2015 IL App (1st) 141515-U

FOURTH DIVISION
August 27, 2015

No. 1-14-1515

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

REGINALD LINDSEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 L 13386
	)	
CENTRAL BLACKTOP COMPANY, INC.,	)	The Honorable
	)	John H. Ehrlich,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Cobbs concurred in the judgment.

ORDER

HELD: Summary judgment was proper where facts demonstrated that defendant did not owe plaintiff duty of care either contractually or under section 343 of the Restatement (Second) of Torts.

¶ 1 Plaintiff-appellant Reginald Lindsey (plaintiff) brought suit against defendant-appellee Central Blacktop Company, Inc. (Central) after he was injured at work. Central filed a motion for summary judgment, arguing that it did not owe a duty of care to plaintiff and that it did not proximately cause his injury. The trial court granted Central's motion, finding that it did not owe plaintiff a duty. Plaintiff appeals, contending that the trial court erred in granting summary judgment because "Central had a duty of care for more than one reason," thereby creating an "abundance of genuine issues of material fact." He asks that we reverse the trial court's decision and remand this cause for further discovery and trial. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Plaintiff was a forklift operator employed by Electro-Motive Diesel, Inc. (EMD) at its facility in McCook, Illinois. EMD contracted Central to perform road repair and resurfacing work in certain areas at the facility, including excavating, placing base course and pouring new concrete. On October 19, 2010, while both plaintiff and Central were performing their separate jobs at EMD, plaintiff allegedly hit a break on the pavement north of EMD's warehouse; his forklift jumped, he was slammed inside, and he heard a pop in his neck. Plaintiff suffered a cervical injury which required two fusion surgeries.

¶ 4 Plaintiff filed a complaint at law against Central[1] sounding in negligence, asserting that Central owed him a duty to perform its work in a safe and workmanlike manner and to act with reasonable care, and that Central breached this duty in several respects, including causing broken

[1]Plaintiff also named Raffin Construction Company as a defendant in his suit; however, this defendant was voluntarily dismissed from the cause.

concrete in his path of travel, failing to remove and repair this concrete, failing to conduct the flow of traffic and to warn him, failing to implement a traffic control plan and failing to provide a safe means of egress free of obstructions. Plaintiff further asserted that, as a direct and proximate result of Central's negligence, he was injured.

¶ 5 In response, Central filed a motion for summary judgment, arguing that it did not owe a duty to plaintiff because his injury occurred in an area outside its work area and on a preexisting cracked and deteriorating roadway under the exclusive control of EMD. Additionally, Central argued that it did not proximately cause plaintiff's injury, asserting instead that it was caused by EMD's negligence, including that EMD knew its existing roadways were in poor condition and that its forklifts had no pneumatic tires or suspension systems to better handle its roadway irregularities.

¶ 6 The plans and specifications for the project between EMD and Central contained various general clauses and notes. For example, the work was to be completed in accordance with village specifications and codes and Central was to follow the Illinois Manual of Uniform Traffic Control Devices (MUTCD). Central was also responsible for installing and maintaining adequate signs, barricades and other traffic control devices. It was to protect pavements, walks, curbs and structures "within and adjacent to the pavement work zone," and it was to keep these areas clean of debris, mud and other byproducts of its construction work, including dust. And, in addition to enforcing all safety precautions and doing all work in a workmanlike manner, Central was to provide concrete lane barriers "in quantities and location required to keep vehicular, mobile equipment, and pedestrian traffic out of work areas" and to "complete all items of work as

directed" in the plans and specifications.

