2019 IL App (1st) 180915-U

No. 1-18-0915

Order filed June 6, 2019

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

GEORGIA PETERS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant	)	Cook County
	)	
v.	)	No. 16 L 6778
	)	
THE ROYALTON CONDOMINIUM HOMES, INC., an	)	Honorable
Illinois not-for-profit corporation,	)	John P. Callahan Jr.,
	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court granting defendant's motion for summary judgment where plaintiff failed to establish a *prima facie* case of negligence.

¶ 2 Plaintiff Georgia Peters appeals from the circuit court's determination on summary judgment that plaintiff had failed to make a *prima facie* showing that defendant The Royalton Condominium Homes, Inc. was negligent in its design and maintenance of the parking lot at the

Royalton Condominium Homes (Royalton)[1] located at 6800 North California Avenue in Chicago, Illinois. Plaintiff, a resident of Royalton, was injured in the Royalton parking lot when another resident, Madeline Permutt, reversed her vehicle out of her assigned parking space and struck plaintiff. Plaintiff initially filed suit against both Permutt and defendant, but settled out of court with Permutt, voluntarily dismissed her remaining claims against defendant, and then re-filed this action less than one year later. Both plaintiff and defendant largely relied upon the expert testimony of Daniel Robinson, an architect, regarding the design and maintenance of the parking lot. After reviewing the depositions and other evidence on file, the circuit court granted defendant's motion for summary judgment. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed her initial complaint in this action in 2012 in Cook County case number 12 L 13466. In her complaint, plaintiff named both defendant and Permutt as defendants. Plaintiff contended that on July 30, 2012, she was walking through the Royalton parking lot when Permutt, while in the process of reversing her vehicle out of her parking spot, struck plaintiff with her vehicle causing her injury. Peters raised 18 allegations of negligence against defendant, including that it was negligent in allowing vehicles to drive in reverse while having obstructed views of areas where pedestrians were walking in the parking lot, and that it negligently failed to mark the surface of the parking lot to control the flow of traffic. Defendant filed a motion for summary judgment and the court granted the motion with respect to two of the 18 allegations:

[1] For clarity, we will refer to The Royalton Condominium Homes, Inc., the landowner, as defendant and The Royalton Condominium Homes, the location of the incident, as Royalton.

"[Defendant] [c]arelessly and negligently failed to provide a sidewalk or other safe means of travel to protect pedestrians exiting the west side of the Property and walking to Pratt Blvd. or California Ave. from being struck by vehicles traveling in reverse in the West Parking Lot."

[Defendant] [c]arelessly and negligently failed to guard against the prospect of a vehicle backing out of a parking space in the West Parking Lot and striking a pedestrian exiting from the western side of the Property."

Thereafter, plaintiff elected to voluntarily dismiss the original action on July 31, 2015.

¶ 5 Less than one year later on July 8, 2016, plaintiff refiled the instant action against defendant. Plaintiff's newly filed complaint largely mirrored her complaint from the previous action, including the two allegations of negligence that had previously been dismissed on summary judgment. Plaintiff subsequently filed an amended complaint[2] raising 16 allegations of negligence. Plaintiff contended that defendant (a) had carelessly and negligently maintained the parking lot in a defective condition; (b) negligently failed to erect barricades to protect pedestrians in the parking lot; (c) negligently allowed for the construction of a brick wall in the parking lot that obstructed the views of both pedestrians and drivers; (d) negligently failed to provide a sidewalk or other safe means of travel for pedestrians in the parking lot; (e) negligently failed to provide signs, crosswalks, or other controlling devices that governed automobile and/or pedestrian traffic; (f) negligently failed to place mirrors in the parking lot so that pedestrians and drivers could see around the brick wall; (g) negligently failed to mark the surface of the parking lot with designated roadways to control the flow of traffic; (h) negligently failed to mark the

[2] All references made to the allegations in plaintiff's complaint will refer to the allegations in her first amended complaint unless otherwise specified.

surface of the parking lot to designate where pedestrians should walk and where the parking lot began; (i) negligently failed to provide warning or caution signs to warn pedestrians and drivers of the "unique dangers" present in the parking lot; (j) negligently failed to have any signs or devices present in the parking lot to govern the speed and direction of travel of vehicles in areas used by pedestrians; (k) negligently failed to post any signs or markers instructing drivers of vehicles parked in the parking lot to exit only northbound; (l) negligently failed to follow custom and practice in the industry regarding the design, care, operation, and maintenance of the parking lot; (m) negligently failed to adhere to the rules and regulations of the Chicago Building Code (Building Code) regarding the design, care, operation, and maintenance of the parking lot; (n) negligently failed to modify the design of the parking lot to create a reasonable alternative that would have better protected pedestrians from being struck by vehicles in the parking lot; (o) negligently created a condition in which a driver was unable to safely back up a vehicle in the parking lot in compliance with 625 ILCS 5/11-1402; (p) and was otherwise negligent in the maintenance, repair, administration, and operation of the parking lot.

