STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2046

Gregory Marshall,
d/b/a Secure America,
Appellant,

vs.

Esco Industries, Inc.,
d/b/a Performance Seed and Miller Grain,
Respondent.

Filed September 15, 2009
Affirmed; motion denied
Lansing, Judge
Dissenting; Shumaker, Judge

Stearns County District Court
File No. 73-CV-07-13627

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Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

LANSING, Judge

The district court granted summary judgment dismissing Gregory Marshall's negligence claim against Esco Industries, Inc. for injuries Marshall sustained when he fell from a ladder he found at Esco's seed-packing facility while doing maintenance work on the security system. On appeal, Marshall challenges the district court's determination that Esco did not, as a matter of law, breach the duty of reasonable care that it owed to Marshall. Because the district court properly determined that the evidence compels a determination that Esco did not breach its duty of reasonable care, we affirm.

F A C T S

Gregory Marshall professionally installs and maintains security systems as the owner of Secure America. In August 2005 Marshall went to a seed-packing facility owned by Esco Industries, Inc. to perform maintenance work. While there, Marshall sustained injuries when he fell from a ladder he found at the facility. He filed a negligence action against Esco in July 2007, alleging that Esco had negligently failed to correct, repair, replace, or warn Marshall that "one of the rubber traction pads" at the bottom of the ladder was "broken, missing, or ineffective.

Esco moved for summary judgment in April 2008. It argued that the negligence action should be dismissed on four grounds: Esco did not breach the duty of reasonable care that it owed to Marshall; Esco's alleged negligence was not the proximate cause of Marshall's fall from the ladder; no reasonable jury could conclude that Esco's negligence

was greater than Marshall's negligence; and Marshall assumed the risk of using the ladder.

Both parties submitted evidence for the district court to review in ruling on the motion for summary judgment. The evidence included deposition testimony from Marshall about his usual practices. He stated that he kept a four-foot ladder in his truck; that the four-foot ladder was not long enough to reach the twelve-foot-high security equipment at Esco's seed-packing facility; that he had serviced Esco's system about twenty times since he installed the system in the mid-1990s; that he always used Esco's ladder to service the system; that he usually looked for the plant manager to assist him when he arrived at the seed-packing facility; that a ladder was either brought to Marshall or he looked for it at the facility; and that Marshall always used a ladder he could lean against the wall instead of opening into an A-frame position because an open ladder "would be out in the middle of [the] floor, and either the doors would hit it with the fork trucks going through or [he] would be run over by a fork truck."

In his deposition testimony, Marshall also described the circumstances surrounding the accident. He said that when he arrived at the facility he could not find the plant manager so he found a ladder by himself; that he did not observe any warning labels on the ladder, including a warning stating "SET ALL FOUR FEET ON FIRM LEVEL SURFACE"; that he leaned the ladder up against the wall in ignorance of the ladder's warning; that he climbed the ladder; that the ladder slid out from under him; and that he landed in a sitting position. He also said that an Esco employee saw Marshall fall and pointed out that the bottom of the ladder was missing rubber; that on a return visit to

the seed-packing facility Marshall saw that the facility had two ladders and that, unlike the ladder he used on the day of the accident, the ladder that he normally used had "a back piece" and "an angled foot" so that "when you put the ladder against the wall, the flat rubber foot is flat on the ground."

Based on the evidence, the district court granted Esco's motion for summary judgment. Marshall subsequently filed a notice of appeal and filed his appellate brief. Esco responded by moving to strike portions of Marshall's brief and appendix that cited a federal regulation as a standard to apply in determining whether Esco had breached its duty of reasonable care. Esco asserted, and Marshall conceded, that Marshall did not raise the issue of a federal regulation with the district court. A special-term panel of this court deferred a decision on the motion for consideration with the appeal on the merits.

D E C I S I O N

This appeal raises two related issues: Marshall's argument that the district court erred in granting summary judgment and Esco's motion to strike portions of Marshall's appellate brief and appendix.

The district court granted summary judgment based on its conclusion that Esco did not, as a matter of law, breach the duty of reasonable care that it owed to Marshall. *See Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 573 (Minn. 2005) (stating that defendant is entitled to summary judgment in negligence action "when the record reflects a complete lack of proof on any of the four essential elements," including breach of defendant's duty of care).

