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2016 IL App (3d) 150470-U

Order filed April 27, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

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| LINDA DUCKMANTON, | ) | Appeal from the Circuit Court |
| | ) | of the 12th Judicial Circuit, |
| Plaintiff-Appellee, | ) | Will County, Illinois. |
| | ) | |
| v. | ) | Appeal No. 3-15-0470 |
| | ) | Circuit No. 12 L 527 |
| DUPAGE TOWNSHIP, | ) | |
| | ) | The Honorable |
| Defendant-Appellant. | ) | Barbara Petrungaro, |
| | ) | Judge, Presiding. |

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JUSTICE McDADE delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Schmidt, specially concurring.

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**ORDER**

¶ 1 *Held*: Although the nature of the city property indicated that the plaintiff is a permitted and intended user of the street, her alleged distraction at the time she used the open and obvious hazardous public property was a self-distraction because it was not one that could be reasonably expected to have been foreseen.

¶ 2 This case involves an injury that occurred on July 20, 201l, when plaintiff, Linda Duckmanton fell while walking from the end of her driveway onto the broken and damaged area of DePaul Court (street), a street which is owned and maintained by the defendant, DuPage

Township (Township). Duckmanton brought a suit against the Township for negligence due to the injury she incurred. The Township moved for but was denied both summary judgment and its motion to reconsider the denial in light of *Bruns v. The City of Centralia*, 2014 IL 116998. The trial court found that there were material issues of fact as to the open and obvious nature of the damaged portion of the street. After a bench trial, the court entered judgment in favor of Duckmanton and awarded her damages. The Township appeals arguing the trial court erred in finding (1) that Duckmanton was both a permitted and intended user of the street so that the Township owed her a duty of care and (2) that Duckmanton's "distraction" warranted application of the "distraction exception" to the open and obvious rule. We reverse.

¶ 3 FACTS

¶ 4 On July 20, 2011, Duckmanton fell while walking from the end of her driveway onto the street. Duckmanton filed a complaint against the Township for the injuries she incurred due to her fall. In her complaint, after its amendment, she claimed that the Township owned, maintained and controlled the street on which she resides and, therefore, owed her a duty of care and was negligent in failing to remedy or repair the surface cracks in the street that caused her to fall and sustain injury.

¶ 5 The Township denied (1) it owed Duckmanton a duty of care; (2) it had notice of the condition; and (3) it was negligent. It claimed various affirmative defenses including the assertion that Duckmanton was not an intended user of the street pursuant to section 10/3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity

¶ 6 Act). (745 ILCS 10/3-102(a) (West 2010)).

¶ 7 At the close of discovery, the Township filed a motion for summary judgment arguing that there was no genuine issue of material fact. It asserted that (1) it did not owe Duckmanton a

duty of care because the defective condition of the street was open and obvious and known to the her; (2) the Township did not have notice of the defective condition of the street; (3) litigation was barred due to discretionary immunity in the care and maintenance of its property; and (4) Duckmanton is barred from recovery because her contributory negligence is greater than 50%.

¶ 8 Duckmanton replied to the motion arguing, in part, the distraction exception to the open and obvious rule. She conceded that the broken asphalt at the end of her driveway was an open and obvious condition, but argued that her son calling out to her as she stepped from her driveway and onto the street was a "distraction" that caused her to forget or fail to appreciate the hazardous condition of the street and fall. The trial court denied the Township's summary judgment motion.

¶ 9 The Township moved for reconsideration following our supreme court's ruling in *Bruns*. However, after consideration of the *Bruns'* decision, the court still denied the Township's motion. The matter proceeded to a bench trial.

¶ 10 At trial, on January 8, 2015, Duckmanton and Ronald Homerding, a maintenance supervisor for the Township, testified in plaintiff's case. Over the Township's objection and emergency motion *in limine* to bar the testimony of Dr. Mukund Komanduri as an independent expert witness, Dr. Komanduri testified by evidence deposition. The trial court found his opinions disclosed and proper and denied the Township's motion to bar the testimony.

¶ 11 Duckmanton testified that every day she takes the same path from her house to retrieve mail from her mailbox across the street from her house. She walks down her driveway where it abuts the street, then steps onto and crosses the street. She stated that no crosswalk exists and her path is the shortest route to her mailbox. She testified that there was missing and broken asphalt, and that the street had been in this condition for some time. She stated that she had called the

Township in the spring to report the road condition. Each time she crossed, she took care to avoid the broken pavement by stepping around or over the area. However, on the day of the incident in question, her son had "bellowed" out to her with a question about a plant as he mowed the lawn. Duckmanton turn to respond to him while continuing to walk. As a result, instead of avoiding the broken pavement, she stepped into it, twisted her left foot, and fell. The fall resulted in scrapes, bruises, back pain, and a knee injury requiring physical therapy and later injections.

