2015 IL App (2d) 141246-U
No. 2-14-1246
Order filed August 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EWELINA PORZEZINSKI,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-LA-3
	)	
WAL-MART STORES, INC.,	)	Honorable
	)	Michael J. Chmiel,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant summary judgment on plaintiff's negligence claim, as plaintiff presented no evidence that the accumulation of tracked-in rainwater on which she slipped was made unnatural by a defect in the floor.

¶ 2 Plaintiff, Ewelina Porzezinski, sued defendant, Wal-Mart Stores, Inc., for negligence when she slipped and fell while trying to enter defendant's lawn and garden department after it had rained. Defendant moved for summary judgment (see 735 ILCS 5/2-1005 (West 2012)), claiming that plaintiff slipped on a natural accumulation of water and that, even if the water constituted an unnatural accumulation, no evidence suggested that defendant was aware of this.

In response, plaintiff argued, among other things, that defendant failed to address the claims in her complaint concerning the defective floor design. The trial court granted the motion for summary judgment, and this timely appeal followed. At issue is whether summary judgment was proper. For the reasons that follow, we affirm.

¶ 3 The facts relevant to the issue raised are as follows. In her complaint, plaintiff alleged that defendant had a duty to maintain its premises in a reasonably safe, clean, and orderly fashion so as not to cause injury to plaintiff. On August 9, 2012, it rained, water was tracked into the store, puddles formed, the floor at the entrance became wet, and plaintiff fell. Plaintiff alleged that defendant was negligent in that it:

> "a. utilized, operated and/or maintained said entrance such that water deposited onto the floor created a slick and slippery walking surface;
>
> b. knowingly allowed water from said rain to remain on the floor by the entrance creating a slick and slippery walking surface;
>
> c. failed to remove excess water and/or clean the entrance to the premises;
>
> d. failed to utilize non-slip mats in the areas in which said rain had collected near the entrance;
>
> e. failed to have a non-slip surface on the entrance floor that would make that surface safer and less likely for a person to slip on;
>
> f. fail[ed] to utilize a recorded warning to alert patrons that said rain was collecting near the entrance;
>
> g. failed to provide adequate warning signs, warning cones or other warning devices so as to inform the [p]laintiff and other patrons of the slick and slippery walking surface created by the rain deposited on the floor near the entrance;

h. failed to otherwise warn the [p]laintiff and other patrons of the slick and slippery walking surface created by the rain deposited on the floor by the entrance;

i. failed to restrict passage by the [p]laintiff and other patrons through the areas of the floor made wet, slick and slippery by said moisture;

j. failed to maintain the entrance in a reasonably safe condition;

k. was otherwise careless or negligent."

¶ 4 Plaintiff then alleged that, as a direct and proximate result of one or more of these negligent acts or omissions, plaintiff slipped and fell while holding her infant son and sustained disabling, disfiguring, and permanent injuries to various parts of her body. As a result of her injuries, plaintiff incurred medical expenses and lost wages and has been prevented or hindered from enjoying and living her life as she had prior to the fall.

¶ 5 Defendant answered the complaint, denying the substantive allegations and asserting that plaintiff was contributorily negligent. Defendant also advanced three affirmative defenses, which plaintiff denied.

¶ 6 The cause proceeded with discovery, during which plaintiff and three of defendant's employees were deposed. During plaintiff's deposition, she stated, in relevant part, that she slipped on rainwater when she entered the lawn and garden department of Wal-Mart at around 2 p.m. on August 9, 2012. As she was walking into the store while carrying her infant son and walking with her older son, she was "looking at the floor in front of [her]," which she described as "pretty good." Plaintiff clarified that "[she] didn't see any rain, no cones, nothing." Later, plaintiff characterized the floor as a "very bad floor, slippery," but she did not observe "any type of puddles" or any "cracks or holes in the cement [floor]" on which she slipped.

¶ 7 Two of the three Wal-Mart employees testified about the condition of the floor on the day plaintiff fell. Specifically, Raya Miller, a sales associate at Wal-Mart who was working on the day plaintiff fell, testified that she typically works in the lawn and garden department, that the entrance at that area is not considered the main entrance, and that the flooring is "smooth" "cement." Miller indicated that "all the entrances look [the same]," meaning that they are all the same color and "made out of [the same material]." Kevin Schneider, an assistant manager who was also working on the day plaintiff fell, stated that the flooring of the entrance into the lawn and garden department is "smooth" "concrete." Schneider testified that other entrances into Wal-Mart are different colors and that they have rough surfaces. When asked why the other surfaces are rough, Schneider stated that "[he] assumed it was pitting caused by salt but [he] should say [he does not] know." Schneider also indicated that the flooring leading into the lawn and garden department was not repaired or resurfaced after plaintiff fell.

