2019 IL App (2d) 180658-U
No. 2-18-0658
Order filed June 28, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JACOB MICHAEL MORGENSTERN,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-L-186
	)	
CITY OF HIGHLAND PARK,	)	Honorable
	)	David P. Brodsky,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in issuing jury instructions and denying a new trial.

¶ 2 Plaintiff, Jacob Morgenstern, M.D., filed a negligence suit against defendant, the City of Highland Park, after he slipped and fell on an ice berm between the City's street and sidewalk. The jury entered a verdict for the City, determining in a special interrogatory that the ice berm resulted from "natural" accumulations. Because there is *no duty* to remove ice or snow resulting from natural accumulations, Morgenstern's claim failed. A natural accumulation may include the effects of normal snow removal. The jury was shown pictures of the ice berm, witnesses

testified to the nature of the ice berm, and Morgenstern does not now challenge the jury's determination that the ice berm resulted from natural accumulations.

¶ 3 Instead, Morgenstern finds fault with the jury instructions. The jury was given instructions from the Illinois Pattern Instructions (IPI) Civil 125 Series, which are the instructions designated for use in cases involving a landowner's liability for a fall on ice and snow. See, *e.g.*, *Ziencina v. County of Cook*, 188 Ill. 2d 1, 16 (1999). The instructions require the plaintiff to prove that the ice on which he or she slipped was an unnatural accumulation and that the landowner, here, the City, had notice of its existence. As he argued in an unsuccessful motion for a new trial, Morgenstern argues again that the court should have given ordinary negligence instructions, rather than the premises liability, IPI Civil 125 series instructions, for two reasons. First, because he was injured "directly" by a snow removal operation, ordinary negligence instructions may be used (which do not require him to prove that the ice on which he slipped was an unnatural accumulation). Second, and separately, even if the ice on which he slipped was a natural accumulation, the City voluntarily undertook a duty to remove or guard against it through its conduct and/or by contract. According to Morgenstern, since the trial court should not have given the IPI 125 series, it should not have given a special interrogatory requiring the jury to determine whether the ice upon which he slipped was natural or unnatural. Requiring him to prove extra, unnecessary elements compromised the fairness of his trial.

¶ 4 The trial court did not abuse its discretion in giving the IPI Civil 125 series. It reasonably determined that Morgenstern was not injured "directly" by a snow removal operation. Also, it reasonably determined that the City never voluntarily undertook to remove the ice berm upon which Morgenstern slipped. Because it was proper to give the IPI Civil 125 series, it was also

proper to give the special interrogatory. Further, the trial court did not abuse its discretion in denying the motion for a new trial. We affirm.

¶ 5 I. BACKGROUND

¶ 6 On a March afternoon in 2014, Morgenstern and his girlfriend drove to the Shavetz Deli on Central Avenue in the Highland Park business district. The parking area in front of the deli contained ice and snow. An ice berm had formed between the street and sidewalk. Morgenstern looked for a parking space with a clear access to the sidewalk, but there was none. He parked three spaces from the Deli entrance. He recognized that the ice berm was a potential hazard, so he placed his hand on the rear of his car for support and balance as he crossed it. Nevertheless, he slipped and fell, injuring his shoulder.

¶ 7 Morgenstern filed a negligence complaint against the City. In it, he alleged that he was an intended and permitted user of the sidewalk, he encountered an unnatural accumulation of ice and/or snow that resulted from the City's negligent and careless snow removal, and that the unnatural accumulation of ice and/or snow caused him to fall and sustain bodily injuries. (Morgenstern also sued neighboring businesses, but the court dismissed those defendants.)

¶ 8 Prior to trial, the court conducted a jury-instruction conference. There, and in a supporting brief, Morgenstern urged that the court should utilize ordinary negligence instructions (IPI Civil 20.01) rather than premises liability instructions specific to snow and ice removal (IPI Civil 125.01, 125.02, and 125.04). Morgenstern observed that the notes on use for IPI Civil 125.01 stated that the series does not apply "[i]f the plaintiff claims he was injured *directly* by a snow removal operation." (Emphasis added.) IPI Civil (2011) No. 125.01. The City responded that it took "directly" to mean "in the course of the snow removal operations," such as being injured by the plow itself. The court reserved judgment.

