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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-743

Robert M. Polomis,
Appellant,

vs.

John Palmer,
Respondent.

Filed December 19, 2011
Affirmed
Larkin, Judge

Chisago County District Court
File No. 13-CV-10-857

Tracy N. Tool, Bye, Goff & Rhode, Ltd., River Falls, Wisconsin (for appellant)

John R. Crawford, Jason M. Hill, Johnson & Lindberg, P.A., Minneapolis, Minnesota (for respondent)

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

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

LARKIN, Judge

In this negligence action, appellant challenges the district court's grant of summary judgment to respondent, arguing that the district court erred in concluding that appellant primarily assumed the risk of injury. In a related appeal, respondent challenges

the district court's conclusion that he owed appellant a duty of care as a landowner. Because respondent did not owe appellant a duty of care, we affirm.

FACTS

This appeal stems from appellant Robert M. Polomis's personal-injury lawsuit against respondent John Palmer. Appellant sued respondent for negligence after he fell from scaffolding and was injured during the construction of respondent's log home. Appellant has more than ten years of experience in the construction industry. He has worked as a carpenter, a log-home builder, and a stone mason. At the time of the events giving rise to the underlying suit, appellant was a self-employed carpenter.

In August 2004, respondent purchased property in Rush City. He contracted with Patriot Log Homes to construct a log home on the property. Construction began in December. Patriot hired appellant as a subcontractor to frame the roof and to erect the walls of the home. After respondent ended his contractual relationship with Patriot, he directly hired appellant to complete the home's staircase, soffit work, and windows.

Respondent provided scaffolding for appellant's use. Appellant was aware that the scaffolding planks provided by respondent did not have hooks to secure the planks to the scaffolding. Appellant concedes that he was aware of the attendant safety risks. But appellant did not complain to respondent regarding the planks, nor did he ask respondent to provide different planks. Instead, appellant attached cleats to the planks in an attempt to make them safer. Appellant also informed respondent that he was going to use some of his own scaffolding and brackets. Appellant's scaffolding was made of angle iron and

attached directly to the home's exterior walls with screws; pegboards were clamped to the top of the angle iron scaffolding.

Appellant used respondent's scaffolding for nearly two months without incident. In the days before his fall, appellant reassembled the scaffolding and planks that respondent provided near the soffit on the south wall of the house. Appellant also assembled his own scaffolding in the same area.

On February 3, 2005, appellant and his crew were completing the soffit work on the log home, using both the scaffolding that respondent provided and appellant's scaffolding. Because there was frost on respondent's scaffolding, appellant applied salt to the planks to melt the ice. Later that morning, appellant climbed onto respondent's scaffolding, and when he stepped onto the top level of the scaffolding, the planking slid out from under him, causing him to fall and sustain injuries.

Appellant sued respondent, alleging that "[respondent] owed [appellant] a duty of due and reasonable care" and that respondent "negligently breached the duty of care by, among other things, failing to secure proper planking for the scaffolding, failing to inspect, failing to warn, and failing to provide safe premises free of unreasonable danger." Respondent moved for summary judgment, arguing that he did not owe appellant a duty of care and that appellant primarily assumed the risk of injury. The district court concluded that respondent owed appellant a duty of care as a landowner. But the district court granted respondent summary judgment based on the primary-assumption-of-risk doctrine. Appellant filed an appeal challenging the district court's

conclusion that he primarily assumed the risk of injury. Respondent filed a related appeal challenging the district court's conclusion that he owed appellant a duty of care.

D E C I S I O N

A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). No genuine issue of material fact exists if the evidence "merely creat[es] a metaphysical doubt as to a factual issue." *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 886-87 (Minn. 2006). We apply a de novo standard of review to a grant of summary judgment based on a legal conclusion, and we view the evidence in the light most favorable to the nonmoving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). "We will affirm a district court's grant of summary judgment if it can be sustained on any grounds." *Presbrey v. James*, 781 N.W.2d 13, 16 (Minn. App. 2010).

"A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). "The basic elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury." *Bjerke v. Johnson*, 742 N.W.2d 660, 664

(Minn. 2007). "[T]he existence of a duty . . . is a legal question to be determined by the judge, not the jury." *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987). On appeal, the existence of a duty is a question of law subject to de novo review. *Bjerke*, 742 N.W.2d at 664.

Two recognized duties of care are raised in this appeal. One is based on the "retained-control" rule and the other is based on respondent's status as a landowner. The Minnesota Supreme Court has explained the difference between the two liability theories:

> [A]n employer of an independent contractor is liable for any personal negligence on his part which causes injury to an employee of the independent contractor. This personal negligence, in an appropriate case, may consist of breach of a duty to exercise reasonably careful supervision of a jobsite where employees of the independent contractor are working when the employer retains control or some measure of control over the project. Even where the employer retains no control, he may still owe a duty of care, as a possessor of land, to persons coming on the premises, including the employees of an independent contractor. Ordinarily this duty would be to inspect and to warn before turning over the jobsite.

