2015 IL App (1st) 142154-U

No. 1-14-2154

Fourth Division
June 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

TYRONE WHITE, as Administrator of the Estate of TYRONE WHITE, III, deceased, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 12L6552
CHICAGO PARK DISTRICT and WESTREC MARINAS, Defendants-Appellees.	)	Honorable Eileen Mary Brewer, Judge, presiding.

JUSTICE Cobbs delivered the judgment of the court.
Presiding Justice Fitzgerald Smith concurred in the judgment.
Justice Ellis specially concurred.

O R D E R

¶ 1 *Held*: Where a five-year-old child drowned near a boat harbor on Lake Michigan, defendants, the owner and maintainer of the harbor, did not owe a duty to warn of the dangers associated with the water or to ensure the dock was clear of all obstacles. The ruling below granting summary judgment in favor of the defendants is affirmed.

¶ 2 In 2011, decedent, Tyrone White III (Tyrone), died after drowning near Jackson Park Harbor on Lake Michigan. Plaintiff, Tyrone White II, as administrator of Tyrone's estate, filed a

negligence complaint against defendants, Chicago Park District, which owns Jackson Park Harbor, and Westrec Marinas, which maintains the harbor. Plaintiff's complaint alleged that defendants were negligent in maintaining and managing the facilities, which lead to Tyrone's death.

¶ 3 On February 5, 2014, the trial court granted defendants' motion for summary judgment. The court found that plaintiff had insufficient evidence to prove that defendants caused Tyrone to enter the water, and held that defendants had no duty to warn plaintiff of the open and obvious dangers associated with the lake. The trial court denied plaintiff's motion to reconsider on June 19, 2014. Plaintiff appeals, arguing that genuine issues of material fact exist as to whether defendants owed plaintiff a duty to warn of the harbor's dangers and defendants were a proximate cause of Tyrone's death. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 The pleadings and deposition testimony establish the following facts in this tragic case: On June 19, 2011, Tyrone accompanied his father, Tyrone White II (Mr. White), his mother (Mrs. White), and his siblings for a ride on his father's boat. Mr. White rented a dock slip from Jackson Park Harbor for his boat. Tyrone had not learned how to swim. Mr. White purchased life jackets, but he did not plan to put them on his children until boarding the boat. At around 3:30 p.m., Mr. and Mrs. White stood a few yards from each other on the harbor, engaging in conversation with other harbor patrons. Tyrone walked between his father and mother on the dock, holding a toy. At one point, Tyrone told Mrs. White he would walk back to his father. Mrs. White's attention was focused on the woman with whom she was speaking. A short time later, Mr. White walked toward Mrs. White and asked, "Where is Tyrone?" He then noticed Tyrone's toy floating in the water. Mr. White and other bystanders jumped into the water to try to find Tyrone. Unfortunately, they were unsuccessful. No one witnessed how Tyrone ended up

in the water. Divers later found Tyrone's body near where Mr. White found Tyrone's toy. A police investigation indicated that the current swept Tyrone under a boat and pinned him against the pier.

¶ 6 Mr. White testified in his deposition that after Tyrone went missing, he saw a rope that looked like it had been kicked or disturbed. Part of the rope lay in the water, and the other part rested on the dock. He reasoned that Tyrone must have tripped over the rope and fallen into the water. However, he admitted that he had not seen the rope previously, and that the rope may have been thrown into that position.

¶ 7 Joe Williams, the marina manager, testified that the harbor had no official rules requiring life jackets on the dock and that there were no signs warning patrons to wear life jackets. He did testify that while he patrolled the docks, he would tell patrons to put life jackets on their children. He also testified that the harbor had emergency flotation devices in the form of life buoys, but they were not used on the day of the incident. He also testified that if employees saw hoses or lines that were not wrapped up properly, they would tell the customer to pick up the rope, or the employees would wrap it up themselves.

¶ 8 Plaintiff filed the instant suit on June 12, 2012, alleging causes of action under the Wrongful Death Act (740 ILCS 180 (West 2012)) and the Survival Act (755 ILCS 5/27-6 (West 2012)) against defendants. The complaint alleged that defendants were negligent in managing and maintaining the facilities. Specifically, plaintiff alleges that defendants negligently: (1) failed to warn visitors of the dangers of the underwater current, (2) failed to warn visitors that they must wear personal flotation devices (life jackets) while walking the dock, (3) failed to ensure that the dock was clear of any obstructions, causing Tyrone to trip on the rope that Mr. White saw lying on the dock, and (4) failed to equip the dock with ladders going into the water,

or with additional emergency flotation devices that would have assisted bystanders in their attempts to save Tyrone.

