2019 IL App (4th) 180372-U

NO. 4-18-0372

FILED
June 4, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

LAUREN BUCARO,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
SAMUEL PAYNE and JEANENE PAYNE,	)	No. 13L76
Individually and d/b/a PLEASANT VIEW FARMS,	)	
Defendants-Appellees.	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's summary judgment rulings for defendants are affirmed.

¶ 2 On April 26, 2018, the trial court granted motions for summary judgment filed by defendant Samuel Payne and defendant Jeanene Payne, individually and d/b/a Pleasant View Farms. The court included an Illinois Supreme Court Rule 304(a) (eff. March 8, 2016) finding in the written order. Plaintiff Lauren Bucaro appeals, arguing the court erred in granting the respective motions for summary judgment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 24, 2014, plaintiff filed her fourth amended complaint at law. The first count alleged defendant Samuel Payne violated the Illinois Premises Liability Act (Act) (740 ILCS 130/1 to 5 (West 2012)) and caused plaintiff to suffer injuries. The second count alleged Jeanene Payne did the same. The complaint alleged defendants operated, maintained,

managed, and controlled Pleasant View Farms. Jeanene Payne owned the property in question. Samuel Payne occupied the property and rented it out for barn dances to students at Illinois State University.

¶ 5 On September 29, 2012, plaintiff attended a barn dance at the farm as an invited guest of the Gamma Phi Beta sorority. Approximately 200 students and guests attended the barn dance. Defendant Samuel Payne constructed or caused to be constructed a large bonfire for the party. According to plaintiff, the bonfire was so large it became unsafe and extremely dangerous for the guests attending the dance. Plaintiff alleged she fell into the bonfire while attending the barn dance and suffered first, second, and third degree burns.

¶ 6 Plaintiff testified at a deposition on March 29, 2016. According to her testimony, she previously had been to two barn dances at the same farm. One dance was about a week prior to the night in question here and the other was approximately a year earlier. There were bonfires in the same location on these two prior occasions.

¶ 7 On the night in question, plaintiff started drinking about 5:30 p.m. She had approximately five cans of beer before she went to the barn dance and had one or two additional beers after she arrived at the farm. Prior to her accident, she danced and went on a hay ride. At approximately 9:30 p.m., she and a man named Joe Rock sat on a bale by the bonfire. Approximately 10 people were around the fire at that time. She and Joe sat by the fire for about 15 minutes before she fell.

¶ 8 Plaintiff testified the bale was four to five feet from the fire itself and two feet from the fire's embers. She considered the embers part of the fire. Including the embers, the fire was approximately 10 feet in diameter. While sitting on the bale, she could feel the heat of the fire. Plaintiff testified the fire was so hot she had to sit with her back to it. Because she was

facing away from the fire, she testified she did not see the embers.

¶ 9 Rock asked plaintiff to take a picture of him in front of the fire, which she did. She then asked him to take a picture of her in front of the fire. Although she had been drinking, she testified she felt completely in control and followed Rock's direction with regard to where to stand for the photograph. Right before she fell into the embers, plaintiff was between two of the bales near the bonfire. She acknowledged she could feel the heat of the fire. When asked whether she agreed "nothing would have distracted you so that you would forget the fire was there?" Plaintiff responded, "I suppose." Moments earlier in her deposition, plaintiff testified the point of the photograph was to pose by the bonfire.

¶ 10 She admitted backing up near the bonfire without looking where she was going or where she was in relation to the fire and embers. According to plaintiff, "I was trying to make sure I took a good picture." While moving between the bales, she stepped back and her foot landed on what she thought was a piece of wood. The object rolled under her foot, and she fell backwards into the hot embers of the fire. Plaintiff could provide no information with regard to the size of the object she stepped on, but she did testify the object was about a foot from the embers.

¶ 11 On May 24, 2017, Jeanene Payne filed a motion for summary judgment. On June 13, 2017, Samuel Payne filed a motion for summary judgment. Defendants argued plaintiff's claims were barred as a matter of law by the "open and obvious" risk doctrine.

¶ 12 On November 14, 2017, plaintiff responded to the respective motions for summary judgment. Plaintiff argued the embers and debris in the area surrounding the bonfire, which caused her injuries, was not an open and obvious danger as a matter of law. According to plaintiff, a question of material fact existed over the obviousness of the danger she faced from

the embers and debris. Assuming the trial court might determine the embers and debris constituted an open and obvious danger, she contended an analysis of the four traditional duty factors still established defendants owed her a duty of reasonable care. Plaintiff argued defendants could have eliminated the risk by doing nothing more than placing the bales farther from the bonfire, not erecting a perimeter around the bonfire at all, and/or clearing the area surrounding the bonfire of debris. Further, according to plaintiff, because defendants created or at least contributed to the factors leading to her distraction at the time of the injury, the distraction exception to the open and obvious doctrine applied to this situation.

