2011 IL App (3d) 100541-U

Order filed November 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

SUSAN M. BARKOWSKI,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiff-Appellant,	)	La Salle County, Illinois
	)	
v.	)	Appeal No. 3-10-0541
	)	Circuit No. 07-L-167
D. CONSTRUCTION, INC., an Illinois Corporation,	)	
	)	
	)	Honorable Eugene P. Daugherity,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: Where plaintiff stepped onto the shoulder and fell while walking her dog through a road construction project in the dark, the trial court did not err in granting defendant's motion for summary judgment.

¶ 2 Plaintiff, Susan Barkowski, brought this negligence action against defendant, D. Construction, Inc., seeking to recover for injuries allegedly suffered in a slip and fall accident at defendant's construction site. The circuit court of La Salle County granted defendant's motion for summary judgment. Plaintiff appeals, claiming genuine issues of material fact sufficient to preclude summary judgment exist and that the trial court misapplied the doctrine announced in *Hunt v. Blasius*, 74 Ill. 2d 203 (1978).

¶ 3 FACTS

¶ 4 Plaintiff's complaint alleges that approximately one week prior to October 8, 2007, D. Construction repaved Hossack Street in Seneca, Illinois. Plaintiff alleged that defendant negligently maintained Hossack Street, particularly its shoulder, by failing to backfill the shoulder of the roadway, thereby allowing a drop-off between the road and the adjoining shoulder of approximately six inches.

¶ 5 The complaint further notes plaintiff took her dog for a walk on October 8, 2007, on Hossack Street at 7:45 p.m. when she was "confronted with the six-inch drop-off, causing her to fall." Other allegations in the complaint include plaintiff's claims that D. Construction was negligent for: failing to maintain the roadway in a reasonably safe condition; failing to properly grade the area between the roadway and the shoulder; failing to inspect the roadway after completion of the work for proper grading; and failing to warn of the dangerous condition of the roadway. Plaintiff also alleged negligence against the Village of Seneca for failing to warn of the six-inch drop-off, to close the roadway until the shoulder was properly graded, to allow for

the improper grading of the roadway and its shoulder, and to inspect the roadway. The Village of Seneca filed a motion to dismiss, which the trial court granted. The order dismissing the Village is not part of this appeal.

¶ 6 During her discovery deposition, plaintiff admitted she knew that two blocks of Hossack Street were under construction as she saw "caution fresh oil" signs during the project. Plaintiff stated her fall occurred at approximately 7:45 p.m. When asked to describe the lighting conditions, she noted, "I wouldn't say really pitch, pitch black because there is a lot of lights around there but it's darker, yes." Plaintiff indicated she was walking against traffic about a foot or two feet onto the asphalt when she noticed headlights coming in her direction. This led her to step with her left foot onto the shoulder when "not realizing there was that much of a drop-off, my left foot went down, twisted, and then I landed flat down." When asked if she was aware of the changes in elevation at the spot she fell, plaintiff stated that she "knew there was a little difference but I didn't expect it to be as much of a drop-off as it is."

¶ 7 The facts established during discovery indicate that D. Construction contracted with the Village of Seneca to conduct maintenance at various locations and specifically to repave certain streets. The contract provided that D. Construction would "complete the work in accordance with the plans and specifications hereinafter described, and in full compliance with all the terms of this agreement and the requirements of the Engineer under it."

¶ 8 Specifically, the contract, in part, stated:

"2. The existing bituminous surfaces to receive Operation #2

shall be cleaned to the satisfaction of the engineer prior to commencing the operation. The edges of the existing pavement shall be free of all loose and attached dirt and aggregate.

3. Bituminous material prime, tack coat, RC-70, shall be applied at the rate of 0.10 gallon/square yard. All areas to be paved shall be coated uniformly at the required rate. Aggregate (prime coat) shall be applied as a rate of 2 to 4 lbs./s.y. The aggregate (prime coat) shall be incidental to the prime coat.

4. Apply ¾" thick (84 lb./s.y.) of hot-mix asphalt leveling binder (machine method) IL-9.5, N30, to correct crown deficiencies and fill depressions.

5. Apply 1 ¼" (140 lbs./s.y.) of hot-mix asphalt surface course, IL-9.5, N30.

***

Contractor shall apply aggregate shoulders, Type B (CA-6) with a uniform widener, to a width of 2 feet. Aggregate thickness shall meet the edge of pavement, and shall taper to 0" to 2 feet. Aggregate shoulder shall be wetted as necessary and compacted."