¶ 7 In his deposition, plaintiff testified that, on the day in question, he was working at EMD driving an older model forklift to Dock H of a warehouse. The roadway on which he was driving was not temporary, but he stated that the portion north of the warehouse was "rough" with "broken" and "deteriorated" concrete, making for a "bumpy ride." Plaintiff and his coworkers had often complained about these road conditions to EMD, noting, in general, that the facility's whole roadway system "just like *** suck[ed]" and all the roads were in "bad" shape. On this particular day, and while driving the "old and decrepit" roadway toward the warehouse, plaintiff's visibility was impaired a bit by dust from ongoing construction. However, he affirmed that he was clearly able to see the road in front of him and he did not see any cracks or breaks in the pavement. In fact, he stated that he had driven this path many times, including multiple times on the day of the incident, and he made no complaints to his superiors regarding its condition or the ongoing construction at the facility. In addition, plaintiff noted that there were other workers along his path and caution tape delineating Central's work areas. Plaintiff averred that at some point while driving, he turned right on his route and hit something in the pavement, which he assumed to be a crack, causing his forklift to jolt and him to be slammed inside it, resulting in a "pop" in his neck and injuring him. However, plaintiff could not describe anything regarding the crack in the roadway; he stated he never saw it before or after the time of the incident, he could not describe how long or wide it was, and he did not know its precise location. In the incident report he filled out for EMD, plaintiff made no mention of Central's construction work or dust as contributing factors to his accident.

¶ 8 Gregory H. Pestine, an engineering expert retained by plaintiff, testified that he examined the plans and specifications of the project, reviewed the incident at issue and prepared a report regarding his findings. In this, he stated that Central and EMD shared a joint responsibility with respect to the project, with Central to maintain a clear path for travel and EMD to train its drivers and prepare them for the construction. He also made several findings in his report, including that EMD failed to enforce Central's contract requirements regarding barricades, signage and maintenance of work areas; that EMD's safety training for forklift workers was not in compliance with standards and did not properly prepare plaintiff to drive safely in construction work zones; and that Central's work zone safety did not comply with contract requirements for the project. Pestine determined that the primary cause of the accident was a defect in the road on which plaintiff was driving his forklift, resulting from either a preexisting crack, a crack exacerbated by construction or debris in the roadway. He opined that, had EMD provided adequate training of its drivers and had Central used proper barricades and signs and maintained the roadways, plaintiff's accident would have been prevented.

¶ 9 Pablo Esqueda, Jr., EMD's supervisor of engineering materials management, testified that prior to plaintiff's accident, he had noticed rough roadway conditions which he reported to EMD and that roads throughout EMD's facility were in poor condition with cracks and loose pavement. He also noted that EMD's forklifts did not have shocks or suspension. On the day in question, plaintiff notified him of his accident, telling Esqueda that he had run over a crack in the roadway north of the warehouse. Esqueda testified that he recalled Central performing construction on that day, but west of the warehouse near another building and not in the area plaintiff described.

Esqueda took plaintiff to receive medical attention and, while en route, drove north of the warehouse with plaintiff to the location as he described. However, Esqueda saw only normal wear and tear on the roadway and nothing that would have caused plaintiff's accident. To the contrary, plaintiff could not pinpoint a specific area or location for the accident, and Esqueda noted that there was sufficient room for forklift drivers to operate, with Central's nearest workzone some 25 yards away. Esqueda later prepared an incident report regarding plaintiff's accident, citing as contributing factors "rough road surface," "hard tires on vehicle" and "inattention/distraction." Under the section entitled "best preventive measure," Esqueda noted that the roads needed to be resurfaced "both short and long term" and "changing to pneumatic tires" on forklifts would help drivers. Esqueda made no mention of Central, its construction work or dust in the report as factors contributing to or involved in the accident.

¶ 10 Kenneth Stocker, who wrote the project for EMD and was the contact person during construction, testified that EMD contracted with Central in relation to its decision to restructure its facility. Mainly, Central was to replace concrete, add new concrete to widen the pavement and replace gravel with concrete in certain sections of EMD's facility. Stocker noted that prior to Central's work, while portions of EMD's roadways were in fair or good condition, several areas of its existing concrete exhibited spalling surfaces and deterioration. In relation to the project plans and specifications, Stocker averred that he was present and monitoring the work sites several times a week and, while Central had erected barricades, he did not see any concrete lane barriers. Stocker further stated that Central was responsible for protecting the pavement within and adjacent to its work zones. However, Stocker made clear that Central was not permitted to

do any work outside the designated work zones agreed to by it and EMD without EMD's written authorization. This included if Central noticed any potholes or cracks in pavement outside its work areas; namely, Central could not fix these without informing EMD and receiving its permission via a new, written work-change order. In addition, Stocker averred that only EMD could close down an area of the facility or authorize the commencement of work in an area of the facility. Finally, Stocker testified that he found no indication that, during the duration of the project, Central damaged or destroyed any portion of pavement outside its designated work areas.

