NOT DESIGNATED FOR PUBLICATION

No. 125,651

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JENNY E. DECAVELE,
Appellant,

v.

WINBURY OPERATING, LLC; BEAR PARTNERS, LLC; and
FOUR B CORP., d/b/a BALLS SUN FRESH MARKET,
Appellees.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; CONSTANCE M. ALVEY. Opinion filed May 26, 2023. Affirmed.

Scott A. Hunter, of Hunter & Cassidy, LLC, of Kansas City, Missouri, for appellant.

Christina L. Ingersoll, of Andersen & Associates, of St. Paul, Minnesota, for appellees.

Before BRUNS, P.J., GREEN and WARNER, JJ.

PER CURIAM: This negligence case arose from Jenny DeCavele's fall on a sidewalk owned by Sun Fresh Market in Wyandotte County. The district court granted summary judgment for the defendants based on an 88-year-old legal principle known as the slight-defect rule. This rule, which was adopted by the Kansas Supreme Court and marries negligence theory with a recognition of the practical realities of Kansas weather, recognizes that a property owner's duty of reasonable care to maintain his or her property does not include an obligation to maintain perfect sidewalks. Thus, a person cannot be held liable in negligence for injuries resulting from slight defects in sidewalks.

DeCavele appeals the district court's ruling, urging the Kansas appellate courts to abandon the slight-defect rule as it applies to private sidewalks and allow her case to go before a jury. But this court is bound by Kansas Supreme Court precedent, including its most recent decision retaining the slight-defect rule. And we agree with the district court's conclusion that the missing corner of the sidewalk in this case—measuring roughly 1.5 inches across and .75 inches deep—falls within the scope of that rule. We thus affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2018, DeCavele went to Sun Fresh Market to purchase a ham. She parked her car and walked toward the grocery store. When she was walking on the sidewalk in front of the store's entryway, her toe caught a crumbled section at the corner of one of the concrete slabs, causing her to fall forward onto the concrete. As a result of her fall, DeCavele injured her left hand, left wrist, and ribs. Her left hand sustained permanent damage.

DeCavele sued three parties over her fall: Winbury Operating, LLC, was the property management company that maintained the area where DeCavele fell; Bear Partners, LLC, owned the property; and Four B was a corporation that owned and operated the store, doing business as Balls Sun Fresh Market. For ease of reference, we describe these parties collectively as the defendants.

DeCavele's negligence suit alleged that her fall was caused by a hole and depression in Sun Fresh Market's sidewalk. The hole was at the intersection of four slabs of concrete and measured about 1.5 inches wide by .75 inches deep. The petition alleged that the sidewalk was only used by people entering and exiting Sun Fresh Market—not by the public to access other buildings, and it was not part of a shopping center or mall.

According to DeCavele, the imperfection in the sidewalk rendered it unsafe. She asserted that the defendants knew or could have known of this unsafe condition and that they failed to use ordinary care to repair, barricade, or remove it. And as a direct and proximate result, she fell and injured herself.

The defendants moved for summary judgment, asserting that DeCavele's claim was legally barred by a principle of Kansas Supreme Court caselaw that has come to be known as the slight-defect rule. The district court granted the defendants' motion. In its journal entry, the district court cited several Kansas Supreme Court cases that reaffirmed the slight-defect rule. The district court then found that this principle applied to the deteriorated section of the sidewalk in front of Sun Fresh Market, so DeCavele could not as a matter of law prevail on her negligence claim. DeCavele appeals.

DISCUSSION

DeCavele's claims against the defendants are based on the theory of negligence—alleging that her injuries resulted from their failure to adequately maintain the sidewalk outside the grocery store. At its core, negligence is the breach of a legal duty to exercise reasonable care under the circumstances. To succeed on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a legal duty and breached that duty, and that the plaintiff was injured because of the defendant's breach. *Sall v. T's, Inc.*, 281 Kan. 1355, Syl. ¶ 2, 136 P.3d 471 (2006).

Summary judgment "is seldom proper in negligence cases." *Esquivel v. Watters*, 286 Kan. 292, Syl. ¶ 3, 183 P.3d 847 (2008). This is because summary judgment is only appropriate when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." K.S.A. 2022 Supp. 60-256(c)(2). "In the vast majority of cases, claims based on negligence present factual determinations for the jury, not legal questions for the court." *Hauptman v. WMC, Inc.*, 43 Kan. App. 2d 276, Syl.

¶ 1, 224 P.3d 1175 (2010). But summary judgment is proper in a negligence case when "the only questions presented are questions of law" or when "reasonable persons could arrive at only one conclusion" under the facts. 43 Kan. App. 2d 276, Syl. ¶ 1.

A party seeking summary judgment must show there are no disputed questions of material fact—that there is nothing the fact-finder could decide that would change the outcome in the case. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). In reviewing a summary-judgment motion, the district court views the evidence in the light most favorable to the nonmoving party, giving that party the benefit of every reasonable inference drawn from the evidentiary record. 289 Kan. at 900. If reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Becker v. The Bar Plan Mut. Ins. Co.*, 308 Kan. 1307, 1311, 429 P.3d 212 (2018); *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432 (2018). Because summary judgment tests the legal viability of a claim, we apply this same framework on appeal. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013).

