FOURTH DIVISION
September 28, 2012

No. 1-11-1671

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOLANTA WERENSKA, Plaintiff-Appellee, v. SAWA'S OLD WARSAW, INC., d/b/a OLD WARSAW & BANQUET, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. 08 L 012820 The Honorable Mary A. Mulhern, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: (1) The defendant's brief on appeal, though it did not technically comply with Illinois Supreme Court Rule 341 (Ill. S. Ct. R. 341(h)(7), (i) (eff. July 1, 2008)) because it lacked proper citations to the record in the argument section, did contain the citations to the record in the statement of facts and contained properly supported argument with citation to authority and thus the defendant's argument was not waived. (2) Granting

summary judgment when discovery is not yet complete is not improper, as section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 2006)) provides that summary judgment can be brought at any time and nothing in the Illinois Supreme Court Rules precludes bringing the motion while discovery is ongoing. (3) Granting summary judgment on the defendant's second motion for summary judgment on the basis of deposition testimony that was available at the time a prior motion for summary judgment is a matter of the court's discretion and in this case there was no abuse of discretion. (4) A second summary judgment motion was not an improper motion to reconsider a prior motion for summary judgment. (5) Granting summary judgment based on any alleged lack of evidence of notice to the defendant of the dangerous condition was an error as a matter of law because plaintiff alleged that the defendant was responsible for the dangerous condition on the premises and so notice was not an element of plaintiff's case, and in any event even under a notice theory there was a genuine issue of material that the defendant in fact had notice. (6) To the extent the circuit court applied the *de minimus* doctrine in granting summary judgment, this was an error of law because the rule does not apply to premises indoors. (7) Granting summary judgment was improper because defendant failed to meet its burden of showing that it was either entitled to judgment as a matter of law or that there was an absence of disputed issues of material fact.

¶ 1 BACKGROUND

¶ 2 On November 18, 2006, plaintiff, Jolanta Werenska, went to the banquet hall owned and operated by defendant, Sawa's Old Warsaw Inc., d/b/a Old Warsaw & Banquet (Old Warsaw) for a christening party. Plaintiff and her grandchild held hands and danced for about five or ten minutes on the dance floor. Her foot then got caught where the carpet abuts the dance floor and she fell. Plaintiff filed the instant action against Old Warsaw, alleging that she fell because of a divot on the floor.

¶ 3 At her deposition, plaintiff testified that there had to be a difference in height between the borders of the dance floor and the parquet tiles of the dance floor, although she did not know the exact difference in height. She testified that her heel caught where the carpet abuts the dance floor. Plaintiff further testified that "while dancing around the edge of [Old Warsaw's] dance floor, the 'edging' caught Plaintiff's heel and caused her to fall."

¶ 4 Chester Markiewicz is the president of Old Warsaw and has operated the banquet hall since 1972. Markeiewicz testified that upon opening the hall in the morning, he inspects the entire premises for cleanliness and soundness of the facility, including the dance floor. He acknowledged the change in elevation from the carpet around the dance floor to the dance floor, and testified that it is perhaps a quarter of an inch to an eighth of an inch. He also testified that the wood dance floor has a beveled out edge to smooth the transition from the carpet onto the dance floor. Any joints in the dance floor are filled and smoothed with floor putty. The wooden dance floor was installed in 2005 or 2006. Markiewicz testified that the wooden dance floor was installed by a professional named Nick whom he knew through one of Markiewicz's friends who later passed away. Markiewicz could not remember Nick's last name and did not have any documentation concerning the work performed on the floor.

¶ 5 The floor was not installed on top of the carpet, but on the concrete which was poured and leveled by Nick. The parquet pieces were glued to the concrete. Nick cut the edges of the carpeting around the dance floor. A year or two later the dance floor was enlarged by one or two parquet tiles on each side of the dance floor, and Nick again performed the work. Markiewicz testified that he himself inspects the floor daily and does not have anyone else maintain the floor. Every year a building inspector inspects the dance floor and the inspector never said anything about it.

¶ 6 Markiewicz further testified that the angled wooden edging of the dance floor had a "tendency" to "dance," and so screws were utilized at no particular interval to secure it. However, the screws break. Also, there was padding between the carpet and the concrete floor,

and thus the carpet was softer than the dance floor.

