2019 IL App (2d) 181053-U
No. 2-18-1053
Order filed September 18, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EVA SCHULTZ, Plaintiff-Appellant, v. THE RIVER SHORE OF NAPERVILLE CONDOMINIUM ASSOCIATION, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of Du Page County. No. 16-L-6 Honorable Dorothy French-Mallen, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court properly granted defendant summary judgment in this slip-and-fall case, where the plaintiff had alleged that she fell on black ice in a raised area of a parking lot. Affirmed.

¶ 2 Plaintiff, Eva Schultz, a condominium-unit owner, sued defendant, The River Shore of Naperville Condominium Association, alleging negligence after she slipped and fell in a common area parking lot behind her unit. The trial court granted defendant summary judgment. Plaintiff appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 5, 2016, plaintiff sued defendant, alleging that defendant, as owner and manager of the common elements of the condominium property, had a duty to keep the premises, including the parking lot, sidewalks, and walkways, in good condition and in a proper state of repair, but breached its duty when, on January 9, 2015, it permitted certain areas of the parking lot to remain in a dangerous condition. Plaintiff further alleged that, on January 9, 2015, while walking through the parking lot to her vehicle, which was parked in a garage, and as a result of the dangerous and defective condition of the lot, she slipped and fell in the common area parking lot and sustained a broken left elbow. Plaintiff asserted that defendant: allowed the parking lot to remain defective by permitting it to become worn, cracked, rutted, and marred by deep holes and depressions so as to cause and become a hazard to those walking on the parking lot; permitted water to pool and freeze in unnatural accumulations in the winter; failed to post warning signs or notice to the public alerting it to the dangerous conditions of the lot; failed to restrict and prevent resident access to the defective areas of the parking lot; and failed to anticipate that residents would be distracted and fail to appreciate the dangerous conditions of the lot and take precautions to prevent injuries to patrons.

¶ 5 Defendant filed an answer, denying the allegations, and the matter proceeded to discovery.

¶ 6 A. Depositions

¶ 7 At her deposition, plaintiff, age 38, testified that she has owned her condo unit since March 2009. On the evening before her fall, it snowed. On the day of her fall, a Friday, it was sunny and very cold. The parking lot was covered in snow, but plaintiff could not recall its depth. The lot had not been plowed.

¶ 8 Around lunch time, plaintiff left her condo unit to walk to the parking garage. The only way to access the garage is to walk through the parking lot. There were two areas that appeared clear of snow along her path, and plaintiff walked toward them. She explained that the two spots were black "wide bumps" and "two broad bumps." The parking lot, according to plaintiff, was uneven and had areas that rose up slightly and were black. Rectangular ruts had formed in the parking lot over the years; there was a bulge, a rut, another bulge, and then plaintiff's garage door. She aimed for the black areas, trying to avoid the snow and believing they would be safer, "but that was where the black ice was." She stepped on one of the black areas that appeared clear, but "there was black ice and I fell." The black area where plaintiff fell measured two-to-three feet by about four-to-nine feet. Plaintiff could not recall if, immediately after the fall, she inspected the area where she fell. Plaintiff *presumed* there was ice on the ground, based on the fact that "I was walking and then I flipped over and my foot went out from under me." She could not recall if it was her left or right foot. There were no other persons in the area where plaintiff fell.

¶ 9 Plaintiff was aware of the ruts before her accident; they had been present since she purchased her condo unit. In the years that plaintiff lived at the complex, she had observed this pattern of snow and bare areas. While she walked through the area, plaintiff was carrying a box in both hands almost fully extended in front of her. The box blocked her vision directly below her.

¶ 10 Plaintiff further testified that, over the years, defendant had repaired potholes in the parking lot, but had not resurfaced the lot or weatherproofed it. The driving surface behind plaintiff's unit (from the steps toward the garage door) is generally level and the topography is "a wave where there's bump, rut, bump, rut." The clear areas were the bumps/bulges. The ruts

were snow covered. Plaintiff had seen this pattern in the past. The areas of bulges and ruts ran parallel to the garage doors and ran along the traffic pattern that people would drive on in the parking lot. Plaintiff never complained to defendant about snow or ice issues in the parking lot or snow and ice removal.

