STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2268

Desiree Petsch,
Appellant,

vs.

State of Minnesota,
Respondent,

City of Rochester,
Respondent,

Andy's Liquor, Inc., et al.,
Respondents.

Filed November 23, 2010
Affirmed
Collins, Judge[*]

Olmsted County District Court
File No. 55-CV-08-9079

David W. Van Der Heyden, Brian J. Ellsworth, VanDerHeyden Law Office, P.A., Rochester, Minnesota (for appellant)

Lori Swanson, Attorney General, Sarah McGee, Assistant Attorney General, St. Paul, Minnesota (for respondent State)

Rylee Retzer, League of Minnesota Cities, St. Paul, Minnesota (for respondent City)

Paul E. D. Darsow, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondents Andy's Liquor, et al.)

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

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and Collins, Judge.

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

COLLINS, Judge

Appellant Desiree Petsch challenges the district court's grant of summary judgment in favor of respondents State of Minnesota (state), City of Rochester (city), Andy's Liquor Inc. (Andy's), and Crossroads Land LLC (Crossroads). Because Petsch waived any challenge to the district court's determination that statutory immunity bars her claims against the state and because the remaining respondents owed no duty to Petsch, we affirm.

FACTS

In this negligence action, Petsch sued respondents for damages resulting from her fall into a drainage ditch. Petsch had left the sidewalk and stood in a grassy area while waiting for a signal change to cross state Highway 63 at the intersection of 14th Street Southwest in Rochester. Due to the proximity of traffic moving through the intersection, Petsch backed away and, in doing so, stepped into a hole near a culvert, fell into the ditch, and was injured.

Respondents each moved for summary judgment. The city submitted responses to interrogatories indicating that the city performed inspections of the sidewalk, but that the drainage ditch and culvert were within the state-highway right-of-way. The state submitted an affidavit of David Redig, a maintenance superintendent for the Minnesota Department of Transportation (MnDOT), stating that the culvert was within the state's

right-of-way, and that MnDOT's right-of-way duties included mowing, drainage, and maintenance of drainage culverts. Pursuant to a 1992 cooperative agreement between the city and the state, the city was responsible for "the proper maintenance of [sidewalks]" at this intersection, but the agreement did not extend the city's responsibility to any area within the state's right-of-way beyond the sidewalk.

Redig's affidavit also indicated that the freeze-and-thaw cycle can cause culvert sections to separate and erode, but that because of MnDOT's limited resources and the number of culverts within its rights-of-way, he had adopted a "response-to-complaint policy" and MnDOT employees did not otherwise routinely inspect culverts for damage. According to Redig, MnDOT had not received any relevant complaints or reports of an erosion hole and was not aware of the hole at this intersection before Petsch's fall.

The district court granted summary judgment in favor of the state on the ground that statutory immunity, pursuant to Minn. Stat. § 3.736, subd. 3 (2008), bars Petsch's claims and, in the alternative, Petsch failed to demonstrate that the state owed her a duty of care because the danger was open and obvious. The district court granted summary judgment in favor of Andy's, the commercial occupier of the property abutting the state's right-of-way, and Crossroads, the property owner, on the grounds that (1) neither of them had a duty to repair the ditch or the culvert, (2) surface water drainage into a ditch is natural and not an extraordinary use, and (3) the danger was open and obvious. The district court granted summary judgment in favor of the city on the grounds that (1) the injury occurred within the state's right-of-way, (2) the city had no actual or constructive

knowledge of the hazard, and (3) the danger was open and obvious.[1] This appeal followed.

D E C I S I O N

In deciding an appeal of a summary judgment, appellate courts ask "(1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review de novo the question of whether any genuine issue of material fact remains and the district court's application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). In a negligence action, a defendant is "entitled to summary judgment when the record reflects a complete lack of proof on any of the four elements necessary for recovery: (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 existence of a legal duty in a negligence case is a question of law that is reviewed de novo. *Id.*

I.

We first address whether Petsch has waived her challenge to the grant of summary judgment to the state. The district court concluded that, as a matter of law, "[t]he state is entitled to statutory immunity from Petsch's negligent maintenance claim and claims of negligent failure to warn or repair." On appeal, Petsch's statement of the case and brief

[1] In its order, the district court noted that Petsch initially claimed that the sidewalk design was defective, but that Petsch subsequently conceded that this claim was barred by the expiration of the statute of repose for improvements to real property, Minn. Stat. § 541.051, subd. 1 (2008).

make no mention of the district court's statutory-immunity determination. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Although this court has the discretion to address issues as justice requires, Minn. R. Civ. App. P. 103.04, Petsch's attorney at oral argument confirmed the intentional waiver of any challenge to this issue. We therefore affirm the district court's grant of summary judgment in favor of the state on the ground of statutory immunity.

II.