¶ 13 On April 26, 2018, the trial court held a hearing on the motions for summary judgment. The court found the open and obvious doctrine applied to the facts in this case, finding no distinction existed between the fire and the embers. With regard to the traditional four-factor duty analysis, the court found plaintiff would not be able to establish her injuries were reasonably foreseeable or likely. With regard to the magnitude of the burden of guarding against an injury like plaintiff's, the court found this was a closer question but still weighed against plaintiff. The court questioned whether the consequence of placing a burden on defendants in a situation like this would result in them not being able to have bonfires at all. The court again found defendants owed plaintiff no duty in this situation. With regard to the distraction exception, the court held it did not apply because cases applying the distraction exception involved circumstances requiring a plaintiff to focus her attention on some other condition or hazard, which was not the situation in this case.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Because plaintiff argues the trial court erred in granting the motions for summary

judgment, we apply a *de novo* standard of review. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284, 769 N.E.2d 18, 20 (2002). Summary judgment is a drastic means of disposing of litigation. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007). For summary judgment to be appropriate, the movant's right must be clear and free from doubt. *Bagent*, 224 Ill. 2d at 163, 862 N.E.2d at 991. Pursuant to section 2-1005(c) of the Code of Civil Procedure, summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). While a plaintiff need not prove her case to survive a motion for summary judgment, she must present a factual basis arguably entitling her to judgment in her favor. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12, 21 N.E.3d 684.

¶ 17 A. Open and Obvious Condition

¶ 18 To prevail in a negligence action, a plaintiff must establish the existence of a legal duty owed to her by defendant, a breach of the duty, and an injury proximately caused by the breach. *Bruns*, 2014 IL 116998, ¶ 12. To determine whether a duty exists, courts must determine whether a plaintiff and defendant had such a relationship that the law requires the defendant to act in a manner for the benefit of the plaintiff. *Bruns*, 2014 IL 116998, ¶ 14. In analyzing whether a duty existed in a certain situation, a court looks at "(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." *Bruns*, 2014 IL 116998, ¶ 14. The circumstances of a given case control the weight to be given these factors. *Bruns*, 2014 IL 116998, ¶ 14.

¶ 19 An individual who owns or controls land is not required to foresee and protect

against an injury to someone on his property from a potentially dangerous condition if the potentially dangerous condition is open and obvious. *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44, 796 N.E.2d 1040, 1046 (2003). Under section 343A of the Restatement (Second) of Torts (Restatement), which has been adopted by our supreme court (*Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434, 566 N.E.2d 239, 241 (1990)), a "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them[.]" Restatement (Second) of Torts § 343A (1965). The Restatement defines an obvious condition as one where "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts § 343A cmt. b (1965).

¶ 20 Our supreme court has specifically noted fire is an open and obvious risk. In *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448, 665 N.E.2d 826, 832 (1996), the supreme court stated:

> "In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks."

The open and obvious rule is not confined to just common conditions such as fire, height, and bodies of water. *Bruns*, 2014 IL 116998, ¶ 17. For example, in *Bruns*, the open and obvious condition was an uneven sidewalk on which the plaintiff in that case tripped. *Bruns*, 2014 IL

116998, ¶ 1.

¶ 21 Illinois courts have recognized even young children are presumed to be aware of the dangers of fire. In *Sampson v. Zimmerman*, 151 Ill. App. 3d 396, 398, 401-02, 502 N.E.2d 846, 847, 849 (1986), the Second District Appellate Court affirmed the trial court's summary judgment ruling against a child, who at the age of four, was burned by the flame of a candle. In *Piwowar v. Garrett*, 182 Ill. App. 3d 411, 412, 538 N.E.2d 127, 127 (1989), the Third District affirmed the trial court's summary judgment ruling against a 12-year-old child who was burned when he slipped and fell into a grass fire. If a child as young as four can reasonably be expected to fully understand and appreciate the danger of fire, a young woman clearly must be expected to appreciate the danger of a large bonfire, the embers of the still burning fire, and any debris in the immediate vicinity of the still burning fire and its embers.

¶ 22 Based on the facts in this case, the trial court found the bonfire and the embers from the bonfire were an open and obvious condition. Plaintiff does not seem to dispute the still burning bonfire was an open and obvious condition. However, she claims the smoldering embers and the debris around the embers was not part of this open and obvious condition. Plaintiff argues defendants had a duty to maintain the area surrounding the bonfire in a safe condition and breached that duty by not clearing the debris surrounding the bonfire. According to plaintiff, the piece of debris she stepped on, which rolled under her foot, was the proximate cause of her injuries, not a deliberate encounter with an open and obvious condition.

¶ 23 Plaintiff testified in her deposition she did not see this piece of debris because she stepped backward onto the debris without looking where she was going. She could not offer any testimony as to the size of this piece of debris. However, she testified it was within one foot of the embers of the fire. According to plaintiff, she was not aware of the smoldering embers and

debris because of the way defendant Samuel Payne arranged the bales of hay around the bonfire.

¶ 24 Whether plaintiff was aware of the smoldering embers and debris in the immediate vicinity of the fire and embers is not relevant for purposes of this case. "[T]he determination of whether the condition is open and obvious depends not on plaintiff's subjective knowledge but, rather, on the objective knowledge of a reasonable person confronted with the same condition. [Citation.] This is because property owners are entitled to the expectation that those who enter upon their property will exercise reasonable care for their own safety." *Racky v. Belfor USA Group, Inc.*, 2017 IL App (1st) 153446, ¶ 119, 83 N.E.3d 440. Any reasonable person would understand the dangers associated with a large burning bonfire, its smoldering embers, and its debris.

