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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1784**

Said Ahmed Nur,
Appellant,

vs.

Jimmy Johns Sandwiches,
Respondent.

**Filed July 2, 2018
Affirmed
Stauber, Judge***

Hennepin County District Court
File No. 27-CV-16-16305

Said Ahmed Nur, Minneapolis, Minnesota (pro se appellant)

William A. Celebrezze, Goetz & Eckland P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Reilly, Judge; and Stauber,
Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges the summary-judgment dismissal of his claims against
respondent for injuries sustained when appellant walked into a glass vestibule wall at

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

respondent's restaurant. Appellant argues that his attorney failed to provide the district court with all of the relevant evidence and that respondent's subsequent remedial measures indicate that it was negligent. We affirm.

FACTS

In June 2016, appellant Said Ahmed Nur sued respondent Jimmy Johns Sandwiches (Jimmy Johns), asserting claims of negligence and negligence per se under Minn. Stat. § 299G.11 (2008) regarding Nur's collision with a glass wall at a Jimmy Johns restaurant in Minneapolis.¹ The complaint alleged that the front entrance to the restaurant was a "commercial single panel glass door encompassed in a metal frame with a push bar located in the center of the door." The complaint also alleged that "[b]eyond the front door there is an entrance area or vestibule which leads to another entrance door into the sandwich shop." The vestibule consists of floor-to-ceiling clear sheets of glass, including the door to the inside of the restaurant. The complaint alleged that on November 21, 2015, at about 1:30 a.m., Nur attempted to enter the Jimmy Johns restaurant through its front entrance and that after entering the first door, Nur "assumed he was then in the sandwich shop" and "due to the lack of markings and clear glass panes, . . . Nur walked with full stride about eight feet" and "collided into a clear pane of glass." The complaint further alleged that as a result of this accident, Nur sustained "serious and permanent injuries to his forehead, nose, and front teeth," incurred medical expenses, and has been unable to work full time.

¹ Minn. Stat. § 299G.11 previously required public buildings to have markings on doors or side lights constructed with clear glass. The legislature repealed the statute in 2010. 2010 Minn. Laws ch. 280, § 40, at 17.

On September 11, 2017, Jimmy Johns brought motions in limine to exclude from trial (1) information about Jimmy Johns's insurance coverage, (2) arguments that Jimmy Johns is negligent per se under Minn. Stat. § 299G.11 or any other statute, (3) a hearsay statement from a bystander who was allegedly present at the time of the collision, (4) any fact witness other than Nur, (5) any expert-witness evidence, (6) medical records or bills that were not produced in discovery, (7) arguments that Nur sustained any permanent injury other than disfigurement to his nose and upper lip, and (8) arguments that Nur sustained any income loss.²

On September 18, 2017, the district court held a hearing regarding Jimmy Johns's motions in limine. Nur did not oppose any of the motions and the district court granted all of them. After the district court granted Jimmy Johns's motions in limine, Jimmy Johns's counsel noted that he intended to bring a motion for a directed verdict after Nur's opening statement at trial. Jimmy Johns's counsel argued that Nur did not "have a witness to testify that . . . the vestibule constitutes an unreasonable risk of harm, and that's a threshold evidentiary predicate for a negligence claim." Jimmy Johns's counsel asked the district court whether it would address the legal sufficiency of Nur's claims after Nur's opening statement during trial or at the motion hearing. Nur objected to addressing the legal sufficiency of his claims at the hearing. The district court decided to address the issue and

² On September 15, 2017, Jimmy Johns brought an additional motion in limine regarding exhibit 3 in Nur's proposed witness and exhibit list. The exhibit was not present in Nur's proposed witness and exhibit list filed with the district court, and Jimmy Johns indicates that Nur removed it in response to the motion in limine.

Jimmy Johns and Nur made arguments regarding whether the glass vestibule at the Jimmy Johns restaurant constituted an unreasonable risk of harm giving rise to a duty of care.

Nur submitted exhibits depicting his injuries and the vestibule at issue. The exhibits show that the glass wall with which Nur collided was surrounded by a metal frame and had a red neon sign hanging behind it.

The district court construed Jimmy Johns's dispositive motion at the hearing as a motion for summary judgment and granted it. The district court reasoned that the facts were undisputed and that "whatever the condition was [in the glass vestibule], it was open and obvious." This appeal follows.

DECISION

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact exists "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Likewise, "the party resisting summary judgment must do more than rest on mere averments." *Id.* If reasonable minds might draw different conclusions from the evidence presented, summary judgment is inappropriate. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 665 (Minn. 2015).

