2012 IL App (1st) 112648-U

FIFTH DIVISION
March 30, 2012

No. 1-11-2648

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EUGENE A. DABROWSKI,	)	
	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Cook County, Illinois.
	)	
THE YOUNG MEN'S CHRISTIAN	)	No. 10 L 5230
ASSOCIATION OF CHICAGO, a/k/a YMCA	)	
OF METROPOLITAN CHICAGO, sued herein	)	Honorable
as YMCA METROPOLITAN CHICAGO, LLC,	)	Kathy Flanagan,
	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justice McBride and Justice Howse concurred in the judgment.

ORDER

HELD: (1) Defendant owed no duty to clear natural accumulation of snow from staircase, and (2) even where staircase had previously been covered with traction tape that was worn away, defendant was not liable, since the condition of the tape did not increase the risk of harm, which was wholly attributable to the snow accumulation.

¶ 1 This case arises from a slip and fall accident on a snow-covered staircase. On January 28, 2009, at approximately 5:30 or 6:00 p.m., plaintiff Eugene Dabrowski was returning to his residence at the YMCA on Irving Park Road in Chicago, Illinois. It was snowing. As plaintiff attempted to climb the steps at the front entrance of the YMCA building, he allegedly slipped and fell, fracturing his left ankle. He subsequently brought the instant suit against YMCA seeking compensation for his injuries.

¶ 2 The trial court granted summary judgment in favor of YMCA. Plaintiff now appeals. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In plaintiff's amended complaint, which frames the instant action, plaintiff alleged the following. On January 28, 2009, defendant possessed, operated, managed, maintained, and controlled the entrance stairway at the Irving Park YMCA. In addition, plaintiff alleged that defendant had a duty to maintain the premises in a reasonably safe condition for those lawfully on the premises. Nevertheless, according to plaintiff, defendant negligently permitted the premises to remain in a dangerous condition despite the fact that it knew or should have known of such dangerous condition. Specifically, plaintiff alleged, defendant allowed an "unnatural" amount of snow and ice to accumulate on the entrance stairway, allowed the stairway to "deteriorate," and failed to properly maintain the non-slip traction tape on the stairway. As a result of this alleged negligence, when plaintiff stepped on the front stairway to enter the premises on January 28, 2009, he slipped and fell, sustaining severe and permanent injuries.

¶ 5 Defendant filed an answer in which it admitted possessing, managing, and maintaining

the premises at the Irving Park YMCA, including the staircase at issue, but it denied having a duty to maintain the premises in a reasonably safe condition, and it further denied all allegations of negligence.

¶ 6 Defendant subsequently filed a motion for summary judgment on May 26, 2011. Defendant contended that, under Illinois law, in order for a plaintiff to recover as a result of falling on ice, snow, or water, the plaintiff must establish that the accumulation was unnatural in origin and created by the premises owner. Defendant further stated that, according to the plaintiff's own deposition testimony, it was snowing at the time that plaintiff left the premises approximately six hours before his fall, and it was snowing at the time he returned and had his fall. Thus, defendant argued, the accumulation of snow on the steps was a natural accumulation for which YMCA could not be held liable. Additionally, defendant argued, it had no duty to place traction tape on the steps, and, having done so voluntarily, it had no duty to maintain the traction tape on the steps.

¶ 7 In support of its motion for summary judgment, defendant attached the depositions of four individuals: plaintiff; Antonio Gonzalez, the director of maintenance for the Irving Park YMCA at the time of plaintiff's accident; Mark Langan, the executive director of the Irving Park YMCA at the time of plaintiff's accident; and Bob Friedrich, the director of maintenance for the Irving Park YMCA in the 1980s when traction strips were first installed on the front staircase.

¶ 8 In his deposition, plaintiff stated that he took up residence at the Irving Park YMCA on November 1, 2008. He testified that the traction tape on the front stairway was already worn down as of that date: "It was gone since the day I moved in," he said. He stated that YMCA

employees used that stairway and would "definitely" have seen that the traction tape was worn down. Prior to the accident, he had not complained to any YMCA employee about the condition of the front steps, nor did he know anyone who made such complaint, nor did he know anyone else who had slipped and fallen on the front steps.

¶ 9 On January 28, 2009, the day of plaintiff's accident, plaintiff left the YMCA at approximately 11:00 a.m. He testified that it was lightly snowing at that time. When he returned to the YMCA, it was around 5:30 or 6:00 p.m. At that time, it was snowing, although plaintiff could not remember if the snow was heavy or light. He described the stairs as wet, slippery, and slushy. He said that he did not know if it had been snowing all day, but there was snow and slush on all of the sidewalks in the neighborhood.

¶ 10 Plaintiff stated that when he stepped onto the first step with his left foot, his left foot slid sideways, and he fell forward. Counsel for the YMCA asked plaintiff whether he was holding onto the handrail at that time. Plaintiff replied that he was moving toward the right handrail, but he had not yet taken hold of it, because there was a pole in the way preventing him from doing so. He explained that there was a canopy positioned over the stairs (which did not prevent snow from getting on the stairs), and holding up that canopy was a pole placed near the handrail. "The pole's in the way of grabbing the handrail," he said. "You have to get on the stairs first."

¶ 11 After plaintiff's fall, he got up, shook himself off, and slowly went up the stairs. When he entered the YMCA, there were a couple of employees at the front desk. He stated that he told the employees, "You better get some salt out there. I just fell." He did not tell them that he was injured, because, at that time, he was unaware of how badly he was hurt. Subsequently, on the

morning of January 30, 2009, he went to the hospital, where it was discovered that his ankle was fractured and required surgery.

¶ 12 Plaintiff testified that after the accident occurred, and after he had been to the hospital, he spoke with Langdon, the executive director of the Irving Park YMCA. Langdon allegedly told him, "We've had a lot of problems with these stairs."

¶ 13 The next deposition attached to the YMCA's motion for summary judgment was that of Antonio Gonzalez, who had been the director of maintenance for the Irving Park YMCA since August 2007. Gonzalez stated that, as director of maintenance, he was in charge of the building's repairs, cleaning, and electrical, mechanical, and cosmetic maintenance. He had six staff members working under him in January 2009. In addition, Friedrich, a former director of maintenance, helped him on a volunteer basis.

