

No. 1-12-2700

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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VACHON HARPER-YOUNG,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
THE ITALIAN VILLAGE RESTAURANT, INC.	)	No. 10 L 556
and ALFREDO CAPITANINI,	)	
	)	
Defendants-Appellees,	)	
	)	The Honorable
THE CITY OF CHICAGO, a municipal	)	Kathy Flanagan,
corporation,	)	Judge Presiding.
	)	
Defendant.	)	

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PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly granted summary judgment in favor of defendants because plaintiff cannot demonstrate that a genuine issue of material fact existed with regard to duty and proximate cause. We affirm.

¶ 2 This interlocutory appeal arises from the trial court's order granting summary judgment in a slip-and-fall lawsuit to defendants The Italian Village Restaurant, Inc. and Alfredo Capitanini,

the iconic downtown restaurant's proprietor. On appeal, plaintiff Vachon Harper-Young contends that the trial court erroneously granted defendants' motion for summary judgment as to plaintiff's negligence claim because a genuine issue of material fact existed regarding the elements of duty and proximate cause. We affirm.

¶ 3

### BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. This case arises from injuries sustained in a slip-and-fall in front of the restaurant. Plaintiff commenced this action in January 2010, alleging negligence against defendants and the City of Chicago (City). Plaintiff later filed an amended complaint adding Commonwealth Edison Company, (ComEd) as an additional party.<sup>1</sup> The amended complaint alleged, in pertinent part, that plaintiff was lawfully walking to work on the sidewalk in front of defendants' establishment, located at 71 West Monroe Street, when she slipped and fell on the defective sidewalk and metal vault cover. Specifically, she alleged that defendants should have known that the vault cover was unreasonably slippery and uneven, causing a dangerous condition to exist on the sidewalk. In addition, she alleged it was defendants' duty to exercise ordinary and reasonable care to maintain the premises, specifically the sidewalk and vault cover, in a reasonably safe condition, through among other measures, the removal of ice and snow.

¶ 5 Several depositions were taken during discovery. Plaintiff testified that on the day of the incident, due to the snowfall, she traveled by train to work and arrived downtown around 7:30 a.m. She slipped on the "southern edge of the metal vault" on the sidewalk in front of defendants' establishment because of its "smooth nature," injuring her ankle. She said that she

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<sup>1</sup>In July 2012, plaintiff settled with ComEd and her suit is still pending in the trial court against the City.

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did not trip on the vault cover or any nearby planters, and was uncertain whether her foot had taken any steps on the vault cover prior to slipping. It was light outside and there was a "slushiness of snow" on the ground, but no ice on the vault cover or sidewalk. After the incident, she went to her place of employment and an ambulance escorted her to the hospital. Plaintiff and her husband went back to the site of the occurrence and took pictures later that afternoon. There was a yellow cone on the sidewalk, and to her knowledge, defendants were unaware of the incident.

¶ 6 Defendant Capitanini testified that he heard about the incident from his general manager and to defendant Capitanini's knowledge there had never been any similar prior incident. The sidewalk in front of his establishment was a blackish gray color and displayed a *Fluer-de-lis* emblem, which was there when he became owner 20 years ago. The City billed defendants a year ago for their decorative planters on the sidewalk, but not for the emblem. No work had been performed on the sidewalk or the emblem. In addition, a vault under the sidewalk could be accessed through a locked door downstairs in the establishment. The vault contained piping and electrical wiring, but had not been used for storage or any other purpose. The vault's cover at street level was welded shut and in 2010, the City's inspector, a Mr. Prendergast, told Capitanini that the vault and cover were owned by the City. Capitanini further testified that he did not know the establishment's guidelines for putting the yellow cone out when it snowed.

¶ 7 Daniel Allen, who had been defendants' engineer for 11 years, testified that his responsibilities did not include the sidewalk. During his employment, no maintenance work had ever been performed on the emblem or vault cover. He testified that the vault was swept out once a year for the City inspector, but was never used by defendants. During the 2010 inspection, defendants asked Prendergast if they could get the vault sealed off near its lower level

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"entrance", but Prendergast suggested paying the City a fee to take over the space. In addition, a 2011 inspection was conducted to determine if ComEd or the City owned the vault. Allen occasionally assisted with the salting and shoveling on the sidewalk, but did not believe it was defendants' duty to clear the sidewalk. The placement of the yellow cone was a courtesy to defendants' customers and the cone was not specifically placed on the vault cover.

¶ 8 Joseph Deininger, defendants' general manager, also testified that the vault cover was welded shut and the vault was not used by defendants. Similarly, he testified that snow was cleared before the restaurant opened at 11:00 a.m and the placement of the yellow cone was a courtesy to defendants' customers. The yellow cone was not specifically placed on the vault cover. Deininger testified that defendants would make a request to the alderman when they needed something repaired on the sidewalk.

¶ 9 In May 2012, defendants moved for summary judgment, arguing, in pertinent part, that defendants owed no duty to plaintiff because defendants did not maintain control over the location of the alleged injury. In addition, defendants argued plaintiff could not prove proximate cause because she could not show that the substance she allegedly slipped on was formed through unnatural accumulation and she could not specifically prove what had in fact caused her fall. The trial court granted defendants motion. Plaintiff now appeals.

¶ 10 ANALYSIS

¶ 11 Plaintiff's principal contention on appeal is that the trial court erroneously granted defendants' motion for summary judgment with regard to plaintiff's negligence claim because a genuine issue of material fact existed regarding the element of duty. Summary judgment is proper where the pleadings, admissions, depositions and affidavits demonstrate there is no genuine issue as to any material fact so that the movant is entitled to judgment as a matter of law.

