2016 IL App (2d) 151079-U
No. 2-15-1079
Order filed June 9, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EGBERT VALK and URSULA E. VALK,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 13-L-70
	)	
THE KROGER COMPANY and	)	
DEVELOPERS DIVERSIFIED REALTY,	)	Honorable
	)	Eugene G. Doherty,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendants summary judgment on plaintiffs' claim that defendants negligently failed to repair a pothole in their parking lot: the defect was *de minimis*, as the pothole was less than two inches deep; plaintiffs did not provide evidence of any aggravating circumstance, as nothing indicated that the pothole was hidden and the other dimensions of the pothole, given the pothole's location in a large parking lot, were insufficient.

¶ 2 Plaintiffs, Egbert Valk and Ursula E. Valk, appeal the trial court's summary judgment for defendants, The Kroger Co. (Kroger) and Developers Diversified Realty (Developers). Plaintiffs alleged that Egbert was injured when he stepped on a "hidden unsafe and unlevel surface" in defendants' parking lot. The trial court determined that defendants' duty of care did not extend to

this defect, because the defect was *de minimis* and, alternatively, because the defect was open and obvious. For the reasons that follow, we agree that the defect was *de minimis* and thus summary judgment was properly granted.

¶ 3 I. BACKGROUND

¶ 4 On July 12, 2013, plaintiffs filed an amended complaint seeking damages for injuries that Egbert sustained in the parking lot of Hilander Foods, which was owned by Kroger and maintained by Developers. Counts I and II were brought against each defendant respectively. According to plaintiffs, on March 10, 2011, at about 4 p.m., Egbert exited his vehicle in the parking lot and, while walking in the parking lot, encountered a "hidden unsafe and unlevel surface, to wit a hole in the Parking Lot where the asphalt had peeled away leaving an unlevel surface over three inches (3") deep." Plaintiffs alleged that Egbert "stepped on an unsafe and unlevel surface" and was injured as a result. They argued that defendants were negligent in failing to adequately maintain the parking lot, failing to inspect the parking lot, failing to warn plaintiffs of the dangerous condition, and failing to remedy the unsafe condition. Count III alleged a cause of action against both defendants on behalf of Ursula for loss of consortium.

¶ 5 Defendants moved for summary judgment, arguing that the defect in the sidewalk was *de minimis* and open and obvious. Defendants attached depositions from Egbert, two Kroger employees, and a private investigator.

¶ 6 Egbert testified, in relevant part, that, on the day of the fall, he was walking with Ursula from his car to the entrance of the store and, as he was crossing a roadway aisle in front of the store, he stepped into a pothole and fell. Although there was a painted pedestrian walkway, he did not use it. He was looking ahead and did not see the pothole. He testified: "It wouldn't matter anyway, because there was water in the hole." He testified that, had he seen the puddle, he would

not have stepped into it. He did not recall much after he fell. He did not know if there were puddles in the parking lot. Egbert returned to the store about a week later and saw the pothole. He estimated that it was four to five inches deep.

¶ 7 Private investigator John A. Markley testified, in relevant part, that, on March 29, 2011, he took pictures and measurements of the pothole. According to Markley, the pothole was about 18 inches in diameter and roughly 1 inch deep.

¶ 8 Carmen Stedman, a Kroger employee, testified that she was at work on the day Egbert fell. When she learned that Egbert had fallen, she went outside and looked at the pothole from about seven feet away. She did not know if there was any water in the pothole. Stedman was aware that there were potholes in the parking lot. She did not have any particular knowledge about the specific pothole that Egbert stepped in. Stedman testified that other people had tripped over potholes in the parking lot. She recalled potholes being filled with water, but she could not recall specifically if the pothole that Egbert had tripped in had ever been filled with water.

¶ 9 Michele Sherard, a Kroger employee, testified that she believed she was at the store on the day Egbert fell. She thought that Stedman told her about Egbert's fall. Sherard estimated that the parking lot was the size of a "couple of football fields." There were four entrances to the store that one could walk to from anywhere in the parking lot. There was a covered two-lane drive-through area in front of one of the entrances. On the outside of that area, closer to the parking lot, was another two-lane driveway. There was a pedestrian walkway that ran across the four lanes to the front of the store. Sherard was aware of the pothole prior to Egbert's fall. Employees would put a grocery cart over it so that people would not step in it. They once dragged a stop sign that had a cement base and placed it in the pothole. She testified that the pothole would fill up with water and that people would not know that it was there. Sherard testified that

she did not have any memory of seeing the pothole on the day that Egbert fell. She did not know if there was water in the pothole on that day.

¶ 10 Plaintiffs responded to defendants' motion, arguing that the defect was not *de minimis*, given its size, location, and hidden nature. Plaintiffs further argued that defendants had notice of the defect. In addition, plaintiffs attached expert testimony concerning the nature of the defect.