¶ 7 Old Warsaw filed its first motion for summary judgment on July 8, 2010, which, after extended briefing, the court denied on January 6, 2011. After filing its first motion for summary judgment, Old Warsaw deposed two of its employees. The depositions were taken prior to the filing of Old Warsaw's reply brief in support of its first motion for summary judgment, but did not refer to these depositions in its reply brief. On April 12, 2011, Old Warsaw filed a second motion for summary judgment, incorporating the original motion but also raised two different grounds, namely, lack of notice and the de minimus doctrine, and alleged the existence of new evidence. Plaintiff responded that the motion was untimely and actually an improper motion to reconsider. Plaintiff also argued that notice was irrelevant because Old Warsaw created the dangerous condition and, in the alternative, Old Warsaw had constructive notice. Plaintiff further argued the *de minimus* doctrine did not apply since her fall occurred indoors and, in the alternative, aggravating circumstances applied for an exception to the doctrine. After oral argument on the motion, the circuit court inquired regarding the status of discovery and was advised that experts had yet to be retained and deposed.

¶ 8 The circuit court granted Old Warsaw's second motion for summary judgment and found that it was not a motion to reconsider the denial of the first motion for summary judgment. The court held that there was no evidence that the difference in elevation between the carpet and dance floor was a dangerous condition, and that there was no evidence that Old Warsaw's installation of the dance floor was negligent. Plaintiff appealed.

¶ 9 ANALYSIS

¶ 10 Plaintiff argues that: (1) Old Warsaw's brief on appeal does not comply with Illinois Supreme Court Rule 341 (Ill. S. Ct. R. 341(h)(7), (i) (eff. July 1, 2008)) because it lacks proper citations to the record and should be stricken and any argument is waived; (2) granting summary judgment when discovery was not yet completed was improper; (3) granting summary judgment on Old Warsaw's second motion for summary judgment was error because there was no new evidence; (4) Old Warsaw's second motion was actually an improper motion to reconsider; (5) granting summary judgment based on any alleged lack of evidence of notice to Old Warsaw of the dangerous condition was an error as a matter of law because plaintiff alleged that Old Warsaw was responsible for the dangerous condition on the premises and so notice is not necessary; (6) the circuit court also erred as a matter of law in applying the *de minimus* doctrine in granting summary judgment because the rule does not apply to premises indoors; and (7) granting summary judgment was improper because disputed issues of material fact were presented by plaintiff.

¶ 11 Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show 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." 735 ILCS 5/2-1005(c) (West 2008). See also *Farm Bureau Mutual Insurance Co. v. Alamo Rent A Car, Inc*., 319 Ill. App. 3d 382, 386 (2000) (holding that summary judgment is appropriate only where there is no genuine issue of material fact and the pleadings, depositions, and affidavits show that the moving party is entitled to a judgment as a matter of law). Although summary judgment is appropriate if a plaintiff cannot establish an element of his claim, it should only be granted when the right of

the moving party is clear and free from doubt. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335 (2004). "If, from a review of the pleadings and evidentiary material before the trial court, a reviewing court determines that a material issue of fact exists or that the summary judgment was based upon an erroneous interpretation of the law, a reversal is warranted. *Pagano v. Occidental Chemical Corp*., 257 Ill. App. 3d 905, (1994) (citing *Reed v. Fleming*, 132 Ill. App. 3d 722 (1985), *Warren v. Lemay*, 144 Ill. App. 3d 107 (1986)), *appeal denied*, 155 Ill. 2d 566 (1994). Summary judgment orders are reviewed *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 12 As we explain below, we disagree with plaintiff's first four contentions regarding the summary judgment procedure. However, we agree with her remaining three substantive arguments regarding errors of law and the existence of disputed genuine issues of material fact and hold that summary judgment was improperly granted in this case.

¶ 13 I. Waiver

¶ 14 On appeal, plaintiff first argues that Old Warsaw's brief does not comply with Illinois Supreme Court Rule 341 because it lacks proper citations to the record and should therefore be stricken and any argument therein deemed waived. See Ill. S. Ct. R. 341(h)(7), (i) (eff. July 1, 2008). However, Old Warsaw did cite to the record in its recitation of the statement of facts. Also, Old Warsaw does cite authority and therefore has not waived any points in its argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Further, any waiver of the issue is a limitation on the parties and not this court. *Geise v. Phoenix Co. Of Chicago, Inc*., 159 Ill. 2d 507, 514 (1994). Therefore, we consider the arguments of the parties.

