STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2356

Virginia Harrison, et al.,
Appellants,

vs.

Myron Vold, et al., d/b/a Silver Cliff Motel,
Respondents.

Filed August 24, 2010
Affirmed
Lansing, Judge

Lake County District Court
File No. 38-CV-09-277

Scott R. Suter, Suter Law Office, P.A., Burnsville, Minnesota (for appellants)

Paul A. Rajkowski, Eric S. Oelrich, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Lansing, Judge; and Peterson, Judge.

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

LANSING, Judge

The district court granted summary judgment dismissing Virginia and Charles Harrison's negligence claim against Myron and Carol Vold for injuries Virginia Harrison

sustained after falling on the lawn of the motel owned by the Volds. On appeal, the Harrisons argue that they presented sufficient evidence of the Volds' breach of their duty to protect against a dangerous condition on their property to preclude summary judgment. Because we conclude that the evidence of the existence of a causative dangerous condition is insufficient to withstand summary judgment, we affirm.

F A C T S

Virginia and Charles Harrison were on vacation in September 2003 when they stopped at the Silver Cliff Motel, which is owned and operated by Myron and Carol Vold. The Harrisons parked their vehicle on the driveway in front of the motel's office, which also served as the Volds' residence. The Harrisons walked along the lawn in front of the office to view Lake Superior from the perspective of the motel's cabins. As the Harrisons walked back toward their vehicle and the office entrance, Virginia Harrison fell and broke her leg in three places.

In her deposition testimony Virginia Harrison stated that she fell in a hole that was three or four inches deep. She then qualified her description by saying that she never looked at what caused her to fall, that she did not know what she was basing her description on, and that her description was just a guess. During her deposition she was presented with four pictures of the driveway, the lawn, and the entrance to the motel's office from different perspectives. On two of the photographs she circled the area in the lawn where she fell. The two photographs that she marked also depicted several drainage pipes in the lawn near the area where the Harrisons had parked and walked. Virginia Harrison testified that she did not see the drainage pipes when she fell and became aware

of them only through the photographs. When asked if it was possible that she was walking in the area with the drainage pipes when she fell, Virginia Harrison responded, "No."

Charles Harrison stated in his deposition that he was walking in front of Virginia Harrison when she fell and "didn't see anything." He also said that he did not look around the day of the accident to see where Virginia Harrison fell and did not know if she fell in a hole, a depression, or on uneven ground. The day after the accident, Charles Harrison returned to the motel and took photographs of the lawn. During his deposition, he circled the area of the lawn in the photographs that contained the drainage pipes and said that this was where Virginia Harrison fell. Myron Vold described a slight depression between the drainage pipes and stated that he had to use his hand mower, rather than his riding mower, to cut the grass in this depression.

The Volds moved for summary judgment. The Harrisons opposed the motion and submitted an affidavit from Virginia Harrison, in which she stated that the circle drawn by Charles Harrison on the photograph he took depicts the hole that she fell in and that the circles she drew on the photographs she was shown in her deposition depict the area where she landed. The district court granted summary judgment, concluding that the Harrisons were speculating on the cause of Virginia Harrison's fall and that her affidavit contradicting her deposition testimony was insufficient to raise a genuine issue of material fact. The Harrisons appeal.

D E C I S I O N

On appeal from summary judgment, we determine whether the evidence, "viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). "Mere speculation, 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).

Summary judgment for the defendant is appropriate in a negligence action "when the record reflects a complete lack of proof on any of the four essential elements of the negligence claim: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) [that] the breach of the duty [was] the proximate cause of the injury." *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

A possessor of land "has a duty to use reasonable care for the safety of all . . . persons invited upon the premises." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001) (quotation omitted). The scope of the duty is limited by the probability or foreseeability of injury to an invitee. *Hanson by Hanson v. Christensen*, 275 Minn. 204, 212, 145 N.W.2d 868, 874 (1966). And negligence is not proved by the "mere occurrence of an accident." *Bisher v. Homart Dev. Co.*, 328 N.W.2d 731, 733 (Minn. 1983) (quotation omitted) (stating that "[t]he duty is to guard, not against all possible consequences, but only against those which are reasonably to be anticipated . . . ." (quotation omitted)). The existence of a legal duty is generally a question of law, which we review de novo. *Louis*, 636 N.W.2d at 318.

The district court determined that the Volds did not owe a duty to Virginia Harrison to warn her of "indents, holes, or slopes in the yard, especially when a concrete sidewalk was accessible for use." The Harrisons maintain that Virginia Harrison fell in a hole between the drainage pipes and that the hole constituted a dangerous condition that the Volds should have warned visitors about or repaired. Virginia Harrison's deposition testimony does not support this argument. She stated that it was not possible that she was in the area with the drainage pipes when she fell and instead circled an area to the left of the pipes to designate where she fell. She could only speculate or "guess" about the existence and characteristics of a hole in the lawn that caused her fall. The places that she marked on the photographs showed no visible holes or indentations. She stated that she did not see a hole, that she did not know if her fall was caused by a one-inch change in elevation, and that she was guessing when describing a hole.

Virginia Harrison's post-deposition affidavit is the only nonspeculative evidence that a hole caused her to fall. "A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact." *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995); *see Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001) (citing *Banbury*, 533 N.W.2d at 881). This principle preserves "the utility of summary judgment as a procedure for screening out" issues of fact that are contrived or not genuine. *Banbury*, 533 N.W.2d at 881 (quoting *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983)). An affidavit that explains or clarifies deposition testimony when the deposition itself reflects confusion or mistake can, however, raise a

genuine issue of material fact. *Id.*; *see Hoover*, 632 N.W.2d at 541 n.4 (citing *Camfield*, 719 F.2d at 1365).

Virginia Harrison's affidavit directly contradicts her deposition testimony that the hole she fell in was within the circles she drew on two photographs during her deposition, and that it was not possible that she fell in the area containing the drainage pipes. Although at the time of her deposition she was unsure of the exact cause of her fall, she was certain about the area in which she fell, and her deposition testimony did not reflect confusion or mistake that required clarification in a post-deposition affidavit.

Significantly, Virginia Harrison's affidavit did not include an explanation for the change in her testimony. *See Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 237 (7th Cir. 1991) (stating that "a genuine issue of material fact cannot be established by a party contradicting his own earlier statements unless there is a plausible explanation for the incongruity"). Both her deposition and her affidavit occurred nearly six years after the accident, and it is unlikely that the affidavit, submitted several months after the deposition, would present a clearer memory. Consequently, Virginia Harrison's contradictory affidavit is insufficient to establish a genuine issue of material fact on the existence of a potentially dangerous condition on the Volds' property.

The Harrisons, in their deposition testimony, could only speculate about the existence of a dangerous condition that caused Virginia Harrison's injuries. Virginia Harrison's post-deposition, conflicting affidavit provides no explanation of the reason for the conflict and is insufficient to create a genuine issue of material fact. Because the Harrisons did not present sufficient evidence of the presence of a dangerous condition,

the district court did not err in concluding, as a matter of law, that the Volds had no duty to repair the alleged hole or to warn Virginia Harrison of its existence.

Affirmed.