2015 IL App (1st) 133796-U

FIRST DIVISION
May 11, 2015

No. 1-13-3796

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELKE CHARFOOS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 11 L 2917
	)	
STAPLES THE OFFICE SUPERSTORE, LLC,	)	
and PAUL BUTERA,	)	Honorable
	)	Eileen Mary Brewer,
Defendants-Appellees,	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

Held: The circuit court properly granted summary judgment because the plaintiff in a personal injury action failed to put forth evidence showing defendants owed her a duty of care. Plaintiff also failed to provide any non-speculative evidence showing the cause of her injury.

¶ 1 Plaintiff, Elke Charfoos, brought this negligence action against defendants Paul Butera and Staples, The Office Superstore, LLC (Staples), seeking recovery for injuries she sustained

after slipping and falling on property owned by Butera and leased to Staples. According to plaintiff, she slipped on an unnatural accumulation of snow, ice, or other moisture. Defendants each filed motions for summary judgment, which the circuit court granted.[1]

¶ 2 At issue is whether the circuit court properly granted summary judgment in defendants' favor. We hold the circuit court properly granted summary judgment because plaintiff failed to put forth evidence showing that the snow she allegedly slipped on was an unnatural accumulation. Therefore, under the natural accumulation rule, plaintiff failed to put forth any evidence that would allow this court to infer that defendants owed her a duty of care. Plaintiff also failed to provide any non-speculative evidence showing the cause of her injury.

¶ 3 JURISDICTION

¶ 4 On November 6, 2013, the circuit court granted defendants' motions for summary judgment. On December 4, 2013, plaintiff timely appealed. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301(eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 On December 7, 2012, plaintiff filed a two-count amended complaint sounding in negligence against defendants seeking recovery for injuries she sustained while on property owned and managed by defendant Paul Butera, and leased to defendant Staples, located at 4610 North Clark Street in Chicago, Illinois. Plaintiff alleged that on December 10, 2010, "she slipped and fell on an unnatural accumulation of water, ice, and slush that had accumulated

[1] Before this court, defendants have presented a united defense and are represented by a single law firm. The record shows that before the circuit court, each defendant filed their own motion for summary judgment. Those motions, however, were filed by the same law firm. Later, defendants filed a combined reply in support of their motions for summary judgment and a single attorney argued on defendants' behalf at the summary judgment hearing.

adjacent to and under the roof and overhang, and adjacent to and on the pavement dip[2] just outside the [Staples'] store entrance."

¶ 7 Under count I of her amended complaint, plaintiff alleged that defendant Staples had a duty to provide her a safe passageway free from any accumulation of water, ice, and slush; and a duty to exercise ordinary care in owning and maintaining their store. Accordingly, plaintiff alleged Staples committed the following careless and negligent acts, or omissions to act, that proximately caused her injuries: failed to maintain the premises in a safe and clean condition; failed to warn her of a dangerous and hazardous condition; permitted a dangerous condition to exist at their store despite knowing of the condition; failed to provide a safe passage into its store; failed to properly clean the outside area of its store; failed to provide proper lighting to allow store patrons to see hazardous conditions created by the roof, overhang, sidewalk, and pavement dip; failed to correct the runoff of snow, ice, and slush from the roof, overhang, sidewalk, and pavement dip; and failed to properly apply salt to the area despite knowledge of the dangerous condition.

¶ 8 Under count II of her amended complaint, plaintiff alleged defendant Paul Butera, the "owner, developer, lessor and/or property manager," maintained the property including the roof, overhang, drainage, runoff, pavement, lighting, and ingress and egress from the store. Plaintiff further alleged Butera was responsible for snow removal and salting of the common areas, entrances, and exits on the property and had "a duty to exercise reasonable and ordinary care in the operation of the building, development, maintenance and overall safety at said Staples [s]tore." Accordingly, plaintiff alleged Butera committed the following careless and negligent

[2] The parties agree that the "dip" plaintiff refers to is an incline, or accessible ramp, at the front entrance to the store.

acts, or omissions to act, which proximately caused her injuries: failed to provide proper drainage of unnatural accumulations of snow, slush, ice and other moisture from the rooftop, overhang, and pavement dip near the entryway of the store; failed to warn of dangerous conditions; permitted a dangerous condition to persist despite knowledge of the condition; failed to provide proper lighting in the area; and failed to provide plaintiff with safe access to the store.