¶ 12 Homerding testified that in April 2011, while working in the Township's streets and highways department, he was driving to a worksite and drove onto Duckmanton's street. He noticed the general wear-and-tear of the street, including crumbling or broken portions of the asphalt. He opined that the street was in need of repair but that this was typical roadway deterioration with just the top layer the asphalt peeling a little bit in certain areas. He noted that the crumbling blacktop was at the juncture of Duckmanton's driveway and the street. Although he did not personally have job responsibilities concerning road maintenance, Homerding told his supervisor about his observations of the crumbling blacktop.

¶ 13 In his deposition, Dr. Komanduri established his medical credentials and stated that he had reviewed Duckmanton’s medical records. His testimony confirmed that the care and treatment received by Duckmanton were necessitated by the injuries she sustained in her fall. After closing arguments the trial concluded.

¶ 14 Thereafter, the court issued a written ruling in favor of Duckmanton in the amount of $16,000, plus costs. It held that Duckmanton was an intended and permitted user of the street and was owed a duty of care by the Township because of (1) the location of her mailbox, (2) the fact that the street did not have sidewalks, and (3) that the street’s allowance for parking also allowed

for pedestrian traffic. The court further found that although Duckmanton admitted to knowing of the hazardous condition of the street, her distraction was not a self-distraction and it applied the distraction exception.

¶ 15 The Township moved to vacate the judgment. The trial court denied the motion on June 4, 2015.

¶ 16 The Township timely appealed.

¶ 17 ANALYSIS

¶ 18 On appeal, the Township presents two arguments challenging the trial court's finding that it owed Duckmanton a duty of care and had breached that duty. First it asserts that the trial court erred in its reliance on *Di Domenico v. Village of Romeoville*, 171 Ill. App. 3d 293, 295-96 (1988), in finding that Duckmanton was an intended and permitted user of the street such that the Township owed her a duty of care. It argues that although she is a permitted user of the street for the purpose of retrieving her mail from her mailbox, she is not an intended user of it. Second, it asserts that because Duckmanton's distraction was not one that the Township could have reasonably foreseen the trial court erred in applying the distraction exception to the open and obvious rule and finding that it owed Duckmanton a duty of care.

¶ 19 Duckmanton counters that the Township has failed to show that the trial court's ruling was against the manifest weight of the evidence. She asserts that because (1) local entities placed her mailbox across the street from her house and (2) street parking was set up to allow pedestrian ingress and egress to and from the street, she is both a permitted and intended user of the street. She further asserts that her son's shout to her was not a self-distraction but one reasonably foreseeable in a neighborhood cul-de-sac. Therefore, she contends that the trial court's application of the distraction exception to the open and obvious rule was proper.

¶ 20 Our standard of review for a trial court's order in a bench trial is whether the judgment is against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent, or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id*.

¶ 21 To be successful in a claim of negligence, a plaintiff must plead and prove that the defendant owed her a duty, that the defendant breached that duty, and that an injury proximately resulted from that breach. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434 (1990). Here, the underlying facts are not in dispute. The only issues in this appeal are whether, under those facts, (1) Duckmanton was an intended and permitted user of the street such that the Township owed her a duty of care and (2) the Township's "open and obvious" defense against the existence of a duty of care was negated by a reasonably foreseeable distraction.

¶ 22 Unless the plaintiff can demonstrate that a duty is owed, there can be no negligence imposed upon the defendant. *Sandoval v. City of Chicago*, 357 Ill. App. 1023, 1027 (2005) (citing *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 2 (1992)). The existence of a duty depends upon "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." *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). Whether a duty exists is determined by weighing 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 v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 18. The weight to be given to each factor depends upon the circumstances of a given case. *Id*

¶ 23 Intended and Permitted User

¶ 24 We look first to the Township's issue regarding whether Duckmanton was both an intended and permitted user of the street. It claims that the trial court erred in finding that Duckmanton was an intended and permitted user of the street by relying on *Di Domenico v. Village of Romeoville*, 171 Ill. App. 3d 293 (1988). It concedes that Duckmanton may have been a permitted user of the street but asserts that she was not an intended user because applicable Illinois law has consistently held that pedestrians are not permitted users of the street outside of crosswalks. The Township argues that *Di Domenico*, on which Duckmanton and the trial court relied, is irrelevant to the matter at hand because the holding in that case is limited to pedestrians using the street for ingress and egress from vehicles legally parked on the street. Thus it is inapplicable to the facts in this case.

¶ 25 The Tort Immunity Act states in relevant part that:

> "[A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity *intended and permitted* to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used***" (emphases added) 745 ILCS 10/3-102(a) (West 2014).