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*Ioerger v. Halverson Construction Co., Inc.*, 232 Ill. 2d 196, 201 (2008); 735 ILCS 5/2-1005 (West 2010). In determining whether a genuine issue of material fact exists, the court must consider such items strictly against the movant and liberally in favor of its opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review the trial court's order granting summary judgment *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 12 In order to recover damages based upon a defendant's alleged negligence, a plaintiff must prove that (1) the defendant owed the plaintiff a duty; (2) that the defendant breached the duty; and (3) that the breach was the proximate cause of the plaintiff's injuries. *Perfetti v. Marion County, Illinois*, 2013 IL App (5th) 110489, ¶ 16. 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 will not be held liable for any injuries incurred on a public sidewalk under the control of the municipality, even though the sidewalk may be used for ingress or egress to the premises. *Friedman v. City of Chicago*, 333 Ill. App. 3d 1070, 1073 (2002). If the occupier appropriates the premises for its own use, however, it then has a duty to insure that the sidewalk is safe. *Dodd v. Cavett Rexall Drugs, Inc.*, 178 Ill. App. 3d 424, 432 (1988).

¶ 13 Plaintiff contends that defendants appropriated the sidewalk for their own use mainly because they had possession and control of the vault and vault cover. The record suggests, however, that the vault was never owned, used or maintained by defendants. In addition, in the City's response to defendants' request to admit facts, the City admitted that only had the authority to remove or move the vault cover. Furthermore, defendant Capitanini, Allen and Deininger all testified that the vault was not used by defendants and they had no authority to maintain the area. In contrast, no evidence produced in discovery supports the allegation that defendants controlled the vault. We further find plaintiff's attempt to analogize the instant case to *Kellems v. Schiele*,

297 Ill. App. 388, 394 (1938), to be disingenuous. In *Kellems*, the plaintiff slipped on an unfastened piece of iron and fell into a nine- foot deep man hole, which the defendant put there to furnish light to his basement. *Id.* Here, defendants did not construct the vault or vault cover. The vault, along with the *Fluer-de-lis* emblem, was there when defendants acquired the establishment.

¶ 14 Plaintiff also contends that defendants appropriated the sidewalk because they installed an overhang in front of the entrance along with two large potted plants. Again, plaintiff fails to show how this constitutes an appropriation creating a duty toward anyone lawfully on any portion of the sidewalk. *Cf. Friedman*, 333 Ill. App. 3d 1070 at 1073 (where the court found that the defendants owed a duty by sectioning off a portion of the sidewalk for use as an outdoor café).

¶ 15 We further reject plaintiff's suggestion that because defendants general practice was to clear the area and warn pedestrians when it snowed that defendants had a duty to do so any time it snowed. There is no common-law duty to remove natural accumulations of snow and ice. See *Claimson v. Professional Property Management, LLC*, 2011 IL App (2d) 101115, ¶ 18 (a general practice of shoveling and salting in the winter does not impose a duty to do so on all occasions). In addition, a property owner is not liable for injuries sustained in a fall on an icy sidewalk where the accumulation is natural and not caused or aggravated by the owner. See *Endsley v. Harrisburg Medical Center*, 209 Ill. App. 3d 908, 910 (1991). Here, nothing in the record suggests that defendants caused the condition leading to this incident by clearing the sidewalk immediately before plaintiff's fall. Accordingly, no duty was created triggering the exception to apply. Plaintiff has cited no authority for the principle that a general practice is sufficient to create the type of duty at issue. Having considered all the pleadings and the discovery in support thereof in the light most favorable to the plaintiff, plaintiff cannot

demonstrate that a genuine issue of material fact existed with regard to duty. The record only supports the conclusion that the defendants had none.

¶ 16 Plaintiff finally contends that a genuine issue of material fact existed with respect to proximate cause. Although we need not consider this contention in light of our determination regarding duty, we will touch upon it briefly. In order to establish proximate cause, a plaintiff must establish both "cause in fact" and "legal cause." *Rivera v. Garcia*, 401 Ill. App. 3d 602, 610 (2010). Cause in fact is established if the occurrence would not have happened "but for" the conduct of the defendant. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 1007 (2005).

Furthermore, proximate cause must be established to a reasonable certainty and may not be based upon mere speculation, guess, surmise or conjecture. *Id.*

¶ 17 Plaintiff's testimony was quite nebulous as to the cause of her slip-and-fall. She could not be certain whether her foot had taken any steps on the actual vault cover prior to slipping. In addition, she testified that there was no ice on the vault cover or sidewalk and that she did not trip on the vault cover. Moreover, plaintiff specifically identified the smooth nature of the vault cover as the only defective condition, but a smooth, slippery surface without more is insufficient to establish negligence. See *Lucker v. Arlington Park Race Track Corp.*, 142 Ill. App. 3d 872, 874 (1986). Here, no reasonable inferences can be drawn to establish that but for defendants' negligence the incident would not have occurred. See *McCraw v. Cegielski*, 287 Ill. App. 3d 871, 873 (1996). In addition, based on the above determination, we need not address whether the condition was open and obvious. Because the record presents no genuine issue of material fact, defendants were entitled to summary judgment as a matter of law.

¶ 18 CONCLUSION

¶ 19 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

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¶ 20 Affirmed.