

NOTICE

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2014 IL App (5th) 130348-U

NO. 5-13-0348

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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MOLLY CARVER and SANDY DODS,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Madison County.
	)	
v.	)	No. 11-L-816
	)	
ILLINOIS POWER COMPANY, d/b/a Ameren IP,	)	Honorable
	)	Dennis R. Ruth,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE SCHWARM delivered the judgment of the court.  
Justices Goldenhersh and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly entered summary judgment in the utility company's favor because the utility company did not owe the plaintiffs a duty to properly maintain utility pole so that pole would not break upon impact of car traveling off of roadway.

¶ 2 The plaintiff, Molly Carver, and her mother, Sandy Dods, brought a negligence action against the defendant, Illinois Power Company, doing business as Ameren IP, to recover for injuries sustained after a vehicle, in which Molly was a passenger, collided with a utility pole. The circuit court entered summary judgment in favor of the defendant. For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 3

## I. BACKGROUND

¶ 4 On March 3, 2006, Abby Kansal was driving her parents' vehicle, with Molly sitting in the front passenger seat and Sean Carlson, Alexandria Lesicko, and Stuart Marshall sitting in the back seat. After turning onto Yellow Hammer Crossing, where Molly and her parents live, Abby began to speed. Abby, Sean, Alexandria, and Stuart estimated the car's speed to have reached approximately 80 miles per hour. Yellow Hammer Crossing is a curved, single-lane, dead-end road. According to the plaintiffs, it is "extremely narrow \*\*\* with no curb, \*\*\* not smoothly paved, and slope[d] to each side, \*\*\* increas[ing] the likelihood that vehicles \*\*\* will leave the traveled path of the road." The Carvers' home was one of two homes accessed by Yellow Hammer Crossing.

¶ 5 Abby lost control of the vehicle, veering to the right and entering a backyard in an adjacent subdivision. The car crashed through a landscaping berm and birdbath and became airborne. The vehicle thereafter curved back toward the roadway, crashed through a fence in another backyard, and struck the defendant's utility pole, which was located approximately six feet from the roadway. The car traveled over 400 feet prior to striking the pole. The pole, along with the connected wires, fell onto the car. The occupants of the car saw sparks, believed the car to be on fire, and exited the vehicle.

¶ 6 Stuart believed that Molly was the first to exit the car. He saw her standing outside the car, and she was "stiff looking." When Stuart exited the car, Molly was lying on the ground with one foot touching the car. He tapped her. She was gasping and did not respond verbally. The power lines had remained energized, and Molly sustained injuries upon touching the car.

¶ 7 On January 4, 2012, the plaintiffs filed their first amended complaint for injuries Molly sustained and expenses Sandy incurred under the Family Expense Act (750 ILCS 65/15 (West 2006)). In their first amended complaint, the plaintiffs alleged that the defendant was negligent because it failed to maintain its poles and lines or to replace them at appropriate intervals; failed to provide proper and adequate protection devices to promptly deenergize or cut off power to the power lines; failed to adequately secure, maintain, and guard said utility pole to prevent it from breaking and falling to the ground; failed to properly install, maintain, and operate the reclosers and other deenergizing devices which govern the power lines attached to the utility pole; and allowed its downed power line to be back-fed. The plaintiffs also filed claims based on spoliation of evidence, asserting that the defendant improperly destroyed the utility pole before the plaintiffs had an opportunity to inspect it.

¶ 8 On April 10, 2012, the defendant filed a motion for summary judgment, arguing that it owed Molly no duty to maintain the utility pole to withstand a collision and that its alleged negligence was not the proximate cause of her injuries. In their response to the defendant's motion for summary judgment, the plaintiffs attached the affidavit of Craig McIntyre, Ph.D., an expert in the field of wood preservatives and treatments for wood. Dr. McIntyre sits on the utility poles committee of the American National Standard Institute. Dr. McIntyre stated that, pursuant to rules established by the United States Department of Agriculture, utility poles are to be periodically inspected and maintained to ensure that they can withstand the forces exerted against them.