¶ 6 In response, defendant denied the allegations of negligence in the amended complaint and raised two affirmative defenses. In its first affirmative defense, defendant contended that plaintiff's own negligence in failing to keep a proper lookout for vehicles in the parking lot was the cause of her injuries. In its second affirmative defense, defendant contended that the circuit court had previously granted summary judgment in defendant's favor with regard to allegations (c) and (p) of plaintiff's complaint. Defendant contended that plaintiff did not appeal this judgment after voluntarily dismissing the initial action and therefore the issue of potential liability on those bases was barred by *res judicata*.

¶ 7 A. Depositions

¶ 8 In her deposition, Permutt testified that on July 30, 2012, she was in her vehicle in the Royalton parking lot. The parking spaces in the parking lot are angled so that drivers must be driving north through the parking lot in order to appropriately enter the parking spaces. Permutt knew that drivers should not drive south in the parking lot, but had observed other drivers doing so. When Permutt entered her vehicle, she was intending to reverse her vehicle south into the parking lot, over the speed bump in the drive aisle, then back around the corner to the east in order to turn her vehicle around so that she could drive forward to the south and exit the parking lot. Before she backed out of her parking space, she checked her rear-view mirror and her side-view mirrors and she looked to her left and right and out of each of her windows. Nothing obstructed her vision as she was backing up and she was driving one or two miles per hour as she was reversing her vehicle.

¶ 9 As her vehicle approached the speed bump in the drive aisle, she felt the rear bumper of her vehicle come into contact with something. She immediately stopped her vehicle and got out to see what had contacted her rear bumper. She testified that her vehicle was only a few feet outside of her parking space and that she backed up in the same manner whether she was intending to drive her vehicle north or south in the drive aisle. She testified that her vehicle was still facing a "tad" northwest because she had not had time to fully straighten out from the angled parking space. She testified that the speed bump was south of her vehicle and she had not yet turned her vehicle to the east as she intended. However, she acknowledged that she had backed up further than she normally would have if she were intending to drive north in the drive aisle. When she inspected the rear of her vehicle, she saw a walker next to the bumper of her vehicle. She then saw plaintiff sitting on the ground 20-25 feet to the south of her vehicle. Permutt called 911 and the Chicago Fire Department arrived to tend to plaintiff.

¶ 10 Plaintiff testified in her deposition that she was walking toward her vehicle in the Royalton parking lot when Permutt hit her with her vehicle. Plaintiff testified that Permutt's vehicle was behind her when she was struck and she did not see the vehicle before it hit her. Plaintiff did not know where on her body Permutt's vehicle struck her and she did not know which part of Permutt's vehicle hit her.

¶ 11 Both parties relied on the expert testimony of Robinson. In his deposition, Robinson testified that he had designed "hundreds and hundreds" of parking lots. In preparation for his deposition testimony, Robinson visited the parking lot twice, drove through it, took measurements, took pictures, and measured the width of drive aisle and the depth of the parking stalls. Robinson also reviewed Permutt's and plaintiff's depositions, reviewed reports from the Chicago Fire Department and the hospital where plaintiff was treated, and examined an aerial photograph of the parking lot. Robinson also prepared a report of his findings. Robinson testified that because the diagonal parking spaces faced north, the drive aisle should be used only in that direction because it was not wide enough for two-way traffic. In the proper use of the parking lot, therefore, vehicles would enter from the south from Pratt Boulevard and drive north through the drive aisle. Vehicles could then exit the parking lot north onto Morse Avenue. As such, drivers should always travel south to north through the drive aisle.

¶ 12 Robinson testified, however, that drivers were inappropriately using the drive aisle for two-way traffic. Robinson noted that the parking lot's defective design led drivers to use the drive aisle in this inappropriate manner. Robinson noted that there was a stop sign leading out onto Pratt Boulevard, which could lead drivers to believe that they could both enter from and exit to Pratt Boulevard. Based on design of the parking lot, however, vehicles should only enter from Pratt Boulevard, not exit onto it. Robinson did not know whether defendant or the City installed

the stop sign. Robinson testified that based on his measurements, the drive aisle was not wide enough for two-way traffic. Robinson also noted that the parking stalls measured only 14-feet deep, but should be 19.7-feet deep. He testified that this five foot discrepancy gave the appearance that the drive aisle was wide enough for two-way traffic, but when factoring in these additional five feet, the drive aisle was not wide enough for two-way traffic.

¶ 13 Robison testified that there were no vision obstructions that would have prevented Permutt from backing out her vehicle safely and there was nothing about the design of the parking lot that inhibited Permutt's ability to see plaintiff. He noted that there were no other vehicles or pedestrians in the parking lot at the time of the incident. He also testified that the drive aisle in a parking lot was a reasonable walkway and it was not necessary for the parking lot to have sidewalks or some type of protected walkway for pedestrians. Robison testified that the only code that applied to the design of the parking lot was the Building Code, but testified that there are "other parking lot standards that would apply." Robinson cited the International Building Code and the International Property Maintenance Code, but acknowledged that those codes have not been adopted by the City of Chicago.

