2016 IL App (1st) 150365-U

FOURTH DIVISION
April 28, 2016

No. 1-15-0365

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TACONIA ELLIS, as Special Administrator of the Estate, of KENNETH WALKER, deceased, Plaintiff-Appellant, v. THE CITY OF CHICAGO, an Illinois Municipal Corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Nos. 08 L 1052 11 L 7069 Honorable Jeffrey L. Lawrence, Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment for defendant City of Chicago affirmed. Plaintiff could not point to any evidence that would show that City breached duty to reasonably maintain streets. No evidence revealed cause of clog in drainage system that led to standing water.

¶ 2 This appeal addresses whether defendant the City of Chicago (the City) could be held liable for the death of Kenneth Walker, who was a passenger in a car that crashed into a light pole after the driver swerved in an attempt to avoid a large pool of water that had accumulated beneath a viaduct. Due to the slope of the road, the high curb on the south side of the street, and the tendency of various parts of the drainage system for the road to become obstructed, pools of

water had formed in the same area in the past. And the City had undertaken remedial measures to remove the standing water in the past. On the evening preceding the early-morning accident, a significant amount of rain fell that, along with a problem with the drainage system, caused a pool of water to form that was 6 inches deep at its deepest point.

¶ 3 Raphael Newman was driving along 95th Street, with Walker in the left rear passenger seat. Newman saw the pool of water and swerved in an attempt to avoid it. He lost control of the car, and it slammed into a light pole on the car's left side. Walker died.

¶ 4 Plaintiff Taconia Ellis, acting as special administrator of Walker's estate, sued Newman and the City. The trial court granted summary judgment for the City, finding that plaintiff could not, as a matter of law, establish a breach of the City's duty to maintain the street.

¶ 5 Plaintiff appeals, arguing that a genuine issue of material fact existed as to the issue of the City's breach. Plaintiff contends that there was evidence that the City, despite being aware of the propensity for pools of water to form in that location on 95th Street, negligently failed to clear the drains on the street, failed to inspect the street, or failed to remove the water from the street.

¶ 6 We affirm. While plaintiff was not required to prove her case at the summary-judgment stage, she was required to point to some evidence that would entitle her to judgment. But none of the evidence showed what caused the drainage system to fail on April 1, 2007. Without any evidence attributing the clogged drain to the City's negligence, there is no genuine issue of material fact as to the City's breach. And we decline to find that the City breached any duty by failing to send a crew to inspect and repair the drain within hours of the rainfall.

¶ 7 I. BACKGROUND

¶ 8 On 95th Street in Chicago, just west of Dorchester Avenue, railroad tracks travel over the street, forming a viaduct. Because the road sloped slightly to the south, and the curb on the south side of the street was tall, rainwater would flow to the south side of the street. There was a drainage system in place to remove the water, but it would periodically clog and leave standing water in the street.

¶ 9 95th Street was a state-owned road, but the City agreed to "operate and maintain" the street pursuant to a written agreement with the state. The City's obligation to operate and maintain the street included "cleaning and litter pickup, snow and ice control and all other routine operational services."[1]

¶ 10 John Kilroe, an assistant district superintendent with the City's water management department, testified in a deposition that there could be several different reasons for water to accumulate on the street. The most common way was for the drain cover to be blocked by garbage. Once the garbage was removed, the water would drain. If the drain cover was not blocked, but there was still water in the street, Kilroe would then remove the drain cover and see if there was dirt over the outlet pipe, which carried water from the street into the ground. Dirt, garbage, or other debris could collect in the catch basin or the outlet pipe and clog it. Finally, if there was standing water but none of these other problems had occurred, Kilroe would look to the main sewer to see if the water flowing through it had been blocked.

