MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sarah Swingley,
Appellant-Plaintiff,

v.

City of Muncie, Ball State University, and Board of Trustees of Ball State University,
Appellees-Defendants.

April 22, 2021

Court of Appeals Case No. 20A-PL-1797

Appeal from the Delaware Circuit Court

The Honorable Thomas A. Cannon Jr., Judge

Trial Court Cause No. 18C05-1710-PL-108

Mathias, Judge.

[1] Sarah Swingley sued the City of Muncie (the "City"), as well as Ball State University and the Board of Trustees of Ball State University (collectively, "BSU"), after she was struck and run over by a pick-up truck near BSU's campus.[1] The Delaware Circuit Court granted BSU's and the City's motions for summary judgment. Swingley now appeals, claiming the trial court erred in granting summary judgment to the City and BSU.

[2] We affirm.

Facts and Procedural History

[3] During the morning of November 3, 2015, Swingley, then a student in her final year at BSU, left her off-campus apartment on foot. She walked west along Ashland Avenue, a public roadway maintained by the City, Appellant's App. Vol. III, p. 146, toward BSU's campus. BSU owns a parcel of property that abuts the northern side of Ashland Avenue, at the intersection of Ashland Avenue and Martin Street. Appellant's App. Vol. II, pp. 42, 101; Vol. III p. 145. BSU used that parcel as a commuter parking lot (the "Parking Lot Property"). A sloped strip of grass, which meets the northern edge of the Ashland Avenue, separates the roadway from the surface of the parking lot. Appellant's App. Vol. IV, pp. 95–96; Vol. V, pp. 227–32.

[1] The driver of the pick-up truck is not a party to this appeal.

[4] Swingley had taken the Ashland Avenue route "[h]undreds of times" during the prior eighteen months. Appellant's App. Vol. IV, p. 95. Indeed, "[t]hat was the way [she] always went." *Id*. And she "would always walk on the north side of Ashland," the side closest to the Parking Lot Property. *Id.*

[5] Because there is no sidewalk along the southern edge of the Parking Lot Property, and because the strip of grass abutting Ashland Avenue "wasn't necessarily the greatest place to walk," Swingley walked on the pavement of the roadway, rather than in the grass of the Parking Lot Property. *Id*. at 99–100. Even though "it wasn't raining," and there was "not standing water," Swingley wanted "to protect [her] boots to try and look presentable" because the grass was "always muddy and nasty." *Id*. She chose not to take a nearby alternative route where a sidewalk was available because that route "was less direct," it "added five minutes" to her commute, and it "didn't lead to the bus station." *Id.* at 101.

[6] Swingley listened to music through headphones while she walked. Moments before the accident occurred, she saw a white pick-up truck heading south on Martin Street toward the intersection at Ashland Avenue. She stopped walking when she reached the intersection so that the white pick-up truck could pass before she continued toward BSU's campus. *Id*. at 96. She looked down at her cell phone while she waited, contemplating her response to a text message she had received earlier that day. *Id*. After a few moments, Swingley looked up and realized the white pick-up truck had turned left onto Ashland Avenue, rather than continuing south on Martin Street as she had assumed it would.

Appellant's App. Vol. II, p. 63; Vol. IV, p. 96. The pick-up truck struck her, knocking her to the pavement before running over her mid-section. Appellant's App. Vol. II, p. 63; Vol. IV, p. 100.

[7] Swingley recovered from her injuries quickly enough to complete her final semester of school without delay. Appellant's App. Vol. IV, pp. 92–93. In July 2016, approximately two months after graduating from BSU, she moved to Los Angeles, California, to pursue graduate studies. *Id.* at 91.

[8] On October 25, 2017, Swingley initiated a negligence action against BSU and the City. Appellant's App. Vol. II, p. 35. BSU moved for summary judgment on July 1, 2019, and the City filed its own motion for summary judgment on September 13, 2019. On August 31, 2020, after holding a hearing on the parties' motions, the trial court awarded summary judgment to BSU and to the City. Appellant's App. Vol. II, pp. 20–34.

[9] Swingley now appeals.

Standard of Review

[10] We review a grant of summary judgment using the same standard as the trial court: summary judgment is appropriate "if the designated evidentiary matter shows 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." Ind. Trial Rule 56(C); *see also, Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). We look only to the parties' designated evidence, and we resolve all doubts about the inferences to be drawn from that evidence in favor of the party who did not

seek summary judgment. *Reece v. Tyson Fresh Meats, Inc.*, 153 N.E.3d 1193, 1198 (Ind. Ct. App. 2020).

