2016 IL App (1st) 150698-U

No. 1-15-0698

Fifth Division
March 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MATIAS AMOS, a Minor, Through His Mother and Next Friend, Georgia Gross,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 10 L 004478
v.	)	The Honorable Daniel Gillespie,
CAROL DIPRIZIO and SURE-SET MONUMENT SERVICE,	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff was injured when a gravestone fell on his leg after he had been sitting on it, the trial court's grant of summary judgment in favor of the defendant gravestone owner and defendant monument setter is affirmed because neither defendant owed plaintiff a duty with respect to the gravestone and accordingly were not liable for negligence.

¶ 2 The instant appeal arises from the trial court's grant of defendant Carol DiPrizio's[1] and defendant Sure-Set Monument Service's (Sure-Set) motions for summary judgment. Plaintiff Matias Amos, a high school sophomore who weighed approximately 350 pounds at the time of the incident in question, filed a negligence lawsuit against defendants when he was injured after a gravestone owned by DiPrizio and installed by Sure-Set fell on him after he had been sitting on it. Defendants each filed a motion for summary judgment, contending that they did not owe a duty to plaintiff, and the trial court granted summary judgment in defendants' favor. Plaintiff appeals and, for the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Complaint

¶ 5 On April 15, 2010, plaintiff filed a complaint against Queen of Heaven Cemetery[2] (the cemetery), alleging that due to the cemetery's negligence, plaintiff was injured on April 18, 2008, when the gravestone of Joseph and Vito DiPrizio "toppled down onto and upon" him while plaintiff was in the cemetery visiting the gravesite of a deceased friend.

¶ 6 On November 23, 2012, plaintiff filed an amended complaint, adding Bertacchi & Sons (Bertacchi) and Carol DiPrizio as additional defendants. Count I was against the cemetery, and alleged negligence as in the original complaint. Count II was against Bertacchi[3] and also alleged negligence. Count II alleged that Bertacchi was in the business of providing gravestones and other gravesite markers and had "fabricated and/or placed" the gravestone on the gravesite owned by Carol DiPrizio, which injured plaintiff. Count II alleged that

[1] DiPrizio died on May 30, 2012, while the instant litigation was ongoing, and her death was spread of record and a special administrator appointed on October 11, 2013. However, the special administrator was not substituted in the caption of the instant case, so we use the name "DiPrizio" to refer to both DiPrizio and the special administrator.

[2] The cemetery is no longer a party to the action and is not involved in the instant appeal.

[3] Bertacchi is no longer a party to the action and is not involved in the instant appeal.

Bertacchi had a duty "to fabricate and install their gravestones/grave markers such that they would not topple upon [and]/or injure plaintiff, and other similarly situated individuals, who happened to be in the vicinity thereof." Count III was against DiPrizio and alleged negligence. Count III alleged that DiPrizio had a duty "to use reasonable care in purchasing, and placing upon the grave site of her loved one, any gravestone/grave marker she might choose to place there as well as providing that it would be properly maintained such that it would not constitute a danger to nearby persons." Count III further alleged that DiPrizio breached this duty by, *inter alia*, "[n]egligently cho[osing] and/or purchas[ing] a gravestone/grave marker which was likely to become unbalanced and[/]or topple onto various mourners moving thru [*sic*] the cemetery in and around its vicinity"; "fail[ing] to contract for a system of period inspection and/or maintenance to ensure that the gravestone, once placed, would remain in a safe condition given the likely presence of persons such as Plaintiff, and others similarly situated, who were likely to be distracted by grief when they were moving in and around the area of Defendant's gravestone/grave marker"; and "caus[ing] or allow[ing] PLAINTIFF, and others similarly situated, to come into contact with a dangerous, improperly fabricated and installed gravestone/grave marker when Defendant knew, or in the exercise of reasonable care should have known, that the grave marker was not properly fabricated, inspected and[/]or secured in installation—thereby constituting a danger to persons lawfully upon their premises."

