2012 IL App (1st) 110923-U

FIRST DIVISION
March 26, 2012

No. 1-11-0923

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).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL FLORES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 08 L 14159
ILLINOIS COMMUNITY COLLEGE DISTRICT	)	
NO. 515, a/k/a PRAIRIE STATE COLLEGE,	)	Honorable,
	)	Irwin J. Solganick,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

Held: In this slip-and-fall negligence case, summary judgment in favor of defendant is reversed where there is a disputed question of material fact as to whether plaintiff fell on ice which formed naturally as a result of freezing rain.

¶ 1 Plaintiff, Daniel Flores, brought this action to recover damages for injuries he suffered as a result of slipping and falling on ice while on the property of defendant, Illinois Community College District No. 515, a/ka Prairie State College (Prairie State). The trial court granted summary judgment in favor of defendant, having found there was no disputed issue of fact that plaintiff slipped on a natural accumulation of ice. We reverse.

¶ 2 I. BACKGROUND

¶ 3 In his complaint, plaintiff alleged that as he was properly on the grounds of Prairie State on February 9, 2008, Prairie State owed him a duty of care to keep its sidewalks and parking lots safe. Plaintiff claimed Prairie State breached its duty and was negligent in its failure to remove unnatural accumulations of snow and ice. As a result of this negligence, plaintiff fell and suffered injuries. In its answer, Prairie State denied it acted negligently and that its conduct was a proximate cause of plaintiff's injury. Prairie State also pled certain affirmative defenses, including immunity from liability under section 3-105 of the Illinois Tort Immunity Act (Act). 745 ILCS 10/3-105 (West 2010).

¶ 4 The parties engaged in discovery and took depositions. In his deposition, plaintiff testified that on Saturday, February 9, 2008, he went to Prairie State for a skilled labor employment meeting along with Ed Schaflein and Jessie Oliva. Mr. Oliva drove them in a small pickup truck. Plaintiff said the streets were clear of ice and snow at that time. The weather was cold and sunny with no precipitation. Plaintiff did not know if the temperature was above or below 32 degrees that morning. In response to questions about the weather on the night of February 8 through the morning of February 9, plaintiff testified as follows:

> "Q. Okay. Can you tell me anything about what the weather was the night before February 9th?
>
> A. It was cold.
>
> Q. Okay. Any precipitation: snow, rain?
>
> A. No."

¶ 5 Arriving at Prairie State at about 9:40 a.m. or 9:45 a.m., Mr. Oliva parked his truck in the middle of lot C. Plaintiff and Mr. Schaflien walked together across the parking lot to a curved sidewalk, a distance of about a block. Mr. Oliva had returned to the truck for papers. The parking lot was clear of ice and snow and its surface was level. The sidewalks between lots C and D formed ovals and had no curbs. Snow was piled three-feet high in the non-paved areas in the center of the sidewalk area, and extended onto the sidewalks. Plaintiff experienced no difficulties walking across the parking lot. When plaintiff reached the sidewalk, he placed his left foot on the sidewalk and fell forward onto his left knee and hands. He felt the sidewalk was cold and saw what he described as "clear" and "black ice." The ice covered "almost the whole width of the sidewalk," from the snow pile to the parking lot and from "line to line" of the sidewalk square where he fell. Plaintiff did not see the ice until he "hit the pavement."

¶ 6 During his deposition, plaintiff was shown pictures which were taken on February 23, 2008. He testified that a picture identified as exhibit 11 depicted a portion of the Prairie State sidewalk, which was near where he fell, and showed what "seems to be ice from the sun melting the snow." He testified there was more snow on the sidewalk, and the snow mound was higher on February 9, 2008, than shown in exhibit 11. Plaintiff broke his knee cap.

¶ 7 Mr. Schaflein, a longtime friend of plaintiff, testified he and plaintiff walked about a "half block" across the parking lot to a sidewalk. He testified there was no ice on the parking lot and he did not have to walk "carefully." Mr. Schaflein asserted there were snow piles about three-feet high, covering about half of the sidewalk. His deposition includes the following exchange:

"Q. Okay. And as you approached that sidewalk, what did you see relative to that

sidewalk?

A. Just looked like a wet spot, like I said, where they had plowed the snow. And it looked like the snow had melted and part of the sidewalk was–looked wet.

Q. Okay.

A. It was a big patch there.

Q. All right. The part that is wet or as you were coming up on the sidewalk, the part that looks wet, is that the part that [plaintiff] fell on?

