STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1487

Charles Andrew Herold,
Appellant,

vs.

Grande Market Place Limited Partnership,
Respondent,

Building Maintenance Management, Inc.,
Respondent.

Filed June 30, 2025
Affirmed in part, reversed in part, and remanded
Cochran, Judge

Hennepin County District Court
File No. 27-CV-23-7562

Paul F. Shoemaker, Shoemaker & Shoemaker, PLLC, Bloomington, Minnesota; and

Michael K. Hoverson, Hoverson Law Offices, P.A., Minneapolis, Minnesota (for appellant)

Nicholas H. Jakobe, Samantha R. Alsadi, Erstad & Riemer, P.A., Minneapolis, Minnesota (for respondent Grande Market Place Limited Partnership)

Jeannie Provo-Petersen, Provo-Petersen & Associates, P.A., Rosemount, Minnesota (for respondent Building Maintenance Management, Inc.)

Considered and decided by Reyes, Presiding Judge; Cochran, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

While walking down a sidewalk, appellant sustained injuries when he tripped on the edge of a ramp connecting the sidewalk to an apartment building's entrance. Appellant filed this lawsuit against respondent-landowner and respondent-maintenance-company, alleging that they violated duties of care owed to appellant. The district court granted both respondents' motions for summary judgment and dismissed appellant's complaint. Appellant challenges the district court's determination that he failed to present a genuine issue of material fact on whether respondents owed appellant a duty of care.

We affirm the district court's grant of summary judgment to respondent-maintenance-company. But, because we conclude that there is a genuine issue of material fact on whether respondent-landowner should have reasonably foreseen appellant's trip-and-fall, we reverse the grant of summary judgment to respondent-landowner. We also reverse the district court's grant of summary judgment dismissing respondent-landowner's cross-claim for indemnification against respondent-maintenance-company. We therefore affirm in part, reverse in part, and remand for further proceedings.

FACTS

On a summer morning in 2022, appellant Charles Andrew Herold was walking with his wife on a sidewalk abutting Nicollet Avenue in Burnsville, Minnesota. As they walked past an apartment building owned by respondent Grande Market Place Limited Partnership (GMP), Herold tripped on the edge of a ramp that connected the building's entryway to the sidewalk. After tripping, Herold fell and struck his head on the ramp's metal handrail,

which had been removed from its normal position and placed against a wall beside the ramp by employees of GMP and respondent Building Maintenance Management, Inc. (BMM), as pictured below.

Herold suffered various injuries from the fall that required him to be hospitalized.

Herold sued GMP and BMM, an independent maintenance contractor retained by GMP to perform maintenance on the apartment building. In an amended complaint, Herold asserted that GMP and BMM caused his injuries by negligently failing to maintain the ramp in a safe manner. Herold also asserted a claim for negligence per se based on code violations. GMP brought a cross-claim against BMM, asserting that its contract with BMM obligated BMM to defend and indemnify GMP for any injury claims arising from services performed by BMM.

GMP and BMM each moved for summary judgment on the basis that they owed no legal duty to Herold. The following summarizes the evidence received on summary judgment, framed in the light most favorable to Herold, the nonmoving party.

Maintenance of the Ramp

In May 2022, GMP performed an annual inspection of the apartment building and noted that the ramp's handrail was "leaning significantly" and "not functioning as its intended purpose." GMP had a maintenance contract with BMM that required BMM to provide a "maintenance technician to perform maintenance duties at" the apartment building. Pursuant to that contract, GMP instructed a BMM employee to service the malfunctioning handrail.

The BMM employee was deposed and testified that on June 2, 2022, GMP's property manager instructed him and a GMP maintenance person to remove the railing and paint a yellow stripe where the railing had been. The BMM employee testified that the entire job took only about five minutes because the railing was already loose. He further testified that after he removed the railing and painted a yellow line "to indicate that that was the edge," GMP's property manager "looked at it [and] okayed it." GMP's property manager then instructed them to lean the railing against the building and said that GMP "would be contacting a concrete company to do the repair." BMM's director of operations stated, in an affidavit, that BMM performed no further maintenance on the railing.