¶ 9 The contract did not specify a time frame for completion of any of the operations. It further called for traffic control devices as directed "by the Engineer and in accordance with the

applicable parts of Article 107.14 of Standard Specifications and Illinois Manual on Uniform Traffic Devices for Streets and Highways and in accordance with highway Standards 701501-03 and 702001-06." A special provision of the contract incorporated the Illinois Department of Transportation (IDOT) Standard Specifications for Road and Bridge Construction which read as follows:

> "105.01 Authority of Engineer. All work of the contract shall be completed to the satisfaction of the Engineer. The decision of the Engineer shall be final on all questions which may arise regarding, including but not limited to, the quality and acceptability of materials and work; the manner of performance; acceptable rates of progress on the work; the interpretation of the contract plans and specifications; the fulfillment of the contract; the measurement of quantities and payment under the contract; and the determination of the existence of changed or differing site condition."

¶ 10 Kenneth Sandeno, the president of D. Construction, explained that Chamlin & Associates was the engineer hired for the project and acted as the agent for the Village of Seneca. Chamlin & Associates prepares plans on projects for the Village and conducts construction inspections for the Village when the State of Illinois requires them. This project required inspections as it was funded by motor fuel tax funds.

¶ 11 Sandeno further stated that the entire project lasted a little over a week and consisted of prep work, laying asphalt, shoulder work and cleanup. Sandeno believed that no policy or contractual requirement existed as to when the shoulder crew was to begin work after the asphalt crew finished. He indicated the timing of the shoulder work would vary depending on a number of factors as you "want the asphalt surface to be able to support other loads coming on to it with the machinery that they use to apply the shoulder stone."

¶ 12 Kenneth Wilhelmi worked for D. Construction as a project manager and estimator for the project. He noted the engineer's function on the site was to direct D. Construction on work the engineer designed and wanted installed.

¶ 13 Asphalt foreman Ron Parrish noted that his crew placed "Fresh Oil" signs at each intersection throughout the paving operation. His crew laid the paving on Hossack Street on October 2, 2007. A different crew was assigned to handle the shoulder work and completed it on October 11, 2007.

¶ 14 Mike Farrell is a professional land surveyor and project manager for Chamlin & Associates. He was present on the jobsite as a site inspector. His responsibility was to inspect and conduct yield checks regarding the amount of materials being used to confirm compliance with the specifications of the contract. If D. Construction was not in compliance with the plans and specifications of Chamlin & Associates, Farrell had the power to shut down the project.

¶ 15 Farrell's job file consisted of tickets that showed dates that work was completed, blacktop tickets showing the quantity used and the time each load was delivered, and gravel

tickets for aggregate shoulders that were placed. He kept an ongoing tab of asphalt mix tonnage to make sure that D. Construction was in compliance with the total yield numbers of asphalt that he previously calculated for the plans and specifications.

¶ 16 Farrell noted that the actual tonnage amount of asphalt used never is exactly the quantity estimated for a given job. This project came in 19 tons over the estimated 512 tons, which was not a rare occurrence. He noted the overage was likely due to driveways being bigger than originally calculated. No problem existed with yield compliance throughout the project.

¶ 17 In addition to conducting yield checks, Farrell noted he was there "from the time that they start work until the time that they end work" and it was his responsibility "to monitor the depth that they're putting down, the depth of the asphalt ***." A metal probe existed on the back of the asphalt machine which was set to a specified level. Had Farrell observed the material going down too thick, he would have told the foreman to reduce the thickness of the asphalt. Farrell believed D. Construction complied with the yield and thickness requirements of the job. Farrell's normal practice is to follow behind the machine with a ruler to "double-check" that the thickness is appropriate.

¶ 18 When shown a photograph depicting about a 5½-inch difference from the street to the shoulder, Farrell explained that as the asphalt is laid, it may fall down along the existing edge and disguise the street as being all brand new asphalt. He further noted that rain could have washed off some of the shoulder so that it was lower than the existing pavement before the project started. Farrell never informed Parrish or anyone on the site that a problem existed with

a drop-off at the shoulders. Had he observed such a problem, he had the authority to correct it. He did not find any part of D. Construction's work unacceptable. Chamlin & Associates prepared the pay estimates to be submitted to the Village after the project was completed as it was in compliance with all specifications. Farrell was unaware of anyone from Chamlin & Associates complaining to D. Construction about any aspect of the project.

