

No. 1-10-3556

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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RUBEN REYES,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
SEGUIN SERVICES, INC.,	)	08 L 7564
	)	
Defendant-Appellee	)	
	)	
(Annabella Morales,	)	Honorable
	)	Kathy M. Flanagan,
Defendant).	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Epstein and Justice J. Gordon concurred in the judgment.

ORDER

- ¶ 1 HELD: The trial court properly granted summary judgment when Seguin Services, Inc. did not owe plaintiff a duty of care and Annabella Morales was not acting as an agent of Seguin Services, Inc. at the time of the her accident with plaintiff.
- ¶ 2 In August 2008, plaintiff Ruben Reyes filed his amended complaint against several

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defendants<sup>1</sup>, including Seguin Services, Inc. (Seguin) and Annabella Morales, alleging negligence arising from a collision that occurred when plaintiff, while operating a bicycle, collided with Morales' vehicle that was exiting Seguin's parking lot. Plaintiff alleged two counts against Seguin: one for its own negligence and the second for negligence under a theory of *respondeat superior* with Morales acting as an agent for Seguin. Seguin filed a motion for summary judgment, which the trial court granted.

¶ 3 Plaintiff appeals, arguing that the trial court erred in granting Seguin's motion for summary judgment because: (1) Seguin owed a duty of care to plaintiff to maintain and replace mirrors on its brick fence as a manner of safe egress to its invitees to avoid reasonably foreseeable collisions with individuals on the adjacent public sidewalk and street; and (2) Morales was acting as an agent of Seguin and acting according to Seguin's direction and control at the time of the accident.

¶ 4 In August 2008, plaintiff filed his amended complaint for negligence in the trial court. His complaint alleged the following facts.

¶ 5 Seguin is a corporation licensed to do business in Illinois and is located at 3100 South Central Avenue in Cicero, Illinois. On August 9, 2006, at approximately 9:30 a.m., Annabella Morales was driving a vehicle out of the gated parking lot "owned, operated, maintained and/or controlled" by Seguin. At the same time, plaintiff was operating a bicycle on the sidewalk near 3100 South Central Avenue. Morales "failed to properly stop for pedestrians on the sidewalk

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<sup>1</sup> The other named defendants, Nubani Trading Company, Salvador Miranda and MMI Products, Inc., have been dismissed from the complaint and are no longer parties to this action.

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prior to exiting the gated parking lot, causing a collision" with plaintiff. As a result of the collision, plaintiff suffered injuries requiring medical treatment.

¶ 6 The complaint further alleged that Seguin failed to post mirrors on the gated exit of the parking lot to allow exiting vehicles to see pedestrians near the exit on the sidewalk. Seguin should have known the gated exit represented a danger to pedestrians on the sidewalk in front of the gated exit.

¶ 7 The complaint alleged two counts against Seguin. The negligence count alleged that Seguin had a duty to ensure that the gated exit to the parking lot was maintained to ensure the safety of all, including plaintiff. Seguin breached this duty by (1) carelessly and negligently operating, managing, maintaining, inspecting and/or controlling the gated exit, including the attached side mirrors; (2) negligently and knowingly allowing the mirrors at the gated exit to remain in an unsafe condition, knowing or should have known in the exercise of reasonable care, it would create a dangerous condition to individuals on the sidewalk near the gated exit; (3) negligently and knowingly failing to post proper warnings of the dangerous condition; (4) failing to follow its policies and procedures for inspection of the premises; and (5) was otherwise careless and negligent. Further, as a direct and proximate result of one or more of these careless and negligent acts and/or omissions, plaintiff suffered severe and permanent injuries. Plaintiff sought a sum no greater than \$50,000, plus costs.

¶ 8 The second count against Seguin was premised on the theory of *respondeat superior*. This count alleged that at the time of the collision, Morales was an agent and/or employee of Seguin and was acting within the scope of her agency and/or employment. Morales failed to

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properly stop for pedestrians on the sidewalk prior to exiting the gated parking lot, causing a collision with plaintiff. Morales had a duty to operate her vehicle in a safe and reasonable manner consistent with Illinois traffic laws.

¶ 9 Seguin breached this duty through Morales, its agent and/or employee, by (1) carelessly and negligently operating, managing, maintaining, and controlling the vehicle; (2) carelessly and negligently operated the vehicle at a rate of speed which was greater than reasonable and proper with regard to traffic conditions; (3) carelessly and negligently failed to equip the vehicle with proper brakes to ensure safe operation; (4) carelessly and negligently failed to give proper warning of the approach of the vehicle although such warnings were necessary to ensure safe operation; (5) carelessly and negligently failed to keep a proper lookout while exiting the parking and lot and to stop or alter the course of her motor vehicle to avoid striking the pedestrian; and (6) was otherwise careless and negligent. As a direct and proximate result of one or more of the alleged careless and negligent acts and/or omissions of Seguin, by and through its agent Morales, plaintiff suffered severe and permanent injuries. Plaintiff sought a sum greater than \$50,000, plus costs for this count.

¶ 10 The parties presented additional evidence throughout discovery. Seguin is a not-for-profit organization that is funded almost entirely through federal and state contributions with a small amount from private charitable organizations. Seguin is a qualified foster care placement agency that places developmentally disabled adults in foster homes. The foster care adults were required to be brought to the facility daily at 9 a.m. for living skills or job training. The facility has separate driveways for entrance and exit into the parking lot. The driveways are gated, but are

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open during the time for drop-off and pick-up. The parking lot is surrounded by a brick fence. The record is unclear when the fence was constructed. Morales stated in her deposition that the fence had been there when she became a foster parent in 1998 and Ingeborge Sandoval, director of maintenance for Seguin, stated in her deposition that the fence existed when she started in 1997. However, Tom Foley, Senior Vice President of Operations for Seguin, stated in his answers to plaintiff's interrogatories that the fence surrounding the parking lot was constructed in March 2001.