¶ 11 Ronald Schlesinger, Central's operations manager, testified that Central provided all the signs and barricades necessary for the project at EMD. While it did not erect concrete lane barriers, Central used flagging and ribbon between barricades, road-closed signs and arrow signs to direct traffic around its designated work zones. Schlesinger described that Central used different categories of barricades, including both A-frame or saw-horse type structures placed along the edges of its work sites, and bigger or larger barricades with three horizontal panels and two lights placed where traffic would run. Just as Stocker, Schlesinger testified with respect to the general clauses in the project's plans and specifications outlining Central's responsibilities to complete its work in a workmanlike manner, maintain safety and protect the areas within and adjacent to its work sites. Also like Stocker, Schlesinger reaffirmed that Central was not permitted to do any work outside its designated work areas without EMD's permission and that any work outside the scope of the contract and plans had to be authorized by EMD in writing. In addition, Schlesinger testified that no one from EMD ever complained about Central's barricade installation or locations, its safety precautions, its work or any resulting dust, and no one from

EMD ever informed Central of plaintiff's accident.

¶ 12 Thomas Jenkins, Central's project superintendent, testified that Central was expected to follow all plans and specifications for the project at EMD and that it was responsible for the safety of all workers from Central and EMD. He also noted that there were several construction projects going on at EMD's facility, with several contractors and subcontractors other than Central working there. With respect to the day in question, Jenkins, who filled out the daily work reports, stated that Central was performing new paving in the area north of EMD's warehouse, where the existing concrete was failing due to spalling and cracking. It was within EMD's discretion which areas were to be repaired. According to Jenkins, Central's specific work that day north of the warehouse included concrete pouring and grading; Central was also performing a simultaneous project laying stone near door E15, which was located several hundred feet away from the area north of the warehouse. As both of these projects involved only pouring and grading, Jenkins explained that they would generate "[v]ery little, if any" dust. When asked if Central's work could cause cracks in the surrounding roadway, Jenkins responded that this was "highly unlikely" due to Central's method of concrete cutting and removal. With respect to safety, Jenkins testified that Central used two different types of barricades, describing, just as Schlesinger, the A-frame type and the larger, more visible type for traffic direction. Jenkins stated that Central's work areas were "barricaded very heavily," and that he used "way more" barricading than he would on any standard road job, to the point of "overkill" and definitely above and beyond any MUTCD requirements, which were actually for road projects. This barricading kept vehicular and forklift traffic out of the work areas and diverted this traffic

to a large road area approximately 50 to 60 feet wide with "plenty of room for bidirectional traffic." Jenkins averred that while the existing concrete on this road area had some spalling and cracks, it had been inspected before the project and was "perfectly fine and perfectly passable for vehicular traffic," with no section "impassable or unsafe." Jenkins described that he spoke to Stocker on a daily basis and would inform him of any plans for the diversion of traffic, as well as the barricades and traffic pattern Central would need to employ, and that Stocker would give the final decision approving, modifying or disapproving these plans. For example, Central did not provide concrete lane barriers as originally mentioned in the project's plans and specifications; however, Jenkins discussed this with Stocker who approved this decision. Essentially, all diversion of traffic had to be approved by Stocker. Jenkins further testified that Central kept its work areas clean and safe and always barricaded. Central was not allowed to perform any work outside its designated work sites without EMD's authorization. And, Jenkins affirmed that no one from EMD ever complained about Central's barricades, any lack of signage or dust; that he was never informed about plaintiff's accident until an attorney called him to be deposed; and that Central was never reprimanded or fined regarding the incident.

¶ 13 After reviewing these depositions and the evidence presented, the trial court granted Central's motion for summary judgment. In its order, the trial court stated that Central "owed no duty to [p]laintiff." And, having "found the issue of duty determinative," it further noted that it did not need to address the issue of proximate cause.