¶ 19 Given these facts, D. Construction filed a motion for summary judgment, which the trial court granted. The trial court found that the photograph showing approximately 5½ inches between the top of the asphalt and the gravel shoulder did not reasonably support "an inference that creates a material issue of fact that the jury would consider without engaging in speculation and conjecture and surmise."

¶ 20 The trial court found that "the only direct evidence" showed that two inches of asphalt was applied. It further noted that Farrell's testimony evinced how a jury may speculate as to the thickness of the road from the picture as Farrell gave alternative theories on how such a picture could seemingly show 5½ inches of asphalt when only two was actually laid.

¶ 21 The trial court found that the engineer had the responsibility for signage and determined the "only logical inference in reading the contract itself is that the engineer accepted the signing that was done by the contractor on the job and that *** it met the specifications." As such, the trial court held that D. Construction did comply with signage requirements.

¶ 22 Finally, the trial court ruled that D. Construction owed no common law duty to plaintiff to keep the roadway safe for her use as a pedestrian as it is intended for the use of automobiles.

Plaintiff appeals the trial court's order granting defendant's motion for summary judgment.

¶ 23 ANALYSIS

¶ 24 We review the granting of a motion for summary judgment *de novo*. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32 (2004). The purpose of summary judgment is not to try a question of fact, but rather to determine if a genuine issue of material fact exists. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179 (2002). 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 2008). When determining whether a genuine issue of material fact exists, we must construe the pleadings, depositions, admissions and affidavits strictly against the movant. *Adams*, 211 Ill. 2d at 43.

¶ 25 On appeal, plaintiff raises a number of seemingly intertwined theories of why we should find the trial court erred in granting defendant's motion for summary judgment. Plaintiff's theories can essentially be grouped into two categories. In the first category, plaintiff argues the trial court erred in its application of the *Hunt* doctrine leading it to erroneously conclude that defendant neither owed nor breached a duty to the plaintiff. Furthermore, in her second group of arguments, plaintiff claims the trial court failed to properly consider certain evidence that created a genuine issue of material fact sufficient to preclude summary judgment.

¶ 26 A. The *Hunt* Doctrine and Defendant's Duty to Plaintiff

¶ 27 Initially, plaintiff argues that the trial court erred in holding that defendant "owed no

duty" to the plaintiff in this matter. Included in this argument is plaintiff's claim that defendant "voluntarily undertook a project and created a dangerous condition" creating "at a minimum a question of fact as to whether the defendant contractor violated a duty to the plaintiff in the instant matter."

¶ 28 We begin our analysis with the *Hunt* doctrine. In *Hunt v. Blasius*, 74 Ill. 2d 203 (1978), our supreme court noted:

> "Since its inception in Illinois, the general rule, a corollary of the doctrine of privity of contract, has been applied not only to independent contractors, but to all suppliers of chattel. [Citations.] Under strict adherence to the general rule, a contractor, manufacturer or vender whose negligence caused injury to a third person would not be liable to that person because no contractual relation existed between the parties. To ameliorate this harsh result, Illinois courts gradually broadened the scope of the exceptions to the rule so that tort liability could be imposed on negligent independent contractors and manufacturers. [Citations.]
>
> ***
>
> An independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow. If the contractor carefully carries out the

> specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them." *Hunt*, 74 Ill. 2d at 207-09.

¶ 29 *Hunt* involved an automobile accident that took place when a car left the paved portion of Interstate Highway 55 near Normal, Illinois and collided with the post of an exit sign. *Id.* at 206. The two people killed and the three seriously injured sued the firm that constructed and installed the exit sign post. *Id.* at 206. Defendant submitted an uncontroverted affidavit establishing that the "sign and supporting posts were designed, constructed and installed by [defendant] in strict conformity to specifications mandated by the State of Illinois" and that the work was completed and accepted by the State. *Id.* at 206.

