2015 IL App (4th) 141037-U

NO. 4-14-1037

FILED
December 8, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ERIN E. HUTSON and JACOB HUTSON,	)	Appeal from
Plaintiffs-Appellants,	)	Circuit Court of
v.	)	Vermilion County
THE VILLAGE OF RIDGE FARM, a Municipal Corporation,	)	No. 13L40
	)	
Defendant-Appellee.	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment to defendant; the evidence fails to show defendant owed a duty to plaintiffs.

¶ 2 In July 2012, plaintiff, Erin E. Hutson, suffered injuries while in her bathroom while defendant, the Village of Ridge Farm (the Village), used a high-pressure jetter to clear the sewer line that ran in front of plaintiffs' house. Plaintiffs filed suit, alleging the Village's negligence caused Erin's injuries. In June 2014, the Village moved for summary judgment, asserting, in part, it did not owe a duty to plaintiffs. The trial court agreed with the Village and granted the Village summary judgment.

¶ 3 Plaintiffs appeal, arguing (1) the Village owed them a common-law duty of care to protect them from harm during the use of the jetter system; (2) the Village is not immune from

suit under the Local Government and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 *et seq.* (West 2012)); and (3) the public-duty rule does not bar their suit. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On July 3, 2012, Erin entered her bathroom to take a bath. She began filling her bathtub and then sat on her toilet. The toilet made some gurgling sounds. Before Erin could react, sewage began gushing from the toilet. Erin jumped and began screaming for Jacob. Feces and urine splattered five feet into the air and five feet across the room. Jacob entered the bathroom and observed the sewage continue to spew from the toilet. Jacob wrapped his wife in a bathrobe and exited the home. Jacob yelled at the Village's crew, who turned off the equipment and retracted the hose. Tony Thurman, public works superintendent, was contacted. Thurman and the mayor entered plaintiffs' home and inspected the bathroom. Erin was instructed to undergo hepatitis B testing.

¶ 6 That same morning, a Ridge Farm maintenance crew used a jetter to clear roots from the main sewer line that ran in front of plaintiffs' home on East North Street. The jetter consists of a 500-gallon tank with a gas-powered pump and a 400-foot hose. The jetter had chains that it "flipped" around to clean out the line. If roots were present, a root cutter was used. Water was jettisoned through the hose at 1,000 to 1,200 pounds per square inch. One operator fed the hose through a manhole into the line, while another stood at the next manhole (about 350 feet away) to ensure the hose did not blow up and out. Once the line reached the next manhole, the line was clear.

¶ 7 The sewer system in the Village consists of mains, collectors, and laterals. The

laterals are lines that extend from the houses. The lateral lines are neither installed nor maintained by the Village. The jetter was used to clear the mains, not the laterals.

¶ 8 The Village used the jetter system approximately 12 times per year for at least 4 years before the incident, between 25 and 50 times. The jetter was twice used that summer before July 3, 2012, on East North Street without incident. On July 3, 2012, no residences other than plaintiffs' experienced sewer back-up. Plaintiffs did not have their lateral connection to the Village's main inspected before or after the incident.

¶ 9 The record references at least two other instances where sewage backup occurred after use of the jetter system. In her deposition, Erin testified a friend, Stan Richardson, told her a similar incident happened at least once before July 3, 2012, and once after that date. Thurman testified at his deposition he knew of one incident of sewage entering through a homeowner's toilet. Thurman described an incident occurring approximately one year before July 3, 2012. Thurman's crew was operating the jetter when Linda Todd exited her home and told Thurman some water had gurgled out of her stool. Thurman recalled Todd stating the jetter "blew the water out of the stool." Todd told Thurman "it wasn't that bad." Todd "wiped it up with a towel." The situation became a "running joke" between Todd and Thurman. After July 3, 2012, Thurman contacted governmental officials in another town to see if they had experienced problems like plaintiffs'. Those he spoke to reported none.

