STATE OF MINNESOTA
IN COURT OF APPEALS
A10-269

Lukas A. Czech, et al.,
Appellants,

vs.

Little Falls Area Chamber of Commerce,
Respondent.

Filed August 31, 2010
Affirmed
Johnson, Judge

Morrison County District Court
File No. 49-CV-09-523

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and James M. Sherburne, Sherburne Law Offices, P.A., St. Louis Park, Minnesota (for appellants)

Joseph A. Nilan, Davis A. Kessler, Gregerson, Rosow, Johnson & Nilan, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Minge, Presiding Judge; Johnson, Judge; and Harten, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving 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

JOHNSON, Judge

Lukas A. Czech was seriously injured when he fell through the ceiling of the second floor of a commercial building and dropped approximately 25 feet to the floor below. Czech alleges that his injuries were caused by the negligence of the building's tenant. The district court granted summary judgment in favor of the tenant. We conclude that summary judgment is appropriate because the tenant did not owe Czech a duty of care. Therefore, we affirm.

FACTS

In 1899, just before moving to New York City, architect Cass Gilbert designed four railroad depots for the Northern Pacific Railway, one of which was built in the city of Little Falls. The depot building now is listed on the National Register of Historic Places and is occupied by the Little Falls Chamber of Commerce. The building, which faces west, has a tall transverse gable in the two-story center section, flanked by one-story sections on the north and south ends of the building. On the north side of the gabled roof are two small dormers, which have wooden louvers to allow ventilation in the attic space at the peak of the gabled roof, above the two-story center section.

In June 2007, some of the louvers on one of the dormers were broken. The Chamber hired A.C. Construction to repair the broken louvers and to make additional repairs to the building that are not relevant to this case. Czech was employed as a full-time carpenter for A.C. Construction, which was owned by his father. Debora Boelz, the President and CEO of the Chamber, informed Czech's father that a small number of

pigeons were in the attic space but that his workers should not be concerned with them and should simply replace the louvers, even if pigeons were trapped inside. Czech overheard this conversation between his father and Boelz. Czech's father later told Czech that Czech could perform all of the repair work from the outside of the dormer and should cause the pigeons to leave the attic by making noise from outside the dormer.

On June 26, 2007, Czech and another employee of A.C. Construction went to the depot building to perform the repairs. After arriving, Czech climbed a ladder to the roof, walked up the rooftop to the louvered dormer, and looked inside the attic space. He saw approximately 15 to 20 pigeons. He decided to install a screen on the inside of the louvers so that pigeons would not be able to enter the attic space again after he repaired the louvers. Czech later testified that he was "excited" to work on the building because of its historical significance and that he wanted "to make sure the job was done right" in order "to prevent it from happening again."

Czech and his coworker went to a hardware store, where Czech purchased materials for the screen and a dust mask. When they returned, Czech went inside the building with an extension ladder. He told Sylvia Ryden, the Chamber's receptionist, that there were more pigeons in the attic than he had anticipated and that he needed to get into the attic space to perform some repairs from the inside. Ryden showed Czech where to access the attic. Czech climbed his ladder and entered the attic space above the north wing of the building. Czech walked through the north part of the attic and then climbed a built-in ladder to enter the attic space in the center section of the building. Czech walked

toward the center section on plywood planks and along a "catwalk," which apparently consists of wide wooden beams.

When Czech reached the area of the dormers in the attic above the center section of the building, he saw approximately 30 to 40 pigeons. He removed approximately 20 to 25 of the pigeons from the attic space by shooing them out or picking them up and setting them on the edge of the dormer. Czech estimates that he removed pigeons in this manner for approximately 30 minutes before he fell through the attic floor and the second-floor ceiling, apparently because he stepped between exposed floor joists. Czech has no recollection of the fall and does not know why or how he fell. Czech suffered numerous injuries, including an injury to his spinal cord at the level of his thoracic vertebrae, which has caused him to be paralyzed below his chest.