¶ 30 In affirming the grant of summary judgment to defendant, our supreme court noted that the plaintiffs failed to allege that "the specifications were so flawed that [defendant] should have been put on notice that the product would be dangerous and likely to cause injury. [The plaintiff] also fails to provide any facts from which a court might infer that the specifications were so glaringly dangerous that [defendant] should have refrained from complying with the specifications. We find no basis upon which [defendant] can be held liable in negligence for merely complying with the State's contract specifications." *Id.* at 210.

¶ 31 The trial court herein found this to be a "classic *Hunt*" situation: *i.e.*, the Village of Seneca contracted D. Construction to perform certain work and D. Construction performed it to

the approved specifications. Plaintiff mischaracterizes the trial court's reference to a "classic *Hunt*" situation as a finding by the trial court that defendant owed plaintiff no duty as a matter of law. That is not what the trial court found.

¶ 32 The trial court said very specifically that "under the *Hunt* standard, the plaintiff's responsibility in order to establish a case against the contractor comes in one of two ways. Either they have to establish that there was a failure to abide by the plans and specifications that were set out in the contract or that the plans and specifications themselves were so egregious that no competent contractor undertaking that work would ever attempt to comply with it." That is a far cry from finding that defendant owed plaintiff no duty whatsoever. Clearly, the trial court engaged in the proper path of analysis: that being, pursuant to *Hunt*, D. Construction owed "no duty" to third parties such as the plaintiff *beyond* performing its obligations under the contract. Finding no credible evidence that D. Construction deviated in its performance of its contractual duties, beyond that which would lead a jury to engage in speculation and conjecture, the trial court granted defendant's motion for summary judgment. We find the trial court did not err in its analysis of *Hunt* or its review of the evidence contained within the record on appeal. As such, we hold the trial court properly granted defendant's motion for summary judgment.

¶ 33 Similarly to the situation presented in *Hunt*, there is no allegation in this matter that the specifications presented to D. Construction were so inherently dangerous that no reasonable contractor would follow them. In fact, in the case at bar, plaintiff acknowledges that, "Herein, the plans on their face are not glaringly dangerous."

¶ 34 Furthermore, plaintiff attempts to distinguish the holding and application of *Hunt* by referencing legal theories associated with voluntary undertakings are not well taken.

¶ 35 It is well settled that the duty of care imposed on a defendant is limited to the extent of defendant's voluntary undertaking. *Bailey v. Edward Hines Lumber Co.*, 308 Ill. App. 3d 58 (1999). Here, the extent of D. Construction's undertaking was to perform the work within the specifications of the contract. The trial court correctly found that all credible evidence produced during discovery leads to the inference and conclusion that D. Construction performed the work within the specifications provided by the contract. Plaintiff disagrees and claims that inferences drawn from a picture and certain testimony are sufficient to create a genuine issue of material fact from which a jury could conclude that defendant failed to perform as required under the contract.

¶ 36 B. Genuine Issue of Material Fact

¶ 37 The plaintiff produced a photograph that the trial court characterized as showing "about a five-and-a-half-inch gap between the edge of the road and the gravel pavement of the road." A more accurate description of this photograph, a copy of which is contained within the record on appeal, indicates that it shows what appears to be an approximate six-inch difference in height between the top of the newly laid asphalt and that of the road bed below the asphalt. Plaintiff claims that picture alone, and the inferences that can be drawn therefrom, is enough to create a genuine issue of material fact as to whether or not D. Construction complied with the specifications under the contract that called for it to lay down approximately 2¼ inches of

asphalt. The trial court disagreed and stated as follows:

> "In this case, the record is very plain from everybody who was involved in this project, from the resident engineer, Mr. Farrell, who is not an employee of the defendant, from Mr. Parrish, the job superintendent, from their bidder -- or from their estimator, and others on this project, that there were three ways that they directly determined that the contractor was in compliance with the specifications as to the quantity being laid. And the first was through the job tickets. And the measurements by the engineer through calculations from the engineer, that they were in compliance with the quantity of asphalt to be laid; there was no overage and that there was no shortage; and that in his computations and in his calculations and in his opinion, there was no noncompliance with those requirements. That's number one.
>
> Number two was that he physically got out there with a ruler and measured the application of the asphalt from the surface of the roadway to the top of the portion that was leveled and that it met the requirements of the contract.
>
> And then finally and number three was that there was a calibrator on the applicator itself that was set so that there would

not be an overage in the application. That's the direct evidence that they were in compliance."

