

No. 1-13-2914

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**

SARAH OGUNNUBI and FUNSHO OGUNNUBI,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County
)	
v.)	
)	No. 10 L 9667
EVANSTON GAS and FOOD, INC., and)	
EQUILON ENTERPRISES, LLC d/b/a SHELL)	
OIL PRODUCTS,)	Honorable
)	James N. O'Hara,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's grant of summary judgment is affirmed where the plaintiffs did not allege sufficient facts supporting their claim that plaintiff Sarah fell on an unnatural accumulation of ice on defendants' property. The trial court also did not abuse its discretion in setting the briefing schedule, which allowed plaintiffs six months to respond to the motions for summary judgment.

¶ 2 Plaintiffs, Sarah and Funsho Ogunnubi, appeal the order of the circuit court granting summary judgment in favor of defendants, Evanston Gas and Food, Inc. (Evanston Gas), and Equilon Enterprises, LLC (Equilon), on plaintiffs' negligence complaint. On appeal, plaintiffs contend that the trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether Sarah Ogunnubi slipped and fell on an unnatural accumulation of ice. Plaintiffs also argue that the trial court's briefing schedules were unfair and did not allow them time to file proper responses to defendants' motions. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court granted summary judgment in favor of defendants on January 30, 2013. Plaintiffs filed a motion to reconsider, which the trial court denied on June 20, 2013. Plaintiffs filed their notice of appeal on July 19, 2013. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 In February 2010, defendants owned a gas station and food mart located at 101 Ridge Avenue in Evanston, Illinois. On February 16, 2010, plaintiff Sarah Ogunnubi was a customer at defendants' gas station when she "slipped and fell due to the slippery condition of the walking surface on the premises." She and her husband, Funsho Ogunnubi, filed a complaint alleging negligence, loss of consortium, and spoliation of evidence. In her fourth-amended complaint, Sarah contends that she slipped on "an unnatural accumulation of ice sheets or ice slabs on grease and/or oil," and that defendants failed to provide proper lighting for the premises.

¶ 7 Witnesses made the following statements through their depositions. Officer William Teasley stated that he spoke with Sarah at the gas station after she fell and she told him that she was wearing dress shoes. As she stepped out of the vehicle, her foot "slid out of her dress shoes" because she had "stepped wrong." Officer Teasley described the weather conditions that night as cold with snow on the ground, but "we hadn't had fresh snow in quite some time." He also described the streets, sidewalks, and parking lots as "cleared of snow and ice by this point." Officer Teasley stated that he "definitely" recalled that "the parking lot was free of ice and snow."

¶ 8 Plaintiff's husband, Funsho, stated that when they arrived at the gas station the weather was cold, but not snowing. Funsho got out of the vehicle to pump gas and when asked whether he noticed any ice or snow on the ground he responded, "I didn't see anything." Saheed Oshidele stated that he drove the vehicle and parked so that Sarah could "buy pop" at the minimart. When asked whether he noticed any ice, Oshidele answered that he "wasn't looking for it. But there was some ice on the floor." He later described the condition of the property as having "snow on the side, packed to the side, and there was snow on the floor with tire marks coming and going and there was snow around. That's about it. But I wasn't looking particularly for – I mean, maybe it was – I wasn't looking out for anything." Oshidele could not recall whether it had snowed that day.

¶ 9 Plaintiffs filed their initial complaint on August 23, 2010, and filed an amended complaint on May 6, 2011. The depositions of witnesses Funsho, Oshidele, and Officer Teasley had been taken by July 25, 2011. The trial court granted leave for plaintiffs to file their second amended complaint. Sarah, who suffered the fall, had her deposition taken on December 15, 2011, and on January 17, 2012, the trial court granted plaintiffs leave to file their

third amended complaint. On February 1, 2012, defendant Evanston Gas filed its motion for summary judgment. Plaintiffs filed a fourth amended complaint on February 9, 2012, and defendant Equilon filed its motion for summary judgment, and joined Evanston Gas's summary judgment motion, on April 27, 2012.

¶ 10 The trial court entered a briefing schedule on Equilon's summary judgment motion on May 4, 2012. It granted plaintiffs' motion for leave to inspect the premises on July 12, 2012, and subsequently entered a briefing schedule requiring plaintiffs to file a response to all pending motions, including the summary judgment motions, by September 27, 2012. The trial court also granted plaintiffs' motion to bar gas station clerk Wajid Ali from testifying in the case because defendants failed to present him for deposition. On September 26, 2012, plaintiffs filed a motion for extension to file responses and the trial court entered a "final" briefing schedule requiring plaintiffs to file responses to all pending motions for summary judgment by November 17, 2012. On October 16, 2012, Sarah submitted an affidavit stating that the unnatural ice that caused her fall resulted "from migrating or draining thawed snow water that was flowing from snow piled up at the higher elevation close to the store on the north east end" and the thaw/freeze cycle of temperatures at the time. She also alleged that the lighting in the area was inadequate.