¶ 9 Defendants each filed their own motions for summary judgment. Butera stated in his motion that he owns the shopping center and rents the store premises to Staples pursuant to a lease agreement. Butera argued that summary judgment in his favor was proper because plaintiff could not establish proximate cause. Butera characterized plaintiff's accusations as speculative because she could not determine what she fell on and could only assume that she slipped on snow or ice. Butera also pointed out that plaintiff admitted that the lighting in the area was fine and that plaintiff could not establish that any of the alleged snow was caused by an unnatural accumulation. Butera further asserted that even if he had a duty to remove snow, he satisfied that duty when he contracted with Rosario Gambino & Son Landscaping to provide snow removal services, who in turn voluntarily assumed all contractual responsibility for snow and ice removal at the property.

¶ 10 Staples raised similar arguments attacking plaintiff's claims, pointing out that plaintiff was unaware of any of the conditions she alleged in her complaint; she did not know what caused her fall; she could only speculate to the presence of snow, ice, or other moisture; and her allegations were, at best, based on an assumption that she slipped on snow. Staples maintained plaintiff could not show it owed her a duty due to the absence of any evidence of an unnatural accumulation of snow, ice, or moisture.

¶ 11 Defendants attached the following identical exhibits in support of their respective motions for summary judgment: plaintiff's amended complaint; Butera's contract with Rosario Gambino & Son Landscaping, for snow removal services; and the lease between Staples and Butera. Defendants also provided deposition testimony from plaintiff, Anthony Johnson, Cristina Romero, Giuseppe Gambino, Rolando Pacheco, and James Weinberg.

¶ 12 Plaintiff testified at her evidence deposition that on December 10, 2010, she drove to Staples alone. She thought she drove to the store in the early afternoon and agreed it was light outside. She wore a "typical winter jacket" and "winter boots with ridges" that were "designed to walk in the snow." Plaintiff recalled she parked "[s]omewhere in the middle" of the parking lot. She could not remember the temperature or if it snowed or rained that day. When asked whether she remembered snow being present in the Staples's parking lot that day, plaintiff testified as follows:

> "Q. Do you recall any snow being on the parking lot when you drove into the Staples that day?
>
> A. Probably. I don't know.
>
> Q. I don't want you to guess or speculate. Do you know if there was any snow on the ground in the parking lot when you drove into the parking lot on December 10, 2010?
>
> A. I didn't pay attention. I don’t know.
>
> Q. The snow that you were referring to you said was in other places, maybe in your yard that day? Is that what you are talking about?
>
> A. No.

Q. No?

A. It was just white all over.

Q. Meaning on the grass or- -

A. No, meaning on the parking lot.

Q. Okay. Maybe I misunderstood you. I thought you said on December 10, 2010 when you drove in that parking lot, you do not recall if there was any snow on the parking lot that day; is that right?

A. Yeah. It was white so there must have been snow.

Q. So you're saying the parking lot was white?

A. Yes.

Q. Do you know what the white was?

A. Snow.

Q. How do you know that?

A. Because I walked on it.

Q. Okay. Maybe I'm confused. Why did you say you didn't know if there was snow on the ground a couple of questions ago when you drove into the parking lot?

A. Well, I don't know. The vision I still have to this day is it was all white, but I don't know specifically."

¶ 13 Plaintiff testified she could not remember if there were any lines, marks, or footprints in the parking lot. She also could not recall seeing ice or piles of snow in the parking lot. When she walked to the entrance, she carried a shoulder bag. She could not remember if the sun was

shining that day and testified there were no problems with the lighting of the parking lot. Plaintiff described her accident as occurring when she walked "towards the door, slipped and fell, and hit this post." The following exchange occurred:

"Q. *** Do you know if one of your feet slipped?

A. One or both. I don't know. At least one.

Q. Do you know what caused you to fall?

A. Something slippery.

Q. Do you know if there was ice or snow that caused your fall? Do you know?

A. No.

Q. Do you know if it was something else besides ice or snow, if you know?

A. No."

¶ 14 Plaintiff testified that her knee hit the ground and then her head hit the post. She later testified she "assumed" the slippery thing she slipped on was snow. She knew she slipped on something because she remembered her feet sliding. She could not remember if she spoke to the store manager or emergency personnel after the accident. She did not look at the awning of the store at all on the day of her accident, and she did not see the awning leak water at any time. She answered "I don't remember" when asked "[a]fter you fell when you were laying on your stomach, was there any snow or ice or moisture where you were laying." She could also not remember seeing any snow, ice, or moisture of any kind in the area of her fall. At the end of her deposition, however, plaintiff answered "[y]es" when asked by her attorney whether there was snow in the area where she fell.

