FIRST DIVISION
FILED: March 29, 2013

No. 1-11-3477

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EGAN MARINE CORPORATION, Plaintiff-Appellant, v. EXXONMOBIL OIL CORPORATION, EXXONMOBILE OIL CORPORATION, and IRVING FRANCIS HOLM, JR., Individually and/or as agent of Exxonmobil Oil Corporation and/or Exxonmobile Oil Corporation, Defendants-Appellees.	) Appeal from the) Circuit Court of) Cook County.)) No. 09 L 6212)))))))) Honorable) William Taylor,) Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment in favor of the defendants on the strict products liability and negligence claims was improper where there were genuine issues of material fact; summary judgment in favor of the defendants on the willful and wanton negligence claims was proper where there was no evidence supporting that the defendants acted with conscious disregard for the plaintiff's safety.

¶ 2 The plaintiff, Egan Marine Corporation (Egan), appeals the trial court order granting summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)) in favor of the defendants, Exxonmobil Oil Corporation, Exxonmobile Oil Corporation (Exxon), and Irving Francis Holm, Jr. (Holm), individually and/or as agent of Exxonmobil Oil Corporation and/or Exxonmobile Oil Corporation, on the strict liability and negligence claims it filed following an oil barge explosion in January 2005. We affirm in part and reverse in part.

¶ 3 The following facts are alleged in Egan's complaint. Exxon owns and operates an oil refinery in Joliet, which produces, as a byproduct of the gasoline refining process, a substance known as clarified slurry oil (CSO). At this refinery, CSO travels through a "rundown line" to two land-based shore tanks, known as Tank 515 and Tank 516, where it is stored until it is drawn for transportation. In January 2005, Apex Oil contracted to purchase certain quantities of CSO from Exxon and contracted with Egan to transport the CSO from Exxon's Joliet refinery to a location near Canal Street and California Avenue in Chicago. The CSO was to be transported by Egan's tank barge, known as "EMC 423," which was towed by the motor vessel known as "Lisa E."

¶ 4 On January 18, 2005, EMC 423 arrived at the Joliet refinery to load the CSO. Exxon had planned to load the CSO from Tank 516, but a problem with the equipment occurred. Holm, a shift supervisor in oil movements at the Joliet refinery, directed that EMC 423 be loaded with: 20,833 barrels of CSO from Tank 515; 4,407 barrels from Tank 516; and 606 barrels from the refinery's rundown line. At approximately 6:15 a.m. on January 19, EMC 423 and Lisa E began their voyage up the Chicago Sanitary and Ship Canal. At approximately 4:40 p.m., the cargo aboard EMC 423 exploded, causing extensive damage to both the barge and Lisa E. Shortly thereafter, EMC 423 and

Lisa E both sank, and some of the CSO drained into the waters. Lisa E crewmember Alexander Oliva died as a result of the explosion. The barge and its cargo were later recovered from the canal, and the CSO eventually was delivered and accepted by Apex.

¶ 5 In June 2008, the United States filed a complaint against Egan, alleging it was responsible for the explosion and the subsequent oil spill and seeking damages under federal maritime law. *U.S. v. Egan Marine Corporation*, 808 F.Supp. 2d 1065, 1071-72 (N.D.Ill. 2011). Egan filed a third-party complaint against Exxon for contribution, indemnity, and liability, claiming that Exxon's negligence in loading contaminated CSO was the sole or partial cause of the explosion and spill. *Id.* at 1072. The federal court granted Exxon's motion for summary judgment on those claims on August 9, 2011. In 2009, while the federal litigation was pending, Egan filed a three-count complaint in the circuit court of Cook County, alleging claims against Exxon and Holm for strict products liability, negligence, and willful and wanton negligence. Its allegations against Exxon were similar to the claims made in federal court: that they negligently loaded contaminated CSO on EMC 423 and that contaminated product caused the explosion.

¶ 6 Egan's strict products liability claim alleged that: Exxon placed CSO into the stream of commerce; the CSO was unreasonably dangerous in that it was contaminated with other gasoline products that created a flammable vapor; Exxon failed to warn about the product's condition; the unreasonably dangerous condition caused the explosion; and Egan suffered damages as a result. Egan's negligence claim alleged that Exxon breached its duty of care by: loading contaminated CSO which was illegal for EMC 423 to transport; failing to warn Egan that the contaminated CSO contained light hydrocarbons and flammable gases; and providing a vague and misleading Material

Safety Data Sheet (MSDS), which did not warn of the dangers of the product actually loaded. Egan's willful and wanton claim reiterated these allegations, adding that Exxon acted with reckless disregard for the safety and well-being of Egan and the public. According to the complaint, CSO is a Grade E product, meaning it has an average flashpoint of greater than 150 degrees Fahrenheit, but the product that was actually loaded onto EMC 423 was not a Grade E substance. The three counts directed at Exxon were simultaneously directed at Holm "individually and/or as agent" of Exxon. Hereafter, we refer to both defendants as "Exxon."

