MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Connie Dominiack
and
Jerry Dominiack,
Appellants-Plaintiffs,

v.

City of South Bend,
Appellee-Defendant.

January 28, 2022

Court of Appeals Case No. 21A-CT-2102

Appeal from the St. Joseph Circuit Court

The Honorable John E. Broden, Judge

Trial Court Cause No. 71C01-1907-CT-250

Tavitas, Judge.

Case Summary

[1] Connie Dominiack sued the City of South Bend ("the City") after sustaining injuries in a parking lot owned by the City.[1] The City moved for summary judgment, arguing that Dominiack was a licensee, rather than an invitee, and had not presented the requisite evidence of willful or wanton conduct on the part of the City. The trial court agreed and granted summary judgment to the City as to Dominiack's claims, as well as her husband's derivative loss of consortium claim. On appeal, we agree with the trial court, conclude that Dominiack was not an invitee, and affirm the judgment below.

Issue

[2] Dominiack raises a single issue: whether the trial court erred in granting summary judgment to the City.

Facts

[3] Dominiack works at the St. Joseph County Treasurer's office in South Bend. Dominiack maintained a nearby parking spot "by the alley" for which she paid a monthly fee. Appellant's App. Vol. II p. 42. In order to reach the County-City Building, where her office was located, Dominiack frequently cut across an adjacent parking lot that was owned by the City. On July 10, 2017,[2]

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[1] Dominiack's husband, Jerry, is also a listed appellant, as the underlying complaint included a claim for loss of consortium.

[2] The complaint alleges that the date of the injuries was July 11, 2017, but Dominiack testified in her deposition that the correct date was July 10. Appellant's App. Vol. II p. 40.

Dominiack parked her car next to the church in her usual spot across from the City-County Building. The adjacent City parking lot was in disrepair, and as Dominiack walked across it that morning, she tripped, fell, and sustained injuries, including a broken nose.

[4] Dominiack filed a complaint on July 9, 2019, alleging that the City had negligently failed to maintain its parking lot, and, as a result, caused Dominiack's injuries. The City filed a motion for summary judgment on February 7, 2021. The City sought a ruling as to whether Dominiack was an invitee or a licensee while in the parking lot. As its designated evidence, the City provided portions of Dominiack's deposition, as well as a City parking ordinance. In response, Dominiack designated a duplicative portion of her deposition as well as an affidavit averring that she had observed other pedestrians walking across the lot over the years and that there are no restrictions, fences, or signage prohibiting pedestrian traffic.

[5] The trial court granted summary judgment in favor of the City. In a comprehensive order, issued May 19, 2021, the trial court held, in relevant part:

> 4. The *Jump*[3] case cites to the Restatement (Second) of Torts Section 332 (1965) and uses the following definition of a "public invitee[.]" "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." [*Id.*] at 877. A person may

[3] Here the trial court refers to our decision in *Jump v. Bank of Versailles,* 586 N.E.2d 873 (Ind Ct. App. 1992), upon which Dominiack heavily relies.

qualify as a public invitee if she is "invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." Restatement (Second) of Torts Section 332(2); *Jump*, [586 N.E.2d at] 877. The Court of Appeals in *Jump* stated that an examination of the invitation itself was a necessary first step in such an analysis. In *Jump*[,] the evidence was undisputed that the land in question was used by the general public for many years as a public walkway. The bank posted no signs restricting access to the passageway or forbidding trespassers. In *Jump*, the Bank's president acknowledged that it maintained the steps and the passageway to prevent anyone from falling and to make certain people had a safe way to get through. In this case, there is evidence in the record that Plaintiff Dominiack observed that she and "many other pedestrians walked unimpeded" across the City lot. There is also evidence in the record that there are no fences, signage, physical barriers, or anything else limiting access to the City lot. However, unlike the *Jump* case, there was no evidence in the record that the City did anything to maintain or improve the lot in question. In fact, as counsel for the City indicated at oral argument, the City did next to nothing to maintain this lot.

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Plaintiff Dominiack acknowledges that she takes this route through the City owned parking lot because it is more convenient to her.

* * * * *

7. Because the Court FINDS that Plaintiff Dominiack was a licensee, the City owed her the duty to refrain from willfully or wantonly injuring her or acting in a manner to increase her peril. *Burrell*, [569 N.E.2d] at 639. Because there is no evidence in the record that the Defendant City engaged in such willful or wanton

conduct, Defendant City is entitled to summary judgment in this matter.

Appellant's App. Vol. II pp. 13-16.

[6] Dominiack filed a motion to correct error, which the trial court denied on August 30, 2021.[4] This appeal ensued.