In January 2009, Czech and his wife commenced this negligence action against the Chamber. In October 2009, the Chamber moved for summary judgment. In opposition to the Chamber's motion, Czech submitted the affidavit of Philip Goodrich, an engineer who professes specialized knowledge concerning the safe interaction of humans and animals in livestock and poultry facilities. Goodrich's affidavit states that Czech fell because pigeon feces in the attic emitted high levels of noxious gases, such as ammonia, hydrogen sulfide, methane, and carbon dioxide, which caused Czech to lose consciousness. The district court granted the motion and entered summary judgment in favor of the Chamber. Czech appeals.

D E C I S I O N

Czech argues that the district court erred by granting the Chamber's motion for summary judgment. 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). We apply a *de novo* standard of review to a grant of summary judgment, and we view the evidence in the light most favorable to the non-moving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008); *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 39 (Minn. App. 2010).

To prevail in a negligence action, a plaintiff must prove each of four elements: "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). In a negligence action against a possessor of real property, the analysis "begins 'with an inquiry into whether the [defendant] owed the entrant a duty.'" *Foss v. Kincaid*, 766 N.W.2d 317, 320 (Minn. 2009) (quoting *Louis*, 636 N.W.2d at 318). Whether the defendant owed a legal duty to the plaintiff is a question of law. *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 186 (Minn. 2005); *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

A possessor of real property "has a duty to use reasonable care to prevent persons from being injured by conditions on the property that represent foreseeable risk of injury." *Rinn v. Minnesota State Agric. Soc'y*, 611 N.W.2d 361, 364 (Minn. App. 2000) (citing *Hanson v. Christensen*, 275 Minn. 204, 213, 145 N.W.2d 868, 874 (1966)). "When determining whether a danger is foreseeable, we 'look to whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.'" *Foss*, 766 N.W.2d at 322 (quoting *Whiteford ex rel. Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn. 1998)). "The scope of the duty is defined by the probability or foreseeability of injury to the invitee." *Gilmore v. Walgreen Co.*, 759 N.W.2d 433, 435 (Minn. App. 2009), *review denied* (Minn. Mar. 31, 2009). "Although in most cases the question of foreseeability is an issue for the jury, the foreseeability of harm can be decided by the court as a matter of law when the issue is clear." *Foss*, 766 N.W.2d at 322-23.

On appeal, Czech argues that the Chamber owed him a duty to make the property reasonably safe or to warn him about the hazards arising from the large number of pigeons in the attic. At oral argument, Czech made clear that his negligence claim is not based on the general risk of walking in an attic in which the floor joists are not completely covered by a flooring material. Rather, Czech's negligence claim is based on the risk of injury due to being present in such an attic with noxious gases emitted by pigeon feces. In light of Czech's theory of the case, the Goodrich affidavit is essential to the success of his claim. The district court did not adopt the facts stated in the Goodrich affidavit. The parties dispute whether the district court deemed the affidavit inadmissible

or simply concluded that it did not create a genuine issue of material fact, and they make opposing arguments concerning whether the Goodrich affidavit should be part of the district court record. For purposes of this opinion, we assume without deciding that the Goodrich affidavit is admissible and, thus, part of the district court record.

The Chamber frames the duty issue by breaking it down into component parts. The Chamber contends that Czech cannot establish a duty of care unless he can establish each of the following: (1) that the Chamber knew that a large number of pigeons (rather than a few pigeons) were in the attic, (2) that the Chamber knew that a large quantity of pigeon feces would emit high levels of noxious gases that might cause a person to lose consciousness, and (3) that the Chamber could foresee that Czech would enter the attic despite the Chamber's statement that it was unnecessary to do so. We agree that this is a proper way to analyze the evidence. *See Foss*, 766 N.W.2d at 323 (analyzing knowledge and foreseeability based on case-specific facts). Ultimately, a plaintiff has the burden of proving "that the operator of the premises had actual knowledge of the defect causing the injury." *Wolvert v. Gustafson*, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966).

With respect to the first part of the duty analysis, the evidence in the summary judgment record does not create a genuine issue of material fact as to whether the Chamber knew that a large number of pigeons (rather than a few pigeons) were in the attic. Boelz, the Chamber's President and CEO, testified that she had observed only four to six pigeons in the dormer. Czech's father testified that Boelz told him that there were only a few pigeons. Ryden testified that she had observed pigeons on the roof of the building and pigeons entering and exiting the dormer, but she was not specific about their

number. The evidence establishes that Chamber employees knew about the presence of pigeons for more than 15 years before the accident, but that fact, by itself, does not establish that the Chamber knew the extent of the number of pigeons actually present.