¶ 11 Kilroe said that his department cleaned the drainage systems in viaducts even if there was no complaint of standing water. He testified that the department tried to clean them "in the

[1] The City does not argue that it was not responsible for the maintenance of the street because it did not own the street. As mentioned above, the City agreed to maintain the street pursuant to an agreement with the State of Illinois, the entity which owns 95th Street.

spring," but that they did not all get cleaned every spring. There was no set schedule for cleaning the viaducts; they were "all cleaned periodically."

¶ 12 Kilroe used several different methods to clean a viaduct. If the drain cover was blocked by garbage, the garbage could simply be removed with a shovel. Kilroe also used an "orange peel," which was a truck with a "big claw" that could remove debris from the catch basins. Sometimes Kilroe would use a vactor, essentially a large vacuum cleaner that could suck water and dirt out of the drains. In other situations, Kilroe could rod the outlet pipe, which involved shoving a rod into the pipe to clear a pathway for the water to drain.

¶ 13 Kilroe said that he had personally cleaned the drains at the 95th Street viaduct between 5 and 10 times from 1999 until 2007. But he also said that he did not have to clean this drain much more frequently than others in the city.

¶ 14 Several service request reports generated by the water management department recorded the work performed on the sewer system at the viaduct on 95th Street, beginning in 2003 and up to the time of the accident at issue on April 1, 2007:

· January 21, 2003: As part of a regularly-scheduled cleaning, the department used a vactor to clean the catch basin under the viaduct, removing a quarter-yard of dirt. Nine days later, the catch basin was vactored again, removing another quarter-yard of dirt.

· October 25, 2004: A report indicated that the catch basin and outlet required "RUSH" repair, and the catch basin was repaired.

· December 22, 2004: The catch basin in the westbound lanes was cleaned using a vactor.

· January 13, 2005: After investigating a call by a citizen, the department found that both the east- and westbound lanes were "completely flooded." A vactor was used to

clean the catch basins. According to the department's records, the main sewer was unaffected.

· January 18, 2005: In response to a complaint of ice and snow on the street, the department salted the street.

· May 2 and 5, 2005: As part of a regularly scheduled cleaning, the catch basin was cleaned with an orange peel.

· September 10, 2005: A caller complained of a leak in the street, but the report indicates that, upon inspection, "no leak [was] visible in [the] area."

· October 4, 2005: As part of a regularly scheduled cleaning, the catch basin was again cleaned, although the report does not indicate the equipment used.

· November 28, 2005: In response to a phone call complaint, an investigator went to the viaduct and cleared the eastbound lanes of water himself. According to Kilroe, this outcome suggested that the investigator "probably got the garbage or whatever was on that lid or whatever he had to do to get that drain to take the water so the eastbound lane could open up." That same report indicates that the investigator could not drain the westbound lanes himself, so he called for a vactor truck.

· June 10, 2006: In response to a call about water in the street, a crew used a vactor and a rod to clean 10 yards of dirt from the catch basin.

· July 3, 2006: After receiving a call about water in the street, an investigator drained the water by simply removing the catch basin lid.

· July 31, 2006: Two reports indicated that individuals had called and reported water on the street, but the reports also stated that there was no water when the site was inspected.

· September 13, 2006: As part of a regularly scheduled cleaning, the crew rodded the manhole and main sewer.

· November 9, 2006: A crew vactored the manhole at the viaduct, removing five tanks of water and debris.

· November 11, 2006: The City received calls that the viaduct was flooded.

· November 20, 2006: The City received a call about a leak in the street above the water main. The report reads, "EMERGENCY! POSSIBLE BROKEN WATER MAIN," but does not describe any work performed.

· November 29, 2006: The City received calls about water in the "[c]enter" of the street under the viaduct.

· February 4, 2007: The City received a call about a leak in the street above the water main. The report indicates that a salt truck was called to the scene.

· April 25, 2007: 24 days after the accident, the department cleaned the catch basin and gutter box under the viaduct. The report of that cleaning does not reveal how it was cleaned or what was removed.