¶ 7 On July 12, 2011, plaintiff filed his second amended complaint, adding Sure-Set as a defendant, which is the complaint at issue in the case at bar. The complaint added a new count IV, alleging negligence against Sure-Set. Count IV alleged that Sure-Set was in the business of providing gravestones and other grave markers to be placed upon graves and that

Sure-Set had placed a gravestone on a gravesite owned by DiPrizio. Count IV alleged that Sure-Set had a duty "to fabricate and install their gravestones/grave markers such that they would not topple upon [and]/or injure plaintiff, and other similarly situated individuals, who happened to be in the vicinity thereof." Count IV alleged that Sure-Set breached this duty when it "[f]ailed to properly fabricate their gravestones/grave markers to preclude the likelihood of them becoming unbalanced and[/]or toppling onto mourners moving thru [*sic*] the cemetery in and around their vicinity"; "[f]ailed to implement a safety inspection procedure to ensure that the gravestones, tombstones and mausoleums manufactured by them were safe for placement in areas of populated traffic by individuals likely to be distracted by grief when they knew, or in the exercise of reasonable care should have known, that said gravestones, tombstones and mausoleums, by virtue of their sheer size and weight, constituted a potential threat to persons likely to come into contact therewith if not properly inspected prior to installation"; "[c]aused o[r] allowed Plaintiff and other[s] similarly situated, to come into contact with a dangerous improperly fabricated and installed gravestone/grave marker when they knew, or in the exercise of reasonable care should have known, that their grave marker was not properly fabricated, inspected and[/]or secured in installation—thereby constituting a danger to persons lawfully upon their premises"; and "[f]ailed to provide an appropriate pathways follow up procedure whereby previously placed gravestone/grave marker installations could be checked for safety following placement and after the ground there around had an opportunity to settle following the marked interment."

¶ 8 II. Depositions

¶ 9 A. Plaintiff[4]

¶ 10 At his discovery deposition, plaintiff testified that on April 18, 2008, plaintiff was a high school student and went to Queen of Heaven Cemetery to visit the gravesite of Francisco,[5] a deceased friend who plaintiff knew through a school friend. Abel,[6] one of plaintiff's friends, informed plaintiff that he and several other people were going to visit Francisco's gravesite and plaintiff decided to join them; plaintiff estimated that there were six to nine people in the group. While that day was a school day, plaintiff did not attend school that day. Instead, Abel picked plaintiff up in his truck during the morning and they drove around, arriving to the cemetery in the afternoon. On the way to the cemetery, plaintiff consumed a bottle of beer, but testified that nobody in his group had any alcoholic beverages at the cemetery.

¶ 11 Plaintiff testified that after arriving at the cemetery, they parked along the roadway inside the cemetery near Francisco's gravesite. For 30 to 45 minutes, plaintiff "was looking at my friend's gravesite and grieving." Plaintiff then walked away from Francisco's gravesite and walked over to the DiPrizio gravesite and sat down on top of the gravestone, sitting in such a fashion that his legs were dangling in front of where the writing on the gravestone would have been. The gravestone did not wobble or shift when plaintiff sat on it. Plaintiff sat there for 5 to 10 minutes then "jumped off the tombstone because we were about to—we were about to leave. And I guess when I jumped off—Because I was much heavier at the time, when I hopped off, I guess the tombstone came right behind me. And I just remember I was on the ground." Plaintiff testified that at the time of the incident, he was approximately 5 feet

[4] Plaintiff's deposition transcript was attached to Bertacchi's motion for summary judgment. As noted, Bertacchi is no longer a party to the instant case, and is not involved in the instant appeal.

[5] Plaintiff did not know Francisco's last name.

[6] Plaintiff did not know Abel's last name.

11 inches tall and weighed approximately 350 pounds and that as he leaned forward to stand up, he grabbed onto the gravestone at the same time "[a]nd I guess the force of my weight must have brought it down."

