2016 IL App (2d) 160158-U
No. 2-16-0158
Order filed December 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRIAN CORRIGAN,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-L-151
	)	
HOLY ANGELS PARISH and BUTLER	)	
& SONS LAWNCARE, INC.,	)	Honorable
	)	Mark A. Pheanis,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendants summary judgment on plaintiff's negligence claim: neither the property owner nor its snow-removal contractor owed plaintiff a duty to remove a natural accumulation of ice.

¶ 2 Plaintiff, Brian Corrigan, sued defendants, Holy Angels Parish (Holy Angels) and Butler & Sons Lawncare, Inc. (Butler), for damages sustained when he slipped on ice located in Holy Angels' parking lot. The trial court granted summary judgment for defendants, and plaintiff timely appealed. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 30, 2013, plaintiff filed a three-count first amended negligence complaint. Count I, brought against Holy Angels, alleged that Holy Angels violated its duty to provide plaintiff a safe means of ingress and egress. Count III, brought against Butler, alleged that Butler breached its duty to exercise ordinary care in the performance of its alleged agreement with Holy Angels to perform certain snowplowing and salting services. (Count II was brought against the Diocese of Rockford but was subsequently voluntarily dismissed.)

¶ 5 Deposition testimony established the following facts. Plaintiff testified that he went to Holy Angels on the morning of January 28, 2012, to attend a funeral. He parked his vehicle in the parking lot, which was mainly flat, other than having a downward pitch toward the street at the entrance to the parking lot. It had snowed very lightly the night before. When plaintiff entered the parking lot, he saw wet spots on the ground. The parking lot was clear of snow, and he did not see any salt. He saw that the sidewalks near the church were clear but heavily salted. Plaintiff exited his vehicle, and when he stepped onto the ground, he fell. He claimed that he slipped on a patch of ice that was about four parking spaces wide. He testified that the ice might have resulted from the melting and refreezing of the prior evening's snowfall. He did not see anything that would have caused water to puddle in the area of his fall. After falling, he had to crawl six feet to get off of the ice, and his clothes were wet.

¶ 6 Kelly Corrigan, plaintiff's wife, testified that she was in the passenger seat of the vehicle when plaintiff fell. She exited the car and saw that there was a "sheet of ice underneath [her] side" of the vehicle. She did not know how the ice got there. She saw salt pellets on the steps and sidewalk in front of the church, but she did not see any salt pellets in the area where plaintiff fell.

¶ 7 Michael Butler testified that he was the owner of Butler and a parishioner at Holy Angels. Michael identified a written work proposal that he had submitted to Paulette Thayer, Holy Angels' business manager and Michael's sister. The proposal was dated October 10, 2008, and was not signed. The proposal indicated that Butler charged $450 per "push" for two to four inches of snow. A "push" referred to a single plow of the lot. The proposal also indicated that there was a $250 charge per salting of the lot; however, that provision was crossed out. Michael next identified invoices that he had provided to Holy Angels for services that he had performed during the 2008/2009 winter season. According to the invoices, he performed only snowplowing services.

¶ 8 Michael next identified invoices that he had provided to Holy Angels for services performed in January 2010. Those invoices included charges for salting the parking lot in addition to snowplowing. Michael explained that, at some point, Thayer had asked him to salt the parking lot. Michael did not have a written agreement with Holy Angels or any discussion with Holy Angels as to how and when he would salt the parking lot. He testified that, in accordance with his customary business practices, he would automatically salt the lot if there was at least one inch of snow on the ground. Michael identified an invoice showing that, on January 28, 2012, he salted Holy Angels' parking lot at 5 a.m. He did not recall being called out to salt the lot. He salted the lot at 5 a.m. because Holy Angels had church services at 6:30 a.m. Michael was asked: "Was it your understanding in performing the salting services for Holy Angels Parish that any time there is ice on the parking lot you were expected to come out and salt the lot?" He responded: "Yes."

