STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2126

Joyce Rau,
Appellant,

vs.

Jordan Michael Keith Leininger, et al.,
Defendants,

Robert Murphy, et al.,
Respondents.

Filed September 15, 2009
Affirmed
Collins, Judge[*]

Stearns County District Court
File No. 73-CV-07-13802

Michael Bryant, Bradshaw & Bryant, 1505 Division Street, Waite Park, MN 56387 (for appellant)

Dyan J. Ebert, James S. McAlpine, Quinlivan & Hughes, 400 First Street South, Suite 600, 56302 (for respondents)

Considered and decided by Minge, Presiding Judge; Stoneburner, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

COLLINS, Judge

Appellant challenges the district court's grant of summary judgment to respondents, arguing that issues of (1) knowledge or obviousness of a hazard and (2) whether respondents could anticipate the danger notwithstanding the fact that a hazard is apparent pose factual questions for a jury. Because there is no genuine issue of material fact and respondents are entitled to judgment as a matter of law, we affirm.

FACTS

In the afternoon of July 14, 2005, appellant Joyce Rau went next door to see the deck that respondents Robert and Geralyn Murphy (the Murphys) had recently added to their home. While there, Rau and Geralyn Murphy stood on the step adjacent to the back door of the garage with their backs towards the Murphys' home. The home has a lower-level window with a window well near the step. According to Geralyn Murphy, when the two started to get off the step Rau's "knee [gave] way, and she went sideways into the window. She fell and she hit her head on the window." Rau simply claims that when her foot left the step she fell backwards into the window well. According to Rau, after the fall Geralyn Murphy repeatedly admitted that the Murphys "knew it was a dangerous place for that window well; they want to put [up] a rail thing; they knew it could be a hazard," and told her "not to worry. [Geralyn Murphy's] insurance will pay or help [Rau]."

It is undisputed that Rau was aware of the window well before she fell into it and that the Murphys "had concerns" about how close the window well was to the back door

of the garage but did not think installing a railing was necessary because they never believed someone would fall into it. The Murphys admitted that they had previously discussed installing a railing around the window well, but testified that they had in mind a mere decorative railing.

Rau sustained serious injuries and sued the Murphys, alleging that her injuries were "the result of [the Murphys'] negligence and carelessness." The Murphys moved for summary judgment, arguing that there is no evidence to establish that they breached a duty owed to Rau or that they caused her injury because (1) the window well was open and obvious, and (2) there is no evidence to indicate that the Murphys anticipated or should have anticipated the harm despite the condition being open and obvious. The district court dismissed Rau's complaint on summary judgment, and she appeals.

D E C I S I O N

Whether summary judgment was properly granted is a question of law, which we review de novo. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). In doing so, we consider whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A genuine issue of material fact does not exist when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.* at 71. A genuine issue for trial must be established by substantial evidence. *Id.* at 69-70. We view the

evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Summary judgment is appropriate when a party fails to establish the existence of an element essential to the party's case. *Bersch v. Rgnonti & Assocs.*, 584 N.W.2d 783, 786 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998).

Rau first asserts that the district court erred by applying the open-and-obvious-danger doctrine because questions of knowledge or obviousness of a hazard are jury questions. To prevail on a negligence claim a plaintiff must first demonstrate that a duty of care existed. *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). The scope of the duty is defined by the probability or foreseeability of injury to the invitee. *Hanson v. Christensen*, 275 Minn. 204, 212, 145 N.W.2d 868, 874 (1966). A possessor of land must "act as a reasonable person in view of the probability of injury to persons entering upon the property." *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972). But the possessor is generally not liable to invitees for physical harm caused to them by a condition on the land if the danger posed by the condition is obvious or known to the invitees. *Zuercher v. N. Jobbing Co.*, 243 Minn. 166, 171, 66 N.W.2d 892, 897 (1954). Generally, whether a condition presents a known or obvious danger is a question of fact. *See, e.g., Louis v. Louis*, 636 N.W.2d 314, 321-22 (Minn. 2001) (holding that summary judgment was not appropriate because whether danger posed by swimming pool was known or obvious was fact question).

Rau relies on *Louis* and the Restatement (Second) of Torts § 343A, cmt. b, to support her position that the district court must make explicit findings that she knew of and appreciated the risk, but neither authority requires such an explicit finding. First, *Louis* is an assumption-of-the-risk case.[1] We determine whether primary assumption of the risk applies by asking whether "a person who voluntarily takes the risk (1) knows of the risk, (2) appreciates the risk, and (3) has a chance to avoid the risk." *Peterson v. Donahue*, 733 N.W.2d 790, 792 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). Contrary to the open-and-obvious-danger doctrine, appreciation of the risk is an express requirement of assumption of the risk. *See Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 746 (Minn. App. 2000) ("Application of the doctrine requires actual, rather than constructive, knowledge."), *review denied* (Minn. Oct. 17, 2000). Second, although Minnesota has adopted the rule set forth in the Restatement (Second) of Torts on open and obvious hazards, the rule states that there is no liability if the risk is known *or* obvious—not known *and* obvious. Restatement (Second) of Torts § 343A (1965). Hence, although the Restatement provides that for a condition to be "known" it must also be recognized to be dangerous, and the probability and gravity of the threatened harm must be appreciated, this principle does not apply if the condition is itself obvious—a fact that Rau does not dispute. Finally, Minnesota caselaw has held that whether a danger is open and obvious depends on an *objective* determination of whether a person would reasonably have seen the danger, not on a *subjective* consideration of whether the person

[1] The Murphys argue that Rau made no such argument before the district court. Rau argued that the Murphys owed her a duty, which we will read to include the issue of whether the open-and-obvious-danger doctrine applies.

actually perceived and appreciated the danger. *Munoz v. Applebaum's Food Market*, 293 Minn. 433, 434, 196 N.W.2d 921, 922 (1972).