¶ 15 Anthony Johnson, the general manager of the Staples store at the time of the accident, testified that the landlord was responsible for the outside areas of the store. A "snow removal crew" would remove snow and salt the outside areas of the store. Although Johnson was present in the store on the day of the incident, he did not see plaintiff fall. When he was told that a customer had fallen, he went outside right away and saw plaintiff on the ground lying on her back. Johnson described his conversation with plaintiff as follows: "She said to me, ' I feel really stupid. Feel really stupid.' And I asked what happened, and she said, 'I walked into this pole. I was looking for my keys.' She said, 'I walked into the pole and I fell.' "

¶ 16 Johnson testified plaintiff spoke to him in a calm manner and did not appear to be in pain. He did not believe she hit her head, and he could not recall any scrapes or blood on her face or head. Johnson stayed with plaintiff until an ambulance arrived two or three minutes later. She told Johnson repeatedly that she felt like an " 'idiot' " for walking into the post. Johnson testified that plaintiff's knees "didn't look too good" because they appeared out of place. Johnson testified there was no ice on the ground that day and that the weather was "[v]ery cold and cloudy." When asked if the snow removal crew was there that day, he answered "Yes, because there was no snow on the ground." Johnson testified further that there was no snow or ice in the area of plaintiff's accident.

¶ 17 Cristina Romero, the operations manager at the Staples store at the time of the incident, also testified that the property manager took care of snow removal. She could not remember the weather on the day of the incident, and could not recall if it snowed or if ice was present that day. She recalled it was still light outside but was "[c]lose to" getting dark. She did not see plaintiff fall, but saw plaintiff lying on the floor on her back next to a pole. She remembered plaintiff stating repeatedly that she was " 'so embarrassed.' " Plaintiff told Romero that "she

was looking down in her purse and walked into this pole." She did not notice any scrapes or blood on plaintiff's face. An ambulance arrived "[w]ithin minutes." Romero testified she did not see any snow or ice in plaintiff's vicinity and she did not notice any snow or ice near the entryway to the store.

¶ 18 Giuseppe Gambino, a manager for Gambino & Son Landscaping, testified that he plows the Staples parking lot, and shovels the sidewalks, walkways, and entryway. He then applies salt to those areas. Gambino "[v]aguely" remembered plowing and salting the Staples parking lot and shoveling the walkways on December 10, 2010. He testified he arrived between 3 a.m. and 6 a.m. and described the conditions as "[s]nowy." He could not recall the condition of the parking lot or sidewalks. He did not know what the weather was like later in the day.

¶ 19 James Weinberg, the owner of Professional Cleaning Company, testified that his company provides janitorial services to Staples but has no role in snow or ice removal. Rolando Pacheco, a supervisor for Professional Cleaning Company, testified that he never observed any pooling, or accumulation of water, snow, ice, or slush at the front of the store. Pacheco was not present at the time of plaintiff's accident.

¶ 20 Plaintiff filed a combined response to defendants' motions for summary judgment, and argued that the defective design of both the store's awning and the inclined entrance combined to create an unnatural accumulation of snow and ice that proximately caused her to slip and fall. According to plaintiff, water dripping off of the awning, which would then freeze on the incline, created this hazardous condition. Plaintiff pointed out that the weather fluctuated that day between freezing and thawing which led to moisture flowing off of the awning and onto the incline to freeze, which then created an unnatural accumulation. Plaintiff also argued, in the

alternative, that the "prescribed means" exception[3] to the natural accumulation rule applied to the facts of this case, and that Butera assumed a duty to remove natural accumulations of snow and ice based on his lease with Staples.

¶ 21 In addition to relying on the exhibits defendants attached to their respective motions, Plaintiff also attached pictures of the front of the store and the snow boots she wore that day. In support of her weather claims, plaintiff attached an uncertified weather report taken at Chicago's Midway Airport for December 10, 2010, which listed the minimum temperature as 26.1 degrees Fahrenheit, the mean temperature as 30.8 degrees Fahrenheit, and the maximum temperature as 37.9 degrees Fahrenheit. The report stated that the total precipitation was 0.04 inches and the snow depth was 2 inches.

