STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2184

Steven Sell,
Appellant,

vs.

Wal-Mart Stores, Inc.,
Respondent.

Filed September 1, 2009
Reversed and remanded
Stauber, Judge

Crow Wing County District Court
File No. 18CV072452

Paul J. Phelps, Sawicki & Phelps, P.A., 5758 Blackshire Path, Inver Grove Heights, MN 55076 (for appellant)

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

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

STAUBER, Judge

This is an appeal from summary judgment dismissing appellant's premises liability claim arising out of personal injuries suffered when appellant ran into a hose extending down from a reel positioned above an aisle in respondent's lawn and garden

center. Appellant argues that the district court erred in concluding as a matter of law that respondent owed no duty to protect appellant because respondent did not have actual or constructive knowledge of the condition that caused the injury. Because the evidence would allow a reasonable factfinder to conclude that respondent had actual knowledge of the condition of the hose, we reverse and remand.

FACTS

In March 2007, appellant Steven Sell entered a Wal-Mart store (respondent) with his girlfriend, Tanya Rono. As the couple walked down an aisle in the lawn and garden department, appellant stopped to look at an item on one side of the aisle, while Rono stopped to look at something on the other side of the aisle. Neither appellant nor Rono saw a water hose that was extending down from a reel above the aisle. The hose reel was positioned overhead, but the hose and a black weight on the end of the hose extended down into the aisle at eye level. When Rono asked appellant to look at an item, appellant turned and struck his left eye on the black weight that was attached to the hose. As a result, appellant's eyeball was surgically removed.

Appellant brought suit against respondent, alleging that respondent was negligent in maintaining the premises, failing to properly inspect its premises, and failing to warn of a dangerous condition. Respondent subsequently moved for summary judgment on the basis that it did not have actual or constructive knowledge of the condition that caused appellant's injury. The district court granted respondent's motion. This appeal followed.

D E C I S I O N

On appeal from summary judgment, this court asks 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) (quotation omitted). A genuine issue of material fact exists when reasonable persons can draw different conclusions from the evidence. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). "[A]ll inferences from circumstantial evidence and all doubts must be resolved against the movant." *Forsblad v. Jepson*, 292 Minn. 458, 459-60, 195 N.W.2d 429, 430 (1972). In a negligence action, the defendant is entitled to summary judgment when the record reflects a complete lack of proof on any of the four essential elements of the claim: (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 the proximate cause of the injury. *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 573 (Minn. 2005).

Landowners have a duty "to use reasonable care for the safety of all such persons invited upon the premises." *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972). Landowners' duty of reasonable care for the safety of entrants on their land includes the duty to inspect their premises for dangerous conditions and to repair them or warn entrants about them. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005). Where the defendant and his employees have not caused the dangerous condition, the burden is on the plaintiff to establish that the operator of the premises had actual knowledge of the defect causing the injury or that it has existed for a sufficient period of

time to charge the operator with constructive notice of its presence. *Wolvert v. Gustafson*, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966).

Appellant argues that the district court erred in granting summary judgment in favor of respondent because there is an issue of material fact as to whether respondent had actual knowledge of the condition of the hose. We agree. Rono testified in her deposition that Mark Spangler, a respondent employee, must have seen the hose because he was standing 10–12 feet from the couple when appellant struck the hose. Rono claimed that because Spangler was looking down the aisle at her and appellant when appellant struck the hose, he must have seen the condition of the hose prior to appellant's contact with the hose. If believed, Rono's testimony would support appellant's claim that respondent had actual notice of the condition of the hose that caused appellant's injuries. Although Spangler denied that he saw the hose, Rono's testimony creates an issue of fact as to whether respondent had actual notice of the condition of the hose. Therefore, we conclude that the district court erred in granting summary judgment in favor of respondent.

Reversed and remanded.