STATE OF MINNESOTA
IN COURT OF APPEALS
A10-758

Michael John Wolf, et al.,
Appellants,

vs.

Don Dingmann Construction, Inc.,
Respondent,

Lumber One, Cold Spring, Inc.,
Respondent

Filed January 4, 2011
Affirmed
Wright, Judge

Stearns County District Court
File No. 73-CV-09-7294

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

Timothy P. Tobin, Brock P. Alton, Gislason & Hunter, LLP, Minneapolis, Minnesota (for respondent Don Dingmann Construction)

Kevin F. Gray, Kristi D. Stanislawski, Rajkowski Hansmeier, LTD., St. Cloud, Minnesota (for respondent Lumber One, Cold Spring, Inc.)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Huspeni, 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

WRIGHT, Judge

In this negligence action, appellant challenges the district court's summary judgment in favor of respondents, arguing that the district court erred by concluding that respondents owed no duty to appellant. Because there exist no genuine issues of material fact with respect to whether (1) appellant assumed the risk of injury, and (2) the hazard was open and obvious, we affirm.

FACTS

In 2006, appellant Michael John Wolf contracted with respondent Lumber One, Cold Spring, Inc., to remodel his home. Lumber One awarded a subcontract to respondent Don Dingmann Construction, Inc. (subcontractor), to be responsible for certain portions of the construction project. Wolf lived in the house during the construction, and he was present at the jobsite on most days to inspect the progress. Part of the construction project, which Wolf designed, included a ventilation pipe leading from a fireplace in the den up through a loft. With Wolf's knowledge and at his direction, the subcontractor left a 42-by-42 inch opening in the loft's floor during construction to accommodate the ventilation pipe.

On Friday, May 19, 2006, the subcontractor had not yet installed a railing at the edge of the loft. The subcontractor's owner, Don Dingmann, suggested removing the temporary stairs to prevent a risk of injury by eliminating access to the loft over the weekend. But Wolf declined, stating that he would be the sole person on the premises that weekend.

The following Monday, at approximately 11:15 a.m., Dingmann was working in the loft approximately ten feet from the hole while the other members of the subcontractor's crew were working outside. Dingmann observed Wolf climb the stairs from the den into the loft. When Dingmann descended from his ladder a few minutes later, he noticed that Wolf was no longer in the loft. Dingmann found Wolf lying unconscious on the ground below the hole in the loft floor and called for emergency assistance. Wolf remembers ascending the stairs to the loft to check the work on the walls, but he does not remember falling.

Wolf subsequently initiated a lawsuit in district court, alleging that Lumber One and the subcontractor negligently caused his fall. Lumber One and the subcontractor moved for summary judgment, arguing that they owed no duty to Wolf because the danger was open and obvious and because Wolf had assumed the risks associated with his presence on the jobsite. Following a hearing on the motion, the district court granted summary judgment for the contractors. In its decision, the district court concluded that Wolf's primary assumption of the risk of falling negated the contractors' duty of care. Alternatively, the district court concluded that, because the hazard was open and obvious, the contractors owed no duty of care to Wolf. This appeal followed.

D E C I S I O N

We review the district court's decision to grant summary judgment to determine whether there are any genuine issues of material fact 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). Summary judgment shall be granted 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 judgment as a matter of law." Minn. R. Civ. P. 56.03. Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment. Minn. R. Civ. P. 56.05. A genuine issue of material fact does not exist when the nonmoving party presents evidence that creates merely a metaphysical doubt as to a factual issue or evidence that is not sufficiently probative as to permit a reasonable person to draw a different conclusion regarding an essential element of the nonmoving party's case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Rather, there must be evidence sufficient to establish an essential element on which the nonmoving party bears the burden of proof. *Id.* Therefore, to oppose a motion for summary judgment successfully, the nonmoving party is required to "extract *specific*, admissible facts" from the record that demonstrate that a genuine issue of material fact exists. *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988).

I.

