

NOTICE
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2011 IL App (4th) 100874-U

Filed 8/29/11

NO. 4-10-0874

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

GENA L. GUTTSCHOW,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
THE TOWN OF NORMAL, a Municipal)	No. 08L136
Corporation; and CORE CONSTRUCTION)	
SERVICES OF ILLINOIS, INC., an)	
Illinois Corporation,)	
Defendants-Appellees,)	
and)	
JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC,)	Honorable
a Missouri Corporation,)	G. Michael Prall,
Defendant.)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's grant of summary judgment affirmed because plaintiff lacked sufficient evidence to show defendants' conduct was the proximate cause of her injuries.

¶ 2 On September 13, 2007, plaintiff, Gena L. Guttschow (Guttschow), fell on a public sidewalk near 209 North Street in the Town of Normal (Town). On September 4, 2008, Guttschow filed a complaint against the Town alleging the Town failed to properly maintain the sidewalk and failed to warn pedestrians of fence piping that extended out onto the sidewalk. Guttschow later filed an amended complaint adding four defendants including Core Construction Services of Illinois, Inc. (Core), who had erected the fence at issue. After motions to dismiss

were granted, Guttschow filed an amended complaint on October 2, 2009.

¶ 3

I. BACKGROUND

¶ 4

On April 14, 2009, the Town and Core sent interrogatories to Guttschow concerning the identity of witnesses, injuries sustained by Guttschow, photographs or videotapes of the location of the alleged incident, and related matters. Guttschow failed to respond to the interrogatories.

¶ 5

On December 4, 2009, the Town and Core served Guttschow with requests to admit facts. See Ill. S. Ct. R. 216(a) (eff. Jan. 1, 2011). Among the requests were that Guttschow lacks the mental competence to testify regarding the September 13, 2007, occurrence, and that Guttschow does not remember the events of September 13, 2007. Guttschow responded that she "cannot competently admit nor deny this request as she is under a legal (mental) disability as defined" in section 8–201 of the Dead-Man's Act, 735 ILCS 5/8–201 (West 2008). Guttschow's attorney stated at argument that Guttschow had deteriorating multiple sclerosis and could not testify to the facts as they existed.

¶ 6

On February 26, 2010, the Town and Core filed a motion for summary judgment, attaching the requests to admit which were deemed admitted. On June 9, 2010, Guttschow filed a response to the motion. The response included a series of photographs of the alleged scene of the incident and copies of medical records. The medical records indicated that Guttschow had deteriorating multiple sclerosis which had progressed, at the time of the accident, to the point where she had an unsteady gait, walked in a shuffling fashion, and used a cane. The response was not verified and did not include any affidavits or depositions. On October 4, 2010, the trial court granted the motion for summary judgment and made a written finding under Illinois

Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason for delaying either enforcement or appeal.

¶ 7

II. ANALYSIS

¶ 8 Summary judgment is appropriate when the pleadings, depositions, and admissions, together with any affidavits, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2008). When ruling on a motion for summary judgment, a trial court must view all evidence in a light most favorable to the nonmovant. *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 687-88, 737 N.E.2d 662, 667 (2000). We review grants of summary judgment *de novo*. *Id.* at 688, 737 N.E.2d at 666.

¶ 9

The movant bears the burden of persuasion and the initial burden of production. *Williams*, 316 Ill. App. 3d at 689, 737 N.E.2d at 668. Only if a defendant-movant satisfies its initial burden of production does the burden shift to the plaintiff to present some factual basis that would arguably entitle her to a judgment under the applicable law. *Id.* "A party opposing summary judgment may rely solely upon the pleadings to create a question of material fact until the movant supplies facts that would clearly entitle it to judgment as a matter of law." *Id.*

¶ 10

A defendant who moves for summary judgment may meet its initial burden of production in at least two ways: (1) by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law, or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action. *Williams*, 316 Ill. App. 3d at 688, 737 N.E.2d at 668 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-233 (1986)). In *Kimbrough v. Jewel Companies*,

Inc. 92 Ill. App. 3d 813, 817, 416 N.E.2d 328, 331 (1981), for example, defendant was able to produce a deposition of the plaintiff in which plaintiff stated she did not know why she fell and answers to interrogatories in which plaintiff stated there were no other known eyewitnesses.

¶ 11 The Town and Core have met their initial burden of production in this case. The requests to admit, which were not responded to within 28 days, establish that Guttschow is unable to testify as to the events of September 13, 2007. We reject Guttschow's argument that the Dead-Man's Act somehow excuses her failure to respond to the requests to admit. The Dead-Man's Act applies in cases where a "party sues or defends as the representative of a *** person under a legal disability." 735 ILCS 5/8–201 (West 2008). This is not such a case. Guttschow brings this action on her own behalf. The Dead-Man's Act bars testimony of an adverse party to conversations with a "person under legal disability." No such conversations are involved here. Both Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) ("Written Interrogatories to Parties") and Rule 216 ("Admission of Fact or of Genuineness of Documents") have been interpreted " 'to require a party to answer fully and in good faith to the extent of his actual knowledge and the information available to him or to his attorney.' " *Szczeblewski v. Gossett*, 342 Ill. App. 3d 344, 349, 795 N.E.2d 368, 372 (2003) (quoting *Singer v. Treat*, 145 Ill. App. 3d 585, 592, 495 N.E.2d 1264, 1268 (1986)).

¶ 12 Once the Town and Core met their initial burden of production, the burden shifted to Guttschow to provide some factual basis that would arguably entitle her to a judgment. Guttschow, however, failed to present any affidavits in response to the motion for summary judgment. The unverified photographs and medical records attached to Guttschow's argument in response to the motion were insufficient under the summary judgment statute. 735 ILCS

5/2–1005(c) (West 2008). There is no indication when the photographs were taken or what they represent.

¶ 13 When defendant files a *Celotex*-type motion, it is essential that plaintiff be given adequate time to gather evidence. *Celotex*, 477 U.S. at 322, 4 R. Michael, Illinois Practice § 38.4, at 227 (1989). Guttschow argues that the physical facts here can be proven by other persons, including the rescue squad, who were at the scene before and immediately after the fall. Guttschow, however, had more than ample time to investigate this case and talk to witnesses. The fact that she has not presented any witnesses warrants the application of summary judgment. Guttschow did not make any request that the trial court give her additional time to interview witnesses or prepare affidavits.

¶ 14

III. CONCLUSION

¶ 15 For the foregoing reasons, we affirm the trial court's judgment.

¶ 16 Affirmed.