With respect to the second part of the duty analysis, the evidence in the summary judgment record does not create a genuine issue of material fact as to whether the Chamber knew before the accident that a large quantity of pigeon feces would emit high levels of noxious gases that might cause a person to lose consciousness. Boelz testified that she never has been in the attic and that she had no knowledge about specific health hazards caused by accumulated pigeon feces. She also testified that none of the Chamber's employees had chronic coughs or any respiratory problems that might have indicated a health hazard. The facts stated in the Goodrich affidavit were not known to the Chamber before the accident.

With respect to the third part of the duty analysis, the evidence in the summary judgment record does not create a genuine issue of material fact as to whether it was foreseeable to Boelz that Czech would enter the attic. Boelz did not tell Czech's father that it was necessary for a worker to enter the attic. Czech's father testified that, consistent with Boelz's statements, he instructed Czech to cause the pigeons to leave the attic by yelling at them and tapping and beating the outside of the dormer, and to go ahead and perform the repair from the outside of the dormer, regardless of the number of pigeons that remained inside. Czech contends that his entry into the attic was foreseeable because he told Ryden that he was doing so. But Czech's intention to enter the attic became known to Ryden too late in time for the Chamber to take any action. If the risk

of harm is not foreseeable, then no legal duty exists. *See Foss*, 766 N.W.2d at 322. "A harm which is not objectively reasonable to expect is too remote to create liability." *Id.*

In his reply brief, Czech contends that the Chamber had a duty to inspect the attic before Czech performed his repairs such that it should be deemed to have "constructive knowledge" of the condition of the attic and the risks present there. A duty of care may arise if a person in possession of real property "had actual *or constructive knowledge* of the dangerous condition." *Rinn*, 611 N.W.2d at 365 (emphasis added) (citing *Messner v. Red Owl Stores*, 238 Minn. 411, 413, 57 N.W.2d 659, 661 (1953)). Regardless whether the Chamber had a duty to inspect generally, Czech's argument conflicts with the rule that a person in possession of land "does not have a 'duty to inspect or to warn of a defect or danger the employee was engaged to correct.'" *Presbrey v. James*, 781 N.W.2d 13, 19 (Minn. App. 2010) (quoting *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 407 (Minn. 1981)). Before entering the attic, Czech informed Ryden that he "needed to go up . . . and do some repairs from the inside and chase some pigeons out." From Ryden's point of view, Czech was engaged, in part, to remove pigeons from the attic, which would preclude any duty of the Chamber to inspect the attic before allowing Czech to enter it. Without a duty to inspect, the Chamber cannot be charged with constructive knowledge of the condition of the attic. *See Conover*, 313 N.W.2d at 407.

To establish the existence of a duty of care, Czech has "the burden of proving either that [the Chamber] caused the dangerous condition or that it knew, or should have known, that the condition existed." *Messner*, 238 Minn. at 415, 57 N.W.2d at 662. Here, none of the evidence demonstrates that the Chamber had knowledge of the large number

of pigeons in the attic or that noxious gases emitted from accumulated pigeon feces in the attic might cause a person to lose consciousness. In addition, the evidence shows that the Chamber did not foresee, and could not have foreseen, that Czech would enter the attic. Therefore, the Chamber did not owe Czech a duty to prevent the harm caused by the accident or to warn him of the hazards arising from the large number of pigeons in the attic. In light of this conclusion, we need not analyze whether the allegedly dangerous condition in the attic was open and obvious, whether the doctrine of assumption of the risk applies, or whether the pigeon feces was the proximate cause of Czech's injuries.

In sum, the district court did not err by granting the Chamber's motion for summary judgment. We respect Czech's high standards of craftsmanship, and we acknowledge the tragedy of his circumstances, but the law does not allow the conclusion that the Chamber is liable for his injuries.

Affirmed.