¶ 38 Conversely, the trial court found the photograph could not reasonably support an inference that D. Construction applied too much asphalt without allowing the jury to engage in "speculation and conjecture and surmise." In coming to this conclusion, the trial court pointed to Mr. Farrell's testimony in which he provided competing theories of how a picture could appear to show six inches of asphalt when "no more than two inches [were] applied in total."

¶ 39 The trial court further found plaintiff's allegations that the evidence showed defendant failed to timely grade the shoulder to be without merit. The trial court correctly noted that the contract "has no requirement as to the timing of when the grading out of the shoulder should be done." Therefore, the trial court found that no evidence existed upon which a trier of fact could conclude that D. Construction deviated from the specifications for the job by waiting to grade the shoulder for nine days after it laid the asphalt. The trial court noted that imposing a time frame different than what the contract called for would totally "eliminate the *Hunt v. Blasius*" doctrine.

¶ 40 We agree with the trial court's rationale and well thought out reasoning noted above. To withstand a motion for summary judgment, the nonmoving party need not prove his case but must present some factual basis to support his claim. *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002). However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313 (1999). We hold the trial court correctly found that no evidence existed beyond mere

speculation or surmise that D. Construction did anything but fulfill its obligations as called for by the specifications of its contract with the Village of Seneca. Mike Farrell's testimony stands alone in the record to explain the depth of the asphalt as shown in plaintiff's picture. He provided numerous theories as to how a picture could appear to show D. Construction put down six inches of asphalt when, in fact, they only laid down two inches. We agree with the trial court that the photograph produced by plaintiff fails to show, beyond mere speculation and conjecture, that D. Construction put down more asphalt than called for by the specifications of the contract.

¶ 41 Finally, plaintiff claims the trial court erred in its application of IDOT's rules and regulations regarding signage. Specifically, plaintiff points to rule 701.7 specifying certain signing requirements "exceeding 3 in. (75mm) between the edge of pavement or edge of shoulder within 3 ft (900mm) of the edge of the pavement and the earth or aggregate shoulders." Plaintiff notes that a question of fact exists as to whether road signs were up the entirety of the project or whether they were pulled once the asphalt application was completed.

¶ 42 Defendant claims that regardless of the existence of the signs, they complied with the terms of the contract. Defendant notes that the contract indicates that "placement and maintenance of all traffic control devices shall be as directed by the engineer."

¶ 43 The trial court found "the only logical inference in reading the contract itself is that the engineer accepted the signing that was done by the contractor on the job and that it met the - - it met the specifications; and that's why he accepted it." We agree with the trial court's characterization of the evidence and inferences drawn therefrom.

¶ 44 There is no evidence that the engineer required barricades or vertical panels be placed at 200 or 100 feet centers as plaintiff claims the IDOT rules mandate. While a question does exist as to whether the fresh oil signs remained up during the project, it is uncontroverted that the engineer controlled what signage was and was not appropriate and that he never told D. Construction that its signage was anything but appropriate.

¶ 45 Moreover, were we to find that D. Construction failed to comply with the contract by failing to place barricades or vertical panels at 100 or 200 feet centers, there is no indication that the failure to put those items in place had any effect on plaintiff's actions and resulting injury. Common sense dictates that any signage would be directed toward drivers, not pedestrians. Plaintiff acknowledged she was aware that the street was under construction and that she still chose to walk on it, at night, where an adjacent sidewalk existed. Again, plaintiff "knew there was a little difference" between the level of the asphalt and shoulder but simply "didn't expect it to be as much a drop-off as it" was.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the order of the circuit court of La Salle County is affirmed.

¶ 48 Affirmed.

¶ 49 JUSTICE McDADE, dissenting:

¶ 50 The majority has affirmed the finding of the LaSalle County Circuit Court awarding summary judgment to the defendant D. Construction, Inc. and against plaintiff Susan Barkowski.

Because I believe defendant's motion for summary judgment should have been denied, I respectfully dissent.

¶ 51 The basis for the majority's decision is a finding that the defendant owed the plaintiff no duty other than to comply with the specifications of its contract with the Village of Seneca to complete a road repaving project. The basis for my dissent it my contrary belief that the defendant did indeed owe plaintiff a greater duty – to exercise due care to protect third persons during its compliance with the contract.