Conover v. N. States Power Co., 313 N.W.2d 397, 401 (Minn. 1981) (citation omitted).

"Landowners have a duty to use reasonable care for the safety of all . . . persons invited upon the premises." *Sutherland v. Barton*, 570 N.W.2d 1, 7 (Minn. 1997) (quotation omitted). But landowners are not liable for harm caused by "known or obvious dangers." *Id.* However, "even for obvious dangers, a possessor has a duty to warn if harm to an invitee should be anticipated despite the obviousness of the danger." *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995). "A possessor of land, however, has no duty to an invitee where the anticipated harm involves dangers so obvious that no

warning is necessary." *Id.* "The rationale underlying this rule is that no one needs notice of what he knows or reasonably may be expected to know." *Id.* (quotation omitted). "The difference between open and obvious dangerous activities and conditions for which the possessor should anticipate harm and those activities and conditions for which the possessor should not anticipate harm because they are so open and obvious is a fine one, but one that [appellate courts] choose to make." *Id.* Moreover, "[a] landowner has no duty to an invitee to warn or make safe known and obvious conditions when that invitee has assisted in creating those conditions." *Id.* at 494.

The district court concluded that respondent owed appellant a duty of care as a landowner. The district court reasoned that the danger of falling from the scaffolding was known and obvious to appellant, but that respondent nevertheless should have anticipated the harm. The district court next applied the doctrine of assumption of the risk and concluded that appellant "primarily assumed the risk of falling from icy or wet unhooked scaffolding, therefore negating the duty of reasonable care owed by [respondent]."

Appellant contends that the district court correctly concluded that respondent owed appellant a duty of reasonable care but that the district court erred in concluding that he primarily assumed the risk of falling. Appellant argues that the district court erroneously blurred the distinction between primary and secondary assumption of risk[1]

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[1] "Primary assumption of risk, express or implied, relates to the initial issue of whether a defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. . . . On the other hand, secondary assumption of risk is a type of contributory negligence where the plaintiff voluntarily encounters a known and

and that a jury should decide whether he manifested consent to relieve respondent of his duty of care.

In his related appeal, respondent asserts that the district court erred in finding a duty based on respondent's status as a landowner, arguing that he had no duty to warn of or correct any dangerous condition associated with the scaffolding planks because the danger was open and obvious. Although the district court did not consider or determine whether respondent owed appellant a duty of care under the retained-control rule, respondent also asserts that, because he did not maintain detailed control over the project, he had no duty under the rule. *See Sutherland*, 570 N.W.2d at 2 ("A company hiring an independent contractor is not liable for injuries to that contractor's employee when the company did not retain detailed control over the work project as a whole or over the specific task on which the employee was working when injured.").

The district court's approach to the issues presented is consistent with precedent. *See Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001) (explaining that a determination regarding the existence of a duty must be made before a court considers assumption of the risk); *Baber*, 531 N.W.2d at 495 ("Before a court considers assumption of risk, it should first determine whether the defendant owed a duty to the plaintiff."). In accordance with this approach, we first review the district court's legal conclusion that

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appreciated hazard created by the defendant without relieving the defendant of his duty of care with respect to such hazard." *Armstrong v. Mailand*, 284 N.W.2d 343, 349 (Minn. 1979) (quotation omitted).

respondent owed appellant a duty of care. We begin by defining the proper scope of review on this issue.

In the summary-judgment proceeding in district court, respondent argued that he did not owe appellant a duty of care under the retained-control rule or as a landowner because respondent did not retain a detailed level of control over the construction project and because the danger associated with working on the scaffolding's frosty, unsecured planks was open and obvious. As previously noted, these are separate and distinct theories of liability. *See Conover*, 313 N.W.2d at 401 ("Even where the employer retains no control, he may still owe a duty of care, as a possessor of land . . . ."). But appellant did not assert that respondent owed a duty of care under the retained-control rule: appellant's liability theory in the district court was based on respondent's status as a landowner. Thus, the district court's conclusion that respondent owed appellant a duty of care was based solely on respondent's status as a landowner: in fact, the district court's supporting memorandum does not mention the retained-control rule.

We typically do not consider arguments that were not considered and determined by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court generally will not consider matters not argued to and considered by the district court). Moreover, appellant's appellate briefing on the retained-control rule is limited to his reply brief. And when this court asked appellant, at oral argument, to clarify the legal basis for his assertion that respondent owed him a duty of care, appellant

relied on one legal theory: respondent's status as a landowner.[2] We therefore limit our review of the existence-of-a-duty issue to the landowner-liability theory advanced by appellant.[3]

At the time of his fall, appellant had been working in construction for more than ten years. He was a sole proprietor who specialized in building log homes. Although appellant asserts that "standard issue" scaffold planks have hooks, he concedes that he knew that the planks provided by respondent lacked hooks. Appellant also admits that he knew that, without the hooks, there was a risk that the planks would slide out from under him and cause him to fall. In fact, appellant attached cleats to the planks, in an attempt to compensate for the lack of hooks. These undisputed facts show that appellant knew of the danger involved in using the planks provided by respondent.