¶ 14 Gonzalez testified that it was part of his job to be observant with regard to safety hazards on the property. He conducted both formal and informal inspections of the property. Formal inspections were conducted twice a year, and he would give formal inspection reports to the executive director, who, in January 2009, was Langdon. Furthermore, if he recognized a safety hazard, it would be his job to fix it, and he would have the authority to do so.

¶ 15 Gonzalez said that part of his duties and responsibilities in performing maintenance was to maintain the front stairway to the building. He described the stairway as about five steps made of granite with black iron handrails. Upon questioning by plaintiff's counsel, Gonzalez agreed that the surface of the steps would become "more slippery" (in counsel's words) when wet. Gonzalez said that in March 2010, over a year after plaintiff's accident, he installed non-slip

traction tape on the steps. He did so at the request of Langdon, who wanted the traction tape installed "[t]o add more safety for those steps." Gonzalez stated that the traction tape made the steps safer by making them less slippery.

¶ 16 Prior to March 2010, Gonzalez said, there was some traction tape on the steps, but only "a few pieces left." Gonzalez explained that it had been completely worn away by foot traffic in the middle of the steps, but remnants of the tape were still visible on the sides. He stated that once the traction tape is worn away, it becomes ineffective. However, he further stated that, prior to January 2009, he did not remember anyone telling him that the traction tape was worn down, or, indeed, anything related to the traction tape. "There was no problems prior," he said. "No problems with those steps, to my knowledge."

¶ 17 Gonzalez additionally stated that, as part of his job as maintenance director, he performed snow removal on the steps. In particular, the steps needed to be shoveled every time it snowed.

¶ 18 During examination by counsel for the YMCA, Gonzalez stated that he had no knowledge of the YMCA entering into any contract in which it agreed to shovel snow or put salt down. In addition, he stated that he did not know the law in Illinois regarding whether a premises owner has a legal duty to shovel snow, salt, install traction tape on steps, or, if traction tape was previously installed, to keep it there.

¶ 19 The YMCA also attached the deposition of Mark Langan, who was the executive director of the Irving Park YMCA at the time of plaintiff's accident. Langan testified that as executive director, he was the senior YMCA official at the facility, and he managed all employees at that location.

¶ 20 Langan testified that it was the duty and responsibility of all YMCA employees to deal with any hazards or maintenance concerns that arose on the premises. He stated that employees ought to be reasonably observant in keeping an eye out for any hazards, including slip and fall hazards, on the premises. He also stated that fixing hazards or maintenance concerns on the premises would be a portion of the job of YMCA maintenance staff.

¶ 21 Langan stated that, although outside contractors performed some of the outdoor maintenance work at the YMCA, such as snow removal in the parking lot, YMCA in-house personnel were responsible for maintaining the front steps. He stated that, as a general matter, it was the job of the staff to make the steps as safe as they reasonably could. However, he said, that might or might not include the installation of traction tape, depending on the weather or other environmental conditions. Counsel for plaintiff asked him whether he would expect YMCA employees to replace traction tape on the steps if it were completely worn away. Langan replied, "Depending on the condition, I would ask that they would deal with it in a fair and reasonable way." He said that an appropriate response would vary depending on the time of day, the time of year, and other conditions.

¶ 22 Langan stated that he met with plaintiff on February 11, 2009, following plaintiff's accident. He denied telling plaintiff that he was aware that the steps were in a dangerous condition. Counsel for plaintiff asked Langan whether he told plaintiff that he had received numerous complaints regarding the dangerous condition of the steps. Langan answered, "I may have said something like, 'You know, it is winter in Chicago. Stuff gets wets [*sic*] and slippery.' I don't know that I received any specific complaints about those steps and said anything to him

about that."

¶ 23 Upon examination by counsel for the YMCA, Langan stated that he was not professing any knowledge of Illinois case law with respect to duties to maintain premises, and that when he spoke of employee responsibilities, he was merely stating how the YMCA operated. He further stated that YMCA never made any agreement with its residents to continue to put down traction tape on the front steps.

¶ 24 The final deposition attached to the YMCA's motion for summary judgment was that of Bob Friedrich. Friedrich stated that he had lived at the Irving Park YMCA since March 1949, and ever since that date, he had assisted in the maintenance of the building on a volunteer basis. He explained that he would help the director of maintenance, and, when the director of maintenance was discharged or died, Friedrich would serve as the interim director of maintenance until a new one was selected. Furthermore, after his retirement in 1986, he worked as the permanent director of maintenance until 1993.

¶ 25 Friedrich stated that, in the late 1980s, during his tenure as director of maintenance, he purchased and installed traction tape on the front stairway. "We decided to put some tape down because some of our members were a little unsteady on their feet," he said. He stated that, before the traction tape was installed, a couple slipped on the steps. Subsequently, Friedrich suggested the use of traction tape to the executive director, and, after obtaining the executive director's permission, he installed the tape. He stated that he installed it because it would make the steps less slippery and therefore safer for everybody.

¶ 26 However, Friedrich testified, there were two problems with the tape. First, he said, the

adhesive on the back of the tape did not hold to the steps very well, and children would peel off the tape. Second, the granular finish of the tape would wear down over time. Friedrich recognized that these problems existed, but he said that "It was no hurry to do anything about it." He explained, "There is nothing saying that we had to do this. We did it for the benefit of the people."

¶ 27 Counsel for plaintiff asked Friedrich whether it was part of his job as director of maintenance to maintain the traction tape, and the following dialogue occurred.

"FRIEDRICH: I would say no.

COUNSEL FOR PLAINTIFF: But you put down the non-slip traction tape, didn't you?

A. As a volunteer, yes. It didn't say anyplace we were required to have this tape down.

Q. But you put it down to make it safe–

A. But there's no requirement where somebody came along and said we had to put tape down.

Q. You're saying the executive director required you to put it down, right?

A. It was volunteer on our part.

***

Q. Would you agree it makes sense once you put down this non-slip traction tape on the steps, that it would be a good idea to maintain it so it doesn't wear away?