¶ 8 Thereafter, defendant moved to close Illinois Supreme Court Rule 213(f)(1) (eff. Jan. 1, 2007) discovery and stay medical discovery. In the motion, defendant noted that "[n]o medical discovery, depositions, or expert discovery has been completed"; that it intended to file a motion for summary judgment on the issue of liability; and that "[f]or the purposes of judicial economy and saving of possibly unnecessary time and expense on medical and expert discovery," staying medical and expert discovery would be appropriate. Plaintiff never challenged this motion.

¶ 9 At the hearing on defendant's motion, the court asked, "Is all the discovery done?" In response, plaintiff stated, "For the most part, I'm not sure if there's anything else that the defendant would have to present." The court indicated that it would "like to close [discovery]," and, after defendant asserted that "[t]here's been no medical discovery, there's been no expert discovery," plaintiff stated, "I want to go ahead and at least ask that medical be stayed."

¶ 10 Thereafter, in addressing defendant's anticipated motion for summary judgment, plaintiff indicated that she did not want a delay. Plaintiff stated, "I'd say that those depositions have been finished three plus months ago. Let's get on with it." The court then encouraged defendant to file its motion for summary judgment, "so then we can get onto that expert discovery if that's what you want to do next." Defendant responded, "Absolutely, judge." The court then indicated that it did not want defendant to file a motion for summary judgment, depose an expert, and then file another motion for summary judgment. In response, defendant stated that "as long as plaintiff['s] counsel has no intention of filing or retaining and hav[ing] three liability expert[s], there would be no reason for us to be filing a separate motion, two motions for summary judgment." Plaintiff never alerted the court that she would present any expert.

¶ 11 After further discussion, the following exchange was had:

"MR. LOUGHNANE [(plaintiff's counsel)]: I suggest that (unintelligible) we're not going to go ahead with it, I mean, until we get this out of the way. I don't want to fool around with (unintelligible) I want to know with respect to closing discovery (unintelligible) witnesses (unintelligible).

THE COURT: I agree. Because that was my thought, what we're doing, going to do a dispositive motion practice—

MS. SHEA [(defendant's counsel)]: Okay. So—

THE COURT: —hold back to see if it sorts things out. If not, then you guys keep going. All right?

MS. SHEA: So I'll just enter and continue on my motion then?

THE COURT: Yes, please."

¶ 12 The court then granted defendant time to file its motion for summary judgment, setting the same hearing date for that motion and the motion to close Rule 213(f)(1) discovery and stay medical discovery. Accordingly, defendant moved for summary judgment (735 ILCS 5/2-1005 (West 2012)). Defendant claimed that plaintiff slipped on a natural accumulation of water, such that it was not liable for the injuries plaintiff sustained. Moreover, defendant asserted that "[e]ven if this Court finds some evidence to suggest the water constituted an unnatural accumulation, there is no evidence to establish actual or constructive notice." In addressing this point, defendant noted that "[t]o establish a duty, the plaintiff must make an *affirmative* showing of an unnatural accumulation or an aggravation of a natural condition before recovery will be allowed." (Emphasis in original.) Defendant noted that, because no evidence indicated that defendant was aware of prior complaints or requests related to water in the vestibule of the lawn and garden department, "even if this Court believes that some evidence exists to support the argument of an unnatural accumulation, which [d]efendant strongly disputes, there is no evidence of actual or constructive notice of any water in the vestibule before [p]laintiff's incident."

¶ 13 In response, plaintiff claimed that summary judgment should be denied, because, among other things, defendant failed to challenge several theories of negligence that plaintiff advanced in her complaint. As relevant here, plaintiff asserted that defendant failed to address paragraphs 9(a) and (e) of her complaint, which she insisted advanced a defective-design claim.

¶ 14 Defendant replied, contending, among other things, that mere allegations that the floor was "slippery" or "smooth" are not enough to establish a genuine issue of material fact. Rather, what is required is evidence of defective materials used on the floor or the improper application

of the materials on the floor. Because, among other things, plaintiff could not point to such evidence, defendant argued that summary judgment should be granted.

¶ 15 The trial court granted defendant's motion for summary judgment, finding, in the written order, that it did so "for reasons more fully stated on the record." No transcript or substitute for the transcript was presented to this court. Plaintiff moved to reconsider, arguing again that defendant did not address plaintiff's defective-design theory in its motion for summary judgment.