¶ 11 In 2003, a foster parent made a suggestion that Seguin install mirrors to assist with visibility when exiting the parking lot. The safety committee for Seguin approved this suggestion and mirrors were installed on each side of the brick fence at both of the driveways. One of the mirrors at the exit driveway was not present for at least a month prior to the collision. Seguin believed vandals stole the mirror. The missing mirror was from the left side of the exit driveway and provided a view of traffic to a driver's right.

¶ 12 In August 2006, Morales was a foster parent for Seguin. She and her husband had acted as foster parents since 1998. She and her husband took care of three developmentally disabled adult men. As part of her compensation, Seguin provided a house for Morales and her husband. Morales originally paid rent, but later the arrangement with Seguin changed. Morales did not pay rent, but Seguin provided less money directly to Morales and her husband. Morales underwent extensive training to be a foster parent and received yearly training from Seguin. Morales testified at her deposition that she never had a problem exiting the facility prior to the installation of the mirrors or in the month prior to the collision when one mirror was missing.

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¶ 13 On the day of the collision, Morales had dropped off her foster adults and was exiting the facility parking lot. Morales was driving a vehicle owned and maintained by her husband. She estimated that she was driving 5 miles per hour, though plaintiff testified at his deposition that she was traveling at 9 to 10 miles per hour. Morales stated that as she was exiting, her attention was to the left as she intended to make a left turn out of the parking lot. As she turned to look to her right, the impact occurred. Plaintiff had been riding his bicycle on the sidewalk and he estimated that he was traveling 4 to 5 miles per hour. Plaintiff was transported to the hospital and sustained injuries to his knee, leg, ribs, and ankle, as well as a traumatic brain injury.

¶ 14 In July 2010, Seguin filed a motion for summary judgment. In the motion, Seguin asserted that plaintiff cannot show that Seguin owed plaintiff a duty nor that the negligent acts allegedly committed by Seguin were the proximate cause of his injuries as a matter of law. Seguin also contended that it was not vicariously liable under the doctrine of *respondeat superior* as Morales was not an agent of Seguin. Following briefing by the parties, the trial court granted Seguin's motion for summary judgment.

¶ 15 The trial court, relying on *Commerce Bank v. Youth Services*, 333 Ill. App. 3d 150 (2002), found that a foster parent is not an agent of a foster care or social services agency. The court noted that Morales was driving her own vehicle out of the facility parking lot and her negligence in the operation of her vehicle had nothing to do with her foster care of the disabled adults. The court further held that since the accident occurred on the public walk, not Seguin's property, Seguin owed no duty with regard to the public sidewalk. The trial court noted that it was not alleged that the lack of a mirror prevented Morales from safely operating her vehicle as she

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exited the parking lot. "It was simply not foreseeable that this accident would occur as a result of a lack of a mirror prohibiting Morales from seeing [plaintiff]." The court held that the lack of a mirror, in and of itself, is not a dangerous condition. The court also found "the evidence in the record shows that there is nothing to support proximate cause with respect to the lack of a mirror."

¶ 16 The trial court made a finding pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) that there was no just reason to delay the enforcement or appeal of the order. This appeal followed.

¶ 17 On appeal, plaintiff argues that the trial court erred in granting Seguin's motion for summary judgment because Seguin owed plaintiff a duty to maintain the mirrors on the brick fence as a manner of safe egress from its parking lot and that Morales was an agent of Seguin and acting according to Seguin's direction and control at the time of the accident.

¶ 18 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). We review cases involving summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998). We first consider the plaintiff's count alleging direct negligence by Seguin.

¶ 19 "In order to recover in an action for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach." *Sameer v. Butt*, 343 Ill. App. 3d 78, 86 (2003). "The

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question of the existence of a duty is a question of law and, in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party.” *Sameer*, 343 Ill. App. 3d at 86. “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.” *Ziembra v. Mierzwa*, 142 Ill. 2d 42, 47 (1991).

¶ 20 Plaintiff argues that it was reasonably foreseeable that an accident would occur because the brick fence without an operational circular mirror impaired a motorist's ability to see activity on the sidewalk when exiting Seguin's property. Plaintiff further contends that Seguin chose to build a brick fence which obstructed the view of the sidewalk and then compounded this dangerous condition by establishing policies and procedures to drop-off and pick-up clients.

¶ 21 In contrast, Seguin asserts that it has no duty as a matter of law. Seguin maintains that the brick fence only created a condition, but it was not dangerous without the negligent actions by Morales. Seguin reasons that Morales, the third-party driver, was in the best position to guard against injury to others by exiting the parking lot in a cautious manner.

¶ 22 The supreme court in *Ziembra* considered a similar issue. There, the plaintiff was riding a bicycle along a public roadway. The defendant owned property that abutted a portion of the public roadway, which included an unmarked driveway not visible to people traveling along the roadway due to foliage growing on the defendant's property. As the plaintiff was riding his bicycle, a dump truck exited the defendant's property on the driveway and struck the plaintiff.

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*Ziembra*, 142 Ill. 2d at 45-46. The plaintiff alleged that the defendant was negligent and asserted that the defendant had "a duty to exercise 'reasonable care in the conduct of activities on his property, so as not to cause damage or injury to persons on the adjacent roadway.'" *Ziembra*, 142 Ill. 2d at 46. The plaintiff further alleged that the defendant breached this duty and he was injured as a proximate cause of one or more of the alleged breaches by the defendant. *Ziembra*, 142 Ill. 2d at 46.