¶ 10 In July 2013, plaintiffs filed suit against the Village with claims of negligence, loss of consortium, and *res ipsa loquitor*. The Village moved for summary judgment, asserting the evidence shows it owed no duty to plaintiffs.

¶ 11 The trial court, in October 2014, agreed with the Village and granted summary

judgment. The court found no duty arose under either common law, the special-duty exception to the public duty rule, or the Act.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 A. Summary Judgment

¶ 15 An order of summary judgment is appropriate when depositions, pleadings, affidavits, and admissions on file, viewed in the light most favorable to the nonmovant, show the existence of no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Pontiac National Bank v. Vales*, 2013 IL App (4th) 111088, ¶ 29, 993 N.E.2d 463 (quoting 735 ILCS 5/2-1005(c) (West 2008)). Summary judgment is a drastic means for resolving a case; it should be given only when the right of the moving party is clear and free from doubt. *Id.* We review a summary-judgment order *de novo*. *Rettig v. Heiser*, 2013 IL App (4th) 120985, ¶ 30, 996 N.E.2d 1220.

¶ 16 B. Common-Law Duty of Care

¶ 17 Plaintiffs allege the Village is liable under theories of negligence. To recover for negligence, plaintiffs must establish "the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430, 856 N.E.2d 1048, 1053 (2006). The trial court granted summary judgment upon finding the Village owed no duty of care to protect plaintiffs from the risk of injuries they suffered while its maintenance crew used a jetter to clear a sewer main under the street in front of plaintiffs' home.

¶ 18 Using a traditional duty analysis, plaintiffs maintain the trial court erred and the

facts establish the Village owed plaintiffs a duty. Whether a duty exists is a question of law that turns on the nature of the relationship between the defendant and the plaintiff. See *Brooks v. McLean County Unit Dist. No. 5*, 2014 IL App (4th) 130503, ¶ 27, 8 N.E.3d 1203. "[T]he concept of duty in negligence cases is very involved, complex and indeed nebulous." (Internal quotation marks omitted.) *Marshall*, 222 Ill. 2d at 435, 856 N.E.2d at 1056-57. Four factors are relevant to determine whether the law imposes an obligation of reasonable conduct on defendant for plaintiffs' benefit: (1) the reasonable foreseeability of plaintiffs' injuries, (2) the reasonable likelihood of the injuries, (3) the magnitude of the burden of defendant guarding against the injuries, and (4) the consequences of placing such burden on defendant. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 389, 706 N.E.2d 441, 446 (1998).

¶ 19 Regarding the first factor, plaintiffs emphasize it was reasonably foreseeable the Village's use of highly pressurized water into sewer lines connected to homes could cause water to be discharged into the homes through their toilets and cause injury. Plaintiffs point to the fact the jetter uses up to 1,200 pounds of pressure per square inch and a "very similar event" occurred the year before when use of the jetter "blew the water out of" Todd's stool. Plaintiffs maintain the incident at the Todd residence could have caused personal injury had Todd been sitting on the stool as Erin had been. Plaintiffs argue the superintendent of public works was so concerned he contacted a neighboring town and an operator admitted hearing the term "blowing a toilet."

¶ 20 In contrast, the Village emphasizes the nature of the incident at the Todd residence, which was cleaned with a towel, did not make what occurred at plaintiffs' residence reasonably foreseeable. The Village points to the testimony the jetter had been used without an incident like the one at plaintiffs' home for at least four years, between 25 and 50 times, and on

plaintiffs' street twice earlier that summer. The Village also emphasizes when the superintendent contacted the neighboring town, he learned of no similar incidents there.

¶ 21 We agree with the Village and the trial court and find the spewing of sewage five feet high and five feet out, during use of a jetter, was not reasonably foreseeable. Plaintiffs point to only one specific incident in the evidence, and this incident was not sufficiently similar to put the Village on notice the events of July 3, 2012, could occur. Plaintiffs point to the words "blew the water out" of Todd's stool and argue they imply more than a "gurgling" or "bubbling." However, there is no evidence in the record "blew the water out" was similar to what occurred at plaintiffs'. There is no affidavit by Todd or deposition testimony by Todd. In fact, there is evidence in the record the overflow "wasn't that bad," was cleaned by a towel, and the incident became a running joke with Todd—indicating the events were not so similar as to make plaintiffs' injuries reasonably foreseeable.