¶ 11 The trial court granted the motion for summary judgment, finding that the pothole was a *de minimis* defect and that there were no aggravating factors, such as the location of the defect, that warranted imposition of a duty. The court specifically noted that the parking lot was the size of two football fields and that the pothole was not located in a pedestrian walkway but rather in a drive aisle. The court stated that to impose a duty upon defendants to ensure that no similarly-sized defects existed anywhere on the parking lot would be unduly burdensome. The court also rejected plaintiffs' argument that the fact that the defect was " 'camouflaged by water' " removed the defect from the *de minimis* rule. The court noted that there was no evidence that the pothole, although possibly filled with water, was obscured. The court further noted that defendants' knowledge of the defect was irrelevant. Further, the court agreed with defendants' alternative argument that, even if the pothole was completely filled with water, no duty was owed as such a condition would have been even more obvious than the pothole itself.

¶ 12 Plaintiffs timely appealed.

¶ 13 II. ANALYSIS

¶ 14 Plaintiffs contend that the trial court erred in granted summary judgment for defendants. Summary judgment is appropriate where "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

2014). In determining whether a genuine issue of material fact exits, a court must construe the materials of record strictly against the movant and liberally in favor of the nonmoving party. See *Perri v. Furama Restaurant, Inc*., 335 Ill. App. 3d 825, 829 (2002). "If fair-minded persons could draw different inferences from the undisputed facts, the issues should be submitted to a jury to determine what inference seems most reasonable." *Menough v. Woodfield Gardens*, 296 Ill. App. 3d 244, 245-46 (1998). We review *de novo* the entry of summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co*., 154 Ill. 2d 90, 102 (1992).

¶ 15 To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Tzakis v. Dominick's Finer Foods, Inc*., 356 Ill. App. 3d 740, 745-46 (2005). The existence of a duty generally is a question of law and, therefore, may be resolved on a motion for summary judgment. *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 154 (1992).

¶ 16 An owner or occupier of land is not an absolute insurer of the safety of an invitee. See *Hutter v. Badalamenti*, 47 Ill. App. 3d 561, 563 (1977). The duty of an owner or occupier of any premises toward invitees is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them, and he must maintain the premises in a reasonably safe condition. *Ward v. K mart Corp*., 136 Ill. 2d 132, 141 (1990). However, that duty does not extend to *de minimis* defects. See *Morris v. Ingersoll Cutting Tool Co.*, 2013 IL App (2d) 120760, ¶ 11.

¶ 17 The *de minimis* rule originated in cases involving municipalities, where it was noted that "[m]unicipalities do not have a duty to keep all sidewalks in perfect condition at all times." *Gillock v. City of Springfield*, 268 Ill. App. 3d 455, 457 (1994). Thus, although a municipality has a duty to keep its property in a reasonably safe condition, it has no duty to repair *de minimis* defects

in its sidewalks. *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 202 (2003). The *de minimis* rule stems in large part from the recognition that municipalities would suffer an unreasonable economic burden were they required to keep their sidewalks in perfect condition all the time. *Id*. Although the *de minimis* rule originated in cases involving municipalities, it has since been applied to private owners and possessors of land. *St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505, ¶ 13; *Morris*, 2013 IL App (2d) 120760, ¶ 12; *Hartung v. Maple Investment & Development Corp.*, 243 Ill. App. 3d 811, 817 (1993).

¶ 18 There is no simple standard to separate *de minimis* defects from actionable ones. *St. Martin*, 2014 IL App (2d) 130505, ¶ 14. However, it is well established that, absent any aggravating factors, a vertical displacement of less than two inches is *de minimis*. See *Warner v. City of Chicago*, 72 Ill. 2d 100, 104-05 (1978) (a variation of only 1⅛ inches, absent more, is *de minimis*); *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 121-22 (1993) (a variance of 1⅞ inches was *de minimis*); *Putman*, 337 Ill. App. 3d at 202-03 (a one-inch displacement was *de minimis*). This court has cautioned that the *de minimis* rule cannot be applied mechanically to cover every situation and that its application in a particular case may very well depend on other factors. See *St. Martin*, 2014 IL App (2d) 130505, ¶ 15. If there is evidence of an aggravating circumstance, whether the defendant owed a duty to the plaintiff is a question of fact. See generally *Repinski v. Jubilee Oil Co.*, 85 Ill. App. 3d 15, 20-21 (1980). But if the plaintiff fails to provide evidence that such a circumstance exists, summary judgment is appropriate. See *Hartung*, 243 Ill. App. 3d at 817.