Herold's Deposition Testimony

At his deposition, Herold testified that he was walking with his wife to a restaurant on June 16, 2022, when he tripped on "the very end of" the ramp in front of GMP's

apartment building. Herold testified that, before he tripped, he was walking just to the left of a seam in the sidewalk that intersected the edge of the ramp. Herold added that he was looking ahead while walking and that he usually takes care to look where he is going to avoid tripping. Herold testified that he "was walking along, talking with [his] wife, and [] didn't notice the edge, that small edge [of the ramp]." At his deposition, Herold reviewed a photo of the ramp and circled the part of the ramp that he tripped on, as indicated below:

In response to a question from GMP's attorney, Herold agreed that anyone walking along the sidewalk should be able to plainly see the edge of the ramp and the stairs as they

approached. And Herold conceded that the rusty, malfunctioning handrail had left a brown line of residue on the ramp that was clearly visible. Herold also agreed that there was room for him to walk on the sidewalk to the left of the ramp. When asked why he did not see the ramp on the day of the accident, Herold responded, "I was talking, not paying attention, maybe. I don't know."

Herold's Building-Code Expert

The summary-judgment record also contains a report prepared by Don Hedquist, Herold's expert on building-code compliance, along with Hedquist's declaration. Hedquist opined that various building codes required GMP to maintain the handrail "in good repair and anchored in . . . position at all times." Hedquist asserted that GMP was required to place warning devices around the ramp "to block or eliminate access" while the handrail was removed for maintenance.

The District Court's Ruling on Summary Judgment

After a hearing on the respondents' motions, the district court granted summary judgment against Herold and dismissed his complaint, along with GMP's cross-claim against BMM. The district court determined, based mostly on Herold's deposition testimony, that the ramp was an open and obvious condition that Herold "would have appreciated had ordinary care been taken." Based on that determination, the district court concluded that GMP owed Herold no duty of care as to the open and obvious ramp. The district court also determined that BMM owed no duty of care to Herold because "BMM was neither in a special relationship with [Herold] nor should be expected to protect against the open and obvious condition of the sidewalk." Having concluded that neither

respondent owed Herold a duty of care, the district court granted the respondents' motions for summary judgment and dismissed Herold's complaint in its entirety. Because the district court granted summary judgment on all of Herold's claims, GMP would not require indemnification by BMM and, therefore, the district court also granted BMM's motion for summary judgment on GMP's cross-claim against BMM.

Herold appeals.

DECISION

Herold challenges the district court's grant of summary judgment in favor of GMP and BMM. "Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017); *see also* Minn. R. Civ. P. 56.01. A genuine issue of material fact exists when a rational fact-finder could find for the nonmoving party based on the record as a whole. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We review a district court's summary-judgment decision de novo, viewing the evidence in the light most favorable to the nonmoving party, and we resolve all factual inferences and doubts against the moving party. *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019).

"Negligence is generally defined as the failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011) (quotation omitted). Summary judgment is appropriate on a claim for negligence "when the record reflects a complete lack of proof on any one of these four elements: (1) the existence of a duty of care, (2) a breach of that duty, (3) an

injury, and (4) the breach of duty being the proximate cause of the injury." *Senogles*, 902 N.W.2d at 42 (quotation omitted).

In granting summary judgment on Herold's negligence claims, the district court determined that no rational fact-finder could find that GMP or BMM owed Herold a duty of care.[1] Herold asserts that there are genuine issues of material fact regarding both GMP's and BMM's duty of care. Herold also argues that the district court failed to analyze his claim of negligence per se. We address each argument separately.

I. There is a genuine issue of material fact as to whether GMP should have reasonably foreseen Herold's injury.

Herold first disputes the district court's grant of summary judgment on the basis that GMP, as a landowner, owed no duty to Herold. This argument has merit.