¶ 23 In considering the defendant's duty, the supreme court pointed out that "plaintiff never entered defendant's property, nor did he come into contact with any condition on defendant's land. Even though the accident occurred entirely on [the roadway], plaintiff seeks to impose a duty on defendant to guard against this type of accident, based upon the relationship between a traveler on a public highway and the owner of land adjacent to that highway." *Ziembra*, 142 Ill. 2d at 48.

¶ 24 In determining whether defendant's land was unreasonably dangerous to plaintiff, the supreme court first considered if "it was reasonably foreseeable that the condition of defendant's land would result in this type of accident." *Ziembra*, 142 Ill. 2d at 49. The court noted that the appellate court had found that such an accident was highly foreseeable as a result of a vehicle exiting the defendant's driveway. However, the *Ziembra* court noted this statement addressed the foreseeability of the driver's actions causing an injury, not the foreseeability of an injury due to the condition of the land. "The critical inquiry is whether it was reasonably foreseeable that this type of accident would occur as a natural and probable result of foliage obscuring defendant's driveway from the vision of travelers" on the roadway. *Ziembra*, 142 Ill. 2d at 49. The court

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noted that the condition of the land alone was not dangerous, but only became dangerous with the addition of a vehicle exiting the defendant's driveway onto the roadway. *Ziemba*, 142 Ill. 2d at 49-50.

¶ 25 The supreme court noted that the plaintiff alleged in the complaint that the truck driver was negligent when he exited the driveway without warning and failed to yield to traffic on the public roadway. However, the plaintiff did not allege that the foliage prevented the driver from seeing traffic on the roadway. After viewing the facts in light most favorable to the plaintiff, the supreme court held that "[b]ecause the condition was not dangerous, absent this negligent act of the driver, the accident is a reasonably foreseeable result of the condition on defendant's land, only if it was reasonably foreseeable that the driver would violate his statutory duties when pulling out of defendant's driveway." *Ziemba*, 142 Ill. 2d at 50. The court found that under these facts, the defendant could not have reasonably foreseen that a driver would exit his driveway without first determining whether any traffic was approaching on the public roadway. *Ziemba*, 142 Ill. 2d at 52.

¶ 26 The *Ziemba* court further held that even if it was reasonably foreseeable that the condition on the defendant's land would result in an accident, other factors precluded the finding of a duty on the defendant. The court, noting its prior finding that the " 'imposition of a general duty to anticipate and guard against the negligence of others would place an intolerable burden on society,' " concluded that the defendant did not have a duty to guard against the negligence of third-parties since the condition of his land alone did not pose a danger to the plaintiff. *Ziemba*, 142 Ill. 2d at 53 (quoting *Dunn v. Baltimore & Ohio Railroad Co.*, 127 Ill. 2d 350, 366 (1989)).

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The supreme court also concluded that its conclusion was supported by policy considerations because the truck driver, not the landowner, was in the best position to prevent injury. *Ziemba*, 142 Ill. 2d at 53.

¶ 27 Following the decision in *Ziemba*, the court in *Adame v. Munoz*, 287 Ill. App. 3d 181 (1997), held that there was no duty on a landowner to remove an obstruction because the obstruction did not become dangerous until combined with a motorist who failed to proceed toward an intersection without sufficient caution. In that case, the minor plaintiff was riding his bicycle at or near a cul-de-sac parking lot at the same time a motorist was proceeding on the road toward the intersection with the cul-de-sac parking lot. The landowner of the cul-de-sac parking lot placed or permitted trash dumpsters to be located in an area which obstructed the view of motorists in the vicinity of this intersection. The minor plaintiff was struck and injured when the motorist proceeded through the intersection. *Adame*, 287 Ill. App. 3d at 183.

¶ 28 The plaintiff alleged that the placement of the dumpsters impaired visibility and therefore caused the motorist's vehicle to collide with the minor plaintiff, such that the landowner had a duty of reasonable care that the placement of the dumpsters did not create a foreseeable risk of injury. *Adame*, 287 Ill. App. 3d at 184. The reviewing court found that this cause of action was "foreclosed" by the supreme court in *Ziemba*. *Adame*, 287 Ill. App. 3d at 184.

¶ 29 "There is simply no duty in Illinois on the part of landowners to maintain their property in such a way that it does not obstruct the view of travelers on an adjacent highway, and this refusal to find such a duty applies even where the obstruction is an artificial condition." *Adame*, 287 Ill. App. 3d at 186. The *Adame* court noted that the obstruction was "not inherently dangerous like a

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falling tree or branch," but only became dangerous "when combined with a motorist, bicyclist, or pedestrian who, while undoubtedly noticing the view was obstructed at least momentarily, nonetheless failed to proceed toward the intersection with adequate caution in order to avoid a collision." *Adame*, 287 Ill. App. 3d at 186. The court also noted similar policy considerations that the motorist under these circumstances was in the best position to prevent injury as the obstruction to his view would alert him to the need to slow down and proceed with caution. *Adame*, 287 Ill. App. 3d at 187.