[11] Indiana's distinctive summary judgment standard requires the party seeking summary judgment to "affirmatively negate an opponent's claim." *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Thus, the party moving for summary judgment bears the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Ka v. City of Indianapolis*, 954 N.E.2d 974, 977 (Ind. Ct. App. 2011). Once the moving party has met that burden, the party who did not move for summary judgment must come forward with specific evidence demonstrating the existence of genuine factual issues. If the nonmoving party fails to do so, summary judgment should be granted. *Id.*

[12] Put simply, the party who moved for summary judgment must prove that the nonmoving party would lose at trial, rather than simply show that the nonmoving party is unlikely to win. *Converse v. Elkhart Gen. Hosp., Inc.*, 120 N.E.3d 621, 625 (Ind. Ct. App. 2019). Keeping in mind this "onerous burden," *Hughley*, 15 N.E.3d at 1003, we address Swingley's claims as to BSU and the City in turn.

Ball State

[13] To prevail on her negligence claim, Swingley must show: (1) BSU owed a duty to Swingley; (2) BSU breached that duty by allowing its conduct to fall below the applicable standard of care; and (3) BSU's breach proximately caused a

compensable injury. *Rogers v. Martin*, 63 N.E.3d 316, 321 (Ind. 2016). Before BSU can be held liable for negligence, it must first be shown that BSU owed a duty to Swingley. Absent a duty, there can be no breach and therefore no liability for negligence. *Goodwin v. Yeakle's Sports Bar & Grill*, 62 N.E.3d 384, 386 (Ind. 2016). In granting summary judgment to BSU, the trial court concluded that BSU owed no common law duty to Swingley, a pedestrian injured while traveling upon a public roadway adjacent to BSU's property. We agree.

[14] A duty may arise by statute or by operation of law. *Franklin v. Benock*, 722 N.E.2d 874, 878 (Ind. Ct. App. 2000), *trans denied*. Whether one party owes a duty to another in a negligence action is generally a question of law that is well suited for summary judgment. *Sizemore v. Templeton Oil Co.*, 724 N.E.2d 647, 650 (Ind. Ct. App. 2000). In premises liability cases, whether a duty is owed depends primarily upon whether the defendant was in control of the premises when the accident occurred. *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004); *see also Haskin v. City of Madison*, 999 N.E.2d 1047, 1052 (Ind. Ct. App. 2013).

[15] Here, the designated evidence establishes—and the parties do not dispute—that the accident occurred on Ashland Avenue. It is also undisputed that BSU does not own or control Ashland Avenue. Consequently, the duties owed by landowners to persons visiting upon their land do not apply. *See, e.g.*, *Rogers*, 63 N.E.3d at 320 (stating that a landowner must exercise reasonable care for an invitee's protection while the invitee is on the landowner' premises).

[16] Swingley seems to argue instead that BSU owed a duty "to exercise reasonable care to protect its student pedestrians walking . . . near its campus parking lots," Appellant's Br. at 17–18, meaning BSU had a duty to install a sidewalk along the southern edge of the Parking Lot Property. In her complaint, Swingley alleged that BSU "did not provide a sidewalk for [Swingley] to safely traverse to and from classes," and that because of BSU's "failure to provide sidewalks . . . [Swingley] was forced to walk along the street in the roadway." Appellant's App. Vol. II, p. 63. At the summary judgment hearing, Swingley stated that "the duty to install that sidewalk lies with [BSU]." Tr. p. 37. And, on appeal, Swingley contends that "[t]he specific issue of [BSU] failing to install a sidewalk . . . goes to the question of whether [BSU] breached its common law duty to exercise reasonable care." Appellant's Br. at 21.

[17] In support of her argument, Swingley relies on *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991). However, our supreme court has explained that while "the three-part balancing test articulated in *Webb* is a useful tool in determining whether a duty exists," its usefulness is limited to "those instances where the element of duty has not already been declared or otherwise articulated." *N. Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003) ("For example, there is no need to apply *Webb* to determine what duty a business owner owes to its invitees."). Thus, a judicial determination of the existence of a duty is unnecessary where the duty has already been articulated. *Rogers*, 63 N.E.3d at 321.