¶ 26 In *Di Domenico*, the court found that because the Tort Immunity Act, in subsequent sections, allowed for persons to park on the street, it was expected and foreseeable that those individuals would need to walk on the street for ingress to and egress from their respective vehicle. *Id*. at 294. Thus people who parked on the street were permitted and intended pedestrian traffic for the street. Though the facts of this case do not involve parked vehicles, the principle of

needing to use the street for pedestrian traffic due to local governmental allowances and input is still relevant.

¶ 27 As a primary matter, we are not persuaded by Duckmanton's argument here on appeal that a local governmental entity placed her mailbox across the street from her home thus requiring her to cross the street midblock. No evidence of the truth of that assertion is in the record. Therefore, we cannot infer that she was an intended user of the street due to the placement of her mailbox. *C.f. Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 620 (2010) (court held that it was logical to infer from the city's *established* policy of requiring residents to place their trash containers in the alley that the city intended that a resident "be able to access [their] waste containers and that means walking in the alley in order to reach them.")

¶ 28 However, the evidence does show that pedestrian traffic on Duckmanton's street is not only permitted as conceded by the Township, but also that the Township should have expected and foreseen such traffic. As noted in *Peters v. Riggs*, 2015 IL App (4th) 140043, ¶ 51, a case heavily relied upon by the Township, it is the nature of the city property that indicates whether pedestrians are expected and foreseeable, and thus *intended* users of the street. In *Peters*, a passing vehicle struck the plaintiff, a college student, as she attempted to cross a street midblock. *Id*., ¶¶ 3, 4. The plaintiff argued that it was customary for students to cross the street midblock to get to that dormitory from the student parking lot. The court found that the presence of sidewalks, which did not have curb cuts or slopes for pedestrian access to the street, and the fact that there were no painted crosswalks midblock indicated that pedestrians were merely permitted but not intended users of the midblock area of the street. *Id*., ¶ 51.

¶ 29 In this case, however, there are many factors regarding the nature of the property that indicate pedestrians are expected and foreseeable, and thus intended users of Duckmanton's

street. It is uncontested that Duckmanton lives in a cul-de-sac where the houses have driveways, but there are no public sidewalks. Thus by neighborhood and public property design, short of trespassing onto each other's yards (720 ILCS 5/21-3 (West 2012) (criminal trespass to real property); see *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 228 (1996) ("A trespasser is one who enters upon the premises of another with neither permission nor invitation and intrudes for some purpose of his own, or at his convenience, or merely as an idler."), Duckmanton and other residents of that cul-de-sac are forced to walk out into the street for ingress to or egress from their homes if they do not have or use a vehicle. Additionally, the record shows the area has light vehicle traffic but allows for vehicular parking. Therefore, pedestrian traffic is expected and foreseeable on Duckmanton's street.

¶ 30 The Township cites *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 757-60 (2009), in support of its contention that Duckmanton was not an intended but only a permitted user. However, the holding in that case works against the very point the Township was attempting to make. Just as the *Peters* court, the court in *Doria* specifically noted that it is the nature of the property that determines whether the particular use was permitted or intended. *Id*. at 870.

¶ 31 The Township also cites *Tieman v. City of Princeton*, 251 Ill. App. 3d 766, 768 (1993), and *Ramirez v. City of Chicago*, 212 Ill. App. 3d 751, 755 (1991), in further support of its position. However, those cases are readily distinguishable from the matter at hand because the injured pedestrians may have been foreseeable but they were not expected and thus not intended users of the street. In *Tieman* and *Ramirez*, the injured pedestrians were using the street in ways that may have been foreseeable but did not meet the level of intended user, as their actions could not have been expected. There were curbs and inferably a sidewalk to which both plaintiffs had

access. Again, however, the record here in this case shows that there was no sidewalk for Duckmanton to use to access her mailbox, no crosswalk, or public property for basic pedestrian ingress or egress from her home other than the street. Therefore, it was not only foreseeable that she would walk onto the street, she had no other option. The nature of the public property makes her an expected and foreseeable, and thus an intended user of the street and imposes a duty of care upon the Township.

¶ 32 Distraction Exception to the Open and Obvious Rule

¶ 33 Having found that Duckmanton is both an intended and permitted user of the street, we now discuss whether the Township's duty of care is overcome by the open and obvious nature of the damaged portion of the street where she was injured. Generally, "a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious." *Rexroad v. City of Springfield*, 207 Ill.2d 33, 44 (2003). Property owners are allowed to expect that a person who "enters upon their property will exercise reasonable care for their own safety." *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (2005). This is known as the open and obvious rule and its application affects the first two factors of the duty analysis: the foreseeability of injury, and the likelihood of injury. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425 (1998). "Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of duty." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 19.