A. It is a good idea to maintain it. That's up to the individual who is taking care

> of the building, whether he thinks it was necessary. *** I did originally because I thought it would be good for all the people. There was no law requiring me or the YMCA to do this."

Friedrich further noted that traction tape had never been installed on the stairway on the other side of the building, and it was "[n]o problem."

¶ 28 Friedrich stated that, after the first set of traction tape became worn down, he installed a second set of traction tape on the steps, using a different adhesive. This occurred while he was still the director of maintenance for the building. He testified that the second set of traction tape lasted for years. Eventually it started wearing out in the middle, but, Friedrich said, he was no longer director of maintenance at that time, so he did not worry about it.

¶ 29 Friedrich testified that in March 2010, around a year after plaintiff's accident, Gonzalez informed Friedrich that he was installing traction tape on the front stairway, and Friedrich helped him to install it. Friedrich stated that the March 2010 installation was the first time that new traction tape had been installed since he stepped down as director of maintenance in 1993.

¶ 30 On July 7, 2011, plaintiff filed a response to defendant's motion for summary judgment, raising three main contentions. First, although plaintiff did not claim that YMCA had any duty in the first instance to install traction tape on the steps, he contended that once YMCA chose to install traction tape, it voluntarily assumed a duty to maintain that traction tape. Second, plaintiff contended that YMCA voluntarily assumed a duty to shovel and salt the front steps as part of its maintenance program. Third, plaintiff contended that YMCA had a duty to maintain a safe means of ingress and egress to its building.

¶ 31 In support of his response, plaintiff attached the four depositions previously set forth (that is, the depositions of plaintiff, Gonzalez, Langan, and Friedrich), as well as two additional depositions, namely, the deposition of Darrin Lowery, the resident director for the Irving Park YMCA at the time of plaintiff's accident, and the deposition of Roman Tatus, the business manager for the Irving Park YMCA.

¶ 32 Darrin Lowery stated that there were three entrances to the building: the front door (where plaintiff's accident allegedly occurred), a rear door that was used as a service entrance, and a door for the facility's daycare center. When he arrived at the YMCA in the morning, he would typically enter the building through the rear service entrance. However, if that entrance was locked, then he would instead enter through the front door. He stated that the same was generally true for the other YMCA employees, except for those who worked at the daycare center.

¶ 33 Lowery stated that when he worked at the YMCA, he wanted to be observant for any hazards on the premises. If he observed a hazard, then he would either resolve it himself, or he would report it to the director of maintenance, the front desk coordinator, or the executive director, depending on the circumstances. Counsel for the plaintiff asked him what he would do if he noticed that there was traction tape on the steps that had been worn away. Lowery replied that he would report it to the maintenance staff and would expect them to remedy it. He further stated that if an employee working for him observed a hazard on the premises, he would expect that employee to report it so that it could be resolved.

¶ 34 Lowery testified that the duties of the director of maintenance included maintaining the

premises, and, in particular, the front steps. However, he said he did not know if the director of maintenance had a duty to keep the premises safe. He also did not know whether it was the job of the maintenance staff to maintain traction tape on the front steps. However, he said, if, hypothetically, he had determined that worn-away traction tape on the front steps was a hazard, and if he reported to the maintenance staff that he wanted it to be fixed, be would expect them to get it done.

¶ 35 Lowery further stated that he had seen YMCA maintenance staff shoveling snow on the front stairway. Counsel for plaintiff asked him whether those staff members would have been in a position to see any hazards on the steps. "I don't know," Lowery said. "I imagine so." Counsel for plaintiff then asked him whether they would have been in a position to see if traction tape on the steps had been worn away, and he replied, "Imagine they would."

¶ 36 Upon examination by counsel for the YMCA, Lowery stated that he did not know the law in Illinois regarding a landowner's duty to maintain its premises with respect to snow and ice.

¶ 37 Also attached to plaintiff's response to the YMCA's motion for summary judgment was the deposition of Roman Tatus, business manager for the Irving Park YMCA. Tatus said that safety on the premises was "everybody's responsibility" and that employees should be observant as to hazards at the facility. Counsel for plaintiff then asked him whether employees had a duty to report safety hazards that they observed. Tatus said that this was not necessarily the case. He explained that, while he would expect employees to take responsibility for their immediate work areas, he did not think that reporting of hazards was contained in the job description of all employees. He said, "I don't think I have in my particular job description to be vigilant of any

hazardous or dangerous environment and such."

¶ 38 With regard to the site of plaintiff's accident, Tatus stated that the front door was the primary entrance to the facility for YMCA employees, as well as the entrance that residents were required to use. He said that employees using the front steps would be in a position to see worn-away traction tape. He additionally stated that the duties of the director of maintenance included maintaining the outside of the building and, in particular, the front stairway, although he said that he had only a vague knowledge of what the director of maintenance and the maintenance staff did. If an employee noticed that the front stairway was in a dangerous condition, Tatus said that he would expect the employee to report it, and he would then expect the YMCA maintenance staff to deal with the issue by fixing and repairing the dangerous condition. Counsel for plaintiff asked, "And if they [the maintenance staff] determined the dangerous condition to be worn away non-slip traction tape, they could replace it by putting down new traction tape, correct?" Tatus answered, "In the case if the cause of the slippery steps was the lack of the traction tape, yes."

¶ 39 Counsel for plaintiff also asked Tatus about snow removal on the property and, in particular, on the front steps. Tatus stated that the YMCA maintenance staff would perform snow removal on the sidewalks, parking lot spots, and around the main gate to the parking lot. However, he said, because the front steps were covered by a canopy, the probability of them being covered by snow was low. He stated that he had not ever seen the maintenance staff shoveling snow off the front steps. He could not remember whether they salted the front steps in January 2009, when plaintiff's accident occurred.

¶ 40 Upon examination by counsel for the YMCA, Tatus stated that he did not know the law

in Illinois as to a property owner's duties with respect to accumulations of ice and snow or maintenance of premises.