¶ 15 II. Summary Judgment When Discovery Not Yet Completed

¶ 16 As to the merits, plaintiff argues that the trial court erred in considering Old Warsaw's second motion for summary judgment. Plaintiff argues that discovery had not yet been completed, including the disclosure of more fact witnesses and any expert witnesses. Old Warsaw responds that the circuit court properly considered its second motion for summary judgment because it was based on additional evidence and raised different legal defenses than the defendant's first motion for summary judgment.

¶ 17 We disagree with plaintiff that summary judgment may not be granted when discovery is not yet complete. We acknowledge that summary judgment motions are routinely brought after the close of discovery. See *Dever v. Simmons*, 292 Ill. App. 3d 70, 74 (1997) (motions to dismiss under section 2-619 and summary judgment motions are routinely made after discovery has been completed and the parties know the evidence). However, section 2-1005 of the Illinois Code of Civil Procedure does not provide any limitation that discovery must be completed before a party may move for summary judgment. Section 1005(b) specifically provides: "A defendant may, *at any time*, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her." (Emphasis added.) 735 ILCS 5/2-1005(b) (West 2006). Further, nothing in our Supreme Court Rules limits the timing of filing summary judgment motions depending on the status of discovery. Rule 191(a) merely provides: "Motions for summary judgment under section 2–1005 of the Code of Civil Procedure and motions for involuntary dismissal under section 2–619 of the Code of Civil Procedure must be filed before the last date, if any, set by the trial court for the filing of dispositive motions." Ill. S.

Ct. R. 191(a) (eff. July 1, 2002).

¶ 18 Further, the argument raised by plaintiff has previously been rejected by our supreme court. In *Addison v. Whittenberg*, 124 Ill. 2d 287, 295-96 (1988), the plaintiff also argued that summary judgment was improperly granted where it should have had an opportunity to conduct more discovery of an opinion witness. *Addison*, 124 Ill. 2d at 298. In rejecting this argument, our supreme court held that:

> "This argument must fail. A party may not resist a motion for summary judgment simply by identifying potential trial witnesses and then failing to determine what their opinions are or what their testimony might be; the plaintiff makes no claim that he did not have sufficient time in which to procure the necessary expert testimony." *Addison*, 124 Ill. 2d at 299.

¶ 19 Here, plaintiff knew of the witnesses and had sufficient time to obtain their testimony, either by way of affidavit or deposition. One previous summary judgment motion had already been briefed, heard, and decided. She already had the opposing fact witnesses' depositions of Old Warsaw waitresses. Thus, plaintiff could not simply rest on her laurels and oppose Old Warsaw's (second) summary judgment motion by making vague statements as to what witnesses would testify; to properly oppose Old Warsaw's summary judgment motion plaintiff was required to obtain either affidavits or depositions of her opposing witnesses, including any expert witnesses. It is incumbent upon plaintiff as the non-movant under section 2-1005 to put forth evidence which establishes a genuine issue of material fact. Thus, we must reject this ground alleged as error by plaintiff.

¶ 20 III. Second Motion for Summary Judgment Based On Evidence Available During Briefing on First Summary Judgment Motion

¶ 21 Plaintiff next contends that the second summary judgment motion should have been barred because the allegedly "new" evidence it relied upon was actually available during briefing on Old Warsaw's first motion for summary judgment. Plaintiff argues that, based on this language in Loveland, the converse must also be true: that where new facts come to light before the summary judgment motion has been made and denied, it is improper to bring a second motion for summary judgment. Plaintiff contends that, here, Old Warsaw knew of its employees' depositions forty-one days prior to filing its reply brief in support of its first summary judgment motion on December 1, 2010, and sixty-six days prior to filing its second summary judgment motion on April 5, 2011.