¶ 14 ANALYSIS

¶ 15 On appeal, plaintiff contends that the trial court erred in granting summary judgment in

favor of Central because Central owed him a duty of care "for more than one reason," namely, pursuant to its contract with EMD and pursuant to section 343 of the Restatement (Second) of Torts. Contractually, plaintiff asserts that Central violated eight different duties it assumed under the plans and specifications of the project; meanwhile, legally, plaintiff asserts that Central was the possessor of the property at issue and that it knew about the defect in the roadway, knew that plaintiff would not discover it, and failed to exercise reasonable care to protect him. We disagree with plaintiff's assertions and find, as the trial court did, that, under the circumstances presented, Central owed no duty to plaintiff here.

¶ 16 In order to sustain his cause of action for negligence, plaintiff must establish that Central owed him a duty of care; that is, he is required to prove that he and Central stood in such a relationship to one another that the law imposed upon Central an obligation of reasonable conduct for the benefit of plaintiff. See *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 483 (2002) (listing elements of negligence claim, all of which must be proven in order to impose liability); see also *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 525 (1987). Whether a duty of care exists is a question of law, appropriately determined by the trial court on a motion for summary judgment. See *Bonner*, 334 Ill. App. 3d at 483; accord *Curatola v. Village of Niles*, 154 Ill. 2d 201, 207 (1993).

¶ 17 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001); accord *Purtill v. Hess*, 111 Ill. 2d 229, 240-44 (1986).

While this relief has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35, quoting *Purtill*, 111 Ill. 2d at 240. Appellate review of a trial court's grant of summary judgment is *de novo* (see *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992)), and reversal will occur only if we find that a genuine issue of material fact exists (see *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)).

¶ 18 Unless plaintiff demonstrates that a duty is owed, there can be no negligence imposed upon Central. See *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992) (duty is essential element of negligence claim); accord *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 388-89 (1998) (unless a duty is owed by the defendant, the plaintiff cannot prevail on a negligence action). The factors that must be considered in determining whether a duty exists are, generally: (1) the foreseeability that the defendant's conduct will result in injury to another; (2) the likelihood of injury; (3) the magnitude of guarding against it; and (4) the consequences of placing that burden upon the defendant. See *Bonner*, 334 Ill. App. 3d at 484, citing *Curatola*, 154 Ill. 2d at 214; accord *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002). Again, " 'where no duty exits, summary judgment is proper because there is no possible recovery for plaintiff as a matter of law.' " *Zakoff v. Chicago Transit Authority*, 336 Ill. App. 3d 415, 421 (2002), quoting *Ordman v. Dacon Management Corp.*, 261 Ill. App. 3d 275, 278 (1994); accord *LaFever*, 185 Ill. 2d at 388.

¶ 19 The first duty factor of foreseeability is the key component of the instant cause. While the actual injury itself is not germane to the determination of the existence of a duty, the pre-

injury relationship between plaintiff and Central, along with the foreseeability of an injury to this particular plaintiff, are very relevant. See *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill. App. 3d 32, 40-41 (1997). With respect to foreseeability in this context, our courts have declared that while it is an elusive concept, it is not one that ignores common sense. See *Schmid v. Fairmont Hotel Co.-Chicago*, 345 Ill. App. 3d 475, 485 (2003). Foreseeability requires something more than the mere possibility of occurrence or the general knowledge of danger alone: "[s]ome additional quantum of knowledge tipping the scales in favor of the expectation of an injury is required." *Schmid*, 345 Ill. App. 3d at 491. This is because, as our state supreme court has found, " '[n]o [one] can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded.' " *Schmid*, 345 Ill. App. 3d 485, quoting *Cunis v. Brennan*, 56 Ill. 2d 372, 376 (1974).