¶ 9 At trial, Morgenstern testified as set forth above.

¶ 10 Ramesh Kanapareddy, the City's director of public works, testified to the City's snow removal procedure. Kanapareddy relied upon a manual setting forth the City's snow removal procedures. The manual stated that the City would enter into contract with workers for snow removal services. The City employed approximately 35 people to remove snow from its 156 miles of streets, 130 miles of sidewalks, and 90 miles of curbs. The City removes snow from the five-foot-wide sidewalks with a five-foot-wide plow. The City typically plows snow from the sidewalk toward the street, to allow pedestrians use of the sidewalk. The snow cannot be completely cleared off either the sidewalk or the street, because, in order to clear one, the other would be unduly obstructed. A worker persisting in that task would be pushing snow endlessly back and forth from the street to the sidewalk. Rather, at his or her discretion, the worker may make "curb cuts" to provide access between the sidewalk and street. The number of curb cuts is *not* documented in the manual, but workers may choose to make several in a city block.

¶ 11 Mario Vasquez, the worker responsible for plowing Central Avenue in 2014, corroborated this procedure. He plowed the sidewalk alongside Central Avenue. When removing snow from the sidewalk, he angled the blade on the plow so that it deposited the snow toward the curb.

¶ 12 The jury viewed photos of the relevant portion of Central Avenue. Morgenstern agreed that the photos, taken a few days after the incident, fairly and accurately depicted the area where he fell. The photos show ice along the parking bay and sidewalk curb.

¶ 13 Prior to deliberation, the trial court issued its jury instructions. It declined Morgenstern's request to provide ordinary negligence instructions. Instead, it determined that the IPI Civil 125 series was appropriate.

¶ 14 As based on IPI Civil (2011) No. 125.01, the court instructed:

"The owner of the property is under no duty to remove ice or snow which has resulted from natural accumulations."

¶ 15 As based on IPI Civil (2011) No. 125.04, the court instructed:

"In these instructions, I have used the expression 'natural accumulation of ice or snow.' The snow or ice involved in this case was a natural accumulation if it resulted from normal freezing and thawing or the effects of normal snow removal.

On the other hand, the snow or ice involved in this case was an unnatural accumulation if it resulted from negligent snow removal.

Whether the snow or ice which the plaintiff claims proximately caused injury was a natural accumulation or an unnatural accumulation is for you to decide."

¶ 16 As based on IPI Civil (2011) 125.02, the court instructed:

"Plaintiff, Dr. Jacob Morgenstern, seeks to recover damages from the defendant, the City of Highland Park. In order to recover damages, the plaintiff has the burden of proving:

First, there was an unnatural accumulation of ice or snow on the land which presented an unreasonable risk of harm to people on the property.

Second, the defendant knew or should have known of both the condition and the risk.

Third, the defendant could reasonably expect that people on the property would not discover or realize the danger or would fail to protect against such danger.

Fourth, the defendant was negligent in one or more of the following ways:

a. It plowed snow from the street and sidewalk along Central Avenue in a manner that created a berm and prevented safe access to the sidewalk;

b. It failed to remove a berm of snow along the curb line of Central Avenue which was created by its snow removal operations;

c. It failed to make 'curb cuts' between the sidewalk and parking spaces along Central Avenue in sufficient numbers so as to allow safe access from vehicles to the sidewalk; and/or

d. It failed to properly and adequately remove an unnatural accumulation of ice and snow from the public sidewalk.

Fifth, the plaintiff was injured, and;

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury."

¶ 17 The court also gave the jury the City's Special Interrogatory A, which stated:

"The ice or snow accumulation on which Dr. Morgenstern slipped and fell was _____ (choose one). ____ Natural _____Unnatural."

¶ 18 The jury entered a verdict for the City. It also answered the special interrogatory stating: "The ice or snow accumulation on which Dr. Morgenstern slipped and fell was natural."