¶ 9 Thayer testified that her responsibilities at Holy Angels included overseeing the buildings and grounds. Thayer was shown the proposal dated October 10, 2008, and agreed that the

proposal had been accepted by the pastor at Holy Angels. She explained that the salting provision had been crossed out because at that time Holy Angels had equipment to perform the salting themselves. In 2009, she asked Butler to take on the salting because Holy Angels' salting equipment had not worked. When asked what the verbal agreement had been as to when Butler would salt the lots, she stated: "It's done according to their discretion." According to Thayer, John Richard was the sole maintenance personnel at Holy Angels in January 2012. He was responsible for clearing the sidewalks in front of the church. He was not responsible for the parking lot, because that responsibility was contracted out to Butler.

¶ 10 On July 29, 2015, Holy Angels filed a motion for summary judgment, arguing that, under Illinois law, a property owner has no duty to remove natural accumulations of ice, snow, or water from its property. If a property owner voluntarily undertakes to remove a natural accumulation from its property, its duty is only to refrain from doing so negligently. Holy Angels asserted that it had entered into an oral agreement with Butler calling for Butler to plow certain parking lots whenever two inches or more of snow fell and for Butler to salt the lots, including the lot at issue, whenever it snowed, even if less than two inches. Holy Angels maintained that, at about 5 a.m. on the morning of plaintiff's fall, Butler had salted the parking lot at issue. Holy Angels asserted that, even if the salting caused the melting of snow that refroze and turned to ice, that ice was not unnatural. According to Holy Angels, because plaintiff could not establish that the ice he slipped on was unnatural, Holy Angels owed no duty.

¶ 11 On August 17, 2015, Butler filed a motion for summary judgment, arguing that plaintiff had failed to present any evidence that he slipped on anything other than a natural accumulation of ice. Butler further argued that, even if the accumulation was unnatural, plaintiff could not establish that Butler caused the unnatural accumulation. Butler also maintained that it did not

have a contract with Holy Angels. Last, Butler argued that plaintiff could not establish that ice proximately caused his fall.

¶ 12 In response, plaintiff argued that Holy Angels and Butler, by virtue of their verbal agreement, voluntarily assumed a duty to salt and remove ice from the parking lot and thus it was irrelevant whether the accumulation was natural. Plaintiff further argued that Holy Angels owed him a duty to provide safe ingress and egress, which included salting the parking lots. Plaintiff also argued that there was no speculation as to the cause of his fall.

¶ 13 Plaintiff also filed an affidavit from Mark Yandell, who had experience as a snow and ice removal contractor for commercial and industrial clients. Yandell opined that Butler "was negligent in that it failed to properly apply salt at the parking lot of Holy Angels." He stated that "[a] proper application of salt would have melted these accumulations and mitigated any hazard." He further opined that Butler "was expected to monitor parking lot conditions per it's [*sic*] agreement with Holy Angels but failed to do so." He further opined that Holy Angels had "the overall responsibility for the conditions of it's [*sic*] premises and grounds and the safe ingress and egress of it's [*sic*] parishioners and invitees." He stated that "Holy Angels was negligent in that it failed to provide even a minimal level of inspection of the premises and any supervision of it's [*sic*] snow and salting operations at all."

¶ 14 Defendants moved to dismiss the affidavit for failing to comply with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013). The court granted defendants' motions.

¶ 15 The trial court granted summary judgment for defendants. The court found that the agreement between Holy Angels and Butler was that Butler would salt if it snowed. The court stated that there was no agreement that Butler would remove all ice from the parking lot. The court noted that, although there was evidence that Butler had salted on the morning of plaintiff's

fall, the fact that ice remained after it salted was not a violation of the agreement. The court thus concluded that there was no duty.

¶ 16 Plaintiff timely appealed.

¶ 17 II. ANALYSIS

¶ 18 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 2014). 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). 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). The entry of summary judgment is subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 19 The common-law duty of a landowner with respect to accumulated snow or ice was stated in *Webb v. Morgan*, 176 Ill. App. 3d 378, 382-83 (1988), as follows:

> "The general rule in Illinois is that a property owner owes no common law duty to remove natural accumulations of ice and snow from common areas which remain under his control and thus cannot be found liable for injuries resulting from a natural accumulation of ice and snow. [Citation.] However, when the property owner chooses to remove ice and snow, he is charged with the duty of exercising ordinary care in the accomplishment of that task. [Citation.] The property owner, then, has no duty to remedy a natural accumulation of ice and snow. His duty is to prevent an unnatural

> accumulation on his property, whether that accumulation is the direct result of the owner's clearing of the ice and snow, or is caused by design deficiencies that promote unnatural accumulations of ice and snow. [Citation.] The plaintiff has the burden of affirmatively proving that the ice and snow on which she fell was an unnatural accumulation caused by the defendant. [Citation.]"

