

No. 1-12-0322

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

VERA SURIWKA,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellant,)	
)	
v.)	
)	
WALGREEN CO., an Illinois corporation, CITY OF)	09 L 10021
CHICAGO, a municipal corporation, STATE-WALTON,)	
LLC, an Illinois limited liability corporation, and)	
MIDWEST PROPERTY GROUP, LTD., an Illinois)	
corporation,)	Honorable
)	Diane J. Larsen,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 HELD: The trial court properly granted summary judgment in favor of the City of Chicago and Walgreens because neither defendant was liable to plaintiff for her injuries.

¶ 2 In January 2010, plaintiff Vera Suriwka filed her second amended complaint against defendants Walgreen Co. (Walgreens), City of Chicago (City), State-Walton, LLC (State-Walton), Midwest Property Group, Ltd. (Midwest), Seven-D Construction Company, Pinner

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Electric Company, and W.E. O'Neil Construction¹, alleging negligence in the maintenance of the sidewalk at 933 N. State Street which caused plaintiff to fall on April 16, 2009. Defendants, the City, Walgreens, State-Walton and Midwest, each filed motions for summary judgment. Plaintiff filed a cross-motion for summary judgment on the issue of ownership, management, and/or control of the sidewalk by the City. The trial court granted all of the defendants' motions for summary judgment.

¶ 3 On appeal, plaintiff presents separate issues against the City and Walgreens. As to the City, plaintiff argues that (1) the trial court erred in finding that the City did not operate or maintain the premises where plaintiff fell because the City made repeated judicial admissions that it operated and maintained that property, the City is equitably estopped from arguing that it did not operate and maintain the sidewalk at issue, and the City admitted that it was their duty to ensure that repairs made to the sidewalk were sufficient; (2) the City had notice of the existence of a dangerous condition and should not be immunized under section 3-104 of the Tort Immunity Act (745 ILCS 10/3-104 (West 2008)) for a failure to warn; and (3) plaintiff's cross-motion for summary judgment as to the ownership, management, and/or control should have been granted.

¶ 4 As to Walgreens, plaintiff argues that the trial court erred in finding that Walgreens was not liable for her injuries because Walgreens had a duty to ensure the sidewalk was in a safe condition, Walgreens failed to give adequate warning or repair the known dangerous condition, and Walgreens gratuitously rendered its services to repair the sidewalk and is liable for the harm

¹ Seven-D Construction Company, Pinner Electric Company, and W.E. O'Neil Construction were voluntarily dismissed from the case by plaintiff.

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resulting from her fall.

¶ 5 Although both defendants were named in her notice of appeal, plaintiff has not raised any issues on appeal regarding the granting of summary judgment in favor of State-Walton or Midwest. Plaintiff stated in her brief that State-Walton and Midwest are not a party to this appeal despite naming them in her notice of appeal. "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Accordingly, plaintiff has waived any issues against these defendants and we affirm the trial court's grant of summary judgment in favor of State-Walton and Midwest.

¶ 6 In August 2009, plaintiff filed her initial complaint alleging negligence against the City and Walgreens. Plaintiff filed an amended complaint in November 2009 and her second amended complaint in January 2010. The allegations against Walgreens and the City remained identical under each complaint. The second amended complaint alleged the following facts.

¶ 7 On April 16, 2009, plaintiff "was a pedestrian lawfully walking" on the public sidewalk, located in front of 933 North State Street. Walgreens owned, managed, operated and controlled a store at 933 N. State and was in control of the sidewalk in front of the store. The City "regulated and controlled for the use and travel of the general public" the public sidewalk at 933 N. State. Plaintiff alleged that both Walgreens and the City had the duty "to maintain the sidewalk at the premises in a reasonably safe condition." Plaintiff further alleged against each defendant that they were guilty of one or more of the following careless and negligent acts or omissions:

"(a) Carelessly and negligently permitted holes, depressions and uneven areas to form and to remain in the said area;

- (b) Carelessly and negligently maintained said area in a broken, uneven and otherwise hazardous condition;
- (c) Carelessly and negligently failed to rope off said area, post warning signs, or otherwise give timely and adequate warning of the dangerous condition existing thereon;
- (d) Carelessly and negligently failed to repair said area;
- (e) Carelessly and negligently failed to properly inspect the said area at timely intervals;
- (f) Was otherwise careless and negligent."