¶ 20 Accordingly, we have held that an occurrence or injury is reasonably foreseeable "if a reasonably prudent person could have foreseen as likely the events which did transpire." *Zakoff*, 336 Ill. App. 3d at 423; accord *Schmid*, 345 Ill. App. 3d at 485. Thus, a duty of ordinary care is not absolute: " 'when a person [defendant] has no reason to suspect injury, he is not required to look for it' " and cannot be charged with a duty. *Schmid*, 345 Ill. App. 3d at 486, quoting *Prater v. Veach*, 35 Ill. App. 2d 61, 65 (1962). This "reasonable foreseeability" test is an objective one, focusing on whether it was objectively reasonable to expect an injury to occur, and not on whether an injury might only have conceivably occurred. See *Schmid*, 345 Ill. App. 3d at 491, citing *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 466 (1976) (noting that this is "the proper

role of foreseeability in a negligence determination").

¶ 21 Examining how much Central knew or should have known of the possibility of injury to the particular plaintiff in this cause, we do not believe, based on the record, that Central owed any duty to him.

¶ 22 Plaintiff presented no evidence to show how he sustained his injury and, in turn, that Central should have reasonably foresaw its occurrence. Plaintiff testified that, on the day of his accident, he was driving on a preexisting road north of the warehouse; it was not a temporary road designated or erected by Central but, rather, a regular road at EMD's facility. As plaintiff described, the roadways in this area of the facility were "rough," with "broken" and "deteriorated" concrete that was "bumpy." In fact, he and his workers had complained about this often to EMD, claiming that the entire roadway system at the facility "suck[ed]" and all the roads were in "bad" shape. Plaintiff stated that on this day, even though the roadway on which he was traveling was "old and decrepit," nothing impaired his view and he was clearly able to see the road in front of him. He affirmed that he did not see any cracks or breaks in the pavement, and testified that he even drove this road several times that very day without incident or complaint to anyone regarding the road's condition or any construction going on at the facility. He averred that there were workers along his path, but he clearly saw them, as well as the caution tape delineating Central's work sites. Most critically, plaintiff could not describe how he was injured. That is, he explained that shortly after he made a right turn, he hit something in the pavement, which he assumed to be a crack, causing his forklift to jolt. However, he admitted he never saw a crack in the roadway either before the accident or anytime after it, even when he returned to the area. Nor

could he describe how long or wide the crack was or even its location.

¶ 23 Supervisor Esqueda's testimony corroborated plaintiff's inability to specify the cause of his injury, or to demonstrate how it was tied to Central. Esqueda, too, testified as to the rough roadway conditions at EMD, roads throughout the facility, controlled solely by EMD, that were in poor condition with cracks and loose pavement. While taking plaintiff to receive medical attention immediately after the accident, Esqueda drove to the area plaintiff told him was the location of the accident and the crack he assumed he had hit. Esqueda testified that plaintiff could not pinpoint a specific area or location of his accident, and Esqueda himself only noted normal wear and tear on the roadway at issue–nothing that would have caused the accident as plaintiff described. To the contrary, Esqueda noted that there was sufficient room for forklift drivers to operate on that roadway, and Central's nearest work zone was some 25 yards away.

¶ 24 Accordingly, then, plaintiff presented no evidence to show how he was injured, or that Central had caused or aggravated a crack in the preexisting roadway, or even that this alleged crack occurred within Central's work area that it was contracted to repair such that Central should have known, or should have reasonably foreseen in an objective sense, that an injury to plaintiff would have occurred. Without such evidence, there is no duty that can be imposed on Central.

¶ 25 Plaintiff points out that a duty of ordinary care may arise pursuant to a contract, and that a defendant can be found negligent because of its failure to perform an act required by agreement. He then goes on to cite eight "contractual duties and responsibilities" attributable to Central pursuant to the plans and specifications of the instant project and claims that Central's violation of these created genuine issues of material fact as to its duty to plaintiff and, thus, preempted the

grant of summary judgment in this cause.

¶ 26 Plaintiff is correct that when negligence is alleged against a defendant due to its failure to perform an act allegedly required by contract, we look to the contract to determine whether the defendant had a duty to perform the act. See *St. Paul Mercury Insurance v. Aargus Security Systems, Inc.*, 2013 IL App (1st) 120784, ¶ 60. However, this determination is strictly governed by the terms of the contract itself. See *St. Paul*, 2013 IL App (1st) 120784, ¶ 60 ("[n]egligence allegations based on contractual obligations are defined by the subject contract"). Accordingly, "[t]he scope of the defendant's duties will not be expanded beyond that required by the contract." *St. Paul*, 2013 IL App (1st) 120784, ¶ 60.