¶ 25 A bonfire's diameter shrinks as the fire's fuel source is consumed. However, the embers surrounding the flames, which are the remains of the fuel source, remain hot and dangerous. Further, parts of a fire's fuel source often do not burn completely and debris is left in the embers and in the immediate vicinity of the embers. A reasonable person would have known the hot embers would be present, and debris could be present both in the embers and in the immediate vicinity of the embers. Further, a reasonable person would understand the need to keep a safe distance from the embers and to exercise caution if she had to be near the embers.

¶ 26 While the trial court did not address the piece of debris plaintiff stepped on which she claimed caused her fall, the evidence in this case shows this unidentified piece of debris was part of the open and obvious risk in this case. Plaintiff testified this piece of debris was within one foot of the embers of the fire. A reasonable person would have known to exercise caution if she was in plaintiff's position within a foot of the embers of a bonfire. As our supreme court has stated, the law generally assumes individuals who encounter a fire will take care to avoid the

dangers inherent in the fire. *Bucheleres*, 171 Ill. 2d at 448, 665 N.E.2d at 832.

¶ 27 B. Distraction Exception

¶ 28 Assuming this court might agree plaintiff's injuries were caused by an open and obvious condition, plaintiff argues the distraction exception to the open and obvious rule applies to this situation. An exception to the open and obvious rule may apply when "the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger." Restatement (Second) of Torts § 343A cmt. f (1965). The distraction exception applies "where the possessor [of land] 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 cmt. f (1965); see also *Sollami v. Eaton*, 201 Ill. 2d 1, 15-16, 772 N.E.2d 215, 223-24 (2002).

¶ 29 Our supreme court has not adopted a precise definition of what constitutes a "distraction" for purposes of the distraction exception. *Bruns*, 2014 IL 116998, ¶ 23. However, the court has noted the distraction exception is only applicable if evidence exists allowing a court to infer the plaintiff was actually distracted. *Bruns*, 2014 IL 116998, ¶ 22.

¶ 30 Many conditions, like a crack in a sidewalk, a hole, or a drop-off, are only open and obvious in a visible sense. It is much easier to explain how an individual's attention could be distracted from this type of condition. However, a bonfire can be seen, heard, and felt without coming into actual contact with the condition. A possessor of land would have no reason to expect a person on his property would not detect or would somehow forget she was in the presence of a large bonfire.

¶ 31 The distraction exception is not applicable to the situation in this case. Plaintiff

was well aware of the bonfire. She fell while posing for a picture in the immediate vicinity of the bonfire. Plaintiff acknowledged she could feel the heat from the bonfire as she was backing up between two of the bales to pose for the picture. Further, according to plaintiff, the point of the picture was to have the fire in the background.

¶ 32 C. Traditional Duty Analysis

¶ 33 Even though we have held plaintiff's injuries were caused by and resulted from an open and obvious condition, we still must apply the traditional duty analysis to the situation. *Bruns*, 2014 IL 116998, ¶ 19. In analyzing whether a duty exists, courts examine the reasonable foreseeability of the injury, the likelihood of the injury, the burden of guarding against the injury, and the consequences of placing that burden on the defendant. *Bruns*, 2014 IL 116998, ¶ 14. The weight attributed to each of these factors is governed by the circumstances of the particular case. *Bruns*, 2014 IL 116998, ¶ 14.

¶ 34 Normally, the foreseeability and likelihood of injury is slight and weighs against imposing a duty on the landowner if a condition is open and obvious. *Bruns*, 2014 IL 116998, ¶ 19. That is the case here. As noted earlier, reasonable people understand how dangerous fire can be. Any reasonable person would have understood how potentially dangerous the bonfire, embers, and debris in the immediate vicinity of the embers could be. Plaintiff seems to argue the magnitude of the burden on defendant to guard against this type of injury is not that great. According to plaintiff, defendants could have simply placed the bales farther from the fire. However, plaintiff's injuries were not caused by her sitting on the bales or tripping over the bales. She was injured when she chose to move carelessly in the immediate proximity of the bonfire. Moving the bales away from the fire would not have stopped plaintiff from getting too close to the fire and its embers. We agree with the trial court that the consequence of imposing a

burden on defendants to guard against an injury like plaintiff's would essentially require defendants not to have bonfires. Based on the facts in this case, defendants had no duty to guard against plaintiff's injuries in this case. Defendants were entitled to summary judgment.

¶ 35 D. Supreme Court Rule 375 Sanctions

¶ 36 Defendant Samuel Payne asks this court to impose sanctions against plaintiff pursuant to Illinois Supreme Court Rule 375 (eff. Feb.1, 1994). We deny defendant's request as we find plaintiff's appeal was not frivolous and was made in good faith.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's summary judgment rulings in favor of defendants.

¶ 39 Affirmed.