¶ 8 Both defendants "had actual or constructive notice of the defective, hazardous or dangerous condition of said area." As a direct and proximate result of one or more of the careless and negligent acts of the defendants, plaintiff "was caused to trip and fall to the ground while walking upon or along said area." Plaintiff alleged that she suffered injuries of a personal and pecuniary nature and sought damages in excess of \$50,000 from each defendant.

¶ 9 After discovery, including depositions, interrogatories and other filings, the facts of the case are as follows. On April 16, 2009, plaintiff visited the Walgreens store at 933 N. State. After leaving the store, she turned right onto northbound State Street. She tripped and fell on a hole adjacent to an air shaft sidewalk grate and frame. Plaintiff described the hole as seven feet long, ten inches wide and two inches deep.

¶ 10 Following her fall, plaintiff returned to the Walgreens store and spoke with the pharmacist and the store manager Robert Wong. She told them she had tripped and fallen

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outside the store. They offered her ice and offered to call 911, but plaintiff declined and went home on her own. She saw a doctor approximately one week after her fall.

¶ 11 Wong testified at his deposition that he was aware of the existence of holes at the air shaft grate. In the summer of 2007, Wong called 311 and reported the hole and requested a repair.

The hole was patched within two weeks, but Wong did not know who fixed the hole. However, the hole began to crack and deteriorate. In the summer of 2008, Wong called 311 again to report the hole and request a repair. At this time, Wong placed potting soil in the hole to help even the pavement as a temporary fix. The hole was fixed a second time within two weeks, but he did not know who made the repair. In the spring of 2009, the hole had returned. Wong called 311 to report the hole at the air shaft grate. He also emailed a complaint to the City website, which was forwarded to his local alderman. Plaintiff fell before a repair was made. Wong said that he had received complaints from customers about the hole and that prompted him to report the hole.

Other than placing potting soil in the hole, Wong stated that the only other action taken in regard to the sidewalk was for his employees to sweep and to shovel the sidewalk outside the store.

¶ 12 John Errera testified at a deposition that he was employed as a civil engineer with the City of Chicago. He admitted that he did not have any specific knowledge about the area around 933 N. State Street prior to plaintiff's accident. He has viewed photographs of the area and assisted the corporation counsel in answering discovery in the case. Errera did not know if the area had been repaired. He stated that "[t]he City of Chicago would not touch this" because "it looks like a private air shaft, either for Commonwealth Edison or for CTA or a building."

¶ 13 Errera testified that he was familiar with reports generated by calls made to 311 and was

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aware that calls had been made about the area at 933 N. State. When a report is made, a surveyor or engineer would be sent to the area to investigate and determine whose property it was. He stated, "If it's CDOT (Chicago Department of Transportation), we'll take actions to repair it. If it's a private utility, we'll contact the private utility." He said that "the private utility would be responsible for repairing the sidewalk around that air shaft" and the City would not supervise this work. He stated that the City would make sure it matched and was compatible with the City sidewalk around it, and if it was not level, they would contact the utility and notify them that it was not correct.

¶ 14 In August 2010, Walgreens filed a third party complaint for contribution against the Chicago Transit Authority (CTA). As an alternative, Walgreens alleged the injuries suffered by plaintiff were the result of the negligent conduct of the CTA's agents or employees. The CTA was "responsible for operating, maintaining, and repairing the Chicago subway systems and its appurtenances (which include the air vent and the areas at or near the subway grates in the area where Plaintiff fell, at or near or by 933 N. State Street in Chicago, Illinois)." Further, CTA's agents and/or employees "had a duty to inspect, maintain, and repair" the Chicago subway systems and appurtenances, including the subway grates, and keep in a reasonably safe condition for use in the exercise of ordinary care of people CTA intended and permitted to use the property, including plaintiff. "Plaintiff was caused to trip and fall on a 'hole' by the subway grate at or near or by 933 N. State Street in Chicago, Illinois." CTA had actual or constructive notice of the defective, hazardous or dangerous condition in that area and knew it was not reasonably safe in sufficient time prior to plaintiff's injuries to have taken measures to remedy or protect against

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such condition. As a result of CTA's negligence, plaintiff suffered injuries. Walgreens alleged that it was entitled to contribution from CTA in an amount commensurate with relative culpability, fault, and/or legal responsibility attributed to Walgreens.

¶ 15 In interrogatories, CTA stated that it did not own the sidewalk at or near the subway grate, at or near 933 N. State, but the City was the owner. However, the CTA admitted that it "was responsible to maintain the subway grate and the concrete frame to which the grate is attached at this location on the date of the alleged occurrence."