¶ 14 Robinson opined that the design of the parking lot influenced Permutt's vehicle on the day of the incident. He noted the substandard depth of the parking stalls which made the drive aisle appear wider and would lead people who are using the parking lot to believe it was a two-way drive aisle, "which means you could use it in both directions, whether you're backing down it or turning around." Robison also noted that there was no additional signage or pavement markings with arrows to direct drivers that north is the only appropriate direction to drive, which could lead a driver to believe that they could drive either north or south. Robinson further noted that the drive aisle widens on the east side, but there is no striping or other indication as to the

purpose of the widened area—whether the area is for parking or drop off. Robinson opined that this widened area could also lead drivers to believe that the drive aisle is appropriate for two-way traffic. Robinson testified that all of these factors meant that other drivers and pedestrians would not anticipate someone driving from the north to the south and they would not anticipate someone backing out of a parking space and then continuing to back down the drive aisle to the south when they should be driving north.

¶ 15 Robinson noted that Permutt testified that she was driving at a low rate of speed and did not complete her intended back out and turn around maneuver. He opined, however, that she backed up too far for a normal driving maneuver, *i.e.*, to put her car in drive and proceed north in the drive aisle. He noted that there was a discrepancy in Permutt's testimony between how far she testified that she backed up and what likely happened based on where plaintiff was struck in the parking lot. Robinson testified that there was a discrepancy of about 25 feet between where Permutt testified her vehicle was when she stopped it and where the incident likely occurred in the parking lot. He testified, however, that whether Permutt's vehicle actually travelled south of the speed bump as he believed did not impact his opinion that the parking lot was defective in its design, construction, and maintenance. He opined that Permutt reversed her vehicle an inappropriate distance and in an inappropriate manner because she was confused about the manner in which the parking lot could be used. He testified that if Permutt had backed out of her parking space to the south solely so that she could drive north in accordance with the design of the parking lot, then the design of the parking lot would not have been "causative."

¶ 16 Robinson further testified that the parking lot would have been regularly inspected by the City and there was no indication that the City put defendant on notice of any defect in the parking lot. Under the Building Code, the parking lot would have to be permitted and approved

for construction just like a building. Robinson opined that the parking lot likely would have passed the approval process because there is sufficient room for the parking stalls to be appropriately striped to the correct depth and enough room for a one-way drive aisle which would have met the City of Chicago standard. Robinson testified that defendant had an obligation to have the property inspected on a periodic basis to make sure that it was in a safe condition and in compliance with the applicable codes. Robinson acknowledged that if the construction of the parking lot complied with the architect's drawing and specifications it should be code complaint. He testified that it would be reasonable for a condominium association to rely on the persons and corporations it hires to design an area like a parking lot to be code compliant.

¶ 17 In addition to his deposition testimony, Robinson prepared a written report which defendant attached to its motion for summary judgment. The report details Robinson's inspections of the parking lot and a detailed description of the incident. His findings in the report largely mirror his deposition testimony regarding the design, construction, and maintenance of the parking lot. In his report, Robinson found that the parking lot failed to meet City of Chicago design standards because the parking stalls were striped too short, which made the drive aisle appear wider than it actually was and the widened area of the parking lot near the center of the building was not clearly delineated by markings or signs. Robinson also found that the design of the parking lot was defective because the Pratt Boulevard entrance had stop signs on both sides giving drivers the impression that it was an entrance as well as an exit. In the "Findings" section of his report, Robinson concluded that defendant's failure to make "reasonable changes" to the parking lot and provide signs and markings for guidance "was a violation of the standard of care for safe premises and was a cause of [plaintiff] being struck and injured." This conclusion was

based on Robinson's determination that the drive aisle was not compliant with "applicable code and standards for parking lot design, configuration and dimension."

¶ 18 In its motion for summary judgment, defendant contended that plaintiff had failed to establish a *prima facie* case of premises liability because Robinson did not express an opinion that any condition of the parking lot caused the accident. Robinson testified that there was no visual obstruction that prevented drivers or pedestrians from seeing each other, that the driving lane itself was an appropriate walkway, and that the parking lot was not in violation of any provisions of the Building Code. Defendant further contended that it could not be found liable on the basis that it failed to control Permutt's operation of her vehicle while driving in reverse because the court had already granted it summary judgment on that issue. Defendant asserted that even in the event plaintiff's claim was not barred by *res judicata*, Illinois law does not impose a duty on landowners to protect against ordinary and patent conditions such as vehicles backing up into the drive aisle of a parking lot. The circuit court granted defendant's motion for summary judgment and this appeal follows.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiff contends that the court erred in granting defendant's motion for summary judgment where Robinson's undisputed testimony demonstrated that the design of the Royalton parking lot constituted a dangerous condition. Plaintiff asserts that Robinson's testimony clearly shows that defendant owed a duty to plaintiff to provide a safe parking lot, that defendant breached that duty by failing to properly warn of or correct the parking lot's latent and undisclosed defects, and that these defects proximately caused plaintiff's injuries. Plaintiff contends that, at a minimum, Robinson's deposition testimony created a genuine issue of

material fact as to whether the design of the parking lot constituted a dangerous condition that proximately caused plaintiff's injuries such that summary judgment was improper.