¶ 7 For background purposes, we note that the Code of Federal Regulations provides for the grading of liquids for vessel shipping. The Code defines a combustible liquid as a liquid having a flashpoint above 80 degrees Fahrenheit as determined from an open-cup tester. 46 C.F.R. § 30.10-15 (2012). The term flashpoint indicates the temperature in degrees Fahrenheit at which a liquid gives off a flammable vapor when heated in an open cup tester. 46 C.F.R. § 30.10-27 (West 2012). The Code provides for equivalent flashpoints using other methods of testing. 46 C.F.R. § 30.10-27 (West 2012) (open cup test of 80 degrees is equivalent to 75 degrees using Tag closed cup; open cup test of 150 degrees is equivalent to 140 degrees using Pensky-Martens closed tester). Grade E is any combustible liquid having a flashpoint of 150 degrees Fahrenheit or above; Grade D has a flashpoint below 150 degrees and above 80 degrees Fahrenheit. 46 C.F.R. § 30.10-15 (2012). The Code defines a flammable liquid as any liquid which gives off flammable vapors, as determined from an open-cup tester, at or below a temperature of 80 degrees Fahrenheit. 46 C.F.R. § 30.10-22 (2012). Grade A is flammable liquid having a Reid vapor pressure of 14 pounds or more; Grade B has a Reid vapor pressure under 14 pounds and over 8 ½ pounds; and Grade C has a Reid vapor pressure of 8½

pounds or less and a flashpoint of 80 degrees Fahrenheit or below. 46 C.F.R. § 30.10-22 (a-c) (West 2012).

¶ 8 Exxon moved for summary judgment on December 7, 2010. The parties agreed to supplement the trial court's record with all of the documents and evidence that were filed in the *Egan Marine* federal court proceedings, creating a record of over 6,000 pages and comprised of numerous depositions and expert reports. On September 22, 2011, the trial court granted Exxon's motion for summary judgment, and in doing so, it took judicial notice of certain factual findings made by the *Egan Marine* court.

¶ 9 Regarding the strict liability claim, the trial court took judicial notice that no evidence that EMC 423 could carry only Grade E cargo was found in the federal *Egan Marine* case. No evidence that Exxon loaded a substance other than Grade E CSO onto EMC 423 was found either. The trial court found no evidence in its record that contradicted the federal court's findings. It also determined that the MSDS warned of the CSO's dangerous properties, including that it is a combustible liquid and may produce a flammable atmosphere in the storage tank headspace even when stored at a temperature below the flashpoint. It was undisputed that the MSDS was provided to Egan. Further, the trial court took judicial notice that the *Egan Marine* court found that Egan had a duty to know about the dangerous nature of its cargo and that no evidence existed to show that Exxon loaded anything on its barge that had properties that would have made Egan treat the cargo any differently than it did. Therefore, the trial court concluded that Exxon was entitled to summary judgment as to the strict products liability claim, because the undisputed facts established that the CSO was not unreasonably dangerous and the explosion was not caused by an unreasonably dangerous product.

¶ 10 Regarding the negligence claim, the trial court determined that the facts did not establish that Exxon had a duty to warn Egan, because the dangers of CSO were open and obvious. Accordingly, it granted summary judgment in favor of Exxon on both the negligence and the willful and wanton claims. For the same reasons, the trial court granted summary judgment on all counts against Holm in his favor.

¶ 11 Egan timely appealed, arguing that summary judgment was not proper where there was a question of fact as to whether Exxon loaded Grade E CSO or some other material, without warning it of the actual substance's properties. It argues that, while Exxon provided the MSDS, the information did not apply to the highly unstable substance that Exxon loaded and that the risks of the unknown substance were not open and obvious. Egan argues that there was evidence in the record showing that the cargo had vapors that had a lower flashpoint than that of normal Grade E CSO and the vapor pressure was incredibly high. Egan further argues that there was evidence that EMC 423 would not be able to carry anything graded higher than E unless it disabled the barge's thermal heater, which it had not done. Egan primarily relies on the affidavits of its expert, Donald Flessner.