¶ 16 In July 2011, the City filed a motion for summary judgment, contending that the area identified by plaintiff was maintained and controlled by CTA and the City is immune under section 3-104 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-104 (West 2008)). The City attached a copy of a 1945 city ordinance providing that the City holds the sidewalk in trust but gave the CTA exclusive rights to operate and maintain the area of the air vent, including the area at 933 N. State. In October 2011, Walgreens moved for summary judgment, arguing that it "did not own, control or possess the public sidewalk or subway grate (or its concrete encasement) where plaintiff alleges she tripped and fell" and owed no duty to plaintiff. Additionally, there was no evidence that Walgreens proximately caused plaintiff's alleged injuries. Plaintiff also filed a cross-motion for partial summary judgment against the City on the issue of ownership, management, and control of the premises.

¶ 17 In January 2012, the trial court conducted a hearing on the motions for summary judgment and granted both motions filed by the City and Walgreens.

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¶ 18 This appeal followed.

¶ 19 On appeal, plaintiff argues that the trial court erred in granting both the City's and Walgreens' motions for summary judgment.

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

¶ 21 “In order to recover in an action for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach.” *Sameer v. Butt*, 343 Ill. App. 3d 78, 86 (2003). “The question of the existence of a duty is a question of law and, in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party.” *Sameer*, 343 Ill. App. 3d at 86. “In considering whether a duty exists in a particular case, a court must weigh the foreseeability that defendant's conduct will result in injury to another and the likelihood of an injury occurring, against the burden to defendant of imposing a duty, and the consequences of imposing this burden.” *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991).

¶ 22 Plaintiff first contends that the City is foreclosed from denying that it owned, managed,

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and/or controlled the sidewalk at 933 N. State because it made repeated judicial admissions in its answers to plaintiff's complaints that it maintained or operated the property where plaintiff fell.

The City responds that its answers did not admit responsibility for maintaining the concrete subway frame where the subject hole was located and it did not know the location of the hole where plaintiff fell until after it answered the complaints.

¶ 23 "Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Serrano v. Rotman*, 406 Ill. App. 3d 900, 907 (2011). "For a statement to constitute a judicial admission, it must be clear, unequivocal, and uniquely within the party's personal knowledge." *Serrano*, 406 Ill. App. 3d at 907. "In order to constitute a judicial admission, a statement must not be a matter of opinion, estimate, appearance, inference, or uncertain summary." *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468 (2009). "The statement must also be an intentional statement which relates to concrete facts and not an inference or unclear summary." *Serrano*, 406 Ill. App. 3d at 907. "What constitutes a judicial admission must be decided under the circumstances in each case, and before a statement can be held to be such an admission, it must be given a meaning consistent with the context in which it was found." *Serrano*, 406 Ill. App. 3d at 907.

¶ 24 All of plaintiff's complaints made the following allegation against the City:

"On and prior to April 16, 2009, the Defendant City of Chicago, had within its corporate limits public streets, sidewalks, curbs and adjacent parkways, which it regulated and controlled for the use

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and travel of the general public, including a public sidewalk located in particular in front of 933 North State Street in the City of Chicago, County of Cook, and State of Illinois."

¶ 25 In each of its answers, the City responded to that allegation as follows:

"Defendant City admits that the public right-of-way at or near the site of Plaintiff's alleged accident is and was, on the date of the Plaintiff's alleged accident, held in trust for the benefit of the public by the City of Chicago, but denies all other allegations contained in this paragraph."

¶ 26 The City asserts that plaintiff's allegation was vague, general, and failed to detail the location of her fall as the frame surrounding the subway grate. The City's response generally stated its responsibility for maintaining the public sidewalk at 933 N. State. The City contends that it "cannot be charged with admitting something much more specific than and different from the allegations it was asked to answer." Further, the City observes that there is a public sidewalk at 933 N. State so there was no basis to deny the general allegation made by plaintiff.

¶ 27 A similar issue was presented in *Dixon v. City of Chicago*, 101 Ill. App. 3d 453 (1981). In that case, the plaintiff filed an action against the City, asserting that it negligently failed to maintain the streets and sidewalks at the corner of Pulaski Street and Chicago Avenue where the plaintiff fell and was injured. The plaintiff alleged in her complaint that "she had fallen and injured herself on a corroded 'street and sidewalk' which the city had negligently failed to maintain safely." *Dixon*, 101 Ill. App. 3d at 454. In its answer, the City denied the plaintiff's

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negligence allegations, but admitted that it " 'owned, maintained, managed and controlled, and held out to the public as being reasonably safe for pedestrian travel, certain public streets improved with public sidewalks, including the northeast corner of Chicago Avenue and Pulaski Street * * *.' " *Dixon*, 101 Ill. App. 3d at 454. Later, in her deposition, the plaintiff testified that she was injured when she fell from the curb, not the sidewalk as alleged. The City then filed a motion for summary judgment, asserting that the curb was maintained by the State of Illinois, not the City. The trial court granted the City's motion. *Dixon*, 101 Ill. App. 3d at 454-55.