¶ 16 At the hearing on the motion, plaintiff stated that "all the parties, including your Honor, had acknowledged the fact that there would be a future expert discovery yet to come." The court disagreed, asserting that "[w]hat [it] said is in response to the motion [for summary judgment], nothing was put forward to suggest a genuine issue of (indiscernible.) That would have been the opportunity to put forward something such as an expert." The court clarified that "[it was not] speculating *** that there was [an expert] yet to come." Rather, the court noted that "[n]one existed, regardless of whether it was yet to come or not." The court also disagreed with plaintiff's suggestion that there would be "two separate motions for summary judgment, one pre-expert discovery, one post-expert discovery." The court noted that "[n]ever ever, ever [was there] an argument that we have an expert coming[.]" The court denied the motion to reconsider. In doing so, the court observed, among other things, that the case had been ongoing for 14 months, that nothing prevented further discovery from taking place up until the court ruled on the motion for summary judgment, and that plaintiff never asked for an extension of time in which to obtain an expert to support her defective-design theory.

¶ 17 At issue in this appeal is whether defendant's motion for summary judgment should have been granted. Summary judgment is appropriate where "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). A triable issue precluding summary judgment exists where material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). We review *de novo* the entry of summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty to him, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 745-46 (2005). When a plaintiff claims that he fell on an unnatural accumulation of water, at issue is whether the defendant owed a duty to the plaintiff. See *Roberson v. J.C. Penny Co.*, 251 Ill. App. 3d 523, 528 (1993). The existence of a duty is a question of law and, therefore, may be resolved on a motion for summary judgment. *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 154 (1992).

¶ 19 It is well established that a plaintiff cannot recover for injuries resulting from a fall on ice, snow, or water unless the plaintiff can establish that the accumulation was unnatural and was created directly or indirectly by the defendant. *Tzakis*, 356 Ill. App. 3d at 746; *Finn v. Dominick's Finer Foods, Inc.*, 244 Ill. App. 3d 278, 281 (1993); *Stypinski v. First Chicago Building Corp.*, 214 Ill. App. 3d 714, 716 (1991). A business owner may be liable when a dangerous condition is exacerbated by the natural accumulation of water, snow, or ice, thus rendering the accumulation unnatural. See *McLean v. Rockford Country Club*, 352 Ill. App. 3d 229, 233-34 (2004) (although a landowner is not responsible for injuries caused by the natural

accumulation of snow or ice, "a property owner may be held liable for such injuries if the accumulation of ice or snow becomes unnatural due to the design and construction of the premises."); see also *Selby v. Danville Pepsi-Cola Bottling Co.*, 169 Ill. App. 3d 427, 431, 434-35 (1988) (the defendant was not liable when the plaintiff slipped in a sloped icy parking lot, as nothing indicated that the slope was defective or defectively designed in such a way that the slope aggravated or caused an unnatural accumulation of ice). "In order to withstand a motion for summary judgment, a plaintiff must come forward with sufficient facts to allow a trier of fact to find that the defendant was responsible for the unnatural accumulation which caused plaintiff's injuries." *Finn*, 244 Ill. App. 3d at 281; see also *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 330 (1992). " 'A finding of an unnatural or aggravated natural condition must be based upon an *identifiable* cause ***.' " (Emphasis in original.) *Crane*, 228 Ill. App. 3d at 330-31 (quoting *Gilberg v. Toys "R" Us, Inc.*, 126 Ill. App. 3d 554, 557 (1984)).

¶ 20 Plaintiff in the present case does not actually argue that there was sufficient evidence in the record to withstand a motion for summary judgment as to a negligent design theory. We agree that there was no evidence in the record suggesting that the flooring of the lawn and garden center of Wal-Mart was defective in any way. Even though the flooring was described as being "slippery" and was comprised of "smooth" "concrete" or "cement," such bald assertions do not create a genuine issue of material fact. See *Richter v. Burton Investment Properties, Inc.*, 240 Ill. App. 3d 998, 1003 (1993) (the plaintiff's testimony that the tile on which he slipped was "the wrong surface" and was "slippery even on a normal day" was a bald conclusion that did not preclude summary judgment). Additionally, although the entrance to the lawn and garden department was apparently smooth while the other entrances had rough surfaces, the evidence suggested that the other entrances had rougher surfaces only because they were damaged. That

is, Schneider theorized that the roughness was caused by salt being tracked into the store and eroding the flooring. In any event, the conditions of the other entrances have no bearing on whether the entrance at issue was unreasonably dangerous.

¶ 21 Nevertheless, relying on *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682 (2000), plaintiff argues that the trial court erred in granting summary judgment on a basis not raised in defendant's motion for summary judgment. Specifically, she contends that she alleged a defective flooring theory in her complaint and that defendant did not move for summary judgment on this theory. According to plaintiff, "the burden never shifted to [her] to produce an expert, and she was entitled to rely on the allegations in her complaint to establish a question of fact on the theory of negligent design." We disagree.

