/b/a Best Western Soldiers Field Tower & Suites and Stoneridge Management Company, d/b/a Best Western Soldiers Field Tower & Suites. On September 7, 2006, between approximately 6:30 and 7:00 p.m., Pape took a shower in his room; it was the third or fourth shower he had taken during this stay. The shower was enclosed by two sliding-glass doors. At the end of his shower, Pape slid one of the doors open, at which point the sheet of glass cracked (without breaking apart). The entire pane fell into the shower and onto Pape's right foot, causing a three-centimeter horizontal cut across the top of his right foot below the big toe. After hitting Pape's foot, the glass shattered. Pape went to the emergency room, where he received six stitches.

Pape sued respondents for personal injury based on negligence. At his deposition, Pape testified that before the accident, he did not recall "having any difficulty operating the door," and that the door "didn't seem to be malfunctioning in any way." He also testified that, when he returned from the hospital, "the entire bathroom was all cleaned up and there was only one door left in the shower. The other frame from the other glass door was gone."

Myron Salz, the general manager of the hotel, testified that there is no written policy concerning room inspection at the hotel, but that the rooms are inspected by the housekeeping staff upon checkout. As to the shower doors, Salz testified that the housekeepers would "inspect and clean them . . . they would operate [the door] . . . sliding it back and forth to make sure that it works properly, that it's—you know, that it slides and then they would clean it and they would wipe it down from there." He also testified that Best Western International sends a representative twice a year to inspect ten rooms at random for cleanliness and to confirm that appliances are in working order.

The district court granted respondents' motion for summary judgment, reasoning that Pape's allegation that respondents' negligent inspection, maintenance, or repair of the door must have caused the door to fall and break was speculative, unsupported by any evidence, and insufficient as a matter of law to establish a disputed issue of fact as to breach. The district court concluded that Pape had no evidence that respondents had actual or constructive knowledge of the alleged defective condition of the door. The district court rejected the application of res ipsa loquitur on the ground that Pape himself was in exclusive control of the door at the time it shattered. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court reviews 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, 76-77 (Minn. 2002). The evidence and conflicting factual inferences must be construed in the light most favorable to the nonmoving party. *See Erickson v. Curtis Inv. Co.*, 447

N.W.2d 165, 171 (Minn. 1989) (noting that, because "conflicting inferences" from the uncontested facts of the case could be drawn as to whether a guard should have noticed a crime taking place, summary judgment was inappropriate). But "the party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). To successfully oppose a motion for summary judgment, the nonmoving party must "extract *specific*, admissible facts from the voluminous record" that show that a genuine issue of material fact exists. *Kletschka v. Abbott Nw. Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988).

A negligence cause of action has four elements: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). Because of the factual nature of the relevant analysis, "[s]ummary judgment is seldom granted on negligence issues. However, it may be entered where the material facts are undisputed and, as a matter of law, compel only one conclusion." *Kaczor v. Murrow*, 354 N.W.2d 524, 525 (Minn. App. 1984).

The parties have never disputed that respondents owed Pape a duty of care, that Pape was injured, and that the door breaking was the proximate cause of Pape's injury. This case turns on the nature of the duty and whether respondents breached it.

I.

"[A] landowner has a duty to use reasonable care for the safety of all entrants upon the premises." *Olmanson v. LeSueur County*, 693 N.W.2d 876, 880 (Minn. 2005). This

"duty of reasonable care includes an ongoing duty to inspect and maintain property to ensure entrants on the landowner's land are not exposed to unreasonable risks of harm." *Id*. at 881; *see also Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972) (stating that a property owner's duty of reasonable care includes inspection).

A duty of reasonable care is not breached by the mere occurrence of an accident. *Johnson v. Evanski*, 221 Minn. 323, 326, 22 N.W.2d 213, 215 (1946); *see also MacBeth v. Mondry*, 392 N.W.2d 24, 27 (Minn. App. 1986) (stating that strict liability does not apply to a landowner in a premises-liability case). "If a reasonable inspection does not reveal a dangerous condition, such that the landowner has neither actual nor constructive knowledge of it, under the theory of negligence the landowner is not liable for any physical injury caused to invited entrants by the dangerous condition." *Olmanson*, 693 N.W.2d at 881; *see also Messner v. Red Owl Stores*, 238 Minn. 411, 413, 57 N.W.2d 659, 661 (1953) (stating that landowner would be negligent if its employees "failed to rectify the dangerous condition after they knew, or in the exercise of reasonable care should have known, that the condition existed").

Pape argues that respondents had constructive notice of the defect because a reasonable inspection of the shower door would have revealed its defective condition. But this assertion is not supported by record evidence. Although constructive notice can be inferred from circumstantial evidence, *Norman v. Tradehome Shoe Stores, Inc*., 270 Minn. 101, 107, 132 N.W.2d 745, 750 (1965), Pape does not offer any evidence (other than the fact of the accident) to support his assertion that a reasonable inspection would have revealed a defect. There was no expert testimony or other evidence demonstrating

that a defect would have been disclosed during a regularly scheduled safety inspection. And Pape himself did not observe any problem with the shower door in the two to three times he used it before the incident in which it broke.