¶ 22 Defendants filed a combined reply in support of their motions for summary judgment in which they characterized plaintiff's position as a bare assertion of a design flaw. Defendants maintained that there was no evidence supporting an inference of an unnatural accumulation caused by a defect in the awning or sidewalk beyond plaintiff's bare allegations. Defendants argued plaintiff's weather report was uncertified and inadmissible. Defendants pointed out that plaintiff failed to provide an affidavit from an expert attesting to the defective nature of the awning. Butera disputed plaintiff's alternative argument that he contractually assumed a duty for snow removal, arguing that plaintiff could not determine what exactly she slipped on.

¶ 23 On July 10, 2013, the circuit court conducted a hearing on defendants' motions for summary judgment. At the hearing, the court noted the absence of an affidavit from an expert

[3] Plaintiff has not raised an argument based on the prescribed means exception to the natural accumulation rule before this court. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

attesting to the defective nature of the awning, and found "[t]here was absolutely no evidence presented as to a dripping awning or any kind of unnatural accumulation of snow or ice due to the defective awning or the sloped nature of the awning." Regarding the alleged defective incline, or dip, the court pointed out that plaintiff testified she did not see any leaks in the awning and that she did not look at the ground where she slipped. The court found plaintiff's weather report to be inadmissible and uncertified. In conclusion, the court stated that plaintiff "presented no evidence *** regarding unnatural accumulation, whether it be through an awning, or whether it be through an incline," and noted that plaintiff repeatedly stated "she wasn't even sure what she fell on. It may have been snow; it may have been ice." Accordingly, the circuit court granted defendants' motions for summary judgment.

¶ 24 Curiously, the circuit court granted defendants' motions "without prejudice" and allowed plaintiff 28 days to file amended pleadings. The circuit court reasoned that it was "going to allow the plaintiff to take another stab at bringing this [c]ourt some evidence that can defeat summary judgment." The circuit court judge told plaintiff's counsel "I'm giving you time and another chance. I'm giving it to your client, not you." Defense counsel objected to this procedure, and the circuit court acknowledged that it was "giving plaintiff a second bite of the apple."[4]

[4] The circuit court also pointed out to plaintiff that she appeared to have omitted a potential argument based on the evidence that she walked into a pole at the store. Our review of the record shows that both Anthony Johnson and Cristina Romero testified that plaintiff told them she walked into a pole near the entrance to the store. Johnson testified plaintiff told him she did not see the pole because she was looking for her keys while Romero testified plaintiff told her she was looking into her purse when she ran into the pole. Regardless, plaintiff's counsel stressed to the circuit court that she was not raising that argument, and plaintiff did not do so in subsequent filings before the circuit court or this court. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 25 On August 7, 2013, the court entered an order allowing plaintiff to file an affidavit from Professor Ralph Barnett. The order indicated that, with the exception of the new affidavit, plaintiff elected to rest on her prior pleadings. Relevant here, Professor Barnett opined that the design of the awning and the incline, or outboard sidewalk ramp, combined with the weather conditions that day, caused plaintiff to fall.

¶ 26 Defendants filed a combined sur-reply in which they asked that Professor Barnett's affidavit be stricken for failure to comply with Illinois Supreme Court Rule 191. Defendants argued that Professor Barnett's affidavit was speculative, unsupported by facts or personal knowledge, relied on uncertified weather data, failed to raise a question of fact regarding what actually caused plaintiff to fall, contradicted the uncertified weather report Barnett relied upon, contained improper conclusory statements, and was of no use to the trier of fact. Defendants further argued that irrespective of Professor Barnett's affidavit, summary judgment in defendants' favor was proper because plaintiff could not establish proximate cause because she could not identify with particularity what she slipped on or where she fell.

¶ 27 On November 6, 2013, the circuit court conducted a second summary judgment hearing taking into account Professor Barnett's affidavit. Prior to argument, the circuit court noted that plaintiff did not amend her complaint, despite the court's advice at the prior hearing. The circuit court then struck Professor Barnett's affidavit, finding it did not "connect up with the facts of the deposition;" it failed "to connect any of the alleged conditions at Staples with an unnatural accumulation of ice or snow;" and it relied on uncertified, inadmissible weather data. The circuit court noted that it "gave the plaintiff another chance, and that plaintiff was unable to overcome the deficiencies." The circuit court subsequently entered a written order on that same day granting defendants' motions for summary judgment "with prejudice."