¶ 11 As a result of her fall, plaintiff sustained a fractured left elbow that required surgical repair.

¶ 12 Jeffrey Vaughn testified at his deposition that, beginning in October 2014, he worked for Associa Chicagoland as a licensed community association manager. Defendant's account was assigned to Vaughn, and he attended quarterly board meetings. Due to the condition of the lot, patching work was done in the parking lot of defendant's property on a continuous basis. In October 2014, Vaughn inspected the lot and noted potholes that needed repair. Thereafter, he tried to inspect the property monthly. There had been no complete replacement of the parking lot for some time. Vaughn wanted it to be budgeted for 2020. Defendant's board was aware of the issue as far back as October 2014 and was working out a budget for the project. Vaughn left Associa in June 2016.

¶ 13 Ana Andino, Vaughn's predecessor at Associa, testified that she started working with the company in April 2012 and left in October 2016. Andino worked as a portfolio manager at Associa, overseeing properties, including defendant's property (starting in May or June 2012 and through the end of 2014). She visited the properties assigned to her at least twice per month. She attended defendant's quarterly board meetings. The parking lots at defendant's property were deteriorating, and defendant's board was aware of the issue.

¶ 14 B. Summary-Judgment Motion

¶ 15 On May 1, 2018, defendant moved for summary judgment (735 ILCS 5/2-1005 (West 2018)), arguing that defendant owed no duty to plaintiff for the removal of natural accumulations of ice and snow on the premises. It also asserted that plaintiff presented no evidence that showed that the "presumed" ice that caused her to fall was unnatural and created by defendant. Rather, in defendant's view, the evidence showed that the presumed ice on which she fell was a natural accumulation. The court noted that plaintiff stated that she did not see the ice before she fell or afterwards.

¶ 16 The trial court granted defendant summary judgment, finding that there was no material factual question to be decided by a jury. It noted that plaintiff testified that she fell on black ice, which is something one cannot see, on a raised area of the parking lot:

> "And if the plaintiff had testified that she slipped and fell in this rut because of an accumulation of ice or snow, that would be a question of fact then because there's no question that this driveway was in a deteriorating condition that was caused because the association had failed to repair it and had had prior notice, many years, of the deteriorating condition of this driveway.
>
> But that's not where she testified that she fell. She said that she looked for an area that had less snow and saw the raised area, which was black, and therefore there wasn't any snow on the raised area and that's what she was heading for."

¶ 17 The trial court further noted that it would take as true that plaintiff slipped on ice. However, the defect, it determined, did not cause the ice. The top of the black asphalt, according to plaintiff, was clear. Because there was snow everywhere else, the court took judicial notice that when the sun comes out, snow can melt on asphalt. The ice on the asphalt bump that

plaintiff slipped on was a natural accumulation. Thus, defendant had no duty to ensure that there was no ice on that asphalt.

¶ 18 On September 12, 2018, plaintiff moved to reconsider, arguing that, had the driveway/parking lot been properly maintained, there would have been an even continuum of snow and no exposed areas that would thaw and freeze and create black ice and give the appearance of clear blacktop. Had the peaks not been present, she maintained, black ice would not have been present and it would have been a natural accumulation.

¶ 19 On December 4, 2018, the trial court denied plaintiff's motion to reconsider. The trial court noted that the peaks were not actually peaks but the flat part of the driveway and that the ruts were the result of cars driving through the driveway and pushing the asphalt into a rut. The court also determined that plaintiff's motion did not meet any of the three bases upon which to grant reconsideration and, in any event, the court stood by its original finding that there was no material factual question that the black ice was an unnatural accumulation. It reiterated that plaintiff did not fall in a rut, and it noted that there was no evidence that the presence of ruts, which accumulate snow, somehow created black ice on the flat surface of the driveway. Plaintiff appeals.