Because the open-and-obvious-danger doctrine does not require the district court to make explicit findings that Rau appreciated the risk, the district court did not err by concluding that the open-and-obvious-danger doctrine applied.

Rau also contends that the district court erred by granting summary judgment to the Murphys, arguing that "[w]hether [the Murphys] anticipated or should have anticipated the chance of harm notwithstanding the apparent hazard is a factual issue for a jury to decide[.]"

In *Peterson v. W. T. Rawleigh Co.*, the supreme court held that a possessor is liable to an invitee for harm caused by a known or obvious condition if the possessor should have "anticipate[d] the harm despite such knowledge or obviousness." 274 Minn. 495, 496-97, 144 N.W.2d 555, 557 (1966); *see also Lawrence v. Hollerich*, 394 N.W.2d 853, 855-56 (Minn. App. 1986) (stating that there are "situations in which the possessor of land can and should anticipate that a dangerous condition will cause harm to someone notwithstanding its known or obvious danger," and in those cases, "the duty of reasonable care of the possessor requires him to warn the invitee or to take other reasonable steps to protect him against an obvious danger if the possessor has reason to expect that the invitee will nevertheless suffer physical harm"), *review denied* (Minn. Dec. 17, 1986). The *Peterson* court stated that if the condition's obviousness is so great that a reasonable person would not anticipate harm to an invitee, the possessor is not expected to anticipate

harm. *Id.* at 497, 144 N.W.2d at 558 (noting that "there are situations which are so obviously dangerous the owner has no duty to warn an invitee"). But if the obviousness is not sufficiently great, "the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection." *Id.* "This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition." *Id.*

The distinction between an obvious condition that requires anticipation of harm and one that does not "is a fine one." *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995). It is not essential that the possessor should have anticipated the "particular method in which an accident would occur." *Hanson*, 275 Minn. at 212, 145 N.W.2d at 874. Rather, the evidence is sufficient if it would allow a fact-finder to conclude that the possessor should have anticipated the possibility of the accident. *Id.* The comment to the Restatement indicates that this exception might apply if the possessor has reason to believe that an entrant will be distracted when he or she encounters the danger, or that an entrant might decide to risk the danger because "to a reasonable [person] in his [or her] position the advantages of doing so would outweigh the apparent risk." Restatement (Second) of Torts § 343A cmt. f.

Whether a possessor could have anticipated harm despite the obviousness of the danger posed is generally a question of fact. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005); *cf. Bjerke v. Johnson*, 742 N.W.2d 660, 667 n.4 (Minn. 2007) (noting that broader issue of whether defendant has duty is generally question of law).

However, in some instances, a district court can decide as a matter of law that the possessor should not be expected to anticipate that an obvious danger would cause harm to an invitee. *See, e.g.*, *Engleson v. Little Falls Area Chamber of Commerce*, 362 F.3d 525, 528-29 (8th Cir. 2004) (applying Minnesota law in holding that municipality had no duty to warn pedestrian who tripped over bright orange 28-inch cone intended to separate pedestrian traffic from vehicular traffic at city fair); *Baber*, 531 N.W.2d at 496 (holding that possessor could not anticipate that invitee would impale himself on rods that invitee helped to install); *Bisher v. Homart Dev. Co.*, 328 N.W.2d 731, 732-34 (Minn. 1983) (holding that evidence was insufficient to support verdict of negligence when invitee had tripped on a 3.5-inch high brick border, that was in plain view, enclosing green plants in a shopping center); *Munoz*, 293 Minn. at 434, 196 N.W.2d at 921 (holding that invitee could not recover after slipping in pool of water that was 20 feet by 20 feet and one-fourth inch deep because "dimensions of the pool were such that the hazard was obvious and no other warning was required"); *Snilsberg*, 614 N.W.2d at 744 (holding that possessors had no duty to warn woman of "common-sense danger that the water off the shorter service dock may have been too shallow for diving"); *Sperr v. Ramsey County*, 429 N.W.2d 315, 318 (Minn. App. 1988) (holding that possessor could not foresee that person would injure himself by running into tree branch), *review denied* (Minn. Nov. 23, 1988); *Lawrence*, 394 N.W.2d at 856 (affirming summary judgment when there was nothing to indicate to possessor that invitee would be harmed by descending steep slope in yard).

Although the evidence indicates that the Murphys "had concerns" regarding the proximity of the window well to the back door of the garage and had previously considered installing some sort of railing around the window well, it is undisputed that the window well was large and readily visible and that Rau was aware of it. This is precisely the type of circumstance in which it was proper for the district court to determine as a matter of law that the Murphys should not have anticipated that Rau would fall into the widow well and be injured.

Affirmed.