Thus, under common law, only unnatural accumulations of snow or ice, *i.e.*, accumulations caused by the property owner or his agents, can be a ground for liability.

¶ 20 We first consider whether Holy Angels owed a duty to plaintiff. As noted, Holy Angels, as the property owner, had no common-law duty to remove the natural accumulation of ice on the parking lot. S*ee Webb*, 176 Ill. App. 3d at 382-83. Plaintiff does not assert that the ice he slipped on was anything other than a natural accumulation. Nevertheless, plaintiff argues that the oral agreement between Holy Angels and Butler gave rise to a voluntarily-assumed duty on the part of Holy Angels. We note, however, that, with respect to Holy Angels, plaintiff's complaint alleged only that Holy Angels had a "duty to exercise ordinary care in the ownership, operation, management, maintenance and control of said premises, including a duty to provide a safe means or ingress and egress" so as not to cause injuries. Plaintiff did not plead that Holy Angels voluntarily assumed a duty by virtue of its contract with Butler. As this theory was not part of his complaint, he may not rely on it at summary judgment or on appeal. S*ee Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 17.

¶ 21 In any event, the argument fails. To be sure, a duty in tort may arise from a contractual obligation to remove snow and/or ice. However, none of the cases cited by plaintiff support his claim that a property owner, merely by contracting with a snow removal company, undertakes a duty to remove natural accumulations of snow. For instance, in *Schoondyke v. Heil, Heil, Smart*

& Golee, Inc., 89 Ill. App. 3d 640, 642 (1980), the plaintiff slipped on snow in the driveway of her parents' condominium. She sued the condominium association for negligent breach of a contractual duty to remove the snow, which had fallen in the morning and still remained in the evening when she returned. *Id.* The plaintiff's parents had entered into an agreement with the association, under which the association agreed to perform snow removal; and her parents' monthly assessments included a snow-removal fee. *Id.* The court held that this contractual obligation created liability to the plaintiff even though she did not own the condominium unit, because it was foreseeable that the association's failure to perform its contractual obligation could cause harm to a nonowner resident. *Id.* at 644-45. Here, however, unlike the property owner in *Schoondyke*, Holy Angels was under no contractual obligation to remove the snow and ice.

¶ 22 Similarly, plaintiff's reliance on *Tressler v. Winfield Village Cooperative, Inc.*, 134 Ill. App. 3d 578 (1985), is misplaced. In that case, the plaintiff leased an apartment from the defendant. The defendant made oral representations to the plaintiff and furnished the plaintiff with a handbook containing those representations, providing that the defendant would arrange for snow removal from the premises. *Id.* at 579. After she was injured from a fall due to snow and ice, she sued the defendant, alleging that her injuries resulted from the defendant's failure to perform the snow removal service. *Id.* The trial court found that the defendant had assumed a duty to the plaintiff based on its "covenant" to remove the snow, but granted summary judgment to the defendant on the ground that there was insufficient evidence that the defendant was negligent. On appeal, the reviewing court agreed that the defendant assumed the duty to remove the snow from the premises, but the court reversed the summary judgment on the ground that whether the defendant negligently breached the covenant was a question for the trier of fact. *Id.*

at 580-81. In contrast to the plaintiff in *Tressler*, here plaintiff does not allege that he was given any verbal or written representations about snow and ice removal procedures based on the oral agreement.