¶ 9 Specifically, Dr. McIntyre stated that the United States Department of Agriculture Rural Utilities Service Pole Inspection and Maintenance Bulletin required the utility pole at issue to have an initial inspection 10 to 12 years from installation and follow-up inspections every 10 years thereafter. Dr. McIntyre stated that because the pole was installed in 1956, it should have been inspected in 1968, 1978, 1988, and 1998. Dr. McIntyre stated that the typical life of a utility pole, if no remediation is completed, is 40 years.

¶ 10 Dr. McIntyre opined that the vehicle at issue was traveling under 30 miles per hour at the time of impact and that a nondecayed utility pole could typically withstand an impact from a car traveling 30 miles per hour or less. Dr. McIntyre concluded that the utility pole at issue was improperly maintained, was decayed beyond its useful life, and broke during the accident because of the defendant's improper maintenance and inspection.

¶ 11 On June 27, 2013, the circuit court entered summary judgment in the defendant's favor. Following the precedent in *Gouge v. Central Illinois Public Service Co.*, 144 Ill. 2d 535, 546 (1991), the circuit court held that the defendant owed no duty to the plaintiffs pursuant to Illinois law. On July 11, 2013, the plaintiffs filed their timely appeal.

¶ 12

## II. ANALYSIS

¶ 13 "To state a cause for negligence, a complaint must allege facts sufficient to show the existence of a duty, a breach of that duty, and injury to the plaintiff which is proximately caused by that breach." *Gouge*, 144 Ill. 2d at 542. "Whether a duty exists is a question of law to be determined by the court." *Id.* Where a question of law is

determinative of a case, summary judgment is a proper remedy. *National Underground Construction Co. v. E.A. Cox Co.*, 216 Ill. App. 3d 130, 134 (1991). We review the circuit court's order granting summary judgment *de novo*. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002).

¶ 14 "Whether a duty exists \*\*\* depends on whether the parties stood in such a relationship to one another that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff." *Gouge*, 144 Ill. 2d at 542. "In considering whether a duty exists in a particular case, a court must weigh the foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant." *Id.* "In terms of foreseeability, the court will consider whether the risk of harm to the plaintiff was *reasonably foreseeable*." (Emphasis in original.) *Id.*

¶ 15 " 'It is common knowledge that vehicles collide in roadways and on occasion leave the roadway and strike a utility pole or tree adjacent to the roadway.' " *Id.* at 545 (quoting *Boylan v. Martindale*, 103 Ill. App. 3d 335, 346 (1982)). " 'However, for a duty to third persons to be imposed upon those who erect and maintain \*\*\* utility poles, there must be reasonable anticipation of such deviation from the roadway as a normal incident of travel.' " *Id.* (quoting *Boylan*, 103 Ill. App. 3d at 346). Thus, a utility company's liability for a motorist's injuries resulting from a collision with a utility pole generally depends on whether the pole is located in or so close to the traveled portion of the highway or is maintained so as to constitute an obstruction dangerous to anyone properly using the highway. *Id.* at 544. "[U]tility companies owe no duty to motorists who

collide with utility poles unless it is reasonably foreseeable that the vehicles would leave the roadway in the ordinary course of travel and strike the utility poles." *Id.*

¶ 16 In *Gouge*, 144 Ill. 2d at 539, the plaintiffs sought damages for injuries suffered when Johnnie Gouge's automobile struck a utility pole owned by CIPS. The utility pole's top portion included a 7,200-volt transformer which was apparently filled with a flammable substance. Upon impact, the utility pole fractured, and the top portion with the transformer attached fell onto Gouge's automobile and through the windshield. The transformer broke open, and the flammable substance spilled out and ignited. Gouge suffered severe, permanent, and disabling injuries from the fire. *Id.*

¶ 17 The plaintiffs in *Gouge* alleged that CIPS negligently installed the wooden utility pole in that, contrary to standards and the National Electric Safety Code, it failed to properly install guy wires to the utility pole. The plaintiffs argued that CIPS had a duty to properly guy the utility pole so that it would have fallen away from the roadway, rather than onto the plaintiff's automobile, when struck by the vehicle. *Id.*