¶ 19 Morgenstern moved for a new trial. He argued that the jury instructions were improper. He again argued that ordinary negligence instructions were warranted, because he was directly injured by the snow removal process. Post-trial, he also stressed that ordinary negligence instructions were warranted, because the City voluntarily undertook to remove or guard against the ice berm through its conduct and/or by contract.

¶ 20 The trial court denied Morgenstern's motion for a new trial. It declined to interpret the word "directly" so broadly as to "encompass any and all plowing or shoveling of snow." Such an interpretation "would render any analysis of natural versus unnatural accumulation meaningless any time snow had been shoveled or plowed. That is clearly not the law in this area."

¶ 21 As to voluntary undertaking by conduct, the court noted that there was no pattern of removing the complained of area of ice by the curb where Morgenstern slipped. As to voluntary undertaking by contract, there was no contract. The manual was not a contract but an internal policy memorandum.

¶ 22 Finally, the court cited to three cases that generally supported its decision to give the IPI 125 series instructions standard to cases involving a landowner's liability for a fall on ice and snow. See, *e.g.*, *Ziencina*, 188 Ill. 2d at 16; *Riccitelli v. Sternfeld*, 1 Ill. 2d 133 (1953); and *McCarthy v. Hidden Lake Village Condominium Ass'n*, 186 Ill. App. 3d 752 (1989).

¶ 23 II. ANALYSIS

¶ 24 On appeal, Morgenstern argues again that the court should have given ordinary negligence instructions, rather than the premises liability, IPI Civil 125 series instructions, for two reasons. First, because he was injured "directly" by a snow removal operation, ordinary negligence instructions may be used (which do not require him to prove that the ice on which he slipped was an unnatural accumulation of which the City had notice). Second, and separately, even if the ice on which he slipped was a natural accumulation, the City voluntarily undertook a duty to remove or guard against it through its conduct and/or by contract. According to Morgenstern, since the trial court should not have given the IPI Civil 125 series, it should not have given a special interrogatory requiring the jury to determine whether the ice upon which he

slipped was natural or unnatural. Requiring him to prove extra, unnecessary elements compromised the fairness of his trial.

¶ 25 We review a trial court's decision on which jury instructions to use for an abuse of discretion. *Schultz v. Northeastern Illinois Regional Commuter Railroad*, 201 Ill. 2d 260, 273 (2002). We look to see whether, taken as a whole, the instructions fairly, fully, and comprehensively apprise the jury of the relevant legal principles. *Id*. at 273-74. We will not reverse unless the instructions clearly misled the jury and resulted in prejudice to the appellant. *Id*. at 274. Here, the trial court did not abuse its discretion in issuing the IPI Civil 125 series instructions or in denying Morgenstern's motion for a new trial.

¶ 26 A. No "Direct" Injury

¶ 27 We first address Morgenstern's direct-injury argument. Morgenstern argues that his complaint sounded in ordinary negligence rather than premises liability theory specific to a slip and fall on ice or snow, which is what the IPI Civil 125 series addresses. Under the IPI Civil 125 series, the plaintiff must prove that he or she slipped on an unnatural accumulation. However, the notes on use for IPI Civil 125.01 state that "if the plaintiff claims he [or she] was injured *directly* by a snow removal operation, then use IPI 120.01 and IPI 10.03 [which provide instructions under an ordinary negligence theory]." (Emphasis added.); IPI Civil (2011) No. 125.01. Under an ordinary negligence theory, Morgenstern would not need to prove that the accumulation of ice or snow was unnatural, nor would he have to prove that the City had notice of the accumulation. Both parties agree that the meaning of the word "directly" determines whether plaintiff may proceed under an ordinary negligence theory.

¶ 28 Morgenstern argues that he alleged direct injury by snow removal by pleading that: (1) "[the City] negligently and carelessly performed snow removal and other related services on or

before the date of the occurrence that created an unreasonably hazardous *unnatural* accumulation of ice and/or snow;" and (2) "as a *direct* and proximate cause of one or more of the forgoing breaches of duty by [the City], [Morgenstern] fell on the subject sidewalk causing him to suffer bodily injuries." (Emphases added.) He notes that, as the plaintiff, he is the master of his complaint and is entitled to proceed under whichever theory he decides, so long as the evidence supports such a theory. *Wind v. Hy-Vee Food Stores, Inc.*, 272 Ill. App. 3d 149, 156 (1995).