¶ 52 Defendant premised its denial on principles set out in two cases: *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474 (1985), and *Hunt v. Blasius*, 74 Ill. 2d 203 (1978). While I have no quarrel with the holdings in these cases, I do not believe either is implicated in or dispositive of the instant case.

¶ 53 Plaintiff argues that defendant construction company owed her a duty of reasonable care with regard to the resurfacing project because defendant voluntarily undertook the project. She further specifically argues that the traffic control signs that were up for the project were not sufficient, that there was no signage warning of the shoulder drop off, and that defendant left the road in an unguarded position in the interim of laying asphalt on the road surface and completing the shoulder work. Thus, defendant’s undertaking increased the risk of harm to her because defendant created the risk–the change in elevation between the road and the shoulder where people customarily walk along the road. Plaintiff acknowledges that the determination of whether defendant owed her a duty is a question of law to be decided by the court (*Kennedy v.*

Medtronic, Inc., 366 Ill. App. 3d 298, 308 (2006)) but states, correctly, that whether defendant breached its duty by failing to act in a careful manner is a question of fact for the trier of fact.

¶ 54 Defendant responds plaintiff's reliance on the voluntary undertaking theory is misplaced. " 'Under the voluntary undertaking theory of liability, the duty of care to be imposed on a defendant is limited to the extent of the undertaking.' [Citation.]" *Kennedy, Inc.*, 366 Ill. App. 3d at 308. Defendant argues that it only undertook to perform the contract, and there is no genuine issue of material fact that it fully complied with the contract. Further, defendant asserts that, where a duty is based on a contractual obligation, the scope of the duty is dependent on the terms of the contact. *Ferentchak*, 105 Ill. 2d at 482 (" 'The scope of that duty, although based upon tort rather than contract, is nevertheless defined by the *** contract' [(citation)] between the engineer and the developer").

¶ 55 We should find the rule in *Ferentchak* does not apply in this case. In *Ferentchak*, the supreme court specifically addressed the "duty [that] arises from *** professional responsibility as a registered civil engineer." *Ferentchak*, 105 Ill. 2d at 481. The *Ferentchak* court relied upon *Bates & Rogers Construction Corp. v. North Shore Sanitary District*, 92 Ill. App. 3d 90, 97 (1980), which also addressed the "duty [that] runs from the architect or engineer who engages in tortious action ***." *Bates & Rogers Construction Corp.*, 92 Ill. App. 3d at 97. There, the court held that "[t]he scope of that duty, although based upon tort rather than contract, is nevertheless defined by the architect and Engineers' contract with the owner." *Id.*

¶ 56 The activity of the defendant in our case was not limited to designs on paper. Rather it

was charged with actually carrying out those designs and it is both reasonable and fair to hold it to the greater responsibility of executing those designs in such a way that third parties were not put at undue risk.

¶ 57 Defendant also relies on *Hunt v. Blasius*, 74 Ill. 2d 203, 209 (1978), as a limitation on the scope of its duty, asserting *Hunt's* proposition that:

> "[a]n independent contractor owes no duty to third persons *to judge* the plans, specifications or instructions which he has merely contracted to follow. If the contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications ***." (Emphasis added.) *Hunt*, 74 Ill. 2d at 209.

Defendant argues there is no genuine issue of fact that it did not breach its limited duty to third persons in the case of independent contractors. Defendant insists its only duty is to not follow contract specifications that "are so obviously dangerous that no competent contractor would follow them." *Hunt*, 74 Ill. 2d at 209. As noted by the majority, plaintiff has conceded that the plans defendant followed are not glaringly dangerous on their face.

¶ 58 We should find that plaintiff's allegations do not fall with the *Hunt* rule. Her allegations of negligence are not grounded on defendant's alleged failure to judge or failure to comply with the plans for this project. She simply argues that defendant carried out those plans in an unsafe manner. Specifically, she asserts that defendant failed to exercise due care in complying with

the plans for the road and shoulder work by (a) leaving the two elements of the project incomplete for the interval of time it did, (b) without adequate signage to warn the public of the dangerous condition–the change in elevation–of the road. To determine whether defendant owed plaintiff a duty, not just to determine whether the terms of the contract were obviously dangerous but in actually fulfilling the contract, we should adhere to well-established duty analysis.

> "The touchstone of the duty analysis is to ask whether the plaintiff and defendant stood in such a relationship to one another that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff. The inquiry involves 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 the burden on the defendant. [Citation.]" *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010).