¶ 41 On August 24, 2011, the trial court granted defendant's motion for summary judgment, finding that, as a matter of law, no basis of liability existed against the defendant. Plaintiff now appeals.

¶ 42 II. ANALYSIS

¶ 43 On appeal, plaintiff argues, as he did before the trial court, that there were material issues of fact regarding the duty of the YMCA with respect to the safety of the staircase. First, he contends that YMCA voluntarily assumed a duty to maintain the traction tape on the steps, which it breached by allowing the tape to wear out. Second, he contends that the YMCA voluntarily assumed a duty to shovel snow and slush from the front stairway as part of its maintenance program. Third, he contends that, as a property owner, the YMCA had a duty to maintain a safe means of ingress and egress from its property.

¶ 44 We consider these arguments in turn. In doing so, we are mindful that summary judgment is appropriate where, "when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002), citing 735 ILCS 5/2-1005(c) (West 2006). We review the trial court's entry of summary judgment *de novo*. *General Casualty*, 199 Ill. 2d at 284.

¶ 45 A. Whether YMCA Assumed a Duty to Maintain Traction Tape on the Steps

¶ 46 The first issue in contention between the parties is whether YMCA had a duty to maintain the traction tape on the steps. Plaintiff contends that YMCA voluntarily assumed such a duty by installing traction tape on the steps in the 1980s and then replacing that traction tape once when it wore out. YMCA, on the other hand, contends that under Illinois law, a property owner has no duty to continue a voluntary undertaking to prevent people from slipping on natural accumulations of snow or ice.

¶ 47 Under Illinois law, the general rule is that a landowner has no liability for injuries that result from natural accumulations of snow, ice, or water. *Lohan v. Walgreens Co.*, 140 Ill. App. 3d 171, 173 (1986) (as a matter of law, store owners were not liable to customer who slipped and fell upon floor that was wet due to rainfall that was tracked inside by other customers); *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1043 (1989) (in order to recover as a consequence of a fall on snow, ice, or water, plaintiff must show that the accumulation was unnatural in origin); *Wilson v. Gorski's Food Fair*, 196 Ill. App. 3d 612, 617-18 (1990) (rejecting plaintiffs' argument that court should depart from rule that landowner has no liability for injuries resulting from a natural accumulation of snow, ice, or water). By contrast, a landowner may still incur liability for injuries that result from an accumulation of snow, ice, or water that is unnatural in that it is caused by the design or construction of the building or premises, or the landowner otherwise caused the accumulation to develop in an unnatural way. See *Bloom v. Bistro Restaurant Ltd. Partnership*, 304 Ill. App. 3d 707, 711 (1999). However, in this case, plaintiff presented no evidence before the trial court that would show that the accumulation of snow and ice upon the front stairway of the YMCA on the day of his injury was

anything but a natural one. Nor does plaintiff allege the existence of any such evidence on appeal. Accordingly, under the natural accumulation rule, YMCA would have had no duty in the first instance to install traction tape on the steps to prevent residents from slipping and falling upon such a natural accumulation of snow and ice, and, consequently, it could not be held liable if it had never installed such traction tape upon the steps. See *Shoemaker*, 187 Ill. App. 3d at 1043; *Wilson*, 196 Ill. App. 3d at 617-18.

¶ 48 Plaintiff does not dispute this point. Nevertheless, plaintiff argues that, having previously installed and replaced traction tape upon the steps, YMCA thereby voluntarily assumed a duty to maintain such traction tape and can therefore be held liable for injuries caused by its failure to reinstall traction tape once the previous tape was completely worn out. We disagree.

¶ 49 Where a property owner voluntarily institutes safety measures to prevent people from slipping on natural accumulations of snow, ice, or rain, it may be held liable for misfeasance, *i.e.*, negligent performance.[1] *Chisolm v. Stephens*, 47 Ill. App. 3d 999, 1006 (1977); *Roberson v. J.C. Penney Co.*, 251 Ill. App. 3d 523, 526-27 (1993); see generally *Wakulich v. Mraz*, 203 Ill. 2d 223, 245-46 (2003). However, where the property owner subsequently discontinues such safety measures, it may not be held liable for such nonfeasance, *i.e.*, its failure to perform, in the absence of detrimental reliance by an injured plaintiff. *Chisolm*, 47 Ill. App. 3d at 1006 ("even a

[1] As shall be discussed below, even liability for misfeasance may be limited to those instances in which the misfeasance creates an increased risk of harm above and beyond what would have existed if the safety measures had never been implemented in the first place. See Restatement (Second) of Torts §323 (1965).

person who has gratuitously assumed to protect others against injury is under no obligation to continue that protection indefinitely"); *Lohan*, 140 Ill. App. 3d at 175; *Roberson*, 251 Ill. App. 3d at 526-27.

¶ 50 Thus, for instance, in *Chisolm*, 47 Ill. App. 3d at 1002, plaintiff slipped and fell on an iced-over sidewalk outside her residence and brought suit against her landlord. The record showed that for the past 15 years, the landlord had a custom of clearing that sidewalk in the winter months before the others in the house went to work. *Id.* at 1003. However, on the morning in question, there was no indication that anyone had attempted to clear or salt the sidewalk before plaintiff's fall. *Id*. at 1002-03. Although plaintiff did not contest the general rule that a landlord has no duty to remove natural accumulations of ice and snow from common areas, she contended that the landlord's conduct in clearing the sidewalk for 15 years created an exception to that general rule. *Id.* at 1004. The *Chisolm* court disagreed, noting that plaintiff did not allege that the landlord committed misfeasance in clearing the sidewalk but, rather, alleged that the landlord committed nonfeasance by taking no action to clear the sidewalk on the day in question. *Id.* Such nonfeasance could not be the basis of liability, since the landlord's undertaking of a gratuitous performance in the past did not create a duty to continue such gratuitous performance in the future. *Id*. The court explained that "even a person who has gratuitously assumed to protect others against injury is under no obligation to continue that protection indefinitely." *Id*. Thus, the *Chisolm* court affirmed the trial court's grant of summary judgment for the landlord. *Id.* at 1009.