¶ 19 Here, it is undisputed that the depth of the pothole was approximately one inch. As noted, such a defect generally is not actionable, because it is *de minimis*. However, plaintiffs argue that

aggravating circumstances were present, more specifically, the other dimensions of the pothole and the fact that it was hidden. We disagree.

¶ 20 First, we reject plaintiffs' argument that the pothole was hidden. Plaintiffs state in their brief, without a supporting citation to the record, that "[t]he facts show Mr. Valk did not see the pothole because there was water in it and it was hidden." Although Egbert testified that he did not see the pothole before he stepped in it, this was because he was not looking where he was stepping. There is no testimony from anyone to support plaintiff's claim that the pothole was obscured by water on the day Egbert fell. And while Egbert testified that there was water in the pothole, the presence of water in the pothole does not mean that the pothole was hidden or obscured by water. Accordingly, we find that there is no genuine issue of fact as to whether the defect was hidden.

¶ 21 We next consider whether the dimensions of the pothole take it out of the *de minimis* rule. We find *Morris* instructive. The defect at issue in *Morris* was a 1½-inch-deep depression in asphalt located in a loading bay. *Id.* ¶¶ 3, 5. It was 2½ feet long and 1 foot wide. *Id.* ¶ 5. We found that, without more, the depth of the defect was *de minimis*. *Id.* ¶ 14. We next considered whether the length and width of the defect were aggravating factors, and we concluded that they were not. *Id.* ¶ 22. We noted that, had the defect been on a sidewalk, the dimensions might have been aggravating, given that the defect would have made up over 40% of the average width of a sidewalk. *Id.* We reasoned that, in such a case, the chances of a pedestrian encountering it would be increased, thereby increasing the foreseeability and likelihood of injury. *Id.* However, because the defect was not on a sidewalk, but rather in a loading bay (which we estimated to be at least 65 feet long), the chances that the defect would be encountered were low, far less than on a sidewalk. *Id.* Thus, we found that the foreseeability and likelihood of injury were also low. *Id.*

We concluded: "Because the defect is but a small crack in the entire loading bay area, its added dimensions do not preclude application of the *de minimis* rule." *Id*.

¶ 22 Here, unlike in *Morris*, the defect was not located in an area routinely traveled by customers. This defect was not located in the middle of a sidewalk or even the area designated for pedestrians; instead, it was located in an area designated for vehicles. Therefore, as we did in *Morris*, we consider the size of the defect with respect to the size of the parking lot. The parking lot was estimated to be equivalent to two football fields. There were four different entrances available to customers, and customers could access the store from their vehicles located virtually anywhere within the large parking lot. They could also walk anywhere in the parking lot where a vehicle was not presently located. Given the size of the defect in relation to the size of the parking lot, we find that the foreseeability and likelihood of injury were low. Further, if we were to impose a duty on defendants to ensure the absence of a defect in the area were Egbert fell, this would essentially require them to ensure that no similarly-sized defects were present on the entire surface of the parking lot. Considering the size of the parking lot and its exposure to the elements, this would be a particularly harsh and undue burden. See *Hartung*, 243 Ill. App. 3d at 817 ("To require private landowners to monitor sidewalks and to maintain them perfectly at all times seems to be unduly harsh and impractical—especially where, for example, in a shopping center, the outside area exposed to the elements might cover hundreds of thousands of square feet."). Accordingly, defendant's duty to plaintiffs did not extend to this defect.

¶ 23 The cases cited by defendant do not warrant a different conclusion, as they are distinguishable based on the location of the defect. For instance, in *Repinski*, the court found that it was a question for the jury whether a hole *in a sidewalk* near a gas-station driveway, 1½ inches deep and 1½ feet wide, was unreasonably dangerous. In *West v. City of Hoopeston*, 146 Ill. App.

3d 538 (1986), the court found that, although a *sidewalk* deviation was slight, with slabs measuring a quarter and nine-sixteenths of an inch in height, it was accompanied by a 2-inch wide gap between the slabs, and thus the plaintiff's claim was actionable. Here, as noted, unlike in *Repinski* and *West*, Egbert was not using a sidewalk. Neither case suggests that a pothole, approximately one inch deep, in a large parking lot is actionable.

¶ 24 We also reject any argument plaintiffs purport to raise concerning defendants' knowledge of the defect. Plaintiffs cite no authority supporting a claim that a defendant's knowledge of a *de minimis* defect precludes application of the *de minimis* rule. In addition, based on our ruling that summary judgment was properly granted because the defect was *de minimis*, we need not consider defendants' alternative argument that it was open and obvious.

¶ 25 Accordingly, we find that the trial court properly applied the *de minimis* rule and granted defendants' motion for summary judgment.

¶ 26 III. CONCLUSION

¶ 27 Based on the foregoing, we affirm the judgment of the circuit court of Winnebago County granting summary judgment for defendants.

¶ 28 Affirmed.