The undisputed facts also show that the danger associated with using the planks provided by respondent was obvious. On the day of the accident, the scaffolding was

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[2] Appellant did not argue that respondent owed him a general duty of reasonable care under common law. *See Domagala v. Rolland*, ___ N.W.2d ___, ___, 2011 WL 5061523, at *8 (Minn. Oct. 26, 2011) (explaining that a duty can be imposed under general negligence principles found in common law and observing that the supreme court has imposed a duty of reasonable care to prevent "foreseeable harm when the defendant's conduct creates a dangerous situation"). We nevertheless observe that such an argument would fail because, as discussed later in this opinion, given appellant's expertise in scaffolding work, his injury was not foreseeable. *See id*. at *9 ("Foreseeability of injury is a threshold issue related to duty that is ordinarily properly decided by the court prior to submitting the case to the jury." (quotation omitted)).

[3] We nonetheless observe that because this case does not involve an injury to an independent contractor's employee, application of the retained-control rule is unclear. *See Presbrey*, 781 N.W.2d at 17 (observing that "we do not find[] any cases considering retained control in the context of a homeowner's relationship with an independent contractor who is working on the homeowner's property" and concluding that "the logic of the retained-control cases" did not apply to the facts of that case).

assembled approximately 15' off the ground. Not only were the planks unsecured, they were also frosty. A reasonable person would be aware of the dangers inherent in working on frosty, unsecured scaffolding planks—especially a professional such as appellant. Thus, the risk of injury from slipping and falling was obvious.

Appellant argues that the district court correctly concluded that respondent nonetheless should have anticipated the harm. *See Sutherland*, 570 N.W.2d at 7 (stating that "even if a danger is known and obvious, landowners may still be liable to their invitees if they 'should anticipate the harm despite such knowledge or obviousness.'" (quoting Restatement (Second) of Torts § 343A (1965)). "A reason to anticipate the harm may arise when the landowner 'has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.'" *Id.* (quoting Restatement (Second) of Torts § 343A cmt. f (1965)).

Appellant has expertise in construction and scaffolding work. This expertise is the very reason that he was hired to complete the soffits. According to appellant's own deposition testimony, he had years of experience in the construction business and was often required to work at heights. Under these circumstances, there was no reason for respondent to expect that appellant would encounter the known and obvious danger—working on unsecured, frosty scaffolding—without taking necessary safety precautions. *See id.* (concluding that, because contractor was hired based on its expertise, it was entirely reasonable for contracting land possessor to expect that contractor and its

employees would take necessary safety precautions when encountering a known and obvious dangerous condition during completion of the project).

And we fail to discern any advantages a reasonable person in appellant's position could identify that would outweigh the apparent risk of falling 15' from frosty, unsecured planks. Appellant's argument that he "simply wanted to do his best at the job and reluctantly used the materials that were provided to him" is not persuasive. We therefore conclude, de novo, that respondent had no duty to protect appellant from the harm associated with the known and obvious danger inherent in working on frosty, unsecured scaffold planks.

The district court noted that "this is not a clear-cut case of duty owed by the [respondent]." *See Baber*, 531 N.W.2d at 496 (observing that the difference between open and obvious dangerous conditions for which a landowner should and should not anticipate harm is a fine one). Although the case may be close, a conclusion that respondent did not owe appellant a duty of care as a landowner is consistent with precedent. The supreme court has held that "a landowner has no duty to an invitee to warn or make safe known and obvious conditions when that invitee has assisted in creating those conditions." *Id.* It is undisputed that appellant placed the scaffolding that respondent provided in the location where his fall occurred and that appellant placed respondent's unsecured planks on the scaffolding. Because appellant assisted to create the dangerous condition, this court will not impose a duty of care on respondent. *See id.* ("To hold a landowner has a duty to warn an invitee of danger created, in part, by that individual is untenable.").

In sum, respondent did not have a duty to warn of, or to correct, a known and obvious danger on his property that appellant assisted to create. And because respondent did not owe appellant a duty of care based on his status as a landowner, we affirm the district court's award of summary judgment without analyzing appellant's argument regarding the distinction between primary and secondary assumption of the risk.[4] *See id.* at 495 ("If no duty exists there is no need to determine whether a person assumed the risk thus relieving the defendant of the duty.").

Affirmed.

Dated: ________________________________

Judge Michelle A. Larkin

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[4] Even though it is not necessary to consider application of the assumption-of-the-risk doctrine in this case, we note the supreme court's statement that application of the doctrine "is confusing and has led to seemingly inconsistent decisions." *Baber*, 531 N.W.2d at 495. As was demonstrated all too clearly at oral argument to this court, the confusion inherent in attempting to logically determine whether a given "assumption of the risk" is "primary" or "secondary" continues.