¶ 21 A. Standard of Review

¶ 22 Summary judgment is appropriate where the pleadings, depositions, affidavits, and admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 25. In determining whether a genuine issue of material fact exists, the court construes the pleadings, depositions, and affidavits against the moving party and liberally in favor of the opposing party. *Carney*, 2016 IL 118984, ¶ 25 (citing *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49). A genuine issue of material fact exists "where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Mashal*, 2012 IL 112341, ¶ 49.

¶ 23 In order to survive a motion for summary judgment, a plaintiff need not prove her case, but she must present a factual basis that would arguably entitle her to a judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12 (citing *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002)). "In a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach." *Bruns*, 2014 IL 116998, ¶ 12. "In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991); see also, *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 483 (2002) ("Whether a duty of care exists is a question of law which may be determined on a motion for summary judgment.")). Although the circuit court in this case did not issue a written order

detailing its basis for granting defendant's motion for summary judgment, we note that we may affirm the court's grant on summary judgment on any basis appearing in the record whether or not the circuit court relied on that basis or whether its reasoning was correct. *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 5. We review the circuit court's ruling on a motion for summary judgment *de novo*. *Bruns*, 2014 IL 116998, ¶ 12.

¶ 24 B. *Res Judicata*

¶ 25 At the outset, we must address the somewhat unusual procedural history of this case. As discussed, plaintiff originally filed this action in 2012 naming both defendant and Permutt as defendants. The negligence claim plaintiff raised in that action was substantially similar to the claim raised here and was supported by a list of specific allegations. The court granted summary judgment in defendant's favor with regard to two of the allegations in plaintiff's negligence claim. Plaintiff then voluntarily dismissed the case and re-filed the case less than one year later raising a claim for negligence supported by a list of specific allegations, including the two allegations that had been the subject of the circuit court's summary judgment finding. Defendant contends, however, that the circuit court's grant of summary judgment in the original action became a final judgment when plaintiff voluntarily dismissed the original action. Plaintiff did not file a motion for reconsideration of that order, nor did she appeal the court's judgment. Defendant contends that plaintiff therefore may not now raise these allegations in the current action because they are barred by *res judicata*.

¶ 26 By voluntarily dismissing her complaint, plaintiff invoked section 13-217 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 1994)).[3] *Watkins v. Ingalls Memorial*

[3] Public Act 89-7, which amended section 13-217 of the Code effective March 1995 (Pub. Act 89-7 (eff. Mar. 9, 1995)), was held to be unconstitutional in its entirety by the Illinois Supreme Court in

Hospital, 2018 IL App (1st) 163275, ¶ 32. Section 13-217 provides, in pertinent part, that if the plaintiff voluntarily dismisses a cause of action, "the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater," after the "action is voluntarily dismissed by the plaintiff." 735 ILCS 5/13-217 (West 1994). However, a plaintiff's claims in the refiled action may be limited by what occurred in the prior action; for instance, if the circuit court granted partial summary judgment as to some of those claims, as occurred in this case. In such a situation, the grant of partial summary judgment represents an interlocutory order when it is entered but that order becomes final and immediately appealable once plaintiff's motion for a voluntary dismissal is granted. *Estate of Cooper ex rel. Anderson v. Humana Health Plan, Inc.*, 338 Ill. App. 3d 845, 850 (2003). The trial court's order in the first case thus represents an adjudication on the merits, which constitutes *res judicata* barring plaintiff from subsequently refiling an action against the same parties involving the same causes of action. *Id.*

¶ 27 However, in order for *res judicata* to apply, three factors must be present: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) commonality of parties or their privies; and (3) commonality of cause of action. *Curtis v. Lofy*, 394 Ill. App. 3d 170, 177-78 (2009). Thus, *res judicata* will serve to bar a party's claims in a refiled action only where the circuit court's grant of summary judgment in the initial proceeding disposes of a "distinct portion" of the action and not merely some of the allegations making up a claim. See *Curtis*, 394 Ill. App. 3d at 187; *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 894-95 (2009). Where the grant of partial summary judgment merely dismisses some of the allegations supporting a

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Best v. Taylor Machine Works, 179 Ill. 2d 367 (1997). Accordingly, the effective version of section 13-217 of the Code is the version that was in effect prior to the March 1995 amendment. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (2008).