¶ 15 When shown the reports during his deposition, Kilroe testified that he could not tell whether the reports all dealt with flooding under the viaduct, or whether some discussed flooding on other areas of 95th Street. He explained that his department "do[es] a lot of jobs on 95th Street," that "[t]here is a main sewer in the middle of every street," and "there are numerous catch basins in the 1300 and 1400 block" of East 95th Street, later reiterating that "[t]here is more than one manhole in the 1400 block." Kilroe said he could only determine that the viaduct was flooded when the report said "flooded viaduct."

¶ 16 Police reports also indicated that there had been car accidents due to ice under the viaduct on November 2, 2006 and December 13, 2004.

¶ 17 Around 2:13 a.m. on April 1, 2007, Raphael Newman was driving east on 95th Street. Walker was in the backseat behind Newman, LaToya Glees was in the front passenger seat, and Andrew Moore was in the backseat behind Glees. Newman, Glees, and Moore were all deposed regarding the accident.

¶ 18 Newman testified that the streets were wet that night from rain that had fallen in the evening of March 31, 2007, but that it was not raining at the time of the accident. He said that the streetlights in the area were lit.

¶ 19 Newman said that, as he approached the viaduct, he saw "a large, gaping amount of water in the right [eastbound] lane," which covered the entire right lane. But, Newman said, he did not notice the pool of water until he was "near it." Newman was in the same lane as the pool of water. He tried to switch lanes to avoid it but could not do so in time. Newman's car hit the pool of water, which caused his car to pull toward the curb. His car skidded up onto the curb and crashed into a pole on the side of the road. He testified that he did not recall how fast he was driving as he approached the viaduct or as he tried to swerve out of the puddle's way.

¶ 20 Newman said that he had consumed one alcoholic drink that night before the accident. Newman testified that he was charged with criminal offenses as a result of the accident but claimed that he did not remember what charges he faced. He was found not guilty of those offenses after a jury trial.

¶ 21 In her deposition, Glees testified that it was raining at the time of the accident. Glees said that she was able to see the pool of water in the underpass and described it as being "in plain sight." She said that she first saw the puddle "a little bit" before the front of Newman's car had

reached it. The streetlights underneath the viaduct were working at that time. She said that the water appeared to be "very high," but she was not sure how deep the pool was.

¶ 22 Glees did not remember the accident itself but remembered the car "veering to the left" as they approached the puddle. She said that she could tell Newman tried to avoid the water.

¶ 23 Glees testified that she did not believe that Newman was speeding as he approached the viaduct. She also testified that Newman did not appear to be intoxicated, but she saw him drink a beer at a party before the accident.

¶ 24 Glees testified that she had passed through the viaduct several times before April 1, 2007. She said that, "if it was raining, it [*sic*] would be water always under that viaduct." She first saw the water under the viaduct between six months and a year before the accident, but she had only seen it a total of one or two times. She had heard other people complain about the standing water under the viaduct, as well. She testified that she never reported the standing water to the City before, and that she did not know anyone else who did.

¶ 25 Moore did not recall the accident or traveling under the viaduct; he was sleeping in the car just before the accident occurred. He had not noticed Newman driving too fast or erratically before the accident. Moore testified that it had rained "real bad" earlier on March 31, around 7 or 8 p.m., but that the rain had stopped before the accident.

¶ 26 Angela Benford was also driving on 95th Street on April 1, 2007—although not in Newman's car—and she witnessed the accident. In her deposition, she testified that she was in the left eastbound lane of the street, when Newman's car "whizzed past" her in the right lane. She was driving 30 miles per hour and estimated Newman's car as traveling "maybe" 50 miles per hour. Benford could not recall whether it was raining at the time of the accident but she said that she "kn[e]w for sure that it had rained earlier that day."