¶ 28 On appeal, the plaintiff contended that the City was estopped from denying its control of the curb because the City admitted control in its answer to her complaint. The reviewing court held that the City's admission that it owns the streets and sidewalks was not an admission that it owned the curb. *Dixon*, 101 Ill. App. 3d at 455.

"The city made such an admission of fact as to its ownership of and control over the streets and sidewalks on the northeast corner of Chicago and Pulaski. It did not, however, admit ownership of and control over the curb. Although an admission of fact carries with it an admission of other facts necessarily implied therefrom, an admission should not be construed as being broader than the allegations or facts admitted. Thus a party is not bound by mere permissible inferences of facts admitted." (Citations omitted.)

Dixon, 101 Ill. App. 3d at 455.

¶ 29 Here, the City correctly admitted that it owned the public sidewalk at 933 N. State, but it

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made no admission of ownership or control as to the subway grate and frame. Plaintiff's complaint only alleged that she fell on the public sidewalk, there was no suggestion that she fell on the subway grate and frame. The City cannot be held to have admitted ownership of the subway grate and frame, such an admission is broader than the allegation made by plaintiff.

¶ 30 The cases relied on by plaintiff can be distinguished from the facts of this case. In *Hastings v. Abernathy Taxi Association, Inc.*, 16 Ill. App. 3d 671 (1973), the plaintiff filed an action against the defendant taxi company after his vehicle was struck from the rear by a taxi. It was alleged in the complaint that the taxi driver was an agent of the defendant and he was driving within the scope of his employment. The defendant's first attorney filed an answer and admitted that the driver was the defendant's agent and was operating the taxi within the scope of his employment. Over the next several years, the defendant changed his attorney multiple times and nearly five years after the original answer was filed, the defendant sought to amend its answer and deny the allegation that the driver was its agent and acting in the scope of his employment. The trial court denied the request and the defendant ultimately was found liable for the plaintiff's injuries. *Hastings*, 16 Ill. App. 3d at 673-74.

¶ 31 On appeal, the defendant argued that the trial court erred in denying its request to amend its answer. The reviewing court affirmed the trial court's denial, noting that the belated denial misled the plaintiff and hindered his ability to conduct an investigation. "The present controversy does not concern an implied admission-Abernathy, by its attorney, explicitly admitted that [the driver] was its agent and, while in the scope of his employment, operated a taxicab owned by it." *Hastings*, 101 Ill. App. 3d at 675.

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¶ 32 The decision in *Renshaw v. Black*, 299 Ill. App. 3d 412 (1998), involved a legal malpractice claim. There, the plaintiffs sought a due process hearing concerning the educational needs for their daughter with special needs under a federal education statute. The hearing officers denied their requested relief and the plaintiffs attempted to file a lawsuit in the district court. However, the action was filed three days after the statute of limitations had passed and the plaintiffs' action was unsuccessful. *Renshaw*, 299 Ill. App. 3d at 413-15.

¶ 33 The plaintiffs then filed a malpractice action against their attorney based on the dismissal of their federal case. In her response to the plaintiffs' second-amended complaint, the defendant "admitted to missing the applicable statute of limitations and that the foundation for the lawsuit's dismissal was this error." *Renshaw*, 299 Ill. App. 3d at 415-16. As the case continued, the plaintiffs did not name any experts and relied on the defendant's admission. When the plaintiffs did not name opinion witnesses, the defendant moved to bar witnesses on the plaintiffs' behalf, which the trial court granted. The defendant then moved for summary judgment, arguing that the issue of proximate cause and damages required the testimony of opinion witnesses and the trial court granted the summary judgment motion. *Renshaw*, 299 Ill. App. 3d at 416.