claim, the partial summary judgment order does not dispose of the rights of the parties on the entire case or on some definite and separate part thereof and is therefore not a final judgment on the merits. See *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997); *Piagentini*, 387 Ill. App. 3d at 894. Accordingly, the grant of partial summary judgment as to some of the allegations supporting a claim, but not the claim itself, cannot be a final judgment because it does not "terminate[] the litigation between the parties on the merits or dispose[] of the rights of the parties, either on the entire controversy or a separate branch thereof." *Piagentini*, 387 Ill. App. 3d at 893-94 (citing *Hull v. City of Chicago*, 165 Ill. App. 3d 732, 733 (1987)). Therefore, an order granting partial summary judgment on certain allegations under the theory of negligence is not a final judgment because other allegations still remain for recovery. *Piagentini*, 387 Ill. App. 3d at 894; *Curtis*, 394 Ill. App. 3d at 187 ("[H]ere, [plaintiff] alleged [defendant] acted negligently in one of many ways at the same time and during the same incident. The order granting partial summary judgment did not terminate any litigation of a *distinct* portion of [plaintiff's] claim. The order only dismissed several allegations of negligence, not the entire negligence cause of action.") (Emphasis in original.) Accordingly, we find no *res judicata* effect stemming from the circuit court's grant of partial summary judgment in the initial action because the order did not dispose of a distinct portion of the litigation and therefore was not a final judgment.

¶ 28 C. Robinson's Report

¶ 29 In her brief before this court, plaintiff contends that she established a *prima facie* case of negligence against defendant based on Robinson's testimony and report. Defendant contends, however, that Robinson's written report was not competent evidence because it was neither an affidavit nor sworn testimony.

¶ 30 As discussed, Robinson prepared a report prior to his deposition detailing his opinions with regard to the parking lot's design and maintenance. Defendant attached the report and Robinson's deposition to its motion for summary judgment. On appeal, and in her response to defendant's motion for summary judgment, plaintiff relied on the information in this report in contending that she had established a *prima facie* case of negligence. Defendant now contends on appeal that the report is not competent evidence because it is not an affidavit, nor is it sworn testimony. Plaintiff contends that at Robinson's deposition, defendant's counsel questioned Robinson extensively regarding the report and because defendant attached the report to its motion for summary judgment, it may not now attack the competency of that evidence.

¶ 31 We agree with plaintiff that under the rule of invited error, defendant may not proceed in one manner in the circuit court and then contend on appeal that the requested action was in error. *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 33 (citing *People v. Harvey*, 211 Ill. 2d 368, 385 (2004)). Defendant attached the report to its motion for summary judgment representing it as competent evidence for that stage of the proceedings and questioned Robinson about the report's contents at his deposition. Defendant's counsel even asked Robinson near the end of his deposition whether they had "discussed all of the opinions that [he had] put into [his] report." Robinson confirmed that they had. Accordingly, we find that Robinson's report is competent evidence for determining whether plaintiff established a *prima facie* case of negligence.

¶ 32 D. Property Owner's Duty

¶ 33 Plaintiff's claim of negligence is premised on the concept that defendant, as the owner of the parking lot, owed a duty to plaintiff to protect her from being injured by vehicles traveling in the parking lot and to "exercise reasonable care to control the conduct of" drivers using the

parking lot. Generally, "[p]roperty owners have a duty to exercise ordinary care in maintaining their property in a reasonably safe condition." *Nguyen v. Lam*, 2017 IL App (1st) 161272, ¶ 20. As such, owners have a duty to exercise reasonable care to discover defects or dangerous conditions existing on their property and either correct them or give sufficient warning to enable those lawfully on the land to avoid danger. *Id.* (Citing *Chapman v. Foggy*, 59 Ill. App. 3d 552, 555 (1978)). "In considering whether a duty exists in a particular case, a court must weigh the foreseeability that defendant's conduct will result in injury to another and the likelihood of an injury occurring, against the burden to defendant of imposing a duty, and the consequences of imposing this burden." *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991).

¶ 34 Plaintiff contends that the incident here was reasonably foreseeable because if defendant had not constructed and maintained its parking lot in a negligent manner, Permutt would not have reversed her vehicle into plaintiff. Defendant contends, however, that the incident was not reasonably foreseeable because the design of the parking lot invited drivers to drive north and even if the incident was reasonably foreseeable, it would be an "intolerable burden on society" to ascribe landowners a general duty to anticipate and guard against the negligence of third parties. We agree with defendant that the circuit court properly granted defendant's motion for summary judgment where plaintiff failed to make *a prima facie* showing that defendant owed plaintiff a duty because the incident was not reasonably foreseeable.

¶ 35 Here, the condition of the parking lot was not in itself dangerous, it was only by Permutt's operation of her vehicle in a negligent manner that the condition of the parking lot posed a danger to plaintiff. *Ziemba*, 142 Ill. 2d at 50. Where the condition of the land alone is not dangerous, "the accident is a reasonably foreseeable result of the condition on defendant's land, only if it was reasonably foreseeable" that the third party would use the land in a negligent

manner. *Id.* We find that it was not reasonably foreseeable that Permutt would use the parking lot in a negligent manner resulting in plaintiff's injury. As noted, the design of the parking lot invited drivers to drive north through the parking lot and defendant had a right to expect that drivers would use the parking lot as designed. See *Id.* at 52 (citing *Zimmermann v. Netemeyer*, 122 Ill. App. 3d 1042, 1054 (1984)). We find the supreme court's decision in *Ziemba* instructive.