¶ 12 Plaintiff testified that the gravestone hit the inside of his right calf, injuring it. Plaintiff fell and the gravestone landed on top of his leg. When plaintiff's friends observed what had occurred, they ran over and lifted the gravestone enough for plaintiff to move his leg out from under it. Plaintiff was unable to stand, so someone called an ambulance to pick him up. Plaintiff was taken to Elmhurst Hospital, where he underwent surgery to repair his leg, which had been fractured; plaintiff required a total of three surgeries.

¶ 13 B. Jay Kornick[7]

¶ 14 At his discovery deposition, Jay Kornick testified that he was the sole owner of Sure-Set, a monument-setting business, and had worked for the business since it was incorporated under that name in 1990; prior to 1990, it was a family business operating under a different name. Kornick had worked as a monument-setter for 40 years. Kornick worked at Sure-Set with a laborer, where they performed the task of delivering monuments to cemeteries and installing them. Kornick estimated that he installed an average of 25 monuments a month in cemeteries around the Chicagoland area.

¶ 15 In describing a typical installation process, Kornick testified that he would receive a call from a shop saying that there was a monument delivery to a particular cemetery and he and the laborer would pick it up at the shop and drive it to the cemetery. At the cemetery, Kornick would take it to the office, where cemetery personnel would inspect the monument to make sure the size and lettering was correct and that there was no damage to the stone,

[7] Kornick's deposition transcript was attached to Sure-Set's motion for summary judgment, described later in this Background.

then Kornick would take the monument to the gravesite. Kornick would set the base, level it by using a dry mix of concrete, take the top piece, and then "there's a special monument setting compound that we use to set it down on to seal it." Kornick testified that the monument-setting compound was "like a putty and it's specially formulated for this purpose, for monument stone setting for monuments"; he further testified that this compound was "basically" the only type of material used to set monuments and that he purchased the compound from a granite supply house. To apply the compound, "[w]hat I do is I roll it and then you put it around the perimeter of the stone, the top piece, then you set the top piece down; and what it does is it forms a vacuum and it sucks the top piece down to the base, and then I trim off the excess." Kornick testified that this installation procedure was a standard in the monument setting industry.

¶ 16 Kornick further testified that cemeteries in Cook County did not have any standards for the setting of monuments and that there was no guidebook for the setting of monuments; any standard was "[o]nly with the way I've been taught to do it and I've never seen any other way." He testified that the method of setting monuments had not changed in the 40 years he had been in business and that he had used the same product for 40 years. Kornick testified that there was no trade association for monument setters and that he learned to set monuments from his father, who learned from his own father.

¶ 17 Kornick testified that "pinning" was a method of monument setting in which a dowel pin was installed into the top piece of the monument and into the base. He had pinned monuments in the past and testified that "[t]he size, shape" of the monument determined whether it would be pinned or glued down by using the monument-setting compound. In his opinion, a monument would be pinned "[i]f the monument is tall, probably taller than four

feet, narrow, top-heavy." He testified that he would "routinely" pin a monument that was over four feet tall. He further testified that a monument that was narrower than two feet in width should be pinned, as should a monument that was six inches or less in thickness. A monument should be pinned for stability, which Kornick testified meant "freestanding, without tipping one way or another," and he determined through his experience whether a monument was stable. He testified that he took into account the fact that people might make contact with the monument, and that "if I'm working on it and it's moving and I don't feel it's stable, then I'm going to do something further and pin it because I understand people are going to be walking around there." He testified that in his 40 years of experience, he had never observed any of his work fall over, nor had he ever been called with a complaint that a monument he installed had fallen over.

¶ 18 Kornick testified that he installed the DiPrizio gravestone at Queen of Heaven Cemetery the week prior to December 27, 2001. He estimated that the top piece of the gravestone weighed 1,700 pounds and the base weighed 1,000 pounds. The top piece of the gravestone was five feet wide, eight inches thick, and 2 feet 10 inches tall. The base was six feet wide, one foot six inches thick, and eight inches tall.