¶ 20 II. ANALYSIS

¶ 21 Plaintiff argues that the trial court erred in granting defendant summary judgment. She asserts that there is a material factual question concerning the role the defective condition of the premises played in the formation of ice upon which she fell that precluded summary judgment. For the following reasons, we disagree.

¶ 22 A motion for summary judgment will be granted only 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 2018). We must construe the record strictly against the movant and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). We review *de novo* the trial court's ruling on a motion for summary judgment. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 16.

¶ 23 To establish negligence, a plaintiff must plead and prove the existence of a duty owed by the defendant, a breach of that duty, and injury proximately resulting from that breach. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12.

¶ 24 "Property owners have a duty to exercise ordinary care in maintaining their property in a reasonably safe condition." *Nguyen v. Lam*, 2017 IL App (1st) 161272, ¶ 20. However:

> "under the common law, a landowner owes no duty to remove natural accumulations of snow and ice. The rule recognizes that to hold otherwise would create an unreasonable burden of vigilance when considering that snowstorms cannot be foreseen or controlled and recognizes the climatic vagaries of this area with its unpredictable snowfalls and frequent temperature changes.
>
> However, landowners do owe a duty of reasonable care to prevent unnatural accumulations of ice and snow on their premises where they have actual or constructive knowledge of the dangerous condition. Thus, liability may arise where snow or ice accumulated by artificial causes or in an unnatural way or by a defendant's own use of the area concerned and creation of the condition, and where it has been there long enough

to charge the responsible party with notice and knowledge of the dangerous condition." (Citations and internal quotation marks omitted.) *Murphy-Hylton*, 2016 IL 120394, ¶ 19.

¶ 25 One theory of liability in this area for falls on unnatural accumulations of ice is when there is a defective condition or negligent maintenance of the premises. *Id.* ¶ 21. See, *e.g.*, *McCann v. Bethesda Hospital*, 80 Ill. App. 3d 544, 550-51 (1979) (excessive slope of parking lot presented a factual question whether ice causing the fall was an unnatural accumulation; the plaintiff had presented an architect's affidavit, wherein he opined that the incline was excessive and would have caused an unnatural accumulation of ice where the plaintiff fell and where he had examined the lot and observed puddling in the fall area). "At a minimum, plaintiff must sufficiently allege an identifiable cause of the ice formation." *Kasper v. McGill Management, Inc.*, 2019 IL App (1st) 181204, ¶ 25.

¶ 26 Here, plaintiff notes that she testified in her deposition that the parking lot was uneven and that there were areas that appeared to be clear of snow. She stepped upon an area that appeared to be clear, but encountered ice and fell. Plaintiff also stated that, due to the condition of the parking lot, bumps and ruts had formed over the years, creating peaks and valleys where snow and ice accumulated. She encountered black ice on one of the peaks/bumps, and she slipped and fell. Plaintiff also points to Vaughn's testimony that the parking lot issue was an ongoing one since before he took over defendant's account. Vaughn also noted that the parking lots had not been completely replaced at any time prior to plaintiff's fall and that only minor repairs were done from time to time due to budgeting issues. Plaintiff also points to Andino's testimony that the parking lot was deteriorating and that defendant's board was aware of the problem.

¶ 27 Plaintiff further argues that the evidence showed that the parking lot had become deeply rutted with a wave pattern of bumps and ruts in which snow accumulated in the ruts up to six inches deep and had bumps upon which ice formed. Defendant, plaintiff asserts, did not exercise ordinary care in maintaining the property and delayed needed repairs for years. She contends that the hazardous condition that defendant allowed to exist over an extensive period and that presented an unnatural accumulation of ice and snow warrant a finding of liability on defendant's part. A jury should decide, in her view, whether the deteriorated condition of the driveway caused or contributed to the ice formation upon which she fell.