Analysis

[7] Dominiack appeals the trial court's grant of summary judgment in favor of the City. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "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.'" *Id*. (quoting *Murray v. Indianapolis Public Schools,* 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[8] The summary judgment movant invokes the burden of making a prima facie showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden shifts to the non-moving party which must then show the existence of a genuine issue of material

[4] Dominiack's briefing addresses only the summary judgment order. She does not address the denial of the motion to correct error. Accordingly, neither do we.

fact. *Id.* On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id.*

[9] We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. Because the trial court entered findings of fact and conclusions of law, we also reiterate that findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *Matter of Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

[10] In order to answer the question of whether there are any genuine issues of material fact, we must recognize that Dominiack's asserted theories of liability are those of negligence. Thus, in order to prevail, she must demonstrate that the City owed her a duty. "The nature and extent of a landowner's duty to persons coming on the property is defined by the visitor's status as an invitee, licensee, or trespasser." *Yates v. Johnson Cnty. Bd. of Comm'rs*, 888 N.E.2d 842, 848 (Ind. Ct. App. 2008) (citing *Rhoades v. Heritage Inv., LLC*, 839 N.E.2d 788, 791 (Ind. Ct. App. 2005), *trans. denied*). The parties do not contend that Dominiack was a trespasser. Rather, they disagree as to whether Dominiack was a licensee or an invitee.

[11] Dominiack asserts that she was an invitee to the City's parking lot. "An invitee is a person who is invited to enter or to remain on another's land. There are

three categories of invitee: the public invitee, the business visitor, and the social guest." *Id*. (citing *Rhoades*, 839 N.E.2d at 791-92) (internal citations omitted). "'Under Indiana law, an invitee is a person who goes onto the land of another at the express or implied invitation of owner or occupant either to transact business or for the mutual benefit of invitee and owner or occupant.'" *Winfrey v. NLMP, Inc.*, 963 N.E.2d 609, 612 (Ind. Ct. App. 2012) (quoting *Markle v. Hacienda Mexican Rest.*, 570 N.E.2d 969, 971 (Ind. Ct. App. 1991)).

[12] Dominiack does not claim that she was a business visitor or a social guest. We, thus, limit our analysis to whether she enjoyed the status of a public invitee. "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." Restatement (Second) of Torts § 332(2).

> "[A]n invitation is conduct which justifies others in believing that the possessor desires them to enter the land." Restatement (Second) of Torts § 332 cmt. b. An invitation does not have to come directly from the landowner . . . . In the absence of actual authority to invite third parties to the [property], the issue is whether the landowner's conduct gave the third party reason to believe that the landowner was willing to allow the third party to enter the land. *See* 62 Am.Jur.2d Premises Liability § 112 (2005) ("The word 'consent' or 'permission' indicates that the possessor of the land is in fact willing that the visitor, or entrant, enter and remain thereon, or that the possessor's conduct gives the entrant reason to believe that the possessor is willing to allow him or her to enter if he or she desires to do so."[)] (citing Restatement (Second) of Torts § 330 cmt. c).

Kopczynski v. Barger, 887 N.E.2d 928, 931-32 (Ind. 2008).

[13] The duty a landowner owes to an invitee is defined by Section 343 of the Restatement (Second) of Torts, adopted by our Supreme Court in *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991). *See Branscomb v. Wal-Mart Stores E., L.P.*, 165 N.E.3d 982, 986 (Ind. 2021). "The highest duty of care is owed to an invitee; that duty being to exercise reasonable care for the invitee's protection while he or she is on the premises." *Yates*, 888 N.E.2d at 848 (citing *Rhoades*, 839 N.E.2d at 791).[5]

[14] The City argues that Dominiack was, at best, a licensee. A licensee has "a license to use the land and are privileged to enter or remain on the land by virtue of the permission or sufferance of the owner or occupier." *McCormick v. State, Dep't of Nat. Res.*, 673 N.E.2d 829, 836 (Ind. Ct. App. 1996) (quoting *Burrell*, 569 N.E.2d at 640). "Licensees enter the land of another for their own convenience, curiosity, or entertainment and take the premises as they find them." *Id.* With respect to a licensee, "the duty is to refrain from willfully or wantonly injuring him or her or acting in a manner to increase his or her peril; this includes the duty to warn a licensee of any latent (non-obvious) danger on the premises of which the landowner has knowledge." *Yates*, 888 N.E.2d at 848

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[5] A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he[:]

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Burrell, 569 N.E.2d at 639-40 (quoting Restatement (Second) of Torts § 343 (1965)).