¶ 19 Kornick testified that the monument-setting compound he used was an all-year-round product and was not affected by temperature; he had used it in temperatures ranging from 10 below zero to 100 degrees. He testified that when it was cold, "[i]t takes a little longer [to set], but the results are the same."

¶ 20 Kornick testified that Sure-Set also occasionally performed monument maintenance, which he estimated as 10% of Sure-Set's business. He testified that, "[g]enerally[,] the family will go to the monument company after they've been out to the cemetery, seen that there's

some dirt or something on the monument, and the monument company will [ask] me to either clean it, level it, reset it." Normally, if he was asked to perform maintenance, he would examine the monument and provide an estimate to the monument company and would also invoice the monument company after the work was finished; he had no recollection of being asked to provide any maintenance to the DiPrizio gravestone. Kornick testified that most of his repair work and maintenance was on gravestones that were "probably 100 years old," when the materials and methods used were different. He had never been asked to maintain or repair any of the gravestones that he had installed, nor had he ever been asked to come back to inspect them.

¶ 21 Kornick testified that he had observed monuments that had been vandalized before, which included them being knocked over. He further testified that he had observed people brushing against monuments or sitting on monuments. Kornick opined that a person sitting on top of a monument would not be able to move it and it would take two or three "strong guy[s]" to knock the monument down.

¶ 22 C. Luis Martinez[8]

¶ 23 In his discovery deposition, Luis Martinez testified that he was an architect and was employed by the City Colleges of Chicago as the lead architect in charge of all construction and rehab for all of its facilities and also owned a consulting company. He had previously worked for 10 years as an assistant commissioner with the Department of Buildings, where he was in charge of new construction and conservation "and from that expertise" he developed his consulting business. Martinez testified that he also sat on the architectural regulatory board for the State of Illinois, which regulated architects' licenses and "ha[d]

[8] Martinez's deposition transcript was attached to Sure-Set's motion for summary judgment, described later in this Background

authority over anything that is constructed in the state of Illinois and ma[d]e recommendations."

¶ 24 Martinez testified that in order to reach his opinions in the instant case, he examined photographs of the monument, conducted internet research, spoke to structural engineers and other architects, and contacted cemeteries and the State to discover any applicable regulations. He also reviewed Kornick's deposition testimony but did not review plaintiff's deposition testimony. Martinez did not speak to anyone in plaintiff's family or to any witnesses in the case, and he did not review any of the pleadings or other documents in the case other than Kornick's deposition.

¶ 25 Martinez testified that he was provided a product by plaintiff's counsel, but was not certain whether the product was the same one used, as Kornick did not name the product during his deposition. Martinez testified that "[Kornick] just calls out a generic compound, which is a setting compound—stone compound, and he rolls it basically. It's like a plumber's putty, and it's to create a sealed chamber with the one stone on top and the base stone, and once that supposedly vacuum was created, which is what he calls out, a vacuum, then it's pretty much a tight seal and the stone is set and that it basically will not move—or should not move, I should say; but there is a lifespan to the product. And, again, it's not an adhesive. It's a compound used for just setting two stones together, and it's really more so to create a—a separation between the two stones. Whenever you have two hard materials such as stone or if it's hitting steel whenever there's temperature change there's stresses that are going to be created in the two products." Martinez opined that "[i]n this case by having a compound between the two you alleviate the stresses and therefore the product will last much longer, but if you're installing a stone of this nature—of this size I would recommend not

installing—you know, first I recommend an adhesive. I'd prefer to pin it. I think the permanent solution would be to pin it. This is a cemetery, this is a headstone that's going to be there for who knows how long, but it's a permanent installation."