¶ 30 Seguin argues that *Ziembra* and *Adame* present "strong controlling precedent" in this case. Seguin further contends that the facts in this case raise a more compelling argument for a lack of duty because both plaintiff and Morales had a degree of unobstructed vision. Plaintiff had an unobstructed view of the sidewalk and driveway such that any vehicles exiting the parking lot would be visible. Additionally, Morales admitted that while exiting the parking lot, she was able to look in one direction and then turn to look in the other direction before the collision occurred. Plaintiff's complaint also alleges a count of negligence against Morales. In that count, plaintiff asserts that Morales carelessly and negligently operated, managed, maintained and controlled her vehicle, carelessly and negligently operated her vehicle at a rate of speed which was greater than reasonable and proper with regard to traffic conditions, carelessly and negligently failed to equip her vehicle with proper brakes, carelessly and negligently failed to give proper warning of the approach of her vehicle, and carelessly and negligently failed to keep a proper lookout while exiting the parking lot and to stop or alter the course of her vehicle to avoid striking the pedestrian.

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¶ 31 Seguin also points out that plaintiff was in violation of a Cicero ordinance. Section 94-541(a) states, in relevant part: "No person, however, shall ride a bicycle on a sidewalk within the business districts." Cicero Municipal Code §94-541(a) (added 1958). Courts have held that a bicyclist riding in violation of a municipal ordinance is not an intended or permitted user of the sidewalk. See *Lipper v. City of Chicago*, 233 Ill. App. 3d 834 (1992); *Prokes v. City of Chicago*, 208 Ill. App. 3d 748 (1991). In both cases, an adult bicyclist was injured while riding a bicycle on the sidewalk in violation of a municipal ordinance prohibiting such use and filed an action against the city for failure to maintain its sidewalks. The reviewing courts concluded that the city did not owe the plaintiffs a duty because they were not intended or permitted users of the sidewalks. *Lipper*, 233 Ill. App. 3d at 838; *Prokes*, 208 Ill. App. 3d at 750. However, the instant case does not involve the liability of a municipality.

¶ 32 Plaintiff argues that *Ziembra* and *Adame* are distinguishable and that the facts in the present case are more analogous to *Raffen v. International Contractors*, 349 Ill. App. 3d 229 (2004) and *Ziencina v. County of Cook*, 188 Ill. 2d 1 (1999). Plaintiff asserts that a fair reading of *Ziembra* shows that one of the key issues was the lack of allegations or evidence that the foliage obstructed the vision of the truck driver exiting the driveway. Instead, the plaintiff in *Ziembra* focused the allegations on the plaintiff's ability to see the driveway. Plaintiff similarly contends that in *Adame*, it was unclear whose view was obstructed and the history of the obstruction, including safety issues.

¶ 33 In *Ziencina*, the plaintiff filed a personal injury action against Cook County and after a jury trial, the plaintiff was awarded \$600,000 in damages. On appeal, Cook County argued that it

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was statutorily immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 1998)). *Ziencina*, 188 Ill. 2d at 8-9.

¶ 34 The evidence at trial showed that the plaintiff was driving north on Ridgeland Avenue when he stopped at the intersection with Vollmer Road. The plaintiff intended to turn left onto Vollmer, but a mound of snow at the southwest corner of the intersection obstructed the plaintiff's view to the west. The plaintiff "edged" into the intersection and was struck by a vehicle traveling from the west on Vollmer Road. *Ziencina*, 188 Ill. 2d at 3-4. The evidence established that the mound of snow was created by snowplows and was not a natural accumulation and stood approximately five feet high and extended for 20 to 25 feet south of Vollmer. The jury found in the favor of the plaintiff and awarded \$1.2 million in damages, but reduced the award by 50% due to the plaintiff's own negligence. *Ziencina*, 188 Ill. 2d at 6-9.

¶ 35 The supreme court, after reviewing the natural accumulation rule, concluded that the mound of snow at issue was an unnatural accumulation and that liability may be imposed on Cook County. *Ziencina*, 188 Ill. 2d at 13. The court found this result to be consistent with the Tort Immunity Act, finding that while a local public entity has no duty to remove a natural accumulation of snow from public property, "if a local public entity undertakes snow-removal operations, it must exercise due care in doing so." *Ziencina*, 188 Ill. 2d at 13-14.

¶ 36 In *Raffen*, the plaintiff's decedent was killed when the car in which he was a passenger collided with another vehicle that was exiting the defendant's driveway. *Raffen*, 349 Ill. App. 3d at 231. The plaintiff's complaint alleged that the decedent's sister was driving north on Frontage

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Road in Elmhurst when her car collided with another vehicle exiting the defendant's driveway.

The complaint further alleged that the snow pile prevented the drivers of both vehicles from seeing the other in enough time to prevent an accident. The allegations against the defendant, as the landowner, were that it failed to properly remove snow from its premises, and piled snow at the edge of its property which impaired the visibility of vehicles entering and exiting the defendant's property. *Raffen*, 349 Ill. App. 3d at 231-32. The defendant filed a motion to dismiss the plaintiff's complaint, which the trial court granted. *Raffen*, 349 Ill. App. 3d at 232.

¶ 37 On appeal, the reviewing court considered the foreseeability of such an occurrence and held that it was reasonably foreseeable for an accident to take place. "[C]ommon sense tells us that a snow pile large enough to block one's view of oncoming traffic may indeed interfere with a motorist's ability to see cross-traffic and avoid an accident. We believe that a reasonably thoughtful person piling snow at the edge of a frontage road would take that into account and would alter his actions accordingly." *Raffen*, 349 Ill. App. 3d at 233-34.

¶ 38 The *Raffen* court relied on *Ziencina* and found that it could not conclude that the decedent's death was unforeseeable. The court also distinguished its case from *Ziemba*. It noted that the phrasing of the allegations was different where the plaintiff in *Ziemba* alleged that his visibility was impaired by the foliage, but in *Raffen*, the plaintiff alleged in her counts against the exiting driver and the defendant that the defendant's snow pile obstructed the view of oncoming traffic. *Raffen*, 349 Ill. App. 3d at 235. The court in *Raffen* further noted that the *Ziemba* court concluded that the truck driver's independent negligent acts caused the accident, whereas in its case, the allegations presented a set of facts in which the defendant's actions in creating the snow

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pile at least contributed to the exiting driver's conduct and the decedent's injury. *Raffen*, 349 Ill. App. 3d at 235.