¶ 29 We must note that, even in Morgenstern's chosen excerpt, he alleges in his complaint that the accumulation was unnatural, a virtual concession that this is not an ordinary negligence case and that he was required to prove that he slipped on an unnatural accumulation. Also, Morgenstern used the word direct in the context of asserting proximate cause. Indeed, he was directly injured by slipping on ice, but this does not answer the question of whether any evidence supported that he was directly injured by a snow removal operation as that phrase is used in the notes on use for IPI Civil 125.01.

¶ 30 The trial court's determination that the evidence did not support direct injury by snow removal operation was reasonable. We agree with the trial court that to interpret the word "directly" so broadly as to "encompass any and all plowing or shoveling of snow *** would render any analysis of natural versus unnatural accumulation meaningless any time snow had been shoveled or plowed." The exception would swallow the rule. Nearly all premises liability cases involving a slip and fall on ice would then be a "direct" injury, negating the purpose of the IPI Civil 125 series altogether.

¶ 31 As demonstrated in both *Riccitelli*, 1 Ill. 2d at 135-36, and *McCarthy*, 186 Ill. App. 3d at 755, when the plaintiff slips as a result of navigating a snow embankment bordering a shoveled walkway, the trier of fact must determine whether the plaintiff slipped on a natural or unnatural

accumulation. See also *Ziencina*, 188 Ill. 2d at 13, 16 (citing *Riccitelli* as a leading case on the natural accumulation rule and noting that the IPI Civil 125 series is appropriate for use in cases involving a landowner's liability for a fall on ice or snow). While *Riccitelli* and *McCarthy* did not specifically concern jury instructions, they demonstrate that the fact pattern at issue here, a plaintiff slipping as a result of navigating a snow embankment bordering a shoveled area, is perfectly suited for the natural/unnatural inquiry and should not be exempt from that inquiry as would happen if the court had allowed ordinary negligence instructions.

¶ 32 Morgenstern's cited cases do not convince us otherwise. In his opening brief, Morgenstern cites three cases in which the plaintiff was, or should have been, permitted to proceed under an ordinary negligence theory rather than a premises liability theory. *Smart v. City of Chicago*, 2013 IL App (1st) 120901; *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712 (1998); and *Wind v. Hy-Vee Food Stores, Inc.*, 272 Ill. App. 3d 149 (1995). These cases broadly distinguished between liability based on the *actions of a defendant* versus liability based on the *condition of the premises*. *Reed*, 298 Ill. App. 3d at 717. Where the liability was based on the actions of the defendant, whether it be by tearing up a road (*Smart*), causing a rusty nail to protrude (*Reed*), or placing floor mats in a dangerous manner (*Hy-Vee*), the plaintiff could proceed under an ordinary negligence theory and did not have to prove the extra element attendant to premises liability cases that the defendant had actual or constructive notice of the hazard. None of these cases involved a slip and fall on ice or snow. None of these cases address what it means to be injured "directly" by a snow removal operation.

¶ 33 Finally, Morgenstern's reply-brief citation to *Kiel v. City of Girard*, 274 Ill. App. 3d 821, 825 (1995), cannot save his argument. In *Kiel*, the court stated that the plaintiff's injuries were "*directly* caused by the City's placement of snow on the curbside, not by the natural process of

melting snow." (Emphasis added.) *Id.* The *Kiel* court's use of the word "directly" was not made in the context of deciding whether the IPI Civil 125 series instructions were appropriate. Rather, the court used the word by chance, in the context of deciding whether the accumulation was unnatural or natural. Thus, this context would only support the necessity of an IPI Civil 125 series and its direction to consider whether an accumulation is unnatural or natural. Morgenstern's reliance on *Kiel* is purely semantic.