¶ 22 Plaintiff relies on *Loveland v. Lewistown*, 84 Ill. App. 3d 190 (1980), "where new facts come to light after a motion for summary judgment has been made and denied, it is not improper to bring a second motion for summary judgment." *Loveland*, 84 Ill. App. 3d at 191. However, we find plaintiff is reading an intent into the holding of *Loveland* which does not exist, as is apparent from a reading of the above statement in the context of the reasoning and holding. In fact, the court evinced a broad view that second motions for summary judgment *should* be allowed, in the court's discretion, to alleviate the congestion in the courts and summarily dispose of cases where appropriate. The court in *Loveland* stated as follows:

> "There is no mention in the statute of whether or not more than one motion for summary judgment may be brought. Nor has our research uncovered any cases ruling on the

> matter. We believe that where new facts come to light after a motion for summary judgment has been made and denied, it is not improper to bring a second motion for summary judgment. Contrary to the plaintiff's assertion that permitting a second motion would increase delay, we believe that it expedites the judicial process. The purpose of the summary judgment procedure is to determine whether any genuine issue of material fact exists and to summarily dispose of cases where none does exist so as to avoid congestion of trial calenders and the expense of unnecessary trials. [Citation.] *Where a party discovers facts which make the case properly resolvable by summary judgment, the case should not have to go to trial simply because there was a prior motion for summary judgment*. In such a situation, the trial judge should have the discretion to permit a second motion where, after considering the status of discovery, the judge believes the motion to be appropriate." (Emphasis added.) *Loveland*, 84 Ill. App. 3d at 192.

¶ 23 The court in *Loveland* did not adopt any *per se* rule regarding second summary judgment motions, instead allowing such second motions in the judge's discretion. Indeed, this court has repeated *Loveland*'s general recognition that "[s]ection 2-1005 of the Code of Civil Procedure *** places no limit on the number of motions for summary judgment that may be brought by a party." (Internal citation omitted.) *Pagano v. Occidental Chem. Corp.*, 257 Ill. App. 3d 905, 909 (1994) (citing *Loveland*, 84 Ill. App. 3d 190 (1980)). Here, there was no basis to bar the second motion for summary judgment pursuant to *Loveland*.

¶ 24 The only relevance of the existence of the deposition testimony of Old Warsaw's waitresses pertains to whether the first motion for summary judgment was correctly decided.

"The question whether a genuine issue of material fact exists, sufficient to prevent entry of summary judgment, is to be determined on the basis of the pleadings, depositions, admissions, and affidavits *on file at the time the motion is heard*." (Emphasis added.) *Addison*, 124 Ill. 2d at 295-96. However, plaintiff does raise any point of error on appeal as to the denial of the first motion for summary judgment. It is undisputed that the depositions were on file and considered by the court when the second motion for summary judgment, at issue here, was heard. This alone is not error. See *Pearson v. Partee*, 218 Ill. App. 3d 178, 183-84 (1991) (holding that it was not error for the trial judge to grant summary judgment where the motion consisted of the same arguments and contentions found in a motion for summary judgment filed two years earlier which a previous judge had denied). We find under *Loveland* the court did not abuse its discretion in allowing and hearing the second motion for summary judgment.

¶ 25 IV. Whether the Second Summary Judgment Motion

Was an Untimely Motion to Reconsider

¶ 26 Plaintiff also argues that the court improperly considered the second summary judgment motion because the motion was actually a motion to reconsider based on new evidence, and here the depositions were not new evidence, and the motion itself was untimely as a motion to reconsider. However, a motion to reconsider is a post-trial motion under section 2-1203 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1203 (West 2006)), and therefore " 'falls within the purview of post-judgment motions which must be filed within 30 days after the challenged judgment is entered.' " *Lajato v. AT&T*, 283 Ill. App. 3d 126, 132 (1996) (quoting *Sho-Deen, Inc. v. Michel*, 263 Ill. App. 3d 288, 290 (1994). The first motion for summary judgment was

decided on January 6, 2011, and the second motion was not filed until April 12, 2011. The second motion for summary judgment was not filed within the 30-day period and thus does not fall within the purview of section 2-1203 motions to reconsider.

¶ 27 The second motion for summary judgment also is not a section 2-1401 motion to reconsider. See 735 ILCS 5/2-1401 (West 2006) (governing motions to reconsider to obtain relief from final orders and judgments filed after 30 days from the entry of the judgment). "The purpose of a motion to reconsider is to bring to the trial court's attention (1) newly discovered evidence not available at the time of the hearing, (2) changes in the law, or (3) errors in the trial court's previous application of existing law." *Hirsch v. Optima, Inc*., 397 Ill. App. 3d 102, 108 (2009) (citing *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140 (2004). As plaintiff herself argues, the depositions included in Old Warsaw's second motion for summary judgment were not "newly discovered evidence not available at the time of the hearing." As plaintiff concedes, the second motion for summary judgment raised new legal theories.