Although summary judgment is rare in negligence actions, appellate courts have upheld summary judgment when the defendant had no legal duty to act because "[w]hether a duty exists is a question of law." *Sall*, 281 Kan. 1355, Syl. ¶ 2. Thus, "[i]f a court concludes that a defendant did not have a duty to act in a certain manner toward the plaintiff, then the defendant cannot be liable to the plaintiff for negligence." *Elstun v. Spangles, Inc.*, 289 Kan. 754, 757, 217 P.3d 450 (2009).

DeCavele argues that the district court erred by entering summary judgment for two reasons. First, she argues that the legal principle the court applied here—the slight-defect rule—is unsound and requires the district court to make otherwise impermissible findings of fact at the summary-judgment stage. Second, she asserts that there was a

factual question as to whether the imperfection in the sidewalk was sufficiently small to fall within that rule's scope.

1. *The slight-defect rule is rooted in Kansas Supreme Court caselaw, and as an intermediate court, we are bound by that precedent.*

"Since 1935, Kansas courts have applied a judicially created rule that slight and inconvenient defects in a sidewalk do not furnish basis for actionable negligence, even though a pedestrian may trip, fall, and injure himself or herself on account of such a trivial defect." *Elstun*, 289 Kan. 754, Syl. ¶ 6; see *Ford v. City of Kinsley*, 141 Kan. 877, Syl. ¶ 1, 44 P.2d 225 (1935). Kansas courts have routinely described this principle as the "slight-defect rule." *Elstun*, 289 Kan. 754, Syl. ¶ 6. But though courts often refer to this principle as a "rule," it is truly an articulation of a property owner's duty of reasonable care when maintaining sidewalks.

Kansas law does not impose a generalized duty on everyone to prevent all possible harm to others; such a duty would be unwieldy and unworkable. See *Gragg v. Wichita State University*, 261 Kan. 1037, 1045, 934 P.2d 121 (1997). But when a property owner invites someone onto the premises—such as the customers of the grocery store—the owner owes those people a duty to exercise reasonable care in maintaining the publicly available facilities and to protect those people from reasonably foreseeable dangers. See *Wrinkle v. Norman*, 297 Kan. 420, 422, 301 P.3d 312 (2013).

The Kansas Supreme Court has long held, however, that this duty of reasonable care is not a duty to "furnish perfect sidewalks." *Taggart v. Kansas City*, 156 Kan. 478, 480, 134 P.2d 417 (1943). Rather, a property owner only has a duty "to furnish walks that are reasonably safe for use." 156 Kan. at 480. Thus, the Kansas Supreme Court has repeatedly indicated that slight defects in sidewalks are not, as a matter of law, breaches of the property owner's legal duty of reasonable care. *Lyon v. Hardee's Food Systems*,

Inc., 250 Kan. 43, 49, 824 P.2d 198 (1992); see also *Elstun*, 289 Kan. 754, Syl. ¶ 6 (slight defects in sidewalks cannot form the basis of negligence claims).

The Kansas Supreme Court first articulated this principle in a case involving sidewalks maintained by a Kansas municipality. See *Ford*, 141 Kan. at 880. In that case, the court observed that municipalities often have significant lengths of sidewalks to maintain. The *Ford* court noted the burden potential liability would impose under these circumstances, given the nature of sidewalks and Kansas' ever-changing weather:

> "'[A] municipality cannot be expected to maintain the surface of its sidewalk free from all inequalities and from every possible obstruction to mere convenient travel[.] [Thus,] slight inequalities or depressions or differences in grade, or a slight deviation from the original level of a walk due to the action of frost in the winter or spring, and other immaterial obstructions, or trivial defects which are not naturally dangerous, will not make a municipality liable for injuries occasioned thereby.'" 141 Kan. at 881.

Although this analysis first arose in a negligence suit against a city, the Kansas Supreme Court has since applied it with equal force "in actions against an individual or private corporation alleged to have created or maintained a defect in the sidewalk." *Sepulveda v. Duckwall-Alco Stores, Inc.*, 238 Kan. 35, 38, 708 P.2d 171 (1985); see also *Pierce v. Jilka*, 163 Kan. 232, 239, 181 P.2d 330 (1947) (applying principle to a floor mat on the walkway in front the defendant's hotel); *Moore v. Winnig*, 145 Kan. 687, 689-90, 66 P.2d 372 (1937) (applying principle to sag in metal doors in a store's walkway in front of store). And this court has applied the slight-defect rule to privately owned sidewalks. *Barnett-Holdgraf v. Mutual Life Ins. Co. of New York*, 27 Kan. App. 2d 267, 269, 3 P.3d 89 (2000) (affirming grant of summary judgment for the defendant because a .5-inch by 1-inch hole in landlord's privately owned sidewalk was a slight defect).