¶ 51 Similarly, in *Lohan*, plaintiff slipped and fell in the vestibule of an entranceway to

defendants' stores. *Lohan*, 140 Ill. App. 3d at 172. Although it was raining at the time, and it was defendants' practice and policy to place extra safety mats in the vestibule whenever it snowed or rained, plaintiff alleged that defendants had failed to do so. *Id.* at 173. The *Lohan* court found that, even if plaintiff's allegation was true, such nonfeasance would not provide a basis for liability against defendants:

> "Plaintiff contends that a duty to her arose from defendants' prior voluntary undertaking to lay down additional safety mats when the floor was wet. But where the accumulation is a natural one there is no duty to continue a voluntary undertaking to remove it [citation], nor is there any liability even where the owner may be charged with knowledge that the accumulation caused a dangerous condition." *Id.* at 175.

Thus, the *Lohan* court affirmed the trial court's grant of summary judgment for defendants. *Id.* at 175.

¶ 52 The instant case is analogous to *Chisolm* and *Lohan*. The record in this case reflects that Friedrich, in his capacity as director of maintenance for the YMCA, originally placed traction tape on the steps in the late 1980s. As noted, plaintiff does not contest that he was under no duty to do so initially but, rather, did so gratuitously. When that first set of traction tape began to lose its effectiveness, Friedrich replaced it with a second set of traction tape. While there are no allegations in plaintiff's pleadings or evidence in the record to suggest that Friedrich acted negligently in his initial installation of the traction tape, the record is plain that, after Friedrich's retirement as director of maintenance in 1993, there was no further installation of tape, negligent or otherwise, until the date of plaintiff's accident in 2009. The existing traction tape wore away

over time, leaving the steps in the same condition as before the tape was installed in the first place, except for the remnants of traction tape visible on the edges of the steps. Indeed, plaintiff testified that the traction tape "was gone since the day I moved in" on November 1, 2008.

¶ 53 Under these facts, plaintiff does not claim that he relied upon the YMCA's voluntary undertaking to place traction tape on the steps, nor could he fairly do so, since it is undisputed that the traction tape was worn away before he began to reside at the YMCA. Furthermore, as noted, plaintiff does not allege misfeasance in Friedrich's original installation of the traction tape. Rather, he seeks recovery based on the YMCA's subsequent nonfeasance in failing to install new traction tape in the 16 years following Friedrich's tenure as director of maintenance. Yet it is well established that, in the absence of reliance, such nonfeasance of a voluntarily undertaking does not form the basis for liability. *Chisolm*, 47 Ill. App. 3d at 1006; *Lohan*, 140 Ill. App. 3d at 175.

¶ 54 Moreover, although the YMCA does not explicitly urge this point or fully articulate this argument, there is authority for the proposition that, even where a defendant commits malfeasance in the performance of a voluntary undertaking, that defendant may only be held liable if its actions place the plaintiff in a worse position than he would have been absent the voluntary undertaking. Such is the standard set forth by section 323 of the Restatement (Second) of Torts, which has been fully recognized and accepted by our supreme court in *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26 (1992), and *Wakulich v. Mraz*, 203 Ill. 2d 223, 243-46 (2003). Section 323 provides:

> "One who undertakes, gratuitously or for consideration, to render services to

> another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking."
>
> Restatement (Second) of Torts §323 (1965).

Comment *c* elaborates upon the circumstances in which one may terminate a voluntary undertaking:

> "The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him. ***
>
> Where, however, the actor's assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated." Restatement (Second) of Torts §323, Comment *c* (1965).

¶ 55 Our supreme court, in its 1980 opinion in *Cross v. Wells Fargo Alarm Services*, 82 Ill. 2d 313 (1980), applied the increased-risk rule as articulated in the Restatement to its facts. There, the Chicago Housing Authority (CHA) had contracted to provide guard services at the housing project between 9 a.m. and 1 p.m. *Id.* at 315. Plaintiff, who was assaulted at 1:15 a.m., alleged that the CHA's part-time security service had the effect of substantially increasing the incidence of crime after 1 a.m., thereby increasing the danger to those on the property. *Id.* at 315. The *Cross* court found that this was sufficient to survive a motion to dismiss, stating, "The complaint in substance asserted that the CHA had the duty to use reasonable care when it undertook to provide guard services to insure it did not thereby create increased dangers to persons lawfully on the CHA property." *Id.* at 318.

¶ 56 Nevertheless, in the subsequent case of *Phillips v. Chicago Housing Authority*, 89 Ill. 2d 122, 127-28 (1982), our supreme court rejected the proposition that an increase of risk is a necessary prerequisite for liability under the voluntary undertaking rule. Our supreme court refused to abandon the preexisting distinction between misfeasance and nonfeasance in determining whether a duty is created through a voluntary undertaking. *Id.* at 127-28. In doing so, the court distinguished *Cross*, stating that, while the *Cross* court found an allegation of increased risk to be sufficient to state a cause of action, it did not state that such allegation was a necessary element of a cause of action. *Id.* Thus, the *Phillips* court found that plaintiff's complaint stated a cause of action even though it did not allege an increase of risk from the CHA's provision of security services. *Id.*

¶ 57 However, in the more recent cases of *Frye*, 153 Ill. 2d 26, and *Wakulich*, 203 Ill. 2d at

243-46, our supreme court has been more explicit in adopting the Restatement approach under section 323 and in implementing its increase-of-risk standard. In *Frye*, the court cited section 323 in support of its holding that the defendant pharmacist and pharmacy were not liable for failing to warn of dangerous side effects of a drug. *Frye*, 153 Ill. 2d at 34-35. It found that, although the pharmacist voluntarily undertook to place "drowsy eye" warning label on prescription container, there was no evidence that decedent relied on such warning or on the absence of any further warnings. *Id.*

¶ 58 In *Wakulich*, the court held that, under section 323, a complaint stated a cause of action for negligent performance of a voluntary undertaking where it alleged that defendants undertook to care for the decedent after she fell unconscious, but prevented others from seeking medical intervention for her. *Wakulich*, 203 Ill. 2d at 243-46. In doing so, the court states that the complaint did, in fact, allege that defendants' actions affirmatively increased the risk of harm to the decedent, thus satisfying the requirements of liability under the Restatement:

> "Defendants contend that the requirement set forth in section 323(a) – that a defendant's conduct must have increased the risk of harm to the other – applies to plaintiff's cause of action, and that defendants' limited conduct, as alleged in the complaint, does not satisfy section 323(a).
>
> We disagree. The allegations of the complaint, if proven, satisfy any requirement that defendants' conduct must have 'increased the risk of harm' to Elizabeth for liability to attach." *Id.* at 244-45.