¶ 27 Benford testified that she saw water in the right lane underneath the viaduct. As Newman approached the viaduct, he tried to move into the left lane, but his truck went into a tailspin and struck a pole near Dorchester Avenue. She did not see the truck hit the pool of water but she did see a splash. She testified that there was no lighting under the viaduct but that there was lighting on the streets. But Benford said that the pool of water was "high enough for [her] to know don't drive on the right-hand side." She said that she could see "that the level was too high to pass through."

¶ 28 Benford said she traveled west on 95th Street earlier on March 31, 2007 and saw the pool of water in the right eastbound lane. She also testified that she saw water collecting under the viaduct every time it rained a significant amount:

> "When it rains really hard, when it rains like a full thing of rain, doesn't have to be like hailing but just when it rains. Just a drizzle, maybe not. I can't recall that. But I definitely know that when it rains a good rain, that the viaduct is—has a pool of water on both sides of the viaduct at the curbs of the viaduct."

She never contacted the City about the pooling water, and did not know anyone else who had. She also had never lost control of her car driving under that viaduct.

¶ 29 Officer Dan Postelnick, a Chicago police officer who had been certified in accident reconstruction, investigated the crash. In his deposition, he testified that 95th Street near the underpass was lit on both sides by streetlights. And the north and south sides of the underpass had lights "to illuminate [the street] underneath the underpass *** [in] both lanes." He did not observe any signs warning drivers about the possibility of water being in the street.

¶ 30 Postelnick opined that the cause of the accident was "[t]hat the vehicle was traveling too fast on approach to a change in the roadway *** and failed to maintain control and keep in [its]

lane." According to Postelnick, the change in the roadway—the slope of the road that causes water to pool in the right lane—"[was] rather noticeable for quite a distance." He added that the pool of water beneath the underpass "was a factor that led to the crash." He explained that the speed at which Newman was driving, coupled with the drag on his wheels caused by the pool of water, likely would have caused Newman to lose control of his truck. He also said that Newman's intoxication would have contributed to the crash, testifying that he had heard that Newman's blood-alcohol content was .08 milligrams/deciliter.

¶ 31 Postelnick measured the depth of the pool at its eastern edge, center, and western edge. At those three locations, the pool of water was 5 inches deep, 3 inches deep, and 6.5 inches deep, respectively. The pool of water extended 17 feet north from the south end of the street. The right eastbound lane of 95th Street was 14 feet, 4 inches wide.

¶ 32 Postelnick could not determine whether Newman's car had traveled through the pool of water. Postelnick said that it had rained on March 31st but he could not recall when precisely it had rained that day.

¶ 33 Plaintiff, as administrator of Walker's estate, sued both Newman and the City, alleging causes of action for wrongful death and survival. Plaintiff alleged that the City knew or should have known about the accumulation of water under the underpass on 95th Street because it occurred after any heavy rainfall. Plaintiff said that the City failed to maintain the roadway in a safe condition, to repair the drainage system at that location, or to inspect the street.

¶ 34 The City moved for summary judgment, raising six arguments: (1) that the City owed Walker no duty with respect to the pool of water because it was an open and obvious condition; (2) that the water was not a proximate cause of the accident; (3) that any defects in the street were *de minimis*; (4) that plaintiff had not shown that the City "failed to provide adequate

drainage or that it was negligent in maintaining or repairing that drainage system"; (5) that the water was a natural accumulation; and (6) that plaintiff had not established that the City's negligence caused the water to accumulate.

¶ 35 At the hearing on the City's motion for summary judgment, the trial court questioned plaintiff's counsel about the standard of care applicable to the City, noting that it was "suffering from a dearth of information here." The court suggested that plaintiff look for "an expert in a position to give credible testimony [that] the City's performance in keeping this drain clean was below standard" and told plaintiff's counsel that it would continue the case to allow such an expert to be retained. The court stated that, without such evidence, the court could not see how the City breached any duty:

> "Let's say that there would have been no water in there if the City happened to be out the day before and cleaned it. But I don't know how long it takes for a drain to clog, and I don't know how long the City was or should have been aware that it was clogged before it did anything about it."