¶ 34 The reviewing court observed that the plaintiffs "were unsuccessful in their attempts to locate even one other attorney in southern Illinois knowledgeable in the field [of education law]. Especially in this unique situation, we hold that attorney Black's own previously expressed expert opinions on the subject matter of the underlying litigation would be admissible without regard to the disclosure requirements of Supreme Court Rule 213(g)." *Renshaw*, 299 Ill. App. 3d at 417. The court concluded that the defendant's admissions created a question of fact as to malpractice

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to be determined by the trier of fact and reversed the grant of summary judgment, remanding for further proceedings. *Renshaw*, 299 Ill. App. 3d at 418.

¶ 35 In contrast, the City's answers were in response to a general allegation of ownership of the public sidewalk. The answer did not admit ownership of the subway grate and frame. In *Hastings* and *Renshaw*, the defendants both made admissions on specific grounds for liability, *i.e.*, the driver was the company's agent and the attorney missed the statute of limitations. No such specific allegation was alleged in this case. A judicial admission must be viewed in context and in this case, the City's answer that it owned the public sidewalk cannot be construed to be an admission of ownership of the specific subway grate and frame. Thus, the City was not bound by judicial admission on the issue of ownership and was properly permitted to deny responsibility for maintaining the location of plaintiff's fall.

¶ 36 Next, plaintiff contends that the City should be equitably estopped from denying its duty to plaintiff because the City knowingly misrepresented a material fact to plaintiff's detriment. Specifically, plaintiff asserts that the City knowingly misrepresented ownership and control of the sidewalk at 933 N. State and plaintiff relied on this misrepresentation to her detriment, *i.e.*, she did not file suit against CTA. The City responds the plaintiff's claim must fail because it has not misrepresented any material fact.

¶ 37 "The general rule is that where a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct, that person will not be allowed to deny his or her words or acts to the damage of the other party." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001). "Equitable estoppel may

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be defined as the effect of the person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse." *Geddes*, 196 Ill. 2d at 313.

"A party claiming estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when that party decided to act, or not, upon the representations; (4) the other person intended or reasonably expected that the party claiming estoppel would determine whether to act, or not, based upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof." *DeLuna v.*

Burciaga, 223 Ill. 2d 49, 82-83 (2006).

¶ 38 "' "[I]t is not necessary that the defendant intentionally mislead or deceive the plaintiff, or even intend by its conduct to induce delay. [Citations.] Rather, all that is necessary for invocation of the doctrine of equitable estoppel is that the plaintiff reasonably rely on the

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defendant's conduct or representations in forbearing suit." ' ' " *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 252 (1994) (quoting *Witherell v. Weimer*, 85 Ill. 2d 146, 159 (1981), quoting *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1071 (7th Cir. 1978)).

¶ 39 Plaintiff's argument for equitable estoppel is premised on the City's answer to the complaint in which it admitted that it held the public sidewalk at or near 933 N. State in trust for the benefit of the public. The City maintains that this statement is true. There is a public sidewalk at 933 N. State for which it is responsible. According to the City, at the time it answered the complaints, it was unaware that plaintiff did not fall on the sidewalk, but that she fell on a hole at the subway grate and frame, which is maintained by the CTA. The City states that its response was not intended to mislead plaintiff or conceal information from plaintiff. We agree with the City.

¶ 40 Plaintiff argues that the City should have known that the subway grate and frame were the source of the sidewalk defect based on reports made to the 311 hotline over the previous two years. However, none of plaintiff's complaints allege that she fell due to a hole at the subway grate and frame. Instead, her complaints allege that she fell on the public sidewalk at or near 933 N. State. Plaintiff did not provide any more specificity as to the location of her fall. It is unreasonable to expect the City to conclude that plaintiff fell on the subway grate and frame, not the public sidewalk as alleged.

¶ 41 Further, as the City points out, it was plaintiff's responsibility to determine which defendants to name in her action. The City notes that the 311 reports released during discovery included references to the CTA grate at that location, which put plaintiff on notice that the CTA

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was potentially liable. Illogically, plaintiff argues that the City should have determined that the CTA was responsible for the location of her fall based on the 311 reports, but denies any responsibility for failing to name the CTA based on the same reports. Plaintiff amended her complaint to add other defendants based on discovery documents, but failed to name the CTA. When considering whether a party has relied in good faith on the misrepresentation to her detriment, "[i]t has been said that this reliance must be reasonable, and that a party claiming estoppel cannot have acted improvidently." *Vaughn v. Speaker*, 126 Ill. 2d 150, 162 (1988).

¶ 42 Plaintiff has failed to show that the City knowingly misrepresented its ownership of the sidewalk to plaintiff's detriment. It is true that the City maintains and controls a public sidewalk at or near 933 N. State, which is all the information alleged in plaintiff's complaint. Further, the onus was on plaintiff to amend her complaint to include the CTA when its potential liability was included on 311 reports released during discovery. Accordingly, plaintiff cannot establish all the required elements for equitable estoppel and summary judgment was proper on this ground.

