COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP876 **Cir. Ct. No. 2014CV452**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DANIEL W. MCBRIDE,

PLAINTIFF-APPELLANT,

V.

CITY OF WATERTOWN, CITY OF WATERTOWN, COMMON COUNCIL, CITY OF WATERTOWN, ENGINEERING DEPARTMENT, LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL INSURANCE, KYLE A. ESMEIER, LISA M. ESMEIER, ERIE INSURANCE COMPANY AND DEAN HEALTH PLAN, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Daniel McBride appeals summary judgment in favor of Kyle and Lisa Esmeier, the City of Watertown, and their respective

insurers (collectively, the respondents). McBride brought a negligence action against the respondents seeking to recover for injuries he allegedly suffered after he stepped into a hole that was located on property that is maintained by the Esmeiers within the right of way of a city street, between the sidewalk and the street. For the reasons discussed below, we affirm summary judgment.

BACKGROUND

¶2 The Esmeiers are the owners of 303 College Avenue in Watertown. In July 2013, McBride broke his leg after he stepped into a hole while mowing the lawn of the home he was renting. The hole, which was between three and five feet deep and large enough to fit a 4-inch by 4-inch piece of wood, was located in the grassy area between the street and city sidewalk at 303 College Avenue, within the right of way of College Avenue.

¶3 McBride brought a negligence action against the respondents, seeking to recover for the injuries that he allegedly sustained when he stepped in the hole. McBride alleged that the Esmeiers and the City were separately negligent in that they "failed to properly inspect, repair, and/or maintain" property where the hole was located.

¶4 The Esmeiers and the City separately moved for summary judgment. The circuit court granted both motions. The court concluded that there was no evidence that the Esmeiers or the City had actual or constructive notice of the hole prior to McBride's accident and that in the absence of such evidence, it would be only speculation that the Esmeiers or the City were negligent. McBride appeals. Additional facts are discussed below where necessary.

DISCUSSION

¶5 We review summary judgment decisions de novo, applying the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. "In order to be entitled to summary judgment, the moving party … must prove that no genuine issue exists as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. If reasonable but differing inferences can be drawn from undisputed facts, summary judgment is not appropriate. ***Delmore v. American Family Mut. Ins. Co.***, 118 Wis. 2d 510, 516, 348 N.W.2d 151 (1984). "Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law." ***H & R Block E. Enters., Inc. v. Swenson,*** 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (2007). Although negligence is ordinarily an issue for the fact finder and not for summary judgment, *see* ***Lambrecht***, 241 Wis. 2d 804, ¶2, it may under the right facts be resolved on summary judgment. *See* ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶¶23-27, 318 Wis. 2d 622, 768 N.W.2d 568.

¶6 To establish a case for negligence, a plaintiff must establish each of the following four elements: (1) a duty of care on the part of the defendant; (2) a breach of that duty by the defendant; (3) a causal connection between defendant's breach of the duty of care and the plaintiff's injury; and (4) an actual loss or damage as a result of the plaintiff's injury. ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906.

¶7 With regard to the question of whether a defendant owed a duty of care, Wisconsin follows the minority view that "'[e]veryone owes to the world at

large the duty of refraining from those acts that may unreasonably threaten the safety of others.'" ***Behrendt***, 318 Wis. 2d 622, ¶17 (quoted source omitted). A defendant breaches the duty "if [the defendant], without intending to do harm, acts, or fails to do an act[] that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property." ***Hoida, Inc. v. M & I Midstate Bank***, 2006 WI 69, ¶30, 291 Wis. 2d 283, 717 N.W.2d 17. In that situation, the defendant "is not exercising ordinary care under the circumstances, and is therefore negligent." ***Id***.

¶8 Necessary to a determination that a defendant breached a duty of ordinary care is the foreseeability of the risk of harm at issue. *See* ***Behrendt***, 318 Wis. 2d 622, ¶23. When a reasonable person exercising ordinary care would not have foreseen injury as a consequence of his or her act or failure to act, there can be no breach of duty. ***Id***. In that situation, a circuit court can determine as a matter of law that there has been no breach of duty by a defendant.[1] ***Id***.

¶9 McBride argued in the circuit court that the Esmeiers had a duty to maintain the length of their grass at a height of eight inches, as required by local ordinance, and that the Esmeiers breached that duty "by allowing the[ir] grass to become overgrown … [which] obscur[ed] an open and obvious hazard." With regard to the City, McBride argued that the City had a duty to ensure that the Esmeiers complied with the local ordinance on grass length and that the City

[1] In ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶¶19-20, 318 Wis. 2d 622, 768 N.W.2d 568, our supreme court explained the interplay between duty of care, breach of duty, and foreseeability. The court stated that although language in prior Wisconsin cases invoked the foreseeability inquiry in connection with the question of whether the defendant owed a duty of care to the plaintiff, "'[a] lack of foreseeability risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination.'" ***Id.***, ¶19.

breached that duty by failing to do so, which resulted in the Esmeiers' grass becoming overgrown and concealing the hole.