¶ 12 We first note that Exxon did not argue in the trial court that *res judicata* barred Egan's claims in this case. It argued in its reply brief filed in support of its motion for summary judgment that the findings of the federal *Egan Marine* court were persuasive, but not binding. "The doctrine of *res judicata* provides that a final judgment, rendered on the merits by a court of competent jurisdiction, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." *Village of Maywood Board of Fire & Police Commissioners v. Department of Human*

Rights, 296 Ill. App. 3d 570, 578, 695 N.E.2d 873 (1998). *Res judicata* is an affirmative defense, and it can be forfeited. *Id.* Because the doctrine of *res judicata* was not raised, the trial court did not address it*;* instead, it stated that it took judicial notice of the factual findings of the federal court and considered the materials in the record in making its decision. The doctrine of *res judicata* is not addressed by the parties in this appeal; therefore, we address only Egan's argument that the trial court erred in taking judicial notice of the federal court's factual findings.

¶ 13 A court is allowed to take judicial notice of facts involved in other court proceedings where those facts are " 'readily verifiable from *sources of indisputable accuracy*' " and when doing so is an important aid in the efficient disposition of litigation. *In re McDonald*, 144 Ill. App. 3d 1082, 1084, 495 N.E.2d 78 (1986) (quoting *People v. Davis*, 65 Ill. 2d 157, 165, 357 N.E.2d 792 (1976)). Here, the trial court had not only the opinion of the federal court, containing its factual findings, but it also had all of the documents that the federal court used in making those factual findings. Thus, we do not find that the trial court erred in taking judicial notice of certain factual findings that were relevant to the claims before it. Regardless, we review the grant of summary judgment *de novo. Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 18, 980 N.E.2d 690.

¶ 14 Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that as a matter of law, the moving party is entitled to judgment. 735 ILCS 5/2–1005(c) (West 2010). "The purpose of summary judgment is not to answer a question of fact, but to determine whether one exists." *Ballog ,* 2012 IL App (1st) 112429, ¶ 18, 980 N.E.2d 690. In determining whether a genuine issue of material fact exists, the reviewing court must construe the materials of record strictly against the movant and liberally in favor of the nonmoving party. *Id.* Summary judgment should not be

granted unless the movant's right to judgment is free and clear from doubt. *Id.* As stated, we review the grant of summary judgment *de novo*. *Id*.

¶ 15 We first consider Egan's strict liability claim. To recover in a strict products liability action, the plaintiff must plead and prove that: (1) the injury resulted from a condition of the product; (2) the condition was an unreasonably dangerous one; and (3) the condition existed at the time the product left the manufacturer's control. *Sollami v. Eaton*, 201 Ill. 2d 1, 7, 772 N.E.2d 215 (2002). "A strict products liability claim may proceed under three different theories of liability: a manufacturing defect, a design defect, or a failure to warn." *Salerno v. Innovative Surveillance Technology, Inc.*, 402 Ill. App. 3d 490, 497, 932 N.E.2d 101 (2010). A manufacturing defect occurs when one unit in a product line is defective, whereas a design defect occurs when the unit conforms to the intended design but the design itself renders the product unreasonably dangerous. *Id.* A failure to warn of a product's known danger may also result in strict liability. *Id.* at 498.

¶ 16 When proceeding under a manufacturing defect theory, we apply the consumer-expectation test to determine whether the product is unreasonably dangerous. *Id.* That test requires a plaintiff to demonstrate that the product is dangerous beyond that which would be contemplated by the ordinary consumer who purchases it. *Id.* When proceeding under a failure to warn theory, a plaintiff must demonstrate that the manufacturer did not disclose an unreasonably dangerous condition or instruct on the proper use of the product as to which the average consumer would not be aware. *Id.* at 499. A manufacturer has a duty to warn where the product possesses dangerous propensities and there is unequal knowledge with respect to the risk of harm, and the manufacturer possessed of such knowledge, knows or should know that harm may occur absent a warning. *Id.* However, there is

no duty to warn where the product is not defectively designed or manufactured and where the possibility of injury results from "a common propensity of the product that is obvious to the user." *Id.*

¶ 17 Here, Egan alleged that the CSO was contaminated with light hydrocarbons during the manufacturing of the product, namely when Holm directed the product be loaded from Tank 515 and the rundown line, instead of Tank 516, without allowing time for flammable vapors to dissipate. Egan argues that the presence of the excessive amount of light hydrocarbons made the product an unreasonably dangerous one. Egan further alleged that Exxon failed to warn of the contaminated product's dangers, arguing that the warnings contained in the MSDS were insufficient.