¶ 11 On December 10, 2012, plaintiffs filed a motion to extend time to file their responses, which the trial court denied. Without leave of court, plaintiffs filed their responses on December 11, 2012. On January 4, 2013, the trial court denied plaintiffs' motion to file their responses instant. The trial court granted summary judgment in favor of defendants on January 30, 2013. Plaintiffs filed a motion to reconsider which the trial court denied. Plaintiffs then filed this timely appeal.

¶ 12

ANALYSIS

¶ 13 Plaintiffs first contend that the trial court erred in granting defendants' motions for summary judgment because a genuine issue of material fact exists as to whether Sarah slipped on an unnatural accumulation of ice on defendants' property.¹ Initially, we note that although the trial court held a hearing on the summary judgment motions, the record does not contain transcripts of the hearing, or of any prior hearings, nor does it contain a substitute report of proceedings pursuant to Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). Without this material, we cannot know the arguments presented at the hearings or the reasoning of the trial court when it made its determinations. Under these circumstances, this court must presume that the trial court acted in conformity with the law and had a sufficient basis in the record for its determination. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 14 Summary judgment is proper where the pleadings, depositions, and admissions on file, together with the affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005). In determining whether the trial court properly granted summary judgment, a reviewing court will construe the evidence in the light most favorable to the nonmoving party. *Pearson v. DaimlerChrysler Corp.*, 349 Ill. App. 3d 688, 697 (2004). "The grant of summary judgment is reviewed *de novo*." *Flight v. American Community Management*, 384 Ill. App. 3d 540, 543 (2008).

¹Plaintiffs' fourth amended complaint also alleged counts of loss of consortium and spoliation of evidence. Plaintiffs do not raise these issues in their brief on appeal and therefore have waived review of these issues. See Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.")

¶ 15 In their fourth amended complaint, plaintiffs alleged that Sarah sustained serious injuries when she "slipped on ice sheet or ice slab [*sic*] on grease and/or oil" while lawfully walking on the premises of defendants' gas station. No other witness at the scene, however, could corroborate her testimony that she slipped on ice. Sarah's husband, Funsho, exited the vehicle to pump gas and when asked whether he noticed any ice or snow on the ground he responded, "I didn't see anything." Officer Teasley, who spoke with Sarah at the gas station after the incident, described the weather conditions that night as cold with snow on the ground, but "we hadn't had fresh snow in quite some time." He also described the streets, sidewalks, and parking lots as "cleared of snow and ice by this point." Furthermore, when he asked Sarah about her fall she told the officer that when she stepped out of the vehicle, her foot "slid out of her dress shoes" because she had "stepped wrong." She did not mention ice on the ground. The only witness who mentioned ice was Saheed Oshidele, who drove the vehicle and parked so that Sarah could "buy pop" at the minimart. When asked whether he noticed any ice, Oshidele answered that he "wasn't looking for it. But there was some ice on the floor." However, Oshidele later described the condition of the property as having "snow on the side, packed to the side, and there was snow on the floor with tire marks coming and going and there was snow around. That's about it. But I wasn't looking particularly for – I mean, maybe it was – I wasn't looking out for anything." Although plaintiffs need not prove their case at the summary judgment stage, they must present some evidentiary facts supporting the elements of their cause of action. *Id.* at 543-44.

¶ 16 Even if plaintiffs sufficiently alleged that Sarah slipped and fell on ice, in order to survive a summary judgment in a slip-and-fall case, they "must present some facts to show that the ice was unnatural or caused by defendant." *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325,

332 (1992). The mere removal of snow which leaves a natural formation of ice underneath does not constitute negligence. *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 746 (2005).