A. Yes."

Mr. Schaflein testified plaintiff fell on a "wide" and "big" patch of ice, which covered two squares of the sidewalk. He said, as he approached the sidewalk, it did not look like ice, but a wet spot. Mr. Schaflein did not remember if it had rained the night before. He described the morning's weather as "somewhat sunny," but cold and without precipitation.

¶ 8 Ronald Leet, director of physical plant and facilities for Prairie State, testified defendant's employees are responsible for snow removal. He testified that snow removal from the parking lots is to be completed without leaving snow piles on the sidewalk. The snow is to be plowed off the sidewalk and onto the grass. Written snow removal procedures as to lots C and D provide:

"Snow can be pushed toward any island and grass area available. Under no condition should snow be pushed toward the sidewalks. Plowing should begin nearest to the sidewalks and building and work outward ***."

Mr. Leet further testified that Prairie State employees are to salt sidewalks to keep them "clear and free."

¶ 9 John Schmidt, Prairie State's supervisor of roads and grounds, prepared the written snow and ice removal procedures for Prairie State in 1990. He testified that on February 9, 2008, either Loui Patrizi or Mark Myers would have been responsible for the removal of snow or ice from the sidewalk where plaintiff fell. Snow is to be removed from parking lots C and D, plowed onto the island of grass between the sidewalks, and compacted. Mr. Schmidt testified that the grassy area by the sidewalks is not always large enough to hold all the plowed snow. The maintenance personnel are to salt icy areas on sidewalks.

¶ 10 Mark Green, a grounds keeper with Prairie State, had primary responsibilities for plowing lots C and D during the week, Monday through Friday. He used a truck with a plow. He said any snow on the sidewalks where plaintiff fell is removed by the trucks plowing the parking lots. Mr. Green explained, the sidewalks have no curbs, and are "really just an extension of the parking lot." Mr. Green further testified as to plowing snow by the portion of the sidewalk where plaintiff fell:

> "[i]f the snow is not too deep and you can get the snow piled up into the grassy area ideally you would want it off that sidewalk, yes."

¶ 11 Loui Patrizi, a general maintenance worker with primary responsibility for plumbing work inside the buildings at Prairie State, also assisted the grounds crew with snow removal. When working on a Saturday, his duties might include clearing sidewalks using a tractor with a snow blower on front and a salt spreader on back. He did not receive training as to snow and ice removal, but he knew sidewalks should be cleared of snow and ice.

¶ 12 Mr. Patrizi worked on February 9, 2008, arriving an hour early for his shift at six a.m. During the prior week, "close to a foot" of snow had fallen. As to the condition of the campus on

the morning of February 9 when he arrived, Mr. Patrizi testified:

> "That day in particular we had a rain that had occurred. The entire campus was full of ice. Every square inch of everything was full of ice at the campus."

After seeing the ice, Mr. Patrizi met with Mark Myers, a Prairie State grounds keeper. He testified to their conversation as follows:

> "We both said *** the ice is that bad, let's go ahead and start a little bit earlier and just try to get this ice out of the way *** every square inch of the campus and the property was covered with this slick ice that day."

Mr. Patrizi immediately began to spread salt on the sidewalks–including the sidewalks for lots C and D–and continued to do so until 11:15 a.m. Mr. Patrizi saw an ambulance that morning near a portion of sidewalk where he "never [had] personally salted or used the snow blower." He explained that this particular area of the sidewalk would become obstructed by plowed snow.

¶ 13 Mr. Patrizi did not know how much rain fell during the night of February 8 through February 9, 2008, nor did he know when the rain fell. He "want[ed] to say 3 o'clock [a.m.] it started bad." However, Mr. Patrizi was not awake at that time.

¶ 14 Mr. Myers testified he was responsible for maintaining all of the parking lots on Saturdays and that he worked on February 9, 2008. He recalled that during the night before, there was "freezing rain, the temperatures dropped." It was not raining when he went to bed, about 11:00 p.m. or 11:30 p.m., nor was it raining when he got up for work at 5:45 a.m. However, Mr. Myers awoke during the night and noticed light rain coming down. Mr. Myers lives about one and one-half miles from Prairie State. He said the roads on the way to the school had been salted, and so had no ice.

After arriving at Prairie State, he saw that all of the sidewalks and parking lots on the campus were covered with ice about one-tenth of an inch thick. After speaking to Mr. Patrizi, Mr. Meyers salted the parking lots from 7:00 a.m. to about 7:45 a.m. that morning. After doing other types of work, he started applying salt to the lots again about 9:30 a.m. because "the salt had dissipated, some of the ice started to dissipate from the salt being applied."

