STATE OF MINNESOTA
IN COURT OF APPEALS
A11-192

Marcella Y. Brown,
Appellant,

vs.

Randy L. Brown, et al.,
Respondents.

Filed September 12, 2011
Affirmed
Larkin, Judge

Lake County District Court
File No. 38-CV-10-465

Gary J. Halom, Hannula & Halom, Superior, Wisconsin (for appellant)

Jerome D. Feriancek, Thibodeau, Johnson & Feriancek, PLLP, Duluth, Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

LARKIN, Judge

Appellant challenges the district court's award of summary judgment for respondents. Because appellant's purported negligent-maintenance claim is barred by the

statute of repose, and because appellant presented no evidence of causation to sustain her failure-to-warn claim, we affirm.

FACTS

In 1981, respondent Randy L. Brown installed a precast concrete staircase in front of the door to his residence. The staircase is comprised of four concrete steps running perpendicular to the door. There is a flat platform at the top of the stairs, adjacent to the door to the dwelling. When the staircase was installed at respondent Brown's residence, it was positioned to leave an approximately five-inch gap between the house and the platform.

On August 22, 2009, appellant Marcella Y. Brown was injured as she exited Brown's residence. Appellant alleges that her left foot slipped into the gap, causing her to fall. Appellant sued respondents, asserting causes of action based on negligent maintenance and negligent failure to warn. Respondents moved for summary judgment, arguing that appellant's claims were barred under the statute of repose in Minn. Stat. § 541.051 (2010) and that respondents had no duty because the dangerous nature of the gap was open and obvious. The district court determined that summary judgment was not appropriate on respondents' theory that the gap was open and obvious, reasoning that "whether or not a dangerous condition was open and obvious is a factual question better left for the jury." Thus, the district court "denied" summary judgment on that basis. But the district court also concluded that the statute of repose applied to both of appellant's causes of action and granted respondents' motion for summary judgment, without

distinguishing between appellant's negligent-maintenance and failure-to-warn claims. This appeal follows.

D E C I S I O N

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

The district court's award of summary judgment was based on section 541.051, which provides:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than

> two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

Minn. Stat. § 541.051, subd. 1(a). The statute further provides that "[n]othing in this section shall apply to actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession." *Id*., subd. 1(d).

The district court reasoned that

> under this statute, a negligence claim is barred where the alleged injury occurred more than ten (10) years after substantial completion of the construction or improvement to the property. All parties agree that the steps which are the subject of this litigation were installed by [respondent] Randy Brown in 1981 and the steps are in the same position with respect to the side of the home as they were in 1981. Approximately twenty-eight (28) years have passed since the time of the installation of the steps.

And the district court concluded that fixing the gap between the stairs and the house would not constitute "maintenance" as used in the statute of repose, but would be an improvement to real property.

It is undisputed that the installation of the staircase at respondents' home constitutes an improvement to real property. But the parties disagree regarding whether respondents' failure to eliminate the gap between the platform and the house constitutes negligence maintenance, which would give rise to application of the exception to the statute of repose.

This court described the difference between maintenance, which falls under the exception, and improvements, which do not, in *Fisher v. Cnty. of Rock*, 580 N.W.2d 510, 511 (Minn. App. 1998), *rev'd on other grounds*, 596 N.W.2d 646 (Minn. 1999). Fisher brought a negligent-maintenance action against the county after her son was killed in a car accident on a bridge. *Fisher*, 580 N.W.2d at 511. The bridge was designed and constructed so that the ends of the rails along its sides were exposed. *Id.* Fisher alleged that the county was negligent for failing to place sloping guardrails at the corners of the bridge. *Id.* The county argued that the statute of repose barred Fisher's suit; Fisher countered that the failure to install the rails constituted negligent maintenance. *Id.*

In *Fisher*, this court reasoned that the proposed action was either an improvement or maintenance. And in determining whether it was an improvement or maintenance, we applied the following definition of "improvement to real property": "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Id.* (quotation omitted). This court concluded that Fisher's lawsuit "alleging failure to add guardrails to existing bridge rails is an action arising out of the defective and unsafe condition of an improvement to real property, i.e., the existing rails, not an action for negligent maintenance of those rails." *Id.* at 512. We reasoned that "[a]dding sloping guardrails to the ends of bridge rails would be a permanent addition and improvement, would involve the expenditure of labor and money, and would be designed to make the bridge safer, if not more useful." *Id.* at 511-12. We further reasoned that "[a]dding sloping guardrails would not be an ordinary

repair comparable to repairing or replacing the timber of the existing rails and posts." *Id.* at 512.

In this case, the district court relied on *Fisher*, reasoning:

> The remedy for the alleged defect (the gap) would not be ordinary repairs but would involve new construction and would be a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable. . . . The term "maintenance" in the exception cannot be reasonably construed to include modification of a condition such as is present here and a strict interpretation of Minn. Stat. § 541.051 is required. . . . The claim is not that the gap widened over time or arose as the steps "shifted," but instead that it was there since the steps were placed and installed in about 1981, well beyond the ten (10) year statute.

The district court's reasoning is sound. Like the proposed action in *Fisher*, expansion of the surface area of the platform on respondents' staircase to eliminate the original gap would constitute an improvement to real property and not "an ordinary repair." Thus, the negligent-maintenance exception to the statute of repose does not apply.