[18] In directing our attention to *Webb*, Swingley seems to suggest either that no applicable duty has yet been declared or that we should redetermine the existence of a separate duty. Either way, Swingley's reliance upon *Webb* is misplaced because the duty a landowner owes to the traveling public is well established. As opposed to the duties a landowner may owe to persons visiting upon its land, "the owner of land adjacent to a highway owes a duty to the traveling public to prevent injury to travelers upon the highway from any unreasonable risks created by the property's dangerous condition which the landowner knew or should have known about." *Precedent Partners I, L.P. v. Hulen*, 863 N.E.2d 328, 332 (Ind. Ct. App. 2007) (quoting *Holiday Rambler Corp. v. Gessinger*, 541 N.E.2d 559, 562 (Ind. Ct. App. 1989)). Or, put more simply, "a landowner owes a duty to the traveling public to exercise reasonable care in the use of his property so as not to interfere with safe travel on public roadways." *Reece*, 153 N.E.3d at 1198 (Ind Ct. App. 2020) (citing *Pitcairn v. Whiteside*, 109 Ind. App. 693, 34 N.E.2d 943, 946 (1941)).

[19] This general duty has already been articulated, so we will not determine the existence of a separate duty here. The question we must answer, on the other hand, is whether the scope of this general duty extends to protecting pedestrians walking upon public roadways from vehicles that are not controlled by the owner of property adjacent to the roadway. It does not.

[20] We have previously examined the scope of a landowner's duty to the traveling public. In *Pitcairn*, for example, railroad employees started a fire, and a dense cloud of smoke drifted across the nearby public roadway. 34 N.E.2d at 945.

Two vehicles traveling upon the roadway collided. *Id.* We held that the railroad owed the traveling public a duty to refrain from creating such a condition on its land—a dangerous condition which visited itself upon the roadway and subjected travelers to unreasonable risks. *Id.* at 946. Our supreme court later reaffirmed that the key factor in *Pitcairn* was that the railroad's own conduct created the dangerous condition that drifted onto the roadway. *Blake v. Dunn Farms, Inc.* 413 N.E.2d 560, 564 (Ind. 1980).

[21] We reached a similar result in *Holiday Rambler*. There, a manufacturing plant allowed hundreds of its employees to leave the plant at the end of each day's afternoon shift, which resulted in hundreds of vehicles spilling onto the adjacent public roadway at once. 541 N.E.2d at 561. The mass exodus of vehicles onto the roadway caused a collision, and a motorcyclist was seriously injured. *Id.* We concluded that the scope of the duty articulated in *Pitcairn* extended to those circumstances. *Id.* at 562. Indeed, as we later reaffirmed, it was the manufacturing plant's own activity on its premises that caused the hazard to infiltrate the roadway. *Sheley v. Cross*, 680 N.E.2d 10, 13 (Ind. Ct. App. 1997), *trans. denied*.

[22] Yet, unlike the circumstances in *Pitcairn* and *Holiday Rambler*—both of which involved landowner-created hazards that visited themselves upon the adjacent roadway—this case involves a pedestrian's collision with a motorist over whom the adjacent landowner had no control. Any suggestion that the absence of a sidewalk on the Parking Lot Property constituted a hazardous condition misses the mark. There is no designated evidentiary material showing that the

"sidewalkless-ness" Swingley complains of visited itself upon the roadway as the railroad smoke did in *Pitcairn* or as the vehicle exodus did in *Holiday Rambler*.

[23] We find that the circumstances here more closely resemble those in *State v. Flanigan*, 489 N.E.2d 1216, 1217–20 (Ind. Ct. App. 1986), *trans. denied.*, where two pedestrians were injured while walking on a public roadway on their way to a nearby flea market. After they were struck by a third-party motorist, the pedestrians brought a negligence action against the operators of the flea market. *Id.* at 1217. We explained that the owner of land adjacent to a public highway generally owes no duty to a pedestrian who was injured when struck by an automobile as that pedestrian was crossing or walking upon such highway. *Id.* at 1218–19.

[24] Here, none of the designated evidence shows that BSU created a hazardous or dangerous condition on the Parking Lot Property that visited itself upon the roadway and interfered with safe travel upon Ashland Avenue.[2] Like the pedestrians in *Flanigan*, Swingley was injured while walking on land over which BSU had no control; she was not on BSU's campus. And she was struck by a pick-up truck driven by a third-party motorist over whom BSU had no control.[3]

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[2] Even if the Parking Lot Property's lack of a sidewalk constituted a dangerous condition, it is a condition that was wholly contained on BSU's property. Where a condition is wholly contained on a landowner's property, there is no duty to the traveling public. *See Reece*, 153 N.E.3d at 1202–03.

[3] We have stated that "a single pickup truck traveling down a public street is not, as a matter of law, a hazardous condition." *Precedent Partners*, 863 N.E.2d at 333.

