THIRD DIVISION
January 19, 2011

No. 1-10-1169

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICK MCNALLY, Plaintiff-Appellant, v. PUBLIC STORAGE, INC., and SHURGARD ILLINOIS PROPERTIES, LLC, Defendants-Appellees.	)))))))))	Appeal from the Circuit Court of Cook County. No. 07 L 11929 Honorable Jeffrey Lawrence, Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgement of the court.

Justices Neville and Murphy concurred in the judgment.

O R D E R

HELD: In an action brought by a trespasser/bicyclist, owner of parking lot did not engage in willful and wanton misconduct by failing to place warning devices on wires separating parking spaces. Summary judgment for landowner affirmed.

Plaintiff, Patrick McNally, appeals from the trial court's grant of summary judgment in favor of defendants Public Storage, Inc. (Public Storage) and Shurgard Illinois Properties, LLC (Shurgard) (collectively defendants).[1] For the reasons set forth below, we affirm.

[1]Shurgard and Public Storage are self-storage companies. In August 2006, Shurgard became a subsidiary of Public Storage.

The facts in this case are not in dispute. Defendants own a self-storage facility at 7300 Lehigh Avenue in Niles, Illinois. On November 27, 2007, plaintiff was riding his bicycle to his health club at 6000 W. Touhy Avenue, which is a few blocks from defendants' business, when he decided to take a shortcut through defendants' parking lot. After entering the parking lot, plaintiff rode his bicycle into an unmarked stainless steel wire that was installed to separate some of the parking spaces on the lot. The wire was several feet off of the ground and was held up by poles that were installed several parking spaces apart. After hitting the wire, plaintiff fell off of his bike and sustained multiple injuries, including a head injury and a broken clavicle.

Plaintiff filed suit against Public Storage and Shurgard on October 22, 2007. He was subsequently granted leave to amend his complaint to correctly name the defendants and on October 23, 2008, filed his third amended complaint naming Public Storage, Shurgard, and Arrow Financial Services, Inc. as defendants.[2] Plaintiff alleged negligence and willful and wanton misconduct against each defendant. On September 4, 2008, defendants filed a motion for partial summary judgment on the negligence count, which the trial court granted on March 25, 2009. On July 7, 2009, defendants filed a motion for summary judgment as to the willful and wanton misconduct count and attached the affidavit of Phil Cacciatore, a district manager for Public Storage, in support of the motion. On January 4, 2010, the trial court granted defendants' motion for summary judgment as to the willful and wanton misconduct count. Plaintiff filed a motion to reconsider, which the trial court denied. Plaintiff now appeals the trial court's order

[2]Arrow Financial Services LLC had an agreement with Shurgard to maintain the parking lot in exchange for the use of three rows of parking spaces. Arrow Financial was voluntarily dismissed on November 20, 2009, without prejudice, and is not a party to this appeal.

granting the motion for summary judgment as to the count alleging willful and wanton misconduct and the denial of his motion to reconsider.

We review *de novo* a grant of summary judgment. Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43(2004). Summary judgment is appropriate only 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 2006); Chatham Foot Specialists, P.C. v. Health Care Service Corp., 216 Ill. 2d 366, 376 (2005). In deciding a summary judgment motion, the court must construe the pleadings, affidavits, depositions and admissions on file strictly against the moving party and liberally in favor of the opponent. Adams, 211 Ill.2d at 43.

The issue before us is whether defendants owed a duty to plaintiff. Whether a duty exists is a question of law for the court to determine. Rhodes v. Illinois Central Gulf R.R., 172 Ill. 2d 213, 227 (1996). A landowner's duty to an individual on the landowner's premises depends upon that individual's status. Rhodes, 172 Ill. 2d at 227-28. The status of "trespasser" belongs to one who enters upon another's land for his or her own purposes without permission, invitation, or right. Lange v. Real Estate Development Corp., 358 Ill. App.3d 962, 832 N.E.2d 274 (2005). Both parties agree that plaintiff was a trespasser when he rode his bike onto the defendants' parking lot.