¶ 9 Defendants filed a motion for summary judgment, arguing that plaintiff failed to make a *prima facie* case for negligence. Plaintiff responded, and attached an affidavit from aquatics safety expert, David Smith, Ph.D. Smith stated in his affidavit that defendants were responsible for the safety of its patrons, that they breached their duty to provide safety information and warnings, and that the failure to provide such warnings were a cause of Tyrone's death. He also mentioned that the harbor lacked ladders going from the docks into the harbor that could assist emergency rescue efforts.

¶ 10 The motion for summary judgment was granted on February 5, 2014. Plaintiff filed a motion to reconsider, attaching a supplemental affidavit from David Smith, stating that defendants breached their duty to have a rule requiring children to wear life jackets prior to walking on the docks. The trial court denied the motion to reconsider, stating that defendants had no duty to warn Tyrone of the risks associated with water. The trial court found that the record did not support plaintiff's theory that Tyrone tripped over the rope, and that case law is clear that defendants had no duty to warn Tyrone of the dangers of Lake Michigan. Plaintiff appeals, arguing that genuine issues of material fact exist and the trial court erred in granting summary judgment.

¶ 11 ANALYSIS

¶ 12 A trial court's ruling on a motion for summary judgment is a question of law and reviewed *de novo*. (735 ILCS 5/2-1005(a) (West 2012)); *Burlington Northern & Santa Fe Ry. Co. v. ABC-NACO,* 389 Ill. App. 3d 691, 716 (2009). Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." (735 ILCS 5/2-1005(c) (West 2012)). Summary judgment "is a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt." *Purtill v. Hess*, 11 Ill. 2d 229, 240 (1986). To survive a motion for summary judgment, a plaintiff must provide a factual basis that would entitle him to judgment if proven true. *Bruns v. City of Centralia*, 2014 IL 116998, ¶12 (2014).

¶ 13 We are not unmindful of the magnitude of the loss in this case. Even so, we are constrained to follow the law in reaching our disposition. A plaintiff who files a claim in negligence must establish the existence of a duty owed by defendant to plaintiff, defendant's breach of that duty, and that the breach proximately caused plaintiff's injuries. *Id.* Thus, we must first determine if defendants owed a duty to plaintiff.

¶ 14 Duty to Warn

¶ 15 Plaintiff asserts that defendants breached a duty to Tyrone by failing to warn visitors that there was a dangerous current in the harbor on the day of the incident. Plaintiff asserts that young children such as Tyrone cannot appreciate the dangers of the current. Defendants respond that the dangers of water are open and obvious to even a young child. Accordingly, they had no duty to warn of the dangers of the current.

¶ 16 The existence of a duty is a question of law. *Bruns*, 2014 IL 116998 at ¶13. Whether a duty exists is determined by weighing four factors: (1) the likelihood of injury, (2) the reasonable foreseeability of such injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on defendant. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 456 (1996) (citing *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 147 (1990)). A duty may also exist where a landowner knew or should have known that children are commonly on the premises and that a dangerous condition existed on the premises, even if such a duty would not exist under ordinary negligence. *Cope v. Doe*, 102 Ill. 2d 278, 286 (1984) (citing *Corcoran*

v. Village of Libertyville, 73 Ill. 2d 316, 326 (1978)). A condition is "dangerous" if it is likely to cause injury to children who cannot be expected to understand and avoid the risks because of their age and immaturity. *Id.*

¶ 17 The common law "open and obvious rule" is relevant to our duty analysis, as a landowner is generally not required to foresee or protect against open and obvious dangers. *Bruns*, 2014 IL 116998 at ¶16 (citing *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003)). A "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them." Restatement (Second) of Torts §343A, at 218 (1965). The open and obvious doctrine affects the duty analysis by reducing the likelihood and reasonable foreseeability of an injury. S*ee Id.* at 456-57.