To prevail on a negligence claim, the plaintiff must demonstrate that (1) the defendant owed the plaintiff a legal duty of care; (2) the defendant breached that duty; (3) the plaintiff suffered an injury; and (4) the defendant's breach was the proximate cause of the plaintiff's injury. *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). Wolf argues that the district court erred by concluding that his primary assumption of the risk of falling negated the contractors' duty of care. Minnesota law recognizes two types of assumption of risk—primary and secondary. *Swagger v. City of Crystal*, 379 N.W.2d

183, 184 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986). Primary assumption of risk completely bars a plaintiff's recovery because it negates a defendant's duty of care. *Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. App. 2002). Secondary assumption of risk constitutes a form of contributory negligence that apportions fault between the parties. *Id*. A plaintiff undertakes primary assumption of risk when, with knowledge and appreciation of the risk, the plaintiff voluntarily engages in that risk, rather than avoiding it. *Olson v.Hansen*, 299 Minn. 39, 43-44, 216 N.W.2d 124, 127 (1974). A plaintiff undertakes secondary assumption of risk when, under the same circumstances, the plaintiff does not manifest consent to relieve the defendant of his duty. *Armstrong v. Mailand*, 284 N.W.2d 343, 351 (Minn. 1979).

An assumption-of-risk analysis is based on the plaintiff's subjective knowledge and appreciation of the risk. *Parness v. Econ. Lab., Inc.*, 284 Minn. 381, 385, 170 N.W.2d 554, 557 (1969); *see also Magnuson v. Rupp Mfg., Inc.*, 285 Minn. 32, 48 n.6, 171 N.W.2d 201, 211 n.6 (1969) (Rogosheske, J., concurring) ("[Assumption of risk] is based on a subjective analysis and may be found whenever the plaintiff (1) had knowledge of the risk, (2) appreciated the risk, and (3) had a choice to avoid the risk and voluntarily chose to chance it."). When the evidence is uncontraverted as to whether a person had knowledge of the risk, application of the assumption-of-risk defense becomes a question of law for the district court to determine. *Knutson v. Arrigoni Bros. Co.*, 275 Minn. 408, 414, 147 N.W.2d 561, 566 (1966).

Wolf's injuries arose from a risk inherent to an elevated construction site, namely, the risk of falling. *See Goodwin v. Legionville Sch. Safety Patrol Training Ctr.*, 422

N.W.2d 46, 50 (Minn. App. 1988) (applying primary-assumption-of-risk doctrine because falling off a roof is a well-known incidental risk of roofing), *review denied* (Minn. June 23, 1988). Even if the subcontractor was negligent by leaving the hole uncovered or failing to erect guardrails, Wolf's recovery is legally barred because primary assumption of risk is applicable when a defendant engages in negligence that is obvious. *See Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 105 (Minn. App. 1991) ("By voluntarily entering into a situation where the defendant's negligence is obvious, the plaintiff accepts and consents to it and agrees to undertake to look out for himself and relieve the defendant of the duty." (quotation omitted)), *review denied* (Minn. Mar. 27, 1991).

The undisputed facts establish that Wolf had personal knowledge and appreciation of the risk of falling. Wolf was familiar with the jobsite because he designed the loft, he lived in the home during construction, and he inspected the jobsite regularly. In his deposition testimony, Wolf stated that he knew better than to fall down a hole, he has been on construction sites before, and a person entering a construction site should be cautious. It is also undisputed that Dingmann and Wolf discussed taking safety precautions regarding the loft because it lacked guardrails. But Wolf declined them as unnecessary. This evidence not only indicates that Wolf had the authority to veto safety decisions, but also that he appreciated the risk presented by the construction site's condition.

Wolf voluntarily chose to engage in the risk rather than avoid it. It was common for Wolf to inspect the work, and a photograph taken the same day as the accident

established that he had stood on the unfinished loft when it was in the same condition as it was when he fell. Wolf went up to the loft on the morning of his fall to check the work on the walls, describing his reason for doing so as being "nosey." The record reflects that Wolf climbed up to the loft for no reason other than his curiosity. In doing so, he undertook the risk voluntarily and relieved the contractors of their legal duty of care.

Wolf argues that secondary assumption of risk rather than primary assumption of risk applies here, thereby creating a genuine issue of material fact to be resolved by a jury. For secondary assumption of risk to apply, there must be an absence of consent to absolve Lumber One and the subcontractor of their duty. "[A] plaintiff consents to relieve the defendant of his duty when the plaintiff voluntarily enters into a relationship in which the plaintiff assumes well-known, incidental risks." *Schneider*, 654 N.W.2d at 150. Although primary assumption of risk is most often applied to spectators at or participants in athletic activities, *id.* at 149, the undisputed facts establish that Wolf had experience at construction sites, knowledge of the incidental risks associated with construction sites generally, and knowledge of the risks associated with this particular construction site. These circumstances warrant application of primary assumption of risk here. Because Wolf manifested his consent to relieve the contractors of their duty and thereby assumed the well-known, incidental risks associated with entering an elevated construction site that included a 42-by-42-inch hole, he primarily assumed the inherent risk of falling that gave rise to his injuries. Summary judgment dismissing his negligence claims, therefore, was proper.