¶ 15 Mr. Myers testified that when he removes snow from lots C and D, he pushes the snow onto a sidewalk toward the median, but the sidewalk may become "obstructed" with snow. He testified that on Saturdays, Mr. Patrizi was responsible for clearing the sidewalk in the area where plaintiff fell.

¶ 16 Prairie State moved for summary judgment arguing that plaintiff slipped and fell on a natural accumulation of ice which had formed as a result of freezing rain. In support of its motion for summary judgment, Prairie State submitted portions of the above-discussed depositions. Plaintiff, in response to the motion, argued that he fell on an unnatural accumulation of ice, and submitted additional portions of these same depositions. Plaintiff also presented his affidavit and certified copies of meteorological records for February 2008, Chicago Midway Airport, from the United States Department of Commerce National Climatic Data Center. The meteorological records showed that about twelve inches of snow fell between February 1 and February 8, 2008. For the twenty-four hour reporting period for February 8 (from midnight February 7 to midnight February 8), there was .12 inches of "Rain, melted snow, etc.," and .4 inches of "Snow, ice pellets, hail." Trace amounts of precipitation fell during the twenty-four hour reporting period for February 9. The report also included a hand-written notation regarding February 8 indicating "light snow 9:13 p.m. to 10:40

p.m." In general, the reports indicate that temperatures from February 1 to February 8, 2008, ranged from 24 degrees to as high as 43 degrees. On February 8, temperatures of 33 degrees and higher were recorded from noon, reaching a high of 39 degrees at 9:00 p.m. that night. Temperatures then dropped into February 9, falling to 32 degrees at 4:00 a.m., 30 degrees at 5:00 a.m. and 28 degrees at 7:00 a.m. that morning.

¶ 17 Plaintiff's affidavit stated:

> "1. Affiant is the named plaintiff in the above referenced lawsuit
>
> 2. Affiant would state that, if called to testify, and in supplement of his October 28, 2009 discovery deposition, that the black ice patch on which he fell directly extended in an unbroken fashion from the plowed three (3) foot snow pile that was partially obstructing the subject sidewalk, which snow pile and patch was similar in configuration to that depicted in Flores' Exhibit No. 11. (Attached hereto and incorporated by reference herein, as Exhibit "A", is a copy of the said Exhibit).
>
> 3. Affiant would state that the ice patch on which he fell appeared to be smooth and clear melted and refrozen snow that directly extended from the plowed snow pile which partially obstructed the sidewalk on which he fell."

¶ 18 The circuit court found that the testimony of Mr. Patrizi and Mr. Myers–relating to the freezing rain and resulting ice throughout the campus–was unrebutted. The trial court further found plaintiff offered only "supposition" that the ice on the sidewalk where he fell formed as a result of snow melting from the nearby piles of plowed snow. The trial court therefore entered an order granting Prairie State's motion for summary judgment, and Plaintiff has now timely appealed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiff contends the trial court improperly granted summary judgment in favor of Prairie State.

¶ 21 As an initial matter, we note that the complete deposition transcripts were not filed in this case pursuant to Supreme Court Rule 207(b). Ill. S. Ct. R. 207(b) (eff. Jan. 1, 1996); see *Ideal Tool & Manufacturing v. One Three Six, Inc.*, 289 Ill. App. 3d 773, 776 (1997) (quoting Urban v. Village of Inverness, 176 Ill. App. 3d 1, 6 (1988)) (" '[T]he rule allowing the use of deposition testimony in support of a motion for summary judgment contemplates that the deposition relied upon is one which has properly been made a part of the court record.' "). The parties submitted only portions of the deposition transcripts. Furthermore, copies of all the exhibits used at the depositions are also not included in the record. The incompleteness of the deposition evidence leads to some confusion as to the meaning of the deponents' testimony. The parties did not object to the state of the record in the trial court, nor do they do so on appeal and have therefore forfeited any issue as to the record's inadequacies. Our analysis therefore refers only to those facts which are both clear and included in those portions of the transcripts included in the record.

¶ 22 A. Standard of Review

¶ 23 Summary judgment is properly granted where the pleadings, depositions, and admissions on file, together with any affidavits, indicate 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). Although a drastic means of disposing of litigation, summary judgment is nonetheless an appropriate measure to expeditiously dispose of a suit when the moving party's right to the judgment is clear and free

from doubt. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009).