Thus, although the *Wakulich* court does not explicitly repudiate *Phillips* with regard to whether

an increase of risk is a prerequisite for liability under the voluntary undertaking rule, it would appear that the court has chosen to adopt the Restatement standard in this regard.

¶ 59 Moreover, we note in passing that, along with section 323, our supreme court has also chosen to follow the tandem section 324A of the Restatement, which deals with liability to third parties for gratuitously undertaken services, and which has provisions that largely parallel section 323. *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 415-16 (1991) (stating that section 324A has been "implicitly adopted" in Illinois). Section 324A states:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of Torts §324A (1965).

Thus, just like section 323, section 324A provides that negligence in the performance of a gratuitous undertaking will result in liability where such negligence increases the risk of harm or where there has been reliance upon the undertaking.

¶ 60 Accordingly, in order for plaintiff in this case to prevail under the principles set forth in *Wakulich*, *Frye*, and the Restatement, plaintiff must establish that YMCA's failure to reinstall traction tape on the front stairway put him in a worse position than if it had never installed

traction tape in the first place, either by affirmatively creating an increased tripping hazard, or because of his reliance upon that traction tape.

¶ 61 Plaintiff has failed to do so. As noted, plaintiff cannot claim that he relied upon the YMCA's voluntary undertaking to place traction tape on the steps, since the traction tape was worn away before he began to reside at the YMCA. Moreover, plaintiff has not alleged that the worn-away traction tape affirmatively increased the risk of harm to him, nor would the record factually support such an allegation. Plaintiff did not claim, for instance, that he tripped upon torn-up fragments of tape that would make the steps more dangerous than before the YMCA voluntarily undertook to place tape on the steps. On the contrary, since the tape was completely worn away from the center of the stairway, it would appear that, with regard to plaintiff's fall, the steps were in the same condition as they would have been if the YMCA had never installed tape on the steps in the first place. See *Wakulich*, 203 Ill. 2d 245 (complaint stated a cause of action for negligent undertaking where the allegations of the complaint, liberally construed, "sufficiently allege that defendants' conduct 'increased the risk of harm' to Elizabeth").

¶ 62 In this regard, the instant case is analogous to *Buffa v. Haideri*, 362 Ill. App. 3d 532, 539 (2005), where the court applied section 323 in holding that the Illinois State Toll Highway Authority could not be held liable for fatal injuries suffered by motorist on an icy roadway. The plaintiff in that case alleged that the Authority's prior provision of snow and ice removal services constituted a voluntary undertaking which it was thereby obligated to perform with due care. *Id.* at 538. The *Buffa* court held, however, that to prevail under section 323, plaintiff would have to show either that the Authority's failure to exercise reasonable care increased the risk of harm to

the decedent, or that the decedent was injured because of reliance on the Authority's undertaking. *Id.* at 539. With regard to the first prong of section 323, namely, increasing the risk of harm to the decedent, the court noted that "[c]onsistent with the Restatement view, Illinois cases have generally limited recovery for negligent snow or ice removal to cases where the removal effort results in an unnatural accumulation of snow or ice or adds to an existing hazard." *Id.* Since the plaintiff in that case had not presented evidence that would support either prong of section 323, the Authority was entitled to summary judgment. *Id.* Likewise, in the present case, since plaintiff has presented no evidence tending to demonstrate that YMCA's failure to install traction tape upon the steps increased the risk of harm to him either because it created an increased tripping hazard or because of his reliance on such measures, defendant is entitled to summary judgment.

¶ 63 Plaintiff nevertheless argues that *Roberson v. J.C. Penney Co.*, 251 Ill. App. 3d 523 (1993), and *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39 (2009), support the imposition of a continuing duty on defendant to reinstall traction tape on the steps as a result of its original voluntary undertaking. Both *Roberson* and *Reed* are slip-and-fall cases in which the court affirmed the grant of summary judgment for the defendant property owners but, in doing so, also discussed a property owner's duty to exercise due care with regard to voluntarily-implemented safety measures.

¶ 64 In *Roberson*, 251 Ill. App. 3d at 525, the defendant, J.C. Penney, had placed non-skid mats on the floor by the interior doors. On the day of plaintiff's accident, water had been tracked into the store from outside, and as plaintiff stepped off the mats and onto the floor, she slipped

and fell. *Id.* Plaintiff brought suit against J.C. Penney, contending that, by placing the mats near its entrance, the store had voluntarily assumed a duty to remove the accumulated moisture that patrons tracked into the store. *Id*. The *Roberson* court rejected that proposition, citing section 324A of the Restatement and stating:

> "Based on our review of the record, we conclude that J.C. Penney's duty extended *only* to maintaining with reasonable care the mats it installed. J.C. Penney had no duty to install as many mats as necessary to absorb tracked-in water. *** Moreover, we note the absence of any evidence that J.C. Penney failed to maintain the mats with reasonable care. In her deposition, Roberson said she did not notice any rips or tears in the mats. She does not allege that the mats were defective in any way." (Emphasis in original.) *Id.* at 526-27.

Thus, the trial court found that J.C. Penney did not breach any legal duty to plaintiff. *Id.* at 527.