¶ 18 "Bodies of water are deemed to signal obvious danger to persons old enough to be at large precisely because of their unknown surface or subsurface elements." *Lerma v. Rockford Blacktop Construction Co.*, 247 Ill. App. 3d 567, 575 (1993). Our supreme court held that the waters of Lake Michigan present open and obvious risks. *Bucheleres* 171 Ill. 2d at 455.

¶ 19 While plaintiff argues that Tyrone was too young to appreciate the dangers of the current, the law assumes that a child old enough to be allowed unsupervised will appreciate certain obvious dangers. *Mount Zion State Bank & Trust v. Consolidated Communications*, 169 Ill. 2d 110, 117 (1995) (citing W. Keeton, Prosser & Keeton on Torts § 59, at 407 (5th ed. 1984)). Even young children appreciate dangers such as fire or water. *Cope*, 102 Ill. 2d at 286-87 (citing Restatement (Second) of Torts §339 comment j. at 203 (1965)). Although Tyrone was only five years old at the time of the accident, courts have consistently held that bodies of water present obvious dangers to even young children. See, *e.g.*, *Cope*, 102 Ill. 2d at 278 (seven-year-old child); *Englund*, 246 Ill. App. 3d 468 (three-year-old child); *Mount Zion*, 169 Ill. 2d 110 (six-year-old child). As our supreme court reiterated in *Mount Zion*, " the issue in cases involving

obvious dangers, like fire, water or height, is not whether the child does in fact understand but rather what the possessor may reasonably expect of him. [Citations.] The test is an objective one." 169 Ill. 2d at 126. The facts in this case must be evaluated in light of established authority on this issue. Accordingly, we find the danger presented by Lake Michigan to be open and obvious to young children like Tyrone.

¶ 20 Plaintiff argues that this case is similar to *Jackson v. TLC Associates, Inc.*, where our supreme court found summary judgment in favor of the defendant inappropriate. 185 Ill. 2d 418 (1998). In *Jackson*, a swimmer dove into a lake and hit his head on a submerged pipe. *Id.* at 426. The court noted that the dangers of water are usually open and obvious where the injury relates to the two inherent dangers related to bodies of water — drowning, or diving into shallow water. *Id.* The court did not find the danger to be open and obvious in this case because the presence of a submerged pipe in a swimming area was completely unexpected. *Id.*

¶ 21 We find this case more similar to *Bucheleres*. 171 Ill. 2d 435. In *Bucheleres*, the plaintiff dove into Lake Michigan off a seawall, as he had done previously numerous times. *Id.* at 438-440. However, storms and erosion caused the level of the water to fluctuate since his last dive. *Id.* at 440. The plaintiff did not expect the water level to be as low as it was, and his head struck the sand bottom. *Id.* The court found that the defendant had no duty to warn of the water level because it is common knowledge that Lake Michigan's strong currents may cause water levels to fluctuate. *Id.* at 454-455.

¶ 22 Unlike the defendant in *Jackson*, defendants did not place an unexpected object in the water. Tyrone's injury resulted from the current pinning him against the pier, causing him to drown. This is a danger commonly associated with large bodies of water, similar to the fluctuating water levels in *Bucheleres*.

¶ 23 We also find this case dissimilar to *T.T. by B.T. v. Kim*, where a child fell into a swimming pool. 278 Ill. App. 3d 11 (1996). There, the court found that the danger of a pool was not obvious because it was obscured by a tarp. *Id.* at 17. Here, the waters of Lake Michigan were not obstructed and clearly visible.

¶ 24 Our analysis does not end here. The existence of an open and obvious danger does not present a *per se* bar to finding a legal duty and a traditional duty analysis is still applied. *Bucheleres*, 171 Ill. 2d at 456-57. However, as we have previously noted, the foreseeability of harm and likelihood of injury are slight when a condition is open and obvious, and this weighs against imposing a duty on the defendant. *Id.*

¶ 25 In the present case, the foreseeability and likelihood of harm were slight given the open and obvious dangers of Lake Michigan. As to the third and fourth factors, we find that placing a duty on defendants to warn of the strength of the current would require defendants to constantly monitor the strength of the current, and post signs every time the current is stronger than usual. Such a requirement would not only be extremely burdensome but also costly. Thus, the third and fourth factors weigh against the imposition of a duty and we find that defendants had no duty to warn plaintiff of the current's open and obvious dangers. Accordingly, even if the underwater current was particularly strong on the day of the incident, we find that defendants owed no duty to warn plaintiff of the current.