¶ 22 In their reply brief, plaintiffs, citing *Ward v. KMart Corp.*, 136 Ill. 2d 132, 554 N.E.2d 223 (1990), contend a duty may arise even when no prior event showing foreseeability occurs. Plaintiffs say the "obvious distinction is private sector versus municipality." This argument is unconvincing. The foreseeability of a collision with a concrete post by a customer leaving KMart while holding a 5-foot tall mirror and walking to the parking lot after being let out by a store clerk (*Ward*, 136 Ill. 2d at 138, 554 N.E.2d at 225) is a different question than the reasonable foreseeability of injury from the use of a jetter in an underground sewer main attached to homes through lateral lines. To establish the latter without a prior incident requires some testimony by an expert or previous operator of the jetter to establish that injury would be reasonably foreseeable. Without such testimony, the only facts on which a duty can be

ascertained are those on record. In this case, those appear in the superintendent's testimony regarding Todd's experience. Plaintiffs' presentation only allows speculation that a reasonably foreseeable result from the regular and usual use of a jetter is damage to the plaintiffs' home. Speculation is not enough.

¶ 23 For a similar reason, plaintiffs' reliance on the size and force of the jetter does not create reasonable foreseeability. Given the years of safe usage of the jetter, these facts do not imply the jetter itself creates a reasonable foreseeability it would cause injury through a lateral line into an individual's home. Simply because an event might conceivably occur, does not make that event reasonably foreseeable. See *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 34, 21 N.E.3d 684.

¶ 24 The same facts and analysis apply to the second factor, the reasonable likelihood of injury. These establish the absence of evidence showing likelihood of injury from use of the jetter. Plaintiffs, on this factor, argue when waste is forced out of a toilet, injury is almost guaranteed to occur. Plaintiffs' argument is misguided. The question is not if the waste that enters the home would likely cause injury, but the likelihood the jetter would cause the injury.

¶ 25 The only evidence in this case showing an "injury" had occurred or would occur was the water that "blew out" from the Todd toilet. This "injury" was cleaned by a towel, and does not create a likelihood the injuries to plaintiffs would occur. In addition, the record contains testimony the jetter cannot enter the lateral lines into the homes.

¶ 26 The absence of a reasonable foreseeability the injury could occur and the likelihood of injury alone sufficiently weigh against the imposition of a duty on the Village. We note, however, the record also fails to establish the remaining factors weigh in plaintiffs' favor.

¶ 27 Plaintiffs argue the magnitude of the burden guarding against injury and the consequences of placing the burden on the Village favors imposition of the duty. In making this argument, plaintiffs contend the burden of the Village is small in warning residents on the street on the days of the jetting or by publishing notice.

¶ 28 This argument is flawed. A "warning" by itself would not prevent injury to the home. It may have prevented the unfortunate surprise to Erin, but it would not prevent waste from entering the homes as plaintiffs allege the jetter caused—spewing waste five feet high and five feet out. Plaintiffs seek recovery not only on a theory of failure to warn, but also negligence in the operation of the jetter and the failure to insure lines are clear. Plaintiffs present no evidence and make no argument on what the burden to the Village would be to insure lines are clear. Such a burden seems particularly weighty, given the lines that enter the homes are not property of the Village and not within the Village's control.

¶ 29 In these circumstances, the law did not impose a duty on the Village in relation to plaintiffs. Given our finding the Village did not owe a duty to plaintiffs, we need not address plaintiffs' remaining arguments the Act does not immunize the Village and the public-duty rule does not bar plaintiffs' claims.

¶ 30 III. CONCLUSION

¶ 31 We affirm the trial court's judgment.

¶ 32 Affirmed.