¶ 28 On December 4, 2013, plaintiff timely filed her notice of appeal.

¶ 29 ANALYSIS

¶ 30 Plaintiff argues the circuit court erred in granting summary judgment in defendants' favor for several reasons. We must first, however, address deficiencies in plaintiff's opening brief which result in the procedural default of several of plaintiff's claims of error.

¶ 31 The rules of appellate practice and procedure are well-established. Illinois Supreme Court Rule 341 sets forth the requirements of briefs before this court. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Rule 341(h)(7) provides "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). The failure to elaborate on an argument, cite persuasive authority, or present well-reasoned argument violates Rule 341(h)(7) and results in the procedural default of that argument. *Sakellariadas v. Campbell*, 391 Ill. App. 3d 795, 804 (2009); *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010). Rule 341(h)(7) requires both citation to relevant authority and argument. *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). Vague allegations, or allegations that are merely listed, do not satisfy Rule 341(h)(7). *Id.* Furthermore, Rule 341(h)(7) requires parties to provide "citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). This court has repeatedly warned litigants that we are "not a depository in which the burden of argument and research may be dumped." *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 80. Furthermore, issues raised for the first time on appeal and not first presented to the circuit court will not be considered. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). Additionally, we may affirm the circuit court on any basis that appears in the record. *Trustees of Wheaton College v. Peters*, 286 Ill. App. 3d 882, 887 (1997).

¶ 32 The first claim of error we will not consider concerns the weather report taken from Midway Airport in Chicago from the day of the accident that plaintiff attached to her response to defendants' motions for summary judgment. The circuit court found the report to be inadmissible due to it being uncertified. Before this court, plaintiff states that the circuit court improperly accepted defendants' position that the data was not admissible because it was not certified. Absent from her claim, however, is any type of well-reasoned argument or citation to relevant authority to dispute the circuit court's finding. She did not address why the weather report should have been admitted by the circuit court. See *Loughnane v. City of Chicago*, 188 Ill. App. 3d 1078, 1081 (1989) (discussing the admissibility of weather reports). Accordingly, we will not consider the weather report because the circuit court found it to be inadmissible and plaintiff has not presented a well-reasoned argument with citation to authority to challenge this finding. Therefore, she is procedurally defaulted from raising this issue.

¶ 33 Similarly, we will also not consider Professor Barnett's affidavit, which plaintiff filed after the circuit court granted defendants' motions for summary judgment without prejudice. Professor Barnett opined that the awning at the store, combined with the store's incline near the entrance, caused the dangerous condition that led to plaintiff's injury. The circuit court struck Professor Barnett's affidavit at the second summary judgment hearing. In her opening brief before this court, plaintiff stated that Professor Barnett's "well-supported affidavit" presented sufficient evidence supporting the element of proximate cause to withstand summary judgment. She further states that Professor Barnett's opinion that the store awning and the incline at the store entrance contributed to the unnatural accumulation of snow and ice raised a question of fact. Missing from her opening brief, however, is any well-reasoned argument or citation to authority addressing the circuit court's striking of Professor Barnett's affidavit. Plaintiff did not

present any well-reasoned argument, cite any relevant authority, or even argue that Professor Barnett's affidavit satisfied Illinois Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013); *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332-34 (2002) (discussing the requirements of affidavits used in summary judgment proceedings). Accordingly, we will also not consider Professor Barnett's affidavit and hold that plaintiff is also procedurally defaulted from raising this issue.[5]

¶ 34 Plaintiff also argues under the third issue in her opening brief that defendant Paul Butera owed her a duty of care under either of two theories: the voluntary assumption or undertaking exception to the natural accumulation rule; or under a contractual assumption of a duty theory based on Butera's lease with Staples. See *Claimsone v. Professional Property Management, LLC*, 2011 IL App (2d) 101115, ¶¶ 19-43 (discussing both the voluntary assumption or undertaking exception and the contractual assumption of a duty). Regarding the voluntary assumption or undertaking exception to the natural accumulation rule, plaintiff did not present this claim to the circuit court. *Haudrich* 169 Ill. 2d at 536 ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Rather, in her response to defendants' motions for summary judgment, she only argued that Butera owed her a duty based on his lease with Staples, *i.e.*, the contractual assumption of a duty. Accordingly, plaintiff is also procedurally defaulted from raising this issue.

