STATE OF MINNESOTA
IN COURT OF APPEALS
A10-862

Dean Kalenda,
Appellant,

vs.

Veit & Company, Inc.,
Respondent,

Copeland Building Corporation,
Respondent,

Glimcher Northtown Venture, LLC,
Respondent,

and

Veit & Company, Inc.,
Third Party Plaintiff,

vs.

Luminaire Recycling, Inc., d/b/a Luminaire Recyclers, Inc., third party defendant,
Respondent.

Filed February 22, 2011
Affirmed
Larkin, Judge

Anoka County District Court
File No. 02-CV-09-4170

Joseph J. Osterbauer, Kirsten M. Tate, Mary A. Bejar, Osterbauer Law Firm, Minneapolis, Minnesota (for appellant)

Daniel A. Haws, John Paul J. Gatto, Murnane Brandt, St. Paul, Minnesota (for respondent Veit & Company, Inc.)

Michael J. Tomsche, Carena E. Crowell-Chambers, Tomsche, Sonnesyn & Tomsche, P.A., Golden Valley, Minnesota (for respondent Copeland Building Corporation)

Dale M. Wagner, Mark R. Bradford, Bassford Remele, A Professional Association, Minneapolis, Minnesota (for respondent Glimcher Northtown Venture, LLC)

Patrick D. Reilly, Erstad & Riemer, Minneapolis, Minnesota (for respondent Luminaire Recyclers, Inc.)

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

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

LARKIN, Judge

Appellant challenges the district court's award of summary judgment to respondents. He also claims that the district court abused its discretion by denying his motion to amend his complaint. Because the district court correctly concluded that respondents did not owe appellant a duty as a matter of law and because the district court did not abuse its discretion in concluding that prejudice would have resulted from the proposed amendment, we affirm.

FACTS

In May 2007, respondent Glimcher Northtown Venture, LLC, owner of the Northtown Mall in Blaine, contracted with respondent Copeland Building Corporation to demolish portions of the southwest corner of the mall. Copeland, the general contractor, subcontracted with respondent Veit & Company, Inc. to perform the demolition and

excavation work. Veit in turn subcontracted with Luminaire Recycling, Inc., to remove certain materials, including fluorescent light bulbs and transformers from mall-entrance overhangs and other areas. Because the removal of light fixtures and transformers is environmentally regulated, it was necessary to remove these items before Veit could begin its demolition work. Appellant Dean Kalenda worked for Luminaire.

On August 30, Luminaire employees, including Kalenda and project-manager Steve Crist, were working at the mall. After Crist left for the day, Kalenda decided to remove transformers from an overhang above one of the mall entrances.[1] The overhang was located 20 feet above the ground. According to Luminaire personnel, the preferred method for removing transformers from inside a canopy of this type is to stand on the platform of a scissor lift,[2] ascend to just below the level of the canopy, puncture a hole in the canopy in the vicinity of the transformer, and remove the transformer while safely standing on the platform of the scissor lift. But Kalenda was concerned for the safety of people walking below the overhang. So, although he had access to a scissor lift, he chose to retrieve the transformers by venturing inside of the overhang.

To enter the overhang, Kalenda used a scissor lift to elevate himself to the height of the mall doors. Next, he climbed from the lift onto a platform above the mall doors and used a six-foot ladder to climb into the overhang by way of an access panel. Once

[1] For purposes of appellate review, the facts are viewed in the light most favorable to Kalenda. *See Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) ("On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.").

[2] A scissor lift is a mechanical lift equipped with stabilizing bars to prevent the lift from tipping after reaching a certain height.

inside the access panel, Kalenda's helmet lamp was his sole light source, and he could only see as far as his arm's length. Kalenda observed a beam that lay perpendicular to support beams and appeared to be secured to those support beams by wires. The beam was between 18 and 19 inches wide. Kalenda crawled on the beam to reach the transformers, which were approximately 25 feet away. Kalenda did not walk on the plaster ceiling below the beams because he knew it would not support his weight. Kalenda did not use a safety harness, even though one was available to him, or any other type of fall protection while performing this work. Kalenda removed two 20-pound transformers, without incident, by pushing them across the beam. Kalenda was in the process of removing a third transformer when the beam shifted. Kalenda lost his balance and fell off the beam. He fell through the plaster ceiling to the ground 20 feet below, and sustained injuries as a result.

Kalenda sued Glimcher, Copeland, and Veit (together, respondents) alleging negligence. Respondents moved for summary judgment, and Kalenda moved for leave to amend his complaint to add a breach-of-contract claim. The district court denied Kalenda's motion for leave to amend and later granted respondents' motions for summary judgment. This appeal follows.