¶ 26 Duty Regarding Life Jackets

¶ 27 Plaintiff next argues that even if the waters of Lake Michigan are an open and obvious danger, the danger of failing to wear a life jacket is not. Accordingly, defendants should have had a duty to require patrons to wear life jackets while on the dock. Plaintiff maintains that if Jackson Park Harbor had such a rule, Tyrone would have worn a life jacket and would not have

drowned. Defendant retorts that water represents the root of the danger in failing to wear a lifejacket, and water is an open and obvious danger.

¶ 28 In *Christon v. Kankakee Valley Boat Club*, a nine-year-old child slipped and drowned after wading into water next to a boat club. 152 Ill. App. 3d 202, 203 (1987). The plaintiffs alleged that the defendants failed to supervise the dock area, provide life rings or poles in the dock area, and failed to provide non-skid surfaces on the docks. *Id.* at 203-04. The plaintiff argued that the danger was not the river, but the hidden slippery strip of metal placed by the defendant near the river. *Id.* at 204. The court found summary judgment in favor of the boat club was proper because the "real" danger was the river, which was open and obvious. *Id.* at 204-05.

¶ 29 Just as the court in *Christon* found that the duty analysis should focus on the dangers presented by the river and not the slippery metal strip, the real danger in our analysis is that posed by Lake Michigan, not the failure to wear a life jacket. Wearing a life jacket is simply a means to safeguard against the danger of Lake Michigan, the failure to do so is not a danger unto itself. Our analysis therefore must revolve around whether defendants had a duty to warn of the danger presented by Lake Michigan, which is open and obvious, not of the need to wear a life jacket.

¶ 30 Even if we were to somehow find that the failure to wear a life jacket presented a concealed danger, we still would not find that defendants had a duty to warn. The basis for a landowner's duty to warn of a concealed condition is the possessor's superior knowledge of a dangerous condition. *Stephen v. Swiatkowski*, 263 Ill. App. 3d 694, 703 (1994) (citing *Mentesana v. LaFranco*, 73 Ill. App. 3d 204, 209 (1979)). In *Keller v. Mols*, the plaintiff's son was injured while playing hockey at the defendant's house. 129 Ill. App. 3d 208, 210 (1984). The plaintiff alleged the defendant was negligent in failing to warn her child of the dangers of

playing without proper protective equipment. *Id.* The court found that the defendant owed no duty to the 14-year-old child because, *inter alia*, the defendant's own mother could observe the hockey game from her kitchen. *Id.* at 211. The court found that the child's parents had the primary duty to ensure their child's safety. *Id.* at 211-212.

¶ 31 In the present case, defendants did not possess superior knowledge of the need to wear life jackets around the lake. Mr. White purchased life jackets for his children and was aware of the safety benefits they can provide. Similar to the child in *Keller*, Tyrone's parents were supervising Tyrone on the day of the incident, and they were at least as well situated as defendants to ensure that Tyrone wore a life jacket.

¶ 32 Plaintiff additionally argues that defendants had a duty to warn of the need to wear a life jacket because the marina manager had previously seen children on the dock without life jackets. In support, plaintiff seeks to analogize our facts to those of *Grant v. South Roxana Dad's Club*. 381 Ill. App. 3d 665 (2008). *Grant* involved a child who rode his bicycle off a dirt pile in a park. *Id.* at 666. Despite the open and obvious danger presented by heights, the court found the defendant had a duty to remove the dirt pile. *Id.* at 673. However, the defendant in *Grant* had actual knowledge of children riding their bikes off the dirt pile in the past, expected them to return in the future, and admitted to anticipating that children would be hurt on the dirt pile. *Id.* at 672-73. The court also noted that the defendant could easily have removed the hazard by smoothing out the dirt pile. *Id.* at 673. Here, the marina manager testified that he had warned patrons that they should put a life jacket on children. He never stated that he expected that children would walk the harbor without life jackets, unlike the defendant in *Grant* who anticipated that the children would continue to ride on the dirt pile and injure themselves. Moreover, although a dirt pile can be easily removed, the hazards of Lake Michigan are fixed. Therefore, we find that defendants had no duty to warn of the need to wear a life jacket.