¶ 27 As noted earlier, the plans and specifications for the project between EMD and Central contained various general clauses and notes, including certain responsibilities Central was to assume. For example, Central was to complete its work in accordance with village specifications and codes and to follow the Illinois MUTCD. Central was also responsible for installing and maintaining adequate signs, barricades and other traffic control devices. It was to protect pavements, walks, curbs and structures "within and adjacent to the pavement work zone," and it was to keep these areas clean of debris, mud and other byproducts of its construction work, including dust. And, in addition to enforcing all safety precautions and doing all work in a workmanlike manner, Central was to provide concrete lane barriers "in quantities and location required to keep vehicular, mobile equipment, and pedestrian traffic out of work areas" and to "complete all items of work as directed" in the plans and specifications.

¶ 28 Taking each of plaintiff's cited eight contractual responsibilities in turn, we still do not

find any indication that Central owed him a duty of care.

¶ 29 The first contractual responsibility plaintiff insists Central failed to perform, thereby leading to his injury, is that it did not comply with MUTCD in that it did not provide proper barricades or delineate a clear path for traffic to move within its construction areas. However, several witnesses, including plaintiff himself, testified to the contrary. Plaintiff testified at one point that driving at the facility was like driving on an "obstacle course." However, plaintiff also described that there were several barriers, namely, caution tape, along his route, a route he admitted was preexisting and upon which he had driven several times, even that day. Clearly, plaintiff's route was clear and delineated. In addition, as plaintiff notes, Esqueda did recall that he did not see any detours or signage at the location where plaintiff claimed his accident occurred. Yet, Esqueda also testified that Central was not working near that location at the time; Central's closest work zone to that area was some 25 yards away and did not impact the roadway plaintiff was using to get to the warehouse. Accordingly, there would be no signage required at that location. And, Esqueda, who drove the route with plaintiff shortly after the accident, described that not only was there nothing on the roadway that would have caused plaintiff's accident, but also averred that there was sufficient room for forklift drivers to drive and operate their machinery. Moreover, Central's operations manager Schlesinger and its project superintendent Jenkins both testified with regards to the precautions Central took in relation to MUTCD–within their work areas. They described that different types of barriers were used, as well as adequate signage, all according to the project requirements. Specifically, Jenkins stated that Central's work areas were "barricaded very heavily," and that Central used "way more"

barricading than any standard job, to the point of "overkill" and definitely above and beyond MUTCD's requirements. He also confirmed that traffic north of the warehouse was on a roadway approximately 50 to 60 feet wide, providing "plenty of room for bidirectional traffic." Contrary to plaintiff's assertion, this does not create a genuine issue of material fact.

¶ 30 Next, plaintiff asserts that Central did not keep its work zone clean. He claims that by the mere virtue of the work Cental was doing, namely, moving and pouring concrete, "[d]ebris and spillage was inevitable." However, this claim too fails to create a genuine issue of material fact. Plaintiff testified that, while he did not see anything in the road, he assumes that he hit a crack in the pavement. Never in his testimony did he ever attribute his accident to debris or spillage. This is true also for the written reports on his accident. That is, plaintiff made no mention of Central's construction work, let alone debris or spillage, as having affected the roadway or having created his accident. Likewise, Esqueda's report cited "rough road surface," "hard tires on" the forklift and plaintiff's own "inattention/distraction" as contributing factors, not debris or spillage.