[5] Plaintiff did, in her reply brief, put forth more of an argument addressing Professor Barnett's stricken affidavit. Rule 341(h)(7) clearly provides, however, that "[p]oints not argued are waived *and shall not be raised in the reply brief*, in oral argument, or on petition for rehearing. (Emphasis added.) Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Regardless, plaintiff still did not put forth any argument in her reply brief addressing why, in her opinion, Professor Barnett's affidavit satisfied Illinois Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013).

¶ 35 We will also not consider plaintiff's argument that Butera contractually assumed a duty based on his lease with Staples because plaintiff has provided this court with little to no argument supporting her contention. Plaintiff merely states that she presented evidence that snow was present when she fell and that Butera contractually agreed to remove snow in his lease with Staples. It follows that a party claiming it is owed a duty based on a contract would at the very least point out to this court the provision in the contract it relies upon. Plaintiff, however, did not do so here and failed to provide any citations to the record to support her position, in violation of Illinois Supreme Court Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Plaintiff also provides minimal legal argument in the two paragraphs she devotes to this issue in her opening brief and fails to address why the lease provisions at issue here show that Butera contractually assumed a duty. Plaintiff's merely states that a landowner may be liable "through privity of contract" and that such a landowner must "exercise ordinary care in doing so." It is not the role of this court to perform research and formulate an argument on plaintiff's behalf. *Holzrichter*, 2013 IL App (1st) 110287, ¶ 80. ("This court is not a depository in which the burden of argument and research may be dumped."). A properly framed argument for our review is necessary here because the existence of a contract for snow removal does not automatically equate to the imposition of a duty. *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 581 (2007). Furthermore, this court has acknowledged that the contractual assumption of a duty to remove snow occurs "[i]n limited circumstances." *Id.* Plaintiff here failed to properly put forth an argument that would allow this court to conduct an analysis of whether Butera contractually assumed a duty to remove snow from the Staples parking lot. Accordingly, plaintiff is also procedurally defaulted from raising this argument.

¶ 36 We will, however, review plaintiff's claim that the circuit court erred in granting summary judgment based on her contention that she raised genuine issues of material fact regarding the proximate cause of her injury. She additionally argues that she raised genuine issue of material fact addressing whether the accumulation of snow in the Staples parking lot was unnatural. In response, defendants argue that the circuit court properly granted summary judgment because plaintiff does not know what caused her fall and because there is no evidence of an unnatural accumulation of snow, ice, slush, or other moisture.

¶ 37 Summary judgment is proper 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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). To withstand a motion for summary judgment, the nonmoving party must present some factual basis that would arguably entitle it to a judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. "Mere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment." *Judge-Zeit*, 376 Ill. App. 3d at 584. In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Pleadings are to be liberally construed in favor of the nonmoving party. *Id.* Our review of the circuit court's entry of summary judgment rulings is *de novo*. *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14.

¶ 38 A plaintiff alleging negligence "must establish the existence of a duty, a breach of that duty, an injury that was proximately caused by that breach, and damages." *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 82. "The burden to prove all the elements of a negligence claim remains on the plaintiff throughout the proceedings. It is not the defendant's burden to disprove negligence." *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 233 (2010). Breach and proximate cause are factual matters reserved for the trier of fact. *Iseberg v. Gross*, 227 Ill. 2d 78, 87 (2007). Determining whether a duty exists presents a question of law for the court to decide. *Bruns*, 2014 IL 116998, ¶ 13. Summary judgment is appropriate where the court is unable to infer the existence of a duty. *Id.*

¶ 39 In Illinois, the natural accumulation rule provides that "a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property." *Krywin*, 238 Ill. 2d at 233. A plaintiff, to avoid the effects of the natural accumulation rule, must show "that the defendant aggravated a natural condition or that the origin of the accumulation of ice, snow, or water was unnatural." *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 26. Liability may attach where it is shown that defendant created the unnatural accumulation. *Id.* To withstand summary judgment, "the cause of the unnatural condition must be " ' identifiable.' " *Id.* ¶ 30 (quoting *Branson v. R & L Investment, Inc.*, 196 Ill. App. 3d 1088, 1091 (1990)).

