IN THE COURT OF APPEALS OF IOWA

No. 2-773 / 12-0154
Filed October 31, 2012

DAVID D. ZAEHRINGER,
Plaintiff-Appellee,

vs.

COUNTY OF MUSCATINE, IOWA,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, John D. Telleen, Judge.

David Zaehringer appeals from the district court's grant of Muscatine County's motion for summary judgment. **AFFIRMED.**

Michael Siering of Metcalf, Conlon & Siering, P.L.C., Muscatine, for appellant.

Michael C. Walker and Amanda R. Newman of Hopkins & Huebner, P.C., Davenport, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, J.

David Zaehringer appeals from the district court's grant of Muscatine County's motion for summary judgment. He contends the court erred in three respects: first, in finding there were no genuine issues of material fact; second, in determining the defect in the land was latent; and third, in finding Muscatine County was entitled to judgment as a matter of law. We affirm, finding Zaehringer did not present to the district court material facts in dispute, did not present evidence the defect was known or should have been known to the County in order to establish a duty to maintain, and otherwise did not sufficiently address for our review the trial court's grounds for its ruling.

I. Facts and Proceedings[1]

Zaehringer was injured in July of 2010 while mowing the grassy area belonging to the County of Muscatine ("County") beside a gravel road near his property. The County maintained the road. Zaehringer voluntarily mowed the grassy strip about three times a month. Below the grassy area was a deep, twenty-foot ditch, which also belongs to the County. Beyond this ditch is Zaehringer's property.

While mowing, the right wheels of Zaehringer's sixty inch mower were on the road, the left on the grass. He could not see the ground below the weeds. The mower slipped some distance down the side of the ditch, the side of the ditch then caved in, and he and the mower fell. The mower slid into the ditch on top of Zaehringer and pinned him underneath. The parties agree there was no

[1] Because this case was resolved on a motion for summary judgment, the facts are set forth in the light most favorable to the nonmoving party, Zaehringer. *See e.g., McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 369 n.1 (Iowa 2012).

cave-in of the side of the ditch until Zaehringer and his mower were sliding down into the ditch. Prior to the accident, Zaehringer had not complained to the County about problems with the area, however, he had complained to the County about issues with a nearby culvert.

Zaehringer filed an action against the County of Muscatine, alleging negligent maintenance of the road, ditch, and drainage system where he was injured. The County filed a motion for summary judgment in response, asserting, among other things, that the County owed no duty to Zaehringer as an individual member of the public and that the County had immunity under Iowa Code section 670.4(6) (2009). The court granted this motion for summary judgment. Zaehringer now appeals.

II. Analysis

Our review of a trial court's grant of summary judgment is for the correction of errors at law. *Van Fossen v*. *MidAmerican Energy Co*., 777 N.W.2d 689, 692–92 (2009). On a motion for summary judgment, the court must

> (1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The existence of a legal duty is a question of law for the court to decide.

Id. at 692–93. (internal citations and quotations omitted). While "negligence actions are seldom capable of summary adjudication, the threshold question in any tort case is whether the defendant owed the plaintiff a duty of care." *Sankey v*. *Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990). The trial court granted the County's motion for summary judgment on several grounds, including that the

County owed no duty to Zaehringer, noting "the [C]ounty has no duty to maintain that property adjacent to the road for those such as Plaintiff who may voluntarily choose to mow it." We may affirm on this or any ground appearing in the record and urged in the district court. *In re Estate of Voss*, 553 N.W.2d 878, 879 (Iowa 1996).

Zaehringer only makes passing mention of the duty issue. Contrary to authority, he characterizes the existence of a duty as a question of material fact. *Van Fossen*, 777 N.W.2d at 693. ("The existence of a legal duty is a question of law for the court to decide."). He also states, "The trial court also found that the Defendant owed no duty of care to the Plaintiff . . . [but] fails to say why a person driving a tractor along the edge and shoulder of the road is not using the roadway." Even assuming that Zaehringer's claim falls within the liability of the County for persons driving on County roads, we agree with the district court that he fails to show the existence of a duty on the part of the County to protect him from the injury he sustained while mowing the grassy strip next to the road.

Our supreme court has recently rearticulated how to determine whether one party owes a duty to another:

> An actionable negligence claim requires the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages. Whether a duty arises out of a given relationship is a matter of law for the court's determination.
>
> Historically, the duty determination focused on three factors: the relationship between the parties, the foreseeability of harm, and public policy. In *Thompson* we said that foreseeability should not enter into the duty calculus but should be considered only in determining whether the defendant was negligent. But we did not erase the remaining law of duty; rather, we reaffirmed it. In short, a lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion.

McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368, 371 (Iowa 2012) (citing *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) (internal citations and quotations omitted)). "In the end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm." *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999).

A local government is "expected to maintain its streets in a condition of reasonable—not absolute—safety for travelers. . . . [It cannot] be expected to foresee and provide against every possible accident." *Meyers v. Delaney*, 529, N.W.2d 288, 290 (Iowa 1995) (reaffirming *Pietz v. City of Oskaloosa*, 92 N.W.2d 577, 579 (Iowa 1958)). "[The County] must have actual notice of the dangerous condition of the street, or the condition must have existed for a sufficient time to enable the city to discover and repair the same, in the exercise of reasonable and ordinary care and diligence." *Pietz*, 92 N.W.2d at 579.

The facts taken in the light most favorable to Zaehringer show he was unaware of any problem with the side of the ditch, although he mowed it regularly; he voluntarily mowed for aesthetic purposes, not using the road for travel; the County conducted routine inspections and maintenance of the roadway; he did not fall due to a defect in the travelled portion of the roadway; and neither Zaehringer nor the County could have seen the defect even if one existed before the mower slid into the ditch. We therefore affirm the district court, finding the County owed no duty to Zaehringer.

AFFIRMED.