¶ 24 The "defendant moving for summary judgment bears the initial burden of production." *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may satisfy this "burden of production in two ways: (1) by affirmatively showing that some element of the case must be resolved in his favor, [citation omitted]; or (2) by establishing 'that there is an absence of evidence to support the nonmoving party's case.' " *Id*. When the defendant has met this initial burden, the burden shifts to "the plaintiff to present a factual basis which would arguably entitle her to a favorable judgment." *Id*. A plaintiff is not required to prove her case in response to the motion for summary judgment, but must present evidentiary facts to support the elements of the cause of action. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009). " '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 [him] to judgment as a matter of law.' " *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 689 (2000)).

¶ 25 The court must examine the evidence in the light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001)), and must construe the material strictly against the movant and liberally in favor of the nonmovant. *Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995). When reviewing an order granting summary judgment, "we conduct a *de novo* review of the evidence in the record." *Id*.

¶ 26 B. Negligence Standards

¶ 27 A plaintiff bringing a negligence claim must prove the defendant owed her a duty of care, the defendant breached that duty, and this breach was the proximate cause of her injury. *Krywin v.*

Chicago Transit Authority, 238 Ill. 2d 215, 236 (2010). Summary judgment is properly entered for the defendant where plaintiff fails to establish one of these elements. *Pavlik*, 323 Ill. App. 3d at 1063.

¶ 28 "Under the natural accumulation rule, a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property." *Krywin*, 238 Ill. 2d at 227. Section 3-105(a) of the Act codifies the natural accumulation rule with respect to local public entities. *Id.* at 245-48. (Freeman, J., dissenting, joined by Kilbride, J.); 745 ILCS 10/3-105(a) (West 2010) (provides a public entity is not liable for injuries caused by "effect of weather conditions," including ice or snow, on public ways).

¶ 29 Nevertheless, a property owner who removes snow or ice, must do so in a non-negligent manner and may be liable for injuries that are a consequence of unnatural or artificial accumulations, or where a natural condition that is aggravated by the owner. See *Strahs v. Tovar's Snowplowing, Inc.*, 349 Ill. App. 3d 634, 638-39 (2004). "The mere removal of snow which may leave a natural ice formation remaining on the premises does not of itself constitute negligence[.]" *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012, 1017 (1988). However, a mound of snow created by snow-removal efforts "is properly considered an unnatural accumulation." *Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990, 994 (2002). A plaintiff who claims an ice formation was caused by a pile of snow, "must either show a direct link between defendants' snow piles and the ice that caused her to slip, or she must provide circumstantial evidence through an expert." *Madeo v. Tri-Land Properties, Inc.*, 239 Ill. App. 3d 288, 294 (1992).

¶ 30 C. Discussion

¶ 31 Prairie State brought its motion for summary judgment on the sole basis that the evidence of record "does not indicate anything other than" a finding that the ice upon which plaintiff slipped, was a natural accumulation "due to the weather conditions." Prairie State had the initial burden of production to "affirmatively show" that there was no issue of material fact as to whether, because of freezing rain, ice formed naturally where plaintiff fell. See *Nedzvekas*, 374 Ill. App. 3d at 624. Only if this burden had been met, would plaintiff have had the burden to show that a factual basis arguably exists to show that the ice upon which he fell was an unnatural accumulation. *Id*. The trial court found both that Prairie State had demonstrated–as a matter of law–that the ice accumulated naturally as a result of freezing rain, and that plaintiff had not presented a factual basis to support his claim that the ice was unnatural. Although our decision as to whether defendant met its initial burden of production with respect to the issue of freezing rain proves dispositive, we will review both of the trial court's findings.

¶ 32 Prairie State argues that the testimony of Mr. Patrizi and Mr. Myers, its employees on duty on the morning of February 9, 2008, is uncontroverted and proves there was a freezing rain during the night of February 8 through February 9. As a result, Prairie State asserts it was uncontroverted that the campus was covered with ice on the morning of February 9. However, the record reveals issues of material fact with respect to whether there had been freezing rain during the night prior to plaintiff's fall and the extent of any such rain. Moreover, even if such rain fell there are also issues of fact as to any impact that rain may have had on the surfaces of Prairie State's campus, particularly upon the sidewalk where plaintiff fell.

¶ 33 We first find that the evidence is in conflict regarding whether freezing rain fell during the

night. Mr. Patrizi expressed a belief that it had rained during the night, and "wanted to say" that "it started bad" about 3:00 a.m. in the morning. However, he also testified he was not awake at that time, and had no knowledge of how much rain fell or when it did so. Mr. Meyers stated there was no rain when he went to bed at about 11:00 p.m. or 11:30 p.m., but when he awoke sometime during the night he noticed "light rain" was falling. The meteorological records show there were trace amounts of precipitation between midnight February 8 and midnight February 9, 2008, and included an indication that light snow fell before midnight on February 8, but not rain. Plaintiff testified there had been no precipitation during the night. These inconsistencies in the evidence reveal issues of material fact which must ultimately be resolved by the trier of fact.