¶ 18 Exxon argues that summary judgment on Egan's strict liability claims was proper, because Egan was neither the user nor the consumer of the CSO. We disagree. "The liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used." *Winnett v. Winnett*, 57 Ill. 2d 7, 11 (1974). Here, Exxon had to reasonably foresee that its product would be transported while in the stream of commerce and that a product contaminated with other materials would pose a danger to those handling it. Therefore, Egan is a proper plaintiff, because it was allegedly injured by Exxon's unreasonably dangerous product.

¶ 19 To establish that the product loaded on EMC 423 was not Grade E CSO, but a contaminated substance, Egan relies on the Flessner affidavit. It argues that Flessner establishes that there were substantial concentrations of volatile light hydrocarbon vapors in EMC 423's compartment

headspace. According to Flessner, these vapors would normally be found in gasoline, not in CSO. Flessner stated that chemical tests performed on the cargo after the explosion resulted in 12 pounds per square inch (psi) vapor pressure at 185 degrees Fahrenheit; CSO normally has vapor pressure of less than 1.2 psi at that temperature. Exxon counters that none of the expert testing resulted in flashpoints that indicated a differently graded substance, and that, regardless, the MSDS supplied to Egan had warned of the potential for flammable vapors developing in CSO headspace compartments. Indeed, as Exxon argues, the record contains opposing evidence that support its contentions that the substance was Grade E material and that Egan was properly warned of the dangers of storing Grade E material. However, summary judgment is not warranted where there is a disputed question of fact. "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists." *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517, 622 N.E.2d 788 (1993). Accepting Exxon's arguments, as we discuss, requires this court to weigh the evidence.

¶ 20 Flessner opined that a contaminated substance was loaded onto EMC 423. While the record contains test results showing flashpoints that were over 185 degrees Fahrenheit, consistent with a Grade E substance such as CSO, Flessner stated in his affidavit that the CSO was contaminated with significant quantities of light hydrocarbons commonly found in gasoline, not in CSO. Flessner further opined that these light hydrocarbons created a vapor pressure that was higher than the vapor pressure normally seen with CSO. When the valve on Tank 516 failed, Holm directed that EMC 423 be loaded with product from the rundown line and product transferred from Tank 516 to Tank 515. According to Flessner, "[t]he contaminated product from the [rundown line] was not held in Tank

515 for sufficient time for natural evaporation of light hydrocarbon contaminants to occur."

¶ 21 Exxon argues that Flessner relied on vapor pressure tests performed by Alan Kasner, another Egan expert, and those tests were untrustworthy. Kasner testified that the pressure testing that he performed applied the closed cup method rather than the open cup method normally used. The tests were also done using assumptions for unknown variables that Kasner could not determine accurately represented the conditions that were present on EMC 423. Kasner testified that he did not know if his pressure results were relevant and admitted that the substance loaded on EMC 423 could have been CSO. These points might undercut the credibility of Flessner's conclusions. However, we are not to weigh the evidence and decide facts when determining whether summary judgment should be granted. *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 25, 971 N.E.2d 522 ("The trial court cannot make credibility determinations or weigh the evidence at the summary judgment stage."). Determining which expert's opinion to accept is the duty of the fact-finder, and such determination should not be decided upon a motion for summary judgment.

¶ 22 Next, we consider Egan's claim that Exxon failed to warn it of the dangers of the contaminated product. Exxon argues that the dangers of transporting CSO are open and obvious, and therefore it had no duty to warn. Regardless, Exxon contends that Egan was warned of the dangers in the MSDS. It is undisputed that Egan was provided the MSDS on Exxon's CSO product. The MSDS warned that a "flammable atmosphere can be produced in storage tank headspaces even when stored at temperatures below flashpoint." The MSDS further advised that the headspace gas concentrations should be monitored and maintained below flammable limits, that sparking conditions should be avoided, and that ignitable sources should be kept out of the area. The MSDS indicated