¶ 26 Martinez testified that he was not aware of what plaintiff was doing when the gravestone fell onto him. He believed that plaintiff weighed approximately 300 pounds at the time of the incident and "[h]e was standing by the monument *** or he was near the monument. *** [H]e either leaned on it and it fell. That's my understanding." He further testified that, prior to his involvement in the instant case, he had no experience with gravestones or monuments in cemeteries, nor did he have any education or specialized training with respect to the installation or setting of cemetery monuments. He testified that in his architectural education and experience, "we deal with a lot of buildings that use granite as a product and at times we have to adhere the granite, whether it's on a wall surface or on a building, whether it's signage at times. So we do use granite a lot—extensively as a product so we understand the variations of adhesives and joint connections in terms of connecting two products." He admitted that a professional monument installer would know more than he did about how to install a cemetery monument.

¶ 27 Martinez testified that he was able to opine that the product that Sure-Set used was inappropriate despite not knowing the exact product used due to "the fact that it failed."

¶ 28 Martinez testified that there was no standard in the industry in 2001, when the gravestone in question was installed, with respect to whether a monument should be pinned. Martinez further testified that there were no standards or rules applicable to how the monument at issue should have been installed at Queen of Heaven Cemetery, saying that such a standard "doesn't exist."

¶ 29 III. Motions for Summary Judgment

¶ 30 On January 29, 2014, DiPrizio filed a motion for summary judgment, arguing that her inclusion in the lawsuit was "based on her purported negligence in selecting a headstone unable to withstand the gross misuse it was subjected to by Plaintiff's reprehensible conduct," namely, plaintiff drinking alcohol with his friends in the cemetery and then resting upon the gravestone of DiPrizio's family member. DiPrizio further argued that "[s]uch theorizing belies the very underpinnings of funereal sanctity as it presupposes that the bereaved Defendant should have anticipated the grave marker would be used as a bench to be sat upon rather than a tangible remembrance of her departed family member."

¶ 31 On April 15, 2014, DiPrizio's motion for summary judgment was denied without prejudice.

¶ 32 On November 26, 2014, Sure-Set filed a motion for summary judgment, arguing that plaintiff had no credible or admissible evidence that Sure-Set breached any duty with respect to its installation of the gravestone. Sure-Set argued that there was no evidence that it did anything outside of industry standards when it installed the gravestone, and that the only evidence presented by plaintiff was the testimony of Martinez, who was not qualified to act as an expert and whose opinions "are not in any way based on ascertainable facts." Thus, Sure-Set argued there was no basis for finding that it was the proximate cause of plaintiff's injury. Sure-Set further argued that it was entitled to summary judgment because "there is no evidence of any duty owed by Sure Set to Plaintiff regarding work installing a monument outdoors in a cemetery over six years prior to the incident in question."

¶ 33 On December 1, 2014, DiPrizio filed another motion for summary judgment, arguing that there were no facts alleged that established any duty on DiPrizio's part and further arguing

that any duty to provide "an inspection system" was a duty imposed on the cemetery, not on the individual who purchased a cemetery plot and gravestone.

¶ 34 The parties came before the trial court for a hearing on the motions for summary judgment on February 5, 2015. After hearing argument from the parties, the court found:

> "Okay, I've made a rul[ing]. It's [a] monument at a cemetery that was granite, it's five feet wide, two feet tall, and eight inches deep. It's a monument, not a bench or a chair, and had it been a bench or chair, I think plaintiff's expert's opinion would be of more importance. But under all the facts and circumstances in this case where there's a monument in a grave yard, you have a 300-pound plaintiff seated upon it as if it were a bench or a chair, and manages to tip it over, there's no duty on that situation from either Sure-Set or the Di Prizio family to that person.
>
> So I find there's no duty and there's also no proximate cause shown. And I just think for all the reasons set forth by the defendants in their brief and their motion supporting their brief and in their reply brief, the motion should be sustained. So that will be the order."

On the same day, the trial court entered a written order granting Sure-Set's and DiPrizio's motions for summary judgment. This appeal follows.