¶ 23 Also distinguishable is *Eichler v. Plitt Theatres, Inc.*, 167 Ill. App. 3d 685 (1988). In *Eichler*, the plaintiff sued four defendants after she slipped and fell on a natural accumulation of ice in a shopping center parking lot. Several trusts owned various contiguous parcels of land that were used for parking at the shopping center, which included a theater. The defendant trust that owned the parcel on which the plaintiff fell (Urban) and another defendant trust (Hutensky) had entered into an easement agreement that outlined their various rights: Urban agreed to keep its parcel clear of snow and ice. Urban later entered into a lease agreement with Plitt Theatres, Inc. (Plitt), which granted Plitt all Urban's rights and responsibilities under the easement. Urban also contracted with a defendant landscaping company (Welhausen) to perform snowplowing and removal. The trial court entered summary judgment in favor of the defendants.

¶ 24 On appeal, the court assessed the plaintiff's argument that the defendants had a duty to remove snow and ice because they had entered into a contract in which they undertook the obligation to do so. The court affirmed summary judgment for Welhausen, finding that it contracted to remove only snow and also finding that the ice was a natural accumulation for which Welhausen owed no duty. The court also affirmed summary judgment for Hutensky because the plaintiff did not fall on its property. The court reversed summary judgment as to Urban and Plitt. Specifically, the court found it critical that Urban promised Hutensky to remove snow and ice from Urban's parcel, that Hutensky agreed in the easement agreement to remove snow and ice from only its own parcel, and that Plitt and Urban entered into a lease agreement under which Plitt accepted Urban's rights and responsibilities. *Id.* at 692-93. Here, unlike the

defendant property owners in *Eichler*, Holy Angels made no promise to remove snow and ice from its property.

¶ 25 Plaintiff also argues that Holy Angels owed plaintiff a duty to provide a reasonably safe means of ingress and egress. According to plaintiff, the duty to provide a reasonably safe means of ingress and egress is not abrogated by the presence of a natural accumulation of ice and snow. See *Johnson v. Abbott Laboratories, Inc.*, 238 Ill. App. 3d 898, 905 (1992); *Kittle v. Liss*, 108 Ill. App. 3d 922, 925 (1982). That is true, however, only when the plaintiff presents evidence of a condition or hazard other than the natural accumulation. For instance, in *Johnson*, the condition of the snow-covered hillside was additionally hazardous as it consisted of a substantial incline, which was made up of stones that had come loose in the past and which was not illuminated. *Johnson*, 238 Ill. App. 3d at 906. In *Kittle*, the court found that, even where the plaintiff slipped on ice and snow on a stairway, the business owner could be liable for failing to provide adequate lighting. *Kittle*, 108 Ill. App. 3d at 925-26.

¶ 26 Indeed, case law makes clear that the presence of a natural accumulation, without more, even at the sole point of ingress and egress, does not subject a business owner to liability for slip-and-fall damages. See *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 43-44 (2009) (absent evidence that laundromat's entranceway was unsafe for reasons other than a natural accumulation of water, the defendant owed no duty to the plaintiff); *Branson v. R & L Investment, Inc.*, 196 Ill. App. 3d 1088, 1094-95 (1990) (summary judgment proper where there was no evidence that the means of ingress and egress was unsafe for any reason other than the accumulation of water); *Wilson v. Gorski's Food Fair*, 196 Ill. App. 3d 612, 615 (1990) (no liability for injuries sustained when the plaintiff slipped and fell due to a mat saturated with tracked-in rain water at the entrance of a store); *Bernard v. Sears, Roebuck & Co.*, 166 Ill. App.

3d 533, 535 (1988) (no liability for injuries sustained when the plaintiff slipped and fell after stepping off a rug soaked with tracked-in water and onto a wet floor after entering the defendant's store); *Lohan v. Walgreens Co.*, 140 Ill. App. 3d 171, 175 (1986) (no liability for injuries sustained when the plaintiff slipped and fell on tracked-in rain water in the vestibule of the common entranceway to the defendant's store). Here, plaintiff failed to provide evidence of a condition of the lot, other than the ice, that caused his injury.