Landowners have a "continuing duty to use reasonable care for the safety of all entrants" upon the premises. *Id.* (quotation omitted). This duty of care "includes an ongoing duty to inspect and maintain property to ensure entrants on the landowner's land are not exposed to unreasonable risks of harm." *Olmanson v. LeSueur County*, 693 N.W.2d 876, 881 (Minn. 2005). But a landowner's duty of care to entrants is not unlimited. The supreme court has adopted Restatement (Second) of Torts section 343A(1) (Am. L. Inst. 1965), which "carves out an exception to the duty, and then carves out an exception to the exception." *Senogles*, 902 N.W.2d at 42. Section 343A(1) provides that

[1] In their motion for summary judgment, GMP addressed only the duty element of Herold's negligence claim. BMM, on the other hand, contended that Herold could not establish that it owed a duty to Herold or that it proximately caused Herold's injuries. Upon concluding that neither respondent owed Herold a duty of care, the district court did not address any of the other elements of Herold's negligence claim.

a landowner does not owe a duty of care to an entrant when a "danger is known or obvious to" the entrant "unless the [owner] should anticipate the harm despite such knowledge or obviousness." *Id.* (quotation omitted).

Here, the district court applied the first part of section 343A(1), determining that the "change in elevation created by the handicap accessible ramp was an open and obvious hazard that [Herold] would have appreciated had ordinary care been taken." But the district court did not determine whether the exception to the exception in section 343A(1) applies to Herold's negligence claim against GMP. In other words, the district court did not determine whether GMP should have "anticipate[d] the harm despite such knowledge or obviousness." *Id.* (quotation omitted).

On appeal, Herold does not dispute the district court's determination that the ramp constituted an obvious hazard. Instead, he contends that the district court erred by not determining whether there is a genuine issue of material fact as to whether GMP should have nonetheless anticipated someone tripping and falling over the edge of the ramp, notwithstanding its obvious nature. Herold further argues that, viewing the evidence in the light most favorable to him, there is sufficient evidence to create a disputed issue of material fact on that question.

We agree that the district court improperly ended its analysis after deciding the first prong of section 343A(1). Consequently, we turn to the question of whether Herold has established a genuine dispute of material fact on the issue of foreseeability such that the district court's grant of summary judgment was inappropriate. *See id.* at 47 (addressing the foreseeability prong of section 343A(1) after this court erroneously "ended its analysis"

after the first prong). "The foreseeability of danger depends heavily on the facts and circumstances of each case." *Id.* at 43. (quotation omitted). "Whether a risk was foreseeable depends on whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Id.* (quotation omitted). A court may decide the issue of foreseeability on summary judgment when it is "clear," but in "close cases" the issue of foreseeability is for the jury. *Id.*

Here, we conclude the question of whether GMP should have foreseen the danger of someone tripping over the edge of the ramp is close and should be decided by a jury. We reach this conclusion based on the following evidence contained in the summary-judgment record. At his deposition, Herold conceded that he saw the ramp and that anyone walking along the sidewalk should have been able to see it. But Herold also testified that he simply did not see the "small edge" at the very end of the ramp, over which he tripped. Photographs in the record confirm that the ramp starts at the building and ends with a small edge that extends into the sidewalk, resulting in a slight elevation change in the sidewalk. In addition, the portion of the ramp that extends into the sidewalk did not have a yellow painted stripe on the edge, unlike the rest of the ramp. An objective, rational fact-finder could find that, despite the ramp's overall obviousness, GMP should have foreseen that someone walking on the sidewalk could trip over the small edge of the ramp where Herold allegedly tripped, particularly if the person was talking with someone else while walking.