¶ 33 Finally, plaintiff contends that the expert affidavit of Smith, stating that defendants breached a duty to warn plaintiff of the need to wear a life jacket, creates a genuine issue of material fact. Defendants retort that the affidavit consists of unsupported legal conclusions. An affidavit under Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) "shall not consist of conclusions but of facts admissible in evidence." Affidavits that merely state conclusions cannot help defeat a motion for summary judgment. *Hagy v. McHenry County Conservation Dist.*, 190 Ill. App. 3d 833, 841 (1989) (citing *In re E.L.*, 152 Ill. App. 3d 25 (1987); See also *Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill. App. 3d 100, 105 (1994) ("[A] court must disregard conclusions in affidavits when adjudicating a summary judgment motion."). Smith's affidavits do little more than list the elements of negligence and assert that they are satisfied. Smith's conclusions improperly invade the province of the court and are insufficient to defeat summary judgment.

¶ 34 Common Law Duty

¶ 35 Plaintiff entreats us to find a duty to warn on the part of defendants by arguing that because Jackson Park Harbor charged visitors a fee to use the docks for recreational purposes, defendants were under a common law duty imposed on private operators of public swimming pools. Plaintiff cites to *Barnett v. Zion Park Dist.*, 171 Ill. 2d 378 (1996), *Brumm v. Goodall*, 16 Ill. App.2d 212 (1958), and *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448 (1907). In each of these cases the court found that the defendant landowners owed a duty to patrons who paid to swim or bathe in the defendants' water. *Id.* Defendants respond that those cases are limited to public bathing or swimming facilities, and the instant case deals with a boating harbor.

¶ 36 These cases are readily distinguishable. "Our courts and the legislature have traditionally regarded public swimming pools differently from other bodies of water." *Cope*, 102 Ill. 2d at 288. Unlike the bodies of water in *Barnett*, *Brumm*, and *Porter*, Jackson Park Harbor is not a

swimming facility, and therefore does not have the heightened duties associated with public swimming pools. Moreover, even swimming facilities do not owe a duty to prevent all possible harms. Rather, the cases required the defendants to safeguard against "those accidents which common knowledge and experience teach are liable to befall" visitors. *Porter*, 137 Ill. App. at 452. As we have determined, this accident was not foreseeable because of the open and obvious nature of the danger. Accordingly, we find that the common law duty imposed on swimming pool operators does not apply to the operators of Jackson Park Harbor.

¶ 37 Duty to Ensure a Clear Dock and Provide Emergency Rescue Equipment

¶ 38 Plaintiff next argues that defendants assumed a duty to keep the dock clear from obstacles. Allegedly, the breach of this duty caused Tyrone to trip on the rope that Mr. White saw lying off the dock and fall in the water. Plaintiff cites to the marina manager's deposition as evidence of this duty. Williams testified that if he noticed that a patron left a rope lying on the dock, he would either tell the patron to clear it, or clear it himself. Plaintiff similarly argues that defendants failed to provide sufficient emergency flotation devices and ladders to assist bystanders in their attempts to save Tyrone after he fell into the water.

¶ 39 We understand plaintiff's argument to mean that defendants undertook a duty to "properly equip and maintain their property" by placing several ring buoys along the dock. Illinois has adopted Section 323 of the Restatement (Second) of Torts when analyzing a duty that arises from a voluntary undertaking. *Torres v. City of Chicago*, 352 Ill. App. 3d 533, 535 (2004) (citing *Wakulich v. Mraz*, 203 Ill. 2d 223, 243 (2003)).

> "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." Restatement (Second) of Torts §323 (1965).

¶ 40 The duty imposed upon a defendant based on a voluntary undertaking is limited to the extent of that undertaking. *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 33 (1992). In *Frye*, the plaintiff sued a pharmacy for negligently performing their voluntary undertaking to warn of a drug's dangerous side effects. *Id.* at 27-28. The pharmacy placed a warning label that the drug could cause drowsiness, but failed to warn that it should not be taken with alcohol. *Id.* at 29. Our supreme court found no duty to issue such a warning, and granted summary judgment for defendants. *Id.* at 33. The court found the duty limited because defendants did not undertake to warn of all of the drug's potential side effects. *Id.*