¶ 28 Moreover, here there was no "judgment" on the first summary judgment motion because it was denied. "Section 2-1401 of the Code of Civil Procedure provides a comprehensive procedure by which final orders, judgments, and decrees may be vacated 'after 30 days from the entry thereof.' " *Stringer*, 351 Ill. App. 3d at 1140 (quoting 735 ILCS 5/2-1401(a) (West 2006)). Here, the order denying the first summary judgment motion was not a final order or otherwise appealable, as it did not contain Rule 304(a) language. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). We readily determine the second motion for summary judgment was not a motion to reconsider. There was no error in hearing Old Warsaw's second motion for summary judgment.

¶ 29 V. Whether Notice is An Element of Plaintiff's Cause of Action as a Matter of Law

¶ 30 Plaintiff next argues that summary judgment was improperly granted as a matter of law because notice is not an element of her case, as the dangerous condition on Old Warsaw's premises was caused by Old Warsaw and, therefore, notice is not required.

¶ 31 The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises was abolished by section 2 of the Premises Liability Act. 740 ILCS 130/2 (West 2006) (eff. Sept. 12, 1984). "The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them." 740 ILCS 130/2 (West 2006).

¶ 32 In *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976), the Illinois Supreme Court adopted the standard for a landowner's liability for a dangerous condition on the land in section 343 of the Restatement (Second) of Torts, which provides in relevant part:

> " '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.' " *Genaust*, 62 Ill. 2d at 468 (quoting Restatement (Second) of Torts § 343 (1965)).

"Under the Act, the duty owed to both invitees and licensees is that of 'reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.' " *Skoczylas v. Ballis*, 191 Ill. App. 3d 1, 4 (1989) (citing Ill. Rev. Stat. 1987, ch. 80, par. 302)).

¶ 33 Plaintiff cites to *Reed v. Wal-Mart Stores*, 298 Ill. App. 3d 712 (1998), which further clarified the contours of the cause of action and held that "a plaintiff does not need to prove actual or constructive notice when she can show the substance was placed on the premises through the defendant's negligence." *Reed*, 298 Ill. App. 3d at 715-16 (citing *Wind v. Hy-Vee Food Stores, Inc*., 272 Ill. App. 3d 149, 155 (1995), *Donoho v. O'Connell's, Inc*., 13 Ill. 2d 113, 122 (1958)). Plaintiff argues this is precisely the case here: Old Warsaw placed the dance floor on the premises, with the customized "edging" on the carpet and that, therefore, notice is irrelevant. Old Warsaw, on the other hand, relies on *Carey v. J.R. Lazzara, Inc.*, 277 Ill. App. 3d 902 (1996), where we held that when liability is predicated on the dangerous condition existing on the defendant's premises the plaintiff must establish evidence to show actual or constructive notice by the defendant.

¶ 34 The distinction attempted to be drawn by the parties here is between a condition on the premises and a substance placed on the premises by defendant's negligence. *Reed* discussed *Wind*, 272 Ill. App. 3d 149, where the court held notice was not required. In *Wind*, the complaint alleged that defendant's employees had negligently installed and maintained a floormat. The *Reed* court explained that the court in *Wind* "held that if the plaintiff can show the object is

related to the defendant's business and offers some slight evidence that the defendant or his servants, rather than a customer, placed the substance on the floor, then the court should allow the jury to consider the issue of defendant's negligence without requiring proof of defendant's actual or constructive notice." *Reed*, 298 Ill. App. 3d at 716 (citing *Wind*, 272 Ill. App. 3d at 155). Here, plaintiff has alleged that the dance floor, which is related to Old Warsaw's business as a banquet hall, and has offered evidence that Old Warsaw placed the dance floor on the premises and maintained it negligently. Thus, as a matter of law notice is not required under the theory advanced by plaintiff in her complaint.