The law does not impose a duty on a landowner to guard against injury to the traveling public from the negligent acts of someone over whom the landowner has no control and which injury occurs off the landowner's premises. *See Precedent Partners*, 863 N.E.2d at 333.

[25] A landowner's duty to persons traveling upon an adjacent roadway is limited to refraining from creating or maintaining hazardous conditions that visit themselves upon the roadway, which BSU undisputedly did not do. In turn, Indiana common law did not impose a duty on BSU to protect Swingley from third-party motorists as she traveled upon Ashland Avenue. For all of these reasons, we conclude that the trial court did not err in granting summary judgment to BSU on this basis.[4]

[26] We turn next to Swingley's claim that the trial court erred in awarding summary judgment to the City.

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[4] Because BSU succeeded in negating the duty element of Swingley's negligence claim, we need not consider Swingley's claim that BSU was negligent per se for allegedly violating the Development Standards of the City's Comprehensive Zoning Code. *See* Appellant's Br. at 14. "[T]he doctrine of negligence per se doesn't concern the duty element of a negligence action." *Stachowski v. Estate of Radman*, 95 N.E.3d 542, 544 (Ind. Ct. App. 2018). Rather, it "assumes the existence of a common-law duty of reasonable care." *Id.* The party asserting a negligence per se claim merely asks the court to "adopt the standard of conduct set forth in a statute or ordinance . . . as the standard of conduct required under that preexisting duty, so that a violation of the statute or ordinance services to satisfy the breach element of a negligence action." *Id.* Having determined that BSU owed Swingley no common-law duty, we need not consider whether BSU failed to observe a standard of care set forth in any ordinance.

The City

[27] As to the City, Swingley argues the City breached its common law duty to exercise reasonable care and diligence to keep streets in a reasonably safe condition for travelers. Appellant's Br. at 26. The trial court concluded, to the contrary, that the City had no common law duty. Appellant's App. Vol. II, pp. 32–33. We agree.

[28] Like her claim against BSU, Swingley's negligence claim against the City cannot prevail unless she shows: (1) the City owed a duty to Swingley; (2) the City breached that duty by allowing its conduct to fall below the applicable standard of care; and (3) the City's breach of duty proximately caused a compensable injury to Swingley. *Rogers*, 63 N.E.3d at 321 (Ind. 2016). Negligence cannot be inferred from the mere fact of an accident. *Pelak v. Ind. Indus. Servs., Inc.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005), *trans. denied*. Rather, all the elements of negligence must be supported either by specific facts designated to the trial court or by reasonable inferences that might be drawn from those facts. *Id.* Summary judgment is appropriate if the City negates at least one element of Swingley's claim, *Converse*, 120 N.E.3d at 625, and, again, there can be no liability for negligence in the absence of a duty. *Goodwin*, 62 N.E.3d at 386.

[29] Governmental entities, such as the City, have a general duty to exercise reasonable care in maintaining highways and streets for the safety of public users. *Fulton Cnty. Comm'rs v. Miller*, 788 N.E.2d 1284, 1286 (Ind. Ct. App.

2003). However, this duty does not attach unless the governmental entity has actual or constructive notice of an unsafe defect. *Ka*, 954 N.E.2d at 977. Constructive knowledge of a defect means the defect might have been discovered by the exercise of ordinary care and diligence. *Harkness v. Hall*, 684 N.E.2d 1156, 1161 (Ind. Ct. App. 1997), *trans. denied*. It is well settled that the complaining party must not only prove that the alleged defective condition existed, but that the governmental entity had knowledge of the condition long enough before the accident occurred to repair the defect and failed to do so. *Brown v. City of Indianapolis*, 113 N.E.3d 244, 250 (Ind. Ct. App. 2018). Where there is neither actual nor constructive knowledge of a defective condition such that a reasonably prudent person would not have been alerted to action, there is no negligence. *Ka*, 954 N.E.2d at 978.