Plaintiff's counsel stressed that he was "not saying that [the City has] to go out there every time it rains," but noted that the service request reports showed that "there [was] a pattern that after three months or four months this basin gets clogged again."

¶ 36 The court awarded the City summary judgment on the basis that there was no evidence "that the City breached a duty to maintain that viaduct" and that there was "no evidence that this was anything but a natural accumulation of water." The court added that the absence of any evidence of the standard of care was "the missing link" in plaintiff's case. The court denied the City's motion on all other grounds, including that the pool of water was open and obvious, that

the pool of water was a *de minimis* defect, or that Newman's actions were the sole proximate cause of Walker's death.[2]

¶ 37 Plaintiff filed this appeal after the trial court denied her motion to reconsider.

¶ 38 II. ANALYSIS

¶ 39 Plaintiff contends that the trial court erred in awarding the City summary judgment. According to plaintiff, questions of fact existed surrounding the City's negligence, where the evidence showed that the City was aware of the tendency of the drainage system at the 95th Street viaduct to clog, resulting in standing water frequently being present in the street.

¶ 40 The City makes two arguments in support of affirming the grant of summary judgment. First, it argues that the trial court correctly found, as a matter of law, that the City did not breach its duty to plaintiff. Second, the City argues a point that the trial court rejected—that the City owed no duty in this case because the flooded viaduct was an open and obvious danger. We may affirm on either basis. *Rodriguez v. Sheriff's Merit Commission of Kane County*, 218 Ill. 2d 342, 357 (2006) (reviewing court may affirm circuit court's decision on any basis appearing in record, regardless of whether circuit court relied on that ground and regardless of whether circuit court's reasoning was correct).

¶ 41 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, 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. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). When reviewing a trial court's award or denial of summary judgment, we must construe pleadings, depositions, admissions, exhibits, and

[2] The trial court did conclude that the cracks in the street were *de minimis*, but plaintiff raises no allegations regarding the cracks in the street in this appeal.

affidavits strictly against the moving party and liberally in favor of the non-moving party. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). We review a grant of summary judgment *de novo*. *Hall*, 208 Ill. 2d at 328.

¶ 42 A municipality owes a duty to maintain its roads in a reasonably safe condition for intended and expected vehicular travel. *Filipetto v. Village of Wilmette*, 254 Ill. App. 3d 461, 468 (1993). While this duty is codified in Section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act (the Act) (745 ILCS 10/3-102 (West 2006), section 3-102 does not create that duty but merely codifies the preexisting common-law duty. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001). Thus, we resort to the common law in determining the existence of duty and the breach of that duty. *Id*.[3]

¶ 43 Under the common law, to establish a local government's negligence, a plaintiff must establish the ordinary elements of negligence: duty, breach, causation, and damages. *Wojdyla v. City of Park Ridge*, 209 Ill. App. 3d 290, 293 (1991). As we have mentioned, the City challenges

[3] Section 3-102, like the other provisions of the Act, does not create duties; it grants immunities and defenses. *CDG Enterprises, Inc.*, 196 Ill. 2d at 490. Plaintiff spends time in her briefs debating the immunity provision in Section 3-102 concerning actual or constructive notice of an unsafe condition, but the question of immunity is separate from the preliminary question of whether a duty and breach of duty existed in the first place. *Id*. Only if plaintiff first establishes liability—duty, breach of duty, and injuries proximately caused by the breach—will the court court consider whether the City is immune from liability under Section 3-102. *Id*.; see also *Barnett v. Zion Park District*, 171 Ill.2d 378, 388 (1996). Because the City did not raise immunity under Section 3-102 as a basis for summary judgment and does not press that issue before this court, the immunity question is not before us, and we express no opinion on it. We thus have no need to further consider Section 3-102 and will look to the common law to determine whether the City owed a duty and whether it breached that duty. *CDG Enterprises, Inc.*, 196 Ill. 2d at 490.

both the existence of its duty and whether it breached any such duty. We will begin our analysis with the ground on which the trial court relied, that the City did not breach its duty to maintain the road in a reasonably safe condition as a matter of law.