¶ 27 We next consider whether Butler owed a duty to plaintiff. The law is well settled that, as to a third party such as plaintiff, a snow-removal contractor can be liable only where the contractor negligently removes snow and ice and thereby creates or aggravates an unnatural accumulation. See *McBride v. Taxman Corp.*, 327 Ill. App. 3d 992, 996-97 (2002). For instance, in *McBride*, the plaintiff, a Walgreens employee, fell on snow and ice outside the entrance of the store where she worked. *Id.* at 993. She brought a negligence action against Walgreens, the shopping center owner, the property manager, and the snow-removal contractor (Arctic) with whom the property manager had contracted. *Id.* After the plaintiff settled with Walgreens and the shopping center owner, the trial court granted summary judgment for the property manager and Arctic, finding that they owed no duty to the plaintiff. *Id.* at 994.

¶ 28 The First District affirmed. As to the property manager, the court found that it had entered into the snow-removal contract as the shopping center owner's agent and thus did not assume a contractual obligation to remove snow. *Id.* at 995. As to Arctic, the court found that its duty was "only not to negligently remove snow by creating or aggravating an unnatural accumulation of snow or ice." *Id.* at 996. The court held that, because there was no evidence that the snow and ice upon which the plaintiff slipped unnaturally accumulated due to Arctic's conduct, Arctic could not be found liable to the plaintiff. *Id.* at 997-98.

¶ 29 In so holding, the *McBride* court relied on several cases that further support our conclusion that Butler owed no duty to plaintiff. *Id.* at 996-97; see, *e.g.*, *Madeo v. Tri-Land Properties, Inc.*, 239 Ill. App. 3d 288, 290 (1992) (snow-removal contractor could be liable to grocery store customer, who fell in adjacent parking lot, for either creating an unnatural accumulation of ice or snow or aggravating a natural accumulation of ice or snow); *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 330 (1992) (duty of snow-removal contractor to customer of parking lot was to perform snow removal in a nonnegligent fashion; plaintiffs had to show that contractor caused an unnatural accumulation of ice); *McCarthy v. Hidden Lake Village Condominium Ass'n*, 186 Ill. App. 3d 752, 758 (1989) (snow-removal contractor could be liable to condominium resident for defective plowing creating unnatural accumulation where condominium association contracted for snow plowing); *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012, 1018-19 (1988) (snow-removal contractor hired by grocery store had duty to plaintiff, who was not identified in the opinion as a customer or otherwise and who fell in the parking lot, only to abstain from negligence; store was under no contractual obligation to remove snow, and contractor's obligation was owed only to the store); *Burke v. City of Chicago*, 160 Ill. App. 3d 953, 957 (1987) (snow-removal contractor hired by city, which leased portion of airport to airline, could be liable to airline employee, who fell on ice at airport after snow was plowed, only by causing an unnatural accumulation or by negligently plowing).

¶ 30 Nevertheless, plaintiff argues that *Williams v. Sebert*, 407 Ill. App. 3d 753 (2011), supports the imposition of a duty on Butler. We disagree. At issue in *Williams* was whether a snow-removal contractor was subject to a heightened owner-occupier standard of care in a negligence action. *Id.* at 756-57. The court found that the plaintiff had to establish ordinary negligence and that the scope of the snow-removal contractor's duty of care was delineated by

the terms of the contract. *Id.* at 757. Where the contract provided for a duty to remove snow, the contractor's duty was only to not negligently remove snow. *Id.* Here, the trial court found that there was no agreement that Butler would remove the ice. In any event, none of the cited cases hold that a snow-removal contractor could be liable to a third-party for a failure to perform snow or ice removal.

¶ 31 Finally, we note that plaintiff also argues that the trial court erred in striking Yandell's affidavit. Although plaintiff concedes that Yandell could not offer opinion testimony as to what conduct, or lack thereof, constitutes negligence, he nevertheless maintains that "Yandell possessed sufficient experience and facts to testify to an opinion that Butler 'failed to properly apply salt at the parking lot of Holy Angels' and that '[a] proper application of salt would have melted these accumulations [of ice] and mitigated any hazard.' " He also argues that Yandell was qualified to testify to an opinion that Holy Angels failed to provide proper inspection and supervision of its premises. However, based on our resolution of the duty issue, Yandell's opinions do not change the analysis.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm summary judgment for defendants.

¶ 34 Affirmed.