¶ 34 B. No Voluntary Undertaking

¶ 35 Morgenstern next argues that, although there is generally no duty to remove ice or snow resulting from natural accumulations, here, the City assumed the duty to remove or protect against natural accumulation of ice or snow by (a) contract and/or (b) conduct. This is a voluntary-undertaking theory. In this portion of the argument, Morgenstern must logically accept that the ice berm was a natural accumulation. The comments for IPI 125.01 and IPI 125.02 state: "If a duty to remove or protect against natural accumulations of snow or ice is created by conduct or contract, then the plaintiff need not prove the existence of an 'unnatural accumulation' and this instruction is inapplicable." IPI Civil (2011) Nos. 125.01, 125.02.

¶ 36 1. Undertaking By Conduct

¶ 37 We first address whether the City voluntarily undertook to remove or protect against natural accumulations through its conduct. Generally, to succeed under a voluntary-undertaking theory based on nonfeasance, a plaintiff must prove that he or she relied on the defendant's past conduct. *Claimsone v. Professional Property Management*, LLC, 2011 IL App (2d) 101115, ¶ 28. In *Claimsone*, the court held that there could be no reliance on past voluntary undertakings of snow removal, because the plaintiff could plainly see that the snow had not been removed. *Id.* ¶ 30.

¶ 38 Similarly, in our case, Morgenstern cannot be said to have been lulled into a false belief that the ice berm had been removed. He did not rely on an alleged past removal of the ice berm. Rather, he does not dispute that he fully observed the presence of the ice berm and even braced himself against his car as he attempted to cross it.

¶ 39 Not only was there no reliance on the alleged past conduct of removing the ice berm; there was no proof of the past conduct itself. To the contrary, Kanapareddy testified that the City did *not* remove the ice berms forming between the sidewalk and street. Rather, at the worker's discretion, the worker could make ice cuts to clear a pathway. The manual did not dictate the precise number of ice cuts to be made. There is no evidence that the City previously and routinely made an ice cut in the proximity of the deli. The state of the area where Morgenstern slipped was consistent with the City's past snow removal efforts. There is no evidence that the City failed to perform a previously undertaken task upon which Morgenstern relied.

¶ 40 We reject Morgenstern's argument that he did not need to prove reliance. Morgenstern argues that he did not need to prove his reliance on the City's prior conduct, because the City committed a misfeasance rather than a nonfeasance. A misfeasance occurs when a party performs a promised service negligently, and, in such circumstances, reliance is not required. See *Claimsone*, 2011 IL App (2d) 101115, ¶ 22. Morgenstern's assertion that the case involves misfeasance is at odds with the entire premise of this portion of his argument. Morgenstern's theory in this portion of his appellate argument is not that the City voluntarily undertook to remove the berm and then did so negligently. Rather, Morgenstern's theory on appeal is that, by its prior conduct, the City undertook to remove the berm and, on the date in question, it failed to do so.

¶ 41 To whatever extent Morgenstern does put forth a misfeasance theory on appeal, *i.e.*, that the City undertook to shovel the natural accumulation on the sidewalk itself (as opposed to the ice berm) and it did so in an unreasonable manner, we disagree that such a theory would warrant different instructions. Morgenstern presented this theory at trial, and this theory calls for the instructions given. For example, if the City created the berm upon which Morgenstern slipped through its negligent shoveling of the sidewalk, then the berm would have been an unnatural accumulation. See, *e.g.*, *Ziecina*, 188 Ill. 2d at 11-13 (synthesizing numerous cases to reach a general rule that, where the snow was shoveled in a reasonable manner, the normal effects, such as mounds or berms, were natural accumulations); *Riccitelli*, 1 Ill. 2d at 136-37 (the snow piles on either side of the shoveled city sidewalk were natural accumulations where the reasonably careful defendant had no place else to put the snow); and *McCarthy*, 186 Ill. App. 3d at 755 (there was a question of fact as to whether the defendant shoveled the snow in an unreasonable manner so as to create an unnatural accumulation). In other words, the question of whether the City created the berm through its negligent shoveling of the sidewalk is linked to the question of whether the berm was an unnatural accumulation.