¶ 44 To properly frame the issue, we first note that plaintiff does not argue that the City was required, on its own prompting, to dispatch a crew to the viaduct within hours of the March 31 rainfall to remediate any potential flooding. In the trial court, plaintiff's counsel said that he was "not saying that [the City has] to go out there every time it rains," and plaintiff has not made such a claim before this court, either. We would agree that it would be unreasonable to expect the City to dispatch crews to every corner of the city to inspect and remediate all areas of potential flooding within hours of a substantial rainfall. See *Lewis v. Rutland Township*, 359 Ill. App. 3d 1076, 1080 (2005) ("It would be unreasonable to require the township to inspect all of its roads within hours of heavy rainfall absent actual notice of a problem.").

¶ 45 Plaintiff's theory, instead, is that the City failed in its preventative measures. As counsel said in the trial court, "there [was] a pattern that after three months or four months this basin gets clogged again." The breach of duty urged by plaintiff is the failure to properly maintain the sewer in this viaduct in such a way that would have prevented the flooding in the first place. Plaintiff argues that, at a minimum, whether the City breached that duty is a question of fact.

¶ 46 Plaintiff is correct that, ordinarily, the question of whether a municipality has breached its duty is a question of fact for the jury. *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 397 (2000). But the issue of breach "may properly be resolved by this court as a legal matter when the evidence *** presents no genuine issue of material fact regarding that subject." *Id*; see also *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 26 (summary judgment on

issue of breach appropriate "when there can be no difference in the judgment of reasonable men on inferences to be drawn from undisputed facts.").

¶ 47 For example, in *Wrobel*, this court held that summary judgment was appropriate when there was a lack of evidence that the City breached its duty to maintain a road, where a pothole had caused a driver to lose control of a car and collide with another car. *Wrobel*, 318 Ill. App. 3d at 391. The evidence showed that, four days before the accident, the City had attempted to fill in the pothole, but the asphalt used to fill the pothole had sunk. *Id.* at 391-92. Other evidence suggested that the failure to remove residual asphalt or moisture from the pothole before filling it could have caused the filling to rapidly deteriorate. *Id.* at 393. The plaintiff argued that this latter evidence was circumstantial evidence of the City's failure to maintain the road, because a reasonable juror could infer that the City's failure to remove residual asphalt or water from the pothole before filling it was negligent conduct that caused the filling to deteriorate before the accident. *Id.* at 393.

¶ 48 This court found that, despite this evidence, summary judgment was appropriate on the issue of breach. *Id.* at 397-99. The court noted that there was no direct evidence showing that the road workers "did not undertake the required repair measures." *Id.* at 397. And the court found that there was no circumstantial evidence of breach, either. *Id.* at 398-99. The court noted that "circumstantial facts must be of such a nature and so related as to make the conclusion reached the more probable, as opposed to possible, one." *Id.* at 398. Although it was reasonable to infer that the pothole patching had broken down due to moisture or residual asphalt, "the record [did] not show that it [was] *more probable than not* that th[e] patch broke down as a result of the workers' failure to make efforts to remove residual asphalt and moisture." (Emphasis added.) *Id.* Because the patch could have broken down "for various other reasons, including traffic patterns

and weather conditions," the plaintiff failed to raise a genuine issue of material fact regarding the City's breach. *Id.*

¶ 49 The decision in *Wrobel* highlights the problem with plaintiff's case here. Plaintiff's theory is that the drainage system had a propensity to clog over time—approximately every three to four months. But the testimony in the record showed that, while some of the reasons for the clogging of the drain might be problems that accumulated over time, some were not—and plaintiff cannot point to any evidence showing which of these conditions caused the flooding on March 31.