¶ 36 In *Ziemba*, a cyclist was riding on a roadway adjacent to the landowner's property when he was injured by a dump truck driver who negligently exited the driveway of the landowner. *Ziemba*, 142 Ill. 2d at 46. The plaintiff cyclist contended that the driveway was obscured by foliage so that it was not visible from the roadway. *Id.* at 45. The cyclist alleged that the landowner failed to use " 'reasonable care in the conduct of activities on his property, so as not to cause damage or injury to persons on the adjacent roadway.' " *Id.* at 46. The circuit court granted the landowner's section 2-615 motion to dismiss the complaint. *Id.*

¶ 37 In finding that the accident was not reasonably foreseeable, the supreme court found that the property owner cannot control and has no right to control the drivers of vehicles and has the right to expect that drivers will not act in a negligent manner on their property. *Ziemba*, 142 Ill. 2d at 52 (quoting *Zimmerman*, 122 Ill. App. 3d at 1054). The *Ziemba* court stressed that there is no duty to 'guard against the negligence of others' " because such a duty " 'would place an intolerable burden on society.' " *Ziemba*, 142 Ill. 2d at 52-53 (quoting *Dunn v. Baltimore & Ohio R.R. Co.*, 127 Ill. 2d 350, 366 (1989)). The court concluded that:

> "The underlying rationale for holding a landowner liable for injuries occurring as a result of conditions on his land is that the landowner is in the best position to prevent the injury. However, in this case, we find that the truck driver was in the best position to

> prevent the injury. Thus the usual justification for imposing landowner liability is not present in this case."

Ziemba, 142 Ill. 2d at 53. We find the same rationale applies here. The condition of the parking lot alone was not a dangerous condition to cause of risk of injury to plaintiff. It was only when Permutt used the parking lot in a negligent manner that the risk of injury to plaintiff arose. Defendant had the right to expect that Permutt would use the parking lot in accordance with its design, and, in fact, Permutt testified that she knew by driving south in the parking lot, she was using the parking lot contrary to its design. As with the truck driver in *Ziemba*, Permutt was in the best position to prevent the injury and placing a burden on defendant to guard against the negligence of others " 'would place an intolerable burden on society.' " *Ziemba*, 142 Ill. 2d at 52-53. Robinson testified that had Permutt used the parking lot as intended, *i.e.*, reversing her vehicle to the south in order to straighten her vehicle enough to drive north, the defective maintenance and design of the parking lot would not have been "causative." Accordingly, we find that because the condition of the parking lot did not pose any danger to plaintiff absent the independent, negligent act of Permutt, the accident in this case was not a reasonably foreseeable result of the condition of defendant's land. *Ziemba*, 142 Ill. 2d at 52.

¶ 38 We further find plaintiff's reliance on *Marshall*, 222 Ill. 2d 422 misplaced. In that case, the supreme court found that the defendant restaurant owed a duty of care to protect customers from the unreasonable risk of harm posed by the negligent acts of third parties where there was a "special relationship" between defendant and the decedent. *Id.* at 443-44. Such a special relationship can give rise to an affirmative duty to protect another against an unreasonable risk of physical harm even if that harm is caused by a third party's innocent, negligent, intentional, or criminal misconduct. *Hougan v. Ulta Salon, Cosmetics and Fragrance, Inc.*, 2013 IL App (2d)

130270, ¶ 22 (citing *Marshall*, 222 Ill. 2d at 438-40). These special relationships include common carrier and passenger, innkeeper and guest, custodian and ward, and business invitor and invitee. *Marshall*, 222 Ill. 2d at 438; *Garland v. Sybaris Club International*, 2014 IL App (1st) 112615, 75. This court has recognized, however, that the landlord-tenant relationship is not a "special relationship" imposing an affirmative duty on the landlord to protect tenants against a third party's harmful acts. See *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 995 (2005) (citing *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215-16 (1988)). Accordingly, we find the reasoning in *Marshall* inapplicable to the case before us and that defendant did not have an affirmative duty to "protect" plaintiff from an unreasonable risk of harm caused by Permutt's actions.

¶ 39 We also find that the injury in this case was not reasonably foreseeable because defendant did not have notice, either actual or constructive, of the defective condition of the parking lot. " 'Liability under the rules of ordinary negligence requires some knowledge on the part of the defendant, actual or constructive, of the possibility of the danger complained of.' " *Schmid v. Fairmont Hotel Company-Chicago*, 345 Ill. App. 3d 475, 486 (2003) (quoting *Prater v. Veach*, 35 Ill. App. 2d 61, 65 (1962)). That is, a property owner may be held liable for the property's dangerous condition only if they knew or should have known of the condition. *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 109. Where there is no evidence of the property owner's actual or constructive knowledge, the property owner will not be liable. *Id.* (Citing *Joyce v. Mastri*, 371 Ill. App. 3d 64, 80 (2007); *Cochran v. George Sollitt, Construction Co.*, 358 Ill. App. 3d 865, 873 (2005)).