D E C I S I O N

I.

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, 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).

"The basic elements necessary to maintain a claim for negligence are (1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury." *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954). If the record lacks proof of any of the elements of the claim, the defendant is entitled to summary judgment. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

The district court granted summary judgment based on its determination that Kalenda failed to establish that respondents owed him a duty. "Existence of a legal duty is generally an issue of law for the court to decide, and we therefore address the issue de novo." *Servicemaster v. GAB Business Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996).

The supreme court has been hesitant to hold a company hiring an independent contractor liable for injuries to that contractor's employees. *Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1997). But

> an 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) (citations omitted); *see also Sutherland*, 570 N.W.2d at 6 (addressing a contracting landowner's duty, as a landowner, to contractor's employee, as a business invitee, despite concluding that the landowner did not retain the necessary detailed control over the construction project or the specific task that employee was performing to warrant imposition of liability for the employee's fatal injuries).

In this case, the district court concluded that respondents did not retain operative control over Luminaire's work and therefore had no duty in that regard. The district court also concluded that respondents had no duty as land possessors to Kalenda as an invitee, because the dangerous condition at issue here was known and obvious. Kalenda does not challenge the district court's conclusion that respondents did not maintain operative control over the project. We therefore do not review this conclusion. *See*

Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived). Instead, Kalenda challenges the district court's conclusion that respondents did not owe a duty of care, as possessors of land, to Kalenda as an invitee.

"Landowners have a duty to use reasonable care for the safety of all . . . persons invited upon the premises." *Sutherland*, 570 N.W.2d at 7 (quotation omitted). As a landowner, a company may be directly liable, as a possessor of land, to persons coming on the premises, including the employees of an independent contractor." *Id.* (quotation omitted). Landowners are not, however, liable for harm caused by known or obvious dangers unless the landowner should anticipate the harm despite its obvious nature. *Id.* "[L]andowners are not liable to their invitees for harm caused by dangers that are 'known or obvious' to those invitees." *Id.*

At the time of his fall, Kalenda had been a Luminaire employee for ten years and had performed demolition work for approximately eight years. Kalenda had several years of experience working at heights, had received fall-protection training, and was provided with safety equipment. Kalenda testified at his deposition that the only safe way to work at a height similar to the height of the overhang was to work on the platform of a lift. These undisputed facts show that Kalenda knew of the danger involved in traversing the beam in the overhang.

The undisputed facts also show that the danger associated with traversing the beam was obvious. Kalenda's headlamp was his sole light source, and it only allowed him to see as far as the end of his arm. Kalenda testified that the beam was no wider than two of his feet put together. He also testified that he knew the ceiling of the overhang,

which was below the beam, would not support his weight. "Obvious" is the only reasonable description of the danger inherent in using the beam, under these conditions, as a method of accessing and transporting the transformers, which weighed approximately 20 pounds each.

Kalenda argues that "the district court missed the mark because the unknown dangerous condition here was not that of falling" but rather of the beam shifting. We are not persuaded. This argument presumes that but for the movement of the beam, there would not have been a known and obvious danger. The record belies this presumption. Even if the beam was completely stable, and its movement was beyond possibility, the use of the beam to access and transport the transformers still presented a known and obvious danger.

Kalenda also argues that even if the danger was known and obvious, respondents should have nonetheless anticipated the harm. *See id.* (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)).

Kalenda argues that because there was an access panel to the interior of the overhang, the beam existed for the purpose of accessing the transformers, and the beam

was the only means of accessing all of the transformers, respondents should have anticipated that Kalenda would have traversed the beam to access the transformers. But the record refutes this argument. There is no evidence that the beam existed for the purpose of accessing the transformers; this is merely Kalenda's assertion. "[T]he party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). And there was another, preferred, means of access: the scissor lift.

Moreover, Kalenda had expertise in removing light fixtures. This expertise is the very reason that Luminaire was contracted to remove the fixtures. According to Kalenda's own testimony, his employment required him to work at heights, and he had training and equipment that would enable him to perform his work safely, including the scissor lift. Kalenda's supervisor testified at his deposition that the preferred method of performing this type of task was to access the transformers from the outside of the overhang, by using a scissor lift to reach its ceiling and a hammer to break through the ceiling. He also testified that if an employee must enter an overhang, the employee should not do so without personal fall protection unless there is a walkway with structural support and guardrails. Under these circumstances, it was entirely reasonable to expect that Luminaire would take the necessary safety precautions and would require its employees to follow proper safety guidelines. Accordingly, there was no reason to expect that Luminaire and its employees would encounter the danger—traversing the beam inside of the overhang—without taking the necessary precautions. *See Sutherland*, 570 N.W.2d at 7 (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). Thus, the district court correctly concluded that respondents did not have a duty to protect Kalenda from the harm associated with the known and obvious danger inherent in traversing the beam.