¶ 43 Plaintiff next contends that the City admitted that it had voluntarily assumed a duty to make repairs on the sidewalk where she fell. Plaintiff relies on portions of Errera's deposition in support. Plaintiff points to Errera's testimony that the City would inspect repairs made by a utility to ensure that it matched the City's sidewalk and if it was not compatible, the City would inform the utility of the mistake. Plaintiff also refers to Errera's testimony that upon receipt of a 311 report, a surveyor would investigate the situation to determine who was responsible to fix the broken sidewalk. The City responds that plaintiff "misunderstands" the voluntary undertaking doctrine, which is not applicable in this case.

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¶ 44 "Under a voluntary undertaking theory of liability, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking." *Bell v. Hutsell*, 2011 IL 110724, ¶ 12. The voluntary undertaking doctrine is to be narrowly construed. *Id.* The supreme court observed that courts have "looked to the Restatement (Second) of Torts (Restatement (Second) of Torts §§ 323 through 324A (1965)) in defining the parameters of liability pursuant to this theory." *Id.*

¶ 45 The relevant portions of the Restatement (Second) of Torts provides:

" § 323. Negligent Performance of Undertaking to Render Services

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

(a) his failure to exercise such care increases the risk of

such harm, or

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

the undertaking.'

'§ 324A. Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to

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the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance on the other or the third person upon the undertaking.' " *Id.*, at ¶ 13 (quoting Restatement (Second) of Torts §§ 323, 324A (1965)).

¶ 46 Contrary to plaintiff's assertion, Errera's deposition testimony does not establish that the City voluntarily undertook the duty to maintain and repair the sidewalk. Errera specifically testified that the City would not repair broken concrete that was part of the grate and frame of an air shaft. He stated that City employees would investigate after a report was made and direct the repair to the appropriate agency and later the City would ensure that the repair was compatible and level with the City's sidewalks. Nothing in Errera's testimony showed an undertaking to make repairs to sidewalk grates under the control of another entity. If the repair by another entity was not compatible, the City would notify the entity responsible. The City did not make any corrections. Further, Errera testified about how the City would generally respond to complaints about broken concrete, but he had no direct knowledge regarding the sidewalks or air shafts at 933 N. State. Errera's general testimony did not set forth a voluntary undertaking by the City to maintain the sidewalk grate and frame at issue. The duty is limited to the extent of the

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undertaking. The City never undertook the responsibility to repair the grates and frame; its undertaking was only to initially determine who was responsible for repairs and then check that the repair was level and compatible with City property. Plaintiff has not presented any evidence to support her voluntary undertaking theory against the City. The record does not show that City assumed any duty to repair or maintain the grate and frame at 933 N. State under the voluntary undertaking doctrine. Summary judgment was proper on this theory.

¶ 47 Next, plaintiff argues that the City had notice of a dangerous condition and her complaint alleged that the City had a duty to rope off the area or post warning signs. The City maintains that it is immune from liability for failure to place barricades under section 3-104 of the Tort Immunity Act (745 ILCS 10/3-104 (West 2010)).

¶ 48 Section 3-104 states:

"Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers." 745 ILCS 10/3-104 (West 2010).

¶ 49 We note that the term "traffic" includes pedestrians. 625 ILCS 5/1-207 (West 2010). Section 3-104 has been held to immunize a municipality against liability arising from its failure to provide barricades or warning signs to pedestrians. See *Prostran v. City of Chicago*, 349 Ill.

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App. 3d 81, 91 (2004); *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 487 (2002). In *Prostran*, the City could not be held liable for failing to place warning signs or barricades around a portion of sidewalk under construction. *Prostran*, 349 Ill. App. 3d at 91. Similarly, in *Bonner*, the City was immune from liability for failing to place barricades around a light post. *Bonner*, 334 Ill. App. 3d at 487. Likewise, in the present case, the City cannot be held liable for the failure to rope off or place warning signs near the area around the grate and frame.