¶ 39 The court also considered other elements necessary to establish a duty. The court concluded that the injury "was probable" because the snow pile prevented both drivers from seeing each other and the magnitude of the burden to guard against injury on the defendant was minimal because it could have piled the snow in a different location. The court held that the defendant was in the best position to guard against the decedent's death because it was in the best position to prevent hazards as it also used the driveway to enter and exit its property. *Raffen*, 349 Ill. App. 3d at 235-36.

¶ 40 Here, plaintiff contends that it is common sense that the brick fence without an operational circular mirror would interfere with a motorist's ability to see activity on the sidewalk and prevent an accident. Plaintiff also relies on a section of the Restatement (Second) of Torts and municipal ordinances as support for Seguin's duty.

¶ 41 Section 364 of the Restatement (Second) of Torts states:

"A possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm, if

(a) the possessor has created the condition, or

(b) the condition is created by a third person with the possessor's consent or acquiescence while the land is in

his possession, or

(c) the condition is created by a third person without the possessor's consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it." Restatement (Second) of Torts § 364 (1965).

¶ 42 This section of the Restatement was also raised in *Adame*. In that case, the plaintiff asserted that she adequately stated a negligence cause of action based upon the duty of a property owner under section 364 because the dumpsters were an artificial condition on the land that impaired visibility, causing the motorist to collide with the minor plaintiff. *Adame*, 287 Ill. App. 3d at 184. The reviewing court found that *Ziembra* and the additional cases "foreclose application of this section of the Restatement in the manner urged by the plaintiff." *Adame*, 287 Ill. App. 3d at 186.

¶ 43 Here, plaintiff simply quotes the Restatement and then states that the brick fence was a structure that Seguin knew, based on its installation of the circular mirrors, created an unreasonable risk of harm. Plaintiff does not assert how Seguin would be subject to liability under the Restatement nor how a duty has been imposed on Seguin under the Restatement. Further, we agree with the conclusion reached by the reviewing court in *Adame* that *Ziembra* does not permit this interpretation of the Restatement for the imposition of a duty against a landowner.

¶ 44 Additionally, plaintiff cites two Cicero ordinances. Section 22-318 states: "No fence shall be constructed which by nature of the material used for its construction or by its location

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would impair public protection services or would impair public safety by obstructing the vision of persons using the streets, sidewalks or driveways adjacent to the lot upon which the fence is proposed to be constructed." Cicero Municipal Code § 22-318 (added Aug. 10, 1999). Section 22-322(b) states: "The property owner shall be responsible for the maintenance of any fence located on his property. Any fence which is not maintained in a safe condition according to the director of code enforcement may be declared a nuisance." Cicero Municipal Code § 22-322 (added Aug. 10, 1999).

¶ 45 Seguin contends that it is exempt from section 22-318 because the brick fence was constructed prior to the enactment of the ordinance. Section 22-324 allowed nonconforming fences in existence prior to the enactment to remain. Cicero Municipal Code § 22-324 (added Aug. 10, 1999). However, the record is unclear when the brick fence was constructed. Seguin asserts that the brick fence existed in 1997 or 1998 because both Morales and Sandoval stated at their depositions that the fence was present when they began working with Seguin. In contrast, Foley answered in one of plaintiff's interrogatories that the fence was built in 2001, which is after the enactment of section 22-318. Plaintiff cites *O'Neil v. Krupp*, 226 Ill. App. 3d 622 (1992), as support that the violation of a statute or ordinance to protect human life or property is *prima facie* evidence of negligence.

¶ 46 In *O'Neil*, the plaintiff, as administrator of his deceased son's estate, brought a wrongful death action against a motorist and property owner. The plaintiff stated that his son was riding a bicycle through an intersection in Mendota, Illinois, when he was struck and killed by a motorist. The motorist's vision was allegedly impaired by shrubs growing on the property owner's land. In

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his complaint, the plaintiff alleged that two Mendota ordinances which regulated the location and growth of shrubs and trees on land near intersections imposed a duty on the property owners.

The plaintiff further alleged that the property owner breached this duty by allowing their shrubs to be overgrown in violation of the ordinance and that breach proximately caused the injury to plaintiff. *O'Neil*, 226 Ill. App. 3d at 622-24.

¶ 47 On appeal, the property owners argued, and the plaintiff conceded, that there was no common law duty in Illinois on a landowner to remove foliage on his property so that motorists approaching an intersection can see other intersecting motorists. *O'Neil*, 226 Ill. App. 3d at 624-25. However, "[i]t is well established in Illinois that a violation of a statute or ordinance designed to protect human life or property is *prima facie* evidence of negligence." *O'Neil*, 226 Ill. App. 3d at 625 (citing *Dini v. Naiditch*, 20 Ill. 2d 406, 417 (1960); *Davis v. Marathon Oil Co.*, 64 Ill. 2d 380 (1976)). "A party injured by such a violation may only recover by showing that the violation proximately caused his injury and that the statute or ordinance was intended to protect a class of persons to which he belongs from the kind of injury that he suffered." *O'Neil*, 226 Ill. App. 3d at 625 (citing *Barthel v. Illinois Central Gulf Railroad Co.*, 74 Ill. 2d 213, 219-20 (1978)). The reviewing court held that the plaintiff had sufficiently stated a cause of action against the property owners because the ordinances were designed to protect people, including the plaintiff's decedent, from injury resulting from accidents at intersections with obstructed visibility. The court found that whether an alleged violation of ordinance proximately caused the injury was a question of fact for the jury. *O'Neil*, 226 Ill. App. 3d at 627.