¶ 35 ANALYSIS

¶ 36 On appeal, plaintiff argues that the trial court erred in granting summary judgment in defendants' favor because defendants owed a duty of care to plaintiff. A trial court is permitted to grant summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-

1005(c) (West 2012). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a trial court's decision to grant a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 37 "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp.*, 154 Ill. 2d at 102. However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). The party moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The movant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). " 'The purpose of summary judgment is not to try an issue of fact but *** to determine whether a triable issue of fact exists.' " *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 38 As an initial matter, Sure-Set filed a motion to strike portions of plaintiff's reply brief on appeal and we have taken that motion with the case. Sure-Set takes issue with plaintiff's citation to his response to the motions for summary judgment because the record on appeal

did not contain the response at the time of briefing the instant appeal. We decline to strike the arguments in plaintiff's brief, although we also note that the portions of the brief objected to by Sure-Set play no part in our analysis of plaintiff's arguments.

¶ 39 To state a cause of action for negligence, a plaintiff must allege facts in his complaint that 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 the breach. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006) (citing *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 421 (2004)). In the case at bar, plaintiff focuses on the trial court's finding that defendants owed no duty to plaintiff. " 'Whether a duty exists in a particular case is a question of law for the court to decide.' " *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 14 (quoting *Marshall*, 222 Ill. 2d at 430). " 'In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper.' " *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13 (quoting *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991)).

¶ 40 Our supreme court has stated that " 'every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons.' " *Simpkins*, 2012 IL 110662, ¶ 19 (quoting *Widlowski v. Durkee Foods*, 138 Ill. 2d 369, 373 (1990)). "Thus, if a course of action creates a foreseeable risk of injury, the individual engaged in that course of action has a duty to protect others from such injury." *Simpkins*, 2012 IL 110662, ¶ 19.

¶ 41 "In resolving whether a duty exists, we ask 'whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff.' " *Bruns*, 2014 IL 116998, ¶ 14 (quoting *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990)). Our supreme court has explained that "[t]he 'relationship' referred to in this context acts as a shorthand description for the sum of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant." *Simpkins*, 2012 IL 110662, ¶ 18. "The weight to be accorded these factors depends upon the circumstances of a given case." *Bruns*, 2014 IL 116998, ¶ 14.

¶ 42 With respect to Sure-Set, plaintiff focuses on the foreseeability factor, arguing that it was foreseeable that there would be "an injury from a graveside monument that has not been set properly toppling on top of a person that sat upon it for 5 to 10 minutes." We do not find this argument persuasive. "It can be said, with the benefit of hindsight, that everything is foreseeable. [Citation.] We must focus, therefore, on the question of whether the injury was reasonably foreseeable at the time defendant engaged in the allegedly negligent action." *Simpkins*, 2012 IL 110662, ¶ 25.

¶ 43 In the case at bar, Kornick testified that he had been using the same method of installing gravestones for 40 years and that, in his 40 years of experience, he had never observed any of his work fall over, nor had he ever been called with a complaint that a monument he installed had fallen over. We also note that the DiPrizio gravestone had been installed over six years prior to the incident at issue in this case. Kornick further testified that most of the repair work and maintenance he performed was on gravestones that were "probably 100 years old," when the materials and methods used were different. Thus, we see no way that it would have been

reasonably foreseeable that a gravestone would fall when installed in the same way Kornick had been installing such gravestones for decades, even if a person sat upon it.

¶ 44 Additionally, even assuming *arguendo* that it was foreseeable that individuals would sit upon gravestones, we cannot agree with plaintiff that it was foreseeable that someone of plaintiff's stature at the time would have sat upon the gravestone. Plaintiff testified in his deposition that at the time of the incident, he weighed approximately 350 pounds. Even if we accept plaintiff's argument that it may have been foreseeable that *someone* would sit on the gravestone, we cannot say that it would have been foreseeable that someone weighing over 150 pounds more than an average person would do so.[9] The fact "[t]hat something 'might conceivably occur,' does not make it foreseeable. [Citation.] Rather, something is foreseeable only if it is 'objectively reasonable to expect.' [Citation.]" *Bruns*, 2014 IL 116998, ¶ 34 (quoting *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 238 (2000)). Thus, we cannot agree with plaintiff that Sure-Set should have prepared for someone of plaintiff's stature to sit on the gravestone.

