Court of Appeals of Minnesota.

Dawn ROLFHUS and Reed Rolfhus, Appellants,

v.

COUNTY OF WRIGHT, Defendant,

Green View, Inc., Respondent.

No. C2-00-1784.

March 27, 2001.

Susan M. Holden, Sieben Grose Von Holtum & Carey, Ltd.; and Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, MN, for appellants.

Timothy J. Eiden, Roger B. Frederickson, Hansen Dordell Bradt Odlaug & Bradt, PLLP, St. Paul, MN, for respondent.

Considered and decided by KLAPHAKE, Presiding J., AMUNDSON, and WILLIS, JJ.

UNPUBLISHED OPINION

KLAPHAKE.

*1 Appellant Dawn Rolfhus was seriously injured at a Wright County park in 1997 after a tree branch broke and struck her head during a summer storm. She and her husband sued the county and respondent Green View, Inc., a non-profit organization that provides senior citizens with maintenance and custodial work at state and county parks. Green View had a contract with the county to maintain the park at which Rolfhus was injured. The district court granted summary judgment to the county, based on immunity, and to Green View, based on a determination that Green View had no duty to inspect trees or warn park patrons of dangerous trees. Rolfhus appeals only the grant of summary judgment to Green View. Because the record does not include material facts that would show Green View voluntarily undertook the duty to inspect and warn of decayed trees, we affirm the district court's grant of summary judgment.

DECISION

On appeal from summary judgment, the appellate court's duty is to determine whether any genuine issues of material fact exist and whether the district court erred in its application of the law. Cummings v. Koehnen, 568 N.W.2d 418, 420 (Minn.1997).“A reviewing court must view the evidence in the light most favorable to the party against whom summary judgment was granted.”Vetter v. Security Counsel Ins. Co., 567 N.W.2d 516, 520 (Minn.1997) (citation omitted).“[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented.”DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn.1997) (citation omitted). A genuine issue of fact exists if it is supported by evidence that is legally sufficient to avoid a directed verdict. Id. at 70.

The elements of a negligence claim include a duty, a breach of that duty, proximate cause, and injury in fact. Nickelson v. Mall of Am. Co., 593 N.W.2d 723, 725-26 (Minn.App.1999).“Whether a duty exists is a question of law and subject to de novo review.”Id. at 726 (citation omitted). Even where no duty otherwise exists, a person who voluntarily assumes a duty may be liable for failing to exercise reasonable care in performing the duty. State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 493 (Minn.1996) ((“[O]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.”) (quotation omitted)).

Rolfhus contends that Green View voluntarily undertook a duty to maintain trees and warn of dangerous trees in the park.FN1Neither the language of the contract between the county and Green View nor the pertinent job descriptions create a duty for Green View employees to inspect trees or warn of their dangers. The evidence Rolfhus cites in support of her claim against Green View includes deposition testimony from various county and Green View employees.

FN1. Green View claims that this court should decline to hear Rolfhus's argument that Green View's negligence is premised on a voluntarily assumed duty because that argument was never raised to or considered by the district court. Generally, a reviewing court may only consider an issue that the record demonstrates was presented to and considered by the district court. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn.1988).“Nor may a party obtain review by raising the same general issue litigated below but under a different theory.”Id. (citation omitted); Pomush v. McGroarty, 285 N.W.2d 91, 93 (Minn.1979) (party may not raise new negligence theory on appeal).“A party is not precluded, however, from making a new argument on appeal for the proposition raised at the time of trial.”Plaza Assocs. v. Unified Dev., Inc., 524 N.W.2d 725, 730 n. 1 (Minn.App.1994), review denied (Minn. Jan. 25, 1995). Further, an appellate court may exercise its discretion to decide an issue if justice requires it. Minn.R.Civ.App.P. 103.04. Because Rolfus's complaint, her argument to the district court, and the district court's memorandum of law can be read to include a claim of voluntary assumption of duty, we conclude that the issue is properly reviewable by this court.

Ralph Borrell, the county park manager, testified in his deposition that the Green View employees, without discussion, undertook to remove the tree that had fallen on appellant. Harold Johnson, a Green View employee, admitted to looking for dead trees in the park, but stated in his deposition that it "isn't our job to chop down trees or anything like that." Another employee, Frank Duncan, conceded that he never saw any county employees in the park inspect trees, but that he "knew they did it." The county employees all testified that it was the county's duty to inspect trees and warn of dangers, and the Green View employees all testified that it was not their duty to inspect trees or warn of their dangers. Even viewing the evidence Rolfhus presented and all of the inferences that can be derived from that evidence in the light most favorable to her, we conclude that she has not provided material facts sufficient to survive a motion for summary judgment. While Rolfhus attempts to seek redress for very serious injuries, under the applicable law we must affirm the district court's grant of summary judgment to Green View.