¶ 48 In the present case, plaintiff did not allege violations of the Cicero ordinances in his

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complaint. He argues in his brief that the ordinances created a statutory duty that Seguin failed to repair the mirrors and there was no unknown or unfair burden on Seguin at the time of the accident. Plaintiff has not asserted a separate basis for negligence based on a violation of the city ordinances. He has not argued that he was part of the class of persons the ordinance was intended to protect nor has he argued that a violation of the ordinance proximately caused his injuries. Since plaintiff failed to allege a violation of the Cicero ordinances as a basis for negligence in his complaint, he has forfeited any argument that a duty exists under the ordinances.

¶ 49 Moreover, plaintiff has failed to argue how Seguin has violated the Cicero ordinances. In his response to Seguin's summary judgment motion and in his brief on appeal, plaintiff cites to two ordinances and then contends that "[i]t is clear from the depositions testimony that Seguin was responsible for maintaining the wall and mirrors. Equally clear, is that Seguin and its employees knew the mirrors were installed as a safety measure to improve visibility that the brick wall obscured." Plaintiff never refers to any specific portions of the depositions to support his conclusion. Plaintiff, in his brief before this court, cites *O'Neil*, but never discusses how the Cicero ordinances apply to the proposition that a violation of an ordinance designed to protect human life is *prima facie* evidence of negligence. Plaintiff's cursory reliance on the Cicero ordinances is insufficient to base a claim of negligence on a violation of these ordinances nor has plaintiff directly asserted that a violation of these ordinances was evidence of Seguin's negligence. Therefore, we find that plaintiff has failed to present a claim of negligence based on a violation of Cicero ordinances.

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¶ 50 To the extent that plaintiff alleges in his complaint that Seguin was negligent in the maintenance of the mirrors attached to the fence and the accident occurred as a result of this negligence, these allegations are in essence a nonfeasance claim for a voluntary undertaking. Plaintiff contends that Seguin owed him a duty because it voluntarily undertook the service of installing mirrors on the fence, but failed to properly maintain the mirrors, causing his injury.

¶ 51 "Generally, pursuant to the voluntary undertaking theory of liability, 'one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking.' " *Wakulich v. Mraz*, 203 Ill. 2d 223, 241 (2003) (quoting *Rhodes v. Illinois Central Gulf Railroad*, 172 Ill. 2d 213, 239 (1996)). The duty of care is limited to the extent of the voluntary undertaking and is to be construed narrowly. *Lewis v. Chica Trucking, Inc.*, 409 Ill. App. 3d 240, 253 (2011). The Restatement (Second) of Torts, which has been adopted by Illinois courts (*Wakulich*, 203 Ill. 2d at 243), states:

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the

risk of such harm, or

(b) the harm is suffered because of the other's

reliance upon the undertaking." Restatement (Second) of  
Torts § 323, at 135 (1965).

¶ 52 "The voluntary undertaking doctrine applies to both misfeasance—performing the undertaking negligently—and to nonfeasance—failure to perform the undertaking." *Lewis*, 409 Ill. App. 3d at 254. Here, plaintiff's allegations against Seguin would fall under nonfeasance.

¶ 53 However, "a person who has gratuitously assumed to protect others against injury is under no obligation to continue that protection indefinitely." *Chisolm v. Stephens*, 47 Ill. App. 3d 999, 1006 (1977); see also *Lewis*, 409 Ill. App. 3d at 255. "In cases of nonfeasance, a plaintiff's reliance on the defendant's promise is 'an independent, essential element' for liability in a case of a voluntary undertaking." *Lewis*, 409 Ill. App. 3d at 256 (quoting *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 997 (2005)). "A plaintiff's reliance is reasonable where 'there is a deceptive appearance that performance had been made, or where a representation of performance has been communicated to plaintiff by defendant, or where plaintiff is otherwise prevented from obtaining knowledge or substitute performance of the undertaking. But, to justify reliance, plaintiff must be unaware of the actual circumstances and not equally capable of determining such facts.' "*Lewis*, 409 Ill. App. 3d at 256 (quoting *Chisolm*, 47 Ill. App. 3d at 1007).

¶ 54 In the present case, no duty can be found because neither plaintiff nor Morales relied on a promise by Seguin to maintain the mirrors. Further, Morales was not prevented from seeing that the mirror had not been replaced. Morales testified at her deposition that she knew the mirror had been gone for at least a week prior to the accident. Morales did not notify or complain to anyone at Seguin regarding the missing mirror and its effect on her visibility while exiting the

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lot. As noted above, Seguin was not obligated to continue its voluntary undertaking indefinitely. Accordingly, Seguin's nonfeasance did not create a duty to plaintiff or Morales.

¶ 55 After reviewing the relevant authority and the evidence in the light most favorable to plaintiff, we find that under these facts Seguin could not have reasonably foreseen that Morales would exit the parking lot without ascertaining whether both directions were clear on the sidewalk. The brick fence with one missing mirror was not in and of itself a dangerous condition. It only became dangerous once combined with the independent, negligent acts of Morales. We believe the circumstances of this case are analogous to *Ziamba* and *Adame*. The evidence showed that Morales knew the mirror was missing but proceeded out of the driveway at 5 to 10 miles per hour without stopping to see if the sidewalk was clear before continuing to the street. She stated that she looked to the left as she intended to make a left turn and as she turned to look to the right, the collision occurred. Morales was in the best position to prevent injury. Seguin does not owe a duty to plaintiff for injuries that occurred as a result of Morales' violation of her standard of care.

