

2011 IL App (2d) 110284-U
No. 2-11-0284
Order filed December 21, 2011

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
SECOND DISTRICT

DANIEL ECKBURG, Individ. and as)	Appeal from the Circuit Court
Special Adm'r of the Estate of Kristi)	of Ogle County.
Eckburg, Deceased,)	
)	
Plaintiff-Appellant,)	
)	
v.)	No. 08-L-1
)	
PRESBYTERY OF BLACKHAWK OF)	
THE PRESBYTERIAN CHURCH (USA),)	Honorable
)	Stephen C. Pemberton,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) because the law-of-the case doctrine did not apply to bar the court's ruling that defendant did not owe plaintiff a duty as a matter of law where it was undisputed that the land in question was dedicated and now under the control of the State of Illinois.

¶ 1 Plaintiff, Daniel Eckburg, individually and as special administrator of the Estate of Kristi Eckburg, filed a complaint against defendant, Presbytery of Blackhawk of the Presbyterian Church (USA). Plaintiff alleged negligence, wrongful death, and survival actions against defendant after

a tragic motorcycle accident occurred on August 11, 2007, when a tree fell onto the roadway in plaintiff's path. Plaintiff appeals the February 23, 2011, circuit court order which granted defendant's motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619) (West 2010). Previously, we reversed the trial court's dismissal of plaintiff's complaint and remanded the cause for further proceedings. See *Eckburg v. Presbytery of Blackhawk*, 396 Ill. App. 3d 164 (2009) (reversing trial court's dismissal of plaintiff's complaint based on defendant's land being rural and notice being insufficient and remanding for trial court to employ traditional negligence analyses to determine whether defendant owed a duty to plaintiff). Upon remand, defendant filed another section 2-619 motion to dismiss, arguing a different basis for dismissal. On appeal, plaintiff argues that the trial court erred in granting defendant's motion because the law-of-the-case doctrine barred defendant from raising its new argument. Further, plaintiff argues that in granting the motion, the trial court effectively disregarded our earlier order and instructions upon remand. We affirm.

¶ 2 Since plaintiff did not amend his complaint upon remand, a summary of the allegations can be found in our previous opinion. *Eckburg*, 396 Ill. App. 3d at 165. While back in the trial court, defendant requested information from the Illinois Department of Transportation (IDOT) that pertained to the section of Illinois Route 2 involved in the accident, including traffic volume, any reports or complaints about dangerous trees filed by Gordon Bell, or any reports or complaints relating to the foliage or trees in that area. IDOT denied defendant's request in part because the information requested was not covered by the Freedom of Information Act (5 ILCS 140 *et seq.* (West 2010)), the request was overly broad, and it was named a respondent in a Court of Claims case filed by plaintiff.

¶ 3 On November 16, 2010, defendant moved for dismissal pursuant to section 2-619, arguing that the tree that fell was located on and within the State's "right-of-way" and that the State of Illinois was responsible for maintaining the right-of-way of Illinois Route 2. Defendant argued that it was prohibited from entering the right-of-way area to trim or cut trees in any way. Accordingly, defendant argued that it did not owe a duty to plaintiff. Defendant relied upon the Illinois Highway Code (605 ILCS 5/2-202 (West 2010)), for its definition of highway and right-of-way and its argument that it was prohibited from entering the right-of-way to tend to the foliage and trees (605 ILCS 5/9-119 (West 2010)). Additionally, defendant attached the affidavit of a licensed surveyor, ReJena Lyon, to establish that the base of the tree that fell was contained in the right-of-way area along Route 2. Defendant also submitted the dedication of the right-of-way, which indicated that in 1940, the grantor, Josephine Strong, granted, conveyed, and dedicated to the people of the State of Illinois, for the purpose of a public highway, the land that is now Route 2 and the right-of-way area extending beyond the actual highway, which encompassed the area where the tree limb fell. The following language is contained in the dedication of the right-of-way:

"Full right, power and authority is hereby granted, conveyed and dedicated to the grantee herein to plant, grow, cultivate and maintain trees, plants and shrubs or any of them and also to do and perform any other lawful acts of highway landscaping which may be considered proper by the grantee on the above described tract of land."

¶ 4 Plaintiff responded that defendant was bound by the law-of-the-case doctrine and was prohibited from raising any issues related to the duty it owed to plaintiff that could have been raised in proceedings prior to the *Eckburg* decision. Further, plaintiff argues that defendant still has title to the land despite the designation of it as a right-of-way to allow the State access to maintain the roadway, and therefore still had a duty to maintain the foliage as a landowner.