that the CSO's flashpoint may be as low as 141 degrees Fahrenheit. Egan claims that the MSDS was insufficient because it warned of CSO properties, but the substance loaded onto EMC 423 was not only CSO, but contained other contaminants that had volatile flammable vapors. It further argues that the elevated amount of light hydrocarbons and elevated vapor pressure were not open and obvious dangers because the vapors were invisible. "If a danger is obvious and generally appreciated then there is no duty to warn because the purpose of a warning is to apprise the party of danger unknown to him so that he may protect himself from that danger." *Carrizales v. Rheem Manufacturing Co., Inc.*, 226 Ill. App. 3d 20, 25, 589 N.E.2d 569 (1991). While gasoline vapors are known to be flammable (*Id.* at 26-7), this case involves the transportation of a large quantity of an oil product, which according to Flessner, is supposed to produce minimal vapor pressure and have low volatility. These characteristics, as Egan argues, may not be observed or appreciated visually. See *id.* at 27-8 (finding flammable risks of gas-lit water heater were not open and obvious where user could not see pilot light). According to Flessner, CSO would not produce the flammable vapors that were present in the cargo space of EMC 423. Therefore, we agree that the allegedly excessive flammable vapors, not normally found with CSO, were not "open and obvious" to Egan, which was expecting to carry normal, uncontaminated CSO; and, if Egan establishes that the CSO was contaminated, there remains a question of fact regarding whether the warnings contained in the MSDS sufficiently apprised Egan of the contaminated product's dangers.

¶ 23 Regarding causation, Exxon argues that there is no evidence demonstrating that EMC 423 was not certified to carry substances graded higher than Grade E or that it would have acted any differently had it known it was contaminated. It is undisputed that EMC 423 was certified to carry

Grade B and lower cargo. However, there is testimony that establishes that the thermal heater on the barge would have to be disengaged in order to carry any material that was not Grade E. There is also evidence in the record that establishes that the thermal heater was on at the time of the explosion. Regardless, Egan relies on its explosion expert, Donald Hoffman, to support its allegation that the contaminants caused the explosion. Hoffman opined that the explosion was caused by the reaction of the vapors and iron sulfide in the air. It is the duty of the trier of fact to decide whether to accept or reject Hoffman's opinion that the contaminants caused the explosion. The breach of a duty and proximate cause are generally questions for the trier of fact to decide. *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 27, 959 N.E.2d 173. Here, with Flessner's and Hoffman's opinions in the record, genuine issues of material fact exist regarding whether Exxon loaded an unreasonably dangerous product, that being a product contaminated with excessive light hydrocarbons, and whether the contaminated product caused the explosion.

¶ 24 Next, Exxon argues that Egan did not address whether the unreasonably dangerous condition existed at the time the product left the manufacturer's control. Exxon argues that Egan merely mentions that the hatches were closed in compliance with federal regulations after the CSO was loaded. Exxon points out that Egan cites to the regulation, but cites to nothing indicating that it had not done anything to the cargo to create a dangerous condition from the time it left Exxon's dock. However, Egan relies on Flessner's opinion that the CSO was contaminated when the "product from the [rundown line] was not held in Tank 515 for sufficient time for natural evaporation of light hydrocarbon contaminants." Flessner further opined that, based on certain tests performed, the vapor pressure of the material at the time of loading was higher than normally found with CSO. Exxon

counters that testing done before the cargo was loaded showed that it had a flashpoint consistent with that of a Grade E substance, alluding that Egan did something to change the product. However, with Flessner's opinion on this point, that the dangerous condition existed at the time it was loaded by Exxon, this remains a question for the trier of fact to decide.

¶ 25 Based on the record, we disagree with the trial court that Exxon were entitled to summary judgment on the strict products liability claims. While we agree it is undisputed that the flashpoint testing was consistent with a Grade E liquid and that Egan received the MSDS information for CSO, we find that there remain genuine issues of material fact as to whether the product loaded onto EMC 423 was contaminated with light hydrocarbons normally found in gasoline and whether those contaminants caused the explosion. Because questions of fact exist, summary judgment should not have been granted on the strict products liability claims.

¶ 26 Next, Egan alleged that Exxon were negligent by: loading contaminated CSO that was illegal for EMC 423 to transport; failing to warn Egan that the CSO contained light hydrocarbons and flammable gases; and providing a vague and misleading MSDS. "The essential elements of a cause of action based on common law negligence may be stated briefly as follows: the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Ward v. K-Mart Corp.*, 136 Ill. 2d 132, 140, 554 N.E.2d 223 (1990). Egan contends that Exxon had a duty to load uncontaminated CSO; it breached that duty by loading contaminated product and failing to warn of the contaminant's dangers; the contaminated product caused the explosion; and Egan suffered damages as a result. It argued that Holm's decision to transfer the CSO from Tank 516 to Tank 515 and to take product directly from the rundown line caused the product

to be contaminated with the light hydrocarbons. As discussed, with the opinions of Flessner and Hoffman in the record, genuine issues of material fact exist regarding whether Exxon loaded a contaminated product and whether the contaminated product caused the explosion. Accordingly, Exxon were not entitled to summary judgment on the negligence claims.