To persuade us otherwise, GMP contends that Herold's testimony that he was "not paying attention" while walking along the sidewalk is dispositive of the issue of foreseeability. Even assuming that the record definitively established that Herold was not

paying attention,[2] GMP's emphasis on Herold's subjective circumstances is misplaced because section 343A(1)'s "exception to the exception" focuses on whether it is "objectively reasonable" for the *landowner* to anticipate the injury—here, a passerby tripping on the ramp's edge. *See id.* at 42-43. For the reasons discussed above, even a person who is paying attention to the sidewalk could trip on the small edge, making it objectively reasonable to expect the specific danger at issue here. Here, whether Herold was paying attention goes to the issues of proximate cause and contributory negligence—not to GMP's duty. *See Fox v. Chicago, St. P., M. & O. Ry. Co.*, 141 N.W. 845, 847 (Minn. 1913) (considering whether the plaintiff "paid close attention to his surroundings" when discussing whether the defendant proximately caused the plaintiff's injuries); Restatement (Second) of Torts § 343A cmt. f (Am. L. Inst. 1965) (providing that when landowner should foresee the risk of harm posed by open and obvious condition, "the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence").

In sum, we conclude that there is a disputed issue of fact regarding whether GMP should have foreseen Herold's trip-and-fall on the small edge of the ramp that extended

[2] We note that Herold's deposition testimony is not conclusive on whether he was paying attention at the time he tripped. Herold's testimony on why he did not see the small edge of the ramp was as follows: he "was walking along, talking with [his] wife, and [] didn't notice the edge, that small edge." When asked if there was anything preventing him from seeing the ramp on the day of the accident, he responded: "I was talking, not paying attention, maybe. I don't know." But, earlier, he also testified that he was looking forward—"up the road"—when he fell and that he typically took care to watch where he walked to avoid falling. Viewing this evidence in the light most favorable to Herold, there remains an issue of material fact as to whether Herold was paying attention.

into the sidewalk. "Summary judgment is a blunt instrument that is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotations omitted). Accordingly, the district court erred by granting summary judgment in favor of GMP on Herold's negligence claim based on the duty element. We reverse and remand for further proceedings.[3]

II. BMM owed no duty of care to Herold based on its limited involvement in the maintenance of the ramp.

Herold also challenges the district court's grant of summary judgment to BMM. While it is undisputed that BMM, which does not own the ramp, owed no affirmative duty to Herold, Herold contends that BMM undertook GMP's duty to maintain the apartment building for the safety of all entrants to the property. Whether BMM assumed GMP's duty is governed by Restatement (Second) of Torts section 324A (Am. L. Inst. 1965).[4]

[3] The district court granted summary judgment to BMM on GMP's cross-claim because dismissal of Herold's complaint meant that "GMP does not require indemnification for any claims by BMM." Because we reverse and remand the district court's grant of summary judgment to GMP, we also reverse and remand the district court's grant of summary judgment on GMP's cross-claim.

[4] In determining that BMM owed no duty to Herold, the district court did not apply section 324A. Instead, it determined that BMM had no duty to warn Herold of the ramp's condition because "BMM was neither in a special relationship with [Herold] nor should be expected to protect against the open and obvious condition of the sidewalk." Despite concluding that BMM owed Herold no affirmative duty to warn, the district court failed to consider Herold's assertion that BMM assumed GMP's duty.

Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus, 801 N.W.2d 193, 199-200 (Minn. App. 2011). Section 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform[5]] his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Whether BMM has assumed a duty within the meaning of section 342A is a question of fact. *Id.* at 199. To survive a motion for summary judgment, Herold must come forward with sufficient evidence to create a disputed issue of material fact regarding whether BMM assumed a duty of GMP. *See id.* at 200 (concluding that summary judgment is inappropriate when there are disputed issues of material fact on whether a duty was assumed).

Herold contends that BMM assumed GMP's duty under subsections (a) and (b) of section 342A. Assuming without deciding that BMM rendered services to GMP that were necessary for the protection of Herold, thereby satisfying section 324A's general requirement, we conclude that, even viewing the evidence in the light most favorable to Herold, Herold cannot satisfy the requirements of subsections (a) and (b).

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[5] "The reporter for this edition of the Restatement has verified that the word 'protect' which appears at this point is a typographical error and should read 'perform.'" *Ironwood Springs*, 801 N.W.2d at 199 n.1 (quotation omitted).