(citing *Rhoades*, 839 N.E.2d at 791). "In determining whether an individual is an invitee or a licensee, the distinction between the terms 'invitation' and 'permission' is critical." *Id*. at 849 (citing *Rhoades*, 839 N.E.2d at 792).

[15] Dominiack argues that "the question of whether the City's invitation was sufficiently general and broad to include Connie is a question for the trier of fact." Appellant's Br. p. 9. But that argument presupposes that the City actually *issued* an invitation of some kind. Dominiack's brief is largely devoted to a disagreement with the trial court's distinguishing of *Jump v. Bank of Versailles*, 586 N.E.2d 873 (Ind. Ct. App. 1992), rather than an argument aimed at establishing that Dominiack was an invitee.[6] We find Dominiack's briefing devoid of a cogent argument that the City engaged in "conduct which justifies others in believing that the possessor desires them to enter the land[,]" and, accordingly, the argument upon which Dominiack's appeal rests is waived. *Kopczynski*, 887 N.E.2d at 931-32; *see also* Ind. Appellate Rule 46(A)(8); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that the failure to present a cogent argument waives the issue for appellate review), *trans. denied*.

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[6] This is to say that Dominiack's briefing is incomplete. Even if we were to accept that the trial court improperly distinguished *Jump* from the instant matter, that would not yield a conclusion that the City issued an invitation or that Dominiack was a public invitee. Dominiack treats those conclusions—the core of the case—as foregone. We, of course, will not. It is true that Dominiack's reply brief focuses on the critical issues in a way that her opening brief does not. We remind her, however, that it is axiomatic that "an argument raised for the first time in a reply brief is waived." *Kirchgessner v. Kirchgessner*, 103 N.E.3d 676, 682 (Ind. Ct. App. 2018) (quoting *U.S. Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 797 n.5 (Ind. 2000)), *trans. denied*.

[16] Waiver notwithstanding, we address Dominiack's contention that she was an invitee, and, by extension, whether the City issued an invitation in any form. There is no designated evidence in the record to show that the City held open the parking lot for the public for purposes of pedestrian traffic. Indeed, there is no designated evidence that seems to originate with the City at all, except the parking ordinance, which does not speak to the question of whether the City invited the public to use this particular lot. Dominiack's arguments to the contrary are unavailing. She maintains that there were no signs or fences prohibiting her and other pedestrians from traversing the lot and that no City official ever told her that such traffic was prohibited. A significant difference between the absence of evidence of a prohibition and evidence that establishes an actual invitation goes to the heart of the matter. Silence does not equate to an invitation.

[17] We look to Dominiack's purpose for entering the lot, as well as whether the City invited the public onto the lot for a particular purpose. Dominiack concedes that she was not permitted to park in the lot, presumably its primary purpose. Alternate public routes to the County-City Building from Dominiack's parking spot existed, and Dominiack knew of the public routes, including public sidewalks. When asked during her deposition why she chose to forgo those public routes in favor of traversing the City's private parking lot, Dominiack replied: "It's closer to go through the parking lot rather than go around the church." Appellant's App. Vol. II p. 44. Dominiack then confirmed that "[i]t's more convenient" for her. *Id*. at 44-45. We find little

difficulty concluding, therefore, that Dominiack's purpose for entering the lot was one of expediency, or, in the words of *McCormick*, for her "own convenience." 673 N.E.2d at 836.

[18] We, therefore, conclude that Dominiack was at best a licensee, and she entered the parking lot by permission rather than invitation. Our task is not complete, however, for the City could still be liable to a licensee if the designated evidence demonstrates that the City acted with willful and wanton conduct. Such conduct:

> . . . consists of two elements: "(1) the defendant must have knowledge of an impending danger or consciousness of a course of misconduct calculated to result in probable injury; and (2) the actor's conduct must have exhibited an indifference to the consequence of his conduct." *Witham v. Norfolk and Western Ry. Co.*, 561 N.E.2d 484, 486 (Ind. 1990). "The distinction between constructive willfulness and mere negligence depends on the actor's state of mind." *McKeown v. Calusa*, 172 Ind. App. 1, 6-7, 359 N.E.2d 550, 554 (1977).

McGowen v. Montes, 152 N.E.3d 654, 662 (Ind. Ct. App. 2020), *trans. denied*. Dominiack has cited no evidence to suggest that the City engaged in such conduct, and we find none in the record. Accordingly, we find that entry of summary judgment in favor of the City was appropriate.

Conclusion

[19] The trial court did not err in awarding summary judgment to the City. We affirm.

[20] Affirmed.

Bradford, C.J., and Crone, J., concur.