The issue of whether a defendant breached its duty of care—an issue that is commonly referred to as the issue of negligence—is generally a question of fact. *Sauter v. Sauter*, 244 Minn. 482, 486, 70 N.W.2d 351, 354 (1955) (negligence); *Stelling v. Hanson Silo Co.*, 563 N.W.2d 286, 290 (Minn. App. 1997) (breach); *see also Foss v. Kincade*, 766 N.W.2d 317, 322-23 (Minn. 2009) (stating that "foreseeability" issue on which liability turns is usually for jury). But "summary judgment may be entered [if] the material facts are undisputed and as a matter of law compel only one conclusion." *Sauter*, 244 Minn. at 486, 70 N.W.2d at 354; *see also Foss*, 766 N.W.2d at 323 (stating that "foreseeability of harm can be decided by the court as a matter of law when the issue is clear"). On appeal from summary judgment, we determine whether the evidence, "viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008).

It is undisputed that Marshall was a business invitee on Esco's property and that Esco therefore owed Marshall a duty of reasonable care. *See Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972) (stating duty of landowner to invitee). The scope of the duty of reasonable care is defined by the probability or foreseeability of injury to the invitee. *Hanson by Hanson v. Christensen*, 275 Minn. 204, 212, 145 N.W.2d 868, 874 (1966). A landowner must act as a reasonable person would under the existing circumstances in view of the probability or foreseeability of harm. *Balach*, 294 Minn. at 174, 199 N.W.2d at 647.

In accounting for a defendant's existing circumstances under the reasonable-person standard, a fact-finder considers the specific knowledge that the defendant had or should have had about the traits or faculties of the plaintiff. *See* Restatement (Second) of Torts § 290 cmt. k (1965) (discussing reasonable person's knowledge of general traits). The Restatement comment discusses this rule in the context of a person's responsibility, under the reasonable-person standard, to act more carefully toward a child in certain instances than he would toward an adult. *Id.* In actions relating to children, the defendant's knowledge about the faculties of the plaintiff increases the defendant's responsibilities. *Id.*

But the defendant's knowledge about the faculties of the plaintiff may also decrease the defendant's responsibilities. *See* Dan B. Dobbs, *The Law of Torts* § 118, at 281 (2000) (explaining that consideration of defendant's circumstances has "forgiving aspect"). For example, if a defendant knows that a plaintiff has particular skills or knowledge that make harm less probable, a fact-finder may expect the defendant to take fewer precautions to prevent the harm. *Cf. Dessecker v. Phoenix Mills Co.*, 98 Minn. 439, 440-41, 108 N.W. 516, 517 (1906) (holding that defendant did not act negligently by failing to inspect ladder for slip-resistant brad because, in part, plaintiff "was an experienced workman" and had used ladder in question "every day for about two months"). "In determining which dangers the person knows or should know of, and which precautions the person can appropriately adopt, it simply is not possible to ignore what knowledge the person actually has." Restatement (Third) of Torts § 12, cmt. a (2005) (Proposed Final Draft).

The defendant's special knowledge does not alter the standard of care; it is, instead, a "circumstance . . . to consider in determining whether the actor has complied with the general standard of reasonable care. *Id.*; *see also Connolly v. Nicollet Hotel*, 254 Minn. 373, 382, 95 N.W.2d 657, 664 (1959) (stating that "standard of care remains constant" but "degree of care varies with [particular] facts and circumstances").

The issue of whether an injury was foreseeable to the defendant under the existing circumstances is sometimes examined as a proximate-cause issue, rather than an issue of negligence. *See* Dobbs, *supra*, § 182, at 448-51 (discussing different formulations); 4 Fowler V. Harper et al., *Harper, James, and Gray on Torts* § 20.5, at 161-69 (3d ed. 2007) (same). But "[i]n contemporary law, the terminology distinction has become unimportant." Dobbs, *supra*, § 182, at 451 (noting that famous tort case, *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (1928), "complicated the lives of generations of law students" because majority opinion cast issue "in the terminology of duty (or negligence)" while dissent "thought that the issue should be cast in the terminology of proximate cause"). However the issue is characterized, courts agree that a defendant is not liable for unforeseeable harms. *Dobbs, supra*, § 182, at 451; *see also* 4 Harper et al., *supra*, at 167 (stating prevailing view).

In his complaint, Marshall alleges that Esco, acting through its agents, breached its duty of reasonable care by failing to correct, repair, replace, or warn Marshall of the broken, missing, or ineffective rubber traction pad on the bottom of the ladder. *See Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 4 (Minn. 2006) (noting that employer may be vicariously liable for torts that employee commits within course and

scope of employment). Thus the central question is whether the evidence permits a finding that, under the existing circumstances, a reasonable landowner would have corrected, repaired, replaced, or warned Marshall of the broken, missing, or ineffective rubber traction pad on the bottom of the ladder in view of the probability or foreseeability of injury.