¶ 35 Also, even under the notice requirement of a premises liability theory plaintiff has shown a genuine issue of material fact. Plaintiff points to the photographs attached to Old Warsaw's (second) motion for summary judgment as Exhibit B, which show areas of damage along the angled edging of the wood abutting the dance floor and the carpeting, as well as the changes in elevation which we have reviewed. These photos also show gaps in areas between the parquet wooden dance floor tiles and the angled edging. There are also cracks and holes. These were photographs from Markiewicz's own deposition. Therefore we find a genuine issue of material fact exists as to whether Old Warsaw had notice of the dangerous condition of the dance floor and edging along the carpeting which precludes summary judgment.

¶ 36 VI. The *De Minimus* Rule as a Matter of Law

¶ 37 Plaintiff argues the circuit court also erred as a matter of law in applying the *de minimus* doctrine to her case because the rule does not apply to premises indoors. The court ruled as follows:

> "The Court finds that *there is no evidence that the difference in height/elevation between the carpet and dance floor is a dangerous condition* and no evidence that defendant's installation of the wood and the dance floor abutting the carpet was negligent." (Emphasis added.)

¶ 38 It is unclear from this finding whether the court found that the change in elevation was not a dangerous condition because it was so slight under the *de minimus* doctrine, or whether the court simply found that the change in elevation here was simply not a dangerous condition. However, Old Warsaw argued the *de minimus* doctrine in its motion for summary judgment, and therefore we address this argument since the lower court may have relied on it and the parties also argue the application of the doctrine on appeal.

¶ 39 Plaintiff is correct that the *de minimus* doctrine does not apply indoors. The *de minimus* rule is well established in Illinois and states that "minor municipal sidewalk defects are generally not actionable." *Bledsoe v. Dredge*, 288 Ill. App. 3d 1021, 1023 (1997) (citing *Warner v. City of Chicago*, 72 Ill. 2d 100, 103-04 (1978), *Arvidson v. City of Elmhurst*, 11 Ill. 2d 601, 604-05 (1957)). "The *de minimus* rule has developed out of the recognition that municipalities should not have a duty to keep all sidewalks in perfect condition at all times." *Bledsoe*, 288 Ill. App. 3d at1023 (citing *Gleason v. City of Chicago*, 190 Ill. App. 3d 1068, 1069 (1989). Application of the *de minimus* rule was extended to an outdoor, privately owned sidewalk in *Hartung v. Maple Investment and Development Corp*., 243 Ill. App. 3d 811 (1993). The court reasoned in *Hartung* that, "like municipalities, private owners of shopping centers should not be required to maintain perfect outdoor sidewalks because of the large area involved, and the extreme and changeable

weather conditions in Illinois." See *Bledsoe*, 288 Ill. App. 3d at 1023 (discussing the holding of *Hartung*).

¶ 40 However, the court in *Bledsoe* held that the doctrine does not apply to covered private entryways. *Bledsoe*, 288 Ill. App. 3d at 1024. The court reasoned as follows:

> "In contrast to the factual situation in *Hartung*, the case at bar involves cracked marble slabs located in a partially enclosed entryway. As the *Hartung* court observed, indoor flooring is not exposed to the weather and can be more easily monitored for defects. *Hartung*, 243 Ill. App. 3d at 816 ***. In the instant case, the entryway is covered and exposed to the weather only on one end. In addition, the entryway could be easily monitored for defects and repaired. Such a covered entryway is not an outdoor sidewalk within the contemplation of the *de minimus* rule." *Bledsoe*, 288 Ill. App. 3d at 1024.

The court in *Bledsoe* noted that "[u]nder such circumstances, as noted in *Hartung*, courts are more inclined to find smaller defects in flooring actionable." *Bledsoe*, 288 Ill. App. 3d at 1024 (citing *Hartung*, 243 Ill. App. 3d at 816).

¶ 41 Therefore, to the extent the circuit court improperly relied upon the *de minimus* doctrine regarding the change in elevation here as a matter of law in granting Old Warsaw summary judgment, this was error and the summary judgment must be reversed.

¶ 42 VII. Genuine Issues Of Material Fact

¶ 43 Having found that summary judgment was not appropriate as a matter of law for a failure of proof on either the notice issue or the *de minimus* rule, we also find that summary judgment

was inappropriate due to the existence of genuine issues of material fact.

