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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1706**

Connie Tesdahl,  
Appellant,

vs.

Howard Rosten,  
Respondent.

**Filed May 29, 2012  
Reversed and remanded  
Cleary, Judge**

Nicollet County District Court  
File No. 52-CV-11-208

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Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Rodenberg, Judge.

**UNPUBLISHED OPINION**

**CLEARY**, Judge

Appellant challenges the district court's order granting summary judgment, arguing that there are genuine issues of material fact about whether respondent was negligent in failing to maintain his home in a non-hazardous fashion and failing to warn

appellant of an unreasonably dangerous condition. Respondent cross-appeals, arguing that, even if he had a duty to warn appellant of the dangerous nature of a step in his home, appellant cannot prove that the step was the proximate cause of her fall. Because we hold that there are genuine issues of material fact that preclude summary judgment, we reverse and remand to the district court.

### **FACTS**

Appellant Connie Tesdahl fell and injured her ankle while she was visiting respondent Howard Rosten's home. Appellant had been sorting through some of her belongings that she was storing in respondent's garage. After appellant arrived at the home, respondent came home and unlocked the back door for appellant so she could use the restroom inside the home. Respondent then returned to work and appellant continued sorting through her things on the rear deck of the home. Later, appellant used the restroom inside the home and was returning outside when she tripped and fell, injuring her ankle.

The rear entrance to respondent's home has a landing just inside the door. From the landing, there is the door to go outside, a door to the basement, and an open doorway to the kitchen. To get into the kitchen, a person must step up from the landing. The step into the kitchen measures 9 ¼ inches up from the landing. On the top edge of the step, there is a wooden strip, or nosing, that measures 1 ¼ inches by 1 ¼ inches by ¼ inch thick. Appellant was stepping down from the kitchen onto the landing when she fell.

Appellant and respondent had known each other for approximately two years at the time of the incident. Appellant had been to respondent's home 50–75 times in those

two years and had used the kitchen-to-landing step approximately 75 times. In the seven months leading up to the incident, appellant had only been in respondent's home two or three times. Respondent had owned the home since 1994 and had never made any changes or improvements to the kitchen floor, the nosing, or the height of the step from the landing to the kitchen. The nosing on the step was installed before respondent purchased the home. During the time respondent owned the home, no one other than appellant had tripped on the kitchen-to-landing step or the nosing on the step, nor had anyone complained to respondent about the nosing or height of the step.

After her fall, appellant sued respondent for negligence, claiming that he failed to maintain his home in a non-hazardous fashion and failed to warn her about an unreasonably dangerous condition. Appellant claimed that she tripped on the nosing part of the step. During discovery, appellant disclosed a report by a registered professional engineer in which he stated his conclusions regarding the safety of respondent's kitchen step. The engineer noted that the material used for the nosing was intended for "vertical, outside corners of wall construction, not horizontal flooring applications." Further, the engineer found that the nosing on the step constitutes a trip hazard, and he opined that "the residence owner failed to install or maintain a correct nosing material; failed to provide a non-trip nosing and that as a consequence the kitchen step-down was rendered hazardous; and that that failure was a substantial factor in causing the accident."

Respondent moved for summary judgment and, despite the evidence presented in the engineer's report, the district court granted respondent's motion and concluded that there was no showing that respondent breached any duty to appellant because respondent

“did not act negligently concerning the condition of his home and any risks associated with the step were open and obvious to [appellant].” The court also held that the situation did not present a scenario where respondent “should have anticipated the harm giving rise to a duty to warn [appellant].” This appeal follows.

## DECISION

### I.

“On appeal, we review a grant of summary judgment ‘to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.’” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quoting *K.R. v. Sanford*, 605 N.W.2d 387, 389 (Minn. 2000)). “A party need not show *substantial evidence* to withstand summary judgment. Instead summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006). “[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). “On appeal, the reviewing court must 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).