¶ 40 Here, plaintiff fails to suggest that defendant had any knowledge, whether actual or constructive, that the condition of the parking lot was dangerous. In his deposition testimony,

Robinson testified that he was not aware of any other incidents like the one that occurred in this case. He also testified that the parking lot would have been regularly inspected by the City and there was no indication the City put defendant on notice of any defects or violations in the parking lot. He acknowledged that it was reasonable for defendant to rely on the opinions of professionals in the construction and maintenance of the parking lot.

¶ 41 Robinson also acknowledged that the parking lot had northern angled parking stalls, which was an invitation to drivers to drive through the parking lot south-to-north. Permutt acknowledged that she knew she was supposed to drive north through the parking lot. There is no indication that defendant had any notice that drivers were driving south through the parking lot. Robinson noted that there was a stop sign facing the parking lot out onto Pratt Boulevard, but he did not know whether the City or defendant placed the stop sign there.

¶ 42 Thus, plaintiff failed to present evidence showing that defendant had actual or constructive knowledge of the alleged defects in the parking lot. Generally, in order to prove constructive knowledge of a dangerous condition, the plaintiff must establish that the condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care. *Racky v. Belfor USA Group, Inc.*, 2017 IL App (1st) 153446, ¶ 100. Although whether a defendant is deemed to have constructive notice of a dangerous condition on its property is generally a question of fact, a summary judgment in defendant's favor is appropriate if the evidence, viewed in a light most favorable to the plaintiff, so overwhelmingly favors the defendant that no contrary finding based on that evidence could ever stand. *Smolek v. K.W. Landscaping,* 266 Ill. App. 3d 226, 229 (1994).

¶ 43 Here, we find that the evidence overwhelming favors the defendant where Robinson testified that the City would regularly inspect the parking lot for code violations and there was no

indication that the City informed defendant on any violations and there was no suggestion of other incidents like the one involved in this case. Although Robinson testified that the parking stalls were striped too short, plaintiff did not present any evidence, or even raise a contention, that this condition existed for such a sufficient period of time that defendant should have discovered the condition through the exercise of reasonable care. Because defendant had no knowledge, either actual or constructive, of the alleged defective condition of the parking lot, it was thus not reasonably foreseeable that defendant's conduct would result in injury to plaintiff. *Lam*, 2017 IL App (1st) 161272, ¶ 20.

¶ 44 Because we find that plaintiff has failed to establish a genuine issue of material fact as to whether defendant owed her a duty, we find that the circuit court did not err in granting defendant's motion for summary judgment. See *Racky*, 2017 IL App (1st) 153446, ¶ 90.

¶ 45 E. Breach of Duty

¶ 46 Even assuming, *arguendo*, the existence of a duty, we find that plaintiff has failed to make a *prima facie* showing that defendant breached that duty. We note that whether defendant breached its duty is generally a factual matter for the trier of fact to decide. *Marshall*, 222 Ill. 2d at 430. Nonetheless, we find that the circuit court properly granted summary judgment because the evidence in this case did not create a genuine issue of material fact regarding the defendant's breach of its duty of care. Plaintiff's myriad breach of duty allegations can generally be broken down into four categories.

¶ 47 1. *Obstructed View Allegations*

¶ 48 In allegations (c) and (f) of plaintiff's complaint, plaintiff contended that defendant was negligent in constructing a brick wall in the parking lot that obstructed the view of both drivers and pedestrians using the parking lot. In his deposition testimony, however, Robinson testified

that there were no vision obstructions in the parking lot that would have prevented Permutt from backing out safely and there was nothing about the design of the parking lot that inhibited Permutt's ability to see plaintiff in the lot. Consistent with this, Permutt testified that there was nothing in the parking lot that obstructed her view of plaintiff, and plaintiff did not testify that her view of Permutt's vehicle was obstructed by the design of the parking lot. Robinson acknowledged that the only reason that plaintiff did not see Permutt's vehicle before it struck her was because plaintiff was facing in the opposite direction. Accordingly, we find that plaintiff failed to establish a *prima facie* case of breach of duty with regard to allegations (c) and (f) of her complaint.

¶ 49 2. *Pedestrian Walkway Allegations*

¶ 50 In allegations (b), (d), (e), (h), and (n) of her complaint, plaintiff contended that defendant was negligent in failing to provide a pedestrian walkway or other safe means of travel for pedestrians in the parking lot. Plaintiff contended that defendant negligently failed to erect barricades to protect pedestrians from being struck by vehicles in the parking lot and failed to mark the surface of the parking lot to designate where pedestrians could walk outside of the parking lot and where the parking lot began. Robison testified, however, that the drive aisle was a "reasonable walkway" for pedestrians and that it was not necessary for the parking lot to have sidewalks or some type of protected walkway for pedestrians. He also testified that the applicable Building Code did not require a protected walkway. Accordingly, we find that plaintiff failed to establish a *prima facie* case of breach of duty with regard to allegations (b), (d), (e), (h), and (n) of her complaint.