¶ 28 Plaintiff also asserts that the trial court erred in determining that plaintiff slipped on what would have been a flat surface of the lot, which was a natural accumulation. She contends that this is inconsistent with the testimony. She maintains that she testified that the lot sloped toward the garage and away from the stairs she descended from her condo building, as depicted in photographs attached to her deposition transcript. Plaintiff also notes that she and the property managers testified to the bulging surface of the parking lot, with the length of the driveway being marked by areas that had been depressed by vehicle traffic adjacent to area that had been pushed above the surface, forming "bumps" across which one would have to traverse to reach the garage. There was no testimony, she urges, that there was a smooth surface marred by ruts or valleys, as the trial court appears to have determined. There is no dispute, plaintiff asserts, that she fell on the defective surface of the driveway on the peak of one of the bumps created on the marred section of the lot and rising above the smooth driveway surface. The peaked surface appeared to be clear, but was covered in black ice, which caused her to fall when her foot slipped out from under her.

¶ 29 Further, plaintiff suggests that this court can take judicial notice that, in January in northern Illinois, the ground is hard-frozen and has been so for some time and that liquid on such ground will freeze in place. Also, plaintiff asks that this court take judicial notice that, on a rutted surface, the peaks of the bumps adjacent to the ruts will be exposed to light and air before the valleys of the ruts, particularly at noon, thus, potentially causing snow on the bumps to melt and re-freeze in place on the frozen ground, creating the black ice conditions plaintiff encountered.

¶ 30 Defendant responds that plaintiff's argument that she fell on an unnatural accumulation is speculative. It notes that plaintiff presented no evidence that showed that the presumed ice on which she fell was unnatural and somehow created by defendant. Rather, in defendant's view, plaintiff's testimony showed that the presumed ice was a natural accumulation. There was no evidence as to the source of the ice on which she fell. Plaintiff, defendant notes, testified only that it had snowed the night before her fall and that the lot had not been plowed. She also stated that she did not see ice before she fell and did not see it afterwards. She merely presumed that she slipped on ice based on the fact that her foot went out from under her. See *Flight v. American Community Management, Inc.*, 384 Ill. App. 3d 540, 541-45 (2008) (testimony that the plaintiff's foot "gave way" on what he believed was ice failed to establish that the ice on which he fell was not a natural accumulation; evidence also showed that it had rained after the snow removal and that the rain froze). Defendant also notes that there are no photographs of the fall site at the time or near to the time of the fall. (Plaintiff produced only photographs taken in the summer months.) Also, there were no independent occurrence or post-occurrence witnesses who could testify as to the condition of the fall site at the time of the fall, and, plaintiff produced no weather-report evidence. Thus, the trial court was left with only plaintiff's testimony concerning

her observations before and immediately after her fall as to the property conditions and the presumed ice underfoot. The trial court found them insufficient to create a factual question concerning the formation of the presumed ice.

¶ 31 Defendant also argues that plaintiff's descriptions of the fall area, taken in the light most favorable to her, cannot show that the ice was unnatural. In its view, the only logical inference from plaintiff's testimony is that the ice was a natural accumulation, because: the parking lot had not yet been plowed; she actually walked in snow to get to the clear spots in the lot; the clear spots were bumps or raised above their surroundings; it was sunny for some time before she left her residence at noon; ice on these clear raised areas could have formed from the action of the sun upon the snow before the accident; and the ice on which she claims she fell was not formed inside a rut or depression of the area and was raised above its surroundings. Further, defendant disagrees that the parking lot's condition alone created a reasonable inference that the ice upon which plaintiff claims she fell was an unnatural accumulation. This claim cannot be inferred from the evidence, defendant urges, when the existence of another fact inconsistent with that claim—a natural accumulation of ice—can be inferred with equal certainty from the same evidence. *Presbrey v. Gillette*, 105 Ill. App. 3d 1082, 1094 (1982).