¶ 50 Plaintiff relies on the decision in *Castorena v. Browning-Ferris Industries of Illinois, Inc.*, 217 Ill. App. 3d 328 (1991), to support her argument that the City cannot be immune from liability when it had prior notice of the dangerous condition. In that opinion, the reviewing court reversed the trial court's directed verdict in favor of the municipality in a negligence trial based on a car accident because the municipality had notice of the dangerous condition from a prior car accident. *Castorena*, 217 Ill. App. 3d at 334-35. However, that decision is no longer valid. The supreme court remanded the *Castorena* decision to the Second District to reconsider in light of *West v. Kirkham*, 147 Ill. 2d 1 (1992). In *West*, the supreme court held that the legislature did not intend for immunity under section 3-104 to be limited to situations in which the municipality did not have prior notice of a dangerous condition. *West*, 147 Ill. 2d at 7. The subsequent opinion in *Castorena* held, based on *West*, that the municipality had no duty to provide warning devices and the trial court properly entered a directed verdict in favor of the municipality. *Castorena*, 237 Ill. App. 3d 702, 704 (1992). Contrary to plaintiff's assertion, Illinois courts have held that immunity under section 3-104 is not limited to situations in which the municipality had no prior notice. Accordingly, under section 3-104, the City cannot be held liable for a failure to provide a

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warning for the hole in the pavement at the grate and frame and summary judgment was proper.

¶ 51 Plaintiff's final argument against the City is that the trial court should have granted her cross-motion for partial summary judgment. However, as we have already concluded that the City owed no duty to plaintiff, the trial court properly denied her motion.

¶ 52 Next, we turn to plaintiff's issues raised on appeal against Walgreens.

¶ 53 Plaintiff first argues that Walgreens had a duty to ensure that its sidewalk was in a safe condition because Walgreens had appropriated the sidewalk for its own use. Walgreens responds that it did not possess, control, or appropriate the sidewalk.

¶ 54 "The general rule regarding the duty of a business occupier of any premises is that it must provide a reasonably safe means of ingress to and egress from the premises, but ordinarily it will not be held liable for any injuries incurred on a public sidewalk under the control of a municipality, even though the sidewalk may also be used for ingress or egress to the premises." *Dodd v. Cavett Rexall Drugs, Inc.*, 178 Ill. App. 3d 424, 432 (1988). "However, if the occupier of the premises appropriates the sidewalk for its own use, it then has a duty to insure that the sidewalk is safe." *Id.* "[A]n assumption of control for purposes of determining a duty of care must consist of affirmative conduct which prevents the public from using the property in an ordinary manner such as blocking the land, parking on it, or using it to display goods." *Gilmore v. Powers*, 403 Ill. App. 3d 930, 933 (2010). Illinois courts have held that "no duty to maintain the city-owned property exists where the landowner merely maintains the property by mowing grass or shoveling and salting it in the winter." *Gilmore*, 403 Ill. App. 3d at 934; see also *Dodd*, 178 Ill. App. 3d at 433 ("Shoveling and salting a sidewalk in the winter does not impose a duty to

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maintain and repair that sidewalk").

¶ 55 In the present case, plaintiff asserts that Walgreens appropriated the sidewalk because it was the sole means of ingress and egress when exiting the Walgreens store and traveling north and that Walgreens employees regularly salted and shoveled the sidewalk. Plaintiff also points to the instance in 2008 when Wong placed potting soil in the hole prior to a repair being made. This is not sufficient evidence to establish that Walgreens took an affirmative action to appropriate the sidewalk. Further, shoveling and salting in the winter does not support a claim of appropriation of the public sidewalk. See *Gilmore*, 403 Ill. App. 3d at 934; *Dodd*, 178 Ill. App. 3d at 433.

¶ 56 Plaintiff relies on the decisions in *Cooley v. Makse*, 46 Ill. App. 2d 25 (1964), and *McDonald, v. Frontier Lanes, Inc.*, 1 Ill. App. 3d 345 (1971), to support her argument that the use of the sidewalk as ingress and egress to the store was an appropriation of the public sidewalk. In *Cooley*, the plaintiff was injured when he fell on a publicly owned pathway that connected the entrance to a tavern and the public sidewalk. *Cooley*, 46 Ill. App. 2d at 26-27. The reviewing court found that the tavern had a duty to maintain the pathway because the pathway's sole purpose was to provide access to its business and it was the sole means of ingress and egress to the entrance. *Cooley*, 46 Ill. App. 2d at 30. In *McDonald*, the plaintiff was injured when she fell in a depression located between the city-owned sidewalk and parkway outside a bowling alley. *McDonald*, 1 Ill. App. 3d at 350. There, the evidence established that the bowling alley's customers frequently drove and walked over the sidewalk and parkway as a means of ingress and egress from the parking lot and customers also parked their vehicles on the sidewalk and

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parkway. *McDonald*, 1 Ill. App. 3d at 349-50. The *McDonald* court concluded that this use was an assumption of the use and control of the sidewalk and parkway by the bowling alley and, thus, the bowling alley owed a duty to its invitees to maintain the property in a safe condition.