¶ 59 Defendant responds: it did not owe plaintiff a duty with regard to its fulfillment of the contract; it had no duty to complete the shoulder work within a certain time or to place warning signs; plaintiff's injury was not reasonably foreseeable because, as a pedestrian, she was not an intended user of the street; imposing a duty on it to guard against pedestrian use of a vehicular roadway by completing shoulder work within a certain time period or placing warning signs would constitute an unreasonable burden in the form of an obligation not called for in its contract

with the Village; and plaintiff cannot establish that defendant's failure to complete the shoulder work sooner or to warn of the drop off was a proximate cause of her injury, where plaintiff admitted she knew there was a change in elevation, just not the severity of the change.

¶ 60 Initially, we should reject defendant's proximate cause arguments as premature at this stage of proceedings. "Questions regarding a breach of a duty and proximate cause of the injury are reserved for the trier of fact." *Krywin*, 238 Ill. 2d at 226. Next, we should note that, although both parties utilize the language of section 3-102(a) of the Illinois Local Government and Governmental Employees Tort Immunity Act (745 ILCS 10/3-102(a) (West 2006)) in their arguments with regard to whether plaintiff was or was not an "intended user" of the street, these arguments are misplaced. The question of the foreseeability of plaintiff's injury as it pertains to the question of the existence of a duty in this case does not turn on whether plaintiff was an intended or permitted user of the street. The provisions of the Act are irrelevant because the Act pertains only to government entities. *Niehaus v. Rural Peoria County Council on Aging, Inc.*, 314 Ill. App. 3d 665, 670 (2000) ("Our review of these cases leads us to conclude that RPCCA is not a local public entity and, accordingly, is not entitled to the Act's protections"). Again, the duty analysis in this case turns on the traditional determinant of the foreseeability of the harm resulting from defendant's conduct. See, *e.g.*, *Diefendorf v. City of Peoria*, 308 Ill. App. 3d 465, 468 (1999) (quoting *Risner v. City of Chicago*, 150 Ill. App. 3d 827, 831 (1986)). See also *Ramirez v. City of Chicago*, 212 Ill. App. 3d 751, 755 (1991).

¶ 61 The appellate court has held that an occurrence is reasonably foreseeable, for purposes of

determining whether a duty is owed, if a reasonably prudent person could have foreseen as likely events which did transpire. *Zakoff v. Chicago Transit Authority*, 336 Ill. App. 3d 415, 423 (2002). But " '[i]f those events are "highly extraordinary" or "tragically bizarre" or "unique" then the occurrence is not reasonably foreseeable.' [Citation.]" *Zakoff*, 336 Ill. App. 3d at 423. We should find that the events that transpired in this case were likely to transpire and, therefore, were reasonably foreseeable for purposes of determining whether a duty existed.

¶ 62 The evidence currently on file leaves no genuine issue of material fact regarding the likelihood that a pedestrian would walk along the road during the construction period. The evidence is that, although there was a sidewalk, the sidewalk did not extend the length of the road and in fact terminated a short distance from where the "event transpired." The evidence is also that the road was open to vehicular traffic. Given those facts alone, a reasonably prudent person could have foreseen that a pedestrian would be walking along the road in this area. See *Zakoff*, 336 Ill. App. 3d at 423 (" '[a] duty may be owed to a motorist who deviates from the ordinary course of travel if such a deviation was reasonably foreseeable.' [Citation.]"). A reasonably prudent person could have also foreseen as likely that such a pedestrian might have to step from the road surface to the shoulder to avoid traffic. It would not be "bizarre" or "highly extraordinary" for such a pedestrian to injure himself in attempting to negotiate the change in elevation.

¶ 63 But this court recently noted that:

> "every risk which is foreseeable does not create a duty to an

> injured person. [Citation.] [I]n addition to the factor of foreseeability, whether a duty exists includes an analysis of the likelihood of injury, the magnitude of the burden guarding against it, and the desirability of placing the burden upon the defendant." *Johnson v. Bishop*, 388 Ill. App. 3d 235, 238 (2009).