The summary-judgment record contains the following evidence: GMP contracted with BMM for facilities maintenance at the apartment building. Under the contract, BMM agreed to provide one technician, who would "report to the on-site property manager," to perform maintenance duties at GMP's apartment building. On July 2, 2022, GMP instructed BMM's employee to assist with maintenance on the malfunctioning handrail. BMM's employee assisted a GMP maintenance person with removing the handrail from the ramp and placing it to the side. At the GMP property manager's instruction, BMM's employee then painted a yellow line along a portion of where the handrail had been. BMM's employee did not paint a similar yellow line along the lower half of the ramp. BMM's employee completed the entire maintenance request in about five minutes. GMP's property manager immediately approved the work and informed BMM's employee that GMP would be hiring another company to reinstall the handrail. BMM had no further involvement with the ramp maintenance. Herold tripped on the ramp two weeks later.

To be liable under section 324A(a), BMM's failure to exercise reasonable care must have increased the risk of Herold's trip and fall. We conclude that, under the specific circumstances of this case, BMM's limited involvement with the ramp's maintenance did not increase the risk of Herold tripping on the ramp. The record reflects that GMP retained control of the ramp, supervised and instructed BMM's employee during the maintenance, and promptly approved of and accepted the maintenance performed by BMM's employee. And, while BMM's employee did participate in the painting of the yellow line, there is no evidence that the employee's participation increased any risk of harm given that GMP directed and approved of the work. As a matter of law, BMM did not increase the risk of

harm to Herold through its employee's brief, supervised participation in the maintenance of the ramp. BMM therefore did not assume GMP's duty under section 324A(a).

To be liable under section 324A(b), BMM must have "*completely* assume[d]" GMP's duty owed to Herold. *Ironwood Springs*, 801 N.W.2d at 202 (emphasis added). The parties' contract required BMM's maintenance technician to report to GMP's property manager. And even though GMP's property manager instructed BMM's employee to perform maintenance on the handrail, GMP retained control of its property and dictated the nature of the maintenance. Under these circumstances, no reasonable fact-finder could find that BMM completely assumed GMP's duty to maintain its premises in a safe manner. BMM therefore cannot be liable under section 324A(b).

Accordingly, Herold's reliance on section 324A is unavailing. Even viewing the evidence in the light most favorable to Herold, BMM's limited involvement in the handrail maintenance imposed no duty on BMM in this case. The district court therefore did not err by granting summary judgment to BMM.

III. The district court must address whether GMP and BMM are entitled to summary judgment on Herold's alternative claim of negligence per se.

Lastly, Herold argues that the district court failed to address his claim of negligence per se when it granted summary judgment for respondents. Although negligence per se "is a form of ordinary negligence," negligence per se results from the defendant's violation of a statute. *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 706 (Minn. 2012) (quotation omitted). As a result, "a statutory duty of care is substituted for

the ordinary prudent person standard such that a violation of a statute is conclusive evidence of duty and breach." *Id.* (quotation omitted).

Herold asserts that he presented undisputed evidence of GMP's and BMM's violations of various municipal codes, sufficient to survive summary judgment on his negligence per se claim. A claim for negligence per se can turn on the violation of "ordinances that are adopted pursuant to statutory authority." *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 7 (Minn. 1995).

While the district court acknowledged that Herold's complaint included a claim of negligence per se, the district court did not address the claim in its order granting summary judgment. The district court's analysis of GMP's and BMM's duties only went so far as the "ordinary prudent person standard" and lacks any discussion of whether GMP or BMM violated an ordinance. *See id.* As a result, the district court did not actually decide the question of whether GMP and BMM are entitled to summary judgment on Herold's negligence per se claim. And "an undecided question is not usually amenable to appellate review." *Hoyt Inv. Co. v. Bloomington Com. & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988). We therefore decline to review this unresolved inquiry and remand to the district court to address the parties' summary-judgment arguments on Herold's negligence per se claim in the first instance.

Affirmed in part, reversed in part, and remanded.