DeCavele's primary argument on appeal is that the Kansas courts should either do away with the slight-defect rule entirely (and allow all such negligence claims to go to a

jury) or overrule *Sepulveda* and the other cases applying the principle to private defendants and limit the application of the slight-defect rules to cases against municipalities, not private actors. For support, DeCavele references our Kansas Supreme Court's decision in *Elstun*, where the court declined to extend the slight-defect rule to parking lots. 289 Kan. at 759. DeCavele asserts that it is unreasonable to allow the possibility for a negligence claim to be presented to a jury if an injury were to arise in a grocery store parking lot but find that a property owner cannot, as a matter of law, be held liable if the same injury occurred on the store's sidewalk.

We acknowledge that there is some dissonance between allowing a jury to assess liability for injuries based on defects in a store's parking lot but not for injuries suffered on slightly defective sidewalks. But the legal principle that DeCavele challenges has been consistently recognized and applied by the Kansas Supreme Court in cases involving sidewalks since 1935. Indeed, even *Elstun*, which declined to expand the slight-defect rule to other properties, recognized that it still applied to sidewalks. See 289 Kan. at 757-58, 760. As our state's intermediate appellate court, we are duty-bound to follow and apply the Kansas Supreme Court's caselaw. "If the Supreme Court's holding needs to be refined, modified, or overturned, it is the province of the Supreme Court to effect that change." *State v. Vrabel*, 301 Kan. 797, 809-10, 347 P.3d 201 (2015).

The district court did not err when it followed Kansas Supreme Court precedent and applied the slight-defect rule in DeCavele's case.

2. *The district court did not err in granting the defendants' summary-judgment motion because the imperfection in the sidewalk was a slight defect.*

DeCavele also asserts the district court erred when it applied the slight-defect rule to her case because the imperfection in the sidewalk—which she describes as a hole—was not a slight defect under the circumstances. The parties do not dispute the size of the

hole: roughly 1.5 inches across by .75 inches deep. The only question before us is whether the district court erred when it found that the hole was a slight defect.

Kansas courts have applied the slight-defect rule to similar sidewalk defects—and some even larger than the one in this case. *Taggart*, 156 Kan. 478, Syl. ¶ 3 (holding that a 3-inch depression between sidewalk slabs was a slight defect); *Blankenship v. Kansas City*, 156 Kan. 607, 612, 135 P.2d 538 (1943) (holding that a 2-inch depression in a sidewalk caused by missing bricks was a slight defect); *Sepulveda*, 238 Kan. at 37-40 (holding that a "[1]-inch drop-off in a sidewalk" was a slight defect); *Green v. Steward*, 216 Kan. 720, 720-21, 533 P.2d 1240 (1975) (holding that a corner of a concrete sidewalk slab raised by .25 of an inch was a slight defect); *Barnett-Holdgraf*, 27 Kan. App. 2d at 275 (holding that a hole in landlord's sidewalk that was—at best—3 inches deep by 5 inches wide was a slight defect).

DeCavele argues that the size of a defect does not automatically trigger application of the rule. See *Lyon*, 250 Kan. at 52 (finding that a requested jury instruction stating that "'[t]he laws of Kansas provide that variances of up to 3 inches between adjacent surfaces of a sidewalk area are "slight variances"'" inaccurately stated the law because a defect is not automatically nonactionable because of its size). Instead, she urges the court to consider all surrounding circumstances—including the location of the sidewalk, the extent of the irregularity, the sidewalk's prior use, and its use at the time of the incident—to assess liability. 250 Kan. at 52. Under these factors, DeCavele asserts the defect was not slight. She offers several reasons why:

- The location of the hole made it dangerous because it was in an area with heavy foot traffic near the entrance of the store.

- The hole was dangerous because it caused her to sustain serious and permanent injuries.

- The sole purpose of the sidewalk is for customers, employees, and vendors to enter Sun Fresh Market—the public does not use it to access other businesses or residences.

But the point of the slight-defect rule is that property owners have no legal duty to provide perfect sidewalks and thus are not liable as a matter of law for slight defects in those walkways. Allowing a plaintiff's negligence claims to survive summary judgment for the reasons DeCavele articulates would effectively nullify the Kansas Supreme Court's reasoning in adopting that rule in the first place—that regardless of the factual circumstances, slight defects in sidewalks cannot form the basis for negligence claims.

Both this court and our Supreme Court have upheld grants of summary judgment based on slight defects under nearly identical circumstances to the imperfection in the sidewalk here. In *Sepulveda*, a woman tripped on a sunken sidewalk a few steps outside of a store's exit, and that woman suffered a permanent disability. 238 Kan. at 35-36. In *Pierce*, a man tripped and fell on a doormat immediately in front of the main entrance of a hotel. 163 Kan. at 233. And in *Barnett-Holdgraf*, a woman fell on a hole in her landlord's privately owned sidewalk. 27 Kan. App. 2d at 268, 273.

The circumstances surrounding DeCavele's fall do not distinguish it from instances when summary judgment was properly granted because the respective holes, imperfections, or depressions fell within the scope of the slight-defect rule. The district court properly applied these principles and reached that same conclusion here.

The district court did not err in granting summary judgment for the defendants because the slight-defect rule barred DeCavele's claim.

Affirmed.