[30] Swingley claims "the evidence designated to the trial court undoubtedly creates a question of fact as to whether [the City] had actual or constructive knowledge of the dangerous condition of Ashland Avenue." Appellant's Br. at 28. She further argues that "photographs of the subject portion of Ashland Avenue on the date of the accident reveal a section of the road that was in incredibly poor condition" due to "an overgrowth of grass and mud, and the deterioration of the road edge and curb that has significantly narrowed the width of the road to the point that it had become too narrow for pedestrians to safely walk along the edge." *Id.*

[31] Even if we assume the designated evidence Swingley relies on demonstrates that Ashland Avenue suffered from defective conditions, the City's designated

evidence establishes it had no actual or constructive knowledge of such conditions. Duke Campbell, the City's Director of Public Works, stated in an affidavit designated as evidence by the City that during the nearly four years preceding the date of the accident, he never received a complaint or other notification related to a purportedly defective condition of Ashland Avenue:

> (a) I never heard any oral or received any written complaints that said stretch of roadway was unsafe or impractical for pedestrian travel . . . ;
>
> (b) I never heard any oral or received any written complaints that it was unsafe or impractical for pedestrians to walk along the south side of West Ashland Avenue because of trees or shrubbery near the intersection of North Martin Street;
>
> (c) I never heard any oral or received any written complaints that it was unsafe or impractical for pedestrians traveling westbound on West Ashland to walk along the south side of the roadway because trees or shrubbery near the intersection of North Martin made it difficult for pedestrians to see vehicular traffic traveling northbound on North Martin;
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> (d) I never heard any oral or received any written complaints that motorists traveling westbound on West Ashland had difficulties crossing the intersection at North Martin because trees or shrubbery along the south side of West Ashland near the intersection of North Martin made it difficult for motorists to see vehicular traffic traveling northbound on North Martin;
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> (e) I never heard any oral or received any written complaints that it was unsafe or impractical for pedestrians to walk in the grassy area on the northside of West Ashland because

the grassy area was too sloped and/or frequently wet and muddy;

(f) I never received any oral or written reports of any motor vehicle accidents at the intersection of North Martin Street and West Ashland Avenue;

(g) I never received any oral or written reports of any motor vehicle/pedestrian accidents at the intersection of North Martin Street and West Ashland Avenue . . . .

Appellant's App. Vol. III, pp. 147–48. And, given his position as the City's Director of Public Works, any complaints or concerns expressed to any other department of the City—including the Mayor's Office and the police department—would have been forwarded to Campbell. *Id.* at 148.

[32] In light of this evidence, the burden shifts to Swingley to designate specific evidence that the City had notice or knowledge of the alleged defects for a sufficient period of time before the accident. *See Brown*, 113 N.E.3d at 248 (Ind. Ct. App. 2018). But Swingley has not directed us to any evidence demonstrating the existence of a factual dispute as to the City's knowledge, and our review of the designated evidence does not reveal any. Instead, Swingley simply states that "the lack of evidence of a specific complaint" about the condition of Ashland Avenue "is undoubtedly insufficient to support summary judgment," and that "Campbell conceded that [the City] does not keep a log of complaints," so "it's possible someone else in the City received notice." Appellant's Br. at 27.

[33] Swingley cannot carry her burden by simply declaring that a genuine dispute about a material fact exists. A factual dispute "is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009). Moreover, a trial court's grant of summary judgment is clothed with a presumption of validity, and Swingley bears the burden of coming forward with contrary evidence demonstrating that the trial court erred in determining there are no genuine issues of material fact. *Id.* at 761–62.

[34] We resolve all doubts as to any facts and the reasonable inferences to be drawn from those facts in Swingley's favor, but an inference is not reasonable when it rests on no more than speculation or conjecture. *See Pelak*, 831 N.E.2d at 769. Swingley's suggestion that the City may at some point have received a complaint about the condition of Ashland Avenue, without more, does not demonstrate the existence of a genuine factual dispute as to whether the City lacked actual or constructive knowledge. For all of these reasons, we conclude that the City's duty to exercise reasonable care in maintaining highways and streets for the safety of public users did not attach.

Conclusion

[35] The designated evidence does not reveal a genuine issue of material fact as to whether a duty was owed to Swingley by either BSU or by the City under applicable Indiana law. Neither owed Swingley any duty recognized in

Indiana[5]. Therefore BSU and the City are entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment to BSU and to the City.

[36] Affirmed.

Altice, J., and Weissmann, J., concur.

[5] Because we conclude that neither party owed Swingley a common-law duty, we need not consider the parties' claims as to immunity under the Indiana Tort Claims Act ("ITCA"). "Immunity, whether under Indiana common law or the ITCA, assumes negligence but denies liability." *Catt v. Bd. of Comm'rs of Knox Cnty.*, 779 N.E.2d 1, 5 (Ind. 2002). Typically, it is only after determining that a governmental defendant is not immune under the ITCA that a court undertakes the analysis of whether a duty is owed. *Benton v. City of Oakland*, 721 N.E.2d 224, 232 (Ind. 1999). There can be no liability for negligence in the absence of a duty, and there is therefore no need to determine here whether BSU or the City is immune from liability under the ITCA.