¶ 31 The same is true for the next contractual responsibility plaintiff cites–Central's failure to "control dust." He claims that there is a dispute about this and, thus, a factual question is raised. However, we find no dispute in the record. Indeed, according to the plans and specifications, Central was responsible for controlling dust resulting from its work on the project. But, the evidence presented before the trial court makes clear that dust was not an issue on the day of the accident. Plaintiff mentioned in his testimony that there was some dust in the area, but he then affirmatively stated that he was clearly able to see the road in front of him and, further, that he did not see any cracks or breaks in the pavement. Again, neither he nor Esqueda, to whom

plaintiff reported immediately after the accident, attributed dust as a factor in the accident. And, Jenkins, who monitored Central's daily work, testified that, on the day in question, Central was pouring and grading concrete north of the warehouse, while simultaneously laying stone several hundred feet away, and that both of these projects, by their nature, would generate "[v]ery little, if any" dust.

¶ 32 Fourth, plaintiff claims that Central was to install proper barricades and traffic control devices according to the project contract, and failed in this duty by not using concrete lane barriers at the facility. However, the plans and specifications for the project stated that Central was to provide concrete lane barriers "in quantities and location required to keep *** traffic out of work areas." Thus, contrary to plaintiff's insistence, the provision of these barriers was not mandated by the contract; rather, they were to be used when required and depending on the location of each particular work zone. Additionally, Jenkins confirmed that Central did not consider concrete lane barriers to be necessary on this portion of the project. He testified that he discussed this with Stocker, who was in charge of EMD's traffic during construction, and Stocker approved the decision.

¶ 33 Next, plaintiff claims that Central did not protect the pavement in its work zone or adjacent to its work zone. He states that he "hit a defect in the roadway either in the work zone or immediately adjacent" to it and that Central's work "either caused or created the defect." However, these statements are conclusory and not supported by any evidence. As mentioned several times, there is no evidence to show where the accident happened, let alone that it was in or adjacent to any of Central's work areas. Again, plaintiff has only ever assumed he hit a crack

or break in the pavement, and he has never been able to show a precise location. And, Esqueda, who also visited the site with plaintiff, testified he saw nothing on the pavement that could have caused the accident, other than normal wear and tear. In addition, Stocker, EMD's foreman, testified that he found no indication that, during the duration of the project, Central damaged or destroyed any portion of pavement outside its work areas. Without demonstrating a location, there is no proof that this accident happened in or even near a Central work zone, as plaintiff claims.

¶ 34 The last three contractual responsibilities plaintiff cites are similar. He claims that Central did not appropriately monitor or supervise safety in that it diverted forklift traffic to an unsafe area, and that Central did not ensure the health and safety of EMD's workers. However, again, the evidence demonstrates the contrary. Plaintiff admitted that the roadway upon which he was driving was not a temporary one or one created by Central. Instead, it was a preexisting one, controlled by EMD, which he had driven many times, as well as several times on the day of the accident. Esqueda noted that there was sufficient room on this roadway for forklift drivers to operate safely, and Jenkins corroborated this when he testified that the roadway was approximately 50 to 60 feet wide with plenty of room for bidirectional traffic. Jenkins had collaborated with Stocker, whose approval was required, with respect to this and certified that the roadway had been inspected and that it was "perfectly fine and perfectly passable for vehicular traffic," with no section that was "impassable or unsafe." This, combined with a lack of any evidence to show that the accident happened within or near a Central work zone, does not raise a genuine issue of material fact.

¶ 35 Without any evidence that the accident happened in or near a Central work zone, there is no genuine issue of material fact here. It is undisputed, and clearly indicated by the testimony of Stocker, Schlesinger and Jenkins, that Central was not permitted to do any work outside its designated work areas. This included repairing any breaks or cracks in the pavement. There is no indication that what occurred did so in an area where Central was contracted or authorized to perform work. Thus, it cannot be said that Central owed a duty to plaintiff.

¶ 36 Plaintiff presents an alternative argument here. He contends that, even if there was not a contractual duty of care upon Central here, the trial court erred by not finding a duty of care under section 343 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 343 (1965)), since Central was the possessor of the land upon which plaintiff was injured. Again, we disagree.

¶ 37 A possessor of land owes its invitees a common law duty of reasonable care to maintain its premises in a reasonably safe condition (*Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 437-40 (1990)), but no legal duty arises unless the harm is reasonably foreseeable (*Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 354-55 (1977)). Section 343 states:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will

fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger."

Restatement (Second) of Torts § 343, at 215-16 (1965).