¶ 40 After reviewing the evidence presented in the light most favorable to plaintiff, the nonmoving party, we hold plaintiff failed to present any evidence to allow this court to infer that defendants owed her a duty of care because she failed to present any evidence showing that she slipped on an unnatural accumulation of snow. Anthony Johnson testified there was no snow or ice in the parking lot or in the vicinity of plaintiff's accident at the time of the accident. Cristina

Romero also did not see any snow or ice in the area. Giuseppe Gambino plowed and salted the area between 3 a.m. and 6 a.m., but did not know what the weather conditions were in the afternoon when plaintiff fell. Regarding whether snow was present in the parking lot, plaintiff's testimony was speculative, at best. She testified both that she could not remember if there was snow, and that snow was present because the parking lot "was all white." Viewing plaintiff's testimony in her favor, which we must do, it still only raises facts showing that she may have slipped on snow that day. It does not show in any way that the snow was an unnatural accumulation. It also does not show that she slipped on slush, ice, or other moisture, as alleged in her complaint. Under the natural accumulation rule, a landowner only has a duty to remove *unnatural* accumulations. (Emphasis added.) *Krywin*, 238 Ill. 2d at 233. Plaintiff presented no evidence supporting the inference that the snow she allegedly slipped on was in any way unnatural. If anything, the evidence tends to show the snow was natural based on Gambino's testimony that he removed the snow from the parking lot in the early morning hours that day. It follows that any snow after that point would have still been in its natural state because plaintiff failed to present any evidence showing the snow was unnatural. Plaintiff's testimony supports this inference because she testified that she did not remember seeing any lines, marks, or footprints in the parking lot. She also did not see any ice or piles of snow in the parking lot. It is plaintiff's burden to prove all of the elements of her negligence claim at all stages of the proceeding. *Id.* Plaintiff failed to do so here because she presented no evidence that the snow she slipped on was an unnatural accumulation. Therefore, the circuit court properly granted summary judgment in defendants' favor because plaintiff has not shown that defendants owed her a duty of care.

¶ 41 Even if we assume, for the sake of argument, that defendants owed plaintiff a duty of care, her cause of action would still not survive summary judgment because the evidence in the record fails to establish the element of proximate cause. We acknowledge that the issue of proximate cause is typically an issue for the trier of fact to decide. *Id.* at 226. In limited circumstances, however, this court, in reviewing a summary judgment ruling, has determined the issue of proximate cause as a matter of law where "the facts are so clearly one-sided that it can be said a party would never be able to recover." *Scerba v. City of Chicago*, 284 Ill. App. 3d 435, 439 (1996); *Lewis v. Chica Trucking, Inc.*, 409 Ill. App. 3d 240, 257 (2011). We believe that this case falls within those limited circumstances. As previously discussed, plaintiff offered speculative testimony regarding whether snow was even present when she fell. Plaintiff also offered speculative testimony concerning the cause of her fall. To withstand summary judgment, plaintiff had to at least identify a cause of the alleged unnatural condition. *Hornacek*, 2011 IL App (1st) 103502, ¶ 30, quoting *Branson*, 196 Ill. App. 3d at 1091. She also could not rely on a speculative argument to defeat summary judgment. *Judge-Zeit*, 376 Ill. App. 3d at 584. Plaintiff here testified she slipped on "[s]omething slippery" that she "assumed" was snow. When asked if she knew "if there was ice or snow that caused your fall," she answered, "[n]o." When asked if she knew "if it was something else besides ice or snow" which caused her fall, she again answered, "[n]o." She did not see a leaking awning and testified that there were no problems with the lighting of the parking lot. Accordingly, plaintiff again, at best, offered only speculative evidence of the causation of her fall. We reiterate that a defendant is not required to disprove negligence. *Krywin*, 238 Ill. 2d at 233. Rather, plaintiff has the burden throughout the proceedings to establish all of the elements of a negligence claim. *Id.* Within the context of a summary judgment motion, plaintiff had to put forth at least some factual

basis for a negligence claim that would arguably entitle her to a judgment. See *Bruns*, 2014 IL 116998, ¶ 12 ("In order to survive summary judgment, a plaintiff need not prove her case, but she must present a factual basis that would arguably entitle her to a judgment."). Plaintiff, however, failed to present any non-speculative evidence tending to show the cause of her accident.

¶ 42 Accordingly, we hold the circuit court properly granted summary judgment against plaintiff because she failed to put forth evidence that would allow this court to infer that defendants owed her a duty of care. Plaintiff also failed to present any non-speculative evidence showing the cause of her fall. Therefore, she also failed to establish the element of proximate cause.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.