This court reviews a district court’s award of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). We “view the evidence in the light most favorable to the party against whom summary judgment was granted to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law.” *Id.*

Before addressing Nur’s specific arguments regarding the district court’s award of summary judgment, we note several principles that govern this court’s review.

“A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Although some accommodations may be made for pro se litigants, they are generally held to the same standards as attorneys. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). Thus, a pro se appellant generally may not raise issues for the first time on appeal.³

“[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [And] the burden of showing error rests upon the one who relies upon it.” *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (quotation omitted). “An assignment of error in a brief based on ‘mere assertion’ and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection.” *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff’d*, 728 N.W.2d 243 (Minn. 2007).

³ Nur was represented in district court but is self-represented on appeal.

Nur appears to make two arguments on appeal. First, Nur contends that his “lawyer did not provide the judge with all of the evidence” and that “[b]ecause of the minimal amount of evidence provided to the judge [his] case was dismissed.” Nur argues that “[t]he evidence included [his] medical reports and images of [his] injuries which contained a cut on [his] nose, lost teeth and a cut under [his] lip which needed multiple stitches.” Nur asserts that “[i]f all of the evidence is provided to the judge it will most likely change the result of [his] case.” To the extent that Nur suggests that he has a malpractice claim based on his lawyer’s failure to submit relevant documents into evidence, such a claim is outside the scope of this court’s review of the district court’s award of summary judgment for Jimmy Johns. Moreover, Nur has not explained what evidence should have been submitted or how it would have changed the result of his case.

Second, Nur asserts that after his collision, Jimmy Johns placed “a poster over the glass so customers now know that there is glass there” and argues that Jimmy Johns should have had a “poster [there] since the shop was opened so this incident [would have] never occurred.” The issue of Jimmy Johns’s subsequent remedial measures was not raised in the district court. Nur’s complaint does not make any allegations regarding subsequent remedial measures, the record does not contain evidence regarding such measures, and neither party raised that issue at the motion hearing.⁴ Nur’s argument regarding Jimmy Johns’s subsequent remedial measures is therefore waived. *See Thiele*, 425 N.W.2d at 582.

⁴ Jimmy Johns asserts in its brief that a photograph of the vestibule as of September 15, 2017 was originally exhibit 3 in Nur’s proposed witness and exhibit list and that Nur removed it before filing the list in district court. That photograph was not entered into evidence in the district court and is not part of the appellate record.

Moreover, Nur's argument fails on the merits. Under Minn. R. Evid. 407, evidence of subsequent remedial measures is inadmissible to prove negligence.⁵ It would have been impermissible for Nur to have introduced evidence regarding Jimmy Johns's subsequent remedial measures in the district court to prove Jimmy Johns's negligence. Nur cannot rely on such evidence, which is not part of the record, on appeal.

In sum, Nur's claims of error are based on mere assertions that are unsupported by any substantive legal argument or authority. Nur has failed to establish error justifying appellate relief.

Because Nur's assertions fail to establish error justifying appellate relief, we need not address the merits of Nur's negligence claim. We nonetheless note that the district court did not err by granting summary judgment for Jimmy Johns on the merits.

"To recover on a claim of negligence, a plaintiff must prove: (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 a proximate cause of the injury." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). "A possessor of land is not liable to [its] 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." *Louis v. Louis*, 636 N.W.2d 314, 319 (Minn. 2001) (quotation omitted). "Whether a danger is 'obvious' is an objective test." *Senogles v. Carlson*, 902 N.W.2d 38, 44 (Minn. 2017).

⁵ Although evidence of subsequent remedial measures may be used to prove the "feasibility of precautionary measures, if controverted," under Minn. R. Evid. 407, Nur did not raise the issue of the feasibility of precautionary measures and Jimmy Johns does not argue that precautionary measures were unfeasible.

“[A] condition is not ‘obvious’ unless both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor, exercising ordinary perception, intelligence and judgment.” *Louis*, 636 N.W.2d at 321 (quotation omitted).

The relevant facts here are undisputed. The glass vestibule wall with which Nur collided was surrounded by a metal frame and had a red neon sign hanging behind it. The distance between the front entrance to the restaurant and the glass vestibule wall was at least eight feet. To the extent that the glass vestibule wall was a dangerous condition, the danger of walking into it was apparent to a reasonable person exercising ordinary perception, intelligence, and judgment. Because the glass vestibule wall was an open and obvious condition, Jimmy Johns did not have a duty to warn visitors about it. The district court did not err by granting summary judgment for Jimmy Johns.

Affirmed.