¶ 42 Finally, we are not persuaded by Morgenstern's citation to *Williams v. Alfred Koplin & Co.*, 114 Ill. App. 3d 482, 487 (1983). In *Williams*, the plaintiff slipped on a patch of snow while walking down a shoveled path on an outdoor stairwell. The patch of snow on the path on which she slipped was a natural accumulation. Ordinarily, there is no duty to clear or guard against a natural accumulation. However, when the landlord voluntarily undertook to shovel the stairway, he had a duty to do exercise reasonable care in doing so. A question of material fact remained as to whether the landlord exercised reasonable care, precluding summary judgment, where he

shoveled a path so narrow that, if a person walked down the path, he or she could not reach the handrails. *Id*.

¶ 43 Unlike in *Williams*, the City never voluntarily undertook to remove the natural accumulation of ice, the ice berm, upon which Morgenstern slipped. Again, in *Williams*, the plaintiff slipped on the path that the landlord had shoveled. To make this case analogous to *Williams*, Morgenstern would have had to slip on the sidewalk, not the ice berm between the street and sidewalk. The City never undertook a duty to remove the ice berm, so it never undertook a duty to remove the ice berm in a reasonable manner. That the City undertook to shovel a path on the sidewalk does not mean that it undertook a duty to completely clear the surrounding area of ice and snow.

¶ 44 2. Undertaking by Contract

¶ 45 We next address whether the City assumed the duty to remove or protect against natural accumulations by contract. Morgenstern admits that no contract was introduced into evidence. However, he urges that the existence of said contract can be inferred by the following language in the manual: "The Duty Foreman will also advise the sidewalk shoveling contractor to begin shoveling *as per the contract* which includes clearing the landing at the railroad stations, the sidewalks of City-owned facilities, and those sidewalks designated within the [Central Business District]." (Emphasis added.) Morgenstern further notes that curb cuts, when made, are performed by contractors. Morgenstern relies on *Schoondyke v. Heil, Heil, Smart & Golee, Inc*., 89 Ill. App. 3d 640, 645 (1980), in support of his position.

¶ 46 In *Schoondyke*, the defendant condominium association had an agreement with the condominium owners to remove natural accumulations of snow from the common areas. In exchange, condominium owners paid a monthly assessment. The agreement was memorialized

in a document containing the condominium bylaws. The association voluntarily undertook a duty to remove natural accumulations when it entered into the agreement. This duty extended to all reasonably foreseeable users of the common area. Therefore, it did not matter that the plaintiff was merely an occupier of her parents' condominium and not an owner herself. *Id.*

¶ 47 Morgenstern urges that, just as it did not matter in *Schoondyke* that the association had no contract with the plaintiff, it does not matter here that the City had no contract with Morgenstern to remove the natural accumulation of snow. Morgenstern was a foreseeable user of the sidewalk in the business district. While this may be true, it is irrelevant. Morgenstern fails to identify the terms of the contract referenced in the manual. He can point to no evidence that such a contract, if it existed, required the removal of the ice berm that formed naturally as a result of the City's efforts to clear the streets and create a reasonable walkway on the sidewalk itself.

¶ 48 Further, to whatever extent Morgenstern argues that the manual itself is a contract, we disagree. The manual is an internal policy memorandum. It cannot be a contract, because there is no second party, no offer and acceptance, and no consideration. See, *e.g.*, *Forest Investment Corp. v. Chaplin*, 55 Ill. App. 2d 429, 432 (1965).

¶ 49 C. Special Interrogatory

¶ 50 We briefly address Morgenstern's argument that the special interrogatory was given in error. Morgenstern's argument that the trial court erred in giving the special interrogatory hinges on his claim that he was entitled to ordinary negligence instructions. As Morgenstern was not entitled to ordinary negligence instructions and was required to prove that the patch of ice on which he slipped was an unnatural accumulation, this argument fails.

¶ 51 In conclusion, this is a classic premises liability case involving a slip and fall on ice or snow. The trial court did not abuse its discretion in issuing the jury instruction made specifically for such cases. Morgenstern was not entitled to evade his burden to prove that the ice upon which he slipped was an unnatural accumulation.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the trial court's judgment.

¶ 54 Affirmed.