¶ 32 We conclude that the trial court did not err in granting defendant summary judgment. We initially note that the record contains copies of two photographs depicting the area where plaintiff fell. However, the documents are merely photocopies and not actual photographs. They are unclear, and we cannot discern any ruts or raised areas in the photographs. Thus, they do not aid our analysis.

¶ 33 This case does not present a scenario such as that in *McCann*, where the excessive slope of the lot presented a factual question. *McCann*, 80 Ill. App. 3d at 550-51. In that case, the

plaintiff had presented an architect's affidavit, wherein he attested that the incline was excessive and would have caused an unnatural accumulation of ice where the plaintiff fell and where he had examined the lot and observed puddling in the fall area. *Id.* Here, there is no expert's affidavit or other such evidence.

¶ 34 Furthermore, contrary to plaintiff's assertion, she did not testify that the lot sloped toward the garage, and her reliance on the photographs to support this assertion does not help her case, because they are not clear. We also decline to take judicial notice that, at noon, in January in northern Illinois, "on a rutted surface, the peaks of the bumps adjacent to the ruts will be exposed to light and air before the valleys of the ruts, *** thus *potentially* causing snow on the bumps to melt and re-freeze in place on the frozen ground surface" (emphasis added), creating black-ice conditions such as those the plaintiff allegedly encountered. Plaintiff essentially asks us to take judicial notice of the key question in this case, indeed, an element of her case, and to speculate as to the creation of a condition that caused her fall. See *People v. Clark*, 406 Ill. App. 3d 622, 632 (2010) ("A judicially noticed fact must be one not subject to reasonable dispute, meaning that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned"). The phenomenon of which plaintiff asks we take judicial notice is not a properly judicially-noticed fact. It constitutes pure speculation. This problem is compounded by the fact that plaintiff failed to provide weather data for the day on which she fell.

¶ 35 Thus, in total here, we have no clear, contemporaneous photographic depictions of the area where plaintiff fell, no temperature data for the date of the fall, and no expert or other such evidence that shows (or reasonably can show when viewed in plaintiff's favor) that it was probable that black ice formed on a bump or flat area of a parking lot under the conditions that

day. "[T]o survive summary judgment, [the] plaintiff must sufficiently show that the unnatural accumulation of snow or ice was caused by the property owner. *** At a minimum, [the] plaintiff must sufficiently allege an identifiable cause of the ice formation." *Kasper v. McGill Management, Inc.*, 2019 IL App (1st) 181204, ¶ 25. When relying on a negligent-maintenance theory, the " 'unnatural or aggravated natural condition must be based upon an identifiable cause of the water accumulation.' " *Id.* ¶ 28 (quoting *Branson v. R & L Investment, Inc.*, 196 Ill. App. 3d 1088, 1094 (1990)). Plaintiff relies on only circumstantial evidence, and that evidence did not make it more probable that black ice formed on the area where she slipped. *Id.* ¶ 29 (Emphasis added.) ((" 'If [the] plaintiff relies upon circumstantial evidence to establish proximate cause to defeat a motion for summary judgment, the circumstantial evidence must be of such a nature and so related as to make the conclusion *more probable as opposed to merely possible*.' ") (quoting *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 225 (2009)). In sum, her evidence amounted to mere speculation, which is insufficient to survive summary judgment. *Id.* ¶¶ 26-29 (where the only evidence showed mere dusting of snow that covered a patch of ice and where there was no evidence to establish that the ice was an unnatural accumulation or that contractor had engaged in prior snow removal efforts that caused ice to refreeze in area where the plaintiff fell, summary judgment for the defendant was appropriate; rejecting the plaintiff's argument that the cause of the ice was runoff from a downspout, where he did not see any such runoff on the day of his fall, presented no expert testimony that it was the probable cause of the ice, and there was no sign of water flowing from the downspout to the area where he fell; the plaintiff's evidence amounted to mere speculation).

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 38 Affirmed.