¶ 65 Similarly, in *Reed*, 394 Ill. App. 3d at 41, plaintiff slipped and fell on a puddle of water as she stepped off a safety mat and onto the bare floor of defendant's laundromat. Plaintiff brought suit against defendant, contending that, by its own voluntary undertaking in placing safety mats at the entranceway of the laundromat, defendant therefore assumed a duty to take precautions against a natural accumulation of water at the entranceway. *Id.* at 47. The *Reed* court disagreed, citing *Roberson* in support of its finding that:

> "Here, defendant's undertaking was to place two mats at the entrance way. Defendant did not then assume a duty to remove tracked in water or install as many mats as necessary to absorbed tracked in water. [Citation.] Defendant's duty extended only to

> maintaining with reasonable care the two mats placed down. [Citation.] Since there is no evidence that defendant failed to maintain the mats with reasonable care, defendant is not liable for plaintiff's injuries." *Id.* at 47-48, citing *Roberson*, 251 Ill. App. 3d at 526.

¶ 66 *Roberson* and *Reed* do not contradict our increased-risk-of-harm analysis. If a property owner were to install safety mats that had "rips or tears" (*Roberson*, 251 Ill. App. 3d at 527) or were otherwise "defective in any way" (*Id.*) so as to create a tripping hazard, then such safety mats would affirmatively increase the risk of harm and could therefore be the basis of liability under section 323 and *Wakulich*. Yet, as noted, plaintiff in this case does not allege that the traction tape installed by Friedrich prior to 1993 was ripped, torn, or defective in such a way as would increase the risk of harm to him. Thus, the present case is not analogous to a situation where a plaintiff slips and falls upon an improperly-maintained mat due to rips or tears in the mat but, rather, a situation where no mat has been set out at all despite similar mats being set out in the past, and the law is clear that no liability results in such a case. See *Lohan*, 140 Ill. App. 3d at 175; *Chisolm*, 47 Ill. App. 3d at 1006.

¶ 67 Plaintiff additionally argues that defendant, via the deposition testimony of its employees, admitted that it was responsible for maintaining the traction tape on the steps. In support, it cites the following testimony by Gonzalez, who was the director of maintenance at the time of plaintiff's accident:

> "COUNSEL FOR PLAINTIFF: If there was a problem with the non-slip traction tape on the front entryway steps of the YMCA, it would be your job to fix it, is that correct?

***

GONZALEZ: There was no problems prior. No problems with those steps, to my knowledge. *** *It would be my responsibility to fix it if there was a problem, yes.*" (Emphasis added.)

However, Gonzalez's personal belief as to his job responsibilities in this regard are not dispositive of the question of his legal duty. See *Chisolm*, 47 Ill. App. 3d at 1009 (landlord could not be held liable for failing to clear snow and ice off sidewalk, despite his testimony that it was his custom to clear the sidewalk every morning, since "indications of a personal sense of duty or obligation *** are hardly equivalent to the imposition of a legal duty"); *Reed*, 394 Ill. App. 3d at 47 ("Businesses do not assume liability for natural accumulations by simply adopting a rainy or snowy day maintenance program"). Indeed, Gonzalez stated later in his deposition that he had no knowledge of the law in Illinois as to a landowner's duty to install or reinstall traction tape on steps.

¶ 68 Plaintiff's final contention on this issue is that the question of whether the YMCA had a duty to maintain the traction tape is an issue of fact for a jury to decide and therefore cannot be decided at the summary judgment stage. However, whether a duty of care exists is a question of law to be decided by the court. *Reed*, 394 Ill. App. 3d at 42. Indeed, it is well established that summary judgment may be granted where there are no genuine issues of material fact to interpose doubt as to whether a landowner owes any duty to a plaintiff who has slipped and fallen on the landowner's property as a result of an accumulation of snow, ice, or rain. See *Lohan*, 140 Ill. App. 3d at 175; *Chisolm*, 47 Ill. App. 3d at 1006; *Roberson*, 251 Ill. App. 3d at

528; *Reed*, 394 Ill. App. 3d at 48.

¶ 69 In support of his contention that the issue of YMCA's duty is a question of fact, plaintiff cites *Holsman v. Darling State St. Co.*, 6 Ill. App. 2d 517 (1955). In that case, plaintiff slipped and fell on a staircase on which the treads were constructed of white marble and were badly worn. *Id.* at 519. The *Holsman* court held that the question of whether the wear on the steps was sufficiently great as to constitute negligence on the part of the building owners was a question of fact. *Id.* at 521. Here, however, the degree of wear on the steps is not an issue, since plaintiff predicates his claim upon his allegation that YMCA had a duty to reinstall traction tape on the steps to prevent residents from slipping and falling on natural accumulations of snow and ice. That question of duty, as discussed, is an issue of law. Thus, *Holsman* is inapposite.

¶ 70 B. Whether YMCA Assumed a Duty to Shovel Snow and Slush from the Steps

¶ 71 Plaintiff next contends that YMCA voluntarily assumed a duty to shovel snow and slush from the front stairway as a part of its maintenance program, which it breached by conducting such shoveling in negligent fashion. YMCA, on the other hand, contends that a landowner's prior voluntary undertaking to shovel does not create a duty to continue to do so.

¶ 72 Although there is some dispute in this regard, there is evidence that YMCA had a snow removal program that included shoveling snow from the front steps. Gonzalez, the director of maintenance, stated in his deposition that the front steps needed to be shoveled every time it snowed, and Lowery, the resident director, stated in his deposition that he had seen YMCA maintenance staff shoveling the front stairway. The parties do not dispute that any such snow removal program would have been, in the first instance, gratuitous. See *Chisolm*, 47 Ill. App. 3d

at 1006 (landowner has no duty to remove natural accumulations of snow and ice from common areas). Plaintiff nevertheless contends that, having voluntarily undertaken to shovel the front steps as part of its maintenance program, YMCA incurred a duty to use due care in its performance of such shoveling.