¶ 18 The court in *Gouge* noted that utility companies have a duty to exercise reasonable care in the installation and maintenance of their utility poles. The court noted, for example, that CIPS owed a duty to properly guy its utility poles so that, for instance, they would not fall onto a roadway, smashing an automobile and injuring the driver. The court held, however, " 'that the imposition of a general duty to anticipate and guard against the negligence of others would place an intolerable burden on society.' " *Gouge*, 144 Ill. 2d at 547 (quoting *Dunn v. Baltimore & Ohio R.R. Co.*, 127 Ill. 2d 350, 366 (1989)). Thus, the court concluded that the utility company "does not owe a duty to

motorists who unforeseeably deviate from the traveled portion of the roadway and strike a utility pole located 15 feet from the roadway." *Id.*

¶ 19 In arriving at its conclusion, the Illinois Supreme Court relied upon section 368 of the Restatement (Second) of Torts, "which involves the liability of owners or occupiers of land for artificial conditions created thereon which cause injury to travelers on an adjacent highway." *Id.* at 544. That section provides:

"A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who

(a) are traveling on the highway, or

(b) foreseeably deviate from it in the ordinary course of travel."

Restatement (Second) of Torts § 368 (1965).

¶ 20 The court in *Gouge* concluded that "[i]f it is not reasonably foreseeable that a motorist will leave the traveled portion of a roadway and strike a particular utility pole, \*\*\* the utility company owes [no] duty to that motorist to maintain that pole in such a condition as to prevent an injury from the impact of the automobile." *Gouge*, 144 Ill. 2d at 546. Accordingly, the Illinois Supreme Court concluded that CIPS did not owe the plaintiffs a common law duty of reasonable care to ensure that if an automobile leaves the traveled portion of a roadway and strikes a utility pole, the pole will fall away from the roadway. The court in *Gouge* noted that if it were to recognize a duty on the part of the

utility company to install utility poles so that they would fall away from the road when struck by an automobile, it would be placing "an onerous and almost impossible burden" on the utility company. *Id.* at 547.

¶ 21 This case is remarkably similar to *Gouge*. As in *Gouge*, the plaintiffs here have alleged no facts which would indicate that it was reasonably foreseeable that the vehicle at issue would deviate from Yellow Hammer Crossing in the ordinary course of travel or as a normal incident of travel and strike the utility pole. If it was not reasonably foreseeable that Abby would leave the traveled portion of the roadway and strike the particular utility pole, the defendant owed no duty to maintain that pole in such a condition as to prevent an injury resulting from the impact of the automobile. *Gouge*, 144 Ill. 2d at 546.

¶ 22 The plaintiffs seek to distinguish *Gouge* by arguing that their action is based on improper maintenance of the pole, *i.e.*, periodic inspections and replacement, as opposed to improper installation. As noted by the defendant, however, the plaintiffs in *Gouge* alleged that the utility company installed or permitted to remain in place an improper guy wire, failed to add a second wire, and failed to place a guy wire across the roadway. *Gouge*, 144 Ill. 2d at 540. These alleged actions and inactions can be characterized as a failure to maintain. Indeed, as noted by the defendant, there is little distinction between a duty to keep a utility pole from falling away from the roadway when struck by a car (*id.*) and a duty to keep a utility pole from breaking when struck by a car, as alleged here.

¶ 23 The plaintiffs further seek to distinguish *Gouge* by arguing that Molly's injuries were caused by the downed power lines, as opposed to the vehicle's impact with the pole



itself. However, in *Gouge*, the plaintiff's injuries resulted from the pole breaking and the ensuing fire, not from the striking of the pole itself. Thus, we find no meaningful distinction.

¶ 24 Since it was not reasonably foreseeable in the ordinary course of travel that Abby would deviate from Yellow Hammer Crossing and strike this utility pole, we do not believe the defendant owed a duty to the plaintiffs to ensure that the pole would not break upon impact. See *Gouge*, 144 Ill. 2d at 545. Accordingly, we find that the circuit court properly entered summary judgment in the defendant's favor. Because we affirm the circuit court's order on this basis, we need not address the plaintiffs' remaining arguments regarding proximate cause.

¶ 25

### III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Madison County.

¶ 27 Affirmed.