¶ 34 The record also reveals disputed issues of material fact as to whether the campus was covered by ice from any freezing rain. Two of defendant's employees did testify that when they arrived at Prairie State between 6:00 a.m. and 7:00 a.m. on February 9, 2008, the entire campus was covered with ice. Mr. Meyers testified the lots needed a second application of salt around 9:15 a.m. because of remaining ice. However, plaintiff and Mr. Schaflein testified the parking lots were clear of ice when they arrived between 9:40 a.m. and 9:45 a.m., and they had no trouble walking a distance across the lots. Before arriving at campus, neither of them had experienced ice around their homes or on the roads to the campus. We note that Mr. Myers also testified the roads were clear of ice when he drove to work, although he said this was because the roads had been salted. Although Mr. Myers and Mr. Patrizi testified as to the generally icy condition of the campus as a whole, the record does not include any testimony from them as to any specific observations of the area of sidewalk where plaintiff fell.

¶ 35 Furthermore, Mr. Myers testified the fluctuating temperatures during the night resulted in the freezing rain. The weather records show temperatures rising above freezing during the night of February 8 through February 9, 2008, with a drop to below-freezing temperatures in the early morning hours of February 9. However, this fluctuation in temperatures could reasonably support either an inference that: (1) during this pertinent time period, it was warm enough for a freezing rain to occur; *or* (2) it was warm enough for the snow piles to melt and then refreeze. "If the facts in the record present more than one conclusion or inference, including one unfavorable to the movant, summary judgment should be denied." *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357 (2000).

¶ 36 Construing the evidence as we must–liberally and in favor of plaintiff–we find defendant has failed to show there were no issues of material fact with respect to its assertion that the ice upon which plaintiff fell was the result of freezing rain which fell the night before. Furthermore, plaintiff has met his burden of providing a factual basis which would arguably support a finding that the ice formed unnaturally.

¶ 37 We find the *Russell* decision instructive. In *Russell*, the appellate court reversed the trial court's grant of summary judgment in the defendant's favor where plaintiff presented evidence that the ice upon which he slipped was in close proximity and contiguous to the piles of snow the defendant had plowed. Although the plaintiff did not actually see the snow melting from the mound, it seemed "clear" to the plaintiff that the "ice got there as a result of the snow melting in liquid form and then being frozen as the temperature lowered." *Russell*, 335 Ill. App. 3d at 992. The appellate court rejected an argument that the plaintiff's testimony regarding the ice constituted mere

assumptions and opinions, stating: "it is within the common knowledge of a person to know what the temperature is on a particular day and that water can melt, freeze, or refreeze depending on the temperature at any given time." *Id*. at 996. Because the plaintiff in *Russell* provided "facts that indicate[d] a nexus between the snow and ice," summary judgment was entered in error. *Id*.

¶ 38 In this case, plaintiff asserts he slipped because Prairie State plowed the snow from the parking lot into mounds which extended onto the sidewalk, and the snow melted and formed the ice upon which he fell. In support of this claim, plaintiff presented evidence that during the week before February 9, 2008, about a foot of snow fell. Prairie State employees testified the snow is removed from lot C to a grassy area adjacent to the sidewalk, and that this sidewalk can become obstructed by the plowed snow. Plaintiff and Mr. Schaflein testified that on February 9, there were mounds of snow which partially covered the sidewalk where plaintiff fell. Plaintiff's affidavit and deposition testimony, as well as the deposition testimony of Mr. Schaflein, described the large ice patch as connected to the plowed snow mound. As discussed above, the meteorological records show that the temperature rose above freezing after midnight on February 8, and then dropped below freezing. Plaintiff also presented a picture which, he said, shows a patch of ice on a portion of sidewalk near where he fell which was formed after some of a nearby snow mound had melted. Mr. Schaflein described the ice upon which plaintiff fell as being melted snow from the pile.

¶ 39 Plaintiff has presented a sufficient evidentiary basis showing a nexus between the unnatural accumulation of plowed snow and the patch of ice upon which he slipped and fell. This showing was sufficient to defeat Prairie State's motion for summary judgment. The order granting Prairie State's motion for summary judgment is therefore reversed.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court is reversed and this cause is remanded for further proceedings consistent with this order.

¶ 42 Reversed and remanded.