Kalenda also asserts that respondents had a contractual obligation and duty to maintain a safe work environment. Kalenda notes that under the contract between Glimcher and Copeland, Copeland was required to "take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to. . . (a)ll employees on the Work and all other persons who may be affected thereby." Kalenda correctly states that a third party may be deemed an intended beneficiary of a contract when "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 427 N.W.2d 281, 285 (Minn. App. 1988) (quotation omitted). Kalenda then concludes, without engaging in any legal analysis or offering any legal argument, that "as the employee of a subcontractor on the demolition project, [he] was an intended third-party beneficiary of Copeland's and Glimcher's agreement to protect the safety of individuals working at the demolition site," that he "is therefore entitled to recover as a third-party intended beneficiary," and that the district court therefore erred in its summary judgment award. But because Kalenda does not provide any legal analysis or argument to support his conclusion that he is an intended third-party beneficiary, this argument is waived for lack of adequate briefing. *See State v. Modern Recycling, Inc.*,

558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error in brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

Kalenda further argues that respondents' alleged violations of OSHA regulations constitute negligence per se. "Minnesota has adopted federal OSHA regulations by statute." *Zorgdrager v. State Wide Sales, Inc.*, 489 N.W.2d 281, 284 (Minn. App. 1992). "It is well settled that breach of a statute gives rise to negligence per se if the persons harmed by that violation are within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent." *Id.* (quotation omitted). Although Kalenda states this rule of law and repeatedly claims that OSHA violations in this case establish negligence per se, he never identifies the alleged violations. Instead, Kalenda generally references "OSHA statutes and regulations that were intended to protect the safety of all workers." But without first identifying the statute or regulation that was allegedly violated, Kalenda cannot establish that he is within the class of persons intended to be protected by the statute, or that the harm that he suffered is of the type the legislation was intended to prevent. Kalenda's negligence per se argument is therefore inadequately briefed, and we do not consider it. *See Modern Recycling, Inc.*, 558 N.W.2d at 772.

In summary, we conclude that respondents owed Kalenda no duty as a matter of law and that the district court did not err in its award of summary judgment.

II.

Prior to awarding summary judgment, the district court denied Kalenda's motion for leave to amend his complaint, concluding that amendment would prejudice respondents and that his proposed breach-of-contract claim could not survive summary judgment. Kalenda argues that the district court erred in this regard.

"Ordinarily, amendments to pleadings should be freely granted except when prejudice would result to the other party." *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000). Furthermore, "[a] motion to amend a complaint is properly denied when the additional claim could not survive summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

Kalenda filed this lawsuit on February 24, 2009. The district court issued a scheduling order in August 2009 setting a discovery deadline of January 10, 2010, and a jury trial date of May 10, 2010. Respondents moved for summary judgment on January 26. On February 11, Kalenda moved to amend his complaint to add a breach-of-contract claim. At the hearing on his motion, Kalenda conceded that the proposed claim would likely require additional discovery.

The district court denied the motion to amend because reopening discovery and delaying trial would have prejudiced respondents. This court has found prejudice to adverse parties in similar circumstances. *See, e.g.*, *Bebo*, 632 N.W.2d at 741 (finding

prejudice would have resulted to parties opposing the motion to amend brought one week after motions for summary judgment and less than two months before trial, because additional discovery would have been necessary); *Metag v. K-Mart Corp.*, 385 N.W.2d 864, 866 (Minn. App. 1986) (holding that the district court did not abuse its discretion in denying motion to amend the complaint brought almost four years after action was commenced where new claims would have required further discovery and postponement of trial), *review denied* (Minn. June 23, 1986). Under these circumstances, the district court did not abuse its discretion by denying Kalenda's motion to amend.

The district court also reasoned that Kalenda's proposed breach-of-contract claim could not survive summary judgment. The district court noted that Kalenda had to establish that he is a third-party intended beneficiary to recover on the claim and concluded that he failed to present evidence of a genuine issue of material fact regarding his rights under the relevant contracts. Although Kalenda assigns error to this conclusion, his argument is limited to the following assertion: "But the claim would survive summary judgment because, as noted above, [Kalenda] is an intended third-party beneficiary under the contracts between the respondents and may therefore recover for their breaches in failing to maintain a safe work environment." This argument, like his earlier unsupported assertion that he is an intended third-party beneficiary, is

inadequately briefed. We therefore do not consider it. *See Modern Recycling, Inc.*, 558 N.W.2d at 772.

Affirmed.

Dated:

Judge Michelle A. Larkin