¶ 41 In our case, defendants never promised that they would ensure that the dock was clear of all ropes and obstacles. Such a duty would be beyond what defendants voluntarily undertook. The marina manager stated that if he happened to see that a patron left an unraveled rope as he was walking the dock, he would either wind up the rope or tell the patron to do so. Just as the court found a limit to defendant's duty in *Frye*, we find the extent of defendants' undertaking to be limited to instances where harbor staff happened to see an obstruction on the dock. Here, there is no allegation that Williams or someone on his staff had seen the rope in question and ignored it. Similarly, we do not find defendant's actions of placing life buoys around the harbor to impose a duty to provide additional emergency equipment. The law does not impose a duty on defendants to provide any more flotation devices than they in fact did. Accordingly, we do not find that defendants had a duty to keep the docks clear of all obstructions or that they had a duty to provide additional flotation devices.

¶ 42 Proximate Cause

¶ 43 Even if we were to find that defendants had such a duty to keep the dock clear and provide additional flotation devices, plaintiff failed to provide sufficient evidence that such acts on the part of defendant were a proximate cause of the accident. Circumstantial evidence is sufficient to establish causation when a reasonable inference can be drawn from the circumstances. *Mort v. Walter*, 98 Ill. 2d 391, 397 (1983). However, the circumstantial evidence must be of such a nature that it is the only probable conclusion that can be drawn from the circumstances. *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 974 (2005) (citing *Weigman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 795-96 (1999)). It is not enough for the inference to be merely possible. *Id.*

¶ 44 Mr. White testified that he saw a rope that appeared to have been kicked or disturbed. Plaintiff argues that the location of Tyrone's body and toy near the rope prove that it was the cause of Tyrone falling into the water. Moreover, Tyrone had not yet learned how to swim, which plaintiff argues is evidence that Tyrone did not enter the water voluntarily. Defendants respond that this theory has insufficient support from the record.

¶ 45 In *Englund v. Englund*, a three-year-old drowned in a swimming pool and her parents sued the homeowner, alleging that their daughter tripped on a loose deck plank and fell into the pool. 246 Ill. App. 3d 468, 472-73 (1993). However, the court noted that plaintiff's theory as to how the child fell was "pure speculation," as it was just as probable that the child fell into the pool while reaching for a toy. *Id.* at 473. Therefore, summary judgment was appropriate. *Id.*

¶ 46 It is possible that Tyrone could have tripped over the rope on the dock and fell in. However, on these facts, we are unable to conclude that possibility as the only probable conclusion. Mr. White testified that the rope's indentation appeared as if someone kicked or tripped over it. However, he did not see the rope before Tyrone went missing and admitted the

rope could have been in that position before the incident. Plaintiff's theory that Tyrone tripped over the rope on the dock, while plausible, is speculative. Thus, there is insufficient evidence to prove that the rope was a proximate cause of Tyrone's entry into the water.

¶ 47 Finally, the record does not suggest that the availability of ladders or additional flotation devices would have saved Tyrone's life. Smith's affidavit mentions that the harbor did not have ladders, but he does not contend that such ladders would have saved Tyrone's life. Moreover, there were also several life buoys available on the dock, but they were not used. It is unclear how additional flotation devices would have been useful. We therefore find that there is insufficient evidence to prove that the alleged lack of emergency equipment was a proximate cause of the accident.

¶ 48 CONCLUSION

¶ 49 For the reasons stated, we affirm the decision of the circuit court of Cook County granting defendants' motion for summary judgment.

¶ 50 Affirmed.

¶ 51 JUSTICE ELLIS, specially concurring.

¶ 52 I concur with the majority's decision to affirm the award of summary judgment for defendants, because I agree that plaintiff could not establish proximate cause as a matter of law. As the absence of proximate cause is sufficient to affirm the court's grant of summary judgment, I would have gone no further in this decision. See *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 14 ("If the plaintiff cannot establish any element of her cause of action, summary judgment for the defendant is proper."); *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 31-32 (2006) (appellate court may affirm summary judgment on any basis in the record).

¶ 53 As to the question of duty that I would not have reached, I agree with the majority in its discussion of defendants' alleged duties to warn, to provide or require life jackets, and to provide emergency equipment. But I respectfully disagree with the majority's discussion as to defendants' duty to properly maintain the dock and ensure that it is free from obstacles. Plaintiff couches this duty as a duty assumed by defendant Westrec Marinas—that is, as a voluntary undertaking.