To survive summary judgment, Pape must offer some evidence that an inspection of the door would have revealed the alleged defect. *Gorath v. Rockwell Int'l, Inc.*, 441 N.W.2d 128, 132 (Minn. App. 1989), *review denied* (Minn. July 27, 1989) (product-liability case). He cannot simply rely on conclusory statements about the inadequacy of respondents' inspections or the possible effect of reasonable inspections; he must come forward with specific facts and evidence. *See Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002) (stating that summary judgment cannot be avoided by "unverified and conclusory allegations or by postulating evidence that might be developed at trial"). Pape has failed to demonstrate a triable issue regarding whether a reasonable inspection would have discovered a defect. As such, summary judgment is warranted.

Pape also alleges that respondents spoliated evidence. Because he did not properly raise this issue before the district court, we decline to address it here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that issues not presented to and decided by the district court are waived on appeal). We also note that the issue is moot because there will be no trial during which an adverse-inference jury instruction would be given as a sanction for the alleged spoliation. *See In re Matter of Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) ("If the court is

unable to grant effectual relief, the issue raised is deemed to be moot resulting in dismissal of the appeal.").

II.

Pape argues that respondent was negligent under the theory of res ipsa loquitur, which "is merely another way of characterizing the minimal kind of circumstantial evidence which is legally sufficient to warrant an inference of negligence." *Stelter v. Chiquita Processed Foods, L.L.C.*, 658 N.W.2d 242, 246 (Minn. App. 2003) (quotation omitted). To justify application of the doctrine, a plaintiff must show that the accident was (1) of a kind which ordinarily does not occur in the absence of someone's negligence, (2) caused by an instrument within the defendant's exclusive control, and (3) not due to any voluntary action or contribution on plaintiff's part. *Id.* at 247. "The circumstances must be such as to give rise to an inference that someone has been negligent, and the defendant's control of the situation must be such that the inference will point to the defendant." *Johnson v. Coca Cola Bottling Co. of Willmar*, 235 Minn. 471, 477, 51 N.W.2d 573, 576 (1952) (quotation omitted).

The facts here do not warrant application of res ipsa loquitur. Pape did not produce any evidence to support his assertion that shower doors do not ordinarily break and fall during ordinary usage absent someone's negligence. *Cf. Stelter*, 658 N.W.2d at 247 (observing that plaintiff satisfied the first element by producing evidence that a grate was designed to support people standing and walking on it and adducing admissions from defendant that properly installed grates do not ordinarily buckle, absent negligence). As for the second element, it is true, as Pape contends, that exclusive control "is not

necessarily a control exercised at the time of the injury, but could be one exercised at the time of the negligent act which subsequently resulted in the injury." *Johnson*, 235 Minn. at 478-79, 51 N.W.2d at 577. Nevertheless, because Pape was indisputably operating the door at the time of the accident, Pape has not established respondents' exclusive control.

As for the third element of res ipsa loquitur—the plaintiff must not have voluntarily contributed to the injury—the fact that a defendant's control may be deemed to carry over from the time of the negligent act to the time of the accident does not "dispense with the necessity of plaintiff's introduction of affirmative evidence to combat the possibility of negligence on his part or that of intermediaries." *Id.* at 479, 51 N.W.2d at 577. In other words, Pape must establish that nothing he did contributed in any way to the accident: "Allied to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident." *Id.* at 477, 51 N.W.2d at 576 (quotation omitted).

But Pape has produced no evidence, other than his mere assertions, that he was properly operating the door at the time of the accident or tending to exclude any other causes. *See Holkestad v. Coca-Cola Bottling Co.*, 288 Minn. 249, 255, 180 N.W.2d 860, 865 (1970) (stating that a defendant's exclusive control is established "if the circumstantial evidence reasonably eliminates improper handling by others or misuse by the injured party, thus permitting the jury to reasonably infer that it is more probable than not that the [instrumentality of harm] was defective"). And he has not produced any evidence showing that respondents' negligence, and not some other factor, was the most likely cause of the accident. *See Hoven v. Rice Mem'l Hosp.*, 396 N.W.2d 569, 572

(Minn. 1986) ("When the injury could have been caused with substantially equal probability from other causes as well as any acts of defendants, facts, other than just the fact of injury itself from which defendant's negligence may be inferred, must exist before a res ipsa loquitur issue can be submitted to the jury.").

We are cognizant that summary judgment is highly unusual in a negligence action because the assessment of breach generally is a factual question to be addressed by the jury and because the district court's task upon a motion for summary judgment is not to try issues of fact, but to determine whether there are factual issues to be tried. But summary judgment is appropriate when, as presented here, the nonmoving party has failed to set forth any facts that go to an essential element of the claim, and the undisputed material facts compel only one conclusion. *Kaczor*, 354 N.W.2d at 525.

Affirmed.