¶10 The respondents argue that summary judgment was appropriate because a reasonable jury could not infer from the summary judgment evidence that the risk of harm in this case—that a person such as McBride would step into a hole on the Esmeiers' property—was foreseeable. Viewing the summary judgment submissions in the light most favorable to McBride, we agree with the respondents that a jury could not reasonably infer from the evidence that it was foreseeable that McBride would step into a hole on the Esmeiers' property and be injured. Put another way, even if a duty to exercise ordinary care included a duty on the Esmeiers' part to cut their grass shorter and a duty on the City's part to enforce its ordinance that the Esmeiers' grass be cut to a shorter length, the respondents did not breach that duty because it cannot be reasonably inferred from the summary judgment submissions that it was foreseeable that someone would fall into an unknown hole.

¶11 During his deposition, McBride testified that the day he stepped into the hole on the Esmeiers' property and was injured, he was mowing the lawn of his rental property for the first time. McBride testified that he had not seen the hole prior to stepping into it. McBride also testified that he did not "have any information … as to what may have caused the hole that [he] fell into" or "any idea how long [the] hole was there."

¶12 Kyle Esmeier testified in his deposition that he had owned the property for six years where the hole was located. Kyle testified that he or his sons normally cut the grass at the property weekly, but that at the time McBride was injured, the grass was being cut closer to every two weeks because his lawn

mower was broken. Kyle also testified, however, that the area where the hole was located was an area that Kyle "would have cut over or walked over on a regular basis," but that he had not seen the hole prior to McBride's accident and that he did not create the hole. Kyle testified:

> Sometime in July I saw a surveyor on our property and I went over to ask him what was going on. That's when [the surveyor] showed me the hole …. I asked him a little bit about it. He mentioned that there had been someone injured and that the hole was there and they were wondering why it was [there]. That's the first time I ever seen the hole.…

Kyle testified that, after the alleged accident, he discussed the hole with his children and that they did not "have any idea or knowledge of the hole."

¶13 Lisa Esmeier testified in her deposition that prior to McBride's accident, she had not noticed the hole, and that she did not know how the hole came to be there. Lisa testified that in 2012, the City had done some work on the curb near where the hole was located, and that the "front apron," the area where the hole was located, was "tore up." Lisa testified that she could not recall any other work being done on the Esmeiers' property while they lived there. Lisa also testified that she never cut the grass.

¶14 Viewing the evidence and the reasonable inferences from that evidence in a light most favorable to McBride, we agree with the respondents that a jury could not reasonably infer that the Esmeiers' or the City's acts or omissions created a foreseeable risk of harm. More specifically, a fact finder could not reasonably infer that the Esmeiers' failure to keep their grass cut at a shorter height created a foreseeable risk that McBride would step into a hole given the absence of any evidence that the Esmeiers, the City, or any other individual was

aware of the existence of any hole prior to McBride stepping into the hole that was there. From that same evidence, or lack thereof, a jury could also not reasonably infer that the City's failure to enforce its ordinance restricting the permissible length of grass created a foreseeable risk that McBride would step into a hole the existence of which was unknown at the time of the accident. Critical is the lack of any evidence as to the age of the hole. Accordingly, we conclude that there is no genuine issue of material fact as to whether the Esmeiers and/or the City breached a duty to McBride. *See* ***id***.

¶15 McBride argues that summary judgment should have been denied because the doctrine of res ipsa loquitur applies to the facts of this case, and, therefore, negligence on the part of the Esmeiers and the City should be inferred. We reject this argument. First, as we explained above, the risk of injury in this case was not foreseeable and, therefore, there cannot have been a breach of duty of ordinary care by the Esmeiers or the City. Second, even if the risk of harm in this case had been foreseeable, McBride has not established that res ipsa loquitur applies.

¶16 Res ipsa loquitur is an evidentiary rule that "applies where there is insufficient proof available to explain an injury-causing event, yet the physical causes of the accident are of the kind which ordinarily do not exist in the absence of negligence." ***McGuire v. Stein's Gift & Garden Center, Inc.***, 178 Wis.2d 379, 389, 504 N.W.2d 385. The rule permits, but does not require, the fact finder to "'fill in the blanks' by drawing an inference of negligence from the happening of the event and the defendant's relationship to it." ***Id.***

¶17 For res ipsa loquitur to apply, the following must be true: (1) the event causing the plaintiff's injuries was of the kind which ordinarily does not

occur in the absence of negligence; and (2) the agency or instrumentality causing the harm was within the exclusive control or right to control of the defendant. ***Id.*** at 390. Here, it is not clear from the summary judgment evidence when or how the hole was formed. The hole was located in the grassy area between the street and the sidewalk, within the public right-of-way, and Lisa testified that the area where the hole was located was not enclosed by a fence. Thus, access to the property where the hole was located was not restricted and anyone at any time could have gone onto the property and made the hole. Because the evidence does not establish that the property where the hole was located was under the exclusive control of the Esmeiers or the City, res ipsa loquitur does not apply.[2]

CONCLUSION

¶18 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).

[2] Because our determination that summary judgment was appropriate because it cannot reasonably be inferred from the summary judgment evidence that the risk of harm was foreseeable is dispositive, we do not address other arguments raised by the parties.