¶ 44 Although the use of a summary judgment procedure is encouraged as an aid in expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and should only be allowed when the right of the moving party is clear and free from doubt. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). The court in *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688 (2000), explained the two differing types of summary judgment motions:

> "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 (traditional test) (see *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 [] (1986)), or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (*Celotex* test) (see *Rice v. AAA Aerostar, Inc.*, 294 Ill. App. 3d 801, 805 [] (1998), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 [] (1986))." *Williams*, 316 Ill. App. 3d at 688.

¶ 45 Here, Old Warsaw argues that the circuit court properly granted summary judgment because plaintiff failed to come forward with any evidence to establish that the alleged divot in the floor was a dangerous condition so as to place Old Warsaw on notice, thus establishing that its motion was of the second type under *Celotex*. As plaintiff correctly points out, the ultimate burden of proof always remains with the movant and consists of establishing both the absence of a 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 2006).

¶ 46 The court found the following in its written order:

> "The Court finds that there is no evidence that the difference in height/elevation between the carpet and dance floor is a dangerous condition and *no evidence that defendant's installation of the wood and the dance floor abutting the carpet was negligent*." (Emphasis added.)

¶ 47 Plaintiff argues that there are genuine issues of material fact regarding the installation and maintenance of the parquet dance floor and the customized wooden edging along the dance floor border abutting the carpeting. Old Warsaw argues that there is no genuine issue of material fact because plaintiff, at her deposition, never identified which side of the dance floor she was on when she fell, and does not know what the change in elevation between the dance floor and the carpeting is. Old Warsaw further points to the testimony of the waitresses that they have worked at the banquet hall for over twenty years and that during that time they have never tripped themselves or heard of or seen an invitee tripping on the dance floor. Old Warsaw further relies on the testimony of Markiewicz regarding his inspection routine regarding the carpet and the dance floor, and that any change of elevation is where the carpet ends and the dance floor begins, and that the borders of the dance floor are beveled.

¶ 48 However, plaintiff alleged in her complaint that there was a divot in the carpeting, and that this divot is what caused her to fall. We note that the waitresses testified that they never saw or heard of anyone tripping solely on the *dance floor*; however, plaintiff maintains she tripped in an area near the *carpet or edging of the dance floor*. Thus, the testimony pointed to by Old Warsaw does not contradict plaintiff's contention that there was a divot in the carpet in her

complaint. Markiewicz did not testify that he specifically inspected the carpet for any divots to ensure the safety of invitees. Moreover, Old Warsaw's urging of allegedly contradictory statements by its employees merely underscores the fact that this is a disputed question of material fact which is inappropriate for resolution by summary judgment.

¶ 49 Old Warsaw relies on *Nickel v. Hollywood Casino-Aurora, Inc*., 313 Ill. App. 3d 925, *appeal denied*, 194 Ill. 2d 535 (2000), where summary judgment in favor of the defendant was affirmed, and asserts that the facts of the instant case are "virtually identical" to the facts in *Nickel*. However, we find the facts in Nickel readily distinguishable. The plaintiff in Nickel fell by herself while attempting to sit on a stool. *Nickel*, 313 Ill. App. 3d at 927. The plaintiff testified that she did not know what caused the stool to slip. *Id*. There was no defective condition on the premises of the defendant. Here, unlike *Nickel*, plaintiff testified that she knew what caused her fall, and what caused her fall was a condition on the premises. Plaintiff testified specifically that she fell because of a divot in the carpet, a condition on Old Warsaw's premises.

¶ 50 Markiewicz further testified that the angled wooden edging of the dance floor had a "tendency" to "dance," and so screws were utilized at no particular interval to secure it. However, the screws break. Also, there was padding between the carpet and the concrete floor, and thus the carpet was softer than the dance floor. As plaintiff argued in its response to Old Warsaw's motion below, "[t]his means that a patron whose heel sinks into the area where the soft carpeting meets the 'dancing' angled wooden board [edge of the dance floor], the [patron's] heel can sink between the two surfaces thereby creating a dangerous trip[ping] hazard – a hazard which was created and maintained by Mr. Markiewicz as president of Sawa's Old Warsaw." We

hold that the disputed facts of this case should be determined by the trier of fact. The grant of summary judgment when there are disputed issues of material fact was improper. Therefore, we reverse and remand.

