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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1245**

David Homick,
Appellant,

vs.

Bozena Hellem,
Respondent.

**Filed January 16, 2018
Reversed and remanded
Smith, Tracy M., Judge**

St. Louis County District Court
File No. 69DU-CV-16-2824

Robert C. Falsani, Falsani, Balmer, Peterson & Quinn, Duluth, Minnesota (for appellant)

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Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and
Smith, John, Judge.*

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

SMITH, TRACY M., Judge

Appellant David Homick challenges the summary-judgment dismissal of his
personal-injury negligence claim, arguing that the district court erred because there is a

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

genuine issue of material fact as to whether respondent-landowner Bozena Hellem should have anticipated the harm to appellant. Because we conclude that the district court erred in granting summary judgment to Hellem, we reverse and remand for further proceedings.

FACTS

On the early morning of March 30, 2015, Homick injured his knee and ankle when he tripped on a raised sidewalk slab while walking out of the rear door and onto the sidewalk of an apartment building owned by Hellem. Homick had been visiting his girlfriend, who was a second-floor tenant in the building. Homick's girlfriend asked Homick to exit through the building's rear door because its self-locking mechanism relieved her of having to walk him to the front door and lock it behind him. The accident occurred in daylight. There was no snow or ice on the ground, it was not snowing or raining, and Homick was wearing tennis shoes. Homick sued Hellem, alleging that his injuries were caused by Hellem's negligent failure to maintain her property.

Hellem had owned the apartment building for approximately 30 years. One year before Homick's injury, Hellem noticed that the condition of the sidewalk had deteriorated. Hellem admitted that the sidewalk was dangerous at the time of Homick's injury and that she had planned to have it repaired. Hellem said that she had received no complaints about the sidewalk and that the apartment building had passed all city inspections prior to Homick's injury.

In June 2017, Hellem moved for summary judgment, claiming that she owed no duty to Homick because the raised sidewalk slab was an open and obvious danger. Homick opposed the motion, arguing that Hellem should have anticipated the harm despite the open

and obvious danger. The district court granted summary judgment in favor of Hellem, concluding that the defect in the sidewalk was so open and obvious that Hellem could not have reasonably foreseen Homick's injury and that Hellem did not owe a duty to warn Homick or repair the defect. Homick appeals.

DECISION

Homick argues that the district court erred by granting Hellem's motion for summary judgment on his negligence claim. Summary judgment is proper when "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 nonmoving party. *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 564 (Minn. 2008). On appeal from summary judgment, we review de novo "whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "[W]e view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

It is the general rule that landowners have a duty to use reasonable care for the safety of all persons who are permitted to enter their land. *Louis v. Louis*, 636 N.W.2d 314, 318-19 (Minn. 2001). As an exception to this general rule, Minnesota has adopted the rule set

forth in Restatement (Second) of Torts § 343A (1965) providing that a landowner may be relieved of a duty to protect entrants from known or obvious dangers:

A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

See, e.g., Louis, 636 N.W.2d at 319. The latter half of the rule, concerning whether a landowner should anticipate the harm despite such knowledge or obviousness, is “an exception to the exception.” *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). The Minnesota Supreme Court has described the framework of applying the rule as follows: a landowner is liable to a guest for harm arising from a condition on the property, *except* if the danger was known or obvious to the guest, *unless* the landowner should have anticipated the harm to the guest. *Id.* at 43.

The parties agree that the raised sidewalk slab presented an open and obvious danger. They dispute whether a genuine issue of material fact exists as to whether Hellem should have anticipated the harm despite the open and obvious danger. Whether a landowner should have anticipated the harm is an issue of foreseeability. *Id.* The foreseeability of a particular harm is based on the facts and circumstances of the case and “whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.” *Id.* (quotation omitted). In some circumstances, a danger is so open and obvious that a landowner should not anticipate the harm and has no duty to warn a guest of the danger. *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995).

Foreseeability is “a threshold issue related to duty that is ordinarily properly decided by the [district] court prior to submitting the case to the jury.” *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn. 2011) (quotation omitted). However, “[i]n close cases, the issue of foreseeability should be submitted to the jury.” *Id.* “[T]he issue of foreseeability is close . . . when the evidence presents an explicit dispute of material fact or when a reasonable person might draw different conclusions from the evidence.” *Senogles*, 902 N.W.2d at 43 (quotation omitted).

In *Senogles*, a four-year-old child sustained severe injuries after nearly drowning in the Mississippi River. *Id.* at 40. The district court granted summary judgment in favor of the landowner on the ground that the harm to the child was not foreseeable to the landowner and therefore the landowner owed no duty to the child. *Id.* at 41. The supreme court reversed the summary judgment, concluding that, even assuming the danger had been obvious to the child, the issue of whether the landowner should have anticipated the harm was a close case to be decided by the jury. *Id.* at 47-48.

In *Peterson v. W. T. Rawleigh Co.*, an employee was injured after slipping on ice in an employer’s parking lot. 274 Minn. 495, 496, 144 N.W.2d 555, 557 (1966). The employer-landowner asserted that it owed no duty to protect its employees from the obvious danger of an icy and unplowed surface. *Id.* Upon review, the supreme court applied the rule of Restatement (Second) of Torts § 343A (1965). *Id.* The supreme court held that a landowner should foresee a harm if he “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.* at 497, 144

N.W.2d at 557-58 (quotation omitted). The supreme court stated that the landowner “should have foreseen that its elderly distributors would . . . attempt to negotiate the area . . . despite the slippery conditions.” *Id.* at 497, 144 N.W.2d at 558. The supreme court concluded that it was proper to submit the negligence claim to the jury. *Id.* at 498, 144 N.W.2d at 558.

Here, we conclude that the evidence, when viewed in the light most favorable to Homick, presents a close case on the issue of foreseeability, which must be decided by the jury. Specifically, Hellem knew that the condition of the sidewalk had deteriorated, that the raised sidewalk slab was dangerous, that the rear door was a convenient exit because it was self-locking, and that tenants and guests were likely to use the rear door and the sidewalk despite its condition. As in *Peterson* and in *Senogles*, a rational trier of fact could conclude that the property owner should have anticipated the harm—specifically, that tenants and guests would use the rear door, attempt to negotiate the deteriorated sidewalk, and encounter the open and obvious danger of the raised slab. With *Senogles* and *Peterson* as our guideposts, we conclude that the district court erred in granting summary judgment because a genuine issue of material fact exists on the issue of whether Hellem should have anticipated the harm to Homick.

Homick raises two additional arguments in support of his contention that the district court erred in granting summary judgment. First, Homick argues the district court erred in failing to consider whether Hellem’s maintenance of the sidewalk violated the Duluth Housing Code. We note that Homick did not address the alleged code violation or how it related to the case in the argument section of his summary-judgment memorandum; he only

referenced it in the fact section. Appellate courts generally do not consider matters not properly argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Second, Homick argues that the district court erred by failing to consider the effect of Hellem's subsequent remedial repair of the sidewalk. Evidence of subsequent remedial measures is inadmissible to prove negligence. Minn. R. Evid. 407. The rule provides a narrow exception for the admissibility of such evidence when offered to prove "[the] feasibility of precautionary measures, if controverted, or [for] impeachment." *Id.* We note that no evidence demonstrates that Hellem controverted the feasibility of repairing the sidewalk and that Homick did not identify a valid impeachment purpose for admitting the evidence. Although neither of appellant's additional arguments is availing, because we conclude that foreseeability is a close question, we reverse the grant of summary judgment and remand for further proceedings.

Reversed and remanded.