We next address the district court's grant of summary judgment in favor of Andy's and Crossroads. Neither of them owned the property on which Petsch fell; thus, neither Andy's nor Crossroads owe Petch a duty unless they "created or contributed to the hazard that existed" on the state's right-of-way and if their use of the right-of-way was extraordinary. *Strong v. Richfield State Agency, Inc.*, 460 N.W.2d 106, 108 (Minn. App. 1990) (citing *Graalum v. Radisson Ramp, Inc.*, 245 Minn. 54, 61, 71 N.W.2d 904, 909 (1955)). In the context of an abutting land owner's use of a sidewalk, we have held:

> [W]here an abutting owner or occupant makes an *extraordinary* use of a sidewalk for his own convenience, he owes a duty to the public to exercise due care in seeing that the affected portion of the sidewalk is maintained in a safe condition for the passage of pedestrians.
>
> An extraordinary use of an adjacent sidewalk arises when . . . such use is not only for the personal convenience and benefit of the abutting occupant but is also of such a nature, in *kind* or in *degree*, that a condition is created which interferes with, and is in derogation of, a normal use of the sidewalk by the public.

Strong, 460 N.W.2d at 108-109 (quoting *Graalum*, 245 Minn. at 60-61, 71 N.W.2d at 908-09).

The district court relied on the *Graalum* rationale in determining that, analyzed as abutting landowners, neither Andy's nor Crossroads owed Petsch a duty of care because they did not own the culvert and ditch area and did not make an extraordinary use of the state highway drainage ditch. Petsch argues that Andy's and Crossroad's use of the drainage ditch was extraordinary because of the volume of water that periodically ran from their abutting property. While photos submitted by Petsch show that water does drain from Andy's and Crossroads into the drainage ditch, which Andy's and Crossroads admit, there is nothing indicating that the volume was extraordinary or that Andy's or Crossroads used the ditch for any other extraordinary purpose. Minnesota caselaw allows an abutting landowner to drain water into a state highway drainage ditch. *See Rick v. Worden*, 369 N.W.2d 15, 18 (Minn. App. 1985) ("A landowner can drain surface water from his land onto his neighbor's so long as he uses his land reasonably and does not unreasonably injure his neighbor."), *review denied* (Minn. Aug. 20, 1985). Because nothing in the record indicates that Andy's or Crossroads used the drainage ditch for anything other than normal rainwater drainage, we conclude that the district court did not err in granting summary judgment in favor of Andy's and Crossroads on the ground that they owed no duty to Pestch.

III.

Finally, we address the district court's grant of summary judgment in favor of the city. It is undisputed that the city owed a duty to maintain and repair the sidewalk within the state's right-of-way pursuant to the cooperative agreement. "The general rule is that pedestrians may assume that the city has exercised ordinary and reasonable care to

maintain its sidewalks and streets in a safe condition." *Brittain v. City of Minneapolis*, 250 Minn. 376, 385, 84 N.W.2d 646, 652 (1957). Although the supreme court has stated that the city is charged with a "lower degree" of care in the maintenance of city property immediately adjacent to a sidewalk where a city would not expect pedestrians, the city "has no right to maintain, or permit others to do so, on its boulevards and especially on those at street corners, anything in the nature of a dangerous pitfall or trap, or snare, or like obstruction, whereby the traveler . . . may be injured." *Id*. at 385-86, 84 N.W.2d at 653.

While the city has an obligation to maintain its sidewalks and prevent abutting landowners from creating obstructions or "traps" that make the sidewalks dangerous, it is undisputed that the area over which Petsch took her backwards steps to the place where she fell was entirely within the state's right-of-way off of the sidewalk. The cooperative agreement requiring the city to maintain the safety and care for the sidewalk does not extend to the ditch and culvert. Because the city agreed to maintain only the sidewalk traversing the state's right-of-way and the state retained the obligation to maintain and repair the drainage ditch, the district court correctly analyzed the city's duty to Petsch by treating the city as if it were an abutting landowner. Other than as to the sidewalk itself, under an abutting landowner theory, the city would only have a duty to Petsch if it "created or contributed to the hazard that existed" within the state's right-of-way. *Strong*, 460 N.W.2d at 108. Obviously, rainwater would run from the sidewalk to the drainage ditch, but nothing in the record indicates that the volume was unusual or that the city's use of the drainage ditch was otherwise extraordinary.

Finally, the district court's order indicates that Petsch conceded that her defective-design claims regarding the sidewalk were barred by the statute of repose, and Petsch has not challenged this determination on appeal. We therefore conclude that the district court did not err in granting summary judgment in favor of the city on the ground that it owed no duty to Petsch.

Having concluded that the district court did not err in granting summary judgment to the state based on statutory-immunity grounds and to Andy's, Crossroads, and the city because they owed no legal duty to Petsch, we need not address Petsch's challenge to the district court's determination that the danger was open and obvious.

Affirmed.