¶ 5 On February 23, 2011, the trial court issued its written order. The trial court stated that while defendant should have raised its current duty issue in its first motion for this court to resolve in the first appeal, to bar defendant from raising the issue at a later time seemed “illogical and unjust, particularly because the appellate court’s decision only addressed the issue of the Defendant’s duty in light of a rural/urban analysis as discussed in the restatement.” The trial court believed that defendant’s motion fell within the parameters of our direction that the parties be allowed to proceed with discovery to obtain more information regarding the nature of the surrounding land and the location of the tree. The trial court noted that we did not find that defendant owed plaintiff a duty, and therefore the law of the case doctrine did not apply to bar defendant from arguing against it. Based on defendant’s motion, the trial court ruled that the affirmative matters presented unquestionably supported defendant’s proposition that on the date of the accident, the tree was located entirely on the right-of-way controlled by the State of Illinois. The trial court stated that the conveyance documents established that the preceding titleholder conveyed the property in question to the State and that the State had the sole obligation to maintain the trees located on the right-of-way.

¶ 6 On appeal, plaintiff argues that the trial court erred in its ruling because the law-of-the-case doctrine should have barred defendant from raising its new argument and that the trial court effectively failed to follow this court’s remand to conduct a traditional negligence analysis to determine whether defendant owed a duty to plaintiff. Regardless of the law-of-the-case doctrine, plaintiff argues that the trial court erred in finding that only the State had the duty to maintain the land where plaintiff submitted the title of the property, which reflected that defendant still owned the property despite the right-of-way dedicated to the State.

¶7 We first address plaintiff's latter argument that the trial court disregarded the mandate issued in our previous decision in *Eckburg*. In *Eckburg*, the issue was whether the trial court correctly determined that section 363 of the Restatement (Second) of Torts (Restatement (Second) of Torts §363, at 258 (1965)) provided defendant immunity from liability. Section 363 provides immunity to rural landowners from liability for harm caused to others by a natural condition of the land. *Eckburg*, 396 Ill. App. 3d at 166. We determined that the trial court should have employed a traditional negligence analysis to determine whether a duty existed rather than using the overly simplistic "urban/rural" distinction contained in section 363. *Id.* at 173-74. We also concluded that the trial court erred in finding that plaintiff's allegation of notice was insufficient during a section 2-619 attack. *Id.* at 175. Accordingly, we remanded the cause back to the trial court to apply the traditional negligence analysis, which takes into consideration factors such as but not limited to: the size and type of the roadway, traffic patterns of the road, the nature of the surrounding land, the condition and location of the tree, the nature of the danger posed to travelers, and the burden of inspecting and removing the danger. *Id.* at 173-74. We stated that the parties should be allowed to proceed with discovery to obtain more information regarding these factors so that the trial court could "fully consider whether defendant had a duty to exercise reasonable care in maintaining the trees that abutted Illinois Route 2." *Id.* at 174.

¶8 We disagree with plaintiff that by considering the dedication of the land, the trial court disregarded our previous decision. While this issue was not raised in defendant's earlier section 2-619 attack and therefore not discussed in *Eckburg* other than the acknowledgment that the rotted and defective trees were on the "easement for Illinois Route 2," we did not limit the factors that the trial court could consider upon remand when determining whether defendant owed plaintiff a duty. Plaintiff's argument essentially ties to his argument that defendant should not have been allowed to

interject this issue because it could have raised the issue earlier, and it could have been addressed in the earlier appeal, bringing us to plaintiff's argument raising the law-of-the-case doctrine.

¶9 Generally, the law-of-the-case doctrine bars relitigation of an issue previously decided in the same case. *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). This doctrine applies to both issues of law and issues of fact. *Id.* Questions of law that are decided on a previous appeal are binding on the trial court on remand as well as on the appellate court in subsequent appeals. *Id.* The doctrine protects settled expectations of the parties, ensures uniformity of decisions, maintains consistency during the course of a single case, effectuates proper administration of justice, and brings litigation to an end. *Id.* Two exceptions to the law-of-the-case doctrine are: (1) when a higher reviewing court makes a contrary ruling on the same issue subsequent to the lower court's decision, and (2) when a reviewing court finds that its prior decision was palpably erroneous. *Id.*

¶10 Plaintiff argues that defendant should not have been allowed to argue that it did not control the land on which the tree was situated because the land had been dedicated to the State of Illinois, which now controlled the maintenance of the land. Plaintiff argues that defendant could have but did not raise this issue in the prior proceedings, and like in *Martin v. Federal Life Insurance Co. (Martin II)*, 164 Ill. App. 3d 820 (1987), the trial court should have barred defendant's "new defense." We find *Martin II* distinguishable from the facts of this case.