¶ 54 The majority notes that a voluntary undertaking such as this one is limited to the scope of that voluntary undertaking. I agree with that legal proposition. But I disagree with how the majority limits that voluntary undertaking in this case.

¶ 55 The majority cites the marina manager's deposition testimony as evidence that defendant only undertook to clean the dock if the manager or employee "happened to see that a patron left an unraveled rope" on the dock. Thus, the majority limits the scope of the undertaking to "instances where harbor staff happened to see an obstruction on the dock." But that characterization of the scope of the undertaking suggests that Westrec undertook no general duty to patrol and clean the docks, and that it would only clear debris if it happened to notice it in the course of any other duties it might be performing. That is not how I read the deposition testimony of Westrec's marina manager:

> "Q. What about issues that involve boaters and their gear up on the docks[?] Who is responsible at Jackson Park Harbor over the past few years that you've been there for keeping an eye out for things that are left on the dock or on the docks?
>
> * * *
>
> A. Only thing that we do is, you know, we walk the docks and we clean the docks. And if there's a problem there, we'll tell that one customer that he needs to

straighten up his stuff or we take it and just tie it up ourself [*sic*], you know what I mean.

Q. And you're referring to such tie ropes or lines from the boats?

A. Yeah, we tell the customer, say, hey—pretty much each boater is responsible for his own stuff on the docks, okay?

Q. Okay. And would you also say that as far as your experience is that the boaters are also responsible for their own safety on the docks?

A. I would say so.

Q. But if you see something out of place, such as, hoses or lines that may not be wrapped or kept properly, you have the ability to say something to them?

A. Yes, sir. I can tell them they can pick it up or either we take it and coil it up ourself [*sic*], if there's a problem.

Q. Do you have any employees under you at Westrec at Jackson Park Harbor that also have the ability to tell these boaters to clean their areas up or the docks?

A. Pretty much they'll come to me and I'll go either tell the customer to straighten it up or either we'll straighten it up, or if there's a complaint, we comply [sic] to it. We try to correct it."

¶ 56 He also testified that his "dockhands" and "dock masters" walked the docks "constantly." He testified that one of his employees' "duties" was to "clean the docks" and "sweep the docks" every day.

¶ 57 Thus, while the marina manager suggested that boaters were responsible for keeping the docks clean, he also testified that he and his employees constantly patrolled the area, swept the docks, told customers to clean the docks, and picked up ropes and items

themselves. A trier of fact could view this testimony as evidence that Westrec voluntarily undertook to patrol the docks and keep them clear of debris and other items, such as the items on the dock the day Tyrone drowned.

¶ 58 Obviously, Westrec employees would not remove an obstacle unless they saw it; you cannot remedy a condition you do not see in the first place. But that does not mean that Westrec's voluntary undertaking should be limited to instances where its employees "happened to see an obstruction on the dock." If Westrec undertook a duty to patrol the docks and keep them free of debris—which I believe a fact finder could conclude in this case—it was required to perform that voluntary undertaking "with due care or 'such competence and skill as (one) possesses.' " *Cross v. Wells Fargo Alarm Servs.*, 82 Ill. 2d 313, 317 (1980) (quoting *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 85-86 (1964)). Reasonable care in the performance of a voluntary undertaking to patrol the docks and keep them clear of debris goes beyond removing obstacles when you happen to see them; it includes, at a minimum, making a reasonable effort to be in a *position* to see them, and keeping the docks in a reasonably clean and safe condition.

¶ 59 I do not mean to suggest that Westrec failed in this regard. Whether Westrec breached any duty in this case is not an issue before us. Nor would I hold, *as a matter of law*, that Westrec undertook the duty to patrol the docks and keep them reasonably accessible. My only point is that I believe there is competent evidence in the record to suggest that the voluntary duty assumed by Westrec was broader than the majority frames it, and thus should be a question of fact for the jury. See *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 54 (question of fact existed as to scope of undertaking); *Shea v.*

Preservation Chicago, Inc., 206 Ill. App. 3d 657, 663 (1990) (scope of voluntary undertaking depends on facts of particular case).

¶ 60 I would not affirm summary judgment on the basis of a lack of duty. Because I agree that the absence of proximate cause compels summary judgment in defendants' favor, I would affirm on that basis alone.