¶ 51 3. *Signage and Roadway Marking Allegations*

¶ 52 In allegations (g), (i), (j), and (k), plaintiff contended that defendant failed to provide adequate signage or roadway markings to control the flow of traffic and caution drivers and pedestrians regarding the "unique dangers present" in the parking lot. Plaintiff contended that defendant was negligent in failing to post any signs or markings that directed vehicles to exit the parking lot only to the north and failed to provide any signs or markings to govern the speed and direction of travel of vehicles in the parking lot. Robinson testified, however, that parking lots that are designed with angled parking are designed for one-way travel in the direction the parking spaces face. In this case, the parking stalls faced north, which was an "invitation" for drivers in the parking lot to drive north. Robinson acknowledged, however, that it is possible for drivers to ignore this design and drive the wrong direction down the drive aisle.

¶ 53 In her deposition, Permutt testified that she knew that drivers should not drive south in the parking lot, but had observed other drivers doing so. Permutt was not driving south at the time of the incident, but was reversing south into the drive aisle, which Robinson testified was an acceptable maneuver provided the driver then drove the vehicle north through the parking lot to the exit. Permutt testified, however, that she was intending to reverse her vehicle further to the south so that she could turn her vehicle around and drive south through the drive aisle and exit onto Pratt Boulevard. Permutt testified that in order to execute this maneuver, she had to reverse her vehicle further south into the drive aisle than she normally would have if she were going to drive north. She was unable to reverse and turn her vehicle around as she planned, however, before her vehicle struck plaintiff.

¶ 54 Plaintiff's contentions in these allegations essentially amount to a contention that because of the design defects identified by Robinson, Permutt was invited or otherwise confused as to the proper use of the parking lot and believed that she could drive the wrong way down the drive

aisle due to either the lack of signage or improper marking. However, this is not what the evidence shows. Permutt did not testify that some design defect in the parking lot led to her to believe that driving south in the parking lot was acceptable. Robinson testified that the parking stalls were striped shorter than they should have been, which gave the drive aisle the appearance that it was wide enough for two-way traffic, but Permutt did not testify that she thought she could drive south in the parking lot because of this apparent design defect. Instead, she acknowledged that she knew driving south in the parking lot was inappropriate, but she intended to drive south in the parking lot on the date of incident anyway. Robinson acknowledged that drivers may ignore the design of the parking lot, as Permutt did, and drive the wrong direction in the parking lot.

¶ 55 In his report, Robinson noted that both a nationally recognized book on parking lot design and parking lot safety and The Federal Manual on Uniform Traffic Control Devices provided that a parking lot owner should provide signage directing the direction of travel in a one-way drive aisle. In his deposition, however, Robinson acknowledged that neither of these standards had been adopted by the City of Chicago and that only the Building Code applied Royalton's parking lot. Robinson did not identify any provision of the Building Code that required defendant to provide additional signage or roadway markings. Accordingly, we find that plaintiff failed to establish a *prima facie* case of breach of duty with regard to allegations (g), (i), (j), and (k) of her complaint.

¶ 56 4. *General Allegations*

¶ 57 Finally, in allegations (a), (l), (m), (o), and (p), plaintiff contended that defendant was otherwise negligent in its maintenance, design, care, repair, and operation of the parking lot. Plaintiff contended that defendant negligently failed to follow custom and practice with regard to

the design of the parking lot and failed to comply with the Building Code. Allegation (o) contends that defendant failed to comply with section 11-1402 of the Illinois Vehicle Code (625 ILCS 5/11-1402 (West 2014). Section 11-1402 of the Illinois Vehicle Code concerns a driver's limitation of backing their vehicle without interfering with traffic or on the shoulder or roadway of a controlled-access highway. As such, that section is not relevant here.

¶ 58 Although Robinson opined that parking lot failed to comply with certain standards and codes, he acknowledged that the City of Chicago had not adopted these standards and the Building Code is the only standard that applied to the design of the parking lot. Robinson testified that the parking lot would be regularly inspected by the City and there was no indication that the City put defendant on notice of any violations or defects in the parking lot. Robinson also testified that the parking lot would have had to pass an approval process when it was first constructed and that the parking lot likely did pass this approval process. Robinson acknowledged that it was reasonable for defendant to rely on the expertise of professionals in the design, maintenance, and operation of its parking lot. Accordingly, we find that plaintiff failed to establish a *prima facie* case with regard to allegations (a), (l), (m), (o), and (p) of her complaint. We therefore find that plaintiff failed to establish a genuine question of material fact as to whether defendant breached its duty to plaintiff and that the circuit court thus did not err in granting defendant's motion for summary judgment.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 61 Affirmed.