A plaintiff in a negligence action must prove 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). The defendant is entitled to summary judgment when the record reflects a complete lack

of proof on any of those elements. *Id.* Analysis of a negligence action brought against a landowner must begin with an inquiry into whether the landowner owed a duty to the entrant. *Baber v. Dill*, 531 N.W.2d 493, 495 (Minn. 1995).

“Possessors of land owe a general duty to use reasonable care for the safety of all entrants upon the premises.” *Presbrey v. James*, 781 N.W.2d 13, 18 (Minn. App. 2010). “The entrant also has a duty to use reasonable care . . . .” *Id.* “Despite the general rule requiring landowners to inspect, repair, and warn, there is an exception where the dangerous condition is ‘known or obvious.’” *Id.* (quoting *Olmanson v. LeSueur Cnty.*, 693 N.W.2d 876, 881 (Minn. 2005)). “[T]he test for what constitutes an obvious danger is an objective test: the question is not whether the injured party actually saw the danger, but whether it was in fact visible.” *Louis*, 636 N.W.2d at 321 (quotation omitted). “[A] condition is not ‘obvious’ unless both the condition and the risk are apparent to and would be recognized by a reasonable [person] ‘in the position of the visitor, exercising ordinary perception, intelligence and judgment.’” *Id.* (quoting Restatement (Second) of Torts § 343A, cmt. b (1965)).

[T]he word known denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus, the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated.

*Id.* (quoting Restatement (Second) of Torts § 343A, cmt. b (1965)) (quotation marks omitted).

Whether a legal duty exists is generally a question of law. *Louis*, 636 N.W.2d at 318. Whether a condition is a known or obvious danger is generally a question of fact. *Olmanson*, 693 N.W.2d at 881. Whether a landowner could anticipate the danger is also generally a question of fact. *Id.*

The parties disagree about whether the danger associated with the nosing on the stair is obvious. Respondent argues that the condition must only be visible, and by nature of its visibility, it is an obvious danger. Respondent concludes that because appellant admits to seeing the nosing on the step, it is an obvious danger. Appellant argues that both the dangerous condition and the risk associated with the condition must be apparent. She admits that the nosing on the step is visible but argues that the danger associated with it (tripping over the material) is not apparent and recognizable.<sup>1</sup> In his report, the engineer stated that the nosing material was intended to be used for vertical, outside corners of walls construction rather than for flooring. The engineer also noted that, in his opinion, the nosing constitutes a trip hazard because it would cause an individual's toe to come to a "dead-stop because of the thickness and type of nosing material." Appellant argues that this risk associated with the material is not readily apparent to a reasonable person encountering the step.

There are limited circumstances in which Minnesota courts have held that conditions constituted an "obvious" danger as a matter of law. These limited

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<sup>1</sup> As noted by respondent, appellant does not argue her claims regarding the height of the step in her brief. Appellant argues only that the nosing on the step was the unreasonably dangerous condition about which respondent had a duty to warn her. As a result, we do not address the height of the step. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not argued in briefs on appeal are waived).

circumstances included certain conditions where “the danger associated with the condition at issue was found to be clearly visible, or in plain view, meaning the condition itself posed the obvious danger.” *Louis*, 636 N.W.2d at 322. The dangers found to be obvious as a matter of law have included walking into a large planter, *Bisher v. Homart Dev. Co.*, 328 N.W.2d 731, 733–34 (Minn. 1983); skydiving over a lake, *Hammerlind v. Clear Lake Star Factory Skydiver’s Club*, 258 N.W.2d 590, 593–94 (Minn. 1977); walking across a 20-foot-square puddle of water that was ¼ inch deep, *Munoz v. Applebaum’s Food Mkt., Inc.*, 293 Minn. 433, 434, 196 N.W.2d 921, 921–22 (1972); walking into a low-hanging branch, *Sperr v. Ramsey Cnty.*, 429 N.W.2d 315, 317–18 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988); and walking down a steep hill, *Lawrence v. Hollerich*, 394 N.W.2d 853, 856 (Minn. App. 1986), *review denied* (Minn. Dec. 17, 1986).