II.

The district court alternatively concluded that, because the hazard was open and obvious, the contractors owed no duty to Wolf. Although Wolf concedes that he was aware of the hole's existence, he argues that the contractors nonetheless owed him a duty because they should have anticipated the harm.

For purposes of the summary-judgment motion, the district court assumed, without deciding, that the contractors owed a duty under a premises-liability theory. The contractors are relieved of that duty, however, if the danger posed by the hazardous condition was known or obvious. *Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001). Determining whether a danger is obvious requires an objective inquiry into whether the danger was visible, regardless of whether the injured party actually observed the danger. *Id.* at 321-22. Minnesota courts have held that walking into a low-hanging branch or large planter, down a steep hill, or across a 20-foot puddle of water present such obvious dangers that a warning was not necessary. *Id.*

The injured party also must have recognized and appreciated that the condition was dangerous. *Id.* at 321. Falling from an elevated height is inherently dangerous. *See Presbrey v. James*, 781 N.W.2d 13, 19 (Minn. App. 2010) (holding that decedent's fall from a deck that he was repairing was an obvious danger); *Goodwin*, 422 N.W.2d at 49-50 (observing that falling is well-known incidental risk of roofing). As discussed in section I, there is ample undisputed evidence that Wolf knew of and appreciated this dangerous condition. This evidence includes Wolf's testimony that he designed the loft specifically so that a pipe would extend through the loft floor without enclosure, that he

was regularly present at the jobsite, and that he could see the hole. Indeed, the photograph taken on the morning of the accident shows Wolf standing adjacent to the hole.

Even if the danger was obvious, Wolf argues, the contractors are not relieved of their duty if they could nonetheless anticipate the harm. *See Louis*, 636 N.W.2d at 321; *see also Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995) (explaining fine distinction between open-and-obvious dangerous conditions for which harm should be anticipated and dangerous conditions so open and obvious that harm should not be anticipated). Wolf relies on *Gaston v. Fazendin Constr., Inc.*, in which the employee of a subcontractor fell into a hole in a bathroom floor that ordinarily was covered but had been uncovered that morning by the defendant construction company to permit work to be completed in that area of the house. 262 N.W.2d 434, 435 (Minn. 1978). The *Gaston* court upheld the jury's finding that the defendant should have anticipated the harm. *Id.* But the facts of *Gaston* are readily distinguishable from those present here. There is no evidence that the plaintiff in *Gaston* knew about the hole or that he had been to that construction site prior to the afternoon of the accident. *Id.* By contrast, Wolf designed the loft, he was regularly at the jobsite inspecting the construction progress, he knew the precise location of the hole, and he had specifically discussed with Dingmann the dangers of falling from the loft. Wolf testified that he did not anticipate falling down the hole because he is "smarter than that." Under these unique circumstances, the contractors were relieved of any duty attributable to their ability to anticipate the harm.

Relying on *Gilmore v. Walgreen Co.*, Wolf argues that, because there is evidence that he was distracted and might have forgotten that the hole was there, such distraction could have been anticipated. *See* 759 N.W.2d 433, 437 (Minn. App. 2009) (holding that possessor may be liable for harms resulting from open and obvious danger if possessor reasonably could anticipate that injured party could be distracted from the danger), *review denied* (Minn. Mar. 31, 2009). But unlike the facts in *Gilmore*, the record here contains no evidence of visual distractions, and the noise of the construction site would not have prevented Wolf from seeing a hole that he knew was present in the floor. Wolf also contends that he may have been distracted by speaking with Dingmann just before he fell. But Wolf's contention that he may have been distracted is based on a statement by a third party who was not present when the fall occurred and indicates only that Dingmann and Wolf might have spoken at some point that morning. "To forestall summary judgment, the nonmoving party must do more than rely on unverified or conclusionary allegations in the pleadings or postulate evidence which might be produced at trial." *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998) (quotation omitted). Here, even when the evidence is viewed in Wolf's favor, Wolf's contention does not preclude summary judgment.

Thus, we conclude, as did the district court, that summary judgment also is proper on the alternate ground that, because the hazard was open and obvious to Wolf, the contractors did not owe Wolf a duty under a premises-liability theory of recovery.

Affirmed.