¶11 In *Martin v. Federal Life Insurance Co. (Martin I)*, 109 Ill. App. 3d 596, 599 (1982), the plaintiff filed a three-count complaint against his employer, the defendant, alleging breach of an oral contract and estoppel, breach of implied covenant of good faith and fair dealing, and tortious interference of breach of contract. *Id.* at 598. The defendant moved to dismiss the complaint, arguing that the employment relationship was at-will and alternatively, the Statute of Frauds barred an oral contract for permanent employment. *Id.* at 599. The trial court granted the defendant's

motion, and the appellate court reversed, finding that the Statute of Frauds did not bar the alleged oral contract and that the plaintiff had sufficiently stated a valid cause of action for breach of an oral contract. *Id.* at 601-02.

¶ 12 Upon remand, the defendant moved for summary judgment, arguing for the first time that a provision of the Insurance Code barred employment contracts between insurance companies and employees that extended beyond three years. *Martin II*, 164 Ill. App. 3d at 822-23. The trial court granted the defendant's motion, and the plaintiff appealed, arguing that there was no evidence suggesting he was ever aware of the insurance provision. *Id.* at 823. The appellate court concluded that it had already decided that the plaintiff stated a valid claim for a breach of an oral contract, and the defendant was obligated to raise the Insurance Code provision at that time. *Id.* at 824-25. Accordingly, the appellate court concluded that the law-of-the-case doctrine prevented it from reconsidering whether the Insurance Code voided the agreement between the parties. *Id.* at 826.

¶ 13 Unlike in *Martin I*, in which the court had decided that the plaintiff stated a valid breach of an oral contract claim, this court did not determine that defendant owed a duty to plaintiff in *Eckburg*. Rather, we determined only that the trial court erred in applying section 363 instead of conducting a traditional negligence analyses to determine whether defendant owed a duty. Our remand specifically told the trial court to consider relevant factors and to allow the parties to pursue discovery on the issue, if necessary. The parties did so, and defendant discovered that the land in question had been dedicated to the State of Illinois as part of the development of Illinois Route 2. As part of that dedication, the maintenance of the road and the trees and foliage was the responsibility of the State. The trial court found that there was no allegation that defendant controlled the property, and therefore, having relinquished control of the property to the State, it did not owe a duty to plaintiff.

¶ 14 Whether a duty is owed is a question of law for the court to decide. *Thompson v. Gordon*, 241 Ill. 2d 428, 439 (2011). The State owes a duty to all highway users to maintain the rights-of-way in a reasonably safe condition, although it may delegate its duty to another highway authority to relieve itself of liability. *Stojentin v. State of Illinois*, 55 Ill. Ct. Cl. 292, ___ (1999). Plaintiff contends that because defendant has legal title to the property upon which the tree was located, it also had a duty to motorists to maintain the trees. Plaintiff, however, does not cite to any case law or evidence that supports this proposition. Our research has not disclosed any authority that would impose a duty to maintain the land for motorists on a titleholder who has dedicated the land in question to the State for use as a public highway and right-of-way. Here, the language of the dedication of the right-of-way unambiguously stated that the State would maintain the right-of-way, and there is no evidence that its duty had been delegated to another authority. There is also no evidence of any affirmative conduct by defendant suggesting it was responsible for the maintenance of the land or the condition of the tree in some way. Generally, a private landowner owes no duty to ensure the safe condition of a public sidewalk or parkway abutting his property. *Gilmore v. Powers*, 403 Ill. App. 3d 930, 933 (2010). An abutting landowner may be held responsible for a condition of a public sidewalk or parkway if he assumes control of it for his own purposes. *Id.* While plaintiff alleged that Gordon Bell warned defendant of the dangerous condition of the trees, plaintiff did not allege a basis for a duty of defendant to report the condition to the State of Illinois or to remedy the condition itself. Accordingly, we affirm the judgment of the trial court in dismissing the complaint for failure to establish that a duty to plaintiff was owed by defendant.

¶ 15 For the reasons stated, we affirm the judgment of the circuit court of Ogle County.

¶ 16 Affirmed.