2011 IL App (1st) 092942-U

FIRST DIVISION
September 12, 2011

No. 1-09-2942

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEAN ZIELINSKI,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	No. 07 L 2722
	)	
	)	
CITY OF CHICAGO, a Municipal	)	
Corporation,	)	
	)	Honorable
	)	Marcia Maras,
Defendant-Appellee.	)	Judge Presiding

JUSTICE HALL delivered the judgment of the court. Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

O R D E R

¶ 1 ***HELD***: The trial court did not err in granting defendant's motion for summary judgment.

¶ 2 Plaintiff Jean Zielinski appeals from a trial court order granting summary judgment in favor of defendant the City of Chicago dismissing her negligence claims against the City. The lawsuit arises out of a one-count complaint filed by plaintiff alleging that on December 13, 2000, shortly after 8:00 a.m., she slipped and fell while walking across a snow-covered crosswalk on Wacker Drive.

¶ 3 The facts established that on Monday, December 11, 2000, between 2:00 a.m. and 8:53 p.m., 9.5 inches of snow fell in Chicago, Illinois. Al Sanchez, who at the time was Commissioner of the City's Department of Streets and Sanitation, testified that as a result of the snowfall there was an "100 percent call out" for snowplow operators beginning at 1:00 a.m. on December 11. A "100 percent call out" means using every available snowplow operator.

¶ 4 Some of the snow that was plowed off of Wacker Drive accumulated along the curbside and also onto the raised median dividing the southbound and northbound traffic on Wacker Drive. On the morning of December 13, 2000, a snow pile approximately four and a half feet high had formed on the median. Plaintiff proceeded to walk through the snowpile using a footpath created by other pedestrians.

¶ 5 Plaintiff testified that as she was walking on the footpath, a chunk of ice and snow dislodged from the snowbank striking her right calf and causing her to lose balance. As she attempted to regain her balance, her left foot hit the median curb causing her to slip and fall backwards. Plaintiff described the cause of her fall as a combination of the dislodging of the ice and snow chunk which caused her to slip and then trip on the median curb when she tried to lift her left foot.

¶ 6 Plaintiff claimed that the defendant's negligent snow-plowing operation caused an unnatural accumulation of ice and snow to collect on and around the crosswalk and the median causing her to slip and fall in the crosswalk.[1]

¶ 7 Defendant filed a motion for summary judgment on the following three grounds: (1) that it breached no duty of care in maintaining the crosswalk; (2) that plaintiff's claims concerning the median were time-barred by section 13-214(b) of the Code of Civil Procedure (Code), the ten-year statute of repose for claims arising out of construction defects (735 ILCS 5/13-214(b) (West 2006)); and (3) that section 3-104 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-104 (West 1994)) immunized defendant from liability for its alleged negligence in failing to erect barricades or warning signs around the snow-covered median.

¶ 8 The trial court granted defendant's motion for summary judgment on all three grounds. Plaintiff appeals. For the reasons that follow, we affirm.

¶ 9 ANALYSIS

¶ 10 Plaintiff first contends that the trial court erred in granting defendant's motion for summary judgment because a genuine issue of material fact exists as to whether defendant breached the duty of care it owed plaintiff. Plaintiff alleges that the defendant, as a local public entity, owed her a duty of ordinary care to maintain its property in a reasonably safe condition.

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[1] A natural accumulation of ice and snow is one which accumulates as a result of an act of nature, whereas an unnatural accumulation is manmade. *Porter v. Miller*, 13 Ohio App. 3d 93, 95, 468 N.E.2d 134 (1983).

¶ 11 Defendant responds that it was entitled to summary judgment on plaintiff's negligence claims because it had no duty to protect plaintiff under the circumstances in this case. We agree with defendant.

¶ 12 Our review of the trial court's order granting summary judgment is *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill. App. 3d 167, 171, 793 N.E.2d 736 (2003). Summary judgment may be granted where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2000); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50, 711 N.E.2d 773 (1999).

¶ 13 In order to recover in an action for negligence, a plaintiff must establish that the defendant owed plaintiff a duty, that the defendant breached that duty, and that the defendant's breach was a proximate cause of plaintiff's injury. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140, 554 N.E.2d 223 (1990). Unless a duty is owed, there can be no recovery in tort for negligence. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26, 594 N.E.2d 313 (1992).

¶ 14 Whether a duty exists is a question of law for the court to decide and is appropriately determined on a motion for summary judgment. *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1027, 830 N.E.2d 722 (2005). The four factors that must be considered in determining whether a duty exists are: (1) the reasonable foreseeability of injury, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against injury, and (4) the consequences of placing

that burden upon defendant. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 281, 864 N.E.2d 227 (2007).

¶ 15 Under Illinois law, absent a contractual obligation, property owners, including public entities, generally owe no duty to remove natural accumulations of snow or ice from their property. *Kiel v. City of Girard*, 274 Ill. App. 3d 821, 825, 654 N.E.2d 1101 (1995); *Madeo v. Tri-Land Properties, Inc.*, 239 Ill. App. 3d 288, 290, 606 N.E.2d 701 (1992). However, a property owner who voluntarily undertakes the removal of ice and snow may be liable for injuries caused by the unnatural accumulation of ice and snow resulting from a negligent snow-removal operation. *Kiel*, 274 Ill. App. 3d at 825.

¶ 16 Defendant argues that the unnatural accumulation of ice and snow that collected on and around the median and in the crosswalk as a result of its snow-plowing operation was an open and obvious hazard for which it owed plaintiff no duty to warn or protect against. Under Illinois law, persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries resulting from dangerous conditions that are open and obvious. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 447-48, 665 N.E.2d 826 (1996). This is because the law assumes that individuals will recognize and avoid obvious risks.