The facts here do not fall within Minnesota’s narrow definition of conditions which are of “obvious” danger as a matter of law, and viewing the evidence in the light most favorable to appellant, it appears that a genuine issue of material fact exists as to whether the nosing on the step is an obvious danger.

The parties also dispute whether appellant had knowledge of the danger posed by the nosing on the step. Respondent argues that appellant knew of the danger because she had used the step approximately 75 times. Appellant admits that she knew of the nosing on the step but did not appreciate the probability and gravity of the threatened harm despite her frequent use of the step. Because the question of whether appellant was aware of the probability and gravity of the threatened harm is a question of fact, and

reasonable people could draw different conclusions about whether appellant had knowledge of the danger posed by the nosing, it appears that there is a genuine issue of material fact about whether appellant actually knew of the danger posed by the nosing on the step.

Respondent argues that he did not owe appellant a duty to warn about the nosing on the step because he could not anticipate any harm to appellant resulting from the nosing. He owned the home for 16 years prior to the incident and no one else had trouble using the step or complained to him about the step. Appellant argues that since the nosing on the step is not blatantly obvious, respondent should have anticipated the harm it could cause.

The district court noted that although it is generally a question of fact, courts have held that, as a matter of law, a landowner should not be expected to anticipate that an obvious danger will cause harm to an invitee on his or her land. The obvious dangers that courts have found do not require a warning, because the landowner could not be expected to anticipate harm to an invitee, have included large orange traffic cones, a 20-foot-square puddle of water, and water too shallow for diving. *See Engleson v. Little Falls Area Chamber of Commerce*, 362 F.3d 525, 529–30 (8th Cir. 2004) (traffic cones); *Munoz*, 293 Minn. at 434, 196 N.W.2d at 921–22 (puddle of water); *Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 744 (Minn. App. 2000) (shallow water), *review denied* (Minn. Oct. 17, 2000).

In another case involving an obvious danger, this court held that a landowner did not have a duty to warn a visitor of an obvious danger when the visitor was descending a steep slope on the landowner's lawn. *Lawrence*, 394 N.W.2d at 856. The court held:

[T]here was no evidence to suggest, and appellant did not claim, that there were any hidden or unobservable conditions that made the hill more treacherous or dangerous than it obviously appeared to appellant. The trial court correctly noted that there was nothing to indicate to respondents, other than the obviousness of the steep slope, that harm would result from appellant descending the hill.

*Id.*

In contrast, appellant here claims that that the danger posed by the nosing might not be readily apparent. She argues that since the nosing protrudes only a small amount above the floor, reasonable minds could reach different conclusions about whether respondent should have anticipated the harm she suffered. The engineer's report included an opinion that the step is a trip hazard because it would cause an individual's toe to dead-stop when striking the nosing. Viewing the evidence in the light most favorable to appellant, there is a genuine issue of material fact about whether respondent should have anticipated the harm and warned appellant about the nosing.

## II.

Generally, an appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

In a footnote to its decision, the district court stated, "Had [appellant] shown a duty and a breach of that duty, questions of fact relating to proximate cause may have necessitated a trial. However, the Court's determination as to the absence of a duty

and/or breach of duty makes the proximate cause question moot.” In his cross-appeal, respondent argues that even if this court holds that he owed a duty of care to appellant, appellant’s claim must fail anyway because the facts show that the nosing was not the proximate cause of her fall. Yet the district court recognized that questions of fact surrounding the issue of proximate cause *may* necessitate a trial.

Under such circumstances, and given that there appear to be genuine issues of material fact surrounding the issues of whether the danger posed by the nosing on the step was known or obvious, and whether respondent should have anticipated the harm and warned appellant about the nosing, we reverse and remand to the district court and do not reach the issue of proximate cause.

**Reversed and remanded.**