¶ 73 Section 323 of the Restatement is dispositive of this claim as well. As noted, the general rule under section 323 is that one who voluntarily provides aid to another may cease providing that aid as long as it does not put the other party in a worse position than he was in before, either because of the affirmative creation or exacerbation of a hazard, or because of the other's reliance upon such aid. See Restatement (Second) of Torts §323, Comment *c* (1965). In the absence of evidence to support such a conclusion, the general rule is that "the gratuitous performance of clearing snow and/or spreading of salt does not create a continuing duty to perform the function." *Burke v. City of Chicago*, 160 Ill. App. 3d 953, 957 (1987) (despite the fact that the defendant had previously thrown salt or urea on the area in question and had been requested to do so on the day of plaintiff's fall, defendant had no duty to throw salt or urea on that area); see *Watson v. J.C. Penney Co., Inc.*, 237 Ill. App. 3d 976, 978 (1992) (business owner owes no duty to business invitees to remove natural accumulations of snow and ice). In this case, plaintiff has presented no evidence that any purported negligence of the YMCA maintenance staff in carrying out their snow removal program made the stairway more dangerous than it would have been if no such snow removal program had existed in the first place. Nor does plaintiff argue that he acted in reliance upon their snow removal program to his detriment. Accordingly, plaintiff's claim is insufficient to survive the summary judgment stage.

¶ 74 As with the previous issue, *Chisolm*, 47 Ill. App. 3d at 1006, is directly on point. As noted, the defendant landlord in *Chisolm* had a custom for 15 years of clearing the sidewalk outside the house of snow and ice before the residents of the house left for work in the morning. *Id.* at 1003. The *Chisolm* court held that such practice did not create any duty for him to continue such practice, so that, when defendant failed to clear the sidewalk one morning, and plaintiff slipped and fell on that sidewalk, defendant could not be held liable for her injuries. *Id.* at 1006. The *Chisolm* court further rejected plaintiff's argument that, since she relied on the landlord to clear the sidewalk for her in the morning, the landlord could be held liable on the basis of reliance under section 323 of the Restatement. *Id.* at 1007-08. The *Chisolm* court explained:

> "Reliance may reasonably be placed where there is a deceptive appearance that performance had been made, or where a representation of performance has been communicated to plaintiff by defendant, or where plaintiff is otherwise prevented from obtaining knowledge or substitute performance of the undertaking. But, to justify reliance, plaintiff must be unaware of the actual circumstances and not equally capable of determining such facts." *Id.* at 1007.

Since the landlord did not misrepresent the condition of the sidewalk on the morning in question, nor did he do anything to prevent plaintiff from obtaining information about the condition of the sidewalk or taking her own precautions, the *Chisolm* court found that the plaintiff could not claim reliance. *Id.* at 1008. In issuing this holding, the *Chisolm* court specifically rejected the notion that plaintiff's expectation that the landlord would continue his prior snow clearing

services, without more, was sufficient to constitute reliance as a matter of law. *Id.* The court stated that "any reliance by plaintiff on the prior performances by defendants of ice and snow removal in the past is unjustified and unreasonable. Each prior snow and ice fall was an individual and temporary condition, unrelated to the present condition." *Id.*; see also *Burke,* 160 Ill. App. 3d at 957 (defendant's prior conduct in throwing salt upon area in question did not create duty on the part of defendant to do so on future occasions).

¶ 75 Similarly, in the case at hand, plaintiff does not allege that the YMCA or its agents communicated to plaintiff that the front stairway had been cleared of snow and ice or that he was somehow prevented from ascertaining the condition of the front stairway on his own before stepping upon it. Thus, although plaintiff does not claim reliance as a basis for recovery in this case, any such claim would, in any event, be unavailing.

¶ 76 C. Whether YMCA Breached its Duty to Maintain Safe Means of Ingress and Egress

¶ 77 Plaintiff's final contention is that YMCA breached its duty to maintain a safe means of ingress to and egress from its property.

¶ 78 Property owners have a general duty to provide a reasonably safe means of ingress to and egress from their property. *Reed,* 394 Ill. App. 3d at 42; *McDonald v. Frontier Lanes, Inc.*, 1 Ill. App. 3d 345, 350-51 (1971). Thus, although property owners are not liable for injuries resulting from the natural accumulation of snow, ice, or rain, they may be held liable if a plaintiff establishes that the means of ingress or egress was unsafe for any other reason. *Reed,* 394 Ill. App. 3d at 42; *Branson v. R & L Inv., Inc.*, 196 Ill. App. 3d 1088, 1092 (1990).

¶ 79 However, in this case, plaintiff provided no evidence of any dangerous condition of the

stairway other than the natural accumulation of ice and snow. Plaintiff argues on appeal that the lack of traction tape on the steps was in and of itself a dangerous condition, even apart from any precipitation on the steps. Yet plaintiff provides no evidence to support the proposition that these steps were dangerous merely by virtue of not having traction tape installed. Plaintiff has not demonstrated that these steps were dangerous but for the snow that accumulated upon them and the possibility that traction tape could have diminished the danger already created by such accumulation of snow.

¶ 80 In this regard, the present case is analogous to *Branson*, 196 Ill. App. 3d at 1093. The plaintiff in *Branson* slipped and fell upon a puddle of standing water at the top of a ramp leading to the entrance of defendant's property. *Id.* at 1089-90. On appeal from the trial court's grant of summary judgment for the defendant, plaintiff argued that defendant had a duty to provide mats or other safeguards to prevent people from slipping on the ramp. *Id.* at 1092. The *Branson* court rejected this argument, stating:

> "By her argument, plaintiff urges the imposition of a duty on storeowners who install ramps on their premises to provide mats or some other safeguards. Acceptance of plaintiff's argument would impose an unfair burden on storeowners without any guarantee of insulation from liability. Plaintiff has cited to no cases which support her theory of the case, and we decline to impose the duty which she so vigorously advocates." *Id.* at 1092.

Although acknowledging that property owners have a general duty to provide a safe means of ingress to and egress from their properties, the *Branson* court found that there was no evidence that the means of ingress and egress was unsafe for any other reason than a natural accumulation

of water, which could not be the basis for liability. *Id.* at 1094. Accordingly, the *Branson* court affirmed the grant of summary judgment for the defendant.

¶ 81 Likewise, in the present case, plaintiff would seem to urge a general duty on the part of property owners to place traction tape or other safeguards on steps to prevent slipping, yet he has presented no cases which support the imposition of such a duty. Therefore, just as the *Branson* court declined to impose such a duty, we decline as well.

¶ 82 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 83 Affirmed.