¶ 45 Furthermore, our supreme court has noted that "[t]he 'reasonable foreseeability' of injury is one important concern [citation], but this court has recognized that foreseeability alone provides an inadequate foundation upon which to base the existence of a legal duty." *Ward*, 136 Ill. 2d at 140. "Other considerations include the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." *Ward*, 136 Ill. 2d at 140-41. While plaintiff acknowledges this statement of law in his brief before this court, he does not address any of these additional factors, perhaps

[9] According to the Centers for Disease Control and Prevention's National Center for Health Statistics, as of 2012, the average American man weighed 195.5 pounds, while the average American woman weighed 166.2 pounds. National Center for Health Statistics, Centers for Disease Control and Prevention, *Body Measurements*, www.cdc.gov/nchs/fastats/body-measurements.htm (last visited Mar. 17, 2016).

because a consideration of these factors weighs against the finding of a duty in the instant case.

¶ 46 With regard to the second factor, the likelihood of injury, we agree with Sure-Set that this factor does not weigh in favor of a finding of duty. There was no evidence presented that gravestones fall upon visitors in a cemetery with any frequency. Plaintiff makes a comment in his brief that Bertacchi and Kornick testified that they had personally observed people sitting on monuments in cemeteries and that "[s]uch an event was certainly not remarked by either as being an unusual occurrence." Kornick also testified that he had observed vandalized monuments before and that he had repaired old gravestones. However, there is a difference between monuments being purposely toppled by vandals and the situation at issue in the instant case, in which a relatively recently installed gravestone injured an unsuspecting visitor. Indeed, Kornick testified that in his 40 years of experience, he had never observed any of his work fall over, nor had he ever been called with a complaint that a monument he installed had fallen over. Thus, the likelihood of injury is minimal and we cannot find that this factor weighs in favor of finding a duty.

¶ 47 Furthermore, the third and fourth factors, the magnitude of the burden of guarding against the injury and the consequences of placing that burden upon the defendant, weigh heavily against the finding of a duty in the instant case. Kornick testified that he was contracted to install the DiPrizio gravestone and that he was not asked to maintain that gravestone. He further testified that he had never been asked to maintain or repair any of the gravestones that he had installed, nor had he ever been asked to come back to inspect them. A finding of duty in the instant case, then, would be imposing an additional requirement for Sure-Set to maintain and inspect all of the gravestones and other monuments that it had installed, despite

the fact that it had never been contracted to do such work. Additionally, as Sure-Set notes in its brief, Sure-Set does not own the gravestone or monument that it would be required to inspect and maintain, which would lead to issues about Sure-Set's right to make repairs or otherwise guard against injury in light of its lack of ownership interest in the property. Finally, as gravestones and other monuments are generally intended for long-term use, such a duty would extend into perpetuity, meaning that Sure-Set would have this inspection and maintenance duty for literally every monument it has ever, or will ever, install. Kornick testified that he had been a monument setter for 40 years and estimated that he installed an average of 25 monuments a month in cemeteries around the Chicagoland area. This would be a heavy burden indeed and weighs significantly against a finding of such a duty.

¶ 48 We also note, as the trial court did, that at the time of plaintiff's injury, he was using the gravestone as a seat or a bench, a purpose for which it was not intended. Thus, he was not an intended user of the gravestone. While Kornick testified that he had observed people brushing against or even sitting on monuments in the past, plaintiff's rule would essentially require Sure-Set to ensure that the monuments it installed were suitable to be used for purposes other than simply marking a loved one's gravesite, even if the owner of the gravestone or monument did not wish for people to sit on them. Plaintiff provides no authority for such a proposition.