McDonald, 1 Ill. App. 3d at 352.

¶ 57 In contrast, the public sidewalk outside the Walgreens store along State Street was not solely in use as the means of ingress and egress from the store. Rather, the public sidewalk runs along a busy street in downtown Chicago. Further, the entrance and exit from the store is not limited to that portion of the sidewalk. A duty will not be created because some of Walgreens' customers enter or exit via the public sidewalk on State Street. Additionally, we decline to find that Walgreens appropriated the sidewalk when Wong placed potting soil in the hole one time a year prior to plaintiff's accident. This single instance was not an assumption of control and is more akin to shoveling the sidewalk during the winter. The potting soil was a temporary solution and the hole was not repaired by Walgreens at that time.

¶ 58 Plaintiff has failed to show that Walgreens assumed control of the public sidewalk for its own purposes. The conduct of Walgreens employees did not constitute an affirmative action necessary to establish an appropriation of the sidewalk. Therefore, the trial court properly granted summary judgment because Walgreens did not owe plaintiff a duty in regard to the public sidewalk.

¶ 59 Next, plaintiff asserts that Walgreens failed to give adequate warnings or repair the known dangerous condition. Plaintiff contends that Walgreens "assumed the sidewalk where Plaintiff fell as a necessary adjunct of ownership for their store" and had a duty to give adequate

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warnings or repair a known dangerous condition. Plaintiff refers to Wong's deposition testimony that he was aware of the hole in prior years and had reported it to 311. Wong also had received multiple complaints from customers about the hole. However, plaintiff has failed to cite any authority supporting her claim that Walgreens had a duty to post warnings of a dangerous condition on the public sidewalk when Walgreens had not appropriated the public sidewalk for its own use. Instead, plaintiff again cites *Cooley* and *McDonald* for support, but neither case sets forth such a duty and the facts of those cases are distinguishable from the instant case, as pointed out above. Since we have already concluded that Walgreens did not appropriate the public sidewalk and owed no duty to plaintiff, Walgreens also did not have a duty to warn plaintiff about the public sidewalk it did not own or control.

¶ 60 Finally, plaintiff contends that Walgreens gratuitously rendered its services to repair the sidewalk where plaintiff fell and, therefore, is liable for the resulting harm to plaintiff. Plaintiff bases this claim on Wong's testimony that he placed potting soil in the hole a year before plaintiff fell and that Wong's failure to exercise care and properly fix the sidewalk increased the risk of plaintiff's fall.

¶ 61 However, plaintiff fails to acknowledge that in 2008, shortly after Wong used the potting soil as a temporary fix, the hole was repaired by someone other than Walgreens. The record does not indicate what entity fixed the hole. At the time of plaintiff's fall in April 2009, the 2008 repair had deteriorated, but Walgreens did not undertake any additional repairs. The potting soil has no connection to the condition of the hole in 2009. As previously cited, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking and is to be narrowly

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construed. *Bell*, 2011 IL 110724, ¶ 12. " 'Liability is imposed upon a defendant who voluntarily undertakes a duty but performs the undertaking negligently, if the negligence is the proximate cause of the injury to the plaintiff.' " *Engelland v. Clean Harbors Environmental Services, Inc.*, 319 Ill. App. 3d 1059, 1063 (2001) (quoting *Decker v. Domino's Pizza, Inc.*, 268 Ill. App. 3d 521, 526 (1994)).

¶ 62 The record does not support such a duty being imposed on Walgreens. A single instance in which potting soil was placed in a prior version of the hole at the air shaft grate and frame did not create an ongoing duty on Walgreens to continue to make repairs. Walgreens did not voluntarily undertake any repairs to the hole in 2009 and cannot be held liable for an assumption of such an undertaking. The temporary repair in 2008 did not have any impact on the condition of the sidewalk and air shaft in April 2009. Therefore, Walgreens did not voluntarily assume a duty to repair the sidewalk and no liability can be imposed under this theory of negligence. Summary judgment was proper on this claim.

¶ 63 Based on the foregoing reasons, we affirm the trial court's decision to grant summary judgment in favor of defendants City of Chicago and Walgreen Co. and to deny plaintiff's cross-motion for partial summary judgment.

¶ 64 Affirmed.