¶ 56 Moreover, plaintiff cannot establish proximate cause because the brick fence was a condition, not a cause. The term "proximate cause" involves two components: cause in fact and legal cause. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999). Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage, but a defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. *Galman*, 188 Ill. 2d at 258. "A defendant's conduct is a material element and a substantial factor in bringing about an

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injury if, absent that conduct, the injury would not have occurred." *Galman*, 188 Ill. 2d at 258.

Whereas, "legal cause" is a question of foreseeability and "[t]he relevant inquiry here is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct." *Galman*, 188 Ill. 2d at 258.

¶ 57 However, "if the negligence charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury." *Galman*, 188 Ill. 2d at 257. "The test that should be applied in all proximate cause cases is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence." *Galman*, 188 Ill. 2d at 257.

¶ 58 In *Galman*, a tanker truck was parked 41 feet from an intersection on a four-lane road. Truck parking was permitted at specified times of the day, but was not permitted at the time the truck was parked. A pedestrian subsequently crossed the four-lane road, not at the pedestrian crosswalk, but opted to cross mid-block in front of the parked truck. She was struck by another vehicle and died as a result. *Galman*, 188 Ill. 2d at 254-55. The pedestrian's estate sued the truck driver, the truck's owner and the driver of the vehicle that struck the pedestrian for negligence. *Galman*, 188 Ill. 2d at 255. Following a trial, the jury awarded the plaintiff \$1 million, but reduced the award to \$550,000 after finding the pedestrian to be 45% at fault. The truck's driver and owner sought a judgment notwithstanding the verdict, which was denied. *Galman*, 188 Ill. 2d at 255.

¶ 59 On appeal, the truck's driver and owner argued that the parked truck was a passive

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condition that provided an opportunity for the causal agencies, the pedestrian's jaywalking and the negligent driving of the vehicle that struck her. The plaintiff asserted that the parked truck was cause in fact because the driver of the vehicle that struck the pedestrian could not go to her right to avoid a collision and it was also legal cause because the truck driver should have foreseen that students might be crossing the street after school and the driver of the vehicle might need both lanes of the street. *Galman*, 188 Ill. 2d at 257-58. The supreme court concluded that the parked truck was the cause in fact of the pedestrian's injuries, but it was not the legal cause. The court found that it was not reasonably foreseeable that a pedestrian would forego crossing the street at the marked crosswalk and walk to the middle of the block before jaywalking in front of the parked truck. *Galman*, 188 Ill. 2d at 260-61.

¶ 60 Here, the question is whether it was reasonably foreseeable that the absence of one mirror on the brick fence would result in Morales allegedly failing to stop, yield to pedestrian traffic, and carefully drive out of the driveway. We find that it was not. The missing mirror on the fence only created the condition, Morales' failure to exit without first determining whether her path was clear was the cause. The subsequent, independent act of a third-party, Morales, was the cause of the collision. Accordingly, plaintiff cannot establish that the lack of a mirror proximately caused his injuries.

¶ 61 Since plaintiff cannot establish either a duty or proximate cause in his negligence count against Seguin, the trial court properly granted summary judgment in favor of Seguin.

¶ 62 Next, we consider the count alleging Seguin is negligent under a theory of *respondeat superior* for Morales' conduct. Plaintiff asserts that Morales was acting as Seguin's agent when

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the collision occurred, and thus, Seguin is liable for Morales' conduct. Seguin maintains that foster parents are not agents of foster agencies and Morales' conduct cannot be imputed to Seguin.

¶ 63 " 'Although the terms "principal" and "agent" and "employer" and "employee" may have separate connotations for purposes of contract authority, such distinctions are immaterial for tort purposes.' " *Lang v. Silva*, 306 Ill. App. 3d 960, 972 (1999) (quoting *Moy v. County of Cook*, 159 Ill. 2d 519, 532 (1994)). "The doctrine of *respondeat superior* can be invoked where either relationship exists, allowing for a principal or employer to be held liable for acts committed by an agent or employee acting within the scope of his agency or employment." *Lang*, 306 Ill. App. 3d at 972. However, one is generally not liable for the acts or omissions of an independent contractor. *Lang*, 306 Ill. App. 3d at 972. "An independent contractor is hired to achieve a certain result but is not controlled in the method of reaching that result." *Commerce Bank v. Youth Services of Mid-Illinois, Inc.*, 333 Ill. App. 3d 150, 153 (2002). Whereas, in an agency relationship, the principal has the right to control the manner in which the agent performs his or her work. *Commerce Bank*, 333 Ill. App. 3d at 153.

¶ 64 "In determining whether an agency relationship exists, the following factors should be considered: the right to control the manner in which the work is performed, the right to discharge, the method of payment, whether taxes are deducted from the payment, the level of skill required to do the work, and the furnishing of the necessary tools, materials, and equipment." *Commerce Bank*, 333 Ill. App. 3d at 153. Though no single factor is determinative, the right to control the manner in which the work is performed is considered the predominant

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factor. *Lang*, 306 Ill. App. 3d at 972. "The question of whether the parties' relationship is that of principal and agent or independent contractor is a question of fact unless the relationship is so clear that it is undisputable." *Commerce Bank*, 333 Ill. App. 3d at 153.