¶ 64 Defendant's only material argument that the magnitude of the burden is too great for it to guard against the risk involved in this case is that it would add a term to its contract with the Village. That argument is unpersuasive. The analysis involved in this case is of defendant's common law duty to plaintiff, not its compliance with its contractual obligations. The magnitude of the burden on defendant to guard against the risk is actually quite small. All that burden would entail is the placement of warning signs alerting foreseeable pedestrians to the uneven surfaces they might reasonably be expected to encounter. It is desirable to place this burden on defendant, which was in control of the location, had knowledge of the condition, and had the means to guard against the risk.

¶ 65 That it is not unduly burdensome, and is in fact desirable, to place this burden on defendant is demonstrated by Illinois Department of Transportation Rule 701.07 which reads in pertinent part:

> "When HMA [hot mix asphalt] resurfacing is being constructed and the road is opened to traffic, there shall be no more than 4 lane miles *** of new binder or surface adjacent to the

> shoulder without either completing the shoulders, providing barricades or vertical panels, erecting "LOW SHOULDER" signs *** or constructing a temporary earth wedge against the edge of pavement and compacting it to the satisfaction of the Engineer."

That rule, in circumstances similar to but not identical to those presented here, would have required defendant by law to do precisely what this court would be saying defendant should have done here. That is, to place a warning sign alerting users of the road to the drop-off to the shoulder. We should not imply that it is unduly burdensome or undesirable to require a party to guard against a foreseeable harm in circumstances where the law does not explicitly require it to do so.

¶ 66 Nor is the fact that the change in elevation may have been clearly visible to a foreseeable pedestrian user of the road a bar to finding that defendant owed plaintiff a duty with regard to the condition of the road. Our supreme court has held that "the existence of an open and obvious condition is not a *per se* bar to a finding of legal duty on the part of a premises *** occupier." *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002). The court cited favorably the Restatement (Second) of Torts for the following proposition:

> "[R]eason to expect harm from a known or obvious danger may arise *** where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would

> outweigh the apparent risk.' [Citation.]" *Sollami*, 201 Ill. 2d at 15 (citing Restatement (Second) of Torts § 343A(1), Comment f, at 220 (1965)).

¶ 67 This "deliberate encounter" exception to the "open and obvious doctrine" is *not* limited to cases involving economic compulsion. *Sollami*, 201 Ill. 2d at 16. Plaintiff argued that the "distraction exception" also applies because she was distracted by traffic and such distraction, given the customary use of the road, was reasonable and foreseeable.

> "[T]he 'distraction exception' *** refers to a situation where the landowner '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.' [Citations.]" *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1054 (2010).

¶ 68 It is, in my opinion, eminently reasonable to expect that foreseeable pedestrians on the road in question would "proceed to encounter" the risk from the uneven road surfaces because the advantage–reaching their destination–would outweigh the apparent risk–falling off the edge of the road. We should hold that to the extent the danger may have been open and obvious, the exception to the open and obvious rule applies and, therefore, the law imposes a duty to warn against reasonably foreseeable risks of harm. *Sollami*, 201 Ill. 2d at 17 ("With respect to the reasonable foreseeability factor, the law does *** impose a duty to warn of open and obvious

conditions [where] one of the two exceptions discussed above is found").

> "To survive a motion for summary judgment in a negligence case, the plaintiff must present facts sufficient to establish that the defendant owed a duty of care, that the defendant breached the duty, and that the plaintiff incurred injuries proximately caused by the breach." *H and H Sand and Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 249 (1994) (citing *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992)).

¶ 69 We should hold that defendant is not entitled to summary judgment on plaintiff's complaint because defendant owed plaintiff a duty to warn of the condition of the road during its repaving project. We should hold that there are sufficient facts from which to find that defendant breached that duty by maintaining the road in the condition it was in when plaintiff was injured for the length of time it did without warning of that condition. We should also find that there are sufficient facts from which to find that defendant's breach of that duty was a proximate cause of plaintiff's injuries. A reasonable trier of fact could find that the apparent risk was less than the actual risk. Plaintiff admitted that she was aware of the apparent risk when she testified that she knew of the drop off. The testimony was that plaintiff did not know the extent of the change in elevation. Therefore, there is evidence--sufficient to survive a motion for summary judgment--from which a reasonable trier of fact might find that defendant's alleged breach of its duty to

warn of the condition of the road was a proximate cause of plaintiff’s injury.

¶ 70 For all of the foregoing reasons, I would find that the order of the circuit court of LaSalle County granting summary judgment in defendant's favor should be reversed.