¶ 50 The City's water department official, Kilroe, provided several different potential causes for the flooding of a viaduct. The reason could be dirt that built up in the outlet pipe carrying water from the street; clogging in the catch basin from the build-up of dirt, garbage, or other debris; or the main sewer itself could be blocked. Each of those problems could occur over time, requiring periodic cleanings.

¶ 51 But Kilroe identified other causes, as well. He said that, "with the majority of viaducts, the only problem is garbage tends to be thrown on the [drain cover]," much like one might put a stopper in a drain to fill a bathtub or sink with water. He also noted that "if anything goes down and gets stuck" in a drain, "then all the debris that comes in will get stuck behind it." Thus, if someone stuck a large object—using Kilroe's example, "a hockey stick"—down into the drain, it would clog in a relatively short time. Those problems were more likely to happen in a one-off event than over a period of time, such as three to four months.

¶ 52 Unfortunately for plaintiff, nothing in the record showed that one cause of the blockage was more likely than any other. The report of the work performed after the accident did not reveal the cause of the clog. Plaintiff did not depose any members of the water management department who performed that work. Nor did plaintiff put forth any expert to opine on the likely

cause of the flood. Plaintiff cannot rule out the possibility, for example, that on March 31, some garbage or debris obstructed the top drain cover—what Kilroe described as the most common cause of flooding of a viaduct. And *that* condition would have nothing to do with the drainage system slowly clogging over time: No matter how well and how often the City cleaned out the catch basin and outlet pipe and main sewer—even had the City cleaned out the entire drainage system the week before the accident—the viaduct still would have flooded had garbage collected over the drain cover at the street level and blocked the rainwater from ever moving into the drainage system at all. Absent requiring daily inspections by the City or an immediate response to any water accumulation under a viaduct—neither of which duty plaintiff seeks to impose on the City here, nor could she—reasonable maintenance of the drainage system would not include constantly ensuring that no garbage had been thrown into or around the drain cover.

¶ 53 Simply put, plaintiff cannot say that the flooding occurred because the catch basin had filled with dirt, or the outlet pipe was inadequately cleaned, or the main sewer was blocked. She cannot point to any evidence that makes it "more probable than not" that the City's preventative measures failed, that it breached its duty to reasonably maintain the drainage system and the roadway above it. *Id*. at 398. The mere fact that flooding occurred, by itself, is not enough to establish liability. The City is not an absolute insurer of safety on the roadway. *Filipetto*, 254 Ill. App. 3d at 461. Without any evidence suggesting that the malfunction of the drain was more likely caused by the City's negligence than not, plaintiff cannot show that there was a genuine issue of material fact regarding the City's alleged breach. *Wrobel*, 318 Ill. App. 3d at 397.

¶ 54 Plaintiff argues that the evidence shows an uptick in flooding at the viaduct beginning on November 2, 2006 until the date of the accident. According to plaintiff, the November 2 accident, coupled with the increase in flooding incidents thereafter, could give rise to a

reasonable inference that the problem with the drain was one arising from the City's negligence rather than a sudden incident for which the City should not be liable. In other words, because of the frequency of the flooding, it was likely a persistent problem of which the City should have been aware.