The evidence bearing on the probability or foreseeability of Marshall's injury includes Marshall's testimony and photographs of the ladder Marshall used on the day of the accident. Marshall testified that he installed the system at Esco's seed-packing facility in the mid-1990s; that he had serviced the system about twenty times since that time; that he always used a ladder provided by Esco to service the system; that he usually looked for the plant manager to assist him when he arrived at the seed-packing facility; that a ladder was either brought to Marshall or he looked for it at the facility; that Marshall always leaned the ladder up against the wall instead of opening it because otherwise it would be unsuitable for his purposes; that the ladder he usually used at the facility had feet that are angled differently than the feet of the ladder he used on the day of the accident; and that the ladder he usually uses also had "a back piece" and "an angled foot" so that "when you put the ladder against the wall, the flat rubber foot is flat on the ground." The photograph in the record showed that the ladder Marshall used the day of the accident, was clearly labeled, "SET ALL FOUR FEET ON FIRM LEVEL SURFACE."

This evidence demonstrates that a reasonable landowner in the position of Esco's agents would have known that Marshall had experience using a ladder at the facility; that

Marshall knew he needed a ladder that could be used in a leaning position to accomplish his task; that Marshall was familiar with the suitable ladder at the facility because he had found it and used it before; and that the ladder that Marshall used on the day of the accident was clearly identified as a ladder that must be used in an open A-frame position, that is, as a ladder that would not suit Marshall's purpose. When considering Marshall's knowledge, a fact-finder would be compelled to find that a reasonable landowner would not have foreseen that Marshall would use the ladder he found on the day of the accident, much less be injured as a result of its defects. *Cf. Foss*, 766 N.W.2d at 323 (holding that child's injury from unsecured bookcase was not foreseeable because it was not reasonably foreseeable that child would try to climb bookcase).

We therefore conclude that the evidence compels a determination that, in view of the probability or foreseeability of Marshall's injury, a reasonable landowner would not have taken the precaution of correcting, repairing, replacing, or warning Marshall of the broken, missing, or ineffective rubber traction pad on the bottom of the ladder. Consequently, the district court did not err when it determined as a matter of law that Esco did not breach the duty of reasonable care that it owed to Marshall.

As a final matter, we address Esco's motion to strike Marshall's argument that a federal regulation demonstrates that Esco breached its duty of reasonable care. Marshall cites a regulation issued by the federal Occupational Safety and Health Administration (OSHA) that requires the bottoms of a ladder's "four rails . . . to be supplied with insulating non-slip material." 29 C.F.R. § 1910.26(a)(3)(vii) (2009).

We are persuaded that Marshall's argument based on this regulation is improperly raised on appeal because it was not raised in the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts will not consider issues or theories that were not presented to and decided by district court). But, even if we were to consider the OSHA regulation, it would not affect our conclusion. Because it was not foreseeable that Marshall would use the ladder he found on the day of the accident, it is irrelevant whether Esco maintained the ladder in accordance with OSHA regulations. Consequently, we deny Esco's motion to strike on the basis that it is moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot when court did not rely on material).

Affirmed; motion denied.

SHUMAKER, Judge (dissenting)

I respectfully dissent. In my view, both Marshall's use of and injury from the defective ladder were foreseeable.

Marshall had come to Esco's premises to service security equipment some 20 times before the incident at issue. Each time, he used a ladder supplied by Esco or made available on the premises for his use. He never before had a problem with an Esco ladder slipping out from under him, despite the manner in which he used it. The reasonable inference to be drawn from this prior experience is that Marshall expected that the Esco ladders would be safe, at least that they would be free from any defect that could cause slippage and collapse.

The ladder Marshall used on the day of his injury was not safe; it was missing a rubber footing. Based on Marshall's history with Esco, it seems that Esco could have foreseen that Marshall might use the defective ladder. Such foreseeability would have created a duty on Esco's part to use reasonable care to protect Marshall from injury. Once a duty exists, the issue of reasonable care is for the jury.

The pivotal jury questions involve causation and comparative fault. There are issues of concurring causes, and possibly of superseding cause, but those are matters for the jury to resolve.

I believe the district court erred in determining that Esco had no duty to protect Marshall against the injury he sustained. I would reverse and remand to allow the jury to decide whether Esco breached its duty of care as well as the related fact issues.