It is unquestionably the law in Illinois that no duty is owed to a trespasser except the duty not to willfully and wantonly injure him. Rhodes, 172 Ill. 2d at 229; Mount Zion State Bank v. Consolidated Communications, Inc., 169 Ill. 2d 110, 116 (1995). Illinois law does not require a

landowner to assume that a trespasser will expose himself to injury on the landowner's property. Lange, 358 Ill. App. 3d at 966 citing Miller v. General Motors Corp., 207 Ill. App.3d 148, 153-55 (1990). In addition, a landowner is not required to keep his land in any particular state or condition to promote the safety of trespassers. Lange, 3578 Ill. App. 3d at 966 citing Miller, 207 Ill. App. 3d at 154. However, a number of exceptions to the general rule limiting a landowner's duty of care to a trespasser have been created. Rhodes, 172 Ill.2d at 229. One of these exceptions that has been recognized by Illinois courts is for frequent trespassers. Miller, 207 Ill. App. 3d at 155. When a landowner knows, or should know from facts within his knowledge, that trespassers are in the habit of entering his land at a particular point or of traversing an area of small size, many courts hold that there is a duty of reasonable care to discover and protect trespassers in the course of the landowner's activities. Miller, 207 Ill. App.3d at 155. This duty is imposed because the burden of looking out for trespassers is not great. Miller, 207 Ill. App.3d at 155. A typical case is the frequent use of a 'beaten path' that crosses a railroad track, which is held to impose a duty of reasonable care as to the operation of trains. Miller, 207 Ill. App.3d at 155. Liability has been extended in such cases because the landowner's continued toleration of the trespass amounts to permission to make use of the land, so that the plaintiff is not a trespasser but a licensee. Miller, 207 Ill. App.3d at 155.

Although plaintiff contends that the parking lot is designed and intended for use by pedestrians and bicycles, as well as motor vehicles, he does not argue that the frequent trespasser exception applies in this case. And indeed, the evidence in the record does not support the application of that exception, as the plaintiff stated in his deposition that he had never seen any

other bicyclist use the defendants' parking lot as a shortcut and defendants' agent, Phil Cacciatore, stated in his affidavit that defendants "had no knowledge of trespassers driving, riding bicycles or walking through the area where plaintiff's accident allegedly occurred."

Therefore, the only question before us is whether, as plaintiff alleges, defendants engaged in willful and wanton misconduct by failing to place warning devices on the wire in its parking lot. Willful and wanton acts are either intentional or are acts committed under circumstances exhibiting a reckless disregard of the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. Ziarko v. Soo Line R.R. Co., 161 Ill. 2d 267 (1994) citing Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 583 (1946). The party doing the wanton act or failing to act "must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury." Oelze v. Score Sports Venture, LLC, 401 Ill. App. 3d 110, 122-23 (2010) quoting Bartolucci v. Falleti, 382 Ill. 168, 174 (1943)

Plaintiff does not allege that defendants intentionally harmed him or that defendants had knowledge of an impending danger on their premises. Rather, plaintiff asserts that because a metal wire strung across parking spaces posed a foreseeable danger to anyone entering the premises and the burden on defendants to remedy that problem by installing some kind of warning device was minimal, the common law duty to avoid wilfully and wantonly injuring the plaintiff should be applied in this case. Further, plaintiff contends that because defendants'

agent, Cacciatore, conceded the risk of foreseeable harm when he acknowledged in his deposition that a person who rode his bicycle into one of the wires could fall over and be injured, the trial court erred in finding that there was no material question of fact as to defendants' liability on the willful and wanton misconduct claim.

While we do not disagree with plaintiff's assertion that a wire, such as the one in defendants' parking lot could pose a risk of injury to a bicyclist who rode into it, we do not find that plaintiff has established that defendants engaged in willful and wanton misconduct. The issue in a willful and wanton misconduct claim, unlike in a negligence claim, is not whether an injury is foreseeable, but rather, whether defendants "had notice which would alert a reasonable man that substantial danger was involved, and that [the defendant] failed to take reasonable precautions under the circumstances." Miller, 207 Ill. App. 3d at 161. Here, there is no evidence that defendants knew that the wire hanging in the parking lot posed a danger to a bicyclist or to anyone else. Plaintiff acknowledged in his deposition that he had never previously seen a bicyclist crossing defendants' parking lot and presented no evidence of prior similar incidents on defendants' property that would indicate that the wire posed a danger and that defendants had knowledge of that danger. Plaintiff deposed defendants' agent, Cacciatore, who acknowledged that the wire could cause an injury, but had no personal knowledge of any bicycle traffic on the parking lot prior to plaintiff's accident because he did not start working for defendants until five months later. Further, Cacciatore's affidavit asserted that defendants had no knowledge of any trespassers entering the parking lot on a bike. The fact that no warning devices were installed is of little consequence where there is no evidence that defendants were aware that there was any

risk posed by the wires. Therefore, we find that the evidence in the record, even when viewed in a light most favorable to the plaintiff, failed to present a material question of fact as to whether defendants engaged in willful and wanton misconduct.

For the foregoing reasons, we affirm the circuit court.

Affirmed.