¶ 22 First, in contrast to what plaintiff argues on appeal, defendant did argue in its motion for summary judgment that plaintiff failed to present any evidence that the floor was defective. Indeed, because plaintiff admitted that she slipped on tracked-in rainwater, by itself a natural condition, the only issue was whether the condition became unnatural as a result of the floor. See *Richter*, 240 Ill. App. 3d at 1003-04. Thus, in arguing that plaintiff presented no evidence of an unnatural accumulation, defendant necessarily argued that plaintiff presented no evidence that the floor was defective.

¶ 23 Second, we find *Williams* distinguishable. In *Williams*, the plaintiff, who was a patient of the defendant hospital, and the plaintiff's husband sued the defendant for medical malpractice when the plaintiff fell out of bed while under the defendant's care. *Williams*, 316 Ill. App. 3d at 685. When the plaintiff was deposed, she could not recall the fall or even being in the hospital. *Id.* Discovery ensued, and the defendant moved for summary judgment without attaching any affidavits from experts regarding the standard of care, breach of the standard of care, or

proximate causation. *Id.* The plaintiff responded, attaching to her response relevant depositions, a doctor's consultation report, and excerpts from the defendant's " 'fall prevention program' " that outlined when bedrails should be raised on a patient's bed to prevent the patient from falling. *Id.* at 685-86. In its reply, the defendant argued for the first time that the plaintiff had no expert testimony to establish the standard of care and breach of that standard of care. *Id.* at 687.

¶ 24 At the hearing on the motion for summary judgment, the plaintiff orally moved for a continuance, advising the court of the name of the expert she retained to respond to the defendant's motion for summary judgment. *Id.* The trial court denied the motion and granted summary judgment on the basis that the plaintiff did not establish the standard of care or that the defendant breached that standard of care. *Id.* The plaintiff moved to reconsider, attaching to her motion the affidavit of her expert. *Id.* In the affidavit, the expert attested to the standard of care and that the defendant breached that standard of care. *Id.* The trial court refused to consider this affidavit, as it was not presented before the court ruled on the motion for summary judgment, and, thus, the court denied the motion to reconsider. *Id.*

¶ 25 On appeal, the reviewing court reversed. *Id.* at 695. In doing so, the court noted that a medical-malpractice action, unlike a premises-liability action, does not require the plaintiff to prove that she fell because of a condition of the premises. *Id.* at 689 (citing *Kimbrough v. Jewel Cos.*, 92 Ill. App. 3d 813, 818 (1981)). Thus, as the condition of the defendant's premises was not at issue, the defendant was not entitled to summary judgment on this ground. *Id.* As to the standard of care and breach, the court held that the defendant did not place a burden on the plaintiff to produce an expert opinion, as the defendant's motion was unsupported and did not establish that the plaintiff could not produce one. *Id.*

¶ 26 In the present case, defendant argued in its original motion that there was insufficient evidence to support that plaintiff was injured due to an unnatural accumulation, and that was the basis on which the trial court ultimately granted summary judgment. Further, unlike in *Williams*, plaintiff needed such evidence because, of course, the condition of the premises was the basis for her claim. Accordingly, the burden shifted to her, and she could not rely on any vaguely pleaded allegations of defective design contained in the complaint. See *Richter*, 240 Ill. App. 3d at 1002 ("At the summary judgment stage, the mere allegations in the pleadings are not enough to create a material issue of fact. *** A plaintiff must present evidence through depositions, affidavits and admissions to support the allegations.").

¶ 27 Plaintiff also argues that defendant engaged in a " 'bait and switch' " tactic when it argued "that [plaintiff] lacked an expert opinion concerning a design defect in the [r]eply, at such time when [plaintiff] would not have an opportunity to respond and present an expert opinion ***." Again, we disagree. First, as plaintiff acknowledges, "[t]he fact of the matter is that discovery in this case was not closed." At no time has plaintiff ever indicated that she had an expert, or any evidence other than improper conclusory statements, supporting a theory that the flooring was defective in some way. See *Richter*, 240 Ill. App. 3d at 1003-04. She easily could have done this. Second, as the transcript of the hearing on defendant's motion to close Rule 213(f)(1) discovery and stay medical discovery makes clear, plaintiff did not anticipate deposing any other witnesses, expert or otherwise. Rather, she wanted to move forward as quickly as possible, hoping that a trial would commence in the very near future. When the court inquired of defendant whether multiple motions for summary judgment would be filed if plaintiff produced an expert, plaintiff never alerted the court that she had an expert or that she was in the process of

retaining one. This certainly would have been an appropriate time to verbalize such an intention if one existed.

¶ 28 For these reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 29 Affirmed.