¶ 49 Thus, in summary, considering the four factors at play, even if it was foreseeable that plaintiff would use the DiPrizio gravestone as a seat, that is the only factor that could even arguably support a finding of duty. There is no evidence that gravestones or other cemetery monuments falling upon visitors is something that happens with any regularity, so the likelihood of injury is minimal. Furthermore, to impose a duty to inspect and maintain every

single monument that Sure-Set has ever or will ever install into perpetuity is a tremendous burden on Sure-Set. Examining all four factors, we agree with the trial court that Sure-Set had no duty to plaintiff in the instant case and, accordingly, summary judgment in Sure-Set's favor was proper.

¶ 50 With respect to DiPrizio,[10] plaintiff's argument is based on the duty that the owner of property owes to others using the property.[11] "Under certain circumstances, a possessor of land may be held liable for physical harm caused to an individual present on the land by a condition on the land [citation] or by the acts of third persons [citation]." *Marshall*, 222 Ill. 2d at 437. With respect to this issue, our supreme court has adopted section 343 of the Restatement (Second) of Torts, which provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

[10] We note that plaintiff's reference to DiPrizio as the "owner" of the property containing the gravestone may lead to some confusion. A cemetery association may convey ownership of cemetery land "for burial purposes only." 765 ILCS 820/1 (West 2014). "Burial purposes *** is not merely the interment itself, but rather encompasses acts that are intrinsic to the operation of a cemetery. These acts logically include grave marking, continuing care, the preservation and decoration of the place of interment, and the sale, purchase and placement of headstones, burial markers and monuments." *Gast Monuments, Inc. v. Rosehill Cemetery Co.*, 207 Ill. App. 3d 901, 908 (1990). "Ownership of a cemetery lot is not the same as ownership of other real property: 'a cemetery lot purchaser takes only an easement right of burial, to be used in accordance with the reasonable rules of the cemetery[.]' " *Mannheimer v. Wolff*, 38 Ill. App. 2d 216, 221 (1962) (quoting *Steele v. Rosehill Cemetery Co.*, 370 Ill. 405, 408 (1939)). However, "[e]ven though a purchaser *** may not acquire a feesimple title but simply an easement, and must use it subject to and in accordance with the reasonable by-laws and rules of the cemetery, *** he has a property right in his lot which the law recognizes and protects from invasion." *Brown v. Hill*, 284 Ill. 286, 293 (1918).

[11] We note that several of plaintiff's cases he cites to in support of his foreseeability argument with respect to Sure-Set concern premises liability, which is not at issue with respect to Sure-Set but is at issue with respect to DiPrizio. See, *e.g.*, *Ray v. Cock Robin, Inc.*, 57 Ill. 2d 19 (1974); *Marshall*, 222 Ill. 2d 422; *Ward*, 136 Ill. 2d 132.

> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965); see also *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992) (noting the adoption of section 343).

Thus, "[a] possessor of land can be liable for physical harm caused to his invitees by a dangerous condition on the land *if* the defendant knew or should have known that the condition involved a reasonable risk of harm." (Emphasis in original.) *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491, 497 (2008). "The possessor of land, however, will not be liable where there is no evidence of such knowledge." *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 109.

¶ 51 In the case at bar, there is no evidence in the record that DiPrizio had any knowledge about any allegedly improper installation of the gravestone, nor does plaintiff claim that she had such knowledge in his brief on appeal. Instead, plaintiff solely relies on *Ward* and argues that DiPrizio could have foreseen that someone would be injured by the gravestone. However, *Ward* discusses whether the open and obvious exception to section 343 applies, which is not at issue in the instant case and therefore provides no support for plaintiff's argument. Accordingly, in the absence of any evidence that DiPrizio knew about any danger with respect to the gravestone, there can be no liability and the trial court properly granted summary judgment in her favor.

¶ 52 Since we have determined that the trial court properly granted summary judgment on the basis of duty, we have no need to consider the trial court's additional basis for granting summary judgment on the basis of proximate cause.

¶ 53 CONCLUSION

¶ 54 Since neither Sure-Set nor DiPrizio owed plaintiff a duty with respect to the DiPrizio gravestone, the trial court properly granted summary judgment in their favor.

¶ 55 Affirmed.