¶ 55 Plaintiff's argument overlooks the vagueness of the evidence arising from this time frame. None of the evidence shows a tendency of the eastbound lanes of the viaduct to flood. The police report of the November 2, 2006 accident shows that ice had built up in the *westbound* lanes under the viaduct, on the other side of the concrete barrier from the eastbound lanes where the accident in this case occurred. And Kilroe testified that he could not determine whether the service request reports concerned the drains under the viaduct, as opposed to other catch basins along East 95th Street, unless the reports identified a "flooded viaduct." Only two of the five service request reports generated between the November 2, 2006 accident and the April 1, 2007 accident at issue in this case expressly mention flooding under the viaduct. The first, dated November 11, 2006, makes no mention of what work was performed and lists the location of the incident as 1400 East 95th Street. The second, dated November 29, 2006, makes no mention of what the problem was on that date and lists the location of the incident as 1411 East 95th Street. A third report showing that a crew vactored five tanks of water from the manhole on November 9, 2006 could potentially refer to the viaduct, as Kilroe testified that he remembered vactoring a manhole at that viaduct. But Kilroe did not specify when he did so. And the November 9 report does not expressly say "flooded viaduct" and lists the location of the work as 1436 East 95th Street.

¶ 56 And, more importantly, none of these three reports—from November 9, 11, or 29—mentions on which side of the street the flooding occurred. That is no small detail. It is

undisputed that the eastbound and westbound lanes were separated by a concrete barrier in the center of the viaduct, and that each side of the street sloped away from that concrete barrier toward its respective curb, with its respective catch basin and series of pipes leading down to the main sewer. We know it was the westbound lane (the side not implicated in the accident in question) that flooded and turned to ice on November 2. We do not know which side was the subject of clean-up and repair on those subsequent dates.

¶ 57 There is simply no evidence that the eastbound lanes—the lanes flooded during this accident—were even affected in the months preceding the accident. To tie all of these past incidents of flooding to the drain in the eastbound lanes of the viaduct would require a speculative leap that is insufficient to defeat summary judgment. See *Geelan v. City of Kankakee*, 239 Ill. App. 3d 528, 531 (1992) (affirming grant of summary judgment for defendant where "the plaintiff would be unable to present any evidence, other than mere speculation" as to what caused accident).

¶ 58 Even if we were to assume, for the sake of argument, that the November 9, 11, and 29 reports referred to the eastbound lanes under the viaduct, we still fail to see how this would show that the City's negligence was the reason for the flooding. At most, it would show that there were clogging problems *four months* before the accident on April 1, 2007. With no reports of problems from the end of November until the end of March, plaintiff cannot show that there was an ongoing flooding problem that the City ignored.

¶ 59 The other two reports authored between November 2, 2006 and April 1, 2007 have nothing to do with clogs in the drainage system under the viaduct. Both involved leaks in the street caused by problems with the water main occurring around November 20, 2006 and February 4, 2007. Plaintiff cannot rely on these reports as evidence of the City's breach with

respect to the drainage system at the viaduct. In sum, the reports do not lead to a reasonable inference that the street flooded on April 1, 2007 because of an ongoing problem that the City had failed to remedy.

¶ 60 Plaintiff also takes issue with the trial court's noting that plaintiff had not retained an expert witness. Plaintiff argues that, in this case, an expert was not required to establish the standard of care. We disagree that the trial court "required" plaintiff to produce such testimony. Instead, the trial court offered plaintiff's counsel time to retain an expert so that plaintiff could establish that the design of the drainage system was faulty. And the court pointed out the lack of expert testimony on the adequacy of the City's maintenance program for the drainage system as just one reason why it had difficulty ascertaining the standard of care. The trial court did not *demand* that plaintiff retain an expert to prove her case.

¶ 61 Finally, we note that plaintiff does not allege in this court, or below, that the design of the drainage system itself was faulty. Nor do we see any factual basis to support such an allegation; no evidence suggests that a better system could have or should have been put in place.

¶ 62 In sum, we find that no genuine issue of material fact existed on the issue of whether the City breached its duty to maintain the drainage system at the viaduct. With no evidence suggesting that the cause of the clogged drain was more likely the City's fault than not, plaintiff cannot point to any factual basis that could arguably entitle her to judgment. The trial court did not err in awarding the City summary judgment. Because of our disposition, it is unnecessary to reach the City’s alternative argument in support of affirmance.

¶ 63 III. CONCLUSION

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

¶ 65 Affirmed.