¶ 51 We note that our courts recognize that cases of this type raising factual issues regarding a slip and fall on a defective floor should be submitted to a jury for determination: "It appears that in these 'flooring' cases, some positive evidence of even minor defects may be sufficient to raise a factual issue for the jury rather than a question of law for the court to decide." *Hartung*, 243 Ill. App. 3d at 815 (citing *Tracy v. Village of Lombard*, 116 Ill. App. 3d 563, 569 (1983), *River v. Atlantic & Pacific Tea Co.*, 31 Ill. App. 2d 232 (1961)).

¶ 52 Also , Old Warsaw's repetitive assertions that plaintiff's statements that her foot got caught on the dance floor, or the edging, or the carpeting along the edging, are contradictory and that she cannot establish what caused her fall must be rejected. In *Olson v. Weingard*, 77 Ill. App. 2d 274 (1966), a case nearly identical to the facts of the instant case, the plaintiff customer fell and was injured when, while dancing in a tavern, the left heel of her shoe got caught on "raveled" carpeting tacked along a metal strip at the edge of a dance floor. *Olson*, 77 Ill. App. 2d at 276. The plaintiff brought an action alleging that the tavern owner's negligence caused her injuries. The case went to trial and the jury rendered a verdict in the plaintiff's favor and the trial court entered judgment on the verdict. On appeal, the court affirmed the trial court's judgment in favor of the plaintiff and rejected the defendant's argument that the plaintiff's testimony that she was on the dance floor at the time she fell and was not dancing on the carpet was a judicial admission contradicting the allegations in her complaint and barring her claim. *Olson*, 77 Ill.

App. 2d at 279. The court held that the plaintiff's testimony that she was on the dance floor included the bordering strip and raveled carpeting: "[T]he use of the dance floor area would include the bordering strip and raveled rug since a person dancing on the floor could catch a heel or part of a shoe on an improperly installed and maintained metal strip or rug or other obstruction. *Olson*, 77 Ill. App. 2d at 280. Thus, plaintiff's testimony regarding the dance floor, edging, and carpeting along the edging of the dance floor was not contradictory, as all the aforementioned areas can be considered the dance floor. *Id*. Here, just as in Olson, the dance floor area would include the dance floor, the edging along the dance floor and the carpeting abutting the edging.

¶ 53 We note also that *Olson* proceeded to trial, just as the instant case should below on remand. The disputed issues regarding the condition of the dance floor preclude a grant of summary judgment here and must be determined by the trier of fact. Therefore, we reverse and remand for further proceedings.

¶ 54 CONCLUSION

¶ 55 We reject plaintiff's procedural arguments regarding the summary judgment procedure. Granting summary judgment when discovery is not yet complete is not improper, as section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 2006)) provides that summary judgment can be brought at any time and nothing in the Illinois Supreme Court Rules precludes bringing the motion while discovery is ongoing. Also, granting summary judgment on the defendant's second motion for summary judgment on the basis of deposition testimony that was available at the time a prior motion for summary judgment is a matter of the court's

discretion and in this case there was no abuse of discretion. Further, the second summary judgment motion was not an improper motion to reconsider the first motion for summary judgment under either section 2-1203 (735 ILCS 5/2-1203 (West 2006)) or section 2-1401 (735 ILCS 5/2-1401 (West 2006)).

¶ 56 However, we agree with plaintiff's arguments regarding errors of law and the existence of genuine issues of material fact. Granting summary judgment based on a lack of evidence of notice to Old Warsaw of the dangerous condition was an error as a matter of law because plaintiff alleged that Old Warsaw negligently installed and maintained the dance floor and abutting edging and carpeting on the premises and so notice was not an element of plaintiff's case. In any event, even under a notice theory we find a genuine issue of material that Old Warsaw in fact had notice of the dangerous condition, as evidenced by the photographs authenticated by Markiewicz showing damage to the area. The circuit court's grant of summary judgment was also error as a matter of law because, to the extent the circuit court applied the *de minimus* doctrine in granting summary judgment, the rule does not apply to premises indoors and thus has no application to this case. There remain genuine issues of material fact. We conclude that granting summary judgment was improper because defendant failed to meet its burden of showing that it was either entitled to judgment as a matter of law or that there was an absence of disputed issues of material fact.

¶ 57 Reversed and remanded.