¶ 34 However the "distraction" exception to the open and obvious rule provides that an owner or controller of land will still owe a duty of care to a person who enters upon that land to protect against an obvious condition "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he

has discovered, or fail to protect himself against it." Restatement (Second) of Torts § 343A(1) cmt. f, at 220 (1965). The distraction exception will only apply where there is evidence from which a court can infer that the plaintiff was actually distracted. *Bruns*, 2014 IL 116998, ¶ 22.

¶ 35 Here, Duckmanton's claimed distraction was her son calling out to her with regard to a gardening issue at the precise moment she was walking onto the street and into the damaged area. She admittedly did not stop walking but merely turned around to respond to the gardening question. The analysis provided by the *Bruns* court and the cases presented by the Township drive our conclusion that this distraction does not fall within the realm of those our courts recognize as excusing a failure to exercise due care for one's own safety.

¶ 36 In *Bruns* after discussing nearly all of the cases relied upon by the Township in this case, the supreme court found that Bruns had failed to prove that the distraction exception to the open and obvious rule was applicable. The court held that the issue was "not whether plaintiff was looking elsewhere, but *why* she was looking elsewhere." *Id*., ¶30. It further explained that according to the case law it had analyzed, the exception was applied when the purpose for the distractions were avoidance of other hazardous conditions or completion of another particular task required or expected to be performed in the hazardous area. *Id*., ¶¶ 28, 29 (discussing *Ward v. K Mart Corp.*, 136 Ill.2d 132, 153–54 (1990) (the plaintiff was distracted by carrying merchandise out of the defendant's store and walked into a post located just outside the store's exit); *Rexroad v. City of Springfield*, 207 Ill.2d 33, 46 (2003) (the plaintiff was distracted, because of the job he was instructed to do, from observing a hole in the parking lot); *American National Bank & Trust Co. of Chicago v. National Advertising Co*., 149 Ill.2d 14, 29 (1992) (the defendant could foresee that a painter's concern for his own safety as he stepped on a billboard walkway would distract him from the overhead power line); *Deibert v. Bauer Brothers*

*Construction Co.*, 141 Ill.2d 430, 438–39 (1990) (an electrician was distracted from a tire rut because he had to protect himself by looking for construction debris being thrown off a balcony)).

¶ 37 Unlike the aforementioned case law, her son's call to discuss a gardening issue did not implicate avoidance of a potential hazardous condition, an obstruction created by the Township, or a necessary step Duckmanton needed to take as she crossed the street to get her mail. She looked elsewhere for a wholly unforeseeable reason producing a self-distraction.

¶ 38 Further, we note as an aside that her actions are actually contrary to those of a person attempting to avoid a dangerous condition. She testified to having turned her head and walked out onto the street without looking. That alone is a dangerous act not reasonably foreseeable by the Township.

¶ 39 We are not persuaded by Duckmanton's assertion that instances of being called upon by one's child in a cul-de-sac are reasonably foreseeable. "That something 'might conceivably occur,' does not make it foreseeable. (citation) Rather, something is foreseeable only if it is 'objectively reasonable to expect.' " *Bruns*, 2014 IL 116998, ¶ 34 (quoting *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 238 (2000)). First, the facts here show that Duckmanton's adult son did not call out to her in a manner that was shocking or that warned of some impending danger. He merely called out to her about a gardening issue. It would be irresponsible for us to say that such an occurrence is so common that the Township should have foreseen it would happen and cause harm. The fact that Duckmanton's son called out to her at the precise moment she was walking into the street and that she turned around but failed to stop walking does not constitute a reasonably foreseeable occurrence. It is merely conceivable.

¶ 40 Therefore, although we agree that Duckmanton is both an intended and permitted user of the street, we find the trial court's application of the distraction exception to the open and obvious hazardous condition of the street was against the manifest weight of the evidence and was erroneous. The Township's duty of care to Duckmanton was excused by the open and obvious nature of the hazardous condition. The distraction she relies on was a self-distraction at most (see *Bruns*, 2014 IL 116998, ¶ 31) and does not meet the standard set by the courts for application as a exception.

¶ 41 CONCLUSION

¶ 42 The judgment of the circuit court of Will County is reversed.

¶ 43 Reversed.

¶ 44 JUSTICE SCHMIDT, specially concurring.

¶ 45 I concur in the judgment on the basis of my agreement with the majority that the hazard was open and obvious and the distraction exception is inapplicable on the facts of this case.

¶ 46 I neither agree nor disagree with the majority's analysis on the "intended and permitted user" issue. *Supra* ¶¶ 23-31. I simply believe that analysis is unnecessary to our judgment. Upon finding the hazard open and obvious and the distraction exception inapplicable, it is irrelevant whether plaintiff was an intended and permitted user. Therefore, I would not have gone there.