¶ 17 In their fourth amended complaint, plaintiffs alleged that the ice upon which Sarah slipped was an unnatural accumulation, but they do not state how defendants caused the unnatural accumulation. Sarah, however, filed an affidavit eight months later stating that she fell on an unnatural accumulation of ice resulting "from migrating or draining thawed snow water that was flowing from snow piled up at the higher elevation close to the store on the north east end." Her affidavit, without more, is insufficient. When a plaintiff claims that ice was formed by a pile of plowed snow, she "must either show a direct link between defendants' snow piles and the ice that caused her to slip, or she must provide circumstantial evidence through an expert." *Madeo v. Tri-Land Properties, Inc.*, 239 Ill. App. 3d 288, 290 (1992). Plaintiff's mere speculation or conjecture that the snow pile created an unnatural accumulation of ice cannot withstand summary judgment. *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 23. The trial court did not err in granting summary judgment here.²

¶ 18 Plaintiffs, however, contend that the trial court's briefing schedule was unfair and did not allow them time to file the affidavit of architect Michael Eiben, which was signed on November 28, 2012. They argue that they "have the unique burden to secure expert [sic] at this time to defend the dispositive motions pending." They claim that in setting the briefing schedule, the trial court did not consider whether plaintiffs' expert could meet the "tight schedule." Pursuant

²Plaintiffs also allege that a genuine issue of material fact exists as to whether defendants were negligent in providing inadequate lighting on the premises, and in committing possible code violations. However, plaintiffs provide no further argument on these issues nor do they cite authority in support of their contentions. Therefore, they have waived review of these issues on appeal pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013).

to Illinois Supreme Court Rule 183 (eff. Feb. 16, 2011), the trial court may extend the time a party has to "file any pleading provided a showing of good cause has been made." Rulings made pursuant to Rule 183 are within the trial court's discretion. *Premier Electrical Construction Co. v. Morse/Diesel, Inc.*, 257 Ill. App. 3d 445, 454 (1993).

¶ 19 The record shows that defendant Evanston Gas filed its motion for summary judgment on February 1, 2012. The trial court entered a briefing schedule requiring plaintiffs to file a response to all pending motions, including the summary judgment motions, by September 27, 2012. The trial court also granted plaintiffs' motion for leave to inspect the premises on July 12, 2012. On September 26, 2012, plaintiffs filed a motion for an extension to file responses and the trial court entered a "final" briefing schedule requiring plaintiffs to file responses to all pending motions for summary judgment by November 17, 2012. On December 10, 2012, plaintiffs filed a motion to extend time to file their responses, which the trial court denied. Without leave of court, plaintiffs filed their responses on December 11, 2012, and the trial court subsequently denied plaintiffs' motion to file their responses *instanter*.

¶ 20 The trial court's briefing schedule gave plaintiffs ample opportunity to secure the opinion of its expert witness. Defendant Evanston Gas filed its motion for summary judgment on February 1, 2012. At this point, plaintiffs were on notice that they would have to defend against the summary judgment motion, and in a slip-and-fall case, plaintiffs would need to show either a direct link between defendants' snow piles and the ice upon which Sarah slipped, or provide the opinion of an expert. See *Madeo*, 239 Ill. App. 3d at 290. The trial court's initial briefing schedule required plaintiffs to file their responses by September 27, 2012, which gave them more than seven months to secure their expert. However, upon plaintiffs' motion, the trial

court granted an extension to file their responses by November 17, 2012, giving plaintiffs approximately two more months.

¶ 21 Eiben, however, did not visit the premises until November 8, 2012, a little more than a week before plaintiffs' responses were due. Plaintiffs argue in their brief that they could not secure an expert's opinion until they had an opportunity to depose key witnesses, including two gas station clerks and Mike Foster, who plowed the snow from the premises. However, Foster's deposition was taken on June 14, 2012, giving plenty of time for an expert to review Foster's statements before the November 17, 2012, due date. Regarding the gas station clerks present on the date of the occurrence, plaintiffs do not argue that the employees saw Sarah fall or set forth what helpful information they may have had for an expert to review. In fact, plaintiffs may not have viewed gas station employee Wajid Ali's testimony as aiding their cause because they filed a motion to bar his testimony at trial, which the trial court granted months before the deadline. The trial court did not abuse its discretion in denying plaintiffs' motion for another extension to file their responses to defendants' summary judgment motions.

¶ 22 Even if plaintiffs had filed the affidavit of architect Eiben in a timely manner, it does not provide sufficient support to withstand defendants' summary judgment motions. Sarah suffered her fall on February 16, 2010, more than two years prior to Eiben's inspection of the premises. In his affidavit, Eiben does not state that he viewed the alleged snow pile or even photographs of the snow pile. Since Eiben did not see the snow pile that allegedly caused the ice to form, he could not opine whether her fall resulted from the manner in which the snow was piled at the time of the accident. Therefore, the circumstantial evidence introduced through Eiben's affidavit is "insufficient to identify the cause of the ice formation" and the trial court properly granted summary judgment in favor of defendants. *Madeo*, 239 Ill. App. 3d at 294.

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¶ 23 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.