Our conclusion that the exception does not apply does not end our analysis. Appellant brought claims for both negligent maintenance and negligent failure to warn. This court has held that "[u]nder established tort law, owners and possessors of improvements to real property owe a duty of reasonable care to persons using the premises. Reasonable care includes the duty to inspect and repair the premises and, at a minimum, to warn persons using the premises of unreasonable risks of harm." *Sullivan v. Farmers & Merchs. State Bank of New Ulm*, 398 N.W.2d 592, 594 (Minn. App. 1986),

review denied (Minn. Mar. 13, 1987). "The duty to warn the public applies to all unreasonable risks of harm on the premises, whatever their source." *Id.* at 594-95. In *Sullivan*, this court determined that the inclusion of the statute-of-repose exception "evinces a legislative intent to hold owners and possessors to the standard of care required at common law. The fact the risk results from defects in the design or construction of the property improvement does not relieve the owner or possessor of the duty to ensure the safety of persons using the premises through use of appropriate warnings." *Id.* at 595. We therefore held "that Minn. Stat. § 541.051, subd. 1 does not relieve the owner or possessor of a property improvement from the duty to warn of dangerous and unsafe conditions on the premises." *Id.*

In the district court, appellant argued that the statute of repose does not apply to her failure-to-warn claim. But the district court did not specifically address application of the statute of repose to appellant's failure-to-warn claim. Instead, it dismissed appellant's complaint in its entirety, pursuant to its summary-judgment award, under the statute of repose.

Appellant argues that the district court erred in dismissing her failure-to-warn claim. Respondents counter that because appellant's "theory" that the statute of repose does not apply to a negligent failure-to-warn claim was first raised during appellant's oral argument at the summary-judgment motion hearing in district court, and because the district court did not consider the argument, it is not properly before this court for review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally an appellate court will not consider matters not argued to and considered by the district

court). We disagree. Appellant presented her argument for the district court's consideration at the summary-judgment hearing and cited *Sullivan*. Even though *Sullivan* clearly holds that the statute of repose does not apply to failure-to-warn claims, the district court dismissed appellant's failure-to-warn claim under the statute of repose, implicitly rejecting appellant's argument. We therefore consider appellant's argument regarding this issue.

Despite this court's clear holding in *Sullivan*, respondents argue that *Sullivan* is not dispositive. Neither of respondents' supporting arguments is persuasive. First, respondents assert that we should not follow *Sullivan* because it was wrongly decided. But we are bound to follow our published decisions. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (stating that the court of appeals is bound by its published opinions), *review denied* (Minn. Sept. 21, 2010). Respondents also argue that "*Sullivan* is distinguishable as ruling upon the statute of limitations and not the repose provision of Minn. Stat. § 541.051." *See Sullivan*, 398 N.W.2d at 595 (the plaintiff filed suit within the repose period, but not within the limitations period requiring that actions be brought within two years after they accrue). While respondents explain the difference between a statute of limitations and a statute of repose, they do not offer any argument regarding why the reasoning and holding of *Sullivan* is limited to cases that are untimely under the statute of limitations, as opposed to the statute of repose. We therefore conclude that *Sullivan* controls, and under *Sullivan*, the district court erred by dismissing appellant's failure-to-warn claim based on the statute of repose.

Nevertheless, we will affirm summary judgment "if it can be sustained on any ground." *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996). "A prima facie case of negligence requires evidence of: (1) a duty owed by the defendant; (2) a breach of that duty; (3) causation; and (4) injury." *Rinn v. Minn. State Agric. Soc'y*, 611 N.W.2d 361, 364 (Minn. App. 2000). "It is incumbent on the plaintiff in a negligence action to introduce evidence that would afford a reasonable basis for the conclusion that the defendant's alleged negligence proximately caused the plaintiff's injury." *Abbett v. Cnty. of St. Louis*, 474 N.W.2d 431, 434 (Minn. App. 1991). But appellant did not offer *any* evidence to establish that respondents' failure to warn caused her injury; she instead argues that causation is "implicit in the facts." This argument does not defeat respondents' motion for summary judgment. "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *see also Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006) (describing *substantial evidence* as "incorrect legal standard" and clarifying that "summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions"). Because appellant presented no evidence of causation, we hold that the district court properly granted respondents' motion for summary judgment on appellant's failure-to-warn claim. *See Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. App. 1994) (affirming grant

of summary judgment as "mandatory" against party who failed to establish an essential element of a cause of action).

We next consider respondents' assertion that appellant provided information in her appendix that does not appear in the district court record. In their brief, respondents "move to strike portions of the appellant's Brief and Appendix as material outside of the record under Minn. R. Civ. App. P. 110.01." But even if we were to consider the purportedly extra-record material, it would not alter our decision to affirm summary judgment for respondents. Accordingly, we do not address this issue. Respondents also request, in a footnote, a reasonable award of attorney fees based on appellant's purportedly inappropriate conduct "[p]ursuant to Rules 127 and 139.06 of Minn. R. Civ. App. P." But respondents did not serve and file a written motion for attorney fees. Because respondents' request for attorney fees is not properly before this court, we do not consider it. *See* Minn. R. Civ. App. P. 127 ("Unless another form is prescribed by these rules, an application for an order or other relief shall be made by serving and filing a written motion for the order or relief.").

Affirmed.

Dated:

Judge Michelle A. Larkin