¶ 27 Next, we address Egan's willful and wanton negligence claims, which alleged that Exxon acted with reckless disregard for the safety of Egan and the public when it loaded the contaminated product. "There is no separate and independent tort of willful and wanton conduct," but rather it is regarded as an aggravated form of negligence. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 235, 938 N.E.2d 440 (2010) "Willful and wanton acts show 'actual or deliberate intent to harm' or, if not intentional, show 'an utter indifference to or conscious disregard for a person's own safety or the safety or property of others.' " *Vilardo v. Barrington Community School Dist. No. 220*, 406 Ill. App. 3d 713, 724, 941 N.E.2d 257 (2010) (quoting *Pfister v. Shusta*, 167 Ill.2d 417, 421, 657 N.E.2d 1013 (1995)). Egan alleged that Exxon acted with conscious disregard for Egan's and the public's safety when it failed to test the product after having issues with Tank 516's valve, knowing that product from the rundown line would contain an excessive amount of light hydrocarbons. "A nonintentional willful or wanton act is committed under circumstances showing a reckless disregard for the safety of others such as, for example, when a party fails, after knowledge of an impending danger, to exercise ordinary care to prevent the danger or fails to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care." *Id*. The party committing the willful and wanton act or failure to act " 'must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the

surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.' " *Oelze v. Score Sports Venture, LLC*, 401 Ill.App.3d 110, 122-23, 927 N.E.2d 137, (quoting *Bartolucci v. Falleti*, 382 Ill. 168, 174, 46 N.E.2d 980 (1943)). Whether conduct may be considered willful and wanton is generally a question of fact for the jury to determine. *Vilardi*, 406 Ill. App. 3d at 713.

¶ 28 In this case, there is no evidence on the record that Exxon knew or should have known that the decision to transfer the CSO from Tank 516 to Tank 515 and taking some CSO from the rundown line would have altered the product. Holm testified that he was unaware that gravitating the product from one tank to another or taking it from the rundown line changed the product in any way. His testimony is not contradicted by any other evidence in the record. Egan argues that Exxon should have "weathered" the CSO before loading it, meaning giving the product time to rest before loading it to allow vapors to diminish. Egan alleges that because the CSO was not "weathered," Exxon knew it had excessive vapors when it was loaded. This contention is unsupported by the record. Holm testified that the reason that Exxon generally loaded from Tank 516, a "static" tank, versus Tank 515, an "active" tank, was merely for accounting purposes. Clifton Gilbert Hene, an Exxon supervisor, testified that he had never heard of "weathering" before the current litigation and that there was no such practice in place at the Joliet refinery. There is no evidence in the record to support Egan's claim that allowing "weathering" time before loading CSO on a barge is a practice that exists in the refinery business. While Flessner opined that the process of pumping the product from the rundown line and shifting it from one tank to the other did not allow sufficient time for the contaminants to evaporate, he did not opine that Exxon knew or should have known that they should

have allowed the product time to settle. While the question of whether conduct amounts to willful and wanton is generally left for the jury, Exxon are entitled to summary judgment where there is no genuine issue of material fact as to whether it knew from the surrounding circumstances and existing conditions that its conduct would naturally and probably result in injury. Therefore, summary judgment was properly granted in favor of Exxon on the willful and wanton negligence claim.

¶ 29 Finally, to the extent Exxon argues that Holm was not a properly named defendant because he was named "individually and/or as agent" of Exxon, we disagree. The allegations pertaining to Holm involved only his conduct in carrying out his duties as Exxon's shift supervisor, demonstrating an agency-principal relationship and implicating Exxon's liability. His conduct allowed Egan to bring its action against Exxon. *Health Cost Controls v. Sevilla,* 365 Ill. App. 3d 795, 806, 850 N.E.2d 851 (2006) (stating that a principal is liable for the alleged wrongful conduct of its agent if the agent was acting within the scope of his employment at the time).

¶ 30 Based on the foregoing reasons, we reverse the judgment of the circuit court of Cook County which granted summary judgment on strict products liability and negligence claims; and, we affirm the judgment of the circuit court which granted summary judgment on the willful and wanton negligence claims.

¶ 31 Affirmed in part and reversed in part; cause remanded.