¶ 38 Citing *Deibert*, plaintiff states that Illinois courts have "long applied" section 343 to general contractors like Central, concludes that it was a "possessor" of land within the meaning of that section, and then goes on to analyze the remaining factors in his favor. However, based on the evidence before us, we fail to find his conclusions supportable.

¶ 39 First, we disagree with him that Central was a "possessor of land" within the meaning of section 343. Yes, our courts have at times concluded that general contractors can be possessors of land upon which they are working. But, this is not an automatic principle, as plaintiff intimates. Compare *Deibert*, 141 Ill. 2d 430 (finding contractor was possessor of land under section 343 and owed duty), with *O'Connell v. Turner Construction Co.*, 409 Ill. App. 3d 819 (2011) (finding contractor was not possessor of land and thus owed no duty). Rather, this term is defined within the Restatement and requires review. Accordingly, "Possessor of land" is defined as:

"(a) a person who is in occupation of the land with intent to control it; or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it; or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." Restatement (Second) of Torts § 328E (1965).

¶ 40 In the instant cause, as we have repeatedly discussed, there is no evidence to show that plaintiff's accident occurred within or adjacent to a Central work zone or in an area where Central was contracted or authorized to perform work. What the evidence did show was that Central was not allowed to perform any work outside its work zones, unless and until it received written authorization from EMD. Moreover, Central was only allowed to work in certain areas as mandated by EMD; EMD controlled when projects commenced and what areas of the facility, including its roadways, could be closed or rerouted. Clearly, then, Central had no ability, or intent, to control the area.

¶ 41 We find *O'Connell*, as cited by Central in its brief, to be very instructive here. In that case, an employee of a subcontractor hired by an independent contractor brought a negligence suit against the construction manager for a school district's building project following an injury he received while at work asserting, in part, that the construction manager owed him a duty under section 343. The trial court granted summary judgment in favor of the construction manager and we affirmed that decision on appeal. Despite the employee's assertions that the construction manager had general responsibility for safety on the project and coordinated the activities at the construction site, we held that there was no evidence that the manager "possessed" the land. See *O'Connell*, 409 Ill. App. 3d at 824-26. Rather, the employee failed to establish that such authority equated to a right or intent to control the premises. See *O'Connell*, 409 Ill. App. 3d at 824-26 ("one who controls the land on behalf of another is not the possessor and that limited control of the land does not equate [to] possession"). Also, in further support of our decision, we noted that there was no evidence that the construction manager had any dominion over the

construction site, such as being able to exclude anyone from the premises or alter what was built there. See *O'Connell*, 409 Ill. App. 3d at 825. Thus, without a showing that the manager either exercised or intended to exercise such authority over the construction site, it could not be considered a possessor of land under section 343. See *O'Connell*, 409 Ill. App. 3d at 825. See also *Madden v. F.H. Paschen/S.N. Nielson, Inc.*, 395 Ill. App. 3d 362, 375 (2009) (affirming grant of summary judgment in favor of a general contractor and design contractor upon finding that neither was a "possessor" of land because they did not possess or exercise control over the jobsite at the time of the accident at issue).

¶ 42 The instant cause is in line with *O'Connell*. Plaintiff has provided no evidence to show that Central controlled or intended to control the area where his accident occurred. And, of equal import, he fails to show that Central's authority over the premises exceeded EMD's. The testimony provided demonstrated that Stocker, EMD's project manager, was present on an almost daily basis monitoring the construction. He determined the traffic patterns during construction and provided the final approval, or disapproval, of Central's plans, as well as its barricading efforts, in this respect. Moreover, EMD controlled when construction could commence and controlled what areas of the facility could be closed or barricaded. And, again, Stocker, Schlesinger and Jenkins all testified that Central could do nothing outside its work zones without EMD's written authorization. Based on these facts, it cannot be said that Central was a possessor of the land upon which it was working under section 343 so as to impose a duty upon it, as plaintiff would have us.

¶ 43 Accordingly, we find that the trial court's grant of summary judgment in favor of Central

was wholly proper in the instant cause.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 46 Affirmed.