¶ 65 In *Commerce Bank*, a foster child died while enclosed in a closet at the home of her foster parents. The child had been placed in the foster parents' care by Youth Services of Mid-Illinois, Inc. (Youth Services). Youth Services had been hired by the Department of Children and Family Services (DCFS) to provide the services that DCFS would normally provide. It was Youth Services' responsibility to find the foster parents, monitor the foster children in compliance with DCFS regulations and Illinois law, and regulate the licensing requirements for foster parents under DCFS regulations and Illinois law. *Commerce Bank*, 333 Ill. App. 3d at 151-52.

Commerce Bank filed suit on behalf of the foster child's estate against the foster parents and Youth Services. The complaint alleged Youth Services' own negligence and under a theory of *respondeat superior* for the foster parents' actions. Following a trial, the jury found the foster mother was negligent in her care of the foster child and that an agency relationship existed between the foster parent and Youth Services, making Youth Services liable for the foster parent's negligence. Youth Services sought a judgment notwithstanding the verdict and filed a motion for a new trial, which were denied. *Commerce Bank*, 333 Ill. App. 3d at 152.

¶ 66 On appeal, Youth Services argued that the trial court should have granted its motion for a judgment notwithstanding the verdict because the evidence did not support the jury's finding that a principal-agent relationship existed between Youth Services and the foster parent. *Commerce Bank*, 333 Ill. App. 3d at 154. The reviewing court noted that there was testimony and evidence

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that Youth Services did control much of the foster parents' day-to-day supervision and parenting of the foster children.

"[Youth Services] could arrive at the [foster parents'] home any time, could instruct them when and how often to feed the children, to clean up the house, to change the children's bed linen, where the children could sleep, and how much allowance the children get, could direct supervision of the children, and could prohibit corporal punishment, among other things. If the [foster parents] failed to comply with defendant's instructions in any respect, defendant could remove the children from the home." *Commerce Bank*, 333 Ill. App. 3d at 155.

¶ 67 Nevertheless, the court found that in every area where Youth Services could exercise control over the foster parents, it was monitoring the licensing standards set by DCFS regulations. *Commerce Bank*, 333 Ill. App. 3d at 155. The court relied on the supreme court's decision in *Nichol v. Stass*, 192 Ill. 2d 233 (2000).

¶ 68 In *Nichol*, the supreme court considered a similar issue when a foster child died while in the care of foster parents. The birth parents filed an action against the foster parents, and the foster parents asserted a claim of sovereign immunity because they were acting as agents for the State. *Nichol*, 192 Ill. 2d at 234-36. The foster parents based their agency argument on the same requirements from DCFS concerning their care of the foster child. However, the supreme court did "not believe that the preceding measures are anything more than licensing requirements or

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that they serve to establish the defendants' role as state employees or agents." *Nichol*, 192 Ill. 2d at 239.

¶ 69 The court in *Commerce Bank*, noting the conclusion in *Nichol*, found that Youth Services' interaction with the foster parents was "dictated by DCFS regulations." *Commerce Bank*, 333 Ill. App. 3d at 155.

"By merely acting in accordance with DCFS regulations, [Youth Services] did not have the right to exercise any more control over the [foster parents] than DCFS would have had if it were providing services directly. The defendant in this case was essentially acting in DCFS' place. Pursuant to the Illinois Supreme Court's decision in *Nichol*, if there is no proof that [Youth Services] was exercising control over the [foster parents] beyond merely subjecting them to DCFS regulations, then an agency relationship has not been proved in this case." *Commerce Bank*, 333 Ill. App. 3d at 155-56 (citing *Nichol*, 192 Ill. 2d at 240).

¶ 70 The *Commerce Bank* court then held that since there was no evidence that Youth Services subjected the foster parents to any day-to-day supervision beyond the DCFS regulations, the jury's finding of an agency relationship could not stand. The reviewing court reversed the trial court's denial of the motion for judgment notwithstanding the verdict. *Commerce Bank*, 333 Ill. App. 3d at 156.

¶ 71 Here, plaintiff argues that Morales was an agent of Seguin and was acting under its

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direction and control at the time of the accident. Plaintiff further contends that the opposite conclusion from *Commerce Bank* should be reached in this case because Seguin directed the location of the client drop-off, which went beyond an licensing or regulatory requirements. Additionally, plaintiff asserts that it is reasonable to infer that Seguin controlled the operation of Morales' car by instructing Morales where to drop off a client at a particular location on the premises, sufficient to create liability. Essentially, plaintiff's argument is that Seguin is responsible for Morales' negligence because it required her, as a foster parent, to enter through one driveway to drop off her foster adults for services at a specified time, and then exit through a separate driveway. We disagree.

¶ 72 Seguin's actions in providing a specific entrance and exit for its parking lot and requiring foster parents to drop off clients for services at a specified time does not create a principal-agent relationship. Significantly, Morales was operating a vehicle owned and maintained by her husband. Seguin had no control over her operation of the vehicle. The collision occurred while Morales was operating her vehicle as she exited Seguin's parking lot after dropping off her foster adults for services. Seguin did not provide her vehicle nor did it monitor its maintenance. Seguin was not directing the flow of traffic out of the parking lot. As the trial court found in granting Seguin's motion for summary judgment, the facts of this case are "even more compelling than those in *Commerce Bank* with regard to a lack of an agency relationship." There, a foster child died while under the care of a foster parent. Here, Morales was driving her own vehicle out of a driveway on her free time after dropping clients off for services. Simply designating an exit is not enough to establish an agency relationship. Accordingly, plaintiff's count against Seguin

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under the theory of *respondeat superior* must fail. Though the determination of an agency relationship is generally a question of fact, the evidence of the lack of a relationship was undisputable and summary judgment was properly granted in favor of Seguin.

¶ 73 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 74 Affirmed.