¶ 17 A condition is considered "open and obvious where a reasonable person in the plaintiff's position exercising ordinary perception, intelligence and judgment would recognize both the condition and the risk involved." *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 17, 938 N.E.2d 584 (2010). The determination of whether a condition is open and obvious is generally a question of fact, but can be decided as a matter of law where there is no dispute about the

physical nature of the condition. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1053, 930 N.E.2d 511 (2010).

¶ 18 In this case, the snow-covered median and crosswalk presented open and obvious dangers because of the high probability that they might be slippery. See, *e.g.*, *Ververis v. Hartfield Lanes*, 271 Mich. App. 61, 67, 718 N.W.2d 382 (2006) ("by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery"). The plaintiff does not dispute that the danger presented by the snow-covered median and crosswalk was open and obvious.

¶ 19 Whether a condition is open and obvious plays a large role in determining whether a duty exists because it relates to the issues of foreseeability and likelihood of injury. *Wilfong*, 401 Ill. App. 3d at 1052. The foreseeability and likelihood of injury from an open and obvious condition is considered slight because the law assumes that individuals will appreciate the risks associated with such a condition and therefore exercise care for their own safety. *Bucheleres*, 171 Ill. 2d at 456-57; *Wilfong*, 401 Ill. App. 3d at 1053.

¶ 20 In this case, because the danger presented by the snow-covered median and crosswalk was open and obvious, the foreseeability and likelihood of injuries such as those sustained by plaintiff were slight and thus weighed against a finding of duty.

¶ 21 There are two exceptions to the open and obvious doctrine, neither of which applies in the instant case: the "distraction exception" and the "deliberate-encounter exception." Under the "distraction exception," a property owner will be found to owe a duty of care even where a condition is open and obvious if it was reasonably foreseeable that a plaintiff might be too

distracted to notice the condition. *Wilfong*, 401 Ill. App. 3d at 1054.

¶ 22 And under the "deliberate-encounter exception," a property owner will be found to owe a duty of care even where a condition is open and obvious if it was reasonably foreseeable that a plaintiff might deliberately encounter an open and obvious danger because doing so would outweigh the apparent risk. *Wilfong*, 401 Ill. App. 3d at 1054. The deliberate-encounter exception is most often applied in cases involving some type of economic compulsion. *Sollami v. Eaton*, 201 Ill. 2d 1, 16, 772 N.E.2d 215 (2002). Here, there is no evidence regarding the applicability of either the deliberate-encounter exception or the distraction exception.

¶ 23 In regard to the magnitude of the burden and the consequences of placing that burden upon defendant, we believe that it would be unreasonable and prohibitively expensive to impose a duty upon defendant requiring it to completely remove all ice and snow plowed curbside or on a median after a heavy snowfall. See, *e.g.*, *Kiel v. City of Girard*, 274 Ill. App. 3d 821, 828, 654 N.E.2d 1101 (1995) ("[r]equiring prompt cleanup of all snow plowed curbside would place an enormous burden on cities"); *Miehl v. Darpino*, 53 N.J. 49, 53-54, 247 A.2d 878, 880-81 (1968) (finding that it would be impractical and prohibitively expensive to burden a municipality with the impossible task of removing all ice and snow disturbed during a snow-plowing operation).

¶ 24 The evidence in this case reveals that the defendant's snow-plowing and snow-removal operations had been operating at maximum capacity for several days prior to the accident. Moreover, the intersection of Wacker and Randolph where the slip and fall occurred was only one location in a city with hundreds of miles of streets that required snow removal. A municipality already operating at capacity does not breach a duty by failing to be everywhere at

once to clear snow.

¶ 25 After considering all four factors relating to whether a duty exists, we conclude that the defendant did not owe plaintiff a duty of care under the circumstances in this case because the danger presented by the snow-covered median and crosswalk was open and obvious.

¶ 26 Plaintiff next alleges that granting defendant summary judgment was improper because there was a genuine issue of material fact as to whether defendant was negligent in maintaining a crosswalk that included a raised median. Again we must disagree.

¶ 27 The trial court found that plaintiff's claim regarding the median was time-barred under the ten-year statute of repose for improvements to real property (735 ILCS 5/13-214(b) (West 2006)), because the claim was predicated on a design or construction defect to real property. Section 13-214(b) of the Code, also known as the statute of repose, states in pertinent part:

> "No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission." 735 ILCS 5/13-214(b) (West 2006)[2].

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[2] A "statute of repose differs from a statute of limitations in that a statute of limitations governs the time within which lawsuits may be commenced after a cause of action has accrued, while a statute of repose extinguishes the action itself after a fixed period of time, regardless of when the action accrued." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61, 857 N.E.2d 229 (2006).

¶ 28 Plaintiff does not dispute that the median on Wacker Drive had been in the crosswalk since 1949, pursuant to a 1945 design. Plaintiff, however, attempts to avoid application of the statute of repose by characterizing her claim as raising issues of negligent maintenance of a crosswalk, rather than an alleged defect in the construction or design of the crosswalk.

¶ 29 Contrary to this characterization, the crux of plaintiff's claim is that the defendant should not have designed a crosswalk that included a median. Thus, the claim is clearly alleging a defect in the construction or design of the crosswalk and therefore the claim was time-barred by section 13-214(b) of the Code.

¶ 30 Finally, we reject plaintiff's contention that the defendant was negligent in failing to provide warning signs or barricades at or around the snow-covered median. As previously determined, the danger presented by the snow-covered median and crosswalk was open and obvious and therefore the defendant did not have a duty to place warning signs or barricades around these conditions.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County in granting summary judgment in favor of defendant.

¶ 32 Affirmed.